

P R I N C I P L E S
O F
E Q U I T Y.

B O O K I.

Powers of a Court of Equity derived from
the Principle of Justice.

P A R T I.

Powers of a court of equity to remedy the
imperfections of common law with re-
spect to pecuniary interest.

C H A P. VIII.

Powers of a court of equity to remedy
what is imperfect in common law with
respect to legal execution.

THIS chapter splits naturally into
two sections. First, Where the
common law is defective. Se-
cond, Where it is oppressive or unjust.

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S E C T. I.

Where the common law is defective.

IT is natural to believe, and it holds in fact, that the different executions for payment of debt founded on common law, relate to those cases only which most frequently occur in practice. Upon a debtor's failing to make payment, his land is attached by an apprising, his moveables by poinding, and the debts due him by arrestment and forthcoming. But experience discovered many profitable subjects that cannot be brought under any of the foregoing executions. And even with respect to common subjects, several peculiar circumstances were discovered to which the executions mentioned are not applicable. A court of common law, which cannot in any article exceed the bounds of common law, has not power to supply any of these defects. This power is reserved to a court of equity acting upon a principle of justice often above mentioned, namely, That where-
ever

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ever there is a right it ought to be made effectual.

This section comprehends many articles. 1st, Subjects that cannot be attached by the executions of common law. 2d, Circumstances where even common subjects are withdrawn from these executions. 3d, These executions are in some cases imperfect. 4th, They serve only to make debts effectual, and give no aid to other claims.

ART. I. *Subjects that cannot be attached by the executions of common law.*

THE common law is defective with respect to a variety of subjects that cannot be attached by any of its executions; a reversion, for example, a bond including executors, a sum of money with which a disposition of land is burdened, &c. These are all carried by an adjudication invented by the sovereign court. They could not be carried by an apprising in the form of common law: nor can they be carried by an adjudication put in place of an apprising by the act 1672, which by the act

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itself is confined to land, and to what rights are properly accessory to land, real servitudes, for example, and such like. But this is not all. There are many other rights and privileges, to attach which no execution is provided. A debtor has, for example, a well-founded claim for voiding a deed granted by him in his minority greatly to his hurt and lesion : but he is bankrupt, and perversely declines a process, because the benefit must accrue to his creditors : he will neither convey his privilege to them, nor insist on it himself. A reduction on the head of deathbed is an example of the same kind. There are many others. If a man fail to purge an irritancy, the common law admits not his creditors to purge in his name; and they cannot in their own, unless the privilege be conveyed to them. A court of equity supplies these defects of common law; and, without necessity either of a voluntary or judicial conveyance, intitles creditors at short-hand to avail themselves of such privileges. They are impowered to prosecute the same for their own advantage; in the same manner as if the debtor had done

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done them justice by making a conveyance in their favour.

ART. II. *Circumstances where even common subjects are withdrawn from these executions.*

I GIVE the following instances. First, The apprifings of common law reach no land but where the debtor is infest. The apprifing a minute of fale of land and a difpofition without infestment, was introduced by the fovereign court.

Second, John is creditor to James, and James to William. To convey the last-mentioned debt to John, common law requires an arrestment and procefs of forthcoming. But what if before John proceed to execution, William die, and no person is found to represent him? In this cafe there is no place for an arrestment; and yet John ought not to be difappointed of his payment. The court of feflion must fupply the defect, by adjudging to John the debt due by William to James.

Third, Execution for payment of debt fupposes a *mora* on the debtor's part; and

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a judge cannot warrantably authorise such execution where there is no *mora*. This holds even in a process for payment. Nor is there any foundation in equity, more than at common law, for a process before the term of payment. Where the debtor is ready to fulfil his engagement at the term covenanted, and is guilty of no failure, justice will not suffer him to be vexed with a process. But with respect to an annuity, or any sum payable at different terms, if the debtor be once *in mora* to make a process necessary for payment of a part actually due, a decree may not only be pronounced for payment of that part, but also for what will afterward become due, superseding execution till the debtor be *in mora*. Equity supports this extension of the common law, which is beneficial to the creditor by easing him of trouble, and no less to the debtor by preventing the costs that he would otherwise be subjected to in case of future *mora*.

From these principles it appears, that a process for pointing the ground, before the term of payment, ought not to be sustained, more than a process against the debtor personally for payment. I observe indeed,

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deed, that a process of mails and duties has been sustained after the legal term of Martinmas, though Candlemas be the customary term of payment *. But the reason of this singularity is, that originally Martinmas was the conventional term of corn-rent, and for that reason was established to be the legal term. It crept in by practice to delay payment till Candlemas, in order to give the tenant time to thresh out his corns. And for some centuries, this delay was esteemed an indulgence only, not a matter of right. But, now that long custom has become law, and that a tenant is understood not to be bound to pay his corn-rent before Candlemas, a court, whether of common law or of equity, will not readily sustain the process before Candlemas.

A process of forthcoming is in a different condition ; for being held necessary to complete the right of the arrester, it may in that view proceed before the term of payment of the debt arrested †. The same

* Durie, February 5. 1624, Wood contra Waddel.

† Durie, Feb. 21. 1624, Brown contra Johnston.
Durie, July 3. 1628, Scot contra Laird of Drumlanrig.

holds

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holds in a process for poinding the ground, if it be necessary to complete a base infeftment by making it public *.

There is one general exception to the foregoing rule, That if a debtor be *vergens ad inopiam*, execution may in equity proceed against him for security. Thus arrestment in security was sustained where the debtor was in declining circumstances †. The defendant's testator gave the plaintiff L. 1000, to be paid at the age of twenty-one years. The bill suggested, that the defendant wasted the estate; and pray'd he might give security to pay this legacy when due; which was decreed accordingly ‡.

Fourth, In the common law of England there is one defect that gives access to the most glaring injustice. When a man dies, his real estate is withdrawn from his personal creditors, and his personal estate from his real creditors. The common law

* Gilmour, February 1662, Douglas contra Tenants of Kinglassie.

