COMMENTARIES

ON THE

LAW OF SCOTLAND.

INTRODUCTION.

THE design of this Work is to present a view of the Civil Jurisprudence of Scotland in its practical application to the ordinary business of life. With this intention, the several rights and obligations will be explained, on which a demand, or action, for debt may be grounded; the estates or funds described, out of which they may be satisfied; and the various grounds of preference, by which particular claimants may be distinguished from the general mass, brought under review, as in relation to that state of insolvency on the part of the debtor, which places in the keenest rivalship, and under the most vigilant examination, the pretensions of each creditor to a share of the inadequate fund.

In conducting an inquiry which comprehends so great a variety of matter, it is my intention, in the FIRST BOOK, to take a general review of the Law of DEBTOR and CREDITOR; chiefly for the purpose of describing generally the means which are by law provided for compelling the payment of debt when prosecuted by an individual creditor, and to serve as an Introduction to the more detailed consideration of the effect produced by rivalship and the inadequacy of the funds of payment.

The various kinds of estate of which creditors may avail themselves for the payment of debt, will form the subject of the SECOND BOOK; with the several questions which may arise out of the ambiguous states of possession in which property may be placed at the moment of insolvency.

The inquiry will naturally be directed, in the next place, as the subject of the THIRD BOOK, to the rights of personal creditors; in which it is proposed to explain the general principles of PERSONAL OBLIGATION, and CONTRACT, with the grounds of action or claim of debt which arise from them: And this part of the Work will admit of an ample commentary on the doctrines of MERCANTILE and MARITIME CONTRACTS, which have been more imperfectly explained, either in separate treatises, or in the writings of our institutional authors, than any other part of Scottish jurisprudence.

In the FOURTH BOOK will be presented a view of the several grounds of PREFERENCE AMONG CREDITORS, whether resting on securities over the heritable or moveable estate, or on the peculiar footing of privileged debts.

Having in this way considered the relation of creditor and debtor in the abstract, without regard to their characters as Individual, or Social, that distinction will next demand attention. The great operations of mercantile business are conducted by Partnerships, either avowed, and acting under an appropriate Name or Firm; or secret, with Sleeping Partners; or momentary, as in Joint Adventure. In the FIFTH BOOK, I shall give a full view of the LAW of PARTNERSHIP, and of the several very important aspects in which it has lately presented itself to public consideration.

In the SIXTH BOOK I shall proceed to consider the BANKRUPT LAWS; and, after an inquiry into the description and character of Insolvency and of Bankruptcy, the peculiar regulations will be explained by which, in contemplation of bankruptcy, debtors have been prohibited from granting securities voluntarily, and creditors stopped from acquiring preferences by means of execution; with a view to prevent the fraudulent concealment of funds, and the creation of partial preferences. A digest will be attempted of the rules of RANKING and DISTRIBUTION, by which the estate of the debtor is applied in extinction of his debts. And afterwards will be explained the history, nature, and effects, of those institutions by which the estate and person of the debtor are placed under the control of creditors, when he is unable to discharge his obligations; and by which the sale and final distribution of his estate are effected. This includes an explanation of the process of SALE and RANKING, MERCANTILE SEQUESTRATION, and TRUST-DEEDS for creditors, with the law of IMPRISONMENT and CESSIO BONORUM.

The Work will be concluded by a review of the MUTUAL RELATIONS OF THE SCOTTISH AND FOREIGN LAWS relative to DEBTOR and CREDITOR.

BOOK I.

GENERAL REVIEW OF THE LAW OF DEBTOR AND CREDITOR IN SCOTLAND.

It may be useful, in commencing an inquiry into the practical jurisprudence of Scotland, as exhibited in the competition and contests of creditors, shortly to review the general doctrines of the Scottish Law of Debtor and Creditor in the two states of Solvency and of Bankruptcy.

CHAPTER I.

OF EXECUTION FOR DEBT, OR DILIGENCE REAL AND PERSONAL.

The several writs of execution provided by law for enforcing the payment of debt, are directed either, first, against the Estate of the debtor, for the purpose of having it transferred to the creditor in satisfaction of his debt, or converted into money, and the price paid to the creditor; or, secondly, against the Person of the debtor, with the intention of indirectly, but often more effectually and rapidly, compelling him to find the means of payment.

In the law of Scotland, all harsh and sudden proceedings for the recovery of debt have been restrained by a spirit of forbearance towards the debtor, happily enough combined with precautions for the safety of the creditor.

Execution for debt proceeds by writs under the King's signet, issued in virtue of special warrants from the Supreme Court.

The regular system of judgment and execution established in the Roman law,[1] was, in the kingdoms of modern Europe, much interrupted. But without stopping to explain the feudal jurisdictions—the power of barons, counts, and sheriffs, to hold courts and give judgment—or the confusion and surcease of justice which arose from the repledging

[1] In Rome, judgments were carried into execution under the immediate superintendence of the judge who pronounced them, or of the judge or magistrate within whose jurisdiction the subject of execution lay. For this purpose, at the distance of four months after sentence, (which period was allowed for voluntary obedience), an action was instituted, called Actio Judicati; in which the judge first issued his warrant to seize, as a judicial pledge, the moveables, and, within eight days, to sell them for payment of the debt; and afterwards, if there was a deficiency of moveables, he authorized the immoveable property to be seized, and delivered in pledge to the creditor, or put under the care of a factor or curator. At the end of two months, if the debt was not extinguished, he authorized the land, &c. to be sold publicly, and the debt to be paid from the price, the balance being delivered over to the debtor.—Dig. lib. xlii. tit. 1. De Re Jud. l. 15. and 31. Cod. lib. viii. tit. 34. De Jure Dom. impet. l. 3. At first, there seems to have been no remedy, where no purchaser made offer for the lands; but afterwards, an alternative was introduced, by which the property might be adjudged over to the creditor, to the value of his debt.—Cod. lib. viii. tit. 23. Si in causa Jud. pig. l. 2. and 3.

of defendants by powerful lords; it may be sufficient to say, that the increasing power of the Royal Courts, and, both in England and in Scotland, the delegation by brieves issued from the King's Chancery to sheriffs or other officers to try the cause by Jury, redeemed the course of justice from those interruptions, and gradually established a more uniform course of jurisprudence. Those brieves, while they constituted only a jurisdiction for the special occasion, contained also a warrant by which the jurisdiction which they created might be fully executed. This warrant at first authorized the attachment and seizure of the moveables of the debtor, in order to enforce attendance, and to be the subject of execution; and the execution was afterwards extended to land. But the constraint of the person was permitted only in the recovery of merchant debts; or gradually established by indirect forms of proceeding, as for rebellion against the commands of the church and of the king.

