

SOCIAL INQUIRY SOCIETY OF IRELAND.

REPORT

ON THE

LAW OF DEBTOR AND CREDITOR



SO FAR AS RELATES TO

PROCEEDINGS SUBSEQUENT TO FINAL JUDGMENT.

BY

WILLIAM DWYER FERGUSON, ESQ.

BARRISTER-AT-LAW.

AUTHOR OF "PRACTICE OF THE QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER IN IRELAND,"
"FORMS AND PRECEDENTS OF THE PROCEEDINGS OF THE LAW COURTS IN IRELAND,"
"TREATISE ON THE LAW OF JUDGMENTS," "TREATISE ON THE LAW OF RAILWAYS," &c.

DUBLIN:

JAMES McGLASHAN, 50, UPPER SACKVILLE STREET,
JAMES RIDGWAY, PICCADILLY, AND EFFINGHAM WILSON, ROYAL EXCHANGE,
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REPORT.

Dublin, 27th December, 1851.

To the Council of the Social Inquiry Society of Ireland.

GENTLEMEN,

As you have desired that I should report "*On the present state of the Law of Debtor and Creditor in Ireland, so far as relates to the part of the proceedings which is subsequent to final judgment.*" I have most carefully considered the subject, not merely in its legal relations, but in its bearings on commercial credit and the social and moral condition of the community; and in submitting to you the results of my investigation, I have to beg your patient attention to details which are so little attractive in themselves, and so remote from the course of your ordinary reading, that I should despair of interesting you in them, but for the great practical importance to society of an inquiry affecting the ultimate object and result of all legal proceedings—the execution of the judgments of our courts of justice.

It is evident that any system of judicature, however perfect and precise its definition of rights, and systematic its method of ascertaining them, is but delusive after all, if it be not adequate and efficient in the enforcement of its adjudications. If the final result be uncertain or unsatisfactory, all the preliminary steps lead to profitless expense and vexation of spirit. You will not understand me as at present prejudging the existing state of our law as defective in this respect, but rather as indicating that while public attention has been mainly directed to the investigation of the course of procedure that leads to the correct and speedy judgment on the matter in dispute, because perhaps it presented some grosser anomalies and more salient points for reform; it would not be wise to stop short at that point, and to neglect to consider in what manner the ultimate execution of the judgment of the court is to be carried out. It is little satisfaction to the merchant or trader to know that his rights have been properly ascertained, and a correct judgment of the court pronounced, if there exist practical impediments in the way of realizing the fruits of it, and making it effectual.

I therefore proceed to state to you the actual nature and condition of this process of execution, which involves all the proceedings subsequent to final judgment, in order to assist you in arriving at a safe conclusion as to how far it is adequate to its purpose and sufficient for the exigencies of society.

It is not necessary that I should give any definition of the process of execution, which you all understand as well as I do.

Lord Coke describes it, "*fructus, finis, et effectus legis.*" I propose, however, to explain to you the several kinds of executions now in use, their nature and effect; and, secondly, the manner in which they are obtained and the extent to which they are available; and, lastly, I would offer some suggestions as to their simplification and improvement, with a view to their better adaptation to their purpose.

When a creditor has authenticated his debt, and obtained the judgment of the court declaring that he is entitled to recover against his debtor the amount of the debt and the costs of the suit, the law has provided him with several modes of enforcing its judgment. There is, first, the writ of *Fieri Facias* against the goods and chattels of the debtor; secondly, the writ of *Elegit* against his lands and goods; thirdly, the writ of *Capias ad satisfaciendum* against his person; fourthly, the proceeding by way of receiver over the rents and profits of his real estate; and, lastly, the proceeding by way of *sale* of the real estate itself. The two latter modes of recovering the amount of the judgment can be attained only in a court of equity; the three former are the writs of execution in the courts of law; and to them alone do the limits of the present inquiry enable me to advert.

