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the preference that a creditor formerly had acceſs to obtain againſt others by legal execution, the act has a retroſpect of thirty days; within which time an arreſtment or poinding gives no preference. And now it may with confidence be pronounced, that no other country can vie with Scotland in the perfection of its bankrupt-laws.

CHAP. VI.

Powers and Faculties.

EVery right, real or perſonal, is a legal power. In that extenſive ſenſe, there are numberleſs powers. Every individual hath power over his own property, and over his own perſon; ſome over another's property or perſon. To trace all theſe powers would be the ſame with writing an inſtitute of law. The powers under conſideration are of a ſingular kind. They are not rights, properly ſpeaking, but they are means by which rights can

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be created, a power, for example, to make a man debtor for a ſum, a power to charge his land with debt, a power to redeem land from the purchaſer.

Theſe powers are of two kinds; powers founded on conſent, and powers founded on property. A diſpoſition by a proprietor of land to his heir, containing a clauſe impowering a third perſon to charge the heir or the land with a ſum, is an example of the firſt kind: a power thus created is founded on the conſent of the heir, ſignified by his acceptance of the diſpoſition. A power reſerved in a ſettlement of a land-eſtate, to alter the ſettlement, or to burden the land with debt, is an example of the other kind: by ſuch ſettlement the property is ſo far underſtood to be reſerved to the maker, as to impower him to alter or to burden. Theſe powers may be termed *perſonal* and *real*.

To explain a power of the firſt kind, which is commonly termed *a faculty* in contradiſtinction to a power founded on property, it muſt be conſidered, firſt, That with regard to pecuniary intereſt, a man may ſubject himſelf to the power of another: he may gratuitouſly bind himſelf to pay

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pay a ſum of money; or he may impower any perſon to burden him with a ſum. 2d, He may alſo ſubject his property to the power of another: a proprietor can impower any perſon to charge his land with an infeftment of annualrent; and a real right thus eſtabliſhed is good even at common law. Thus, it is laid down by our writers, that the proprietor's conſent will validate a reſignation made by one who hath no right *, and will validate alſo an annualrent-right granted by one who is not proprietor †. 3d, Though an annualrent-right thus granted by a perſon having a faculty to burden the land, is a real right, no leſs complete than if granted by the proprietor; yet the faculty itſelf is not a real right. It may indeed be exerted while the granter continues proprietor; his conſent makes it effectual: but his conſent cannot operate after he is diveſted of his property, more than if he never had been proprietor: it is a conſent by one to burden the property of another; an act that can have no effect in law. Thus

* Stair, tit. Extinction of infeftments, § 7.

† Durie, Dec. 15. 1630, Stirling contra Tenants.

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a power granted by a proprietor to charge his land with a certain ſum, ceaſes by his ſelling the land before the faculty is exerted. Nor in ſtrict law can ſuch faculty be exerted after the granter's death. Whether equity may not interpoſe, is more doubtful. Let us ſuppoſe, that a man makes a deed, impowering certain perſons to name proviſions to his younger children after his death, and to burden his heir and land-eſtate with the payment; leaving at the ſame time his eſtate to deſcend to his heir at law by ſucceſſion. This deed cannot be effectual at common law; becauſe it is inconſiſtent with the nature of property that a burden can be impoſed upon the eſtate of any man without his conſent. It ſeems however juſt, that a court of equity ſhould interpoſe to make ſo rational a faculty effectual againſt the heir, though not to charge the eſtate. The faculty, it is true, cannot be conſidered as a debt due by the anceſtor to ſubject the heir by repreſentation: but it is the will of the anceſtor to burden the heir with proviſions to his younger children; and in equity the will of the anceſtor ought to be a law to the heir who ſucceeds by

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by that very will, implied though not expreſſed. In the law of England accordingly, where lands are deviſed to be ſold for younger childrens portions, and the executor dies without ſelling, the heir is compelled to ſell. And where lands were ordered to be ſold for payment of debts, without impowering any perſon to ſell, it was decreed that the heir ſhould ſell *. But a ſettlement of an eſtate made by the proprietor upon any of his blood-relations that his wife ſhould think proper to nominate after his death, is effectual at common law: for there is nothing in reaſon or in law to bar a proprietor from making a ſettlement upon any perſon he has a mind, whether named by himſelf, or by another having his authority. The ſettlement excludes the heir at law, and the perſon named has a good title by his deed †.

That ſort of power which is a branch of property, is in a very different condition. It is in its nature effectual againſt all ſingular ſucceſſors, even *bona fide* purchaſers; for a diſponee to whom the pro-

* 1. Chancery caſes 176.

† Nov. 28. 1729, Murray contra Fleming.

perty

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perty is conveyed to a limited effect only, cannot beſtow upon another a more extenſive right than he himſelf has.

It may be laid down as a general rule, That powers reſerved in a diſpoſition of land, the moſt limited as well as the moſt extenſive, are all of them branches of the property. To juſtify this rule, it muſt be premiſed, that all the powers a man hath over his own ſubject are included in his right of property; and that the meaning of a reſervation, is not to create a new right, but only to limit the right that is convey'd. The reſervation accordingly of any power over the land implies ſo far a reſervation of the property: and this muſt hold, however limited the reſerved power be, or however extenſive, unleſs it be expreſſed in clear terms, that a faculty only is intended. A ſeparate argument concurs for this rule. Human nature, which in matters of intereſt makes a man commonly prefer himſelf before others, founds a natural and therefore a legal preſumption, that when a diſponer reſerves to himſelf any power over the ſubject diſponed, his intention is to reſerve it in the ampleſt and moſt effectual manner. And hence,

in

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in dubio, a power properly ſo called will be preſumed, in oppoſition to a faculty. Thus, a reſerved power to charge the eſtate diſponed with a ſum, though the moſt limited power that can be reſerved, is held to be a reſervation of the property, ſo as to make the reſerved power good even againſt a purchaſer from the diſponee. A man diſponed his eſtate to his eldeſt ſon, reſerving a power "to affect or burden the "ſame with a ſum named for proviſions "to his children." The ſon's creditors appriſed the eſtate, and were infeft. Thereafter the diſponer exerted his reſerved power, by granting to his children heritable bonds, upon which they alſo were infeft; and in a competition they were preferred *: the reſerved power was juſtly deemed a branch of property, which made every deed done in purſuance of it a preferable right upon the land. James Henderſon, in his eldeſt ſon's contract of marriage, diſponed to him the lands of Grange, "reſerving to himſelf power and "faculty, even *in articulo mortis*, to bur-

* Stair, Dirleton, Jan. 6. 1677, Creditors of Mouſwell contra Children. Stair, Dec. 16. 1679, inter eoſdem.

"den

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" den the land with 8000 merks to any " perſon he ſhould think fit." In his teſtament he legated the ſaid 8000 merks to his three younger ſons; who, in a ranking of the eldeſt ſon's creditors, were preferred before all of them *.

But though a faculty regularly exerted while the granter continues proprietor, will lay a burden on the land effectual againſt purchaſers, and though a power will have the ſame effect at whatever time exerted, it follows not that every exertion of a power or faculty will be ſo effectual: which leads us to examine in what manner they muſt be exerted in order to be effectual againſt purchaſers. That land may be charged with debt without infeftment, or without giving a title in the feudal form, is evident from a rent-charge, and from a clauſe in a conveyance of land burdening the land with a certain ſum †. That without infeftment ſuch a burden may be laid on land by means of a power or faculty to burden, ſeems equally con-

* Henderſons contra Creditors of Francis Henderſon, July 8. 1760.

† See Hiſtorical Law-tracts, tract 4. p. 244.

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ſiſtent; and were there a record of bonds granted in purſuance of ſuch powers, there would be nothing repugnant to utility more than to law in ſuſtaining them as real rights. But as no record is appointed for bonds of this kind, it is a wiſe and ſalutary regulation to ſuſtain none of them as real rights, unleſs where created in the feudal form to produce infeftment; which brings them under the ſtatute 1617, requiring all ſeiſins to be recorded. Where land ſtands charged with a ſum by virtue of a clauſe contained in the diſpoſition, no inconvenience ariſes from ſupporting this right, according to its nature, againſt all ſingular ſucceſſors; for a purchaſer from the diſponee is put upon his guard by the diſpoſition containing the burden, which diſpoſition makes part of his title-deeds. But a power or faculty, could it be exerted without infeftment, might occaſion great imbarraſſment: the power or faculty, it is true, appears on the face of the diſpoſition, which is a title-deed that muſt be delivered to a purchaſer; but then a purchaſer has no means to diſcover whether the power or faculty be exerted, or to what extent. Nay further, if a bond

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be held an exertion, there can be no limitation: for bonds referring to the faculty may be granted for L. 10,000, though the faculty be limited to the tenth part of that ſum. Such uncertainty would put the land *extra commercium* during the ſpace of the long preſcription, commencing at the death of the diſponer who reſerved to himſelf the power of burdening the land. The foregoing regulation is accordingly in ſtrict obſervance. By the deciſion mentioned above, Creditors of Mouſwell *contra* Children, it appears, that when a reſerved power to burden land is regularly exerted, by granting an infeftment of annualrent, ſuch annualrent-right is preferred even before a prior infeftment derived from the diſponee: but a bond ſimply is never ſo preferred. Thus, a man who diſponed his eſtate to his eldeſt ſon, reſerving to himſelf a power to burden the ſame with 5000 merks, granted thereafter bonds for that ſum to his wife and children, proceeding upon the narrative of the reſerved power. After the date of theſe bonds, the diſponee contracted debts, which were eſtabliſhed upon the eſtate by infeftments. A competition ariſing between

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tween theſe two ſets of creditors after the diſponer's deceaſe, the diſponee's creditors were preferred upon their infeftments *. In a diſpoſition to the eldeſt ſon, the father having reſerved power to charge the eſtate with wadſets or infeftments of annualrent to the extent of a ſum ſpecified, a bond referring to the faculty was not deemed a real burden; and for that reaſon it was not held to be effectual againſt a donatar of the ſon's forfeiture †. But where the diſponer reſerves a power to burden the land with a ſum to a perſon named, the heir-male of a ſecond marriage for example; and thereafter grants a bond to that perſon referring to the reſerved power; it ſeems not unreaſonable that this bond ſhould be deemed a real burden effectual againſt purchaſers. For here there is no uncertainty to put the land *extra commercium:* the burden can never exceed the ſum ſpecified in the diſpoſition; and after the diſponer's death, a purchaſer, by inquiring at the perſon

* June 26. 1735, Ogilvies contra Turnbull.

† Stair, July 12. 1671, Lermont contra Earl of Lauderdale.

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named, has acceſs to know whether and to what extent the power has been exerted.

If the foregoing regulation hold in reſerved powers, there can be no doubt of it with reſpect to faculties properly ſo called. The following deciſions I think belong to this claſs. A purchaſer of land took the diſpoſition to himſelf in liferent, and to his ſon *nominatim* in fee, with power to himſelf to diſpone, wadſet, &c. He afterward granted a bond, upon which the creditor adjudged the eſtate after the ſon was diveſted, and a purchaſer infeft. The adjudication was evidently void, and the bond was decreed not to be a proper exertion of the faculty to be effectual againſt ſingular ſucceſſors *. This is properly an inſtance of a faculty, becauſe the power which the father provided to himſelf, could not be a branch of the property which was never in him. Again, a purchaſer of land having taken the diſpoſition to himſelf in liferent, and to his ſon *nominatim* in fee, with a faculty " to burden, contract debt, " and to ſell or otherwiſe diſpoſe at his plea-

* Home, February 1719, Rome contra Creditors of Graham. November 1725, Sinclair contra Sinclair of Barrack.

" ſure,"

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" ſure," did firſt grant a bond, declaring it a burden on the land, and afterward ſold the land. The purchaſer was preferred, the bond not being a real burden on the land *.

The caſes above mentioned are governed by the rules of common law. Let us next ſee what equity dictates. Where a man in a gratuitous diſpoſition of a land-eſtate reſerves a power to burden the ſubject with certain ſums, every queſtion relative to ſuch reſervation muſt be governed by his will; for an obvious reaſon, that the deed and every clauſe in it were created by him. Common law indeed, adhering to the preciſe words, will not intitle the granter to burden the diſponee perſonally. But it will be conſidered, that in burdening the land for his own behoof, he could have no intention to exempt the diſponee; and therefore that this was a pure omiſſion, which ought to be ſupplied by a court of equity, in order to fulfil the will of the granter. In the deciſions accordingly, Rome contra Creditors of Graham, Sinclair contra Sinclair of Barrack, and

* Forbes, December 16. 1708, Davidſon contra Town of Aberdeen.

Ogilvies

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Ogilvies contra Turnbull, now mentioned, though a bond granted in purſuance of a power to burden the land was held not to be a real right; it was held however to be a burden upon the diſponee perſonally. And in like manner, a bond granted in purſuance of a reſerved power to burden the land diſponed, was found effectual againſt the diſponee perſonally, ſo as to ſupport an adjudication of the land againſt the diſponee after the diſponer's death *. In the caſes mentioned, nothing is conſidered in equity but the will of the granter. But where a price is paid, the will of the purchaſer ought to have equal weight; and if he have not agreed to be bound perſonally, equity will not bind him more than common law.

With reſpect to faculties, there is not the ſame latitude of interpretation. A faculty granted to a third perſon gratuitouſly cannot be extended againſt the granter beyond the preciſe words. And it will be the ſame though the faculty has been granted for a valuable conſideration.