In the fifteenth century a great revolution took place in the judicial policy of Scotland. The Court of Session was instituted after the model of the Parliament of Paris: The brief of distress fell into disuse: The principle of the Roman and French jurisprudence was adopted: And judgments were executed by means of special writs issued on judicial warrant, and analogous to the Roman Actio Judicati.

Generally speaking those warrants are decrees; either pronounced in the course of an action, or issued summarily in virtue of the consent of the debtor. To explain fully the law relative to decrees of the former kind, would require a review of the several courts of civil jurisdiction, and of the several forms of action by which payment of debt may be demanded; a discussion by much too extensive to be entered on here, and which is not necessary to this introductory view. The decree by consent, called a Decree of Registration, may generally be described as directly grounded on the registration of an obligation or contract in the books of a court of competent jurisdiction, by virtue of a previous consent incorporated in the obligation or contract. Proceeding on such consent, a fictitious judgment is given forth by the clerk of court, authorizing all usual and necessary writs of execution, as if by authority of the judge.[1] Analogous to this, though, perhaps, more operose in its form, is the English warrant of attorney to confess judgment; and the greater simplicity of the Scottish consent to registration for summary execution, has enabled the legislature to declare, that, by legal construction, such consent shall be implied in bills of exchange and promissory-notes, whereupon protests for non-payment may be recorded to the effect of having a decree of registration issued; and in this way the necessity is avoided of an action on those instruments of trade which are in daily use, and creditors have immediate access to the most summary execution.[2]

The judgment or decree has of itself no effect whatever on the debtor's funds. It does not, as in England, bind the land from its date, however quickly execution may follow; neither are the moveables held, as in the hypothecary law of the continent, to be attached or affected till a writ of attachment is actually executed.

[1] The form of the clause of registration incorporated in bonds or contracts is this:—'And I consent to the 'registration hereof in the books of Council and Ses- 'sion, or other judges' books competent, that letters 'of horning on six days' charge, and all other execution 'needful, may proceed upon a decree of the Lords 'thereof, to be interponed hereto, and to that effect 'constitute

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'my procurators.' The procurator so appointed did, in the original process, appear judicially, and give consent to the decree; but the decree now proceeds summarily, and of course. On registration, an extract of the bond is given out, accompanied by a decree for execution.

[2] By statute 1681, c. 20.; 1696, c. 36.; and 12. Geo. III. c. 72. sect. 41. and 42. a regular protest of a bill for non-payment or non-acceptance, or of a promissory-note for non-payment, shall be a warrant for a decree of registration authorizing the king's writ of execution. The execution can proceed only on a previous charge to pay within a certain number of days; and if there be any good defence, it is competent to stop the execution by applying to the Supreme Court for suspension, on bail to pay the debt if the ground of suspension be bad.

The writs executorial, or diligences, as they are called, by which judgments are put in execution, or payment of debts enforced, may be distinguished into two classes;—one intended to enforce payment out of the estate, or by constraint of the person; the other to provide for intermediate security till this more complete execution can be accomplished.

1. EXECUTION, OR DILIGENCE FOR COMPELLING IMMEDIATE PAYMENT.—Diligence, or execution for payment of debt, may proceed against the estate of the debtor as soon as judgment in a suit, or decree of registration, is given out: Or, even without such decree, a warrant for certain writs may be obtained on exhibiting to the Judge a valid and formal contract or obligation in writing.[1]

Against the LAND or other HERITABLE ESTATE of the debtor, his creditor may proceed by two forms of diligence; one directed only to the purpose of laying an embargo on the debtor's power of alienation to the creditor's prejudice; the other being a judicial transfer of the estate in payment of the debt. The former is called INHIBITION, the latter ADJUDICATION.

INHIBITION is a writ in the King's name, by which the debtor is prohibited from disposing of his land or heritable property to the disappointment of the inhibiting creditor, and even from incurring new debts, by which his land may be affected to the inhibitor's prejudice. This inhibition against the debtor is accompanied by a prohibition to all dealers and others to take conveyances from, or give credit to the debtor, relative to or grounded on the property comprehended in the inhibition. The writ is entered in a public record, where it may be examined by all the world, as forming an embargo on the credit and powers of the debtor. The effects of it will require a very minute consideration hereafter: at present it may be sufficient to observe, 1*st*, That as a mere prohibition this diligence confers no right on the creditor to enter on possession of the debtor's estate, but merely to challenge debts and overturn conveyances made in contempt of the writ; and *2dly*, That other creditors, whose debts are not within the prohibition, may, by the more active diligence of adjudication, acquire a right, as by transference, to the debtor's property, notwithstanding the existence of an inhibition. The debtor cannot be relieved from the embargo of an inhibition, grounded on a debt which is already due, but by paying the debt. It is otherwise with inhibition in security of a debt not yet due, or still in litigation.—See below, p. 7.

ADJUDICATION.—This diligence proceeds in the proper form of an Actio Judicati; the creditor producing his decree, or a written and formal obligation, in proof of his right to demand execution: And the summons, which is to the Court of Session, concludes for having the debtor's lands adjudged to the creditor, redeemably. The judgment is alternative: Either such a portion of land is, with the debtor's consent, adjudged to the creditor as may be found equivalent to the debt; or, if the debtor do not choose to concur, a general adjudication of his whole lands is pronounced. It may be sufficient to say of this diligence, that from the moment the summons is executed it creates a lien over the land, called, in law language, Litigiosity; so, at least, as to prevent the debtor from voluntarily alienating to the prejudice of the creditor: That, if the subject be simply heritable, the decree of adjudication completes the creditor's right; if it be of a feudal nature, the decree of adjudication is completed and carried into execution by the common feudal forms of infeftment. Adjudication, when thus completed, resembles a mortgage; it entitles the creditor to enter into possession, and to recover the rents; the estate being redeemable within ten years, in the general adjudication, and five in the special. During

[1] Inhibition, or adjudication for attaching the heritable estate, may be grounded on a written obligation, without a decree of constitution; or letters of arrestment for attaching moveables and debts may be obtained on a document of the same description.

this term of redemption the creditor must, when called upon, account for what he actually has drawn, or might have drawn, and renounce his infeftment, if the debt has been paid off. If any part shall still remain due, it must either be paid off, and the estate redeemed, or the power of redemption may be foreclosed by an action for declaring the term expired.[1]

The PERSONAL ESTATE of the debtor is taken in execution by POINDING, or by ARRESTMENT IN EXECUTION.