In the early history of our law, the only remedy by way of execution, given between subject and subject, was against the personal estate or the goods and the chattels of the debtor; because, as it was said, it was only a chattel that was lent, and the debtor was trusted on his personal security, and no further than as he had visible chattels to answer the debt; and the judgment being in pursuance of the contract, was only to recover a personal thing. There were, no doubt, other and feudal reasons mixed up with this notion as to the nature of the contract, which exempted the land and the person of the debtor from being subject to execution. The lands were not allowed to be liable, because they were supposed to be held under an obligation to answer the feudal duties to the lord paramount, on whom a new tenant should not be forced without his consent; and the person was not liable, because that was bound by the tenure to serve the king at the wars, and the several lords at their houses, according to the nature of the tenure. This law was well enough framed for a nation trained to war, who were to extend their power by force of arms; but it was soon found unsuited to the circumstances and institutions of a commercial people, whose power and credit rise and fall in proportion to the increase or decrease of trade, which again mainly depends on the personal credit and stability of its merchants, and the extent of security in the fulfilment of their contracts. The king, however, might have had execution for his debt, not only against the goods and chattels, but also against the lands of his debtor; because he was supposed to be not merely bound in person, but holding mediately or immediately all that he had as feudatory from the crown, he was from thence to satisfy what he owed to the king. And, to this day, the process of execution in favour of the crown is the *Levari Facias*, against the lands and

goods of the debtor; but as it very remotely affects the relation of debtor and creditor, and upon recognizances chiefly in the Court of Chancery, I shall not allude to it further than to say that it is in some sense another variety of the process of execution.

The writ of *Fieri Facias*, which, as we have said, is the most ancient process, requires the sheriff to levy the debt, and costs, and interest out of the goods and chattels of the debtor in his bailiwick. This the sheriff does by seizing and selling all the personal chattels belonging to the defendant which he can find, and which are capable of being sold or realized, with the exception of his wearing apparel actually in use, and such chattels as happen to be in his bodily possession. With these exceptions, the sheriff can seize and sell everything that partakes of the nature of a chattel, even a lease of lands for a thousand years, and growing corn and other agricultural produce raised by human industry, because they would pass to the executor and not to the heir of the debtor. But although he can sell a term of years, however long or valuable, he cannot sell anything that pertains to the freehold, nor can he touch the rents or profits of a freehold estate, however short, or precarious, or insignificant. He cannot touch an apple on the tree, nor a hinge in a door, because they are annexed to the freehold, although the freehold itself belong absolutely to the debtor, and may be sold by a chancery proceeding. So, again, though he can seize and sell growing corn, he cannot touch artificial grasses growing under it. The rationale of these distinctions it is difficult to understand; they appear to be very arbitrary remnants of feudal times, that have survived the occasion that gave them a reality and a substance.

Another principle that prevailed until recent times, and still to a considerable extent operates, from a too literal adherence to the terms of the writ of *Fieri Facias*, is this, that nothing can be affected that cannot be realized by a sale. Under this category, coined money, bank notes, cheques on bankers, bills of exchange, and other securities for money were included. They can now be seized, the money paid over to the creditor, and the securities retained by the sheriff, or sued on in his name, on a proper indemnity being given to him. But debts due to the defendant, however considerable, accessible, or well-secured, if not actually covered by written securities, cannot be rendered available to the liquidation of the creditor's demand; and as if to place this doctrine of our law in an absurd light, it has been decided that money actually in the sheriff's own hands, and belonging to the debtor, being the balance of the proceeds of a former execution, even though it were at the suit of the very same plaintiff, because it is merely a *debt* due to the defendant, cannot be applied in satisfaction of another execution lodged with the same sheriff. So money lodged in a banker's, or in a savings' bank, cannot be touched, though the pass-book be seized; nor can money in the hands of a third person in trust for the defendant, or lodged in the same court to his credit. The consequence of this state of the law, in very many cases, is that credi-