A diſponer, who had reſerved a power

* January 17. 1723, Creditors of Ruſco contra Blair of Senwick.

to

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to burden the diſponee with a ſum, grants a bond for that ſum, without referring to the reſerved faculty. Will this bond be in equity deemed an exertion of the faculty, yea or not? If the granter have no other fund of payment, it will be preſumed in equity, that he intended an exertion of the faculty: if he have a ſeparate fund, the preſumption ceaſes, and that fund only is attachable for payment. But what if the ſeparate fund be not altogether ſufficient? A court of equity may interpoſe to make what is deficient effectual by means of the reſerved faculty, in order to fulfil the will of the perſon who granted the bond. Thus, a man, upon the narrative of love and favour, having diſponed his eſtate to his eldeſt ſon, reſerving a power to burden the eſtate to the extent of a ſum named, granted afterward a perſonal bond of proviſion to his children without any relation to the reſerved power. In a ſuit for payment againſt the diſponee's repreſentatives it was objected, That the diſponer at the date of the bond had an opulent fund of moveables; and that there is no preſumption he intended to charge with this debt either his ſon or the eſtate diſponed. The diſponer's

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diſponer's will was preſumed to be, that the bond ſhould burden his executors in the firſt place, and the diſponee in the ſecond place *. By marriage-articles the eſtate was provided to heirs-male, with power to burden it with a ſum named for the heirs of a ſecond marriage. The proprietor made a proviſion for the children of a ſecond marriage, burdening his heir with the ſame, but not charging his eſtate in terms of the reſerved power. At common law the eſtate was not ſubjected, becauſe the proviſion was not made a burden upon it; nor was the heir ſubjected, becauſe the reſerved power intitled the granter to burden the eſtate only. The court ſteered a middle courſe in equity: the heir was made liable *ultimo loco*, after his father's other eſtate ſhould be diſcuſſed †.

It has been queſtioned, whether a reſerved power to charge with a ſum the land diſponed, can benefit a creditor whoſe debt was contracted before the reſerved power was created. The court thought it rea-

* Stair, Dirleton, June 21. 1677, Hope-Pringle contra Hope-Pringle.

† Fountainhall, Dalrymple, June 23. 1698, Carnegie contra Laird Kinfauns.

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ſonable that this power ſhould be ſubjected to the diſponer's debts, whether prior or poſterior *. A power to charge an eſtate with debt, being ſtrictly perſonal, is incommunicable to a creditor or to any other, even during the life of the perſon privileged; not to talk of his or her death. Equity however rules, that a power or faculty ſhould be available to creditors, prior as well as poſterior: for it is the duty of a debtor to uſe all lawful means for paying his debts, whether by ſelling his goods or exerting his faculties; and if he unjuſtly refuſe, equity will hold the faculty as exerted for the benefit of the creditors. In the preſent caſe, the creditors will have acceſs to the land for their payment, as if the debtor had exerciſed his faculty, and burdened the land with the ſum mentioned, payable to them. But if the creditors lie dormant during their debtor's life, and make no ſtep to avail themſelves of his reſerved faculty, the faculty dies with him, and they can take nothing by it. A man diſponed to his ſons of the ſecond

* Fountainhall, Dalrymple, Dec. 16. 1698, Eliot of Swinſide contra Eliot of Meikle-dean.

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marriage ſeveral parcels of land, "reſer-"ving to himſelf full power and faculty "to alter and innovate, and to contract "debt, as fully and freely as if the entire "fee were in him." The queſtion occurred, Whether theſe diſponees were liable to their father's perſonal debts contracted before the exiſtence of the ſaid power; and the affirmative was decreed *. But in caſes of this nature, the diſponee, even where he is heir-apparent, is liable *in valorem* only †: for the diſponee is not liable at common law; and equity ſubjects no man farther than *in valorem* of the ſubject he receives.

Whether and in what caſes a reſerved power or faculty can effectually be exerciſed on deathbed, has frequently been agitated in the court of ſeſſion. One point appears clear, that a reſerved power to alter or burden on deathbed, contained in a diſpoſition to a ſtranger, may be exerciſed on deathbed, ſuppoſing always the granter to be *ſanæ mentis*. And the reaſon is, that the ſtranger laying hold of the diſpoſition, muſt ſubmit to its qua-

* July 21. 1724, Creditors of Ruſco contra Blair of Senwick.

† Dalrymple, January 18. 1717, Abercromby contra Graham.

lities,

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lities, and cannot object to the conditions upon which it is granted. The matter is far from being clear, where the ſettlement is upon the heir, who is *alioqui ſucceſſurus*; as to which our deciſions ſeem not to be uniform; nor is any good rule laid down by our writers. If the heir have not by acceptance of the diſpoſition conſented to the burdening clauſe, his privilege of challenging a burden laid upon him on deathbed, remains entire. But if he have taken infeftment upon the diſpoſition, and be in poſſeſſion, which implies his conſent to every clauſe in the deed, will not this conſent bar him from objecting to the faculty, though exerted on deathbed? This requires deliberation. What diſtinguiſhes an heir from a ſtranger is his dependence upon the predeceſſor for the eſtate, leaving him no freedom of choice: he muſt ſubmit to the will of his predeceſſor under the peril of exheredation. But does this dependence preſume co action in every tranſaction between a man and his heir? This can hardly be maintained; for what if the reſerved faculty be to burden the eſtate with a moderate proviſion to younger children, or to do any other pious or ra-

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tional act? In ſuch a caſe, no good man will with-hold his conſent; and therefore in ſuch a caſe there is no ground for preſuming the heir's conſent to have been extorted from him. This hint leads us to a diſtinction in anſwering the foregoing queſtion. If the heir's conſent be voluntary, ſuch as he would have given in a ſtate of independence, it muſt be effectual both in law and equity to ſupport the deathbed-deed. If it be extorted by fear of exheredation, it may be good at common law, but it will be voided by a court of equity.

But this diſtinction, however clear in theory, ſeems to be not a little dark in practice; for what criterion have we for judging in what caſes this conſent is voluntary, in what caſes extorted? The expiſcation may be intricate, but it is neceſſary. Where a man ſettles his eſtate upon his eldeſt ſon, with a reſerved power to alter even on deathbed, no rational man will willingly ſubmit to be in ſo precarious a ſtate; and therefore the heir's conſent will be preſumed the effect of extortion. On the other hand, where a man, ſettling his eſtate upon his eldeſt ſon, reſerves only power to burden it with a moderate ſum

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to his younger children; this is a fair ſettlement, by which the heir gets more than he gives; and therefore his conſent may ſafely be preſumed voluntary. Hence in general, the heir's conſent to a reſerved power that bears hard upon him, will always be preſumed to have been extorted: his conſent, on the contrary, to a reſerved power that is proper and rational, will always be preſumed voluntary.

This diſtinction gives me the greater ſatisfaction, when I find that it has had an influence upon the deciſions of the court of ſeſſion. A reſerved power to alter upon deathbed a diſpoſition granted to an eldeſt ſon, has in no inſtance been ſupported againſt the heir's reduction, even where he accepted the diſpoſition. But the exerciſe upon deathbed of a reſerved power that is proper and rational has generally been ſupported. Take the following examples. The exerciſe of a reſerved faculty to burden with a moderate ſum an eſtate diſponed to an heir, was ſuſtained, though the faculty was exerted upon deathbed *.

* Stair, June 28. 1662, Hay contra Seton; Stair, June 22. 1670, Douglas contra Douglas.

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A man having diſponed his eſtate to his eldeſt ſon, with the burden of all proviſions to his younger children granted or to be granted, a bond granted to one of his daughters *in lecto*, was ſuſtained againſt the heir who had accepted the diſpoſition *.

I ſhall cloſe this chapter with a ſeparate point, concerning powers given to a plurality, whether in exerciſing ſuch powers the whole muſt concur, or what number leſs than the whole may be ſufficient. If the perſons be named jointly, the will of the granter is clear, that the whole muſt concur, becauſe ſuch is the import of the word *jointly*. To ſay that any number leſs than the whole may be ſufficient, is in other words to ſay, that a nomination to act jointly is the ſame with a nomination to act ſeparately.

But though all muſt concur, it follows not that they muſt all agree. If they be all preſent, the will of the maker naming them jointly is fulfilled; and what remains is, that the opinion of the majority

* Fountainhall, Forbes, Feb. 8. 1706, Bertram contra Weir.

muſt

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muſt govern the whole body. " Celſus, " lib. 2. Digeſtorum, ſcribit, Si in tres " fuerit compromiſſum, ſufficere duorum " conſenſum, ſi præſens fuerit et tertius : " alioquin, abſente eo, licet duo conſen- " tiant, arbitrium non valere ; quia in " plures fuit compromiſſum, et potuit " præſentia ejus trahere eos in ejus ſen- " tentiam. Sicuti tribus judicibus datis, " quod duo ex conſenſu, abſente tertio, " judicaverunt, nihil valet : quia id de- " mum, quod major pars omnium judica- " vit, ratum eſt, cum et omnes judicaſſe " palam eſt *."

The next queſtion is, When a plurality are named without adding the term *jointly*, what is the legal import of ſuch nomination ? Whether is it underſtood the will of the maker that they muſt act jointly, or that they may act ſeparately ? Stair † reſolves this queſtion by an argument no leſs plain than perſuaſive : " A mandate (ſays " he) given to ten cannot be underſtood " as given to a leſſer number. To give a " mandate to Titius, Seius, and Mævius,

* l. 17. § 7 l. 18. De receptis qui arbitr.

† Book 1. tit. 12. § 13.

" cannot

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" cannot be the ſame with giving it to " any two of them." Hence it may be aſſumed as a rule at common law, That a number of perſons named in one deed to act in the ſame affair, are underſtood to be named jointly where the contrary is not expreſſed.

How far in this matter common law is ſubjected to the correction of equity, we next proceed to inquire. When a number of perſons are named *jointly* to perform any work, the whole muſt concur in equity as well as at common law. For here the will is clearly expreſſed, and a court of equity hath no power to vary from will. Thus, two tutors being named *jointly* by a man to his heir, it was decreed, That the office was vacated by the death of one of them *.

A plurality named for carrying on any particular affair without the addition of *jointly*, affords a large field for equitable conſiderations. We have ſeen that at common law the term *jointly* is always implied or preſumed. But in particular caſes there are many circumſtances which a court of

* Stair, Jan. 17. 1671, Drummond contra Feuers of Bothkennar.

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equity will lay hold of to overbalance this preſumption; to reduce which under any general rule is ſcarce practicable: circumſtances are ſeldom preciſely the ſame in any two caſes, and for that reaſon each caſe muſt be ruled by its own circumſtances. All that can be ſaid in general is, that the common law ought to take place, unleſs it can be clearly ſhown that the maker did not intend to confine his nominees to act jointly.

Since general rules cannot be expected, what remains is to ſtate caſes the moſt oppoſed to each other, and which therefore admit of different conſiderations. And firſt, If I name a plurality to perform any act that is to bind or affect me, equity as well as common law requires that the nominees act jointly. In caſes of that nature, there cannot readily occur any circumſtance to infer it to be my will that they may act ſeparately: for if any one of the nominees refuſe to accept, or die after acceptance, it is my privilege to make a ſecond nomination, or to forbear altogether; and it is not preſumable, that any man will give away his privilege, unleſs it be ſo declared. Thus, an award pro-

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nounced by two arbiters and an overſman named by them, was declared void; becauſe it proceeded upon a ſubmiſſion to four arbiters who were empowered to name an overſman *. And when a plurality are conſtituted ſheriffs in that part by the court of ſeſſion, no ſentence can be pronounced by any of them without the reſt; becauſe (as the author expreſſes it) he being but one colleague joined to others, hath no power to pronounce ſentence without their conſent †. This holds in curators, becauſe they are elected by the minor himſelf: if any of them refuſe to accept, or die after acceptance, it is no hardſhip that the nomination ſhould be void, becauſe it is in the minor's power to renew the commiſſion. But where the curators named are many in number, it will ſcarce be held the minor's intention to adhere to the common law by confining them to act jointly. It appears a more natural preſumption, that the purpoſe of naming ſo great a number was to provide againſt death or non-acceptance. And accordingly

* Fountainhall, Nov. 18. 1696, Watſon contra Mylu.

† Balfour, (Of Judges), cap. 26.

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an act of curatory was ſuſtained, though ſeven only accepted of the eight that were named *. Where in an act of curatory a *quorum* is named, there can be no doubt that the act is void if a ſufficient number do not accept to make the *quorum* †. For here the will of the minor is expreſſed in clear terms.

There is much greater latitude for interpretation of will with reſpect to powers intended to be exerciſed after the granter's death. Stair explains this matter extremely well in the following words: "A mandate *inter vivos* giving power is ſtrictly "to be interpreted, becauſe the nominees "failing, the power returns to the mandant. But power given by a man in contemplation of death cannot return, and "therefore he is preſumed to prefer all the "perſons nominated to any other that may "fall by courſe of law ‡." This doctrine is finely illuſtrated in a nomination of tutors. Where a number of tutors are named ſimply, without confining them to act

* Hope, (Minor), March 11. 1612, Airth.

† Stair, Jan. 25. 1672, Ramſay contra Maxwell.

‡ Book 1. tit. 12. § 13.

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jointly, the preference given to them, excluſive of the tutor-in-law, manifeſts the will of the deceaſed, that the management ſhould be carried on by any one of the nominees, rather than by the tutor-in-law. "For were it otherwiſe, the more guardians are appointed for the ſecurity of "the infant, the leſs ſecure he would be, "becauſe upon the death of any one of "them the guardianſhip would be at an "end *." Thus three tutors being named without ſpecifying *conjunctly* or *ſeverally*, and one only having accepted, it was decreed, That the whole office was devolved on him †. And five tutors being named as above, without ſpecifying *conjunctly* or *ſeverally*, the nomination was ſuſtained though two only accepted ‡.

