BOOK III.

HItherto our plan has been, to ſet forth the different powers of a court of equity; and to illuſtrate theſe powers by apt examples ſelected from various ſubjects where they could be beſt found. Our plan in the preſent book is, to ſhow the application of theſe powers to various ſubjects, handled each as an entire whole: and the ſubjects choſen are ſuch as cannot eaſily be ſplit into parts to be diſtributed under the different heads formerly explained. Beſide, as the various powers of a court of equity have been ſufficiently illuſtrated, as well as the principles on which they are founded, I thought it would be pleaſant as well as inſtructive to vary the method, by ſhowing the operation of theſe powers upon particular ſubjects. The firſt and ſecond books may be conſidered as theoretical, explaining the powers of a court of equity: the preſent book is practical, ſhowing the application of theſe powers to ſeveral important ſubjects.

CHAP.

CHAP. I.

What equity rules with reſpect to rents levied upon an erroneous title of property.

WIth reſpect to land poſſeſſed upon an erroneous title of property, it is a rule eſtabliſhed in the Roman law and among modern nations, That the true proprietor aſſerting his right to the land, has not a claim for the rents levied by the *bona fide* poſſeſſor, and conſumed. But though this ſubject is handled at large both by the Roman lawyers and by their commentators, we are left in the dark as to the reaſon of the rule, and of the principle upon which it is founded. Perhaps it was thought, that the proprietor has not an action at common law for the value of the product conſumed by the *bona fide* poſſeſſor; or perhaps, that the action, as rigorous, is rendered ineffectual by equity. So far indeed it is evident, that as no title of

property can abſolutely be relied on, ſad would be the condition of land-holders, were they liable forty years back, for rents which they had reaſon to believe their own, and which without ſcruple they beſtow'd on procuring the neceſſaries and conveniencies of life.

Though in all views the *bona fide* poſſeſſor is ſecure againſt reſtitution, it is however of importance to aſcertain the preciſe principle that affords him ſecurity; for upon that preliminary point ſeveral queſtions depend. We ſhall therefore without further preface enter into the enquiry.

The poſſeſſor, as obſerved, muſt be protected either by common law or by equity. If common law afford to the proprietor a claim for the value of his rents conſumed, it muſt be equity correcting the rigor of common law that protects the poſſeſſor from this claim: but if the proprietor have not a claim at common law, the poſſeſſor has no occaſion for equity. The matter then is reſolvable into the following queſtion, Whether there be or be not a claim at common law. And to this queſtion,

ſtion, which is ſubtile, we muſt lend attention.

Searching for materials to reaſon upon, what firſt occurs is the difference between natural and induſtrial fruits. The former, owing their exiſtence not to man but to the land, will readily be thought an acceſſory that muſt follow the land. The latter will be viewed in a different light; for induſtrial fruits owe their exiſtence to labour and induſtry, more than to land. Upon this very circumſtance does Juſtinian found the right of the *bona fide* poſſeſſor: "Si quis a non domino quem dominum "eſſe crediderit, bona fide fundum eme-"rit, vel ex donatione, aliave qualibet ju-"ſta cauſa, æque bona fide acceperit; "naturali rationi placuit, fructus, quos "percepit, ejus eſſe pro cultura et cura. "Et ideo, ſi poſtea dominus ſupervenerit, "et fundum vindicet, de fructibus ab eo "conſumptis agere non poteſt *." And upon this foundation Pomponius pronounces, that the *bona fide* poſſeſſor acquires right to the induſtrial fruits only: "Fru-

* § 35. Inſtit. De rer. diviſione.

" ctus percipiendo, uxor vel vir, ex re do-
" nata, ſuos facit: illos tamen quos ſuis
" operis adquiſierit, veluti ſerendo. Nam
" ſi pomum decerpſerit, vel ex ſylva cedit,
" non fit ejus: ſicuti nec cujuſlibet bonæ
" fidei poſſeſſoris; quia non ex facto ejus is
" fructus naſcitur *." Paulus goes farther. He admits not any diſtinction between natural and induſtrial fruits; but is poſitive, that both kinds equally, as ſoon as ſeparated from the ground, belong to the *bona fide* poſſeſſor: " Bonæ fidei emptor non
" dubie percipiendo fructus, etiam ex a-
" liena re, ſuos interim facit, non tantum
" eos qui diligentia et opera ejus perve-
" nerunt, ſed omnes; quia quod ad fru-
" ctus attinet, loco domini pene eſt. De-
" nique etiam, priuſquam percipiat, ſtatim
" ubi a ſolo ſeparati ſunt, bonæ fidei emp-
" toris fiunt †."

But now, after drawing ſo nigh in appearance to a concluſion, we ſtumble upon an unexpected obſtruction. Is the foregoing doctrine conſiſtent with the principle,

* l. 45. De uſuris.

† l. 48. pr. De acquir. rer. dom.

Quod

Quod ſatum ſolo cedit ſolo? If corns while growing make part of the land, and conſequently belong to the proprietor of the land, the act of ſeparation cannot have the effect to transfer the property from him to another. And if this hold as to fruits that are induſtrial, the argument concludes with greater force if poſſible as to natural fruits. What then ſhall be thought of the opinions delivered above by the Roman writers? Their authority is great I confeſs, and yet no authority will juſtify us in deviating from clear principles. The fruits, both induſtrial and natural, after ſeparation as well as before, belong to the proprietor of the land. He has undoubtedly an action at common law to vindicate the fruits while extant: and if ſo, has he not alſo a claim for the value after conſumption?

However prone to anſwer the foregoing queſtion in the affirmative, let us however ſuſpend our judgement till the queſtion be fairly canvaſſed. It is indeed clear, that the fruits while extant, the *percepti* as well as *pendentes*, belong to the proprietor of the land, and can be claimed by a *rei vindicatio*

dicatio (*a*). But is it equally clear, that the *bona fide* poſſeſſor who conſumes the fruits is liable for their value? Upon what medium is this claim founded? The fruits are indeed conſumed by the poſſeſſor, and the proprietor is thereby deprived of his property: but it cannot be ſubſumed, that he is deprived of it by the fault of the poſſeſſor; for, by the ſuppoſition, the poſſeſſor was *in bona fide* to conſume, and was not guilty of the ſlighteſt fault. Let us endeavour to gather light from a ſimilar caſe. A man buys a horſe *bona fide* from one who is not proprietor: upon urgent buſineſs he makes a very ſevere journey; and the horſe, unable to ſupport the fatigue, dies. Is the purchaſer anſwerable for the value of the horſe? There is no principle upon which that claim can be founded. In general, a proprietor deprived of his goods by the fact of another, cannot claim the value upon any principle but that of reparation: but it is a rule eſtabliſhed both in the law of nature

(*a*) Whether he may not in equity be liable for ſome recompence to the perſon by whoſe labour the induſtrial fruits were raiſed, is a different queſtion.

and

and in municipal law, That a man free from fault or blame, is not liable to repair any hurt done by him: one in all reſpects innocent, is not ſubjected to reparation more than to puniſhment *. And thus it comes out clear, that there is no action at common law againſt the *bona fide* poſſeſſor for the value of the fruits he conſumes: ſuch an action muſt reſolve into a claim of damages, to which the innocent cannot be ſubjected.

And if *bona fides* protect the poſſeſſor when he himſelf conſumes the fruits, it will equally protect his tenants. A man who takes a leaſe from one who is held to be proprietor of the land, is *in bona fide* as well as his landlord. The fruits, therefore, that the tenant conſumes or diſpoſes of, will not ſubject him to a claim of damages; and if the proprietor have no claim for their value, he can as little claim the rent paid for them.

As common law affords not an action in this caſe, equity is ſtill more averſe. The proprietor no doubt is a loſer; and, which is a more material circumſtance,

* See Sketches of the Hiſtory of Man, vol. 4. p. 71.

what

what he loſes is converted to the uſe of the *bona fide* poſſeſſor. But then, though the proprietor be a loſer, the *bona fide* poſſeſſor is not a gainer: the fruits or rents are conſumed upon living, and not a veſtige of them remains (*a*). Thus, equity rules even where the claim is brought recently. But where it is brought at a diſtance of time, for the rents of many years, againſt a poſſeſſor who regularly conſumed his annual income, and had no reaſon to dread or ſuſpect a claim, the hardſhip is ſo great, that were it founded in common law, the *bona fide* poſſeſſor would undoubtedly be relieved by equity.

What is now ſaid ſuggeſts another caſe. Suppoſe the *bona fide* poſſeſſor to be *locupletior* by the rents he has levied. It is in moſt circumſtances difficult to aſcertain this point: but circumſtances may be ſuppoſed that make it clear. The rents, for example, are aſſigned by the *bona fide* poſſeſſor for payment of his debts: the creditors continue in poſſeſſion till their claims

(*a*) The *bona fide* poſſeſſor cannot be reached by an *actio in rem verſum*; for this action takes place only where the goods applied to my uſe are known by me to belong to another.

are extinguiſhed; and then the true proprietor diſcovering his right, enters upon the ſtage. Here it can be qualified, that the *bona fide* poſſeſſor is *locupletior*, and that he has gained preciſely the amount of the debts now ſatisfied and paid. Admitting then the fact, that the *bona fide* poſſeſſor is enriched by his poſſeſſion, the queſtion is, Whether this circumſtance will ſupport any action againſt him. None at common law, for the reaſon above given, that there is nothing to found an action of reparation or damages in this caſe, more than where the rents are conſumed upon living. But that equity affords an action is clear; for the maxim, *Nemo debet locupletari aliena jactura* is applicable to this caſe in the ſtricteſt ſenſe: the effects of the proprietor are converted to the uſe of the *bona fide* poſſeſſor: what is loſt by the one, is gained by the other; and therefore equity lays hold of that gain to make up the loſs. This point is ſo evidently founded on equity, that even after repeated inſtances of wandering from juſtice in other points, I cannot help teſtifying ſome ſurpriſe, that the learned Vinnius, not to mention Voet and other commentators, ſhould reject the

proprietor's claim in this caſe. And I am the more ſurpriſed, that in this opinion they make a ſtep no leſs bold than uncommon, which is, to deſert their guides who paſs for being infallible, I mean the Roman lawyers, who juſtly maintain, that the *bona fide* poſſeſſor is liable *quatenus locupletior*. "Conſuluit ſenatus bonæ fidei "poſſeſſoribus, ne in totum damno adfici- "antur, ſed in id duntaxat teneantur in "quo locupletiores facti ſunt. Quem- "cunque igitur ſumptum fecerint ex he- "reditate, ſi quid dilapidaverunt, perdi- "derunt, dum re ſua ſe abuti putant, non "præſtabunt: nec ſi donaverint, locuple- "tiores facti videbuntur, quamvis ad re- "munerandum ſibi aliquem naturaliter "obligaverunt *."

Where the *bona fide* poſſeſſor becomes *locupletior* by extreme frugality and parſimony, it may be more doubtful whether a claim can lie againſt him. It muſt appear hard, that his ſtarving himſelf and his family, or his extraordinary anxiety to lay up a ſtock for his children, ſhould ſubject him to a claim which his prodigality

* l. 25. § 11. De hered. pet.

would

would free him from; and yet I cannot ſee that this conſideration will prevent the operation of the maxim, *Nemo debet locupletari aliena jactura.*

The foregoing diſquiſition is not only curious but uſeful. Among other things, it ſerves to determine an important queſtion, Whether *bona fides*, which relieves the poſſeſſor from accounting for the rents, will at the ſame time prevent the imputation of theſe rents toward extinction of a real debt he has upon the land. A man, for example, who has claims upon an eſtate by infeftments of annualrent, adjudications, or ſuch like, enters into poſſeſſion upon a title of property, which he believes unexceptionable. When the lameneſs of his title is diſcovered, his *bona fides* will ſecure him from paying the rents to the true proprietor: but will it alſo preſerve his debts alive, and ſave them from being extinguiſhed by his poſſeſſion of the rents? The anſwer to this queſtion depends upon the point diſcuſſed above. If the proprietor have, at common law tho' not in equity, a claim for the value of the rents conſumed by the *bona fide* poſſeſſor, this value, as appears to me, muſt go in

extinction of the debts affecting the ſubject. For where the proprietor, inſtead of demanding the money to be paid to himſelf, inſiſts only, that it ſhall be apply'd to extinguiſh the real incumbrances; equity interpoſeth not againſt this demand, which is neither rigorous nor unjuſt: and if equity interpoſe not, the extinction muſt take place. If, on the other hand, there be no claim at common law for the value of the rents conſumed, I cannot perceive any foundation for extinguiſhing the real debts belonging to the poſſeſſor; unleſs the following propoſition can be maintained, That the very act of levying the rents extinguiſhes *ipſo facto* theſe debts, without neceſſity of applying to a judge for his interpoſition. This propoſition holds true where a real debt is the title for levying the rents; as, for example, where they are levied upon a poinding of the ground, or upon an adjudication completed by a decree of mails and duties. But it cannot hold in the caſe under conſideration; becauſe, by the very ſuppoſition, the rents are levied upon a title of property, and not by virtue of the real debts.

I illuſtrate this point by ſtating the following

lowing caſe. An adjudger infeft enters into poſſeſſion of the land adjudged after the legal is expired, conſidering his adjudication to be a right of property. After many years poſſeſſion, the perſon againſt whom the adjudication was led, or his heir, claims the property; urging a defect in the adjudication which prevented expiration of the legal. It is decreed accordingly, that the adjudication never became a right of property, but that the legal is ſtill current. Here it comes out in fact, that the land has all along been poſſeſſed upon the title of a real debt, extinguiſhable by levying the rents, though by the poſſeſſor underſtood to be a title of property. Even in this caſe, the levying the rents will not extinguiſh the debt. I give my reaſon. To extinguiſh a debt by voluntary payment two acts muſt concur; firſt, delivery by the debtor in order to extinguiſh the debt; and, next, acceptance by the creditor as payment. In legal payment by execution there muſt alſo be two acts; firſt, the rent levied by the creditor in order to be apply'd for payment of the debt; and, next, his holding the ſame as payment: neither of which acts

are

are found in the caſe under conſideration. The rent is levied, not by virtue of execution in order to extinguiſh a debt, but upon a title of property: neither is the rent received by a creditor as payment, but by a man who conceives himſelf to be proprietor.

The foregoing reaſoning, which becauſe of its intricacy is drawn out to a conſiderable length, may be brought within a narrow compaſs. A *bona fide* poſſeſſor who levies and conſumes the rents, is not liable to account to the proprietor whoſe rents they were; nor is ſubjected to any action whether in law or in equity; and for that reaſon his poſſeſſion of the rents will not extinguiſh any debt in his perſon affecting the ſubject. But if it can be ſpecified that he is *locupletior* by his poſſeſſion, that circumſtance affords to the proprietor a claim againſt him in equity; of which the proprietor may either demand payment, or inſiſt that the ſum be applied for extinguiſhing the debts upon the ſubject.

In theſe concluſions I have been forc'd to differ from the eſtabliſhed practice of the court of ſeſſion, which indeed protects the *bona fide* poſſeſſor from payment; but always

always holds the poſſeſſion as ſufficient to extinguiſh the real debts belonging to the poſſeſſor. But I have had the leſs reluctance in differing from the eſtabliſhed practice, being ſenſible that this matter has not been examined with all the accuracy of which it is ſuſceptible. In particular, we are not told upon what ground the practice is founded: and if it be founded on the ſuppoſition that the proprietor has a legal claim for his rents levied by the *bona fide* poſſeſſor, I have clearly proved this a ſuppoſition to have no foundation.