The warrant to poind or to arrest in execution may be granted by an inferior Judge, who has pronounced decree, or in whose books the obligation has been registered for execution: Or by the Court of Session, a warrant for letters of horning, poinding, and arrestment, may be granted, on which they are issued at the signet.

POINDING in the Scottish law, originally a part of the execution under the brieve of distress, gradually became unjust and oppressive. It was only when reformed in the reign of his late Majesty, that it regained its original purity. It consists, at present, of an adjudication of goods belonging to the debtor, followed by a public sale, under the judicial superintendence of the sheriff of the county; the price being applied in payment of the debt due to the poinding creditor.

ARRESTMENT IN EXECUTION may be described as a lien created by attachment over money due to the debtor, or over moveable property of the debtor in the hands of a third party. The property or money thus attached is made effectual to the creditor, by means of an action of forthcoming against the holder of the fund. To this action the debtor is made a party; and the object of the action is, that the arrestee should be ordained to deliver up to the arrester the debtor's property, or to pay to him the debt.[2]

By execution against the DEBTOR'S PERSON, he is indirectly compelled, by the terror of imprisonment, to bring forth his means, or to call on his friends to assist him in discharging his obligations; and the creditor is enabled, during his debtor's imprison-

[1] In England, as in every other feudal kingdom, land was, for a time, banished from commerce; and the only execution competent against the debtor's estate, was distress by seizure of moveables. The writ of LEVARI FACIAS entitled the sheriff to levy the rents and profits of the debtor's lands, as well as his common moveables; and, if necessary, another writ (VENDITIONI EXPONAS) was issued to authorize their sale. But it was not till the thirteenth century that land was in any degree open to execution for debt in England. In the reign of Edward I. a new kind of execution was introduced, which is thus explained by Sir William Blackstone:—'When 'the restriction of alienation began to wear away, the 'consequence still continued; and no creditor could 'take possession of lands, but only levy the growing 'profits; so that if the defendant alienated his land, 'the plaintiff was ousted of his remedy. The statute, '(13. Edward I. c. 18.) therefore, granted the writ of 'ELEGIT, by which the defendant's goods and chattels 'are not sold, but only appraised, and all of them (ex-'cept oxen and beasts of the plough) are delivered to 'the plaintiff, &c. If the goods are not sufficient, then 'the moiety, or one-half of his freehold lands which 'he had at the time of the judgment given, are also to 'be delivered to the plaintiff to hold, till out of the 'rents and profits thereof the debt be levied, or till the 'defendant's interest be expired.' 3. Blackst. 318. Thus, the ELEGIT differs materially from our adjudication; for the estate, or right which the creditor acquires in the real property of his debtor, is not, as ours, a right of property, redeemable like a mortgage, but merely a conditional right of possession, ceasing with the payment of the debt, but affording no means of carrying the real right of property to the creditor himself.

[2] The original writs for execution against moveables in England, were, the LEVARI FACIAS and FIERI FACIAS. The former contained, at first, a power only to levy the goods, not to sell them; though, afterwards, the Supreme Courts came to insert, in the writs of levari facias issued by them, a power of selling. The fieri facias contained a power of levying the goods and debts, and 'making' of them to the avail of the debt. In the execution of these writs, the sheriff made the goods be valued, fixed an upset price upon them, and exposed them to sale. But here his power ended, if no purchaser appeared, and a new writ, called Venditioni Exponas, was necessary to authorize a sale for what the goods might bring. The elegit, as applicable to moveables, introduced the power of appraisement, in case of the property not finding a purchaser. The fieri facias, and the elegit, are now the great writs of execution against moveables in England; and, under them, the purposes of our poinding and arrestment are accomplished; debts being levied under them, and goods sold for payment, or appraised to the value, and delivered in satisfaction.

ment, to keep a more successful watch on all his motions relative to the disposal of his funds.

Personal execution cannot proceed till after the debtor has been required, by a charge on letters of Horning, to pay the debt, and a certain number of days have been allowed him for obedience. His disobedience to this charge is followed by letters of Caption, which is a warrant for his imprisonment. When imprisonment does follow, it is held by the law to have no other object than to enforce payment and the discovery of funds: And thus execution against the person does not preclude execution against the property; nor can an imprisoned debtor bid defiance to his creditors, while he lives with extravagance in prison.[1]

2. Diligence for Intermediate Security.—The diligences of the Scottish law would be imperfect, if these delays were granted to debtors before personal execution could proceed, or before execution could be had against the effects by poinding, or against the land by adjudication; unless some means of security were provided against their taking advantage of the indulgence. But it has been contrived to reconcile indulgence with security, in a way that seems to be unknown in England.

The two forms of execution already explained, of Inhibition and Arrestment, are easily adapted to the purpose of intermediate security. The creditor who has not yet obtained judgment for his debt, or whose debt is not yet due, is allowed to use Inhibition in Security, where his debtor appears to be vergens ad inopiam; so that during the discussion of the action, or until the arrival of the day of payment, or until he shall be in a condition to take execution for enforcing payment, he may be secured against the insolvency of his debtor and the sale of his property. The only difference between the effect of inhibition in security, and inhibition on a debt already due, is, that the former may be recalled on security being given for the debt, the latter only by payment. In the same way, the creditor may use Arrestment in Security; which also differs from the arrestment in execution, by being subject to recall on security being given for the debt; whereas the other cannot be relieved but by payment.

In regard to personal execution, the delay given to the debtor to prepare for payment, is reconciled with the safety of the creditor, by means of a Meditatio Fugæ Warrant. This the creditor may obtain on judicially swearing to the truth of his debt, and to his belief of the debtor's intention to escape from the country; and on justifying this belief to the magistrate, in presence of the debtor, by the statement of his grounds of suspicion, and by an examination of the debtor himself. Under this warrant the debtor may be imprisoned, to abide the course of his creditor's diligence, unless he shall relieve himself by finding bail to remain in the country.

CHAPTER II.

OF THE EFFECT OF INSOLVENCY ON THE DILIGENCE OF INDIVIDUAL CREDITORS.