Where a number of tutors are named *jointly*, it is more doubtful what is intended by ſuch a nomination. It may have been the intention of the deceaſed, that no act of adminiſtration ſhould be valid unleſs every perſon named by him did con-

* New Abridg. of the law, vol. 2. p. 677.

† Haddington, Dec. 12. 1609, Fawſide contra Adamſon.

‡ Stair, Feb. 14. 1672, Elies contra Scot.

cur;

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cur; and conſequently, that the death or non-acceptance of any one nominee ſhould void the nomination, leaving place to the tutor-in-law. Or it may have been his intention, that all the nominees accepting and alive muſt concur in every act. The argument above mentioned urged by Lord Stair, concludes ſtrongly for the latter interpretation; unleſs the former be ſo clearly expreſſed as to avoid all ambiguity. *In dubio*, it will always be preſumed, that the deceaſed would put greater truſt in his own nominees than in any perſon not choſen by himſelf.

With reſpect to a *quorum*, will the nomination fall altogether, where, by death or *non-acceptance*, there are not left a number of tutors ſufficient to make a *quorum?* In this caſe, as in the former, the will of the deceaſed may be interpreted differently. It may have been his will to void the nomination if there remain not a number of tutors to make a *quorum*. Or it may have been his will only, that ſuppoſing a ſufficient number of acting tutors to make a *quorum*, a *quorum* ſhould be neceſſary to every act. The latter interpretation, for the reaſon above given, ought to be adopted,

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ed, unleſs the former be clearly expreſſed. But now, admitting this interpretation, the falling of the number below a *quorum*, is a *caſus incogitatus* about which the deceaſed has interpoſed no act of will. To ſupply that defect, the court will do what they conjecture the deceaſed would have done had the event occurred to him. About this there can be no heſitation; as it is always to be preſumed, that a man will have more confidence in a truſtee named by himſelf, than in one that is not of his nomination. Suppoſe, for example, ten tutors are named, the tutor-in-law one of them, five to be a *quorum*. By death or non-acceptance the number is reduced to four, of which number the tutor-in-law is one. Can ſo whimſical a thing have been intended as to truſt the tutor-in-law by himſelf, inſtead of confining him to act with the other three. And the argument concludes *a fortiori*, where the tutor-in-law is left out of the nomination. The ſame reaſoning is applicable where a *ſine quo non* is named. This doctrine is finely illuſtrated in the following caſe. A gentleman having named his ſpouſe, his brother,

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ther, and ſeveral others, to be tutors and curators to his only child, " appointed, " that of thoſe who ſhould accept and ſur- " vive, the major part ſhould be a *quorum*; " that his ſpouſe ſhould be *ſine qua non*; " and in caſe of her death or incapacity, " his brother; but that by the death or " incapacity of either, the tutory and cura- " tory ſhould not be diſſolved, but be con- " tinued with the other perſons named, as " long as any one of them remained alive." The only event omitted to be provided for was that which happened, namely, the widow's refuſal to undertake the office; which brought on the queſtion, Whether the nomination did notwithſtanding ſub- ſiſt; or, Whether it was void to make way for the tutor-in-law. The court was of o- pinion, That it appeared the intention of the father to continue his nomination as long as any of the perſons named ſhould exiſt; which is expreſſed in clear terms with reſpect to the death or incapacity of the *ſine quibus non*; and which muſt hold equally in the caſe of their non-acceptance, as no diſtinction can be made. The no- mination accordingly was decreed to ſub- ſiſt

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ſiſt *. In ſeveral other inſtances, neither the failure of a *quorum* nor of a *ſine quo non* was deemed ſufficient to void the nomination. The court conjectured it to be the will of the deceaſed, to truſt any of the perſons named rather than the tutor-in-law †. But the court adopted the oppoſite opinion in the following inſtances. A man, in a nomination of tutors to his children, declared his wife to be *ſine qua non*. She by a ſecond marriage, having rendered herſelf incapable of the office, the court declared the nomination void ‡.

I proceed to examples of a different kind. A man having left 2500 merks to his children, empowered four friends named to divide the ſame among the children. After the death of one of the four, a diviſion made by the three ſurvivors was not ſuſtained, and the children accordingly were

* June 16. 1742, Dalrymple of Drummore contra Mrs Iſabel Somervell.

† Fountainhall, 22d December 1692, Watt contra Scrymgeour; Fountainhall, 22d February 1693, Counteſs of Callender contra Earl of Linlithgow.

‡ Fountainhall, 24th June 1703, Aikenhead contra Durham; 14th February 1735, Blair contra Ramſay.

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decreed to have each of them an equal ſhare *. Here the four being named in the ſame deed, and to concur in the ſame act, were underſtood to be named jointly; and as there was no circumſtance to infer that the granter intended to empower any number leſs than the whole to make the diviſion, there could be no reaſon for varying from the rule of common law.

Helen Cuningham left 4000 merks to her grandchildren, to be employed for their behoof at the ſight of five perſons named, of which number their father and mother were two. This ſum was lent out with the approbation of all, including the father and mother, one of the nominees excepted, who was abroad at the time. The ultimate purpoſe of this ſettlement was evidently to ſecure the grandchildren in the ſum ſettled upon them; and if this was done by lending the money to a perſon of unexceptionable credit at the time, the granter's will and purpoſe was fulfilled. By naming ſo many perſons, he made it eaſy for the executor to get the approbation of a ſufficient number; and it could not

* Fountainhall, Feb. 10. 1693, Moir contra Grier.

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be his intention to require rigidly the concurrence of every perſon named. And yet the court, adhering to the words as a court of common law, found that the money was not employ'd as it ought to have been, and therefore decreed the executor to be liable *.

A reference being made by a man and his ſon to three friends, empowering them to name a ſum to the father when he ſhould be in want, which the ſon ſhould be obliged to pay; and two having concurred in abſence of the third to name the ſum, it was objected by the ſon, That the clauſe, importing a joint nomination, required the concurrence of the whole. The objection was over-ruled, and the determination of the two referees ſuſtained †. The reference to the three friends was the means choſen for aſcertaining the father's claim, but it was certainly not intended to make that claim depend on their life or acceptance. The father had a juſt claim whenever he came to be in want; and ſup-

* Spottiſwoode, (Legacy), Feb. 13. 1624, Hunters contra Executors of Macmichael.

† Fountainhall, July 27. 1694. Riddle contra Riddle.

poſing

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poſing none of the referees had interpoſed, it was the duty of the court of ſeſſion to make the claim effectual.

CHAP. VII.

Of the power which officers of the law have to act *extra territorium*.

A Court of equity not only varies from common law in order to fulfil the great principles of juſtice and utility, but countenances ſuch variations in the conduct of individuals. The preſent chapter is intended as an illuſtration of this obſervation; for ſeveral examples ſhall be given, of ſupporting poſitive infringements of common law, done even by its own officers.

The legal authority of magiſtrates and officers of the law being territorial, is confined within preciſe limits. In ſtrict reaſoning, nothing can be pronounced with greater certainty, than that an officer of the law acting beyond the bounds of his

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commiſſion, acts illegally: and yet in practice we admit ſeveral exceptions from this rule. If goods once apprehended in order to be pointed, be driven out of the ſheriffdom purpoſely to diſappoint the pointing, it is lawful for the officer to follow and complete his pointing, in the ſame manner as if the goods had not been driven away *. By the ſtatute 52. Henry III. cap. 15. "No man for any manner of "cauſe can take a diſtreſs out of his fee, "or in the king's highway." But if the lord coming to diſtrain have the view of the beaſts within his fee, and before diſtraining the tenant chaſes them into the highway; it hath been found, that the lord, notwithſtanding the ſtatute, may diſtrain them there †. With regard to the power of apprehending delinquents, one inſtruction is, That if a delinquent fly without the bounds of a conſtable's charge, the conſtable, being in hot purſuit, may follow and apprehend him ‡. And, by the ſame rule, a ſtranger committing a

* Balfour, (Pointing), March 22. 1560, Home contra Sheill.

† Abridg. of the law, vol. 2. p. 111.

‡ Act 8. parl. 1617. Act 38 parl. 1661.

riot

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riot within a barony, may, by the officers of the barony, be purſued and apprehended out of the barony *.

Sir Matthew Hale, in his Hiſtory of the pleas of the crown †, handles this matter with care, and traces it through various caſes. " If a warrant or precept to arreſt " a felon come to an officer or other, if " the felon be arreſted, and after arreſt " eſcape into another county, yet he may " be purſued and taken upon freſh pur- " ſuit, and brought before the juſtice of " the county where the warrant iſſued; " for the law adjudged him always in the " officer's cuſtody by virtue of the firſt " arreſt. But if he eſcape before arreſt " into another county, if it be a warrant " barely for a miſdemeanour, it ſeems the " officer cannot purſue him into another " county; becauſe out of the juriſdiction " of the juſtice who granted the warrant. " But in caſe of felony, affray, or dan- " gerous wounding, the officer may pur- " ſue him, and uſe hue and cry upon him " into any county. But if he take him

* Nicolſon, (Forum competens), Jan. 8. 1661, Baillie contra Lord Torphichen.

† Vol. 2. p. 115.

" in

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" in a foreign county, he is to bring him " to the gaol or juſtice of that county " where he is taken. For he doth not " take him purely by the warrant of the " juſtice, but by the authority that the " law gives him; and the juſtice's war- " rant is a ſufficient cauſe of ſuſpicion " and purſuit." Here ſeveral caſes are diſtinguiſhed, and different degrees of power indulged to the officer, all of them flatly contradictory to the ſtrict rules of common law: and yet we chearfully acquieſce in the doctrine, having an impreſſion that it is juſt and ſalutary.

Let us try what will the moſt readily occur, in reflecting on this ſubject. If a felon be once arreſted and in the hands of the officer, a notion of property ariſes, and ſuggeſts a right ſimilar to that of the firſt occupant of land. Though the felon eſcape, the officer, in freſh purſuit, is underſtood to retain a ſort of poſſeſſion *animo*, intitling him to purſue the felon till he compaſs his aim, to wit, a ſecond arreſt. We naturally conclude, that the felon, being in ſome ſenſe the property of the officer, may be ſeized where-ever he can be found; and, by virtue of that *qua-*

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ſi property, may be carried before the judge who granted the warrant. This reaſoning will appear ſtill more ſatisfactory when it is applied to the caſe cited above from Balfour, where a poinding is inchoated by apprehenſion of the goods; a circumſtance which undoubtedly produces ſome faint notion of right to the goods, intitling the poinder to ſeize them wherever found.

Again, "where a felon eſcapes without "being arreſted, if the warrant be barely "for a miſdemeanour, it ſeems the officer "cannot purſue him into another county. "But in caſe of felony, affray, or dangerous wounding, the officer may purſue "him into another county." Here is a diſtinction made, which appears to have a foundation in human nature. As this diſtinction cannot ariſe from the nature of the warrant, which is no more extenſive in the one caſe than in the other, it muſt ariſe from the nature of the delinquence. Felony, or any capital crime, inflames the mind, and creates a ſtrong deſire of puniſhment: the heated imagination is hurried along, and cannot be reſtrained by the ſlight fetters of ſtrict form. And accordingly,

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cordingly, in weighing an abſtract principle againſt the impulſe of an honeſt paſſion, the mind, giving way to the latter, embraces the following ſentiment, That the officer ought not to be confined within the limits of his commiſſion. In the caſe of a ſlight miſdemeanour, the reſult is different. Strict principles have a ſtronger effect upon the mind than any impulſe that can ariſe from a venial tranſgreſſion; and therefore, in judging of this caſe, the mind naturally reſts on the limitation of the warrant.

And what is further mentioned in the foregoing quotation, will ſupport theſe reflections. "A delinquent once arreſted, "may, upon a ſecond arreſt, be brought "from another county to the judge who "gave the warrant. But if arreſted for "the firſt time in a foreign county, the "criminal muſt be carried before the judge "of the county where he is taken." The diſtinction here made, ariſes from the principles above explained. It has already been obſerved, that the notion of a *quaſi* property ſupplies the want of a ſecond warrant. But an arreſt for the firſt time in a foreign county muſt be governed by

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a different rule: the mind figuring a hot purſuit of the criminal, eaſily ſurmounts any obſtruction that may ariſe from mere form; but when the end is gained by having the felon in ſafe cuſtody, the impulſe of paſſion being over, the mind ſubſides; and in this condition, perceiving the defect of power, it takes the firſt opportunity of ſupplying the defect, by an application to the judge of the place (*a*).

With reſpect to the two caſes now mentioned, a remarkable difference is obſervable in the operations of the mind. However ſtrong the impulſe of a paſſion may be when it agitates the mind, yet as ſoon as it ſubſides by gratification, the mind is left free to the government of reaſon. Thus, where a felon who was never arreſted is purſued into a foreign county, the defect of power is ſcarce perceived during the heat of purſuit: but immediately

(*a*) This form is now rendered unneceſſary by act 24° Geo. II. cap. 55. "If a perſon, upon a warrant indorſed, be apprehended in another county for an offence not bailable, or if he ſhall not find bail, he ſhall be carried back into the firſt county, and be committed by the juſtices in that county, or be bailed there if the crime be bailable."

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upon the arreſt, the defect of power makes an impreſſion; and reaſon demands that the defect be forthwith ſupplied. The mind is differently influenced in the caſe of an eſcape after arreſt. If once a reſemblance be diſcovered between two objects, there is a natural propenſity to make the reſemblance as complete as poſſible; which in reaſoning produces an error extremely common, that of drawing the ſame inferences as if the reſemblance were altogether complete. Thus, by getting poſſeſſion of the body of a felon a faint notion of property being ſuggeſted, the mind proceeds to form all its concluſions as if the felon were truly the property of the officer.