Another important queſtion has a near analogy to that now diſcuſſed. If the *bona fide* poſſeſſor have made conſiderable improvements upon the ſubject, by which its value is increaſed, will his claim be ſuſtained as far as the proprietor is benefited by theſe improvements, or will it be compenſated by the rents he has levied? Keeping in view what is ſaid upon the foregoing queſtion, one will readily anſwer, that the proprietor, having no claim for the rents levied and conſumed by the *bona fide* poſſeſſor, has no ground upon which to plead compenſation: But upon a more narrow

narrow inſpection, we perceive, that this queſtion depends upon a different principle. It is a maxim ſuggeſted by nature, That reparations and meliorations beſtowed upon a houſe or upon land ought to be defray'd out of the rents. Governed by this maxim, we ſuſtain no claim againſt the proprietor for meliorations, if the expence exceed not the rents levied by the *bona fide* poſſeſſor. It is not properly compenſation; for the proprietor has no claim to found a compenſation upon. The claim is rejected upon a different medium: the rents while extant belong to the proprietor of the land: theſe rents are not conſumed, but are beſtowed upon meliorations; and the *bona fide* poſſeſſor who thus employs the proprietor's money, and not a farthing of his own, has no claim either in law or in equity. Such accordingly is the determination of Papinian, the moſt ſolid of all the Roman writers: "Sumptus in prædium, quod alienum eſſe apparuit, a bona fide poſſeſſore facti, neque ab eo qui prædium donavit, neque a domino peti poſſunt: verum exceptione doli poſita, per officium judicis æquitatis ratione ſervantur; ſcilicet ſi

" fructuum ante litem conteſtatam percep-
" torum ſummam excedant. Etenim, ad-
" miſſa compenſatione, ſuperfluum ſump-
" tum, meliore prædio facto, dominus re-
" ſtituere cogitur *."

CHAP. II.

Powers of a court of equity with reſpect to a conventional penalty.

A Penal ſum is inſerted in a bond or obligation as a ſpur on the debtor to perform. With reſpect to an obligation *ad factum præſtandum*, no law can compel the obligor to perform, otherwiſe than indirectly by ſtipulating a penal ſum in caſe of failure. This is explained by Juſtinian in the following words. " Non ſolum res
" in ſtipulatum deduci poſſunt, ſed etiam
" facta; ut ſi ſtipulemur aliquid fieri vel
" non fieri. Et in hujuſmodi ſtipulationi-

* l. 48. De rei vindicatione.

" bus optimum erit pœnam ſubjicere, ne " quantitas ſtipulationis in incerto ſit, ac " neceſſe ſit actori probare quod ejus in- " terſit. Itaque ſi quis, ut fiat aliquid, " ſtipuletur; ita adjici pœna debet, *ſi ita* " *factum non erit, tunc pœnæ nomine decem* " *aureos dare ſpondes* *." This ſum comes in place of the fact promiſed to be done; and when paid relieves from performing the fact. The only thing that a court of equity has to mind with reſpect to a ſtipulation of this kind, is, that advantage be not taken of the obligant to engage him for a much greater ſum than the damage on failure of performance can amount to. If exorbitant, it is ſo far penal, and will be mitigated by the court. But unleſs the exceſs be conſiderable, the court will not readily interpoſe. Thus, a farm being let to a tenant under the condition, that if he entered not, he ſhould pay a year's rent; the whole was decreed againſt him on his failure: for the landlord's damage might have amounted to a year's rent †.

As payment of a bond for money can be compelled by legal execution, the penal

* § 7. Inſt. De verb. oblig.

† Durie, 15th July 1637, Skene.

clauſe

clauſe in ſuch a bond differs from the former. In our bonds for borrowed money, the debtor is taken bound to pay the principal and intereſt, and "to pay over and "above a fifth part more of liquidate ex- "pences in caſe of failzie." This lump ſum is a modification or liquidation of the damage the creditor may happen to ſuffer by delay of payment, advantageous to both parties by ſaving the trouble and expence of proving the quantum of the damages. Here, as in the former caſe, if the penal ſum correſpond in any moderate degree to the damage that may enſue from the delay, equity will not interpoſe. But as money-lenders in Scotland were not long ago in condition to give law to the borrowers, their practice was to ſtipulate exorbitant ſums as liquidate expences, which, as rigorous and oppreſſive, are always mitigated in equity. "The court "of ſeſſion (ſays Lord Stair) modifies ex- "orbitant penalties in bonds and con- "tracts, even though they bear the name "of liquidate expences with conſent of the "parties, which neceſſitous debtors yield "to. Theſe the Lords retrench to the

" real expence and damage of the par-
" ties *." This penal ſum is now con-ſtantly made the fifth part of the princi-pal ſum; from which our ſcribes never ſwerve, though nothing can be more ab-ſurd. It is commonly no leſs expenſive to recover L. 5 than to recover L. 5000; yet in the former the penalty is no more but twenty ſhillings, in the latter no leſs than L. 1000. How diſproportioned are theſe ſums to their deſtined purpoſe? and yet for preventing ſuch inequality the court of ſeſſion has not hitherto ventured to in-terpoſe. Why not an act of ſederunt, con-fining the penalty in a bond to L. 100, or ſome ſuch moderate ſum, however great the principal may be?

An Engliſh double bond has the effect of a conventional penalty. It was origi-nally intended to evade the common law, which prohibits the taking intereſt for money. That prohibition is no longer in force: the double bond however is contin-ued, as it ſupplies the want of a conven-tional penalty. The penal ſum is upon failure due at common law; but in equi-ty it is reſtricted to damages. " After the

* Book 4. tit. 3. § 1.

" day

" day of payment, the double ſum be-
" comes the legal debt; and there is no
" remedy againſt ſuch penalty, but by ap-
" plication to a court of equity, which re-
" lieves on payment of principal, intereſt,
" and coſts *."

A debtor who by failure of payment draws a proceſs upon him, and has no defence that he can urge *bona fide*, muſt ſubmit to the penalty reſtricted to the purſuer's expence. No other excuſe will avail him. Failure is often occaſioned by want of money: but were ſuch an excuſe admitted, it would never be wanting; and the conventional penalty would loſe its effect. Impriſonment on ſuſpicion of treaſon would not be ſuſtained as an excuſe, were the debtor even refuſed the uſe of pen, ink, and paper, to requeſt aid from his friends. The creditor goes on with all the artillery of the law; and muſt have his expences out of the penalty, becauſe the misfortune of his debtor cannot affect him.

The only doubt is, where the debtor or his heir, truſting to a defence in appear-

* New abridgement of the law, vol. 3. p. 691.

ance

ance good, ventures to ſtand a proceſs, and at laſt is over-ruled; whether the creditor be intitled to the modified penalty. This queſtion merits a deliberate diſcuſſion; in order to which, it will be neceſſary to examine what ground there is for coſts of ſuit, abſtracting from a conventional penalty. Any voluntary wrong is a foundation for damages, even at common law; but a man free from fault or blame, is not liable for damages, or liable to repair any hurt he may have occaſioned *; whence it follows, that there is no foundation even at common law, for ſubjecting to coſts of ſuit a defendant who is *in bona fide*. Equity is ſtill more averſe from ſubjecting an innocent perſon to damages; and conſidering the fallibility of man, his caſe would be deplorable, were he bound to repair all the hurt he may occaſion by an error or miſtake. What then ſhall be ſaid of the act 144. parl. 1592, appointing, "That damage, intereſt, and "expences of plea, be admitted by all "judges, and liquidated in the decree, "whether condemnator or abſolvitor?"

* See the chapter immediately foregoing.

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If this regulation could ever be juſt, it muſt have been among a plain people, governed by a few ſimple rules of law, ſuppoſed to be univerſally known. Law, in its preſent ſtate, is too intricate for preſuming that every perſon who errs is *in mala fide*; and yet, unleſs *mala fides* be preſumed in every caſe, the regulation cannot be juſtified.

Theſe things being premiſed, we proceed to examine, whether a defendant who is *in bona fide* can be ſubjected to coſts by virtue of a conventional penalty. Suppoſe a defence urged againſt payment, ſo doubtful in law as to divide the judges, who at laſt give it againſt the defendant by the narroweſt plurality: Or ſuppoſe the cauſe to depend on an obſcure fact requiring a laborious inveſtigation; as where I owe L. 1000 by bond to my brother, who dies without children, ſo far as known to his relations. A woman appears with an infant, alledging a private marriage. I ſtand a proceſs: the proof, drawn out to a great length, appears ſtill dark and doubtful: judgement is at laſt pronounced againſt me by a plurality. Will juſtice permit me to be loaded with an immenſe ſum of coſts for

for not ſubmitting to the claim without trial? To extend a conventional penalty to ſuch caſes, would be in effect to puniſh men, for adhering, after the beſt advice, to what appears their rights and privileges: the grievance would be intolerable. Many a man, through the dread of coſts, would be deterred from inſiſting on a juſt defence, and tamely ſubmit to be wronged.

It appears therefore clear, that to extend againſt a *bona fide* defendant the penal clauſe in a bond, would be rigorous and unjuſt. And to make it ſtill more clear, I put the following queſtion. Let us ſuppoſe, that in a bond of borrowed money the debtor is taken expreſsly bound to pay the coſts of ſuit, however plauſible his defence may be, however ſtrong his *bona fides*: would not ſuch a clauſe be rejected by the court of ſeſſion as exacted from a neceſſitous debtor by a rigorous and oppreſſive creditor? If the queſtion be anſwered in the affirmative, which cannot be doubted, the neceſſary conſequence is, that the penal clauſe, in its ordinary ſtyle, cannot be underſtood to have that meaning.

But at that rate, it will be urged, a conventional penalty is of no uſe to the creditor where it is moſt needed, namely, in a proceſs for recovering payment; that if the debtor be *in bona fide*, the penalty will not reach him; and if he be litigious, that there is no uſe for the penalty, as he is ſubjected to coſts at common law. I anſwer, That the penal clauſe is of uſe even in a proceſs. Litigioſity muſt be evident to infer coſts at common law; but the ſlighteſt fault, or even doubt, on the defendant's part, though far from amounting to litigioſity, will ſubject him to the modified penalty. And Lord Stair accordingly, in the paſſage partly quoted above, ſays, "That in liquidating the purſuer's "expence, the Lords take ſlender proba- "tion of the true expence, and do not "conſider whether it be neceſſary or not, "provided it exceed not the ſum agreed "on; whereas in other caſes they allow "no expence but what is neceſſary or pro- "fitable."

CHAP. III.

What obligations and legacies tranſmit to heirs.

IF the obligee's heirs be named in the obligation, they will ſucceed whether he die before or after the term of payment, becauſe ſuch is the will of parties. The preſent queſtion relates to obligations where the obligee's heirs are not named. Such obligations by the common law tranſmit not to heirs; becauſe the common law regards what is ſaid to be the only proof of will: but equity is not ſo peremptory nor ſuperficial. It conſiders, that in human affairs errors and omiſſions are frequent, and that words are not always to be abſolutely relied on: it holds indeed words to be the beſt evidence of will, but not to be the only evidence. If therefore any ſuſpicion lie, that the will is not preciſely what is expreſſed, every rational circumſtance is laid hold of to aſcertain, with all the accuracy poſſible,

poſſible, what really was the will of the granter, or of the contractors *.

With reſpect to this point, the motive that produced the obligation is one capital circumſtance. Where there is no motive but good-will merely, the words are ſtrictly adhered to; as there is nothing to infer that more was intended than is expreſſed. Therefore my gratuitous promiſe of a ſum to John, is void at common law, if he die without receiving payment; for as heirs are not named, they have no claim. Nor in equity have they any claim, if the obligee die before the term of payment. But where the obligee ſurvives the term without receiving payment, his heirs have a good claim upon the following rule in equity, That what ought to have been done is held as done †. If payment had been made, as ought to have been done, at the term ſpecified in the deed, the ſum would have been an addition to the ſtock of the obligee, which would have accrued to his repreſentatives; and it would be a reproach to juſtice, were they left to ſuffer by the

* See vol. 1. p. 201. 202.

† See Elucidations of Common and Statute law, p. 62.

obſtinacy or neglect of the obligor. It would be a reproach ſtill greater, that the obligor's fault in poſtponing payment ſhould liberate him from his obligation. The ſum is, In a deed flowing from a motive of pure benevolence, the granter's will muſt govern, which is underſtood to be in favour of the grantee only, if heirs be not mentioned. In commercial obligations, on the contrary, where there is *quid pro quo*, the obligee's will governs; and he is underſtood to purchaſe for his heirs as well as for himſelf, if the contrary be not expreſſed. The not mentioning heirs is an omiſſion, which will be ſupplied by a court of equity; as juſtice will not permit the obligor to enjoy the valuable conſideration without performing the equivalent pactioned. Thus, a bond for borrowed money, though the creditor only be mentioned, and not heirs, deſcends to his heirs, where he dies before the term of payment, as well as after.

Men are bound to educate their children till they be able to provide for themſelves; and any further proviſion is underſtood to be gratuitous. Hence, a bond of proviſion to children is deemed a gratuitous deed;

deed; and for that reaſon, if the children die before the term of payment, equity gives no aid to their heirs. If heirs be named in the bond, they have right at common law: if not named, neither equity nor common law gives them right. Thus, in a contract of marriage certain proviſions being allotted to the children, the portions of the males payable at their age of twenty-one years, and of the females at eighteen, without mentioning heirs or aſſignees; the aſſignees and creditors of ſome of the children who died before the term of payment, were judged to have no right *. I cannot ſo readily acquieſce in the following deciſion, where a bond of proviſion payable to a daughter at her age of fourteen, and to her heirs, executors, and aſſignees, was voided by her death before the term of payment †. The addition of *heirs*, *executors*, *and aſſignees*, was thought to regard the child's death after the term of payment; and not to be an indication of the granter's will that the bond ſhould be effectual though the child died before the term of

* Stair, January 17. 1665, Edgar contra Edgar.

† Stair, February 22. 1677, Belſches contra Belſches.

payment.

payment. The clauſe, I admit, is capable of that reſtricted meaning: but I can find no reaſon for this reſtriction; and in all caſes it is ſafeſt to give words their natural import, unleſs it be made clear that the granter's meaning was different. And accordingly Chalmers having ſettled his eſtate upon his nephew, with the burden of a ſum certain to Iſabel Inglis, wife of David Millar, and to her heirs, executors, or aſſignees, payable year and day after his death, with intereſt after the term of payment; and Iſabel having died before Chalmers, leaving a ſon who ſurvived him; the ſum was decreed to that ſon as a conditional inſtitute *.

Even a bond of proviſion, or any gratuitous deed, will deſcend to heirs, as above ſaid, if ſuch was the granter's intention. Nor is it neceſſary in equity that ſuch intention be expreſſed in words: it is ſufficient that it be made evident from circumſtances.

What is ſaid above ſeems a more clear and ſatisfactory reaſon for excluding heirs where the creditor in a bond of proviſion dies before the term of payment, than

* Millar contra Inglis, July 16. 1760.

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what is commonly aſſigned, that the ſum in the bond, being deſtined as a ſtock for the child, ceaſes to be due, ſince it cannot anſwer the purpoſe for which it was intended. Were this reaſon good, it would hold equally whether the child die before or after the term of payment; and therefore in proving too much it proves nothing.

In what caſes a legacy deſcends to heirs, is a queſtion that takes in a great variety of matter. To have a diſtinct notion of this queſtion, legacies muſt be divided into their different kinds. I begin with the legacy of a *corpus*. The property here is transferred to the legatee *ipſo facto* upon the teſtator's death. The reaſon is, that will ſolely muſt in this caſe have the effect to transfer property, otherwiſe it could never be transferred from the dead to the living: a proprietor after his death cannot make delivery; and no other perſon but the proprietor can make a legal delivery. Now if the legatee be veſted in the property of the ſubject legated, it muſt upon his death deſcend to his heirs even by common law.

But what if the legatee die before the teſtator? In this caſe the legacy is void.

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The teſtator remains proprietor till his death, and the ſubject legated cannot by his death be transferred to a perſon who is no longer in exiſtence. Nor can it be tranſferred to that perſon's heirs, becauſe the teſtator did not exert any act of will in their favour.