tors are obliged, in order to reach even a share of the actual property of their debtors, that may be outstanding in the hands of other persons, to reduce them first to a state of bankruptcy. They can only attain their object at the expense of the commercial character of the debtor, and perhaps his ultimate ruin. It is at least deserving of serious consideration, whether it would not be practicable to adapt the procedure under execution in the court of law, so as to reach any tangible property of the defendant in the hands of third persons, without the necessity of a declaration of bankruptcy or insolvency, or closing the affairs of the debtor altogether. The most substantial portion of a trader's property may often consist of book accounts. At present, if a man has an execution against his debtor, and the creditor's brother happen to owe a book account of equal amount to the same debtor, it is not competent for the one brother to make his payment to the other, or to the sheriff, to be applied to the liquidation of his debt, it not being covered by a written security; although, if the money had been paid, and were found in the debtor's drawer, it might have been taken and so applied. I can see no injustice or inconvenience in at least permitting any debtor to the defendant against whom an execution lies in the sheriff's hands, to pay the amount of his debt to the sheriff, and to receive from him a sufficient discharge in respect of it; and at present I see no practical difficulty to prevent the court in which the action is pending, on proof to its satisfaction that any particular person has property of the debtor, or is indebted to him on a clear and indisputable demand, requiring such person to appear and answer concerning the matter; and if he cannot show good cause to the contrary, obliging him to lodge the amount in court. I cannot see what peculiar aptitude either the Bankrupt or the Insolvent Court has for such a function: nor can I see why a direct means should not be provided of attaining that which is now accomplished by an indirect, expensive, and oppressive proceeding, the foundation of which is the commercial degradation of the debtor. A safe analogy is afforded us in the admirable law of debtor and creditor in Scotland, by which a creditor can attach the debts due to his debtor in the hands of a third person, and make them available to the satisfaction of his own demand.

I have said that the sheriff may seize a chattel lease, and sell the tenant's interest in it; but this must be understood as applying to the case of the debtor himself being the actual *legal* owner of the lease; for if it should be granted to a trustee for him, or if he has mortgaged it, and have but an equity of redemption in it, however valuable his interest or express the trust in his behalf, the sheriff cannot touch it. These rules are derived from a literal adherence to the original scope of the writ, when equitable interests were not recognized by courts of law as being anything real or substantial; but now that this conceit has given way to more rational views upon the subject, and that trust estates are recognized in courts of law for many purposes, it would seem to be

time to abandon this distinction in respect of the scope of the writ of execution.

When the sheriff sells a leasehold interest, he executes an assignment of the lease to the purchaser; but he does not guarantee the title, or even give the possession, unless it be altogether vacant. If the possession be withheld, the purchaser is obliged to bring an ejectment to recover it. This, no doubt, materially deteriorates the value of the interest disposed of, but it is a necessary consequence of the fact I have stated, that the sheriff does not guarantee the title or validity of the lease, and therefore cannot undertake to enforce the possession under it. Whether the principle on which the Incumbered Estates Court guarantees the title to fee-simple estates could be safely applied to leasehold property, sold by the sheriff or in the Court of Chancery, is one too remote from the present inquiry to discuss here; but it is evident that should such a principle be considered safe and judicious, it cannot be applied to sales made by a sheriff, until some machinery be introduced for examining titles professed to be sold and guaranteed, similar to that which exists in the Master's Offices in the Court of Chancery. I confess I feel strongly the public necessity that land shall pass from insolvent to solvent hands, with as little restraint as is possible; and that security of possession, which is the first requisite for all improvement, should not lightly be impeded by reason of fanciful defects and blemishes of title. I am persuaded that with little improvement in our system of registry and search, and some care in the investigation of titles by a properly constituted tribunal, the risk of passing really bad titles would be so small as to be utterly insignificant, as compared with the enormous amount of public good attained. It has been suggested, that if it were necessary to provide a compensation fund for the indemnity of parties whose estates had been wrongfully dealt with, such a fund might be readily created by a trifling per centage on the sale of the properties guaranteed.