It is extremely curious to obſerve, how men ſometimes are influenced by principles and emotions that they themſelves at the time ſcarce attend to; which is remarkable in writers upon law, who, little apt to regard the ſilent operations of the mind, are not ſatisfied but with reaſonings drawn from principles of law. This proceeds from ſtudying law too much as an abſtract ſcience, without conſidering, that all its regulations ought to be founded upon human

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man nature, and be adapted to the various operations of the mind. If one of the greateſt lawyers in modern times furniſh this cenſure, few can hope to eſcape. And that the cenſure is juſt, will appear from conſidering the reaſoning of our author, which is by no means ſatisfactory. With regard to the felon who has been once arreſted, he aſſigns the following reaſon for the regulation, "That the law adjudgeth "him always in the officer's cuſtody by "virtue of the firſt arreſt." But why does the law give this judgement, when it is contrary to the fact? This queſtion ought to have been prevented in accurate reaſoning: inſtead of which we are left in the dark, preciſely where light is the moſt wanted. The true anſwer to this queſtion is given above, that the right of poſſeſſion once fairly acquired, cannot be loſt by ſtealth or force, and therefore is retained *animo*.

Upon the other branch, the reaſoning appears ſtill more lame. The caſe is of a felon apprehended for the firſt time out of the juriſdiction; upon which our author's reaſoning is, "That the officer doth not "act purely by the warrant of the juſtice,

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" but by the authority which the law gives " him; and that the juſtice's warrant is " a ſufficient cauſe of ſuſpicion and pur- " ſuit." This is extremely obſcure, and unſatisfactory as far as intelligible. In the firſt place, it is obvious, that the reaſoning, if juſt, is equally applicable whatever be the nature of the crime: the juſtice's warrant is not a ſufficient cauſe of ſuſpicion and purſuit where the crime is atrocious, more than where it is of the ſlighteſt kind. In the next place, ſuppoſing the juſtice's warrant to be a ſufficient cauſe of ſuſpicion, and conſequently of purſuit, the perſon upon whoſe information the warrant was iſſued has a better cauſe of ſuſpicion, and yet the law empowers not that perſon to apprehend or to purſue. Neither doth a ſufficient cauſe of ſuſpicion give authority to an officer of the law out of the juriſdiction, more than to a private perſon. But let a man having authority to apprehend be figured in hot purſuit of a noted criminal, the mind hurries him on till he reach his quarry where-ever found: no ſuch impreſſion is made by the ſlighter tranſgreſſions. And this difference of feeling

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ing is the foundation of our author's doctrine; a difference that undoubtedly made an impreſſion on him, though overlooked in his reaſoning.

Thus, we have endeavoured to trace out the foundation of ſeveral nice concluſions in law, that depend not on abſtract reaſoning, but on ſentiment. In one of the caſes, an imagined right over the perſon of a felon arreſted, ſuggeſted by a ſlight reſemblance it hath to property, is in reality the only foundation of our concluſion. In the other, what in reality determines us, is the anxiety we have to prevent the felon's eſcape. And whoever examines laws and deciſions with due attention, will find many of them founded on impreſſions or emotions, ſtill more ſlight than thoſe above mentioned.

To complete the ſubject, nothing further ſeems neceſſary but to obſerve, that the foregoing principles and operations of the mind, are countenanced by courts of juſtice, ſo as even to diſpenſe with the cleareſt rules of law. Theſe principles and operations merit regard as virtuous and laudable; but their merit chiefly depends on their

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their utility. By overcoming that ſcrupulous nicety of law, which often is an impediment to the adminiſtration of juſtice, they tend in an eminent degree to the good of ſociety.

CHAP. VIII.

Juriſdiction of the court of ſeſſion with reſpect to foreign matters.

THE ſubjects hitherto treated, falling within the bounds of common law, come of courſe under the equitable juriſdiction of the court of ſeſſion, ſupplying defects or correcting injuſtice in common law. Foreign matters, as will by and by be explained, fall not within the bounds of common law; and for that reaſon come not under the juriſdiction of the ſeſſion, either as a court of common law or as a court of equity. Why then ſhould the preſent ſubject be brought into a treatiſe of equity? Not neceſſarily, I acknowledge.

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ledge. It is however ſo intimately connected with matters of equity, that the ſeſſion, acting whether as a court for foreign affairs or as a court of equity, is governed by the ſame principles, namely, thoſe above laid down. Of theſe accordingly we ſhall ſee many beautiful illuſtrations in handling the preſent ſubject; which, in that view, will make a proper appendix to a treatiſe on equity, if not a neceſſary part.

Such tribes as relinquiſhed the wandering ſtate for a ſettled habitation, came under new rules of law. The laws of a tribe or clan governed originally each individual belonging to it, without relation to place *. But after nations became ſtationary, place became the capital circumſtance. Laws were made to regulate all matters at home, that is, within the territory of the ſtate; and legiſlators extended not their view to what was done or ſuffered in a foreign country, whether by their own people or by others. Thus, laws, originally *perſonal*, became ſtrictly *territorial*; and hence the eſtabliſhed maxim, That law hath no au-

* See Hiſtorical Law-tracts, tract 6.

thority

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thority *extra territorium*. This confined notion of juriſdiction correſponded to the manners of early times: mutual fear and diffidence in days of barbarity, prevented all intercourſe among nations; and individuals ſeldom ventured beyond their own territory. But regular government introduced more ſocial manners: the appetite for riches unfolded itſelf; and individuals were put in motion to ſeek gain where the proſpect was the faireſt. In moſt countries accordingly, there are found many foreigners, who have an occaſional reſidence there for the ſake of commerce. This change of manners diſcovered the imperfection of territorial juriſdiction: a man, by retiring abroad, is ſecure againſt a proſecution, civil or criminal, for what he has done at home; and by returning home, he is ſecure againſt a proſecution for what he has done abroad: common law reacheth no perſon but who is actually within the territory of the ſtate; and reacheth no cauſe of action but what happens within the ſame territory *.

The common law of England is ſtrictly

* Hiſtorical Law-tracts, tract 7.

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territorial in the ſenſe above deſcribed *: nor have we reaſon to believe that the common law of Scotland was more extenſive. When therefore, the foregoing defect was diſcovered, it became neceſſary to provide a remedy: and the remedy was, to bring foreign matters under juriſdiction of the King and council; to which originally, as a paramount court, all extraordinary matters were appropriated. In Scotland particularly, the act 105. parl. 1487, declares the King and council to be the only court for *the actions of ſtrangers of other realms.*

With reſpect to foreign matters, the juriſdiction of the King and council in both kingdoms, was diſtinguiſhed from that of the ordinary courts of law in two particulars. Firſt, The juriſdiction of the latter was territorial with reſpect to cauſes as well as with reſpect to perſons: the juriſdiction of the former was indeed territorial with reſpect to perſons, no perſon in foreign parts being ſubjected to the juriſdiction; but with reſpect to cauſes, it was the oppoſite to territorial, no cauſe but

* See Statute law of Scotland abridged, note 7.

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what happened in foreign parts being competent. Next, The ordinary courts are confined to common law: but with reſpect to foreign matters this law can be no rule, for the reaſon above given, that it regulates nothing *extra territorium*. The King and council accordingly judging of foreign matters, could not be governed by the common law of any country: the common law of *Britain* regulates not foreign matters; and the law of a foreign country hath no authority here. Whence it follows, that foreign matters muſt be governed by the rules of common juſtice, to which all men are ſubjected, or *jure gentium*, as commonly expreſſed.

This extraordinary juriſdiction, confined originally in both kingdoms to the ſame court, is now exerciſed very differently in the two kingdoms. In Scotland, it was derived by intermediate ſteps from the King and council to the court of ſeſſion: and accordingly, by the regulations laid down ſoon after the inſtitution of that court, a juriſdiction is beſtow'd upon it as to foreign matters; and the actions of foreigners are privileged *. In England,

* Act 45. parl. 1537.

this

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this extraordinary juriſdiction made a different progreſs. The extenſive territories in France poſſeſſed by the Engliſh Kings, and the great reſort of Engliſhmen there, occaſioned numberleſs law-ſuits before the King and council. To relieve that court from an oppreſſive load of buſineſs, the conſtable and marſhal court was inſtituted; and to this new court were appropriated foreign matters, to be tried *jure gentium* *. After the Engliſh conqueſts in France were wreſted from them, this court had very little buſineſs. We find ſcattered inſtances of its acting as a criminal court, down to the reign of Charles II.; but none for centuries before of its acting as a civil court. The court of chancery, with reſpect to its power of ſupplying the defects and mitigating the rigor of common law, had ſucceeded to the King and council; and it would have been a natural meaſure to transfer to the ſame court the extraordinary juriſdiction under conſideration, the rule of judging being the ſame in both. But the court of chancery being

* See Duck de authoritate juris Civilis, lib. 2. cap. 8. part 3. § 15. &c.

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at that time in its infancy, and its privilege as to extraordinary matters not clearly unfolded, the courts of common law, by an artifice or fiction, aſſumed foreign matters to themſelves. The cauſe of action is feigned to have exiſted in England *, and the defendant is not ſuffered to traverſe that allegation. This may be juſtly conſidered as an uſurpation of the courts of common law upon the court of chancery; which, like moſt uſurpations, has occaſioned very irregular conſequences. I ſhall not inſiſt upon the ſtrange irregularity of aſſuming a juriſdiction upon no better foundation than an abſolute falſehood. It is more material to obſerve, that foreign matters ought to be tried *jure gentium*, and yet that the judges who uſurp this juriſdiction have no power to try any cauſe otherwiſe than by the common law of England. What can be expected from ſuch inconſiſtency but injuſtice in every inſtance? Lucky it is for Scotland, that chance, perhaps more than good policy, hath appropriated foreign matters to the

* See Duck de authoritate juris Civilis, lib. 2. cap. 8. part 3. § 18.

court

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court of ſeſſion, where they can be decided on rational principles, without being abſurdly fettered as in England by common law.

To form a diſtinct notion of the juriſdiction of the court of ſeſſion with reſpect to foreign matters, it may be proper to ſtate ſuccinctly its different juriſdictions, and to aſcertain the limits of each. Conſidered as a court of common law, thoſe actions only belong to it where the cauſe of action did ariſe in Scotland. With regard to perſons, this court was originally limited like the courts of common law in England: it had no authority over any man but during the time he was locally in Scotland. But in this reſpect the court hath in later times acquired, by preſcription, an enlargement of juriſdiction: every Scotchman, at home or abroad, is ſubjected to the juriſdiction of the court; and, when abroad, may, by a citation at the market-croſs of Edinburgh, pier and ſhore of Leith, be called to defend in any action before the court*. In the next place, conſidering this court as a court of equity,

* See Statute-law of Scotland abridged, note 7.

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empowered to ſupply the defects and mitigate the rigor of common law, its juriſdiction is and muſt be the ſame with what it enjoys as a court of common law. To give it a more extenſive juriſdiction would be uſeleſs; and to confine it within narrower bounds would not fully anſwer the end of its inſtitution, which is to redreſs common law when juſtice demands redreſs. In the laſt place, this court, with relation to foreign matters, has the ſame juriſdiction over perſons that it has as a court of common law or of equity. And accordingly the court had no difficulty to ſuſtain a proceſs for payment of an account contracted at Campvere in Zealand, tho' the defendant, a Scotch merchant reſiding there, was not in this country any time during the ſuit *.

The rules that govern the ſeſſion as a court for foreign matters, are the ſame that govern it as a court of equity; for theſe rules are derived from the principles of juſtice. But it muſt not be held that theſe rules are applied preciſely in the ſame manner: as a court of equity, the ſeſſion will not venture to interpoſe againſt com-

* June 27. 1760, Hog contra Tennent.

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mon law, unleſs authoriſed by ſome general rule of equity that is applicable to all caſes of the kind; but as to foreign matters, which belong not to common law, every caſe muſt be judged upon its own merits. And therefore the court here is leſs under reſtraint, than in ſupplying the defects of common law, or in correcting its rigor.

Though with reſpect to foreign matters, there is, ſtrictly ſpeaking, but one rule for judging, namely, natural juſtice; yet this rule, in its application to different matters, brings out very different concluſions. And ſhould one undertake to unfold all the various caſes to which the rule may be applied, the work would be endleſs. Avoiding therefore this endleſs taſk, I confine my ſpeculations to ſome few leading caſes that have been debated in the court of ſeſſion; and theſe, for the ſake of perſpicuity, ſhall be divided into different ſections.

SECT.

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SECT. I.

Perſonal actions founded on foreign covenants, deeds, or facts.

ACcording to the principles above laid down, a foreigner's covenant will produce an action againſt him here, provided he be found in Scotland. It would be a great defect in law, were there no redreſs againſt a foreigner who retires with his effects to this country, in order to ſcreen himſelf from debts contracted at home. But a momentary reſidence here will not preſume againſt him: he cannot be called into court till a domicil be fixed upon him by a reſidence of forty days. The court of ſeſſion accordingly refuſed to ſuſtain an action brought by one foreigner againſt another for payment of debt contracted abroad; for the parties were here occaſionally only, and the debtor had no domicil in Scotland*. A foreigner is ſub-

* Haddington, Nov. 23. 1610, Vernor contra Elvies.

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jected to our courts for a crime committed here, or a contract made here; but to ſubject him inſtantly to anſwer for a debt contracted abroad, would put it in the power of malice to confine a man at home. Our law, for the facility of travelling, requires a reſidence of forty days to ſubject a foreigner to our courts.