The next caſe I put is of a ſum of money legated to Titius. A legacy of this ſort, giving the legatee an intereſt in the teſtator's perſonal eſtate, and intitling him to a proportion, veſts in the legatee *ipſo facto* upon the teſtator's death. And for the ſame reaſon that is given above, the legacy even at common law will tranſmit to heirs, if the legatee ſurvive the teſtator; if not, it will be void. But what if the legacy be ordered to be paid at a certain term? It is to be conſidered, whether the term be added for the benefit of the teſtator's heir, in order to give him time for preparing the money; or whether it be added to limit the legacy. A term for payment given to the teſtator's heir, will not alter the nature of the legacy, nor prevent its veſting in the legatee upon the teſtator's death; and conſequently ſuch a legacy will tranſmit to heirs, even where the legatee dies before the term of payment, provided

he ſurvive the teſtator. *Dies cedit etſi non venerit.* But where the purpoſe of naming a term for payment is to limit the legacy, the legatee's death before that term will bar his heirs, becauſe he himſelf had never any right. Here *dies nec cedit nec venit.* In order to determine what was the intention of the teſtator in naming a day for payment, the rule laid down by Papinian is judicious: *Dies incertus conditionem in teſtamento facit* *. A day certain for performance is commonly added in favour of the teſtator's heir, in order to give him time for providing the money. An uncertain day reſpects commonly the condition of the legatee; as where a legacy is in favour of a boy to be claimed when he arrives at eighteen years of age, or of a girl to be claimed at her marriage. In ſuch inſtances, it appears to be the will of the teſtator, that the legacy ſhall not veſt before the term of payment. The *dies incertus* is ſaid to make the legacy conditional; not properly, for the naming a day of payment, certain or uncertain, is not a condition. But as the uncertain term for pay-

* l. 75. De condition. et demon.

ment has the effect to limit the legacy in the ſame manner as if it were conditional; for that reaſon, the uncertain term is ſaid to imply a condition, or to make the legacy conditional.

A third ſort of legacy is where the teſtator burdens his heir to pay a certain ſum to Titius ſingly, without the addition of heirs. The heirs at common law have no right even where Titius ſurvives the teſtator, becauſe there is not here, as in the former caſes, any ſubject veſted in Titius to deſcend to his heirs; nor can heirs, at common law, claim upon an obligation which is not in their favour. But equity ſuſtains an action to them: for no day being named, the death of the teſtator is the term of payment; and equity will not ſuffer the teſtator's heir to profit by delaying payment. Where a term of payment is added by the teſtator, the caſe becomes the ſame with that of a gratuitous obligation *inter vivos*.

CHAP. IV.

Arreſtment and proceſs of forthcoming.

CUrrent coin is the only legal ſubject for payment of debt, which accordingly the creditor is bound to accept of. Sometimes however, for want of current coin, the creditor ſubmits to take ſatisfaction in goods; and ſometimes he is put off with a ſecurity, an aſſignment to rents, for example, or to debts, which empowers him to operate his payment out of theſe ſubjects. Legal execution, copying voluntary acts between debtor and creditor, is of three kinds. The firſt, compelling payment of the debt, reſembles voluntary payment. This was the caſe of poinding in its original form *; and it is the caſe of a decree for making *corpora* forthcoming, as will be ſeen afterward. The ſecond re-

* Hiſtorical Law-tracts, tract 10.

ſembles voluntary acceptance of goods for ſatisfying the debt; which is the caſe of poinding according to our preſent practice. The goods are not ſold as originally; but after being valued, are delivered *ipſa corpora* to the creditor. The third reſembles a voluntary ſecurity: it gives the creditor a ſecurity upon his debtor's funds, and enables him to operate his payment accordingly. This is the caſe of an adjudication during the legal; which empowers the creditor to draw payment out of the debtor's rents by a decree of mails and duties againſt the tenants. A decree for making forthcoming ſums of money due to the debtor, is of the ſame nature: it is a ſecurity only, not payment; and conſequently, if my debtor, againſt whom the decree of forthcoming is obtained, prove inſolvent, the ſum is loſt to me, not to my creditor who obtained the decree: his ſecurity indeed is gone; but the debt which was ſecured remains entire.

So much for preliminaries. And as to the ſubject of the preſent chapter, I begin with the ſeveral kinds of arreſtment. The firſt I ſhall mention is that which proceeds on a judicial order to ſecure the perſon,

ſon of one accuſed of a crime. The next is for ſecuring moveable effects in the hands of the poſſeſſor, till the property be determined. This arreſtment, termed *rei ſervandæ cauſa*, is a ſpecies of ſequeſtration: it is a ſequeſtration in the hands of the poſſeſſor. The goods are thus ſecured till the property be determined; and the perſon declared proprietor takes poſſeſſion *via facti*. A third arreſtment is that which is preparatory to a proceſs of forthcoming raiſed by a creditor for recovering payment out of his debtor's moveables, whether *corpora* or *debita*.

A debtor's corporeal moveables in his own poſſeſſion are attached by poinding, correſponding to the *Levari facias* in England. But where ſuch moveables are in the poſſeſſion of any other, and the particulars unknown, there can be no place for poinding. The creditor obtains a warrant or order from a proper court to arreſt them in the hands of the poſſeſſor, to hinder him from delivering them up to the proprietor. The ſervice of this order is termed *an arreſtment*; and the perſon upon whom it is ſerved is termed the *arreſtee*. The firſt ſtep of the proceſs of forthcoming conſequent upon

upon the arreſtment is an order to ſell the goods ſecured by the arreſtment. The price is delivered to the creditor for his payment; and the debt is thereby extinguiſhed in whole or in part, which completes the proceſs. A proceſs of forthcoming upon ſums arreſted is in the ſame form; with this only difference, that inſtead of ſelling *corpora*, a decree of forthcoming goes out againſt the arreſtee, and payment is recovered from him accordingly.

An arreſtment of this kind is not to be conſidered as neceſſary to found a proceſs of forthcoming. This proceſs is founded on common law, and may proceed without an arreſtment; which will appear from the following conſideration. If I have not money to pay my debt, I ought to convey to my creditor what other things I am maſter of, that he may convert them into money for his payment. If I refuſe to do him that act of juſtice, a court of law will interpoſe, and do what I ought to have done. The court will adjudge my land to belong to him; or they will ordain my effects to be made forthcoming to him. An arreſtment indeed commonly precedes; but its

its only purpoſe is, to ſecure the ſubject in the hands of the arreſtee till a proceſs of forthcoming be raiſed. In that reſpect, an arreſtment reſembles an inhibition, which is not a ſtep of execution, but only an injunction to the debtor, prohibiting him to alien his land or to contract debt, in order to preſerve the fund entire for the creditor's adjudication. A forthcoming is of the ſame nature with an adjudication: an heritable ſubject is attached by the latter; a moveable, by the former. A proceſs of adjudication is carried on every day without a preparatory inhibition; and a proceſs of forthcoming may be carried on equally without a preparatory arreſtment.

Though what is above laid down belongs to common law, it is however proper here, as an introduction to the matters of equity that follow. The ſubject to be handled is the operations of common law and of equity with reſpect to a competition between an arreſtment and other rights, voluntary or legal. With reſpect to the arreſtment of a *corpus*, all are agreed that it is a ſequeſtration merely in the hands of the poſſeſſor, and transfers no right to the creditor. The goods ſecured by

by the arreſtment, are in the proceſs of forthcoming ſold as the property of the debtor; and the price is applied for payment of the debt due by him to the arreſter. For that reaſon, an arreſtment cannot bar a poinding carried on by another creditor. If the ſubject belong to the debtor, poinding goes on of courſe by the authority of common law.

It is natural to aſſimilate the arreſtment of a debt to that of a moveable, in being prohibitory only, and in transferring no right to the creditor. Yet many hold that the former has a ſtronger effect than the latter, by transferring to the creditor ſome ſort of right, ſignified by the term *nexus realis*. To aſcertain the nature and effect of ſuch an arreſtment, the beſt way is to give an accurate analyſis of it. The letter or warrant for arreſtment, to which the arreſtment itſelf is entirely conformable, is in the following words: "To fence and "arreſt all and ſundry the ſaid A. B. his "readieſt goods, gear, debts, &c. in who-"ſoever hands the ſame can be appre-"hended, to remain under ſure fence and "arreſtment, at the inſtance of the ſaid "complainer, ay and while payment be

" made to him." Upon this warrant and arreſtment following upon it, it will be obſerved, firſt, That no perſon is named but the arreſter and his debtor. It is not a limited warrant to arreſt in the hands of any particular perſon; but an authority to arreſt in the hands of any perſon that the creditor ſuſpects may owe money to his debtor. Secondly, The arreſtee is not ordered or authoriſed to make payment to the arreſter: the order he receives, is to keep the money in his hand till the arreſter be ſatisfied. Theſe particulars make it plain, that an arreſtment, like an inhibition, is merely prohibitory; and that it transfers not any right to the arreſter. And this point is put out of doubt by the ſummons of forthcoming, concluding, " That the defender ſhould be decerned " and ordained to make forthcoming to " the complainer the ſum of " reſting and owing by him to A. B. (the " complainer's debtor againſt whom the " execution paſſes), and arreſted in the de- " fender's hands at the complainer's in- " ſtance." It is the decree of forthcoming, therefore, that intitles the creditor to demand the ſum arreſted, to be applied

for payment of the debt upon which the arreſtment and forthcoming proceeded; and the preparatory arreſtment has no other effect, but to prevent alienation before the proceſs of forthcoming is raiſed.

If it hold true, that arreſtment is prohibitory only, and that my creditor arreſting in the hands of my debtor, hath no right to the ſum arreſted till he obtain a decree of forthcoming; it follows upon the principles of common law, that this ſum, belonging to me after arreſtment as well as before, lies open to be attached by my other creditors; and that, in a competition among theſe creditors, all of them arreſters, the firſt decree of forthcoming muſt give preference. For the firſt order ſerved upon my debtor binds him to the creditor who obtained the order; after which he cannot legally pay to any other. Thus ſtands the common law, which is followed out in a courſe of deciſions, moſtly of an old date, giving preference, not to the firſt arreſtment, but to the firſt decree of forthcoming.

Whether equity make any variation, ſhall be our next inquiry. It is the privilege of a debtor, with reſpect to his own funds, to

to apply which of them he pleaſes for payment of his debts. Upon the debtor's failure, this choice is transferred to the creditor, who may attach any particular ſubject for his payment. In that caſe, the debtor is bound to convey to his creditor the ſubject attached, for his ſecurity: it is undoubtedly the duty of the debtor to relieve his creditor from the trouble and expence of execution; and, conſequently, to relieve him from execution againſt any particular ſubject, by ſurrendering it voluntarily, unleſs he find other means of making payment. The creditor's privilege to attach any particular ſubject for his payment, and the debtor's relative obligation to ſave execution by ſurrendering that ſubject to his creditor, are indeed the foundation of all execution. A judge authoriſing execution, ſupplies only the place of the debtor; and conſequently cannot authoriſe execution againſt any particular ſubject, unleſs the debtor be antecedently bound to ſurrender the ſame to his creditor *. This branch of the debtor's duty explains a rule in law, "That inchoated

* See above, p. 16.

" execution makes the ſubject litigious, " and ties up the debtor's hands from a- " liening." If it be his duty to prevent execution by ſurrendering this ſubject to his creditor, it is inconſiſtent with his duty to diſpoſe of it to any other perſon.

In applying the rules of equity to an arreſtment, the duty now unfolded is of importance. If the debtor ought to convey to his creditor the ſubject arreſted, no other creditor who knows the debtor to be ſo bound, can juſtly attach that ſubject by legal execution: for it is unjuſt to demand from a debtor a ſubject he is bound to convey to another *. And if a creditor ſhall act thus unjuſtly, by arreſting a ſubject which he knows to be already arreſted by another creditor, a court of equity will diſappoint the effect of the ſecond arreſtment, by giving preference to the firſt.

Our writers, though they have not clearly unfolded the debtor's obligation to the firſt arreſter, have, however, been ſenſible of it; for it is obviouſly with reference to this obligation, that an arreſtment is ſaid to make a *nexus realis* upon the ſubject. I know but of two ways by which a man

* See above, p. 17.

can

can be connected with a debt: one is where he has the *jus exigendi*, and one where the creditor is bound to make it over to him. It will be admitted, that an arreſtment has not the effect of transferring to the arreſter the debt arreſted: the arreſter has not even the *jus exigendi* till he obtain a decree of forthcoming. And if ſo, a *nexus realis*, applied to the preſent ſubject, cannot import other than the obligation which the creditor is under to make over the debt to the arreſter. Thus, by the principles of equity, the firſt arreſtment is preferable while the ſubject is *in medio*; but if a poſterior arreſter, without notice of a former, obtain payment upon a decree of forthcoming, he is ſecure in equity, as well as at common law; and his diſcovery afterward of a prior arreſtment will not oblige him to repay the money *. This equitable rule of preferring the firſt arreſtment while the ſubject is *in medio*, is accordingly eſtabliſhed at preſent, and all the late deciſions of the court of ſeſſion proceed upon it.

An arreſtment, as obſerved above, hath not the effect at common law to bar poind-

* See above, p. 23. 24.

ing;

ing; but in equity, for the reaſon now given, an arreſtment made known to the poinder, ought to bar him from proceeding in his execution, as well as it bars a poſterior arreſtment. A creditor ought not, by any ſort of execution, to force from his debtor what the debtor cannot honeſtly convey to him. And yet, though in ranking arreſtments the court of ſeſſion follows the rules of equity, it acts as a court of common law in permitting a ſubject to be pointed after it is arreſted by another creditor. I ſhall cloſe this branch of my ſubject with a general obſervation, That the equitable rules eſtabliſhed above, hold only where the debtor is ſolvent: it will be ſeen afterward, that in the caſe of bankruptcy, all perſonal creditors ought to draw equally.

So much about arreſters competing for the ſame debt. Next about an arreſter competing with an aſſignee. Touching this competition, one preliminary point muſt be adjuſted, namely, How far an arreſtment makes the ſubject arreſted litigious; or, in other words, How far it bars voluntary deeds. It is obvious, in the firſt place, that an arreſtment makes the ſubject

ject litigious with reſpect to the arreſtee, becauſe it is ſerved upon him: the very purpoſe of the arreſtment is, to prohibit him from paying the debt arreſted, or from giving up the goods. In the next place, As a creditor may proceed to arreſtment without intimating his purpoſe to his debtor, an arreſtment cannot bar the debtor's voluntary deeds, till it be notified to him: the arreſtment deprives him not of his *jus crediti*, nor of his property; and while he continues ignorant of the arreſtment, nothing bars him, either in law or in equity, from conveying his right to a third party. Upon that account, intimation to him is an eſtabliſhed practice in the country from whence we borrowed an arreſtment: " Quamvis debitor debitoris mei a me ar- " reſtari nequeat, cum mihi nulla ex cau- " ſa obligatus ſit, tamen, quod Titius de- " bitori meo debet, per judicem inhibere " poſſum, ne debitori meo ſolvatur, ſine " mea vel judicis voluntate. De quo ar- " reſto debitorem meum certiorem facere " debeo, eique diem dicere, quo ſi com- " pareat, nec juſtam cauſam alleget ob " quam arreſtum relaxari debeat, vel ſi " non compareat, judex ex pecunia arre-

" ſtata

" ſtata mihi ſolvendum decernet *." The ſame doctrine is laid down by Balfour †, " That an arreſtment of corns, " goods, or gear, ought to be intimated " to the owner thereof; and that if no in- " timation be made, it is lawful for the " owner to diſpoſe of the ſame at his plea- " ſure." Thirdly, With reſpect to others, an arreſtment, though notified to the arreſter's debtor, makes not the ſubject litigious; for any perſon ignorant of the arreſtment, is at liberty to take from the arreſter's debtor a conveyance to the ſubject arreſted. The cedent aliens indeed *mala fide* after the arreſtment is notified to him; but the purchaſer is ſecure if he be *in bona fide:* the property is legally transferred to him; and there is nothing in law nor in equity to deprive a man of a ſubject honeſtly acquired. That an arreſtment makes not the ſubject litigious with regard to third parties, will be clear from conſidering, that an effect ſo ſtrong is never given to any act, unleſs there be a public notification: a proceſs in the court of ſeſſion

* Sande Deciſ. Friſ. l. 1. tit. 17. def. 1.