General Principles of Bankrupt Law.—The diligences now enumerated were devised for the use of creditors considered individually, and suffer mutual restraint by rivalship,

[1] As imprisonment by the English law is not, like that of Scotland, a method merely of enforcing payment, and the discovery of hidden funds, but a satisfaction for the debt, the creditor who has imprisoned his debtor can proceed with no execution against the property. While his right is satisfied by the imprisonment of the debtor, the fieri facias and elegit must sleep; and consequently, the debtor may, in the meanwhile, live in prison luxuriously and extravagantly, with his funds untouched by execution.

joined with inadequacy of funds. At first the preference among rival creditors was regulated according to priority of execution; and the time is not long gone by, when the threatened insolvency of a trader brought all his creditors upon him, with a concourse of diligence the most ruinous and deplorable. The policy of the laws relative to bankruptcy is at once to allay all this hurry and perturbation; to bring creditors as nearly as possible to equality; and to prevent the debtor from interfering, to confer on favourite creditors a preference to which they are not justly entitled.

Independently of the peculiar rules of Bankrupt Law, creditors are insulated individuals, connected by no common interest, and not bound to co-operate in execution, or to take joint proceedings for the general benefit. Under the bankrupt law, they are formed into a community: The inadequacy of the fund from which they are to be paid, suggests the wisdom of mutual forbearance; a stop is put to the accumulation of expensive and separate proceedings; and the law, following the reasonable wish of the whole, or, at least, the equity of contending interests, prescribes a general plan for recovering and distributing the estate, at the common expense. The proceedings against the person of the debtor, suffer also a change under the bankrupt law. The right of imprisonment, which, at common law, belongs to the creditors of an insolvent debtor, is restrained by more comprehensive and liberal views: And although the debtor who is guilty of embezzlement or fraud, is exposed to harsher constraints, and regulations more highly penal; he whose insolvency has arisen from innocent misfortune, is relieved from prison, or discharged of his debts.

This peculiar system is not of rapid growth; but the mischances incident to trade necessarily lead to bankruptcies; and with the extension of commerce, and the prevalence of the system of credit, the effect produced by such failures is extended over a country: ‘ Non enim possunt, una in civitate, multi rem atque fortunas ammittere, ut non plureis ‘ secum in eandem calamitatem trahunt.’ It is amidst those frequent insolvencies that the great principles of the bankrupt law are established; that men feel by experience the absurdity and unjust consequences of the old maxims; that they come to take a more candid, equitable, and enlarged view of the effects of insolvency upon the common interests of all, and to acquire a just sense of the benefit to be derived from unanimity and from common proceedings.

In codes of bankrupt law, which thus grow up amidst the multiplying transactions of a commercial country, two great points may be taken, as the fundamental principles into which the whole is resolvable. One is, that, from the moment of failure, the inadequate fund becomes the common property of the creditors: The other, that, as insolvency may often proceed from misfortune alone, it is frequently just, and even expedient, to grant to the debtor freedom from that imprisonment which would render him useless, and a burden, if, having failed from the mischances incident to trade, he is willing to give up every thing to his creditors.

The first of these principles is the more extensive in its operation, and forms the groundwork of all the peculiarities to be found in the bankrupt law, with respect to the right of the creditors,—the powers of the debtor over the estate,—and the peculiar processes by which the funds are collected, converted into money, and distributed.

Thus, it is a direct consequence of this principle, that, from the moment of insolvency, the debtor loses the power of a proprietor, and becomes a mere negotiorum gestor for his creditors, in the management of the common fund; that he is bound to make a fair disclosure of his estate; that he is deprived of the power of making alienations from motives merely of generosity, of affection, or of gratitude. This is the fundamental principle of all those regulations, by which, in the bankrupt laws of various countries, provision is made for the examination of the bankrupt; for preventing direct or indirect embezzlement; and for annulling fictitious debts and voluntary conveyances without value.

A second consequence of the general principle is, that although, in the ordinary case, a debtor is bound to pay his creditors at the appointed day, or to give security to those who are suspicious of his credit, and urgent for payment; he cannot, after insolvency, thus agree to favour any one, without doing injustice to the rest, by encroaching upon a fund which is common to them all. This, again, is the great foundation of those laws which have for their object, the restraining of insolvent debtors from conferring preferences,—from making payments in contemplation of bankruptcy,—from delivering goods as the equivalent of payment,—or granting deeds of security, in favour of prior creditors, over any part of the estate. And such laws are defective or perfect, in proportion to the success with which this general principle may be reconciled with the rights of those who, ignorant of the debtor's condition, may have been induced to rely upon his credit.

A third consequence, deducible from the above principle, is, that as the debtor is stopped, by the common right of the creditors, from bestowing preferences upon individuals of their number; so, those individuals themselves ought to be prevented from acquiring preferences, by the use of separate diligence. With this view, a judicial process is opened to the creditors, for immediately vesting in them, or in trustees, the insolvent estate; to be managed for the general behoof, converted into money, and distributed at the common expense. The perfection of this set of regulations, in any country, must depend upon the simplicity of the process,—the ease with which it may be obtained consistently with safety to persons not bankrupt,—and the rapidity and economy with which the distribution under it may be accomplished.

Next, according to the general principle, each creditor is entitled to an equal share of the funds, unless, previous to the failure, a preferable real right have been created over some part of the estate or effects. It is not the design of the bankrupt law to take, as a fund of division, what does not belong to the bankrupt, or what may be exhausted and covered by real securities; but to allow, as far as may be consistent with those preferable rights, a perfect equality among the creditors.

And, *lastly*, To make effectual the rights of the creditors, and give to each his due share in the distribution, modes of proceeding are invented, for attaching, and converting into money, quickly, and at little expense, the estate and effects, and for accomplishing a division among those entitled to a share.

Thus, the common interest of the creditors in the inadequate fund, furnishes the principle which pervades and systematizes the whole regulations of the bankrupt law, in relation to the estate of the debtor, his powers over it, and the mode of distribution.

The other great principle, above alluded to, bears reference rather to the condition of the debtor. It is a principle which ought to operate in the case of those who are not traders, as well as of those who are more directly exposed to all the dangers of commerce; for, although the trader is chiefly liable to be overtaken by sudden misfortune, other men are not beyond the reach of mischance; and if a debtor, although no merchant, can vindicate his failure from suspicion, and is willing to deliver up his whole estate to his creditors, he ought, at least, to be freed from prison. The more frequent and unavoidable dangers of a merchant's condition, and the necessity of his acting much upon credit, entitles him, indeed, to some distinction; but this should consist, not in the punishment of other men, but rather in the absolute discharge of the fair trader from all his debts; while, to other men, should be granted the more limited remedy of freedom from jail. It is a point, even of public expediency, that an honest merchant, who has failed, should be enabled to recommence his trade unencumbered with the load of former debts, which he has already done every thing in his power to discharge. And it is scarcely a hardship upon creditors to give this indulgence; since the chance of insol-

vency, so peculiarly incident to all mercantile transactions, must, in all a merchant's dealings, enter into his calculations of risk.