When a foreign bond ſtipulating the intereſt of the country where granted, is made the foundation of a proceſs here, it has been doubted, whether that intereſt or the legal intereſt of this country ought to be decreed. This doubt is eaſily ſolved. An agreement to pay the intereſt of the country where the money is borrowed, is undoubtedly binding in conſcience, and therefore ought to be made effectual in every country. Nor do we meet with any obſtruction in the Scotch ſtatutes regulating the intereſt of money, which are not intended to reach foreign intereſt. And this accordingly is the rule in the law of England *. Hence it appears, that the court of ſeſſion erred in refuſing the intereſt of 10 per cent. upon a double bond

* Abridg. caſes in equity, ch. 36. ſect. E. § 1.

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executed in Ireland, and in reſtricting the penal part of the bond to 6 per cent. the legal intereſt here *. This error will be no leſs evident from another conſideration. The penalty of a double bond put in ſuit here, ought to be ſuſtained to the extent of damage and coſts of ſuit: but the damage is plainly the intereſt of the country where the money is lent; becauſe had payment been duly made, the money again lent out would have produced that intereſt. For the ſame reaſon, ſuppoſing the rate of intereſt to be lower in England than here, our judges, in relieving from the penalty of a double bond, will make the Engliſh intereſt the rule; for the lender could not have a view to greater intereſt than that of his own country.

The caſe is different where intereſt is ſtipulated greater than is permitted in the *locus contractus*. Such ſtipulation is uſury in that country, and a moral wrong every where: I ſay a moral wrong, becauſe, as every man is bound to give obedience to the laws of his own country, it is a moral

* Fountainhall, Jan. 27. 1710, Savage contra Craig.

wrong

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wrong to tranſgreſs theſe laws *. When action therefore is brought in a foreign country for payment of the ſtipulated intereſt, it would be unjuſt to make a claim founded on an immoral paction; and the judge who ſhould ſuſtain the claim would be acceſſory to the wrong. But now, admitting that the intereſt ſtipulated ought not to be ſuſtained, it comes next to be conſidered, whether the intereſt of the *locus contractus* ſhould be the rule, or that of the country where the action is brought, or laſtly, whether intereſt ſhould be rejected altogether. This is a puzzling queſtion. One at firſt view will naturally reject intereſt altogether, as a juſt puniſhment for the wrong done. But it is not clear, that a judge can puniſh for a wrong committed in a foreign country. One thing indeed is clear, that action cannot be ſuſtained upon the immoral ſtipulation; and therefore, if there be any claim for intereſt, it muſt be upon the maxim, *Nemo debet locupletari aliena jactura.* This leads the mind to the intereſt of the *locus contractus*;

* See vol. 1. p. 344.

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and I incline to be of opinion that that intereſt is due.

Under the head of covenants marriage comes celebrated abroad. The municipal law of Scotland regulating the ſolemnities of marriage, reſpects no marriage but what is made in Scotland: and as foreign laws have no coercive authority here, ſuch a marriage muſt be regulated by the law of nature. According to that law, the matrimonial connection is founded upon conſent ſolely; the various ſolemnities required by the laws of different nations having no view but to teſtify conſent in the moſt complete manner. In that view, the ſolemnities of the country where a marriage is celebrated, ought with us to have great weight; becauſe they ſhow the deliberate will and purpoſe of the parties. Juſtice however requires that a marriage be held good here, though not formal according to the law of the country where it was made, provided the will and purpoſe of the parties to unite in marriage clearly appear.

According to the doctrine here laid down, a child ought with us to be held legitimate by a ſubſequent marriage, provided

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vided the marriage-ceremony was performed in a country where ſuch is the law; becauſe marriage in ſuch a country muſt import the will of the father to legitimate his baſtard children. But we cannot juſtly give the ſame effect to a marriage celebrated in a country where the marriage, as in England, hath not the effect of legitimation. The reaſon is, that marriage in that country is not a proof of the father's will to legitimate.

A minor, in the choice he makes of curators, is not confined to his own countrymen; and therefore a foreigner choſen curator has the ſame authority here with a native. Neither is it of importance in what place curators be choſen; and accordingly a choice made in England of curators, whether Engliſh or Scotch, will be effectual here. The powers of a guardian to a lunatic in England are more limited. The cuſtody of the perſon of an Engliſh lunatic, and the management of his land-eſtate, in England, belong to the court of chancery; and the chancellor names one guardian to the perſon, another to the eſtate. But the chancellor having no power over

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over a lunatic's land in Scotland, cannot appoint a guardian to manage ſuch land.

Having diſcuſſed civil matters, I proceed to criminal. A crime committed at ſea may be tried by the court of admiralty: but, this caſe excepted, no crime committed in a foreign country can be tried in Scotland. The juriſdiction of the juſticiary-court is ſtrictly territorial, being confined within the limits of Scotland; and the extraordinary juriſdiction of the court of ſeſſion with reſpect to foreign matters, reaches civil cauſes only. Nor is it neceſſary that it ſhould be extended to crimes. It is of great importance to every nation that juſtice have a free courſe every where; and to this end it is neceſſary that in every country there be an extraordinary juriſdiction for foreign matters, as far as juſtice is concerned. But there is not the ſame neceſſity for an extraordinary juriſdiction to puniſh foreign delinquencies: the proper place for puniſhment is where the crime is committed; and no ſociety takes concern in any crime but what is hurtful to itſelf. A claim for reparation ariſing from a foreign delinquency, is different: being founded on the rules of common

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common juſtice, it is a claim that undoubtedly belongs to the juriſdiction under conſideration. No man who injures another, ought to reckon himſelf ſecure any where till he make reparation; and if he be obſtinate or refractory, juſtice requires that he be compelled, where-ever found, to make reparation.

To ſecure the effects of the deceaſed from embezzlement, every perſon who intermeddles irregularly, is, in Scotland, ſubjected to the whole debts of the deceaſed, without limitation. This penal paſſive title, termed *vitious intromiſſion*, is confined to irregular intermeddling within Scotland. The intermeddling in England with the moveable effects of a Scotchman who dies there, muſt be judged by the rules of natural juſtice; and therefore in this country cannot infer any concluſion beyond reſtitution or damages.

SECT.

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SECT. II.

Foreign covenants and deeds reſpecting land.

IN order to have a diſtinct conception of this branch, the extent of our own municipal law with reſpect to land in Scotland muſt be aſcertained; for we are not at liberty to apply the *jus gentium*, or the principles of natural juſtice, to any caſe that comes under our own law. As to this preliminary point, things it is certain as well as perſons are governed by municipal law. Land in particular, next to perſons, is the greateſt object of law; and in every country the acquiſition and tranſmiſſion of land are regulated by municipal law. Our law, for example, with reſpect to the tranſmiſſion of land-property, requires writing in a certain form. Such a writing is held a good title of property, whether executed at home or abroad. A writing, on the other hand, in a form different from that preſcribed by our law, will be diſregarded where-ever executed; for our law regards

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the ſolemnities only, not the place. Thus a teſtament made in England, bequeathing land in Scotland, is not ſuſtained by the court of ſeſſion; becauſe, by our law, no man can diſpoſe of his land by teſtament: nor will it be regarded that land is teſtable in England; becauſe every thing concerning land in Scotland is regulated by our law. In general, the connection of a land-eſtate with the territory where ſituated, is of the moſt intimate kind: it bears the relation of a part to the whole. Thus every legal act concerning land, the conveying it *inter vivos*, the tranſmitting it from the dead to the living, the ſecurity granted on it for debt, are aſcertained by the municipal law of every country; and with reſpect to every particular of that kind, our courts are tied down to their own law.

Are we then to hold, that a conveyance of land in a form different from what is required by us, can have no effect? Suppoſe a man ſells in England his land-eſtate in Scotland, executes a deed of conveyance in the Engliſh form, and perhaps receives payment of the price: ſuch conveyance, not being in the form required by the

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law of Scotland, will not have the effect to transfer the property. But has the purchaſer any claim in Scotland againſt the vender? None at common law; becauſe a court of common law hath not authority to tranſform an actual diſpoſition into an obligation to diſpone. But ſuch claim is ſupported in equity; becauſe where a man, in order to transfer his land to a purchaſer, executes a diſpoſition which is afterward diſcovered to be imperfect, it is his duty to execute a perfect one; and if he be refractory, it is the duty of a court of equity to compel him, or to ſupply his place. If the action be laid within the territory where the land is ſituated, the judge, in default of the diſponer, may adjudge the land to the plaintiff: if in any other territory, all that can enſue is damage for not performance. I illuſtrate this doctrine by a ſimilar caſe. A diſpoſition of land within Scotland without procuratory or precept, will not be regarded at common law: but a court of equity, attentive to juſtice, will interpoſe in behalf of the purchaſer, by adjudging the land to him. Thus, with reſpect to an informal conveyance of land within Scotland, the ſeſſion

acts

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acts as a court of equity; and it acts as an extraordinary court for foreign matters, where a conveyance is executed abroad according to the law of the place.

A covenant was executed in England between two brothers, agreeing, that failing children the eſtate of the deceaſed ſhould go to the ſurvivor. The brother who firſt deceaſed had a land-eſtate in Scotland, a part of which he had gratuitouſly aliened in defraud of the covenant. A reduction was brought of this gratuitous deed by the ſurviving brother, and the covenant was ſuſtained as a good title in the reduction. The covenant, though it had not the formalities of the law of Scotland, was however good evidence of the agreement; and as the deceaſed brother had done a moral wrong in tranſgreſſing the agreement, juſtice required that the wrong ſhould be redreſſed, which was done by voiding the gratuitous deed *. But in a later caſe, the court deviated from the foregoing principle of juſtice. A diſpoſition of an heritable juriſdiction in Scotland, executed in England according to

* Forbes, July 5. 1706, Cuningham contra Lady Sempill.

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the Engliſh form, was not ſuſtained even againſt the granter, to compel him to execute a more formal diſpoſition *. This was acting as a court of common law. And it muſt not paſs unobſerved, that the accumulating different juriſdictions in the ſame court, occaſions frequently miſtakes of this nature; which are avoided in countries where different juriſdictions are preſerved diſtinct in different courts.

SECT. III.

Moveables domeſtic and foreign, and their legal effects.

LOcal ſituation is eſſential to a moveable no leſs than to land: we cannot even conceive a horſe or a ſhip but as exiſting in a certain place. In a legal view, a moveable ſituated within a certain territory, is ſubjected to the judge of that territory; and every action claiming the property or poſſeſſion of it, muſt be brought before that judge. Warrant for execution

* February 1729, Earl Dalkeith contra Book.

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muſt be granted by the ſame judge, as no other judge has authority over it.

It is a different queſtion, by what law the judge ought to regulate his proceedings, whether by the law of his own country, or by what other law. About this queſtion writers have differed widely. Some are of opinion, that moveables *non habent ſequelam*, meaning, that without regard to their local ſituation, they are to be held as belonging to the country of the proprietor, and to be ſubjected to the law of that country. Others, averſe to fiction, are of opinion, that moveables like land ought to be governed by the law of the country where actually ſituated. Opinions ſo different are an incitement to trace this ſubject to its fountain-head, if it can be traced. That each of theſe opinions may be right in particular caſes, is probable; for otherwiſe they would not be adopted: but I ſuſpect, that neither of them will hold in general and in every caſe. I take firſt under conſideration moveables acceſſory to an immoveable ſubject, the furniture of a dwelling-houſe, the ſtocking of a farm, goods in a ſhop for ſale, the implements of a manufacture, which may be termed

permanent

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permanent moveables. Theſe are naturally conſidered, as belonging to the ſame country with the principal ſubject, and to be governed by the ſame law. This view may be enlarged, by comprehending under permanent moveables, every moveable that like thoſe above mentioned, have beſide local ſituation ſome connection with a country. So far the latter opinion appears the beſt founded. And that this way of thinking has long prevailed in Scotland, is made evident by the act 88. parl. 1426, enacting, "That when a Scotchman dies "abroad *non animo remanendi*, his Scotch "effects muſt be confirmed in Scotland." Nor will it alter the rule that the proprietor happens to be a foreigner. The ſucceſſion to an immoveable ſubject is not affected by that circumſtance; and it is natural that an acceſſory ſhould go along with its principal: the thinking mind cannot readily yield to a ſeparation of things intimately connected, to regulate the ſucceſſion of the immoveable part by the law of the country to which it belongs, and of the moveable part by the law of the proprietor's country. This argument muſt appear in a ſtrong light where both parts belong

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belong to a foreigner; and it can make no ſolid difference that the moveable part only belongs to him. We adhere to this doctrine in practice. Letters of adminiſtration from the prerogative court of Canterbury will not be ſuſtained as a title to effects in Scotland that belonged to the deceaſed, even though granted to thoſe who are next in kin by the Scotch law. The powers of that court are confined within its own territory; and Scotch effects muſt be confirmed in Scotland. In England, a baſtard enjoys the privilege of making a teſtament, which obtains not here. And accordingly, notwithſtanding a teſtament made by an Engliſh baſtard, his moveables here were eſcheated to the crown *. A nuncupative will is ſuſtained in England; but it will not carry Scotch moveables, writ with us being neceſſary to convey moveables from the dead to the living †. But the nomination of an executor by the proprietor in his teſtament, be-

* Haddington, 1ſt February 1611, Purves contra Chiſholm.

† Stair, 19th January 1665, Shaw contra Lewins.

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ing effectual all the world over *jure gentium*, will be ſuſtained here.