† Title, Arreſtment, cap. 3.

is ſuppoſed to be known to all; and, as it is a rule, *Quod nihil innovandum pendente lite*, any perſon who tranſacts either with the plaintiff or defendant, ſo as to hurt the other, does knowingly an unlawful act, which for that reaſon will be voided: an inhibition and interdiction are publiſhed to all the lieges, who are thereby put *in mala fide* to purchaſe from the perſon inhibited or interdicted: an appriſing renders the ſubject litigious as to all, becauſe the letters are publicly proclaimed or denounced, not only upon the land, but alſo at the market-croſs of the head-borough of the juriſdiction where the land lies *; and an adjudication has the ſame effect, becauſe it is a proceſs in the court of ſeſſion: a charge of horning bars not the debtor from aliening, till he be publicly proclaimed or denounced rebel; and it muſt be evident, that an arreſtment ſerved upon my debtor, cannot hurt third parties dealing with me, more than a horning againſt myſelf. In a word, litigioſity, ſo as to affect third parties, never takes place without public notification.

* Stair, lib. 3. tit. 2. § 14.

Were we to draw an argument from an inhibition, it might be inferred, that even the actual knowledge of an arreſtment ſhould not bar one from purchaſing the ſubject arreſted. But the argument from an inhibition concludes not with reſpect to an arreſtment; and in order to ſhow the difference, it will be neceſſary to ſtate the nature of an inhibition in a hiſtorical view.

This writ prohibits the alienation of moveable ſubjects as well as of immoveable; and to ſecure againſt alienation, the writ is publiſhed to the lieges, to put every man upon his guard againſt dealing with the perſon inhibited. This writ muſt have been the invention of a frugal age, before the commerce of money was far extended. While inhibitions were rare, their publication could be kept in remembrance; a debtor inhibited would be a remarkable perſon, to make every one avoid dealing with him. But when the commerce of money was farther extended, and debts were multiplied, an inhibition was no longer a mark of diſtinction. And as inhibitions could no longer be kept in memory, they became a load upon the commerce of move-

moveables paſt enduring; for no man was in ſafety to purchaſe from his neighbour a horſe, or a buſhel of corn, till firſt the records of inhibitions were conſulted. A Lycurgus intending to bar commerce, in order to preſerve his nation in poverty, could not have invented a more effectual ſcheme. This execution, inconſiſtent with commerce as far as it affects moveables, is alſo inconſiſtent in itſelf, tending directly to diſappoint its own end. The purpoſe of an inhibition is to force payment; and the effect of it is to prevent payment, by locking up the debtor's moveables, which commonly are the only ready fund for procuring money.

Theſe reaſons have prevailed upon the court of ſeſſion to refuſe any effect to an inhibition as far as it regards moveables. An inhibition indeed, with reſpect to its form and tenor, continues the ſame as originally; and accordingly every debtor inhibited is to this hour diſcharged to alien his moveables, no leſs peremptorily than to alien his land. This inconſiſtence cannot be remedied but by the legiſlature; for the court of ſeſſion cannot alter a writ of the common law, more than it can al-

ter any other branch of the common law. But the court of ſeſſion, as a court of equity, can redreſs the rigor, injuſtice, or oppreſſion, of the common law: and tho' it hath no power to alter the ſtyle of an inhibition, it acts juſtly in refuſing to give force to it as far as it affects moveables; becauſe ſo far it is an oppreſſive and inconſiſtent execution. This argument, as above hinted, may ſeem to apply to an arreſtment, that even the knowledge of this execution ought not to bar any perſon from purchaſing the ſubject arreſted, whether it be a debt, or a *corpus*. But this holds not in practice: and there is good reaſon for diſtinguiſhing, in this particular, an arreſtment from an inhibition: the latter prohibits, in general, the debtor to alien any of his moveables, and for that reaſon is rigorous and oppreſſive: the former is of particular ſubjects only; nor doth it affect any moveables in the debtor's own poſſeſſion, for which reaſon, the execution ſo limited is neither rigorous nor oppreſſive. An arreſtment, therefore, as to the ſubjects affected by it, is allowed in practice to have the full effect that is given it at common law. But with reſpect to a third

third party, it has a more ample effect in equity than at common law: for though a man who *bona fide* purchaſes a ſubject arreſted, is ſecure in equity as well as at common law; yet a *mala fide* purchaſe, though effectual at common law, will undoubtedly be voided in a court of equity.

Having diſcuſſed preliminary points, we proceed to the ſubject propoſed, competition between an arreſter and an aſſignee. I begin with arreſtment of a moveable bond, aſſign'd before the arreſtment, but intimated after. The intimation by our law makes a complete conveyance of the bond into the perſon of the aſſignee; after which the ſum cannot be made forthcoming to the arreſter for his payment: the very foundation of his claim is gone; for neither law nor equity will permit any ſubject to be taken in execution that belongs not to the debtor. Many deciſions, it is true, prefer the arreſter; upon what medium, I cannot comprehend. Our deciſions, however, are far from being uniform upon this point. I give the following example. John aſſigns the rent of his land for ſecurity and payment of a debt due by him. He hath another creditor who

who afterward raiſes a proceſs of adjudication affecting the ſame land. The aſſignee intimating his right after the citation, but before the decree of adjudication, is preferred before the adjudger *. An arreſtment ſurely makes not a ſtronger *nexus* upon the ſubject than is made by a citation upon a ſummons of adjudication; and if an aſſignment be preferred before the latter, it ought alſo to be preferred before the former. But I ſay more. Let it be ſuppoſed, that after the citation upon the ſummons of adjudication, but before intimation of the aſſignment, the rent is arreſted by a third creditor. The decree of adjudication is preferred before the arreſtment †. If ſo, here is a circle abſolutely inextricable; an adjudication preferred before an arreſtment, the arreſtment before an aſſignment, and the aſſignment before the adjudication. This proves demonſtrably that the aſſignee ought to be preferred before the arreſter, as well as before the adjudger. The court went ſtill farther, in preferring an aſſignee before

* Durie, March 2. 1637, Smith contra Hepburn.

† Dalrymple, June 26. 1705, Stewart contra Stewart.

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an arreſter. An Engliſh aſſignment to this day is a procuratory *in rem ſuam* only, carrying the equitable right indeed, but not the legal right. And yet with reſpect to a bond due to Wilſon reſiding in England, by the Earl of Rothes in Scotland, an Engliſh aſſignment by Wilſon of the ſaid bond was of itſelf, without intimation, preferred before an arreſtment ſerved afterward upon the Earl. The preference thus given was clearly founded on equity; becauſe the court of ſeſſion, as a court of equity, could not juſtly make forthcoming to a creditor of Wilſon for his payment, a ſubject that Wilſon had aliened for a valuable conſideration, and to which the purchaſer had the equitable, though not the legal right. But if this be a juſt deciſion, which it undoubtedly is, nothing can be more unjuſt, than to prefer an arreſtment before a Scotch aſſignment of a prior date, even after it is completed by intimation; for here the aſſignee has both the equitable and legal right.

The next caſe I put, is where, in a proceſs of forthcoming upon an arreſtment, an aſſignee appears with an aſſignment prior to the arreſtment, but not intimated.

I have already given my reaſon for preferring the aſſignee, as the court did with reſpect to an Engliſh aſſignment: and yet the ordinary practice is to prefer the arreſtment; which one will have no heſitation to believe, when an arreſtment is preferred even where the aſſignment is intimated.

The preference due to the aſſignee is in this caſe ſo clear, that I am encouraged to carry the doctrine farther, by preferring an aſſignee even before a poinder; provided the aſſignee appear for his intereſt before the poinding be completed. The poinder no doubt is preferable at common law, becauſe till an aſſignment be completed by intimation, the debtor continues proprietor. The aſſignee however has the equitable right; and juſtice will not permit goods that the debtor has aliened for a valuable conſideration to be attached by any of his creditors. The reſult will be different, where the poinding is completed, and the property of the goods is tranſferred to the creditor, before the aſſignee appears. In this caſe, the poinder is ſecure; becauſe no man can be forfeited of his property who has committed no fault.

I proceed to an aſſignment dated after arreſtment, but intimated before competition. Suppoſing the aſſignee to be *in bona fide*, he is clearly preferable; for the intimation veſts in him the legal as well as equitable right; which bars abſolutely the cedent and his creditors: and this reaſon is good at common law to prefer the aſſignee, even ſuppoſing he had notice of the arreſtment before he took the aſſignment. But in equity the arreſter is preferable where the aſſignee is *in mala fide*, for the following reaſon. The debtor, after his ſubject is affected by an arreſtment, is bound in duty to make over the ſubject to his creditor the arreſter: if he tranſgreſs by conveying the ſubject to one who knows of the arreſtment, both are guilty of a moral wrong, which equity will redreſs by preferring the arreſter.

Let us drop now the intimation, by putting the caſe, that in a proceſs of forthcoming upon an arreſtment, an aſſignee appears for his intereſt, craving preference upon an aſſignment bearing date after the arreſtment, but before the citation in the proceſs of forthcoming. Suppoſing the aſ-

ſignee *in mala fide*, he will in equity be poſtponed to the arreſter for the reaſon immediately above given. But what ſhall be the rule of preference where the aſſignee purchaſes *bona fide?* The arreſter and he have each of them an equitable right to the ſubject; neither of them has the legal right. This caſe reſembles that of ſtellionate, where a proprietor of land ſells to two different purchaſers ignorant of each other: neither of whom has the legal right, becauſe there is no infeftment; but each of them has an equitable right. In theſe caſes, I cannot diſcover a rule for preference; nor can I extricate the matter otherwiſe than by dividing the ſubject between the competitors. And after all, whether this may not be cutting the Gordian knot inſtead of untying it, I pretend not to be certain.

Upon the whole, an arreſtment appears a very precarious ſecurity till a proceſs of forthcoming be commenced. This proceſs indeed is a notification to the debtor not to alien in prejudice of the arreſter, and at the ſame time a public notification to the lieges not to purchaſe the ſubject arreſted.

And

And by this proceſs the ſubject is rendered litigious; though the ſame privilege is not indulged to an inhibition as far as moveables are concerned.

CHAP. V.

Powers of a court of equity with relation to bankrupts.

IN the two foregoing books are contained many inſtances of equity remedying imperfections in common law as to payment of debt. But that ſubject is not exhauſted: on the contrary, it enlarges upon us, when we take under conſideration the law concerning bankruptcy. And this branch was purpoſely reſerved, to be preſented to the reader in one view; for the parts are too intimately connected to bear a ſeparation without ſuffering by it.

This branch of law is of great importance in every commercial country; and in order to ſet it in a clear light, I cannot think of a better arrangement than what

follows. First, To ſtate the rules of common law. Second, To examine what equity dictates. Third, To ſtate the regulations of different countries. And to conclude with the proceedings of the court of ſeſſion.

The rules of common law are very ſhort, but very imperfect. Any deed done by a bankrupt is effectual at common law, no leſs than if he were ſolvent: nor is legal execution obſtructed by bankruptcy; a creditor, after his debtor's bankruptcy, having the ſame remedy for recovering payment, that he had before. The common law conſiders only whether the ſubject convey'd by the bankrupt or attached by his creditors, was his property: if it was, a court of common law ſupports both. Let him alien his moveables, or his land, intentionally to defraud his creditors, common law, however, regardleſs of intention, conſiders ſuch acts as legal exertions of property, and conſequently effectual.

In order to determine what juſtice dictates in this caſe, it becomes neceſſary in the firſt place to aſcertain, what circumſtances make bankruptcy in the common

ſenſe

ſenſe of mankind. A man, while he carries on trade, or hath any buſineſs that affords him a proſpect of gain, is not bankrupt though his effects may not be ſufficient to pay his debts; for he has it in view to pay all: but if his buſineſs fail him, and leave him no proſpect of paying his debts, he is in the common ſenſe of mankind inſolvent or bankrupt; his creditors muſt loſe by him.

This ſituation, though not uncommon, is yet ſingular in the eye of juſtice. *Property* and *intereſt*, for the moſt part ſtrictly united, are here disjoined: the bankrupt continues proprietor of his eſtate, but his creditors are the only perſons intereſted in it: they have the equitable right, and nothing remains with him but the legal right. In this view, a bankrupt may not improperly be held as a truſtee, bound to manage his effects for behoof of his creditors: the duty of a bankrupt is in effect the ſame with that of a truſtee, as both of them ought to make a faithful account of the ſubjects under their management. While a debtor continues ſolvent, he may pay his creditors in what order he pleaſes; becauſe no creditor ſuffers by the prefer-

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ence given to another. But upon his bankruptcy or inſolvency, that privilege vaniſhes: he is bound to all his creditors equally; and juſtice dictates, that he ought to diſtribute his effects among them equally. A creditor demanding payment from his debtors, or from their cautioners bound conjunctly and ſeverally, ought to behave with impartiality *: much more is this incumbent upon a bankrupt in making payment to his creditors. No diſtinction ought to be made but between real and perſonal creditors: a real ſecurity fairly obtained from a debtor in good circumſtances, is not prejudicial to the other creditors; and if unexceptionable originally, it cannot be voided by what may afterward happen to the debtor. There is no injuſtice therefore in the preference given to real creditors before perſonal (*a*).

(*a*) The following rule is contained in a code of Hindoſtan laws. "When ſeveral men are creditors "to the ſame debtor, they ſhall make a ſort of com-"mon ſtock of their debts, and receive their re-"ſpective ſhares of each payment. If any creditor "refuſe to accede to this agreement, he ſhall loſe "his ſhare."

* Vol. 1. p. 172. et ſeqq.

To

To confirm this doctrine, I appeal to the general ſenſe of the nation, vouched by act 5. parl. 1696, which, taking for granted that a bankrupt ought to behave with impartiality to his creditors, prohibits him to prefer any of his creditors before the reſt, and annuls every one of his deeds giving ſuch undue preference. And I appeal alſo to the Engliſh bankrupt-ſtatutes, which evidently reſt upon the ſame foundation.

Thus ſtands the duty of a bankrupt with reſpect to his creditors, founded on the rules of juſtice. The duty of the creditors with reſpect to each other may ſeem not ſo evident. It is the privilege of a creditor who obtains not ſatisfaction, to draw his payment out of the debtor's effects; and it will not readily occur, that the debtor's inſolvency, the very circumſtance which enhances the value of the privilege, ſhould be a bar to it. This way of thinking is natural; and hence the following maxims that have obtained an univerſal currency: *Prior tempore potio jure: Vigilantibus non dormientibus jura ſubveniunt.* In rude times, before the connections of ſociety have taken deep root, ſelfiſh principles

ciples prevail over thoſe that are ſocial. Thus in the preſent caſe, a creditor, partial to his own intereſt, is apt to confine his thoughts to the power he hath over his debtor; overlooking, or ſeeing but obſcurely, that where the debtor is bankrupt, his creditors, connected now with each other by a common fund, ought to divide that fund equally among them. But by refinement of manners, man becomes more a ſocial than a ſelfiſh being; and, by the improvement of his faculties, he diſcovers the lawful authority of ſocial duties, as what he is bound to fulfil even in oppoſition to his own intereſt. By ſuch refinement it is at laſt perceived, that by the debtor's inſolvency, his perſonal creditors have all of them an equal claim upon his effects; that a creditor, taking meaſures to operate his payment, ought to conſider the connection he has with his fellow-creditors, engaged equally with him upon the ſame fund; and therefore that juſtice requires an equal diſtribution. In every view we take of the ſubject, we become more and more ſatisfied that this rule is agreeable to juſtice. To make the diſtribution of the common fund depend on

priority of execution, exhibits the appearance of a race, where the ſwifteſt obtains the prize: a race is a more manly competition, becauſe there is merit in ſwiftneſs; none in priority of execution, which depends upon accident more frequently than upon expedition. It is natural for ſavage animals to fall out about their prey, and to rob each other; but ſocial beings ought to be governed by the principle of benevolence: creditors in particular, connected by a common fund and equally intereſted, ſhould not like enemies ſtrive to prevent each other; but like near relations ſhould join in common meaſures for the common benefit.

This propoſition is put paſt doubt by the following argument. A debtor, after his inſolvency, is bound to diſtribute his effects equally among his creditors; and it would be an act of injuſtice in him to prefer any of them before the reſt. It neceſſarily follows, that a creditor cannot be innocent, who, knowing the bankruptcy, takes more than his proportion of the effects: if he take more by voluntary payment, he is acceſſory to an unjuſt act done by the bankrupt; and it will not be

thought that he can juſtly take more by execution than by voluntary payment. If he ſhould attempt ſuch wrong, it is the duty of the judge to refuſe execution *.