† Stair, July 17. 1678, Laird Pitmedden contra Patersons. Home, Feb. 27. 1758, Meres contra York-building company.

‡ 1. Chancery Cases 121.

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affords not to a personal creditor execution against the land of his deceased debtor, nor to a real creditor execution against the moveables ; and by this means a man may die in opulent circumstances, and yet many of his creditors be forfeited. Whether the court of chancery interposes in this case, I am uncertain. In the following case it cannot, I am certain, fail to interpose ; and that is, where a debtor, having a near prospect of death, bestows all his money on land, in order to disappoint his personal creditors. The common law affords not a remedy, because the purchasing land is a lawful act ; and the common law looks not beyond the act itself. But the court of chancery is not so circumscribed. If the guilt appear from circumstances, the court will relieve against the wrong, by decreeing satisfaction to the personal creditors out of the real estate.

Fifth, A process at common law reacheth no man but within the jurisdiction. If a debtor therefore be in foreign parts, a judgement cannot pass against him, because he cannot be cited to appear in court ; and execution cannot be issued against his effects without a judgement. This defect,

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which

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which interrupts the course of justice, is in Scotland remedied by a citation at the market-cross of Edinburgh, pier and shore of Leith, introduced by the sovereign court, acting upon the foregoing principle, That where there is a right, it ought to be made effectual. In England, a person abroad cannot be cited to appear even in the court of chancery. This court however affords a remedy. It will not warrant a citation against any person who is not within the jurisdiction of the court: but it will appoint notice to be given to the debtor; and if he appear not in his own defence, the court will out of his effects decree satisfaction to the creditor. Thus, upon an affidavit that the defendant was gone into Holland to avoid the plaintiff's demand against him, and he having been arrested on an attachment, and a *Capi corpus* returned by the sheriff, the court of chancery granted a sequestration of the real and personal estate*. By virtue of the same power supplying the defects of common law, the court of session gives authority to attach moveables in this country belonging to a foreigner,

* 1. Vernon 344.

in

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in order to convert them into money for payment to the creditor who applies for the attachment. And as the foreigner cannot be cited to appear in the court of session, notice will be appointed to be given him, that he may appear if he think proper. Where a debtor, lurking somewhere in Scotland, cannot be discovered, the court of session makes no difficulty to order him to be cited at that head borough with which he appears to have the greatest connection.

ART. III. *These executions are in some cases imperfect.*

THE executions of common law, even where there is sufficiency of effects, fall sometimes short of the end purposed by them, that of operating payment. I give for example the English writ *Elegit*, that which corresponds the nearest to our adjudication. The chief difference is, that an *Elegit* is a legal security only, and transfers not the property to the creditor. Hence it follows, that though the interest of the debt exceed the rent of the land, the cre-

ditor must be satisfied with the possession ; and hath no means at common law to obtain payment of his capital, or in place of it to obtain the property of the land. But as in this case, the execution is obviously imperfect, hurting the creditor without benefiting the debtor, the court of chancery will supply the defect, by ordering the land to be sold for payment of the debt.

ART. IV. *They serve only to make debts effectual, and give no aid to other claims.*

BESIDE for payment of debt, execution sometimes is necessary for making other claims effectual ; and here also the common law is imperfect. To remedy this imperfection, adjudications in implement, declaratory adjudications, &c. were in Scotland invented by the sovereign court. The following case shows the necessity of a declaratory adjudication.

Sir Robert Munro, debtor to Andrew Drummond banker, assigned to John Gordon, "in trust, and for the use of the said
" Andrew

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“ Andrew Drummond,” certain subjects, and in particular an adjudication led by him against Mackenzie of Redcastle’s estate. After Gordon’s death, Andrew Drummond, upon this adjudication, as his title, brought a process of mails and duties against the tenants of Redcastle. The objection was, That the pursuer, having no conveyance from Gordon, has no title to carry on this process. The judges agreed upon the following propositions: 1st, That the trust being given to John Gordon only, and not to his heirs, was at an end by his death; for there cannot be a trust without a trustee. 2d, That Sir Robert Munro being divested by the trust-deed, the adjudication returns not to him by the death of the trustee. 3d, That though the person for whom the trust is created may in his own name insist in every personal action flowing from the trust, yet none but the trustee can insist in any real action founded on the adjudication; because the trustee only is vested in it. These points being settled, the difficulty was, to find out a legal method for establishing the adjudication in the person of Andrew Drummond; and the judges came
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all into the following opinion, That Andrew Drummond's only method was, to raise a declaratory adjudication, calling all parties that may appear to have interest, namely, the representatives of John Gordon and of Sir Robert, and concluding, that the adjudication thus left *in medio* should be adjudged to him, in order to make effectual the purposes of the trust. This can be done by the court of session supplying defects in common law. An action was competent to Andrew Drummond against John Gordon himself, to denude of the adjudication; and the declaratory adjudication comes in place of that action *.

The common law is defective with respect to those who are *in meditatione fugæ* in order to avoid payment of their debts; but a court of equity lends a helping hand, by granting warrant for seizing the debtor, and incarcerating him, unless he find bail for his appearance. But this is not done rashly, upon the naked complaint of the creditor. He is bound first to give e-

* Andrew Drummond contra Mackenzie of Redcastle,
June 30. 1758.

vidence

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vidence of his debt: he is bound next to explain the reasons of his suspicion; and if these be found groundless, or no sufficient cause of suspicion, the warrant will be refused: he is bound to give his oath of credulity, that he verily believes his debtor to be *in meditatione fugæ*. And in the last place, he is bound to give security for damages in case of wrongous detention *. Damages will be awarded accordingly, if upon trial it be found, either that his claim of debt was groundless, or that he fail to prove the facts alledged by him to justify his suspicion of a *meditatio fugæ*.

S E C T. II.