These seem to be the leading principles of the Bankrupt Law, considered in the abstract. The particular regulations of each state must, of course, vary with the general spirit of the common law, and with the peculiarities of its ordinary institutions. But however numerous or perplexing the rules and institutions of any code may at first appear, in these points they will be found to centre; and the system may fairly be estimated as good or bad, in proportion as effect is given or denied to these general principles.

It might be interesting, in this view, to examine the systems of bankrupt law established in various nations; to inquire how far they accord with these abstract principles, and to what peculiarity any deviation is to be traced. But this is a large field of inquiry; and as it is of chief importance to understand the two systems of bankrupt law which are established in this island—to see how far they agree, and where they differ from each other—it may be proper, in this preliminary inquiry, to confine ourselves to a short contrast of the English and Scottish law in this respect.

Examination of the Bankrupt Law of England and of Scotland.—That dread of the arbitrary maxims of the civil law, which has been the distinction and the boast of England, has not always been productive of happy results in municipal jurisprudence and regulation, though of incalculable benefit in the formation of the Constitution. In the department now under review, while the commerce of England was proceeding rapidly in its great career, the aversion from change still left creditors in full possession of all the old rights of execution, which the common law recognized, against the estates and persons of their debtors. So late as the 16th century, the power of imprisonment remained a sacred privilege of a creditor; and the preference over the funds by priority of execution, was still the rule of the common law. It was in the 34th year of the reign of Henry VIII. that the first alteration was made upon the ancient jurisprudence. But this was an alteration suddenly proposed, in order to remedy evils which bore hard upon the rising commerce of the country; and could not, in its full extent, be applied to others than merchants, without overturning the whole system of the common law. To understand this fully, it may be proper to observe, how radical an alteration was required, in many essential points, to provide for cases of insolvency.

There seem to have been three great inconveniences, which the rigid maxims of the English common law produced, in their application to the dealings of a commercial country.—1. There was no easy and simple method of procuring execution, or even intermediate security for debts by bill, &c. otherwise than in consequence of the judgment of a court, with all its necessary delays, and all the interruptions of vacations. This was, to traders, an evil of great magnitude, where their debtor was insolvent; for, during the interval, the debtor could not be prevented from enjoying his property, and sporting with the interests of his creditors. To remedy this was one great object of the English statutes of bankruptcy; and it was accomplished by authorizing a commission of bankruptcy to be issued, to which the effect of an immediate legal execution was given, so as to deprive the debtor of all power over his property, and carry it at once to his creditors, to be divided among them for payment. 2. Although, originally, imprisonment for debt was not, in England, any more than with us, a part of the common law, it had grown up as the undoubted privilege of a creditor to take satisfaction for his debt by the confinement of his debtor's person; and against this confinement there was no relief, but by payment of the debt. It could not fail to appear as a serious evil, in a commercial country, that traders should be exposed to such a punishment, without any discrimination between extravagance or fraud, and mere misfortune; and with no

other limitation to the duration of the punishment than the caprice of the creditor: To afford relief against it, formed another object of the bankrupt laws. 3. Although all fraudulent deeds are, at common law, ineffectual, it is a matter of no small difficulty to guard against the frauds which, upon the eve of bankruptcy, a debtor, and especially a merchant, may be enabled and tempted to commit. It was, with this view, found necessary, in England, besides subjecting traders to a new code of penal laws, to allow the creditors to take out the commission of bankruptcy in secret, that it might fall suddenly upon the debtor, and surprise him, while his schemes of fraud were not yet accomplished. But the severity of these laws, necessary, perhaps, in one view, afforded many opportunities for oppression.

In all these particulars, (and in many more, which it is not necessary to detail at present), a wide departure from the maxims and rights of the common law was, in cases of insolvency, found necessary for the occasions of an enlarged commerce. But it was not to be expected that a system, which so completely outraged that law in particulars so important, would be suffered to reach beyond the range of necessity which gave it birth. And although, by the first statutes of bankruptcy, in Henry VIII.'s reign, the Commission was not restricted, but made applicable to all ranks of men; when the law came to be renewed, in the 13th year of Queen Elizabeth, it was limited to merchants; and other persons were left to the rules of the common law, neither restrained by the energy, nor favoured with the indulgence of this peculiar code. It has in this way happened, that, till lately, in England, no system of equality was devised for the creditors of those unconnected with trade; that no restraint was imposed upon execution by individual creditors; and that debtors, unconnected with commerce, continued exposed to perpetual imprisonment, at the will of their creditors.

The circumstances of Scotland, and the spirit of her common law, have been more favourable to the establishment of such regulations for insolvency, as might safely be applied to all ranks of men. Our forefathers felt not that dread of the civil law, by which our neighbours were actuated. Perhaps this might be accounted for, from the peculiar circumstances of the nations at the time, and from the different ways in which that system was introduced into the two countries. But however this may be, the institutions and rules of our municipal law have been much improved by the influence of the Roman jurisprudence; holding it, as we have ever done, to be merely a body of general jurisprudence, the rules of which were to be adopted, wherever they were sanctioned by views of expediency, and not inconsistent with our own institutions or peculiar customs. The law of execution for debt partook of this improvement; and, instead of continuing fixed and unaltered, as in England, modifications and amendments were gradually admitted, according to the exigencies of an advancing people. In this way it happened, that, when the commerce of Scotland called for regulations adapted to cases of insolvency, the general disposition of the common law accorded better than in England with the condition of the country, and prevented the necessity of violent remedies.

Instead of rigidly adhering, as the English had done, to the old rule, which required an action and judgment in every case before execution could pass, the decree of registration, or by consent, when introduced in Scotland, was by statute applied to bills of exchange, as well as to formal bonds. This gave a rapidity of execution, the want of which had been felt in England; and which, we have seen, it was one object of the commission of bankruptcy to supply. The remedy of inhibition was adopted from the canon law; and that of the arrestment in security from the civil, as improved in the institutions of France, where that law was most successfully cultivated; and, in this way, we had already apt means for securing a creditor against his debtor's fraud, during the dependence of his action, or the necessary delay of execution. We soon saw the justice also of the Cessio

Bonorum of the Roman law, which gave freedom to the debtor innocent of fraud, and willing to give up every thing to his creditors. These were the three prominent evils which had called for so sudden an alteration of the law in England; and they were thus gradually remedied in the law of Scotland, while yet our commerce was in its infancy. When that commerce increased so as to require a law for insolvency, the only points still to be provided for, were the suppression of frauds, and the equal, rapid, and economical distribution of the estate. And, in legislating on these subjects, what had already been accomplished enabled Parliament to make provision for other cases, as well as for those of traders.