Moveables that are not connected with an immoveable ſubject, nor in any way connected with a country or territory, but merely by local ſituation, may be termed *tranſient moveables*; moveables, for example, that a proprietor carries about with him, his watch, his jewels, his garments, the money in his pocket, his horſes, his coach, and ſuch like. Theſe ſo far coincide with permanent moveables, as that every queſtion concerning them muſt be determined by the judge of the territory where they actually are. But it follows not that the law of that territory ought to be the rule. By their intimate connection with the proprietor, the law of his country ought to prevail. A gentleman in the courſe of travelling traverſes many foreign territories; and happens to die ſuddenly within one of them. What a ſtrange law would it be that his ſucceſſion ſhould depend on ſuch an accident? The nature of man is averſe to chance: we love to reſt on general principles and permanent facts, rejecting circumſtances daily and hourly varying. A Scotchman croſſes

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the border, purpoſing to return home in a week; but dies ſuddenly in the Engliſh ſide by a fall from his horſe. His tranſient effects by this accident remain in England; but it would derogate from the dignity of law to lay any weight on that circumſtance; and laying it aſide, what other rule is there to follow but to regulate the ſucceſſion by the law of Scotland? Theſe effects were carried by the proprietor from Scotland: he purpoſed to carry them back to the ſame country; and it is no wide ſtretch of thought to conſider them as ſtill continuing there. The Engliſh judges accordingly, conſidering them to be Scotch effects, will prefer thoſe who are by the Scotch law next in kin to the deceaſed (*a*). Here the opinion making the law of the proprietor's country the rule of ſucceſſion, appears the beſt founded. This caſe demands peculiar attention: here

(*a*) It may create at firſt ſome backwardneſs of opinion to find a rule of ſucceſſion founded upon an obſcure mental operation; but the argument will acquire weight on conſulting the Eſſays on Britiſh Antiquities, eſſay 4. where will be found many rules of ſucceſſion built upon foundations ſtill more ſlender than that mentioned above.

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judges are led to found their deciſions, not on their own law nor on the *jus gentium*, but on the municipal law of another country. A ſhip is another example of tranſient moveables. While it is abroad on a trading voyage, the proprietor dies at home. The ſhip is under a foreign juriſdiction; but when claimed there, the judge, rejecting the caſual circumſtance of local ſituation, will conſider it as belonging to the country of the proprietor, and will adjudge it to thoſe who have right by the law of that country. A Frenchman conſigns goods in Edinburgh to be diſpoſed of for his behoof; but dies before the commiſſion is executed. The ſucceſſion to theſe goods ought to be governed by the law of France; and the court of ſeſſion, as having juriſdiction in foreign matters, will decree accordingly. In general, ſuch moveables are held to be foreign moveables, conveyable *inter vivos*, and from the dead to the living, according to the law of the proprietor's country. An aſſignment by the foreign proprietor, formal according to the *lex loci*, will be ſuſtained here to carry ſuch moveables. And if they belonged to an Engliſhman, letters of

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of adminiſtration after his death will be here a valid title, without neceſſity of confirmation.

Upon the whole, comparing permanent and tranſient moveables, the local ſituation of the former points out the judge, without regarding the proprietor's country. But as to the latter, the proprietor's country points out the judge, without regarding the local ſituation.

Where a Scotchman, occaſionally in England, dies there inteſtate, the court of ſeſſion, acting as a court of common law, will adjudge his moveables ſituated in Scotland, of whatever kind, to thoſe who are next in kin according to our law. But his tranſient moveables, locally in England, muſt be claimed from the Engliſh judges; who, acting as a court for foreign matters, ought to govern themſelves by the law of Scotland; which brings in the relict for her ſhare. But what if he have made a will, dividing his moveables among his blood-relations, leaving nothing to his wife? Her contract of marriage affords an effectual claim againſt him, which he cannot evade by any voluntary deed. And even without a contract, as the *jus relictæ* is e-

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ſtabliſhed by the law of Scotland beyond the power of the huſband to alter, ſhe ought to have her proportion of theſe tranſient moveables, as the Engliſh judges are in this caſe bound by the law of Scotland, not by their own. To fortify this doctrine, I urge the following argument. Where two perſons joining in marriage are ſatisfied with the legal proviſions, there is no occaſion for a contract; and the parties may be held as agreeing that the law of the land ſhall be the rule. It is in effect the ſame, as if the parties had ſubſcribed a ſhort minute, bearing, that the *jus relictæ* and every other particular between them ſhould be regulated by the law of their country; and ſuch an agreement expreſſed or implied, muſt be binding all the world over, to ſupport the relict's claim againſt the teſtament of a deceaſed huſband.

It may however happen, that two perſons careleſsly join in marriage, having an object in view very diſtant from a legal proviſion. Law does not admit of a preſumption againſt rational conduct. But though it ſhould be admitted, it will not avail. As every man is bound in conſcience

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ſcience to obey the laws of his country, the huſband, when diſpoſed to think, will find his wife intitled by that law to the *jus relictæ*; and will ſee that an attempt to diſappoint her would be againſt conſcience. This muſt be evident to him when at home; and it muſt be equally evident, that change of place cannot relieve him. At any rate the *jus relictæ* muſt have its effect as to his moveables in Scotland; and it would be not a little heteroclete that his tranſient effects ſhould be withdrawn, for no better reaſon than that they happen accidentally to be in a foreign country where the *jus relictæ* does not obtain.

SECT. IV.

Debts whether regulated by the law of the creditor's country or that of the debtor.

DEbts due by people of this country to foreigners, make another branch of the extraordinary juriſdiction of the court of ſeſſion concerning foreign matters. The form of conveying ſuch debts *inter vivos*, of

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of tranſmitting them from the dead to the living, of attaching them by execution, &c. have not hitherto been brought under general rules; and our judges are ever at a loſs by what law theſe particulars ought to be governed, whether by our law, by that of the country where the creditor reſides, or by the *jus gentium*. In order to remove this doubt, authors and lawyers are ſtrongly diſpoſed to aſſimilate debts to land, by beſtowing upon them a local ſituation: and yet this fiction, bold as it is, removes not the doubt; for ſtill the queſtion recurs, Where is the debt ſuppoſed to exiſt, whether in the territory of the creditor or in that of the debtor. Conſidering a debt as a *ſubject* belonging to the creditor, it ſeems the more natural fiction to place it with the creditor as in his poſſeſſion; and hence the maxim, *Mobilia non habent ſequelam*. Others are more diſpoſed to place it with the debtor; a thought ſuggeſted from conſidering, that the money muſt be demanded from the debtor, and that upon his failure the ſuit for payment muſt be in his *forum*.

It is unneceſſary to beſtow words upon proving, that a debt is not a *corpus* to be capable

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pable of loco-poſition, but purely a *jus incorporale*. Rejecting then fictions, which never tend to ſound knowledge, let us take things as they are, and endeavour to draw light from the nature of the ſubject. As here there are two perſons connected, a debtor and a creditor, living in different countries, and ſubjected to different laws, it at firſt ſight may appear a puzzling queſtion, What law ought to govern, whether that of the debtor or of the creditor. One thing is evident, that every queſtion concerning a ſubject, moveable or immoveable, muſt be determined by the judge whoſe legal powers extend over that ſubject; and that execution muſt be awarded by him only. The ſame rule applies to debts, according to the maxim, *Actor ſequitur forum rei*; whence it neceſſarily follows, that the form of the action, the method of procedure, and the manner of execution, muſt all be regulated by the law of the country where the action is brought. But though there can be no doubt about the judge, it may be a doubt what ought to be his rule in determining queſtions concerning the ſubject. With reſpect to that queſtion, I ſubmit the following hints.

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When the creditor makes a voluntary conveyance, it is to be expected that he ſhould ſpeak in the ſtyle and form of his own country; and conſequently, that the law of his own country ſhould be the rule here. It would indeed be ſtrangely heteroclete to ſubject him to the forms of the debtor's country, of which he is ignorant, eſpecially if the debtor have a wandering diſpoſition. In a word, the will of a proprietor or of a creditor, is a good title *jure gentium* that ought to be effectual every where. Thus, an aſſignment made by a creditor in Scotland, according to our form, of a debt due to him by a perſon in a foreign country, ought to be ſuſtained in that country as a good title for demanding payment: and a foreign aſſignment of a debt due here, regular according to the law of the country, ought to be ſuſtained by our judges. A foreign aſſignment cannot at any rate be ſubjected to the regulations of our act 1681 for preventing forgery, nor to any other of our regulations; becauſe theſe regard no deeds but what are executed in Scotland.

A judicial conveyance or legal execution will fall more naturally to be explained

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plained in the laſt ſection. The only remaining point is to examine by what law the creditor's ſucceſſion is to be governed. Debts are part of the creditor's funds, and at his diſpoſal. His alienations for a valuable conſideration muſt be every where effectual, and even his donations. It is in his power alone to regulate his ſucceſſion; and if he make a will, it muſt be effectual. But what if he die inteſtate; whether muſt the law of his country be the rule, or that of the debtor? The former undoubtedly. A man who dies inteſtate, is underſtood to adhere to the legal ſucceſſion; for otherwiſe he would make a will. Therefore thoſe who are heirs by the law of his own country ought to be preferred, according to his implied will. The expreſs will of the deceaſed creditor muſt have that effect; and his implied will ought to have the ſame effect. The debtor has no concern but to pay ſafely: the law of his domicil will ſecure him as to that point: with regard to the creditor's ſucceſſion, it can have no authority. Thus, in a competition between the brother and the nephew of Captain William Brown, who died in Scotland his native country inteſtate and without

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children, concerning moveable debts due to the Captain in Ireland, the brother was preferred as next in kin by the law of Scotland; though by the laws of England and Ireland, which admit the *jus repræſentationis* in the ſucceſſion of moveables, a nephew and niece have the ſame right with a brother and ſiſter *.

From what is ſaid it will appear, that debts differ widely from land and from moveables. It is in vain to claim the property of any ſubject, unleſs the title of property be complete and ſtrictly formal. An equitable title in oppoſition to one that is legal, can never found a real action: it cannot have a ſtronger effect than to found an action againſt the proprietor to grant a more formal right; or in his default, that the court ſhall grant it. But in the caſe of a debt, where the queſtion is not about property but about payment, an equitable title coincides in a good meaſure with a legal title. An aſſignment made by a foreign creditor according to the formalities of his country, will be ſuſtained here as

* Nov. 28. 1744, Brown of Braid contra John Brown merchant in Edinburgh.

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a good title for demanding payment from the debtor: and it will be ſuſtained even though informal, provided it be good *jure gentium*; that is, provided it appear that the creditor really granted the aſſignment. Such effect hath an equitable title; and a legal title can have no ſtronger effect.

It muſt however be admitted, that an equitable title hath not ſo complete an effect in a competition. Suppoſe an Engliſh creditor grants an aſſignment in the Engliſh form, of a debt due to him in Scotland: this aſſignment, though it transfer not the *jus crediti* to the aſſignee, is however an order upon the debtor to pay to the aſſignee. But ſuch aſſignment, even though the firſt in order of time, will not avail againſt a more formal aſſignment taken *bona fide*, and regularly intimated to the debtor. An equitable title may be good againſt the granter; but can never be ſuſtained in a competition with a legal title, where both parties are *in pari caſu*.

I conclude this ſection with applying to debts, what is obſerved with reſpect to moveables in the ſection immediately foregoing. The nomination of an executor in a teſtament, is an univerſal title which

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ought to be ſuſtained every where; and is always ſuſtained in the court of ſeſſion to oblige debtors in this country to make payment *. But an executor-dative with letters of adminiſtration, hath not a title to ſue for payment *extra territorium*. And the ſame is the caſe of a guardian to a lunatic's eſtate, named in England by the chancellor: he has no title to ſue for payment of the lunatic's debts in Scotland †.

SECT. V.

Foreign Evidence.

UNder this head come properly foreign writs; becauſe no writ where there is wanting any ſolemnity of the law of Scotland, can be effectual here to any purpoſe but as evidence merely. And as among civilized nations, the ſolemnities required to make a writ effectual, are ſuch as give

* Durie, Feb. 16. 1627, Lawſon contra Kello.

† June 21. 1749, Moriſon, &c. contra Earl of Sutherland.

ſufficient

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ſufficient evidence of will; it is eſtabliſhed as a rule with us, That contracts, bonds, diſpoſitions, and other writs, executed according to the law of the place, are probative in this country. Thus, action is always ſuſtained upon a foreign bond having the formalities of the place where it was granted *: and an extract of a bond from Bourdeaux ſubſcribed by the tabellion only, and bearing that the bond itſelf ſubſcribed by the granter was inſerted in his regiſter, was ſuſtained, being *ſecundum conſuetudinem loci* †. Depoſitions of witneſſes taken abroad upon a commiſſion from the court of ſeſſion, were ſuſtained here, though ſubſcribed by the commiſſioners and clerk only, not by the witneſſes, ſuch being the form in the country where the depoſitions were taken ‡.

The ſame rule obtains even though the foreign bond bear a clauſe for regiſtring in Scotland. This circumſtance ſhows in-

* Haddington, Jan. 19. 1610, Fortune contra Shewan.

† Home, February 1682, Davidſon contra Town of Edinburgh.

‡ Fountainhall, March 19. 1707, Cummin contra Kennedy.

deed,

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deed, that the creditor had it in view to make his claim effectual in Scotland; but it weakens not the evidence of the bond, which therefore will be a good inſtruction of the claim *.

By the law of England, payment of money may be proved by witneſſes; and therefore the ſame proof will be admitted here with reſpect to payment ſaid to be made in England. For our act of ſederunt confining the evidence to writ †, regards no payment but what is made in Scotland; and it would be unjuſt to deprive a man of that evidence which the law of his own country made him rely on. Accordingly, in every ſuit here upon an Engliſh bond, the defence of payment alledged made in England, is admitted to be proved by witneſſes ‡. Yet where a bond granted in England contained a clauſe for regiſtring in Scotland, the defence of payment made in England was not permitted to be pro-

* Home, Feb. 14. 1721, Junquet la Pine contra Creditors of Lord Sempill.