Where the common law with respect to execution is oppressive or unjust.

EXECUTION for payment of debt is the operation of the judge or magistrate, interposing in behalf of a creditor to whom the debtor refuses or neglects to do justice.

* See act of federunt, December 18. 1613.

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It is the duty of a debtor to convert his effects into money in order to pay his debts ; and if he prove refractory or be negligent, it is the duty of the judge to interpose, and in his stead to do what he himself ought to have done *. Hence it appears, that the judge ought not to authorise execution against any subject which the debtor himself is not bound to surrender to his creditors. But a court of common law, confined by general rules, regards no circumstance but one singly, Whether the subject belong to the debtor : if it be his property, execution issues ; and it is not considered whether it would be just in the debtor to apply this subject for payment of his debts. A man who by fraud or other illegal means has acquired the property of a subject, is not bound to convey that subject to his creditors : on the contrary, he is in conscience bound to restore it to the person injured, in order to repair the wrong he has done. And in such a case a court of law ought not to interpose in behalf of the creditors, but in behalf of the person injured. A court of

* Historical law-tracts, tract. 12. at the beginning.

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equity accordingly, correcting the injustice of common law, will refuse its aid to the creditors ; who ought not to demand from their debtor what in conscience he ought to restore to another ; and will give its aid to that other for recovering a subject of which he was unjustly deprived.

Having thus given a general view of the subject, I proceed to particulars ; and shall first state a case, where a merchant, in immediate prospect of bankruptcy, purchases goods and takes delivery without any view of paying the price. This is a gross cheat in the merchant, which binds him in common justice to restore the goods. A court of common law, however, regardless of that circumstance, will authorise the bankrupt's creditors to attach these goods for their payment, as being his property. This act of injustice ought to be redressed by a court of equity : if the goods be claimed by the vender, the court of equity, barring execution by the creditors, will decree the goods to be restored to him. Thus, a reduction upon the head of the cheat mentioned, was sustained against the bankrupt's creditors arresting the subject purchased in the hands of the person to whom

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it was delivered for behoof of the purchaser *. Mrs Rolland obtained a *cessio bonorum* anno 1748, and began again to trade as formerly. In the year 1749, she purchased a cargo of wine from Main and Company in Lisbon. She commissioned another cargo from them May 1750, which was arrested at Leith by one of her creditors against whom she had obtained the *cessio bonorum*. The venders appeared in the forthcoming, and were preferred to the cargo for payment of the price, upon the following medium, That it was fraudulent in Mrs Rolland to commission goods from her foreign correspondents, when she must have been conscious that they would not have trusted her had they been informed of the *cessio* †.

The same must hold with respect to land, when purchased fraudulently : when the purchaser's creditor commences his adjudication, the vender will be admitted for his

* Stair, Fountainhall, December 22. 1680, Prince contra Pallat; Dalrymple, Bruce, January 18. 1715, Main contra Maxwell; December 8. 1736, Sir John Inglis contra Royal Bank.

† Andrew Forbes contra Main and Company, February 25. 1752.

interest,

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interest, and the following objection will be sustained in equity, " That the land ought " not to be adjudged to the creditor, but " restored to him the vender, to repair the " wrong done him." I put another case. In a process of adjudication, a man who had purchased the land by a minute of sale before the adjudication was commenced, appears for his interest : ought he not to be preferred ? His objection against the adjudger appears good in two respects : it would, in the first place, be unjust in the proprietor to grant to his creditor a security upon that subject ; and it is therefore unjust in the creditor to demand the security by legal execution : in the next place, it would be unjust in the court to authorise execution against a subject which the debtor is not bound to surrender to his creditors ; but, on the contrary, is strictly bound to convey it in terms of the minute of sale.

I illustrate this doctrine by applying it to a subject of some importance that has been frequently canvassed in the court of session. A factor having sold his constituent's goods, took the obligation for the price in his own name, without mention-

ing his constituent. The factor having died bankrupt, the question arose, Whether the sum in this obligation was to be deemed part of his moveable estate affectable by his creditors; or whether he was to be deemed a nominal creditor only, and a trustee for his constituent. The common law, regarding the words only, considers the obligation as belonging to the deceased factor: but equity takes under consideration the circumstances of the case, which prove that the obligation was intended to be taken *factorio nomine*, or ought to have been so intended; and that the factor's creditors are in equity barred from attaching a subject which he was bound to convey to his constituent. The constituent was accordingly preferred *. A employs B as his factor to sell cloth. B sells on credit, and before the money is paid dies bankrupt. This money shall be paid to A, and not to the administrator of B: for a factor is in effect a trustee only for his principal †. Hugh Murray, na-

* Stair, June 9. 1669, Street contra Home. The like, Forbes, March 15. 1707, Hay contra Hay.

† 2 Vernon 638.

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med executor in Sir James Rothead's testament, appointed a factor to act for him. At clearing accounts there was a balance of L. 268 Sterling in the hands of the factor, for which he granted bill to Murray his constituent, and of the same date obtained from him a discharge of the factory. Murray the executor having died insolvent, the said bill as belonging to him was confirmed by his creditors. Sir James's next of kin claimed the sum in the bill as part of his executry, or as the produce of it. They urged, That though the bill was taken payable to Murray singly, yet the circumstances of the case evince, that it was taken payable to him in quality of executor, and that he was bound to account for it to Sir James's next of kin. They accordingly were preferred *. For the same reason, if an executor, instead of receiving payment, take a new bond from a debtor of the deceased with a cautioner, and discharge the original bond, this new bond, being a *furrogatum* in place of the former, will be considered in equity as part of the effects of the deceased; and will not be af-

* January 4. 1744, Sir John Baird contra Creditors of Murray.

fectable by the creditors of the executor *. And if the debt be lost by the bankruptcy of the debtor and his cautioner, equity will not charge the executor with it, but will only decree him to assign the security †. Boylstoun having given money to one Makelwood to buy a parcel of linen-cloth for him, she bought the goods, but without mentioning her employer. Her creditors having arrested these goods, Boylstoun appeared for his interest. The vender deposed, that he understood Makelwood to be the purchaser for her own behoof. She deposed upon the commission from Boylstoun, and that with his money she bought the cloth for his behoof. The court, in respect that the goods being sold to Makelwood for her own behoof became her property, therefore preferred her creditors the arresters ‡. This was acting as a court of common law. The property no doubt vested in Makelwood, because the goods were sold and delivered to her for her own behoof: but that circumstance is far

* Stair, book 3. tit. 8. § 71.