The sheriff under a writ of Fieri Facias is bound at his peril to take only the property of the debtor, and if he seize that of a stranger, he renders himself liable to an action of trespass, although the property be in the actual possession and apparent ownership of the defendant. This imposes upon the sheriff a very embarrassing duty, and places him in an unfair position, which is very imperfectly redressed by the interpleader proceeding. The Bankrupt Laws deal with all the property in the ostensible ownership of the defendant as subject to his debts, because it afforded him the means of making a false appearance to the public, and obtaining a credit on the faith of it. So the law of landlord and tenant deals with all the property found upon the premises, (with some few exceptions) as liable to the distress for rent. Why the principle of the Bankrupt Laws, if it be sound as to the body of the creditors, is not equally so for each of them singly, I do not at present understand; but even admitting that there may be some substantial distinction between the cases, the redress which the law affords to the sheriff appears to me to be the most indirect and expensive that

could possibly be devised. If the property be claimed by a third person on feasible grounds, the sheriff must apply to the court at his own expense for a rule for interpleader. This all results, in a disputed case, in an issue, the object of which is to have the question tried by a jury, whether the property belongs to the defendant or the claimant. I cannot conceive why it should not be permitted to empanel a jury within a reasonable time after the claim is made, and to have the question tried at once in the county before the assistant barrister. The sheriff may, no doubt, have a trial now, but the verdict affords no protection to him. It would be more just to the sheriff, and less expensive to the parties, to permit the sheriff, on his ultimate responsibility for the bona fides of the step, on any such claim of property being made, to have a jury to try its validity; and if the verdict be in favour of the claimant, to relinquish the possession unless adequately indemnified.

The second writ of execution, called the writ of *Elegit*, was introduced into our law by the statute of Westminster, the 2nd. (13 Edw. I. chap 18,) previously to which there was no remedy as between debtor and creditor other than that against the goods and chattels. This statute gave the creditor an election (from which the writ takes its name) to sue out either a *Fieri Facias*, or that the sheriff should deliver to him all the goods and chattels of the debtor, (except his oxen and beasts of the plough) and half his lands, until the debt should be satisfied. The goods were not sold, but handed over at a valuation, and the lands were given at a reasonable rent or appraisement. A lease for years might either be given over at an appraisement as a chattel, or the profits of it extended as a part of the realty, or an interest in the land.

In practice, the writ of *Elegit*, though ostensibly a remedy both against the goods and the lands, was virtually useful only against the latter. It has never been resorted to as a means of reaching the chattel property, because of the inconvenience of getting the debtor's goods in specie in satisfaction of the debt, instead of the proceeds of a sale. Yet this is almost its only value now.

The vicissitudes which this process has from time to time undergone are certainly curious. At the common law, the lands were not liable at all. The Statute of Westminster made a moiety of the lands, of which the debtor was legally seized or possessed at the time of the recovery of the judgment, or at any time afterwards, liable under the *elegit*. The Statute of Frauds went further, and made a moiety of such equitable estates as he had when the writ was delivered to the sheriff liable in the same manner. The act called the Sheriff's Act (5 & 6 W. IV. c. 55), introduced by Sir Michael O'Loughlin, carried this a step further, and gave what was called an equitable *elegit* or a receiver over the entire of the lands of the debtor; and the act for abolishing arrest on mesne process (3 & 4 Vict. c. 105) gave the *elegit* at law over the entire of the lands and tenements of the debtor, and over his tithes, rents, and rectories, whether in possession, reversion, or remainder, or over which he had a disposing power that might be exercised for his