Thus the progress of the Scottish bankrupt law has been gradual. We see little of that violent opposition between the common law and the new institutions, which accompanied and restrained every interposition of the legislature of our neighbouring country. The common and the statute law have been enabled to go hand in hand, till at last, instead of leaving every case of insolvency, not strictly mercantile, to the imperfect and unjust rules of the old common law, as applicable to the recovery of single debts, a double system of laws relative to bankrupts has been formed;—one branch of it applicable to all cases of insolvency; the other, approaching nearly to the English institution, and applicable only to mercantile failures.

From this general idea of the progress of the two systems, it may be proper to proceed, briefly, to mark their characteristical and distinguishing features, as compared with each other, and with the view we have already taken of the spirit of bankrupt law.

General View of the English Bankrupt Law.—The English code of bankrupt law was, from its first institution, intended to form a complete body of regulations for the insolvencies of traders.

When, in the reign of Henry VIII., the commerce of England had risen to sufficient importance to call upon the legislature for a set of regulations that should free the trader from the evils of the old law, a plan was devised, and thus reduced to form. A commission was named, consisting of the first Judges of the land, to whom very unusual and extensive powers were given.—'Their powers were, to take orders and directions, at their 'own wisdom and discretion, with the bodies of insolvents, and with their real and per-'sonal estate; and to cause the said estate and property to be viewed, rented, and ap-'praised, and to make the sale thereof; or otherwise to order the same for the satisfac-'tion and payment of the creditors, in proportion to the quantities of their debts.' They were also vested with very high powers for the prevention and punishment of frauds, concealments, &c. In the 13th year of Queen Elizabeth's reign, this system was altered. Instead of the commission being given to the Judges, it was, by a long succession of statutes, ordered to be intrusted to such wise, discreet, and learned persons, as the Lord Chancellor should appoint. The whole code has, in the progress of two hundred years, been gradually ripened, till it has grown at last into a complete system, having the triple object of preventing frauds,—of dividing equally and expeditiously the estate of the debtor,—and of discharging him from his debts, in cases of fair insolvency. 1. Certain acts are defined as indicative of bankruptcy; the commission of which is, with the view of preventing frauds, declared to vitiate all the bankrupt's future transactions; and to entitle (with certain precautions) any creditor to take out a commission from Chancery, for vesting the bankrupt's estate in the hands of the commissioners, who order his shop to be locked, and himself to be taken into custody. 2. The commissioners, as a court of delegation from the Lord Chancellor, are the judges before whom the affairs of the bankruptcy are conducted,—the debts proved,—the bankrupt examined,—and the funds vested in assignees for division: the orders and decisions of the commissioners being subject to

the review of the Lord Chancellor. 3. The immediate and active management is intrusted to assignees, chosen by the creditors themselves: And, 4. The creditors are formed into a deliberative body, to determine all questions of management, and to judge whether the bankrupt be entitled to a discharge; reporting their opinion to the commissioners and the Lord Chancellor.

Such was the general scope of the bankrupt laws of England as they lately stood. They have now undergone a thorough revisal, and in two successive consolidating Acts, the whole of those laws have been digested into a system better adapted to the necessities of the extensive trade and manufactures of England.[1] In this reformation the following seem to be the points of chief importance. 1. The description is enlarged of those who are subject to the bankrupt laws, many persons being formerly beyond the operation of those Acts who ought to have been included. 2. The description has also been enlarged of the acts which place a trader within the operation of those laws. 3. The rule of the Scottish law has been adopted, which authorizes a trader, who finds himself in insolvent circumstances, to secure the equal distribution of his estate among his creditors. 4. The settlement of insolvency, by means of a trust-deed, has been encouraged and secured against interruption by a commission of bankruptcy. 5. After the example of the Scottish law, contingent creditors have been admitted to the benefit of the distribution; and (besides a great number of other improvements) the Scottish composition contract has been adopted as a most useful improvement of the system.[2] Other improvements are still contemplated: One in the tribunal by which bankrupt law is administered,—another in the facilitating of extrajudicial arrangements between debtor and creditor.

Much as the English law has disregarded persons who are not traders, they have not been entirely overlooked. A debtor, although not a trader, was formerly entitled to the benefit of what was called the Lords' Act; intended as a remedy against the endless imprisonment of the common law. By this Act, a debtor, in prison for a debt under L.300, might petition the courts for liberation; and, on stating his condition, his funds, and his debts, and conveying every thing to his creditors, he might have been liberated. Had the law stopped here, it would have been analogous to our law of Cessio Bonorum; but the benefit of the whole remedy was destroyed by a declaration, that if the creditor, who had the debtor in execution, should object to his enlargement, and find security for payment of a maintenance to him, (a weekly sum not exceeding two shillings and fourpence), he might detain him in prison. 32. Geo. II. c. 28.

The great difficulty of introducing a reform into any part of English jurisprudence, and of proposing relief to debtors that would not give occasion to unforeseen frauds, and great evil to creditors, did not deter Lord Redesdale and others from giving commencement to an institution which is still in a course of experimental legislation; and to the perfecting of which the attention of Parliament has been recently called.[3] It is sincerely to be

[1] This most useful reformation in English jurisprudence was commenced in many important points by Sir Samuel Romilly. The subject was then taken up more systematically by the merchants of London, on the suggestion of Mr John Smith, and a very curious and important inquiry instituted, on that gentleman's motion, before a committee of the House of Commons. In the Report from the Select Committee on the operation of the Bankrupt Laws,—ordered to be printed by the House of Commons, 11th July 1817; Minutes of Evidence, 16th March 1818; Report, 3d May 1818, and farther Report of Minutes of Evidence, 8th May 1818,—numerous proofs have been collected of the imperfection of these laws, and a great body of useful information brought together, with a view to their reformation.

[2] See Analysis of the Bill now depending in Parliament for the consolidation and amendment of the Bankrupt Law, by the Hon. Robert Henly Eden, 1823. Practical Treatise on the Bankrupt Law as amended by the New Act, by the same author, 1825. To this gentleman English merchants are indebted for the careful analysis and consolidation which has reduced to a single Act the whole system of their bankrupt law.

[3] See Reports from Select Committee of the House of Commons on the Insolvent Debtor's Acts, 53. & 54. Geo. III., printed 13th June 1816. See also 5. Geo. IV. c. 61.

hoped, that all these exertions will be crowned with success; and that the great body of information already collected by the committee of the House of Commons on this subject, will result at last in some effectual provision for giving to England the benefit of a complete remedy for the imperfections and errors of the common law relative to imprisonment for debt.