† 1. Chancery cases 74.

‡ Stair, January 24. 1672, Boylstoun contra Robertson.

from

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from being decisive in point of equity. It ought to have been considered, that though the transference of property be ruled by the will of the vender, yet that it depends on the will of the purchaser whether to accept delivery for his own behoof or for behoof of another. Here it clearly appeared, that Makelwood bought the goods for behoof of Boylston; and that in effect she was trustee only in the subject: the legal right was indeed in her, but the equitable right clearly in Boylston. It ought to have been considered further, that Makelwood having laid out Boylston's money in purchasing the cloth, was bound in justice to deliver the cloth to Boylston; and therefore, that he in equity ought to have been preferred to her creditors, even though she had been guilty of making the purchase for her own behoof.

Such is the relief that by a court of equity is afforded to the person who has the equitable claim, while matters are entire and the subject *in medio*. But now, supposing the execution to be completed and the property to be transferred to the creditor ignorant of any claim against his debtor,

debtor, as for example by a poinding or by an adjudication with a decree declaring the legal to be expired; what shall be the operation of equity in that case? In answer to this question, it holds in general without a single exception, That a *bona fide* purchaser lies not open to a challenge in equity more than at common law; because no man can be deprived of his property except by his consent or his crime.

I proceed to another branch of the subject. Execution both personal and real for payment of debt is afforded by the law of all countries: but execution intended against the refractory only, is sometimes extended beyond the bounds of humanity; and equity is interposed against rigorous creditors, where it can be done by some rule that is applicable to all cases of the kind. Two rules have been discovered, which judges may safely apply without hazard of becoming arbitrary. The first governs those cases where there is such a peculiar connection between the debtor and creditor, as to make kindness or benevolence their reciprocal duty. In such cases, if the creditor carry his execution to extremity, and deprive the debtor of bread, he

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acts in contradiction to his positive duty, and a court of equity will interpose to prevent the wrong. The rule is, That a competency must be left to the debtor to preserve him from indigence. Thus, in the Roman law, parents have *beneficium competentie* against their children, and a patron against his client*; a man against his wife†; and the same obtains in an *actio pro socio*‡. The rule was applied by the court of session to protect a father against his children, February 21. 1745, Bontein of Mildovan, where two former decisions on the other side were over-ruled. The common law, in affording execution against a debtor, intends not to indulge the rigor of creditors acting in direct contradiction to their duty. But as in making laws it is impracticable to foresee every limitation, the rule must be made general, leaving to a court of equity to make exceptions in singular cases.

The other rule is more general, and still more safe in the application. Personal exe-

* l. 17. De re judicata.

† § 37. Instit. de actionibus.

‡ l. 16. De re judicata.

cution was contrived to force the debtor, by the terror and hardship of personal restraint, to discover his effects, and to do justice to his creditors. But if the *squalor carceris*, a species of torture, cannot draw a confession of concealed effects, the unhappy prisoner must be held innocent; and upon that supposition, personal restraint is no less inconsistent with justice than with humanity. Hence the foundation of the *Cessio bonorum*, by which the debtor, after his innocence is proved by the torture of personal restraint, recovers his liberty, upon conveying to his creditors all his effects. And in Scotland this action was known as far back as we have any written law.

A P P E N D I X to Chap. VIII.

WHEN a creditor leads an adjudication for a greater sum than is due, it is held that at common law the adjudication is totally void. The reason given is, That an adjudication, being an indivisible right, cannot subsist in part and fall in part. At the

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the same time it is admitted, that where the *pluris petitio* is occasioned by an innocent error, without any *mala fides* in the creditor, the adjudication ought to be supported as a security for what is justly due, not only in accounting with the debtor, but even in a competition with co-creditors; and that in fact it receives this support from the court of session acting as a court of equity. If this be the true foundation of the practice, it belongs to the present chapter; being an example of equity correcting the rigor of common law with respect to execution.

But that this practice cannot be founded on equity, appears to me clear from the following considerations. In the first place, it is made evident above, that one *certans de damno evitando* may take advantage of an error committed by another; and that equity prohibits not such advantage to be taken, except where positive gain is made by it *. This rule is applicable to the present case. A creditor demanding his payment in a competition, is *certans de damno evitando*: and that, in order to ob-

* Vol. I. p. 150.

tain preference, he may lawfully avail himself of an error committed by a co-creditor; and consequently, that to support a void adjudication against him, is not agreeable to any rule of equity. In the next place, an adjudication *ex facie* null as proceeding without citing the debtor, is not supported to any effect whatever either against a competing creditor, or even against the debtor himself. Nor is there any support given to an adjudication against an apparent heir, when it proceeds without a special charge, or where the lands are not specified in the special charge. This leads me to reflect upon the difference between intrinsic objections, which render the adjudication void and null, and extrinsic objections, which only tend to restrict it. If the *pluris petitio* be an objection of the former sort, the adjudication, being void totally at common law, cannot be supported in equity, more than an adjudication that proceeds without calling the debtor: if it be an objection of the latter sort, there may possibly be a foundation at common law for supporting the adjudication in part, even against a competing creditor, though there be no foundation

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tion in equity. The question then is, To which class this objection belongs ?