That creditors having notice of their debtor's bankruptcy are barred from taking advantage of each other, ſhall now be taken for granted. It is not ſo obvious what effect bankruptcy ought to have againſt creditors who are ignorant of it. I begin with payment made by a bankrupt in money or effects, which transfers the property to his creditor. It is demonſtrated above †, that even in the caſe of ſtellionate, the ſecond purchaſer, ſuppoſing him *in bona fide*, and not partaker of his author's fraud, is ſecure by getting the firſt infeftment; and that his purchaſe cannot be cut down in equity more than at common law. The reaſoning there concludes with equal if not ſuperior force in the caſe of bankruptcy: it is unjuſt in a bankrupt to prefer one creditor before another; but if he offer payment, the creditor who accepts, ſuppoſing him ignorant

* See book 1. part 1. chap. 8. ſect. 2.

† p. 41. 42.

of

of the bankruptcy, is innocent, and therefore ſecure: the property of the money or effects being transferred to him in lieu of his debt, there is no rule in equity more than at common law to forfeit him of his property. The ſame reaſoning concludes in favour of a creditor, who, ignorant of the bankruptcy, recovers payment by a poinding, or by a forthcoming upon an arreſtment.

Next comes the caſe of a real ſecurity, which transfers not the property of the ſubject. It is obſerved above, that a real ſecurity, obtained before bankruptcy, is in all events a preferable debt. But what if it be obtained after bankruptcy? The creditor, who, ignorant of his debtor's bankruptcy, obtains from him ſuch ſecurity, whether by legal execution or by voluntary deed, is indeed not culpable in any degree. But before this ſecurity exiſted, each of the creditors had an equitable right to a proportion of the bankrupt's effects; which right cannot be hurt by legal diligence, and ſtill leſs by a partial deed of the bankrupt, who acts againſt conſcience in preferring one of his creditors before the reſt. Where payment is

actually made, a court of equity can give no relief, for two reaſons: firſt, the innocent creditor, to whom the money was paid, cannot be deprived of his property; and next, a debt extinguiſhed by payment cannot be reared up in order to compel the *quondam* creditor to enter the liſts again with the remaining creditors. But where the creditor is ſtill *in petitorio*, demanding preference by virtue of his real ſecurity, the court cannot liſten to his claim; becauſe to prefer him would be to forfeit the other creditors of what they are juſtly intitled to.

If in a bankrupt it be unjuſt to divide his effects unequally among his creditors, it is ſtill more unjuſt to hurt his whole creditors by gratuitous alienations or gratuitous bonds. A gratuitous alienation transferring the property, cannot, it is true, be voided, if the donee be not in the knowledge of the bankruptcy: but he is liable for the value to the bankrupt's creditors, upon the rule of equity, *Nemo debet locupletari aliena jactura*; which is not applicable to an alienation before bankruptcy, becauſe by ſuch an alienation the creditors are not hurt. But againſt a gratuitous bond

claimed

claimed after bankruptcy, though executed and delivered while the granter was ſolvent, the rule *Nemo debet locupletari aliena jactura* is applicable; becauſe the taking payment is a direct prejudice to the creditors by leſſening their fund; and for that reaſon, a court of equity will not interpoſe to make ſuch a bond effectual. It deſerves attention, that this principle operates in favour of a creditor who lent his money even after the date of the gratuitous bond *.

The equitable right to the debtor's effects, which upon his inſolvency accrues to his creditors, makes it a wrong in him to ſell any of his effects privately without their conſent. The ſale indeed is effectual at common law; but the purchaſer, ſuppoſing his knowledge of the bankruptcy, is acceſſory to the wrong, and the ſale is voidable upon that ground. The principle of utility alſo declares againſt a ſale of that nature: for to permit a bankrupt to alien his effects privately, even for a juſt price, is throwing a temptation in his way to defraud his creditors, by the oppor-

* Dirleton, January 21. 1677, Ardblair contra Wilſon.

tunity

tunity it affords him to walk off with the money.

Thus we ſee, that in applying the rules of equity to the caſe of bankruptcy, two preliminary facts are of importance; firſt, the commencement of the bankruptcy; and, next, what knowledge creditors or others have of it: the former is neceſſary to be aſcertained in every caſe; the latter frequently. The neceſſity of ſuch proof tends to darken and perplex law-ſuits concerning bankruptcy. To aſcertain the commencement of bankruptcy muſt always be difficult, conſidering that it depends on an internal act of the debtor's mind deeming his affairs irretrievable: and the difficulty is greatly increaſed, when the knowledge of the bankruptcy comes alſo to be a point at iſſue; for ſuch knowledge muſt be gathered commonly from a variety of circumſtances that are ſcarce ever the ſame in any two caſes. To avoid ſuch intricate expiſcation, which tends to make law-ſuits endleſs and judges arbitrary, it has been a great aim of the legiſlature in every commercial country, to ſpecify ſome ouvert act that ſhall be held not only the commence-

ment

ment of bankruptcy, but alſo a public notification of it.

But if the ſpecifying a legal mark of bankruptcy be of great importance, the choice of a proper mark is no leſs nice than important. Whether in any country a choice altogether unexceptionable has been made, ſeems doubtful. It ought, in the firſt place, to be ſome act that cannot readily happen except in bankruptcy: for to fix a mark of bankruptcy on one who is not a bankrupt, would be a great puniſhment without a fault. Secondly, It muſt be an act that will readily happen in bankruptcy, and which a bankrupt cannot prevent: for if it be in his power to ſuppreſs it altogether, or for any time, he may in the interim do much wrong that will not admit a remedy.

Having thus gone through the rules of common law and the rules of equity concerning bankruptcy, we are, I preſume, ſufficiently prepared for the third article propoſed, namely, to ſtate the regulations of different countries upon that ſubject. And to bring the preſent article within reaſonable compaſs, I ſhall confine myſelf to the Roman law, the Engliſh law, and to that of

of Scotland, which may be thought ſufficient for a ſpecimen. I begin with the Roman law. A debtor's abſconding intitled his creditors to apply to the court for a *curator bonis*; and after the creditors were put in poſſeſſion by their *curator*, no creditor could take payment from the bankrupt *. This *miſſio in poſſeſſionem*, however, ſeems not to have been deemed a public notification of bankruptcy; for even after that period, a purchaſer from the bankrupt was ſecure, if it could not be proved that he was *particeps fraudis* †. But every gratuitous deed was reſcinded, whether the acquirer was acceſſory to the wrong or no ‡; and in particular a gratuitous diſcharge of a debt ‖.

Before the *miſſio in poſſeſſionem* the debtor continued to have the management as while he was ſolvent; and particularly was intitled to pay his creditors in what order he thought proper. It is accordingly laid down, That a creditor, who before the *miſſio in poſſeſſionem* receives payment, is ſe-

* l. 6. § 7. Quæ in fraud. cred. l. 10. § 16. eod.
† l. 9. eod.
‡ l. 6. § 11. eod.
‖ l. 1. § 2. eod.

cure, though he be in the knowledge of his debtor's inſolvency. *Sibi enim vigilavit*, ſays the author *: a doctrine very juſt with reſpect to a court of common law, but very averſe to Prætorian law or that of equity.

The defects of the foregoing ſyſtem are many, but ſo obvious as to make a liſt unneceſſary. I ſhall mention two particulars only, being of great importance. The firſt is, that the neceſſity of eſtabliſhing a public mark of bankruptcy which every one is preſumed to know, ſeems to have been altogether overlooked by the Romans. Even the *miſſio in poſſeſſionem*, as mentioned above, was not held ſuch a mark. It is true, that after ſuch poſſeſſion no creditor could take payment from the bankrupt. But why? Not becauſe of the creditor's *mala fides*, but becauſe of the creditors in general, being put in poſſeſſion of the bankrupt's funds, acquired thereby a *jus pignoris*; and in the diviſion of the price were accordingly intitled each to a rateable proportion. I obſerve next, that it is a great overſight in the Roman law, to ne-

* l. 6. § 7. Quæ in fraud. cred.

glect that remarkable period which runs between the firſt act of bankruptcy and the *miſſio in poſſeſſionem*. In that period generally all contrivances are ſet on foot to cover the effects of the bankrupt, or to prefer favourite creditors.

In England, the regulations concerning bankrupts are extended farther than in the Roman law, and are brought much nearer the rules of equity above laid down. The nomination of commiſſioners by the chancellor upon application of the creditors, is, in effect, the ſame with the nomination of a *curator bonis* in the Roman law. But the foregoing defects of the Roman law are ſupplied, by declaring a debtor's abſconding or keeping out of the way, termed *the firſt act of bankruptcy*, to be a public mark or notification of bankruptcy, of which no perſon is ſuffered to plead ignorance. From that moment the hands both of the bankrupt and of his creditors are fettered: he can do no deed that is prejudicial to his creditors in general, or to any one in particular: they, on the other hand, are not permitted to receive a voluntary payment, nor to operate their payment by legal execution.

It

It is perhaps not eaſy to invent a regulation better calculated for fulfilling the rules of equity, than that now mentioned. It may be thought indeed, that the abſconding or keeping out of the way, ſuppoſing it momentary only, is a circumſtance too ſlight and too private to be impoſed upon all the world as notorious. But the Engliſh bankrupt-ſtatutes are confined to mercantile people, who live by buying and ſelling: and with reſpect to a merchant, his abſconding or keeping out of the way is a mark of bankruptcy neither ſlight nor obſcure. Merchants convene regularly in the exchange; a retailer ought to be found in his ſhop or warehouſe; and their abſconding or abſence without a juſt cauſe is conſpicuous. A creditor may happen, for ſome time, to be ignorant of the firſt act of bankruptcy; but a ſingular caſe muſt not be made an exception: juſtice muſt be diſtributed by general rules, tho' at the expence of a few individuals; in order to prevent judges from becoming arbitrary, and law-ſuits endleſs. There is indeed a hardſhip in this regulation with reſpect to commerce, which is ſoftened by

a late ſtatute *, enacting, That money received from a bankrupt in the courſe of trade and dealing before the commiſſion of bankruptcy ſued forth, whether in payment of goods ſold to the bankrupt, or of a bill of exchange accepted by him, ſhall not be claimed by the aſſignees to the bankruptcy, unleſs it be made appear, that the perſon ſo receiving payment was in the knowledge of the debtor's bankruptcy. This is in effect declaring with reſpect to payment received in the courſe of trade, that the iſſuing the commiſſion of bankruptcy is to be deemed the firſt public mark or notification of bankruptcy, and not what is called the firſt act of bankruptcy.

The firſt bankrupt-act we have in Scotland is an act of ſederunt ratified by ſtatute 1621, cap. 18. intitled, "A ratification of the act of the Lords of Council and Seſſion againſt unlawful diſpoſitions and alienations made by dyvours and bankrupts." In this act of ſederunt, two articles only are brought under conſideration. Firſt, Fraudulent contrivances to withdraw a bankrupt's effects from his

* 19. Geo. II. cap. 32.

creditors,

creditors, by making ſimulate and feigned conveyances. Second, The partiality of bankrupts, by making payment to favourite creditors, neglecting others. With reſpect to the firſt, it is ſet forth in the preamble, " That the fraud, malice, and " falſehood of dyvours and bankrupts was " become ſo frequent as to be in hazard " of diſſolving all truſt and commerce a- " mong the ſubjects of this kingdom; " that many, by their apparent wealth in " land and goods, and by their ſhow of " conſcience and honeſty, having obtain- " ed credit, intend not to pay their debts, " but either live riotouſly, or withdraw " themſelves or their goods forth of this " realm to elude all execution of juſtice: " and to that effect, and in manifeſt de- " fraud of their creditors, make ſimulate " and fraudful alienations, diſpoſitions, " and other ſecurities of their lands, re- " verſions, teinds, goods, actions, debts, " and other ſubjects belonging to them, to " their wives, children, kinſmen, allies, " and other confident and interpoſed per- " ſons, without any true, lawful, or neceſ- " ſary cauſe, and without any juſt or true " price; whereby the creditors and cau-

" tioners

" tioners are falſely and godleſsly defraud-
" ed of their juſt debts, and many honeſt
" families are ruined." For remedying this evil, it is ordained and declared,
" Firſt, That all alienations, diſpoſitions,
" aſſignations, made by the debtor, of any
" of his lands, teinds, reverſions, actions,
" debts, or goods, to any conjunct or con-
" fident perſon, without true, juſt, and
" neceſſary cauſes, and without a juſt price
" really paid, ſhall be of no force or effect
" againſt prior creditors. Second, Who-
" ever purchaſes from the ſaid interpoſed
" perſons any of the bankrupt's lands or
" goods, at a juſt price, or in ſatisfaction
" of debt, *bona fide*, without being par-
" taker of the fraud, ſhall be ſecure.
" Third, The receiver of the price ſhall
" make the ſame forthcoming to the bank-
" rupt's creditors. Fourth, It ſhall be ſuf-
" ficient evidence of the fraud intended a-
" gainſt the creditors, if they verify by
" writ, or by oath of the party-receiver of
" any right from the dyvour or bankrupt,
" that the ſame was made without any
" true, juſt, and neceſſary cauſe, or with-
" out any true price; or that the lands or
" goods of the bankrupt being ſold by the
" inter-

" interpoſed perſon, the price is to be con-
" verted to the bankrupt's profit and uſe.
" Fifth, All ſuch bankrupts, and interpo-
" ſed perſons for covering or executing
" their frauds, and all others who ſhall
" give counſel and aſſiſtance to the ſaid
" bankrupts in deviſing and practiſing
" their frauds and godleſs deceits to the
" prejudice of their true creditors, ſhall be
" reputed and holden diſhoneſt, falſe, and
" infamous perſons, incapable of all ho-
" nours, dignities, benefices, and offices,
" or to paſs upon an inqueſt or aſſize, or to
" bear witneſs in judgement or outwith,
" in any time coming."

The clauſe reſtraining a bankrupt's partiality in making payment to favourite creditors and neglecting others, is expreſſed in the following terms: " If any bank-
" rupt, or interpoſed perſon partaker of
" his fraud, ſhall make any voluntary pay-
" ment or right to any perſon, in defraud
" of the more timely diligence of another
" creditor, having ſerved inhibition, or u-
" ſed horning, arreſtment, compriſing, or
" other lawful mean to affect the bank-
" rupt's lands, goods, or price thereof; in
" that caſe the bankrupt, or interpoſed
" perſon,

" perſon, ſhall be bound to make the ſame " forthcoming to the creditor having uſed " the more timely diligence. And this cre- " ditor ſhall likewiſe have good action to " recover from the co-creditor poſterior in " diligence what was voluntarily paid to " him in defraud of the purſuer."

With reſpect to the article concerning fraud, this act is an additional inſtance of what I have had more than one opportunity to obſerve, that the court of ſeſſion, for many years after its inſtitution, acted as a court of common law only. No wrong calls louder for a remedy than frauds committed by bankrupts in withdrawing their effects from their creditors; and yet from the preamble of the act it appears, that the court of ſeſſion had not, before that period, aſſumed the power to redreſs any of theſe frauds. Nor is it clear that the power was aſſumed by the ſeſſion as a court of equity: it is more preſumeable that the court conſidered itſelf as a court of common law acting by legiſlative authority; firſt by authority of its own act, and afterward by authority of the act of parliament: — I ſay by authority of its own act; for the court of ſeſſion

being empowered by parliament to make regulations for the better adminiſtration of juſtice, an act of ſederunt originally was held equivalent to an act of parliament (*a*).