own benefit. So far, it seemed to be the pleasure of parliament, or rather of the government of the day, to extend and facilitate the creditor's remedy by execution against the land; but since then the tide has turned, and set as strongly the other way. The act (12 & 13 Vict. c. 95, A.D. 1849) repealed the provisions of both the Sheriff's Act and the Abolition of Arrest Act, as to judgments recovered since August, 1849, for sums under £150; and confined the *elegit* on such judgments to such lands as the debtor might be entitled to when the writ was lodged with the sheriff. In the following year (1850), another act was passed repealing the provisions of both the Statute of Westminster and the Statute of Frauds already alluded to, and declaring that no writ of *Elegit* shall issue against the lands, tenements, or hereditaments on any judgment recovered after July, 1850; and that even existing judgments should not affect lands subsequently acquired, and that every judgment shall cease to affect lands as against purchasers, mortgagees and creditors, unless registered and re-registered every five years. Thus you see that the rights of creditors have been almost from year to year subjected to a perpetual mutation. There are at present thirteen acts of parliament regulating and controlling these rights. They depend now so much on dates and amounts, that it is impossible that any ordinary effort of memory can keep them in view; and a gentleman of the bar has recently prepared, for the use of lawyers, a tabular analysis of the several Judgment Acts, shewing the varying rights and properties annexed by them, in the chronological order of their dates. Indeed, nothing can be more embarrassing than the condition of the security by judgment as regards the land of the debtor, or more injurious to the public than the patch-work and capricious style of legislation that is adopted in respect of what was once the favourite security of the country. There is no branch of the law that requires more to be reconsidered and reconstructed, on a large and comprehensive plan, than this law of judgments as it affects freehold and leasehold property. It is impossible to say whether the framers of these acts contemplated the total abolition of the writ of *Elegit*. The language of the act merely expresses that it shall not be issued against *the lands*; I have already stated that against the goods it was an idle form, and never practically employed.

But the certain result of these enactments is, that as to future judgments they cannot be made available against the lands of the debtor, although, strange enough, if a writ of *Fieri Facias* against a beneficed clergyman be returned *nulla bona*, it would seem that the profits of his ecclesiastical benefice can be reached, though it be a freehold; and upon the bond or obligation of a debtor, his real estate descended to his heir will still constitute assets at law to meet the debt, and in equity will be a fund to pay all his debts in a due course of administration. I am not about to question the policy of freeing the land from all such charges as judgments, although they are as old as the Statute of Westminster, and to some

extent had been the consideration in lieu of which the creditor's right to arrest the person of his debtor was curtailed by the Abolition of Arrest Act, which professed to give more extensive remedies against the property of the debtor, as a compensation for the right of restraining his personal liberty. This compact is still observed in England in its integrity; but in Ireland the framers of the recent statutes have given the creditor, in lieu of his ancient remedy, a right to register a claim on foot of his judgment, as if it were a deed, against certain lands which he swears he believes belong to the debtor; and this registered claim is declared to be equivalent to a mortgage of the lands included in the affidavit of ownership. Now the only imaginable pretext for depriving the creditor of the direct remedy which he had against the lands of his debtor, was the great desideratum of freeing the land from such charges as judgments, which attached on all the debtor's lands indefinitely, by the mere fact of the entry or registry, and thus embarrassed and impeded their free transfer. The object thus sought to be attained was no doubt a most proper one, but it is difficult to see how it has been accomplished by the mere change of name, or rather misnomer, of the judgment, and calling it a mortgage. The evil would rather appear to be immensely aggravated, because the judgment was only a charge on the lands which really belonged to the debtor; it did not affect or embarrass the lands of any other person; whereas, from the loose and indefensible system of permitting a charge to be attached on any lands in the kingdom, on a mere affidavit of belief that they belong to the debtor, the number of erroneous, inaccurate, and false registries of mortgages will impose great additional expense and difficulty on the parties dealing with the land. Parties, either from ignorance or fraud, endeavour to register as mortgages judgments which under the old law would have been no charges on the land at all, namely, interlocutory judgments; and I understand that it passes the utmost vigilance of the officers of the court to prevent this, and that in most cases the discovery is accidental, and not in any manner secured by legislative check or controul. So that, while the natural rights of creditors have been materially interfered with, it is impossible to conceive any single advantage derived from the new system; even the former expense of searches for judgments, recognizances, and crown bonds must still be incurred, and the additional expense of a registry search for a memorial of the same judgment. Now, if the legislature had declared that the creditor should have no right to resort to his debtor's lands for the satisfaction of his judgment, not having contracted for any charge against the lands, it would have been consistent and perhaps well; or if the legislature had determined that while it would effectuate the charge against the lands, when actively pursued, it would not permit it to remain dormant, and yet by its inert operation impede the free transfer of the soil, this might have been just to the creditor and politic to the community. If it had said, "You may have satisfaction of your judgment out of the

land if you will, and the land shall be charged from the date of the lodgment of your writ of execution with the sheriff, in the same manner as his goods are; and you may pursue your charge to a speedy judicial sale; but you shall not keep your judgment as a security *in posse*, hovering over the land, and preventing others from dealing with it; nor shall you sever the relation of landlord and tenant, and obstruct all the duties it imposes by a chancery receiver or an Elegit;"—this might have been wise, and have tempered justice with expediency. But it involved larger considerations, and more comprehensive views of the subject than have been taken in the legislation by which this country has been disquieted and unsettled for several years back; and the result is a half measure, preserving the evils of the old system without appropriating the advantages of the adopted one.