Intrinsic objections, generally speaking, resolve into an objection of want of power. A judge, unless the debtor be called into court, cannot adjudge his land to his creditor ; and if he proceed without that solemnity, he acts *ultra vires*, and the adjudication is void. The case is the same, where an adjudication is led against an apparent heir, without charging him to enter to the estate of his ancestor. To determine what must be the effect of a *pluris petitio*, an adjudication shall be considered in two lights ; first as a judicial sale, and next as a *pignus prætorium*. If a man voluntarily give off land to his creditor for satisfaction of L. 1000, understood at the time to be due, though the debt be really but L. 900, the sale is not void ; nor is it even voidable. The property is fairly transferred to the creditor, of which he cannot be forfeited when he is guilty of no fault ; and all that remains is, that the *quondam* creditor, now proprietor, be bound to make good the difference. A judicial sale of land for payment of debt, stands precisely on the same footing : it cannot
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be voided upon account of a *pluris petitio* more than a voluntary sale. I illustrate this doctrine, by comparing an adjudication considered as a judicial sale, with a pointing, which is really a judicial sale. A man points his debtor's moveables for payment of L. 100, and the pointing is completed by a transference of these moveables to the creditor, for satisfaction of the debt. It is afterward discovered, that L. 90 only was due. Will this void the execution, and restore the goods to the debtor? No person ever dreamed that an innocent *pluris petitio* can have such effect with respect to a pointing. By the original form of this execution, the debtor's goods were exposed to public auction, and the price was delivered to the creditor in payment *pro tanto*: the purchaser surely could not be affected by any dispute about the extent of the debt; and the result must be the same where the goods are adjudged to the creditor for want of another purchaser. With regard to all legal effects, he is held the purchaser, and is in reality so; and if it shall be found that the execution has proceeded for a greater sum than was really due, this circumstance will found a personal

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personal action to the *quondam* debtor, but by no means a *rei vindicatio*.

But too much is said upon an adjudication considered as a judicial sale; for during the legal at least, it is not a judicial sale, but a *pignus prætorium* only; and this I have had occasion to demonstrate above*. If a man shall grant to his creditor real security for L. 1000, when in reality L. 900 is only due, will this *pluris petitio* void the infestment? There is not the least pretext for such a consequence: the sum secured will indeed be restricted, but the security stands firm and unshaken. It will be evident at first glance, that the same must be the case of an adjudication led innocently for a greater sum than is due: a *pignus prætorium* must, with respect to the present point, be precisely of the same nature with a voluntary pledge.

Hence it clearly appears, that the sustaining an adjudication for what is truly due, notwithstanding a *pluris petitio*,* is not an operation of equity, to have place regularly in the present treatise; but truly an operation of common law, which sustains not a *pluris petitio* to any other ef-

* Vol. I. p. 380.

fect than to restrict the sum secured to what is truly due, without impinging upon the security. And this was the opinion of the court given in the case of the creditors of Easterfearn, 6th November 1747, ingrossed in Lord Kilkerran's collection. An adjudication was objected to upon a most dishonest *pluris petitio*. The adjudication however was sustained as a security for the sum truly due. Equity could afford no aid to such an adjudication. What the court went upon was, That at common law a *pluris petitio* is not sufficient to annul a right in security, but only to restrict it. This is not a vain dispute; for beside resting the point upon its true foundation which always tends to instruction, it will be found to have considerable influence in practice. At present, an adjudication, where there is a *pluris petitio*, is never supported against competing creditors farther than to be a security for the sums due in equity, striking off all penalties: and this practice is right, supposing such adjudication to be null at common law, and to be supported by equity only. But if a *pluris petitio* have not the effect at common law to void the adjudication, but only to re-

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strict the sum secured, there is no place for striking off the penalties, more than where there is no *pluris petitio*. Equity indeed interposes to restrict penalties to the damage that the creditor can justly claim by delay of payment ; but this holds in all adjudications equally, not excepting those that are free of all objections.

That it is lawful for one *certans de damno evitando* to take advantage of another's error, is an universal law of nature ; that it has place in covenants, is shown in a former chapter ; and that it should have place among creditors, is evidently agreeable to justice, which dictates, that if there must be a loss, it ought to rest upon the creditor who hath been guilty of some error, rather than upon the creditor who hath avoided all error. When matters of law are taken in a train, and every case is reduced to some principle, judges seldom err. What occasions so many erroneous judgements, is the being sway'd by particular circumstances in every new case, without thinking of recurring to principles or general rules. By this means we are extremely apt to go astray, carrying equity sometimes too far, and sometimes

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not far enough. Take the following remarkable instance. Among the creditors of the York-building company, a number of annuitants for life, infest for their security, occupied the first place ; and next in order came the Duke of Norfolk, infest for a very large sum. These annuities were frequently bought and sold ; and the purchasers, in some instances, instead of demanding a conveyance of the original bonds secured by infestment, returned these to the company, and took new personal bonds in their stead, not imagining that by this method the real security was unhinged. These new bonds being objected to by the Duke of Norfolk, as merely personal and incapable to compete with his infestment, the court pronounced the following interlocutor : “ In respect that
 “ the English purchasers, ignorant of the
 “ laws of Scotland, had no intention to
 “ pass from their real security ; and that
 “ the Duke of Norfolk, who had suffered
 “ no prejudice by the error, ought not to
 “ take advantage of it ; therefore find the
 “ said annuitants preferable as if they had
 “ taken assignments to the original bonds,
 “ instead of delivering them up to the
 “ company.”

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"company." This was stretching equity beyond all bounds; and in effect judging that a creditor is barred by equity from taking advantage of any error committed by a co-creditor. Upon a reclaiming petition the interlocutor was altered, and the Duke of Norfolk preferred *. And this judgement was affirmed in the House of Lords.

C H A P. IX.

Power of a court of equity to inflict punishment, and to mitigate it.