This act, framed as we ought to ſuppoſe by the wiſeſt heads of the nation, is however not only ſhamefully imperfect, but in ſeveral particulars groſsly unjuſt. No general regulations are eſtabliſhed concerning the conduct of the bankrupt, of his creditors, or of the judges: no ouvert act is fixed as a public notification of bankruptcy: nor is there any regulation barring the creditors from taking advantage of each other by precipitancy of execution. Such blindneſs is the leſs excuſable in judges to whom the Roman law was no ſtranger; and who, in an Engliſh bankrupt-ſtatute paſſed a few years before, had a good model to copy after, and to

(*a*) Acts by a bankrupt defrauding his creditors, as mentioned at the beginning of this chapter, are left without remedy by common law. As bankruptcy does not diveſt a man of his property, he is underſtood at common law to have the ſame power over his eſtate that he had before, however prejudicial to his creditors his acts and deeds may be, and however ill intended.

improve. But this act, which has occaſioned many irregular and even unjuſt deciſions, muſt be examined more particularly.

In the firſt place, There cannot be a more pregnant inſtance of unſkilfulneſs in making laws, than the clauſe confining the evidence of fraud to the writ or oath of the perſon who benefits by it. A very little inſight into human nature would have taught our judges, that it is in vain to think of detecting fraud by ſuch evidence. Covered crimes muſt be detected by circumſtances, or not at all; and ſuch matters, being beyond the reach of a general rule, ought to be left with judges, without any rule other than to determine every caſe according to its peculiar circumſtances. We ſhall accordingly have occaſion to ſee, that the court of ſeſſion were forc'd to abandon the evidence eſtabliſhed by themſelves; and in every inſtance to indulge ſuch proof as the nature of the caſe will admit. In the ſecond place, With reſpect to deeds done againſt creditors, it muſt appear ſtrange, that the act of ſederunt ſhould be confined to actual fraud; a crime that merits puniſhment,

ment, and to which accordingly a puniſhment is annexed in the act itſelf. It bars not a gratuitous deed in favour of children or others, however prejudicial to creditors; provided it be not granted purpoſely to hurt them, but to benefit the donees. This palpable defect in the act will be accounted for by an obſervation one has occaſion to make daily, that in reforming abuſes, there is commonly a degree of diffidence, which prevents the innovation from being carried its due length. The repreſſing actual fraud was a great improvement, which filled the mind, and ſcarce left room for a thought of further improvement. And, in all probability, it appeared a bolder ſtep to ſupply the defect of common law by voiding frauds committed by bankrupts, than to ſupply the defect of the ſtatute by voiding alſo gratuitous deeds.

So much upon the firſt article. With reſpect to the ſecond, contrived to reſtrain the bankrupt from acting partially among his creditors, it is not in my power to give it any colour either of juſtice or expediency. I have been much diſpoſed to think, that an inchoated act of execution was in-

tended by the legiſlature to be the public notification of bankruptcy, ſo often mentioned. But I am obliged to relinquiſh that thought, when I conſider, that our ſtatute 1621 is not confined to merchants, but comprehends the whole body of the people; and that an inchoated act of horning or arreſtment is ſcarce a mark of bankruptcy at preſent, far leſs when the act was made, with reſpect eſpecially to landed men. And that in fact it was not intended a mark or notification of bankruptcy, is clear from the following conſiderations, that creditors are not barred by it from forcing payment by legal execution; nor even the bankrupt from acting partially among his creditors, except with regard to thoſe only who have commenced execution: all the other creditors are left at his mercy as much as before the act was made. This however is an omiſſion only; and I could wiſh, for the honour of my country, that nothing but an omiſſion could be objected to this clauſe: but it is fruitleſs to diſguiſe that it is groſsly unjuſt. There ought, no doubt, to be a remedy againſt the creditor who obtains payment by the bankrupt's partiality: but to make

make him ſurrender the whole to the creditor who has got the ſtart in execution, is an unjuſt remedy; for juſtice only requires that he ſhould ſurrender a part, that both may be upon a level. To make him ſurrender the whole, is indeed an effectual cure to the bankrupt's partiality, but a cure that is worſe than the diſeaſe; worſe, I ſay, becauſe the partiality of an individual is a ſpectacle much leſs diſguſting than is the partiality of law. This regulation is unjuſt, even ſuppoſing the bankruptcy to be known to the creditor who receives payment. But how much more glaring the injuſtice, where he happens to be ignorant of that fact? the money he receives becomes undoubtedly his property; and juſtice forfeits no man of his property without a fault. Nor is this all. The regulation, in itſelf unjuſt, is no leſs ſo with reſpect to conſequences. Voluntary payment effectually binds up the creditor from legal execution: in the mean time the funds of the bankrupt are ſwept away by other creditors: and the creditor is forfeited for condeſcending to take payment, being left without a remedy. Viewing now this regulation with reſpect to utility,

tility, it appears no leſs inexpedient than unjuſt: to excite creditors to take the ſtart in execution, it holds out a premium, to which they are not intitled by the rules of juſtice; a premium that tends to a very unhappy conſequence, namely, to overwhelm with precipitant execution honeſt dealers, who, treated with humanity, might have emerged out of their difficulties, and have become bold and proſperous traders.

The next bankrupt-ſtatute in order of time is the act 62. parl. 1661, ranking *pari paſſu* with the firſt effectual appriſing, all appriſings of a prior date, and all led within year and day of it; for I ſhall have occaſion to ſhow afterward, that this ſtatute ought to be claſſed with thoſe concerning bankruptcy, though not commonly conſidered in that light. But the connection of matter, more intimate than that of time, leads me firſt to the act 5. parl. 1696, intended evidently to ſupply the defects of the act 1621. Experience diſcovered in the act 1621 one defect mentioned above, that no ouvert act is aſcertained, to be held the firſt act of bankruptcy as well as a public notification of it. This defect

defect is ſupplied by the act 1696, in the following manner. An inſolvent debtor under execution by horning and caption, is declared a notour bankrupt, provided he be impriſoned, or retire to a ſanctuary, or fly, or abſcond, or defend his perſon by force. This is one term, and counting ſixty days back, another term is fixed; after which all partial deeds by a bankrupt among his creditors are prohibited. The words are, "All diſpoſitions, aſſignations, "or other deeds, granted by the bank-"rupt at any time within ſixty days before "his notour bankruptcy, in favour of a "creditor, directly or indirectly, for his "ſatisfaction or further ſecurity, prefer-"ring him to other creditors, ſhall be null "and void."

It will be obſerved, that this ſtatute, with reſpect to the legal commencement of bankruptcy, differs widely from thoſe made in England. And indeed, to have copied theſe ſtatutes, by making abſconding, or keeping out of the way, the firſt act of bankruptcy, would in this country have been improper. In England, arreſtment of the debtor's perſon till he find bail being commonly the firſt act of execution,

cution, a debtor, to avoid impriſonment, muſt abſcond or keep out of the way the moment his credit is ſuſpected; and therefore in England, abſconding or keeping out of the way is a mark of bankruptcy not at all ambiguous. But in Scotland, this mark of bankruptcy would always be too late; for with us there muſt be ſeveral ſteps of execution before a bankrupt be forc'd to abſcond, letters of horning, a charge, a denunciation, a caption. In this country therefore it was neceſſary to ſpecify ſome mark of bankruptcy antecedent to abſconding. The mark that would correſpond the neareſt to abſconding in England, is denunciation upon a horning; for after receiving a charge, the debtor, if he have any credit, will be upon his guard againſt denunciation, ſuppoſing it to be eſtabliſhed as a public notification of bankruptcy. But our legiſlature perhaps ſhowed greater penetration, in commencing bankruptcy from a term of which even the bankrupt muſt be ignorant. Sudden bankruptcy is ſo rare, as ſcarce to deſerve the attention of the legiſlature. A man commonly becomes bankrupt long before he is publicly known to be ſo by

ultimate execution; and conſidering that the ſuſpicious period, during which a debtor is tempted to act fraudulently, commences the moment he foreſees the ruin of his credit, which is generally more than two months before his notour bankruptcy, it appears the ſafeſt courſe to tie up a bankrupt's hands during that period. Such retroſpect from notour bankruptcy cannot be productive of any wrong, if it have no other effect but to void ſecurities, which creditors obtain by force of execution, or by the voluntary deed of their debtor. And therefore the ſtatute 1696, as far as concerns the commencement of bankruptcy, ſeems wiſe and political; and perhaps the beſt that is to be found in any country.

The ſtatute adheres ſtrictly to the principles of equity above laid down, as far as it voids every ſecurity granted to one creditor in prejudice of the reſt, within ſixty days before notour bankruptcy. But I muſt add, with regret, that it goes unwarily too far, when it voids alſo without diſtinction conveyances made in ſatisfaction or payment of debt. To deprive a man of a ſubject, the property of which

he has obtained *bona fide* in lieu of a debt, is, as obſerved above, inconſiſtent with an inviolable rule of juſtice, That an innocent man ought never to be forfeited of his property: and therefore a conveyance of this nature ought not to be voided, unleſs the creditor receiving ſatisfaction be in the knowledge of his debtor's bankruptcy.

But this is an error of ſmall importance compared with what follows. After the commencement of bankruptcy, aſcertained as above, a bankrupt is prohibited to act partially among his creditors; and yet creditors are permitted, as in the act 1621, to act partially among themſelves, and to prevent each other by legal execution. To permit a creditor to take by legal execution what he is prohibited to receive voluntarily, is a glaring abſurdity. Payment or ſatisfaction obtained *bona fide*, whether from the bankrupt himſelf, or by force of execution, ought to be ſuſtained: but after the commencement of bankruptcy, there is the ſame juſtice for voiding a ſecurity obtained by execution, that there is for voiding a ſecurity obtained voluntarily

voluntarily from the bankrupt. And yet our legiſlature has deviated ſo widely from juſtice, as to give full ſcope to execution even after notour bankruptcy. Nothing can be conceived more groſs. It had been a wiſe regulation, that upon notour bankruptcy a factor ſhould be appointed, to convert the bankrupt's effects into money, and to diſtribute the ſame among the creditors at the ſight of the court of ſeſſion. This regulation, eſtabliſhed in Rome and in England, ought not to have been overlooked. But if it was not palatable, our legiſlature ought at leaſt to have prohibited more to be taken by any execution, than a rateable proportion; for after notour bankruptcy no creditor can be *in bona fide* to take payment of his whole debt.

The injuſtice and abſurdity of permitting a creditor to take by execution what he is diſcharged to receive from his debtor voluntarily, though left without remedy by our two capital bankrupt-ſtatutes, have not however been altogether overlooked. And I now proceed to the regulations made to correct that evil, which, for the ſake of connection, I have reſerved to the laſt place, though one of theſe regulations comes in

point of time before the act 1696. The great load of debt contracted during our civil wars in the reign of Charles I. and the decay of credit occaſioned thereby, produced the act 62. parl. 1661, laying down regulations ſuited to the times, for eaſing debtors and reſtoring credit. Among other articles, "All appriſings de-" duced ſince the 1ſt of January 1652, " before the firſt effectual appriſing, or " after, but within year and day of the " ſame, are appointed to come in *pari* " *paſſu*, as if one appriſing had been de-" duced for the whole." This regulation is general without reſpect to bankruptcy. But whatever ſtretches may be neceſſary for a particular exigency, it is evident, that the regulation cannot be juſtified as a perpetual law, except upon ſuppoſition that all the appriſings are deduced after the debtor is inſolvent. A debtor while he is in good circumſtances, may pay his debts or grant real ſecurities in what order he pleaſes. By uſing this privilege he harms none of his creditors: they have no ground for challenging ſuch a deed at the time when it is granted; and his ſupervening bankruptcy cannot afford them a ground

of

of challenge which they had not at firſt. A ſecurity obtained by an appriſing or adjudication is preciſely ſimilar. If the debtor be ſolvent when an adjudication is obtained by a creditor, the other creditors ſuffer not by it; and the adjudger who has thus fairly obtained a ſecurity, muſt be intitled to make the beſt of his right, whether the debtor afterward become inſolvent or no. I have reaſon therefore to place the foregoing ſtatute, conſidered as perpetual, among thoſe which have been enacted in the caſe of bankruptcy: and in order to fulfil the rules of juſtice, the court of ſeſſion, as a court of equity, will conſider it in that light. The involved circumſtances of debtors and creditors at the time of the ſtatute, made it a ſalutary regulation to bring in appriſers *pari paſſu*, even where the debtor was ſolvent, though evidently a ſtretch againſt juſtice: but to adhere ſtrictly to the regulation at preſent, when there is not the ſame neceſſity, is to adhere rigidly to the words againſt the mind and intendment of the legiſlature; for ſurely it could not be intended, that a creditor ſhould for ever be deprived of the preference he obtains by being the firſt adjudger,

adjudger, even where the other creditors are not hurt by that preference. That after the debtor's bankruptcy a creditor ſhould not have more than his proportion of the common fund, is extremely juſt; and ſo far the ſtatute ought to be held perpetual. What farther is enacted to anſwer a particular purpoſe, ought to be conſidered as temporary; becauſe the legiſlature could not mean it to be perpetual.

If then the foregoing ſtatute be held to be perpetual, it muſt be confined to the caſe of bankruptcy; and in that view it deſerves to be immortal. The firſt adjudication may be juſtly held a public mark or notification of the debtor's bankruptcy, warning the other creditors to beſtir themſelves; and a year commonly is ſufficient for them to lead adjudications, which, by authority of the ſtatute, will intitle each creditor to a proportion of the debtor's real eſtate. This was a happy commencement of a much wanted reformation. The court of ſeſſion, taking example, ventured to declare by an act of ſederunt *, That the priority of a creditor's confirmation ſhall

* Feb. 28. 1662.

afford

afford no preference in competition with other creditors confirming within ſix months of the death of their debtor. By another act of ſederunt *, All arreſtments within ſixty days preceding the notour bankruptcy, or within four months thereafter, are ranked *pari paſſu*; and every creditor who poinds within ſixty days preceding the notour bankruptcy, or within four months thereafter, is obliged to communicate a proportion to the other creditors ſuing him within a limited time †. In the heat of reformation, the laſt-mentioned regulation is carried too far. Poinding operates at once a transference of the property and a diſcharge of the debt; and ſuppoſing a poinder to be ignorant of his debtor's inſolvency, which is frequently the caſe where the execution precedes the notour bankruptcy, there is no rule in equity more than at common law to oblige the poinder to communicate any proportion to the other creditors. Nay, it is poſſible that a debtor may be ſolvent within ſixty days of his notour bankruptcy: a poinding againſt him in that caſe, which wounds

* Auguſt 9. 1754. † Act of ſederunt, ibid.

not

not the other creditors, ought not to afford them the ſhadow of a claim (*a*).

The principles of equity ripening gradually, our zeal for the act 1661 has increaſed; and there is a viſible tendency in our judges to make the remedy ſtill more complete. In order to that end, the court of ſeſſion, as a court of equity, might have enlarged the time given by the ſtatute for leading adjudications. The principles of juſtice authoriſe a ſtill bolder ſtep, which is, to put upon an equal footing all adjudications led upon debts exiſting before the firſt adjudication. But the court of ſeſſion, wavering always as to their equitable powers, have not hitherto ventured ſo far. Not adverting to an obvious doctrine, That in order to fulfil juſtice it is

(*a*) Experience ſoon ſuggeſted, that the two laſt-mentioned acts of ſederunt required ſeveral emendations; for which reaſon, being temporary only, they were allowed to run out. And thus again we were laid open to the rapacity of creditors endeavouring to prevent one another by legal execution; till a remedy was provided by a Britiſh ſtatute, that ſhall be mentioned at the end of this chapter *cum elogio*, being the moſt perfect bankrupt-ſtatute that ever was contrived by the wit of man, as far as moveables are concerned.

lawful to improve means laid down in a ſtatute, the court of ſeſſion hath not attempted directly to enlarge the time for bringing in adjudgers *pari paſſu*: but they do the ſame thing every day indirectly; for upon the application of any creditor, ſetting forth, "That if the common *indu-* "*ciæ* required in the proceſſes of conſtitu- "tion and adjudication be not abridged "in his favour, he cannot hope to com- "plete his adjudication within year and "day of the adjudication firſt effectual," the court, without requiring any cauſe to be aſſigned for the delay, give authority for adjudging ſummarily; which in effect is declaring, that all adjudgers ſhall have the benefit of the ſtatute, provided the ſummons of adjudication be within year and day of the firſt effectual adjudication. It may be queſtioned whether this be not too indulgent: the extraordinary privilege of ſhortening the forms, ought not to be permitted, unleſs the creditor can aſſign ſome good cauſe for his delay; becauſe law ought not to be ſtretched in favour of thoſe who ſuffer by their own fault or neglect. It is curious at the ſame time to obſerve, that a court, like an individual,

afraid of a bold ſtep, will, to ſhun it, venture upon one no leſs bold in reality, though perhaps leſs in appearance: for to abridge or diſpenſe with forms, ſalutary in themſelves and ſanctified by inveterate practice, is an act of authority no leſs extraordinary, than to enlarge the time afforded in a ſtatute for ranking adjudgers *pari paſſu*.