† Hiſtorical Law tracts, tract 2.

‡ Durie, November 16. 1626, Galbraith contra Cuningham.

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ved by witneſſes *. This appears to me a wrong judgement; for, as obſerved above, the clauſe of regiſtration imported only, that the creditor had it in view to make his debt effectual in Scotland. It certainly did not bar the debtor from making payment in England; nor, conſequently, from proving by witneſſes that payment had been ſo made.

In Scotland, the cedent's oath is not good evidence againſt the aſſignee; becauſe it is the oath, not of a party, but of a ſingle witneſs. In England, an aſſignment being only a procuratory *in rem ſuam*, the cedent's oath is an oath of party, and therefore good evidence againſt the aſſignee. For that reaſon, an Engliſh bond being aſſigned in England, and a ſuit for payment being raiſed here by the aſſignee, a relevant defence againſt payment was admitted to be proved by the oath of the cedent †.

* Stair, Dec. 8. 1664, Scot contra Henderſon.

† Stair, June 28. 1666, Macmorland contra Melvine.

SECT.

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SECT. VI.

Effect of a ſtatute, of a decree, of a judicial conveyance, or legal execution, extra territorium.

THough a ſtatute, as obſerved above, hath no authority as ſuch *extra territorium*; it becomes however neceſſary upon many occaſions to lay weight upon foreign ſtatutes, in order to fulfil the rules of juſtice. Many examples occur of indirect effects given thus to foreign ſtatutes. One of theſe effects I ſhall mention at preſent for the ſake of illuſtration; reſerving others to be handled where particular ſtatutes are taken under conſideration. Obedience is due to the laws of our country, and diſobedience is a moral wrong *. This moral wrong ought to weigh with judges in every country; becauſe it is an act of injuſtice to ſupport any moral wrong, by making it the foundation either of an ac-

* See vol. I. p. 344. 345.

tion

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tion or of an exception. I give for an example the ſtatute prohibiting any member of a court of law to buy land about which there is a proceſs depending *. Such a purchaſe being made notwithſtanding, the purchaſer follows the vender into a foreign country, in order to compel him by a proceſs to make the bargain effectual. A bargain unlawful where made, becomes not lawful by change of place; and therefore the foreign judge ought not to ſupport ſuch unlawful bargain by ſuſtaining action upon it. Courts were inſtituted to repreſs not to enforce wrong; and the judge who enforces any unlawful paction, becomes acceſſory to the wrong.

Several queſtions ariſe from the different preſcriptions eſtabliſhed in different countries. In our deciſions upon that head, the caſe is commonly ſtated as if the queſtion were, Whether a foreign preſcription or that of our own country ought to be the rule. This never ought to be made a queſtion; for our own preſcription muſt be the rule in every caſe that falls under it, and not the preſcription of any other coun-

* 13. Edward I. cap. 49.; Act 216. parl 1594.

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try. The queſtion handled in theſe deciſions is, What effect ought to be given to a foreign preſcription in caſes that fall not under any of our own preſcriptions. Queſtions of that ſort may ſometimes be nice and doubtful. By the Engliſh act of limitations *, "All actions of "account and upon the caſe, all actions "of debt grounded upon any lending or "contract without ſpeciality, all actions "of debt for arrearages of rent, &c. ſhall "be ſued within ſix years after the cauſe "of action." The purpoſe of this ſtatute is to guard againſt a ſecond demand for payment of temporary debts, ſuch as generally are paid regularly: and to make that purpoſe effectual, action is denied upon ſuch debts after ſix years. As ſtatutes have no coercive authority *extra territorium*, this ſtatute can have no effect with us, but to infer a preſumption of payment from the ſix years delay of bringing an action. And accordingly, when a proceſs is brought in Scotland for payment of an Engliſh debt after the Engliſh preſcription has taken place, it cannot be pleaded here, that

* 21. James I. cap. 16. § 3.

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the action is cut off by the ſtatute of limitations: but it can be pleaded here, and will be ſuſtained, that the debt is preſumed to have been paid. Conſidering that the ſtatute can have no authority here except to infer a preſumption of payment, it follows, that the plaintiff muſt be permitted to defeat the preſumption by poſitive evidence, or to overbalance it by contrary preſumptions, or to ſhow from the circumſtances of his caſe that payment cannot be preſumed. As to poſitive evidence, the purſuer has acceſs to the oath of the defendant; and an acknowledgement that the debt is ſtill exiſting defeats the preſumption of payment *. The preſumptive payment may alſo be counterbalanced by contrary preſumptions. A caſe of this nature is reported by Gilmour †: "A bond "preſcribed by the law of England while "the parties reſided there, was afterwards "made the foundation of a proceſs in "Scotland. The court refuſed to ſuſtain "the Engliſh preſcription, becauſe the

* February 9. 1738, Rutherford contra Sir James Campbell.

† November 1664, Garden contra Ramſay.

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" bond was drawn in the Scotch form be-
" twixt Scotchmen, and bore a clauſe of
" regiſtration for execution in Scotland."
The circumſtances of this caſe ſh[illegible] that the creditor's view was to receive payment in Scotland, or to raiſe his action there; and as a bond bearing a clauſe of regiſtration preſcribes not in Scotland till forty years elapſe, the court juſtly thought, that to preſerve the claim alive the creditor had no occaſion to guard againſt any preſcription but that of Scotland. To proceed, there are circumſtances where the ſtatute of limitations cannot infer any preſumption of payment. What if the debtor within the ſix years did retire beyond ſea? The forbearance in that caſe to bring an action againſt a man who cannot eaſily be reached, and whoſe reſidence perhaps is not known, cannot infer the ſlighteſt preſumption againſt the creditor. The ſtatute however, which makes no exception, muſt in England have been obeyed, till the defect was ſupplied by another ſtatute. But the court of ſeſſion is not ſo fettered: a preſumption of payment will not be ſuſtained when the circumſtances of the caſe admit it not.

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The foregoing defect of the ſtatute of limitations is ſupplied by the Engliſh ſtatute 4*to Annæ*, *cap.* 16. declaring, " That where " the perſon againſt whom a claim lies is " beyond ſeas, the ſtatute of limitation ſhall " not run againſt the creditor." This ſtatute is alſo defective, becauſe it includes not Scotland; for a preſumption of payment cannot juſtly be urged againſt an Engliſh creditor, who forbears to ſue while his debtor is out of England though not beyond ſea. Action however muſt be denied in England by force of the ſtatute, though the debtor has been all along in Scotland. But this is no rule to us: we are at liberty to judge of the weight of the preſumption from circumſtances; and accordingly the court of ſeſſion ſuſtained action after the ſix years againſt a man who reſided moſt of the time in Scotland *.

Though the act of limitations of James I. makes no proviſion for the caſe where the debtor happens to be in a different country, it is more circumſpect as to the creditor's reſidence. For in the 7th ſection

* March 4. 1755, Truſtees for the creditors of Renton contra Baillie.

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it is provided, " That the preſcription " ſhall not run againſt the creditor while " he is beyond ſeas :" and juſtly, becauſe in that ſituation his delaying to bring an action infers not againſt him any preſumption of payment. The caſe is parallel where the creditor happens to reſide in Scotland, and therefore his reſidence there muſt alſo bar a preſumption of payment. Hence it appears, that the deciſion, July 1717, Rae contra Wright, is erroneous. James Rae a Scotch pedlar having died in England, his brother Richard intermeddled with his effects there at ſhort-hand without any warrant. Richard, during the running of the ſix years, returned to Dumfries, and died there. After the ſix years were elapſed, a proceſs was brought againſt his executor by William Rae, a third brother, to account to him for the half of the effects thus irregularly intermeddled with. The court ſuſtained the defence, That the action was cut off by the Engliſh ſtatute of limitations. This was unjuſt. While Richard remained in England, the circumſtance that William, living in Scotland, forbore to raiſe a ſuit in England, afforded not the ſlighteſt ſuſpicion that he had received

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received payment from Richard. And ſuppoſe he had lived in England, payment could not be preſumed againſt him, when his debtor left England before the lapſe of the ſix years.

By eſtabliſhed practice in England, action is not ſuſtained upon a double bond after twenty years. The intereſt at the rate of 5 per cent. equals the principal in twenty years, which therefore exhauſts the whole penal part of the bond, and makes the double ſum due in equity as well as at common law. After this period the ſum muſt remain barren, becauſe intereſt is not ſtipulated in the bond: and in that view, it is juſtly inferred from the delay of demanding payment after the twenty years, that payment muſt already have been made. This in effect is an Engliſh preſcription, inferring from long delay a preſumption of payment. It follows therefore, if the parties have lived all along in England, that the preſumptive payment from preſcription ought to be ſuſtained here.

In the Engliſh bankrupt-ſtatute, 13th Eliſabeth, cap. 7. § 2. it is enacted, "That "the commiſſioners ſhall have power to "ſell

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" ſell all the goods of the bankrupt, real " and perſonal, which he had before his " bankruptcy, and to divide the produce " among the creditors in proportion to the " extent of their debts;" and § 12. it is declared, " That this act ſhall not extend " to land aliened *bona fide* before the bank- " ruptcy." Hence it appears to be the intention and effect of the ſtatute, to bar all deeds by the bankrupt, and all execution by the creditors, after the firſt act of bankruptcy. And the Engliſh writers accordingly invent a cauſe to ſupport theſe ſtatutory effects. They hold, that the effects are veſted in the commiſſioners *retro* from the firſt act of bankruptcy: " Cre- " ditors upon whatſoever ſecurity they be, " come in all equal, unleſs ſuch as have " obtained actual execution before the " bankruptcy, or had taken pledges for " their juſt debts; and the reaſon is, be- " cauſe, from the act of bankruptcy, all " the bankrupt's eſtate is veſted in the " commiſſioners *:" which is to ſuppoſe the effects of the bankrupt veſted in commiſſioners before they have an exiſtence;

* New abridgement of the law, vol. 1. p. 258.

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a ſtrange bias in ſome writers, that they will have recourſe to abſurd fictions for explaining what is obviouſly reducible to rational principles! The ſtatute has a more ſolid foundation than a fiction: it is founded on equity, as is demonſtrated above *. But to confine our obſervations upon the ſtatute to what more peculiarly concerns this country, I muſt obſerve, that the great circulation of trade through the two kingdoms ſince the union, makes it frequently neceſſary for the court of ſeſſion to take the Engliſh bankrupt-ſtatutes under conſideration; and it has puzzled the court mightily, what effect ſhould be given to them here. That a foreign ſtatute cannot have any coercive authority *extra territorium*, is clear: but at firſt view it is not ſo clear, that the ſtatutory tranſference of property above mentioned, from the bankrupt to the commiſſioners, may not comprehend effects real or perſonal in Scotland, or in any other foreign country; for why may not a legal conveyance be equivalent to a voluntary conveyance by the proprietor? I have had occaſion to

* See above, p. 199.

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obſerve above *, that law cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance, when juſtice requires it to be granted, all that a court can do, or the legiſlature can do, is to be themſelves the diſponers; and it is evident that their deed of conveyance cannot reach any ſubject real or perſonal but what is within their territory. This makes a ſolid difference between a voluntary and a legal conveyance. The former has no relation to a place: a deed of alienation, whether of land or of moveables, is good where-ever granted: an Engliſhman, for example, has in China the ſame power to alien his land in England, that he had before he left his native country; and the power he has to diſpoſe of his moveables will reach them in the moſt diſtant corner of the earth. The latter, on the contrary, has the ſtricteſt relation to place: the power of a court, and even of the legiſlature, being merely territorial, reacheth not lands nor moveables *extra territorium*. We may then with certainty conclude, that the ſtatutory tranſ-

* Sect. 4. of the preſent chapter.

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ference of property from the bankrupt to the commiſſioners, cannot carry any effects in Scotland: theſe are ſubjected to our own laws and our own judges; and cannot be convey'd from one perſon to another by the authority of any foreign court, or of any foreign ſtatute. The Engliſh bankrupt-ſtatutes however are not diſregarded by us. One effect may and ought to be given them according to the rules of juſtice: it is the duty of the debtor to ſell his effects for ſatisfying his creditors if he cannot otherwiſe procure money; and it is in particular the duty of an Engliſh bankrupt, to convey all his effects to the commiſſioners named by the chancellor, or to the aſſignees named by the creditors, in order to be ſold for payment of his debts. The Engliſh ſtatute, by conveying to the commiſſioners all the Engliſh funds, does for the bankrupt what he himſelf ought to do: but as the Engliſh ſtatute has no authority over funds belonging to the bankrupt in Scotland, it becomes neceſſary for the commiſſioners or aſſignees to apply to the court of ſeſſion, "ſpecifying the debtor's bankruptcy, and his "failure to make a conveyance; and there-

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" fore praying that the court will adjudge " to the plaintiffs the debtor's effects in " Scotland; or rather that they will order " the ſame to be ſold, and the price to be " paid to the plaintiffs." For that purpoſe, the proper action, in my apprehenſion, is a proceſs of ſale of the debtor's moveables as well as of his land. Debts due here to the bankrupt may alſo be ſold; but as againſt ſolvent debtors a proceſs for payment is better management, it appears that, in the caſe of bankruptcy, this proceſs is competent to the aſſignees without neceſſity of an arreſtment *. The aſſignees being truſtees for behoof of the whole creditors, have a juſt claim to the bankrupt's whole effects, to be converted into money for payment of the creditors; and in the forms of the law of Scotland there appears nothing to bar the aſſignees from bringing a direct action for payment againſt the bankrupt's debtors here, as he himſelf could have done before his bankruptcy. In thus appointing the bankrupt's debtors to make payment to the aſſignees, the court of ſeſſion exerts no power but what

* See above p 174.