IT is an inviolable rule of justice as well as of expediency, That no man be allowed to reap the fruits of his fraud, nor to take benefit by any wrong he has done. If, by the tortious act, another be hurt in his rights or privileges, there is ground for reparation at common law; which

* Feb. 14. 1752, Duke of Norfolk contra Annuitants of the York-building company.

subject is handled in the beginning of this work. But wrong may be done without impinging upon any right or privilege of another; and such wrongs can only be redressed in a court of equity, by inflicting punishment in proportion to the offence. In slight offences it is satisfied with forfeiting the wrong-doer of his gain: in grosser offences, it not only forfeits the gain, but sometimes inflicts a penalty over and above. I begin with cases of the first kind.

A man having two estates, settles them upon John and James, his two sons. John discovering accidentally a defect in his father's titles to the estate settled on James, acquires a preferable title, and claims that estate from his brother. This palpable transgression, not only of gratitude, but of filial affection, was never committed by any person with a quiet mind; and yet, upon the principles of common law, this odious man must prevail. But a court of equity will interpose, and bar him from taking any benefit from this immoral act, by limiting his claim to the sum laid out upon the purchase.

If a gratuitous disposition be granted with

with a proviso that the disponee shall perform a certain fact, his acceptance of the disposition subjects him at common law to performance. But let us suppose that a man makes a settlement of his estate, burdening his heir with a legacy to a certain person named; and that afterward, in a separate deed, he appoints that person to be tutor to his children. Here the legacy being given without any condition, is due at common law whether the legatee undertake the tutory or not. But every one must be sensible, that it is an act of ingratitude in the legatee to decline the trust reposed in him, and that he is in conscience bound either to undertake the tutory or to surrender the legacy. If, therefore, he be so unjust as to claim the legacy without undertaking the trust, a court of equity will punish him with the loss of his legacy*. Many examples of the same kind are found in the Roman law. A *libertus* claiming a legacy left him by his patron, will be removed *personali objectione*, or *exceptione doli* in the language of the Roman law, if he have been guilty of in-

* See Dirleton, 16th June 1675, Thomson contra Ogilvie.

gratitude

gratitude to his patron; even where the act of ingratitude is otherwise laudable, as where after the death of the patron the *libertus* informed against him as a smuggler *. But the connection between a master and his manumitted slave was so intimate, as to make a step of this kind be reckoned highly ungrateful. Again, a legatee who conceals a testament in order to disappoint it, is for his ingratitude to the testator removed *personali objectione* from claiming his legacy †. I shall add but one other example: “*Minisse autem oportebit, eum, qui testamentum inofficiosum improbe dixit, et non obtinuit, id quod in testamento accepit perdere, et id fisco vindicari quasi indigno oblatum. Sed ei demum auferetur quod testamento datum est, qui usque ad sententiam, lite improba, perseveraverit: cæterum, si ante sententiam destitit vel decessit, non ei auferetur quod datum est.*”

When a man is thus forfeited of a good claim, the question is, What becomes of

* l. 1. De his quæ ut indign.

† l. 25. C. De legatis.

‡ l. 8. § 14. De inoff. test.

the subject claimed ; whether doth it accrue to the fisk as *bona vacantia*, or is it left with the person against whom the claim is laid ? Ulpian, in the text last cited, gives his opinion for the fisk ; thinking probably that the legacy becomes a subject without a proprietor ; and that if no person can claim, it must go to the fisk. Paulus takes the other side : “ Amit-
 “ tere id quod testamento meruit, et eum,
 “ placuit, qui tutor datus excusavit se a
 “ tutela. Sed hoc legatum, quod tutori
 “ denegatur, non ad fiscum transfertur,
 “ sed filio relinquitur cujus utilitates de-
 “ fertæ sunt *.” And this seems to be the more solid opinion. The legatee is not guilty of any wrong with respect to the crown, but only with respect to the testator and his heir. Nor can the legacy be ranked *inter bona vacantia* ; for the legatee continues proprietor, and is only barred from the use of his property by an exception competent to the heir, not against the legatee’s right, but only to defend himself against payment. There is an additional reason for this defence against payment, which is, that the heir

* 1. 5 § 2. De his quæ ut indign.

should

should have some compensation as a *solutum* for that distress of mind he must feel, when treated ill by those who owed gratitude to his father or ancestor. In our law accordingly, the heir is relieved from the legacy.

But supposing both parties equally criminal, Ulpian's opinion upon that supposition seems to be well founded. I give for an example an obligation granted *ob turpem causam*, paid and discharged. Here both parties are equally guilty; and hence the maxim in the Roman law, *Quod in turpi causa potior est conditio possidentis*; meaning that the obligee is barred *personali objectione* from demanding payment; and that if payment be made, the *quondam* obligor is equally barred from claiming restitution. This maxim may hold between the parties; but not against the fisc.

Stellionate, which consists in aliening to different persons the same subject, is a crime punishable by statute*. I sell my land to John by a minute of sale. I sell it a second time to James, who is first in-
 feft. If James was ignorant of my bargain with John, his purchase will stand

* Act 105. parl. 1540.

good in equity as well as at common law ; because he made a lawful purchase, and had no intention to hurt John. But what shall be the consequence, supposing James when he made his purchase to have been in the knowledge of my bargain with John ? It will make no difference at common law, which only considers that James is preferable by his first infestment, and that John is not more hurt than if his bargain had been unknown to James. But it was a tortious act in James to receive from me what I could not lawfully give ; and he is punished for the tortious act by voiding his purchase. Thus, if A, having notice that lands were contracted to be sold to B, purchase these lands, such purchase will be voided in equity *. Again, in a case of two purchasers of the same land in Yorkshire, where the second purchaser, having notice of the first purchase and that it was not registered, went on and purchased and got his purchase registered, it was decreed, that the first purchaser was preferable †. A,

* Abridg. cases in equity, chap. 42. sect. A. § 1.