But after all, the foregoing regulations for putting creditors upon a level in the caſe of bankruptcy, are mere palliatives: they ſoften the diſeaſe, but ſtrike not at the root. The court of ſeſſion tried once a bolder and more effectual remedy, borrowed from the law of Rome and of England, that of naming a factor for managing and diſpoſing of the bankrupt's moveable funds, in order that the price may be equally diſtributed among the creditors. It was made for a trial, and in that view was made temporary. Why it was not renewed and made perpetual, I cannot gueſs, if it was not that the court doubting of its powers, thought a ſtatute neceſſary. One thing is certain, that the late bankrupt-ſtatute, mentioned below, was framed

framed by the judges of that court, and procured upon their application.

According to the method propoſed in the beginning, nothing now remains but the operations of the court of ſeſſion, to which I proceed, beginning with deciſions relative to the ſtatutes, and concluding with deciſions founded on equity independent of the ſtatutes. And firſt, the ſtatute 1621 has been extended to a leaſe of land ſet to a truſtee at an undervalue, in order that the bankrupt himſelf might enjoy the profits. A leaſe of this nature, though not comprehended under the words of the act, comes plainly under its ſpirit and intention; and therefore it was the duty of the court to extend the act to that caſe. A fraudulent bond granted by a bankrupt in order to withdraw from the true creditors a part of the fund for the bankrupt's own behoof, is another example of the ſame kind. For, as Sir George Mackenzie obſerves in his explication of this act, "Though neither tacks nor bonds "be comprehended under the letter of the "law, yet the reaſon of the law extends "to them; and in laws founded on the "principles of reaſon, extenſions from the

" ſame principles are natural. And in " laws introduced for obviating of cheats, " extenſions are moſt neceſſary, becauſe " the ſame ſubtile and fraudulent inclina- " tion that tempted the debtor to cheat " his creditors, will tempt him likewiſe " to cheat the law, if the wiſdom and pru- " dence of the judge do not interpoſe." A diſcharge granted by the bankrupt in order to cover a debt from his creditors for his own behoof, will alſo come under the act by an equitable interpretation.

With reſpect to the evidence required in the firſt article of the ſtatute 1621, for detecting fraudulent deeds, the court of ſeſſion hath aſſumed a power proper and peculiar to a court of equity. It has been forc'd to abandon the oath or writ of the partaker of the fraud, being a means altogether inſufficient to anſwer the purpoſe of the ſtatute, and in place of it to lay hold of ſuch evidence as can be had. It is accordingly the practice of the court, after weighing circumſtances, to preſume ſometimes in favour of the deed till fraud be proved, and ſometimes againſt the deed till a proof be brought of its being fair and honeſt. Thus a bond bearing borrowed

rowed money, granted by a bankrupt to a conjunct and confident perſon, was preſumed to be fairly granted for the cauſe expreſſed; and the burden of proving it to have been granted without any juſt cauſe, was, in terms of the act, laid upon the purſuer of the reduction *. A diſpoſition by a bankrupt of his whole heritage to his ſon-in-law, upon the narrative of a price paid, was found probative, unleſs redargued by the diſponee's oath †. A diſpoſition by a bankrupt to his brother, bearing to be for ſecurity of a ſum inſtantly borrowed, was ſuſtained; but admitting the cauſe expreſſed to be redargued by the diſponee's oath. And the judges diſtinguiſhed this caſe from that of a diſpoſition bearing a valuable conſideration in general, which muſt be otherwiſe verified than by the diſpoſition ‡.

On the other hand, in a reduction upon the act 1621 of a bond bearing borrowed money granted by a bankrupt to his brother, the judges thought, that though

* Durie, Jan. 22. 1630, Hope-Pringle contra Carre.

† Durie, Jan 17. 1632, Skene contra Beatſon.

‡ Gosford, Nov. 28. 1673, Campbell contra Campbell.

bonds

bonds *inter conjunctos* may prove where commercial dealings appear; yet as no ſuch dealings were alledged, and as the creditor's circumſtances made the advancement of ſo large a ſum improbable, the bond was not ſuſtained as probative of its cauſe *. A diſpoſition of land by a bankrupt to his brother, bearing a valuable conſideration in general, was not ſuſtained as probative of its narrative in prejudice of prior creditors; and it was laid on the diſponee to aſtruct the ſame †. And he having ſpecified, that it was for a ſum of money advanced in ſpecie to his brother, which he offered to depone upon, the court found this not relevant ‡. In a ſimilar caſe, the diſponee having produced two bonds due to him by the diſponer, and offering to give his oath that theſe were the cauſe of the diſpoſition, the court thought this ſufficient ‖.

* Fountainhall, Forbes, Dec. 5. 1707, Maclearie contra Glen.

† Stair, Nov. 29. 1671, Whitehead contra Lidderdale.

‡ Stair, Dec. 14. 1671, inter eoſdem.

‖ Stair, Dec. 15. 1671, Duff contra Forbes of Culloden.

A diſpoſition by a bankrupt to a conjunct or confident perſon, referring to a prior engagement as its cauſe, is not ſuſtained unleſs the prior engagement be inſtructed. Thus an aſſignment made by a bankrupt to a conjunct and confident perſon, bearing to be a ſecurity for ſums due to the aſſignee, was preſumed to be *in fraudem creditorum*, unleſs the aſſignee would bring evidence of the debts referred to in the deed *. And the aſſignee ſpecifying, that he took the aſſignment for behoof of a third party, one of the bankrupt's creditors, the aſſignment was ſuſtained †. An aſſignment by a bankrupt to his brother, bearing to be a ſecurity for debts owing to him, was preſumed gratuitous, unleſs the aſſignee would inſtruct otherwiſe than by his own oath, that he was creditor ‡. To ſupport the narrative of a diſpoſition by a bankrupt to his ſon, bearing for its cauſe cer-

* Durie, Haddington, Feb. 12. 1622, Denniſon contra Young.

† Hope, (De creditoribus), Feb. 27. 1622, inter eoſdem.

‡ Durie, Jan. 29. 1629, Auld contra Smith; Stair, July 15. 1670, Hamilton contra Boyd.

tain

tain debts undertaken by the ſon, it was judged ſufficient that the ſon offered to prove by the creditors mentioned in the diſpoſition, that he had made payment to them in terms of the diſpoſition *. A diſpoſition by a bankrupt to his brother, bearing to be a ſecurity for certain ſums due by bond, was thought ſufficiently ſupported by production of the bonds, unleſs the purſuer would offer to prove, that the bonds were granted after inſolvency. Here no ſuſpicious circumſtances occurred, other than the conjunction itſelf; and if ſuch a proof of a valuable conſideration be not held ſufficient, all commerce among relations will be at an end. It might upon the ſame footing be doubted, whether even a proof by witneſſes of the actual delivery of the money would be ſufficient, which might be done ſimulately, in order to ſupport a bond, as well as a bond be granted ſimulately in order to ſupport a diſpoſition †. It will be obſerved, that ſome of the foregoing caſes are of bonds granted after bankruptcy, as for

* Stair, Jan. 9. 1672, Robertſon contra Robertſon.

† Fountainhall, Feb. 22. 1711, Rule contra Purdie.

borrowed money, which ought not to be ſuſtained in equity. But the court of ſeſſion, as will be ſeen afterward, is in the practice of ſuſtaining ſuch bonds, for no better reaſon than that they are not prohibited by the bankrupt-ſtatutes.

With reſpect to the ſecond article of the act 1621, prohibiting payment to be made in prejudice of a creditor who is *in curſu diligentiæ*, the court of ſeſſion ventured to correct the injuſtice of this article, by refuſing to oblige a creditor who had obtained payment, to deliver the money to the creditor firſt in execution; unleſs it could be verified, that at the time of the payment the debtor was commonly reputed a bankrupt *. A debtor commonly reputed a bankrupt will always be held ſuch by his creditors; and a creditor knowing of his debtor's bankruptcy cannot juſtly take more than his proportion. Where payment is made before inchoated execution, and yet within threeſcore days of notour bankruptcy, the court of ſeſſion hath no occaſion to extend its equitable powers to

* Dalrymple, Bruce, June 7. 1715, Tweedie contra Din.

ſupport ſuch payment, which ſtands free of both ſtatutes; for the ſtatute 1621 challenges no payments but what are made after inchoated execution, and payments are not at all mentioned in the ſtatute 1696. Payments after notour bankruptcy are in a different caſe: they are barred in equity, though not by this ſtatute.

The ſecond branch of the act 1621, ſecuring a creditor who has commenced execution againſt the partiality of his debtor, is ſo ſtrictly interpreted by the court of ſeſſion, that where a ſecurity is voided by a creditor prior in execution, the whole benefit is given to him. And the act 1696 is ſo ſtrictly interpreted, that moveables being delivered to a creditor in ſatisfaction of his debt, the tranſaction was voided becauſe delivery was made within ſixty days before notour bankruptcy *; though, abſtracting from the injuſtice of depriving an innocent man of his property, the court, in interpreting a rigorous ſtatute, ought to have limited the words within their narroweſt meaning, by finding, that

* Dalrymple, Jan. 27. 1715, Forbes of Ballogie, July 19. 1728, Smith contra Taylor.

move-

moveables, the commerce of which ought to be free, are not comprehended in the ſtatute.

By the act 1696, as above obſerved, "All "diſpoſitions, &c. granted by a debtor "within ſixty days before his notour bank-"ruptcy, in favour of a creditor, for his "ſatisfaction or ſecurity, preferring him "before other creditors, are declared null "and void." This clauſe admits a double meaning: it may import a total nullity; or it may import a nullity as far only as that creditor is preferred before others. The former meaning would be rational, ſuppoſing the creditors to be barred from execution as the bankrupt is from alienation: but as they are left free, the latter meaning ought to be adopted, as what anſwers the purpoſe of the legiſlature, and fulfils the rules of juſtice. And yet, I know not by what miſapprehenſion, the former is adopted by the court of ſeſſion. A diſpoſition accordingly of this kind was voided totally; without even giving the diſponee the benefit of a *pari paſſu* preference with the other creditors, who had attached the ſubject by legal execu-

tion *. This is laying hold of the words of a ſtatute, without regarding its ſpirit and intendment. It is worſe: it is giving a wrong ſenſe to an ambiguous clauſe, in oppoſition to the ſpirit and intendment. The obvious purpoſe of the act 1696 is not to deprive a bankrupt altogether of the management of his affairs, for in that caſe a *curator bonis* muſt have been appointed, but only to bar him from acting partially. It clearly follows, that a court of equity, ſupporting the ſpirit of the law, ought not to have carried the reduction farther than to redreſs the inequality intended by the diſpoſition. Yet the court of ſeſſion, in this caſe, was no leſs partial to the purſuers of the reduction, than the diſpoſition was to the defendant; and their decree exceeded the bounds of juſtice on the one ſide, as much as the bankrupt's diſpoſition did on the other. The ſolidity of this reaſoning will be clearly apprehended, in applying it to a ſecurity granted by a debtor in good credit, but who, within ſixty days after, becomes a notour bankrupt. The

* Fountainhall, Dalrymple, Dec. 4. 1704, Man contra Reid; July 19. 1728, Smith contra Taylor.

creditor,

creditor, being *in optima fide* to take a ſecurity in theſe circumſtances, merits no puniſhment. Another creditor, however, anxious about his debt, attaches the ſubject by legal execution; and thus gets the ſtart of the diſponee, whoſe hands by the diſpoſition are tied up from execution. Could one liſten with patience to a deciſion that voided the diſpoſition altogether, and preferred the other creditor?

With reſpect to particulars that come not under either of the bankrupt-ſtatutes, but are left to be regulated by equity, it is diſtreſſing to obſerve the never-ceaſing fluctuation of the court of ſeſſion between common law and equity. In many inſtances, the court hath given way to the injuſtice of common law without affording a remedy; for a very odd reaſon indeed, That no remedy is provided by ſtatute. In other inſtances, the court, exerting its equitable powers, has boldly applied the remedy. I proceed to examples of both.

A ſale by a notour bankrupt after the act 1696, was ſupported for the following reaſon, That it is not prohibited by the act *.

* Bruce, January 1. 1717, Burgh contra Gray.

Very

Very true. But, as above demonſtrated, it is prohibited by juſtice and by utility; and upon theſe *media* it ought to have been voided. And a bond for money was ſuſtained, though lent to a known bankrupt*. In thoſe days, it ſeems to have been aſſumed as a maxim, That every exerciſe of property even by a notour bankrupt, however deſtructive to his creditors, is lawful, except what are prohibited in expreſs terms by the bankrupt-ſtatutes. Upon the ſtatute 1696 it has been diſputed, whether an act be challengeable where no ſubject is aliened, and yet a partial preference is given. The caſe was as follows. An heir-apparent having given infeftments of annualrent, did thereafter grant a procuratory to ſerve himſelf heir, that his infeftment might accreſce to the annualrent-rights. In a competition between theſe annualrenters and poſterior adjudgers, it was objected againſt the procuratory, That it was granted by a notour bankrupt, and therefore null by the ſtatute 1696; the purpoſe of which is to annul every partial preference by a bankrupt, *direct or indirect*. It

* Stair, June 28. 1665, Monteith contra Anderſon.

was

was anſwered, That the ſtatute mentions only alienations made by the bankrupt, and reaches not every act that may be attended with a conſequential damage or benefit to ſome of the creditors. The court preferred the annualrenters *. Had the ſervice been before the bankruptcy, there could be no reaſon in equity againſt it: but a man, who, conſcious of his own bankruptcy, performs any act in order to prefer one creditor before another, is unjuſt; and the creditor who takes advantage of that act, knowing his debtor to be bankrupt, is partaker of the wrong. The court therefore denying a remedy in this caſe, acted as a court of common law, overlooking its equitable powers.

Oppoſite to the foregoing inſtances, I ſhall mention firſt a donation, the motive of which is love and favour to the donee, without any formed intention to wrong the creditors, though in effect they are wronged by it. That this caſe is not provided for in the ſtatute 1621, is evident from every clauſe in it. Fraud only is repreſſed: not fraud in a lax ſenſe, ſignify-

* February 1728, Creditors of Graitney competing.

ing

ing every moral wrong by which a creditor is diſappointed of his payment; but fraud in its proper ſenſe, ſignifying a deliberate purpoſe to cheat creditors; that ſort of fraud which is criminal and merits puniſhment: which is put beyond doubt by the final clauſe, inflicting a puniſhment fully adequate to fraud in its proper ſenſe. But a gratuitous bond or alienation, of which the intention is preciſely what is ſpoken out, without any purpoſe to cover the effects from the creditors, is not a fraud in any proper ſenſe, at leaſt not in a ſenſe to merit puniſhment. This then is left upon equity: and the court of ſeſſion, directed by the great principle of equity, *Nemo debet locupletari aliena jactura*, makes no difficulty to cut down a gratuitous bond or alienation granted by a bankrupt. With reſpect to a gratuitous bond, the court I believe has gone farther: it has preferred the creditors upon an eventual bankruptcy, even where the granter was ſolvent when he made the donation. And indeed the court cannot do otherwiſe, without deviating from the principle now mentioned.