General View of the Bankrupt Law of Scotland.—In Scotland, there was not at first any attempt to form a complete code of bankrupt law. The evils of perpetual imprisonment, and of fraudulent preferences by voluntary deeds or judicial diligence, first called for the attention of the legislature, and were remedied, as it were individually, by particular regulations, long before any idea was entertained of establishing a system of laws for insolvency.

The first dawn of bankrupt law in Scotland is perceptible in a very remote age; for the Cessio Bonorum of the Roman law is found among the earliest vestiges of our jurisprudence. But though this remedy against perpetual imprisonment was established so early in Scotland, it was not till the seventeenth century that our commerce was sufficiently extended to turn the attention of the legislature towards the frauds of bankrupts. The first statute which professed to regulate matters of this kind, originated with the Judges of the Court of Session. By an act or rule of that court, in July 1620, (which was adopted by Parliament, and makes the statute 1621, c. 18.) all collusive donations by insolvent debtors to their friends and relations, directly or indirectly, were prohibited; as by such deeds, in the first instance, it is, that a debtor endeavours, on the eve of his failure, to save something for future subsistence, and to provide for those in whose welfare he is interested. In this law, provision was also made against the unfair interference of a debtor, to disappoint, by private conveyances, the diligence of his creditors already begun. This was done, by declaring all such deeds subject to challenge by him who should thus be disappointed.

Towards the end of the century in which this law was enacted, cases of insolvency became more frequent, and, from the sums which they involved, infinitely more important than had hitherto been known in the country. Frauds were daily practised, which the existing laws were found inadequate to repress. Where a debtor granted a deed of preference to a favourite creditor, although in the immediate prospect of bankruptcy, no remedy existed, but a proof at common law, that the debtor was insolvent at the date of the deed; and that the receiver knew this to be the case. These intricate points of inquiry gave occasion to many involved questions; and it was found, in those investigations, so difficult to come to any conclusive issue, that little progress was commonly made, after vast expense and delay. The Court of Session, who found themselves daily called upon to decide questions of this kind, and saw the bad consequences which flowed from the want of a fixed principle in a matter of such importance, named a committee of their number to propose a remedy for it. This was in 1694; and the fifth statute, which passed in the Parliament of 1696, was the result of their suggestions. By that law, an universal and precise rule was laid down; the character of bankruptcy was correctly defined; and, this point being fixed, a presumption of fraud was established against all deeds granted within sixty days before in favour of prior creditors.

Besides these provisions for the annulling of fraudulent deeds, a direct punishment was enacted against the bankrupts themselves. The statute of 1621 declared all bankrupts, &c. who should be guilty of fraudulent devices against their creditors, infamous, incapable of honours and dignities, benefices or offices, or of sitting as jurymen, or bearing witness in courts of justice: The statute of 1696 subjects all fraudulent bankrupts to trial by the Court of Session, and, on conviction, to punishment, in the discretion of the court, short

of death: and the Cessio Bonorum afforded an indirect punishment of great efficacy, since the debtor could not hope for liberation, but by vindicating his honesty and fair dealing.

Thus, when the attention of the legislature was first turned to the frauds of bankrupts, all that seemed to be requisite was to make such regulations as might give precision and force to the principles of common justice, in preventing the debtor from injuring the creditors, or unfairly preferring favourite individuals.

While those laws were required as remedies against frauds by voluntary deeds, the necessity began to be felt of introducing equality among creditors doing diligence against the estate. It may appear, at first sight, that the natural, as it certainly is the best remedy for inequalities among creditors, would have been, as in England, a judicial process for attaching and distributing the whole estate; but this remedy was not at that time adopted in Scotland: As the laws against preference by voluntary deed had been introduced in the shape of partial remedies, unconnected with any general process of division; so it happened also with respect to the laws against preference by diligence or legal execution.

The method adopted for equalizing the claims of creditors doing diligence, was so very peculiar, that it is not easy to make it be understood in so brief a summary. It was first introduced in diligence against land, which, in those early days, appeared of chief importance; and, perhaps, to this is owing its peculiar nature. The legislature in Scotland was always averse to authorize such proceedings against land for debt, as might irrevocably carry off his estate from a landholder; and, on this account, adjudication, the diligence against land, was qualified by a power of redeeming the land, by payment within a limited term. While this term continued unexpired, it was impossible to sell the land for payment, without the debtor's consent; and the creditor who first adjudged, of course, excluded posterior adjudgers. In cases of insolvency this was a great grievance. But the legislature could not be prevailed on to sanction any proceedings more peremptory. To remedy the evil, it was declared, that all who should adjudge within a year, should be held as equal in right. This was called the *pari passu* preference. It was, manifestly, a very imperfect remedy, till some means should be provided for bringing the land to sale. But, at last, the legislature yielded so far as to allow a judicial sale of land for payment of debt, where the creditors were in possession, and the debtor bankrupt.

Still the old maxims regulated Execution against moveables; and the rule of preference rested upon mere priority in diligence. Not only was opportunity thus given for constituting fraudulent preferences, and for collusion with debtors; but, from the overstrained anxiety of creditors, upon the slightest alarm, to secure for themselves a preference, much unnecessary expense was incurred, to the prejudice both of the creditors and of the debtor. It was not till the year 1754, notwithstanding the precedent in the case of adjudications, that even partial measures were adopted for securing equality among creditors doing diligence against the moveables. The Court of Session made an act of sederunt, in that year, establishing an equality of preference among all poinders and arresters, within a certain period of bankruptcy. But this was a mere experiment; and, upon the expiration of the act, which was in force only for four years, it was not renewed. This part of the law, therefore, fell back into its old state of imperfection: priority gave preference; and, on the slightest alarm, creditors poured in with diligence against the unhappy debtor, and the most unjust preferences took place among the creditors. In this most imperfect state the law continued till the year 1772, when the first sequestration law was passed. It proved a salutary remedy at a very critical moment.

This was the first attempt to form any thing like a general code of bankrupt law in Scotland. Instead of a commission of bankruptcy, as in England, a form of sequestration

was adopted; under which, the Court of Session sequestrated the whole personal estate of the debtor, to be managed and sold by a judicial factor, and fairly divided among the creditors; and it was declared, that no diligence against moveables, by arrestment or poinding, within thirty days previous to the petition for sequestration, should give any preference, in the event of a sequestration taking place; the poinder being bound to deliver the goods poinded, or the price of them, if sold, and the arrester to deliver the arrested goods, or debt, to the factor, in order to be distributed among the creditors.