† Ibid, chap. 47. sect. B. § 12.

who purchased land though he knew that the vender was but tenant for life and that the property was in his son, sold the land afterward to B, who had no notice of the settlement. Upon a bill brought by the son after the death of his father against A and B, it was decreed, That as to B, who was purchaser without notice, the bill should be dismissed; but that A should account for the purchase-money he received, with interest from the death of the tenant for * life (a).

(a) From this and other similar cases contained in the chancery-reports, one would imagine it to be a rule established in England, that a *bona fide* purchaser, even from a person who has no right, is secure in equity. But if such purchaser be secure, it cannot be upon any principle in equity: for equity forfeits no man of his property unless he be guilty of some wrong; and though a *bona fide* purchase be an equitable title, the title of the true proprietor claiming his subject is no less so. If a *bona fide* purchaser from a person who has no right be preferred before the former proprietor, this preference can have no foundation but the common law. That such was once the common law is certain, *Historical law-tracts*, tract 3.; and, from the decrees above mentioned, it would appear, that the law of England continues the same to this day.

* Abrid. cases in equity, chap. 42. sect. A § 5.

Next

Next of conveying a subject attached by inchoated execution. The conveying a subject thus legally attached is not felonious, because it comes not under the definition of granting double rights. But the disponent is guilty of a moral wrong, in attempting to disappoint his creditor by withdrawing the subject from his execution, to which wrong the purchaser is accessory if he had notice of the execution; and for that reason, though the purchaser's title be first completed, he will be postponed to the creditor in a court of equity, as a punishment. Thus the porteur of a bill of exchange, having indorsed the same for ready money after it was attached by an arrestment laid in the hands of the acceptor, the arrester was preferred before the indorsee, for the reason above mentioned, that the latter, when he took the indorsement was in the knowledge of the arrestment *. This lays open the foundation of a proposition established in practice, That inchoated execution renders the subject litigious. After an adjudication, for example, is commenced, it is

* June 1728, Competition between Logan and M'Caul.

wrong in the debtor to sell the land ; and it is wrong for any one to purchase.

We proceed to the case of a creditor, who, for his security, takes a conveyance to a subject which he knows was formerly disposed to another for a valuable consideration. What pleads for this creditor's preference, is the necessity of providing for his security when he cannot otherwise obtain payment. But the debtor is undoubtedly criminal in granting the security : he is guilty of stellionate, and the creditor is accessory to the crime. This circumstance ought to bar him in equity from taking the benefit of his real security against the first disponee ; for I hold it to be clear in principles, that the motive of preventing loss, is in no case a sufficient excuse for doing an unjust act, or for being accessory to it.

Such is the relief that is afforded to the equitable claim against a purchase made *mala fide*. Let us now suppose, that a purchase is fairly made without notice, and that the property is transferred to the purchaser. I put a strong case, that a man is guilty of stellionate, by selling his land a second time, and that the second purchaser,

fer, ignorant of the other, obtains the first infestment. To make the question of importance, let it also be supposed, that the price is paid by the first purchaser, and that the common author is now bankrupt. Some circumstances at first view seem to weigh against the second purchaser : The common author is guilty of stellation; and though the second purchaser is not accessory to the crime, he takes however the benefit of an iniquitous deed ; which may be reckoned not altogether fair. But upon mature reflection it will be found, that justice militates not against him. By obtaining the first infestment he becomes proprietor : and it only remains to be considered, whether there be any ground in equity or justice to forfeit him of his property. Such forfeiture cannot otherwise be just than as a punishment for a crime, and therefore it cannot be applied against the innocent. Hence an inviolable rule of justice, That the innocent cannot be deprived of their property unless by their own consent. By this rule, the second purchaser first infest is secure : he is secure by the common law, because he has the first infestment ; and he is secure by equity, because,

cause, having purchased *bona fide*, he is innocent.

A is tenant in tail, remainder to his brother B in tail. A not knowing of the entail, makes a settlement on his wife for life as a jointure, without levying a fine, or suffering a recovery. B, who knew of the entail, ingrosses this settlement, but does not mention any thing of the entail; because, as he confessed in his answer, if he had spoken of it, his brother, by a recovery, might have cut off the remainder, and barred him. B, after the brother's death, recovered an ejectment against the widow by force of the entail. She was relieved in chancery; and a perpetual injunction granted for this wrong done by B in concealing the entail; for if the entail had been disclosed, the settlement would have been made good by a recovery*. The connection which B had with the parties, partly by blood, and partly by being employed to ingross the settlement, made it his duty to inform them of the entail. And his wilful transgression of this duty was a moral wrong, which justly de-

* Preced. chan. 35. Raw contra Potts.

prived

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prived him of the benefit he projected to himself by concealing the entail.

In a case that has some analogy to the foregoing, the court of session, as a court of equity, stretched their powers a great way further; further, I am persuaded, than can be justified. An heiress's infestment upon a service to her predecessor, being, after her death, challenged in a reduction as null and void, with the view to disappoint her husband of his curtesy; the court decreed, That the heiress's infestment not having been challenged till after her death, it was sufficient to support the curtesy, upon the following ground of equity, That had it been challenged during her life, the nullity might and would have been supplied *. One is prone to approve this judgement; and yet there appear unfurmountable difficulties. For, first, it is not said that the pursuer of the reduction was in the knowledge of these nullities during the life of his predecessor the heiress. 2dly, What if they had been known to him? Can silence alone be considered as criminal, where there is no other

* June 1716, Hamilton contra Boswell.

connection

connection but that of predeceffor and fucceffor ?

In the foregoing instances, the ill-doer is deprived of the gain he made : in what follow, a punishment is inflicted upon him. A defendant, sued for his rent, deposed that he had no lease : being afterward sued to remove, he produced a current lease. He was barred *personali objectione* from founding any defence upon it *. Which in effect was forfeiting him of his lease as a punishment for his perjury. A man, by adding a seal to a note, which is sufficient without a seal, was punished with the loss of his security †. And accordingly it is a rule, “ That a wrongful manner of executing a thing shall void a matter that might have been executed lawfully ‡.” A bond being vitiated in the sum by superinduction of pounds for merks, was not sustained for the original sum, but was found null *in totum* ||. It is not clear what

* Maitland, 7th December 1563, Laird Innerquharitie contra Ogilvies.