Next comes a ſecurity given by a bankrupt in ſuch circumſtances as not to be challengeable upon either of the ſtatutes, being given, for example, before execution is commenced againſt the bankrupt, and more than ſixty days before his bankruptcy becomes notorious. It is made out above, that a court of equity ought to void ſuch a ſecurity, even though the creditor, ignorant of his debtor's bankruptcy, obtained the ſame *bona fide*. The court of ſeſſion, it is true, hath not hitherto ventured to adopt this equitable regulation in its full extent; but it hath made vigorous approaches to it, by voiding ſuch ſecurity where-ever any collateral circumſtance could be found that appeared to weigh in any degree againſt the creditor. Thus, a ſecurity given by a bankrupt to one of his creditors, who was his near relation, was voided, though the diſpoſition came not under either of the bankrupt-ſtatutes *. In the ſame manner, a diſpoſition *omnium bonorum*, as a ſecurity to a ſingle creditor, is always voided. And here it merits ob-

* Fountainhall, January 28. 1696, Scrymzeour contra Lyon.

ſervation, that the court of ſeſſion acting upon principles of equity, is more correct in its decrees, than where it acts by authority of the ſtatutes; witneſs the following caſe. "A debtor againſt whom no exe- "cution was commenced, having granted "a diſpoſition *omnium bonorum* as a ſecuri- "ty to one of his creditors, another credi- "tor arreſted in the diſponee's hands, and "in the forthcoming inſiſted, that the diſ- "poſition was null, and that the ſubject "ought to be made forthcoming to him "upon his arreſtment. The court redu- "ced to the effect of bringing in the ar- "reſter *pari paſſu* *." The following caſe, though varying in circumſtances, is built upon the ſame foundation. Robert Grant, conſcious of his inſolvency, and reſolving to preſer his favourite creditors, executed privately in their favour a ſecurity upon his land-eſtate, which in the ſame private manner he completed by infeftment. This ſecurity being kept latent, even from thoſe for whom it was intended, gave no alarm, and Robert Grant did not become a notour bankrupt for many months after. But the

* February 25. 1737, Cramond contra Bruce.

peculiar

peculiar circumſtances of this caſe, a real ſecurity beſtow'd on creditors who were not making any demand, ſeiſin given clandeſtinely, &c. were clear evidence of the granter's conſciouſneſs of his bankruptcy, as well as of his intention to act partially and unjuſtly among his creditors; and the court accordingly voided the ſecurity as far as it gave preference to the creditors therein named; *November* 10. 1748, *Sir Archibald Grant contra Grant of Lurg*.

The principle upon which this deciſion is founded was admitted in the following caſe *; though the judgement was laid on a ſpeciality. Fenwick Stow merchant in Berwick, having been employed by the Thiſtle Bank of Glaſgow as an agent for circulating their notes, was indebted to them, February 1768, the ſum of L. 2000. Finding himſelf inſolvent, without hope of retrieving his circumſtances, he ſet on foot a moſt unjuſt plan, that of ſecuring his favourite creditors at the expence of the reſt. In that view, he executed privately three heritable bonds, on his land-eſtate

* 4th Auguſt 1774. Creditors of Fenwick Stow contra Thiſtle Bank of Glaſgow.

in Scotland, two to his near relations, and the third to the Thiſtle Bank for the ſaid L. 2000. Theſe bonds were kept latent, even from the perſons concerned, till late in June 1768; at which time being *in actu proximo* of abſconding, the bond to the Thiſtle Bank was ſent to them by poſt 29th of that month. Upon the 3d July 1768, he left Berwick abruptly, and fled to London; and infeftment was taken upon the bond to the Thiſtle Bank 13th July. By the debtor's ſudden elopement, his other Scotch creditors were deprived of an opportunity to render him notour bankrupt: but upon notice of his abſconding, border-warrants were taken out for apprehending his perſon; and ſundry inhibitions were raiſed and executed 12th and 13th July. In a competition among the bankrupt's creditors, the caſe between the Thiſtle Bank and the adjudging creditors was debated in preſence; and the following argument was urged for the latter.

A merchant in the courſe of buſineſs purchaſes goods, draws bills, grants ſecurities. He may even pay one creditor before another, as long as he has a proſpect to pay all. But where he is ſo far dipt as

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to deſpair of retrieving his circumſtances, and yet delays to declare himſelf inſolvent till he has diſtributed his effects among his favourite creditors; ſuch management is groſsly unjuſt: it is a fraud which no court of equity will countenance; and it is the very fraud which is the inductive cauſe of the bankrupt-act 1696. For what other reaſon are partial preferences cut down by that act, but becauſe they are unjuſt or fraudulent? And what is remarkable in that act, even the *bona fides* of a creditor who obtains a preference, does not ſecure him, if the preference be granted by the debtor within threeſcore days of his notour bankruptcy. Nor ought *bona fides* to be regarded in this caſe: it is fraudulent to prefer a favourite creditor: the *bona fides* of that creditor vaniſheth when he is made acquainted with the condition of his debtor; and he is *particeps fraudis* if he pretend to hold the ſecurity.

It is a groſs miſtake that the act 1696 is the only law we have for repreſſing the partial deeds of a bankrupt. It required indeed a ſtatute to make bankruptcy operate *retro*; and it required a ſtatute to cut down a partial preference *funditus*, ſo as not even

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to rank it *pari paſſu* with other debts. Such effects are far above the power of any court. But though the characteriſtics of notour bankruptcy are neceſſary each of them to produce theſe extraordinary effects, yet the act ſays not nor inſinuates, that any bankrupt who falls not preciſely under the deſcription of the ſtatute may without control commit the groſſeſt injuſtice by preferring one creditor before another. It would be ſtrange indeed to annul *in totum* all partial deeds by one who is a bankrupt in terms of the act 1696, if granted within ſixty days antecedent to the notour bankruptcy; and yet to leave a bankrupt at freedom to diſtribute his effects as he pleaſes, if but a ſingle circumſtance be wanting of thoſe ſpecified in the ſtatute. Our law is not ſo imperfect. For every wrong there ought to be a remedy; and the court of ſeſſion, directed by the great principle of juſtice, will correct every wrong a bankrupt can do to his creditors. So far as the bankrupt-ſtatutes extend, they act as a court of common law: beyond theſe bounds, they act as a court of equity. Take the following inſtances of the latter. A debtor advertiſes his inſolvency in the

news-papers, and appoints a day for the meeting of his creditors; who meet and name truſtees. The bankrupt ſurely will not after this be ſuffered to give a real ſecurity to one of his creditors in prejudice of the reſt; and yet all theſe ſteps may have been taken without a ſingle execution againſt him. A perſon inſolvent having been charged with horning retires to the ſanctuary, or ſteps over the border. Tho' this caſe falls not under the act 1696, yet no one can doubt but that every partial preference granted by him will be cut down by the court of ſeſſion. A peer cannot be brought under the deſcription of the ſtatute, nor a member of the Houſe of Commons during the ſitting of parliament. Are ſuch perſons under no control with reſpect to their creditors? Our law would be miſerably defective if they were not. Nor is it a novelty for the court of ſeſſion to undertake the redreſſing of ſuch wrongs. To cut down *funditus* a ſecurity granted by a bankrupt any of the ſixty days that precede his bankruptcy, requires that he be a bankrupt in terms of the ſtatute; but as it is repugnant to common juſtice that a perſon inſolvent ſhould take upon him to

to parcel out his effects among his creditors unequally, the court of ſeſſion will rectify this act of injuſtice by bringing them all in *pari paſſu*. Thus, a diſpoſition *omnium bonorum* to one creditor has always been cut down as being a partial preference by a debtor who virtually acknowledges himſelf to be inſolvent. A diſpoſition to a near relation ſuffers the ſame fate, where the diſponer appears to be inſolvent. Now of all the caſes that have happened, there is not one that bears more evident marks of partiality and injuſtice in preferring ſome creditors to the ruin of others. The fact here is the ſame that occurred in the caſe, Sir Archibald Grant *contra* Grant of Lurg, namely, a perſon inſolvent granting of his own motive a ſecurity for a large ſum to creditors who were not preſſing him for payment; with the addition, in the preſent caſe, of being granted the moment before abſconding. There cannot be a more bare-faced act of injuſtice, and none that requires more to be redreſſed by the court: the remedy is eaſy, which is to rank all the creditors *pari paſſu*.

It was the opinion of the court, that an inſolvent perſon cannot prefer one creditor before

before another; and that every ſuch partial preference ought to be cut down. But the plurality of the judges voted for ſupporting the infeftment of the Thiſtle Bank, on the following ground, "That the "Thiſtle Bank truſted their notes with "Fenwick Stow to be put into currency "for their behoof, and not with an inten-"tion to lend him money; and that Fen-"wick Stow became their debtor by a "breach of truſt, in uſing theſe notes as "his own, which bound him for repara-"tion." This argument occurred in the courſe of reaſoning, and made a ſudden impreſſion, which I am convinced would have been found inſufficient had the cauſe been brought under review. For at that rate, if a man ſhould burn my houſe, ſpuilzie my goods, run away with my money, or commit any other delict intitling me to reparation, I ought to be preferred before all his other creditors. He is indeed bound in conſcience to repair the hurt he has done me; but is he not equally bound in conſcience to pay the ſums he has borrowed? Let it be ſuppoſed, that Fenwick Stow, inſtead of taking upon him arbitrarily to prefer one creditor before an-

other, had made a fair ſurrender of his effects, would the Thiſtle Bank in a competition have been preferred *primo loco?* This would be a new ground of preference, hitherto unknown. If ſo, it is a clear conſequence, that the bankrupt, by his voluntary deed, could not give a preference to the Thiſtle Bank, which they would not have been intitled to in a competition before the court of ſeſſion.

After finiſhing the inſtances promiſed, another point demands our attention. With reſpect to an alienation bearing to be granted for love and favour, or made to a near relation bearing a valuable conſideration, a doctrine eſtabliſhed in the court of ſeſſion by a train of deciſions, appears ſingular. It is held, that the purchaſer from ſuch diſponee, though he pay a full price, is in no better condition than his author; and that a reduction at the inſtance of the bankrupt's creditors will reach both equally. This doctrine ought not to paſs current without examination; for its conſequences are terrible. At that rate, every ſubject acquired upon a lucrative title is withdrawn from commerce for the ſpace at leaſt of forty years. What ſhall become

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of thoſe who purchaſe from heirs, if this doctrine hold? And if a purchaſer from an heir of proviſion, for example, be ſecure, why not a purchaſer from a gratuitous diſponee? The only reaſon urged in ſupport of this doctrine is, That a purchaſer cannot pretend to be *in bona fide* when his author's right bears to be gratuitous, or is preſumed to be ſo. I do not feel the weight of this reaſon. The act 1621 gives no foundation for ſuch reduction: for if, even in the caſe of a fraudulent conveyance to an interpoſed perſon, a purchaſer *bona fide* from that perſon be ſecure, what doubt can there be that a purchaſer from a gratuitous diſponee is alſo ſecure, eſpecially where the gratuitous diſponee is innocent of any fraud? And conſidering this matter with relation to equity, a gratuitous deed is not ſubject to reduction, unleſs granted by a bankrupt; and to put a man who purchaſes from a gratuitous diſponee *in mala fide*, the bankruptcy ought alſo to be known to him. And yet I find not that the purchaſer's knowledge of the bankruptcy has ever been held a neceſſary circumſtance; one caſe excepted, re-

ported by Fountainhall *: "It is not ſuf-
"ficient to reduce the purchaſer's right
"that he knew his author's relation to the
"bankrupt, unleſs he was alſo in the
"knowledge of the bankruptcy; becauſe
"there is no law to bar a man in good
"circumſtances from making a donation
"to a near relation. And knowledge, an
"internal act, muſt be gathered from cir-
"cumſtances, the moſt pregnant of which
"is, that the granter of the gratuitous
"deed was at the time held and reputed
"a bankrupt." But now, ſuppoſing the bankruptcy known to the purchaſer, I deny that this circumſtance can ſupport the reduction either at common law or in equity: it is made evident above, that a gratuitous diſponee ignorant of his author's bankruptcy, is not bound to yield the ſubject to the bankrupt's creditors, but only to account to them for the value; and when he diſpoſes of the ſubject for a full price, this ſale, far from diſappointing the obligation he is under to the bankrupt's creditors, enables him to perform it. In one caſe only will the purchaſer's right

* November 28. 1693, Spence contra Creditors of Dick.

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be voided in equity; and that is, where the gratuitous diſponee and the purchaſer from him are both of them *in mala fide:* a man who takes a gratuitous diſpoſition knowing his author to be bankrupt, is guilty of a wrong, which binds him in conſcience to reſtore the ſubject itſelf to the bankrupt's creditors; and the perſon who purchaſes from him knowing that he is ſo bound, being alſo guilty, is for that reaſon bound equally to reſtore.

The ſtatute 1696, voiding all diſpoſitions, aſſignments, or other deeds, granted by a bankrupt to a favourite creditor, appears to have no ſubjects in view but what are locally in Scotland, within the juriſdiction of the court of ſeſſion. And indeed it would be fruitleſs to void a diſpoſition of foreign effects granted by a Scotch bankrupt; becauſe ſuch effects will be regulated by the law of the place, and not by a decree pronounced in Scotland. Suppoſing then ſuch a diſpoſition to be granted, is there no remedy? It is certainly a moral wrong for a bankrupt to convey to one of his creditors what ought to be diſtributed among all; and the creditor who accepts ſuch ſecurity knowing his debtor's inſol-

inſolvency, is acceſſory to the wrong. Upon that ground, the court of ſeſſion, tho' they cannot void the ſecurity, may ordain the favourite creditor to repair the loſs that the other creditors have ſuſtained by it; which will oblige the favourite creditor either to ſurrender the effects, or to be accountable for the value. And this was decreed in the court of ſeſſion, July 18. 1758, Robert Syme clerk to the ſignet contra George Thomſon tenant in Dalhouſie.

Of late it has been much controverted, whether a diſpoſition *omnium bonorum* by a notour bankrupt to truſtees for behoof of his whole creditors, be voidable upon the bankrupt-ſtatutes. Formerly ſuch diſpoſitions were ſuſtained, as not being prohibited by any clauſe in either of the ſtatutes. But the court at laſt ſettled in the following opinion, " That no diſpoſition " by a bankrupt can diſable his creditors " from doing diligence *." This opinion, founded on juſtice and expediency, though not upon the bankrupt-ſtatutes, ought to

* July 12. 1734, Snee contra Truſtees of Anderſon. Feb. 3. 1736, Earl of Aberdeen contra Truſtees of Blair.

govern

govern the court of ſeſſion as a court of equity. It belongs not to the bankrupt, though proprietor, to direct the management of his funds; but to his creditors, who are more intereſted in that management than he is. It belongs therefore to the creditors to direct the method by which the funds ſhall be converted into money for their payment; and if they chuſe to have the effects managed by truſtees, it is their privilege, not the bankrupt's, to name the truſtees. It follows, however, from this conſideration, that thoſe truſt-rights only which are impoſed by bankrupts upon their creditors, ought to be voided. There lies evidently no objection, either at common law or in equity, againſt a diſpoſition *omnium bonorum* ſolicited by the creditors, and granted by the bankrupt to truſtees of their naming. On the contrary, a truſt-right of that nature, which ſaves the nomination of a *curator bonis*, as in Rome, or of commiſſioners, as in England, merits the greateſt favour, being an expeditious and frugal method of managing the bankrupt's funds for behoof of his creditors. And ſuppoſing ſuch a meaſure to be concerted among the bulk of the

the creditors, a court of equity ought not to regard a few diſſenting creditors who incline to follow ſeparate meaſures. The truſt-right is good at common law, being an alienation by a proprietor; and it is good in equity as being a juſt act. It muſt accordingly afford a preference to the creditors who lay hold of it. A diſſenting creditor may, if he pleaſe, proceed to execution againſt his debtor, and he may attach the imaginary reverſion implied in the truſt-diſpoſition: but ſuch peeviſh meaſures cannot hurt the other creditors who are ſecured by the truſt-right; for if that right be not voidable, it muſt be preferred before an adjudication, or any other execution by a diſſenting creditor.

I cloſe this chapter with obſerving, that ſince the former edition of this work, all the defects above mentioned of our bankrupt-ſtatutes are remedied by a Britiſh ſtatute, 12th Geo. III. cap. 72.; of which the ſummary follows. Upon application of any of the bankrupt's creditors, or upon his own application, his moveable eſtate is ſequeſtrated, and proviſion made for a fair and equal diſtribution of the ſame among the creditors. In the next place, to bar

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