But this first attempt to form a general code of bankrupt law, for regulating the disposal of the personal estate, was extremely imperfect. Like the first plan of the English commission in Henry VIII.'s time, it included all ranks of men: And as, in England, it was thought proper to restrict their new code to traders; so it appeared to be necessary, in the renewal of the Scottish law, to separate the trading and manufacturing part of the community from other men. But, in doing this, the legislature did not altogether neglect the bankruptcy of those unconnected with trade, nor leave them to struggle with the evils of the old law. They felt that traders are often deeply interested as creditors, and their credit much involved with men who themselves are not traders; and, in altering the law, a double remedy was introduced;—one for traders, simple like that of England,—another for common bankruptcies, supplying what had formerly been left unprovided for, in relation to the preferences by diligence against moveables.

First, In excluding from the sequestration the bankruptcy of men unconnected with trade, it did not occur that any new regulations for the heritable estate were requisite, but it was necessary to devise some means for preventing, in the execution against moveables, those preferences which had, prior to 1772, been the cause of so much anxiety to creditors, and oppression to debtors. The plan adopted was nearly similar to that of the act of sederunt 1754. By 23. Geo. III. c. 12. the bankruptcy of the debtor (as under the statute of 1696, c. 5.) was taken as the criterion of preference among arresters and poinders, instead of the date of presenting the petition for sequestration. All arrestments and poindings, within thirty days before, and four months after the bankruptcy, were put upon an equal footing; and, by the statute 33. Geo. III. c. 74. the period is still further extended to sixty days prior to the bankruptcy.

There are several forms of action, in which effect is given to these equalizing rules for diligence against moveables; but the most general is that of a multiplepoinding, or action of double distress, similar to the English action of interpleader; in which the holder of the funds calls into the field every creditor who has a claim upon them, that the order of preference may be determined by the court, the fund divided, and the holder of it discharged.

Secondly, The mercantile system of bankrupt law in Scotland, though differing in form, and also in many essential points, from that of England, is so far similar, that both seem to accord well with the great pervading principles of bankrupt law.

By the first statute in 1772, the plan of distribution, which included only the personal estate, was alternative.—1. By the sequestration of the common law, a disputed estate is taken by the court under its own management, and a factor appointed, accountable to the court, for behoof of the parties interested: Upon this model it was provided, that a petition should be presented to the Court of Session, praying that, after due notification to the debtor, his personal estate should be sequestrated, and put under the management of a factor, who should be chosen by the creditors, and should act under the direction of the court, in disposing of the estate; and the creditors were to be ranked, and the price distributed, by a judgment of the court. 2. As the expense and delay of those proceedings (which were all judicial) were very considerable, it was declared, that the creditors might choose, at a meeting to be held after the sequestration had been awarded, whether

to continue the sequestration, or to appoint a trustee, and have the whole affairs managed extrajudicially. Many improvements were made upon this plan, both in 1783 and in 1793; but these it would be improper at present to detail. It may be sufficient to observe, that the whole estate, real and personal, heritable and moveable, is now included in the sequestration; and that the radical change made upon the spirit of the institution, was the combination of the judicial and private alternatives of the first law, into one consistent system of trust, and of judicial control; so as to give all the advantages of a private trust, with all the benefits to be expected from the superintendence of a court of law. The sequestration, as a general diligence, stops all individual proceedings, and gives an opportunity for having the estate managed, in the mean time, by a factor, till the creditors can appear, and verify their claims in order to elect a trustee. This election of the trustee finishes the sequestration, properly so called; and the judicial trust begins. The trustee is vested with the estate, and is the manager and distributor of the fund. In his management he is assisted by three commissioners, elected by the creditors from their own body, as a committee of management; and their proceedings are subject to the constant superintendence of the whole creditors. In his character of distributor of the estate, he acts not as the English assignee does, but as judge, in the first instance, subject to the review of the Court of Session. It is his business to bring up the bankrupt for examination before the sheriff of the county; to make proper states of the affairs; to state objections to the claims of the creditors; to rank the creditors on the fund; and to strike the dividend; and objections to his proceedings in these respects, are discussed and determined summarily on petition to the Court of Session. When the time appointed for a final distribution comes, the creditors themselves determine whether the bankrupt is entitled to a discharge, or whether he is to be left to the remedy of the common law, the cessio bonorum; under which, without being discharged of his debts, he is relieved from imprisonment.

This system of bankrupt law has been established by a series of temporary, or, (if the expression be allowable), experimental statutes; and the subsisting Act is of the same description. To the wise precaution of proceeding thus gradually it is owing, that the bankrupt law of Scotland has reached its present excellence, and that practical wisdom and convenience have been kept so steadily in view in regulating the administration of this most difficult department. Instead of attempting at once to form a complete system, the progress of the institution has been slow and gradual; no improvement having been adopted till the course of experience naturally led to it. In reviewing the steps of these proceedings, it is pleasing to observe the happy combination of legal knowledge and mercantile experience that characterized all the consultations in which those laws were digested. Among the lawyers who took a share in the deliberations, there were men of eminent talents and profound knowledge; while those who acted as the deputies of the merchants, were men of large views and great candour, who, though, as traders, they wished the system of English and Scottish law to approach as nearly to similarity as possible, were strongly impressed with the superiority of some of our own institutions. From the papers which are in my possession, there appear, throughout a series of consultations of nearly thirty years, a candour and unanimity in all the proceedings, and a sincere wish to combine, for the public benefit, the knowledge, experience, and foresight of the two professions.[1]

[1] This spirit would never have been maintained in all its vigour, had it not been for the exertions of Sir Ilay Campbell, lately Lord President of the Court of Session. When, upon the expiration of the first sequestration statute, a formidable opposition was made to its renewal, he was selected by the merchants, on account of his long experience, his eminent talents, and extensive knowledge of the law, to defend the Act, and the interests of the merchants, which seemed to be involved in its fate; and, amidst the pressure of other important duties, he devoted much of his attention to the improvement of this branch of the law.

In the revisal of our code of bankrupt law, which is now depending, and the result of which I hope to be able, before the close of this Work, to state, we shall in our turn be able to derive benefit from the new institutions and improvements introduced into the English system. And there is every likelihood, that, by this course of legislation, progressive, candid, liberal, and free from national jealousy, we shall, in both countries, have the advantage of a code well adapted, and with the proper discriminations, to the occasions and to the jurisprudence of either nation.