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is the foundation of all legal execution, namely, the making that conveyance for the bankrupt which he himſelf ought to have made. By this expeditious method, juſtice is ſatisfied, and no perſon is hurt.

Whether the price of the bankrupt's moveable funds, and the ſum ariſing from the debts due to him, ought to be diſtributed here among his creditors, or be remitted to England for that purpoſe, is a matter purely of expediency. The rule of diſtribution ſeems to be the ſame in both countries; and the creditors therefore have no intereſt in the queſtion, but what ariſes from receiving payment in one place rather than in another. But if the bankrupt's land in Scotland have been attached by execution, which is almoſt always the caſe, the price of it upon a ſale muſt be diſtributed here; for the purchaſer is not bound to pay the price till the real debts be convey'd to him, and the real creditors are not bound to convey till they get payment.

In the laſt place come foreign decrees; which are of two kinds, one ſuſtaining the claim, and one diſmiſſing it. A foreign decree ſuſtaining the claim, is not one

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one of thoſe univerſal titles which ought to be made effectual every where. It is a title that depends on the authority of the court whence it iſſued, and therefore has no coercive authority *extra territorium*. And yet as it would be hard to oblige the perſon who claims on a decree, to bring a new action againſt his party in every country to which he may retire; therefore common utility, as well as regard to a ſiſter-court, have eſtabliſhed a rule among all civilized nations, That a foreign decree ſhall be put in execution, unleſs ſome good exception be oppoſed to it in law or in equity: which is making no wider ſtep in favour of the decree, than to preſume it juſt till the contrary be proved. But this includes not a decree decerning for a penalty; becauſe no court reckons itſelf bound to puniſh, or to concur in puniſhing, any delict committed *extra territorium*.

A foreign decree which, by diſmiſſing the claim affords an *exceptio rei judicatæ* againſt it, enjoys a more extenſive privilege. We not only preſume it to be juſt, but will not admit any evidence of its being unjuſt. The reaſons follow. A decree-arbitral

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arbitral is final by mutual conſent. A judgement-condemnator ought not to be final againſt the defendant, becauſe he gave no conſent. But a decreet-abſolvitor ought to be final againſt the plaintiff, becauſe the judge was choſen by himſelf; with reſpect to him at leaſt, it is equivalent to a decreet-arbitral. Public utility affords another argument extremely cogent. There is nothing more hurtful to ſociety than that law-ſuits be perpetual. In every law-ſuit there ought to be a *ne plus ultra*, ſome ſtep that ought to be ultimate; and a decree diſmiſſing a claim is in its nature ultimate. Add a conſideration that regards the nature and conſtitution of a court of juſtice. A decree diſmiſſing a claim, may, it is true, be unjuſt, as well as a decree ſuſtaining it. But they differ widely in one capital point: in declining to give redreſs againſt a decree diſmiſſing a claim, the court is not guilty of authoriſing injuſtice, even ſuppoſing the decree to be unjuſt: the utmoſt that can be ſaid is, that the court forbears to interpoſe in behalf of juſtice; but ſuch forbearance, inſtead of being faulty, is highly meritorious in every caſe where

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where private juſtice claſhes with public utility *. The caſe is very different with reſpect to a decree of the other kind; for to award execution upon a foreign decree without admitting any objection againſt it, would be, for ought the court can know, to ſupport and promote injuſtice. A court, as well as an individual, may in certain circumſtances have reaſon to forbear acting, or executing their office: but the doing injuſtice, or the ſupporting it, cannot be juſtified in any circumſtances †.

To illuſtrate the practice of Scotland with reſpect to a foreign decree ſuſtaining a claim, I give a remarkable caſe. By ſtatute 12*mo Annæ*, *cap.* 18. made perpetual 4*to Geo.* I. *cap.* 12. it is enacted, " That " the collector of the cuſtoms, or any o- " ther perſon who ſhall be employed in " preſerving any veſſel in diſtreſs, ſhall, " within thirty days after the ſervice per- " formed, be paid a reaſonable reward for " the ſame; and in default thereof, that " the ſhip or goods ſo ſaved ſhall remain " in the cuſtody of the collector, till ſuch " time as he and thoſe employ'd by him

* See Concluſion of book 2. † Ibid.

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" ſhall be reaſonably gratified for their aſ-
" ſiſtance and trouble, or good ſecurity gi-
" ven for that purpoſe." This is where the merchant claims his ſhip or cargo. But in caſe no perſon appear to claim, there is the following proviſo: "That goods which
" are in their nature periſhable, ſhall be
" forthwith ſold by the collector; and that,
" after deducting all charges, the reſidue
" of the price with a fair and juſt account
" of the whole, ſhall be tranſmitted to the
" exchequer, there to remain for the be-
" nefit of the rightful owner; and that
" the ſame ſhall be delivered to him ſo
" ſoon as he appears, and makes a claim." Brunton and Chalmers, owners of a veſſel called *The Serpent's prize*, loaded the ſame with 100 quarters of wheat for Zealand. In her voyage ſhe was ſtranded at a place called *Redſcar*, near the town of Stock-town. Chalmers having got notice of the accident, repaired immediately to Redſcar; and found his wheat in the hands of John Wilſon collector of the cuſtoms at Stock-town; part of it laid up in lofts, and part in the open field; the whole greatly damaged by ſea-water. Finding it neceſſary to diſpoſe of the wheat inſtantly, he

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applied to the collector for liberty to ſell; offering to put the price in his hand as ſecurity for the ſalvage. This being obſtinately refuſed, he took a proteſt againſt the collector, and brought againſt him an action of treſpaſs upon the caſe before the King's bench. And the defendant having put himſelf upon his country, the cauſe came to a trial at Newcaſtle; where a ſpecial verdict was returned, in ſubſtance finding, "That all reaſonable care was taken of the wheat by the collector and others by his order; That on the 3d of October then next following, James Chalmers applied to the collector, deſiring that the wheat, being much damaged, might be forthwith ſold; and that the money produced by ſuch ſale might be left in the hand of the collector to anſwer all charges; but did not then offer to pay to the collector any money for ſalvage; neither did the collector then make any demand on that account, he not knowing at that time what the ſalvage amounted to; but then refuſed to deliver the ſaid wheat, or permit the ſame to be ſold, he having an order from the commiſſioners of his Majeſty's

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" cuſtoms for that purpoſe." And the verdict concludes thus: " But whether, " upon the whole matter aforeſaid by the " ſaid jurors in form aforeſaid found, the " within-named John Wilſon be guilty of " the premiſſes within written or not, the " ſaid jurors are altogether ignorant, and " pray advice from the court thereupon." The judge at that circuit having referred the cauſe to the court of King's-bench at Weſtminſter, judgement was at laſt there given on the 18th July 1751, after ſeveral continuations, " Finding, That the ſaid " John Wilſon is not guilty of the pre- " miſſes; that the ſaid Brunton and Chal- " mers ſhall take nothing by their ſaid " bill; but that they be in mercy, &c. " for their falſe claim; and that the ſaid " John Wilſon go thereof without day, " &c. And it is further conſidered, That " the ſaid John recover againſt the ſaid " Brunton and Chalmers ſixty pounds, for " his coſts and charges laid out by him " about his defence on this behalf; and " that the ſaid John have execution there- " of," &c.

For this ſum of L. 60 awarded to the collector for coſts, he brought an action

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againſt Brunton and Chalmers, before the court of ſeſſion; and in ſupport of his claim ſet forth, That it is founded on the preſumption, *Quod res judicata pro veritate habetur*. The defendants inſiſted, That this preſumption muſt yield to direct evidence of injuſtice, which would clearly appear upon comparing the decree with the ſtatute. And the following circumſtances were urged. Firſt, That though the wheat was in a periſhing condition, the collector refuſed to permit the ſame to be ſold, even contrary to his own intereſt, as the price to him was a better ſecurity for the ſalvage than the damaged wheat. Secondly, When the application for ſale was made, the collector was not ready to make his claim for ſalvage, not knowing at that time the amount thereof; in which circumſtances to forbid the ſale, was not only rigorous, but unjuſt: it was, to abandon the wheat to deſtruction, without permitting the defendants to interpoſe. Even the offer of ready money to pay the ſalvage would not have availed them, ſeeing the collector was not in a condition to make any demand. This caſe being reported by the Lord Ordinary, it occurred at adviſing, that the

ſtatute

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ſtatute provides nothing about ſelling periſhable goods, except in the caſe that the merchant does not appear to claim the wrecked goods. Therefore the preſent caſe is not provided for by the ſtatute. It is a *caſus omiſſus*, which in equity muſt be ſupplied agreeably to the intendment and purpoſe of the ſtatute. Viewing the matter in this light, it appeared, in the firſt place, that the defendants, being proprietors of the wheat, were intitled to diſpoſe of it, provided the collector ſuffered no prejudice as to his claim of ſalvage, which he certainly did not if the price were put in his hand. Nay his ſecurity would be improved by the ſale, which would afford him current coin inſtead of periſhing wheat. It was conſidered, in the ſecond place, that this is agreeable to the intendment of the ſtatute; for if the cuſtom-houſe-officer muſt diſpoſe of periſhable goods where there is none to claim, much more where the owner appears, and inſiſts for a ſale. Thirdly, The ſtatute, intitling the officer to retain the goods for ſecurity of the ſalvage, undoubtedly ſuppoſes that the officer can inſtruct his claim, in order

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that the merchant may have inſtant poſſeſſion of the goods, upon paying the ſalvage. In this view the conduct of the collector was altogether unjuſtifiable: the ſtatute gives no authority for retaining the goods as a ſecurity for the ſalvage, unleſs as a *ſuccedaneum* when ſatisfaction is not offered in money; and as the collector here was not ready to receive ſatisfaction, it was a treſpaſs to retain the goods in a periſhing condition. With regard to this matter in general, one obſervation had great weight, That it never could be the intention of the legiſlature, to force merchants firſt to pay ſalvage, and thereafter to undergo the riſk of periſhable and damnified goods, the price of which poſſibly might not amount to the ſalvage. The collector therefore could not in common juſtice demand more than the value of the goods for his ſalvage; and *a fortiori* could not demand any ſecurity beyond that value. The court accordingly unanimouſly refuſed to interpoſe their authority for execution upon this judgement *.

* January 6. 1756, John Wilſon collector of the cuſtoms at Stocktown contra Robert Brunton and James Chalmers merchants in Edinburgh.

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The judgement of the King's-bench may poſſibly be juſtified as pronounced by a court of common law, which, in interpreting ſtatutes, muſt adhere to the letter, without regarding the intention of the legiſlature. If ſo, the proprietors of the wheat ought to have applied to the chancery; or have removed their cauſe there by a *Certiorari*. If courts of common law in England be ſo confined, their conſtitution is extremely imperfect. But ſuppoſing the court of King's-bench to have acted properly according to its conſtitution, it was notwithſtanding right in the court of ſeſſion, to refuſe execution upon a foreign decree that is materially unjuſt, or contrary to equity.

An appeal entered by Collector Wilſon was heard *ex parte*, and the decree of the court of ſeſſion reverſed; by which the L. 60 of coſts decerned in the court of King's-bench was made effectual againſt Chalmers and Brunton. The decree, if I have been rightly informed, was reverſed for the following reaſon; that in England the decree of a foreign ſupreme court has ſuch credence, that judgement is immediately given, without entering into the merits,

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merits, provided the matter have been litigated; that in all countries the decrees of the court of admiralty are, for the ſake of commerce, intitled to immediate execution; and that the ſame credence ought to have been given by the court of ſeſſion to the judgement of the King's-bench. It would ſeem then, that in England greater authority is given to foreign decrees than in any other civilized country; and indeed greater than can be juſtified from the nature and conſtitution of any court. A foreign decree has no legal authority in England; and for the courts of Weſtminſter blindly to authoriſe execution upon a foreign decree without admitting any objection againſt it, is a practice that cannot be approved, becauſe it muſt frequently lead them to authoriſe injuſtice. But admitting the practice of England, it ought to have been conſidered, that the practice of England is no authority in Scotland. In reviewing the decrees of the court of ſeſſion, the law of Scotland is the rule. And if the decree in queſtion was agreeable to the law of *Scotland*, it ought to have been affirmed; eſpecially as the law of Scotland with reſpect to foreign decrees,

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is not only in itſelf rational, but agreeable to the laws of all other civilized nations, England excepted. The Houſe of Lords, we may reſt aſſured, could not intend to try the merits of a Scotch decree by the law or practice of England. But as the appeal was heard *ex parte*, the reverſal has certainly been founded upon the erroneous ſuppoſition, That, with reſpect to foreign decrees, the practice of Scotland is the ſame with that of England.

With reſpect to a judicial conveyance, or legal execution, the nature of it is ſufficiently explained in a former part of this chapter, that it can carry no effects but what are ſubjected to the authority of the court from which execution iſſues. In our poinding, for example, the goods of the debtor are conveyed to his creditor, not by the will of the debtor, but by the will of the ſheriff; and his will can operate no farther than to convey effects within his territory. In England, debts, like other moveables, are attached by the legal execution of *Fieri facias*, ſimilar to our poinding. But a *Fieri facias* can carry no debts but what are due by perſons within the territory of the court

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from which the execution iſſues. It is not a title to force payment from a debtor in Scotland: the court muſt be applied to within whoſe territory he reſides; and that court will authoriſe the execution that is cuſtomary in Scotland, namely, an arreſtment and decree of forthcoming. The ſame holds as to other moveables. And the titles neceſſary to a foreigner for attaching moveables or debts in Scotland, are ſet forth in the third and fourth ſections of the preſent chapter.

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