† 2 Vern. 162.

‡ New abridg. of the law, vol. 2. p. 594.

|| November 26. 1723, Macdowal of Garthland contra Kennedy of Glenour.

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was the *ratio decidendi*; whether a penalty was intended for falsifying the bond, or whether the court meant only to refuse action upon a bond that was vitiated; which they might well do, because the word *pounds* was an evident vitiation, by being superinduced over another word that could not be known to be *merks* but by conjecture. The trying case would have been a reference to the defender's oath, that he really borrowed the sum originally contained in the bond. Would the court of session have refused to sustain this claim, yea or no? They could not have refused upon any footing but *per modum pænæ*. The court of session denied action upon a bond that was purposely antedated in order to save it from an * inhibition (a).

What

(a) This judgement has not a foot to stand upon but that of punishment: and yet the *ratio decidendi* was very different, if we can trust the compiler, namely, "Quia quod non est verum de data quam præ se fert, presumitur non esse omnino verum, nec ullo

* Durie, February 10. 1636, Edmondston contra Syme.

VOL. II.

G

" tempore

What is the legal effect of bribery in the election of a member to serve in parliament, or of magistrates to serve in boroughs? Common law, with respect to electors, considers only whether the man was intitled to vote, disregarding the motive that induced him to prefer one candidate before another; and therefore this matter comes under a court of equity. And as good government requires a freedom and independency in voting, a court of equity will set aside every vote obtained by bribery; for the candidate who is guilty of bribery will not be permitted to be-

“tempore fuiffe gestum.” It is amusing to observe how well an argument passes in Latin, that would make but a shabby figure in English. But to judge well, and to give a solid reason for one’s judgement, are very different talents. There is in the mind of man a disposition to let nothing pass without a reason; but that disposition is easily gratified, for with the plurality any thing in the form of a reason is sufficient. Mascardus, *de probationibus*, lays down the following rule: “That a thousand witnesses, without being put upon oath, afford not evidence in a court of justice.” What is the reason given? It is, that numbers do not supply the want of an oath; which is no more but the same assertion in different words.

nefit

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51

nefit himself by his crime : and even the candidate's own vote is set aside though not obtained by bribery, as a punishment justly inflicted upon him for corrupting others.

By the common law of England, the wife's adultery did not deprive her of her dower, even though a divorce had followed *. Upon this account the act 13^o Edward I. cap. 34. was made, enacting,
 “ That if a wife willingly leave her husband, and continue with her adulterer,
 “ she shall be barred for ever of her dower,
 “ unless her husband willingly, and without coercion of the church, be reconciled to her.” Elizabeth Clement, after living with her husband for three months, deserted him, and lived in open adultery with another man, by whom she had a child. Being cited before the kirk-session of Crieff, she confessed her guilt, and suffered public penance in presence of the congregation. After her husband's decease, she claimed from his representatives the third part of his moveables, and the terce of his land. Her claim was sustained,

* Coke, 2 Instit. p. 435.

notwithstanding her adultery, which was not denied. What moved the plurality of the judges was, that since there was no divorce, the pursuer's adultery did not deprive her of her quality of relict, nor consequently of her legal provisions. This may be right at common law; but it ought to have been considered, that a woman who hath behaved so undutifully as a wife, is justly deprived of the privileges of a wife; and that she ought not to have the aid of a court of equity to make these privileges effectual. The English statute rests obviously upon this equitable foundation; and now that the principles of equity are ripened, the same ought to obtain with us without a statute*.

A statutory penalty cannot be extended beyond the words; but it may be limited within the words upon circumstances that infer innocence. Captain Forbes, who had no land in the shire of Cromarty, was however by act of parliament appointed commissioner of supply for that shire, under the name and designation of "Captain John Forbes of New, factor upon the an-

* Elizabeth Clement contra Sinclair, 4th March 1762.

"nexed

“nexed estate of Cromarty.” A complaint being exhibited against him for acting as commissioner of supply without having the qualification of L. 100 valued rent, the court judged, That he had no title to act. But in respect he had acted many years without challenge *qua* factor upon the said estate, as former factors had done, and in respect the objection against him was not clear and in a similar case had been found by the court to be no objection, his *bona fides* was sustained to free him from the penalty. And yet upon a reclaiming petition this interlocutor was altered, and he was found liable for the penalty. The judges continued in their former opinion, that he acted *bona fide*; but the plurality thought that they had no power to mitigate the statutory penalty; which was in effect maintaining a very absurd proposition, That a punishment may be inflicted on an innocent person for an error in judgement merely. The doctrine of *bona fides* will only hold in statutory penalties; for in a crime against the law of nature, *bona fides* will never be supposed. And with respect to statutory penalties, many of them are enacted in terms so ambiguous, as to make it

it extremely doubtful in what cases the penalty is incurred. A man happens to mistake the statute ; or rather, happens to judge differently from what is afterward found to be its meaning in a court of law : is it consistent with the rules of morality, or of common justice, to subject this innocent person to the penalty ?

Upon the same ground, a conventional penalty is equally subject to mitigation. But in that case, it is sometimes difficult to say, what is to be held a penalty, what not. Take the following instance. A proprietor lets a farm, two thirds to be in grass ; but with liberty to the tenant to add to the corn part upon paying five shillings for each acre taken from grass. This paction has nothing penal in it. But what if, instead of five shillings, L. 50 be stipulated ? This cannot be called properly an oppressive bargain, because the tenant may keep free of it. Nor can it be oppressive in the landlord to afford his tenant an option, however unequal. But now suppose an express prohibition against adding to the corn part, and stipulating a penalty of L. 50 each acre in case of contravention.

This