With what view is the judgment to be converted into a mortgage? Is it to prevent the system of receiverships? Why, a receiver may be had on a petition under the Mortgage Act with as little difficulty as under the Sheriff's Act, and the evils of chancery management are the same in either case. Is it with a view to a sale? If so, why should not the creditor have a right of sale on his judgment instant, and before it is converted into a so-called mortgage? The period is past when the public will be satisfied to regard the land as a commodity that cannot be reached but through the instrumentality of a long and expensive suit. The Incumbered Estates Commission has demonstrated that it is practicable to adjudicate upon a creditor's right and a debtor's title, and to effect a sale, in a period of time hitherto inconceivable. I scarcely think there is any abstract impossibility in a Master of the Court of Queen's Bench accomplishing the same feat as safely and as satisfactorily. If the debtor's property consists of a lease for a thousand years, at a pepper-corn rent, it can be sold under the sheriff's hammer without ceremony; or if the debtor become a bankrupt or insolvent, his real estate is disposed of and converted without difficulty; but yet, in a court of law, if it be a freehold for the life of the most aged man in the kingdom, it cannot be reached without first converting the judgment into a quasi mortgage, and then crossing the hall to another court and filing a petition for its foreclosure and the sale of the property charged. If the judgment entitles the creditor to a mortgage on the real estate, and the mortgage entitles him to a sale of that real estate, why should not the right of sale be annexed to the judgment directly, or not at all? What additional force or value does it acquire by being recorded in the registry office? Many who have been habituated to connect the idea of a sale of land with a long, heavy, and expensive suit, may think that it is necessary to have two stages to travel over, and two courts of justice to resort to, before you attain such an end. It is a more deliberate and a more formidable proceeding, but in no way a more safe or satisfactory one. Those who insist that a creditor by judgment merely

shall have no right to resort to the land of his debtor at all, are consistent and possibly right; but those who concede the right, and yet fetter it with an expensive and tedious proceeding, injure the debtor as effectually as they impede the creditor. Regarded as a departure from the terms of a public compact, by means of which the creditor was given a more direct and extensive remedy against the property in lieu of the person of the debtor, I conceive that it was not compensated by any corresponding public advantage; that it increases the evil it was intended to relieve, and further impedes and incumbers the transfer of the land; and that, until the legislature was prepared to give the creditor an immediate and summary sale of the lands by virtue of his charge, or boldly to say he should have no such charge on the lands at all, it had been better to have left matters even in the unsatisfactory state in which they were.

But in any view it is useless to continue the existence of the Writ of *Elegit*, after its only practical use has been taken away; as a remedy against the goods it is worthless, and it would at least simplify the process of execution to abolish a writ that is obsolete and impracticable.

The writ of *Capias ad satisfaciendum* is the last writ of execution, and that by which the debtor's person is taken and imprisoned. It was the latest remedy given between subject and subject, although it had existed at the common law for the debts of the king as part of his prerogative. It was also said to have been allowed in respect both of *delictis majoribus*, and also of *delictis minoribus* or civil wrongs connected with a breach of the peace, matters rather of criminal than of civil cognizance. It is certain that in respect of mere personal debts, no such remedy existed in England until the reign of Henry V. when the feudal barons procured it against their absconding bailiffs. It was afterwards by degrees extended to other actions, but I find in Reeves' History of the English Law that it was only in modern times that it became generally used; that it had been an extraordinary process of the court, issued not without its special award, and in the exercise of a discretion according to the circumstances of the case. He enumerates several cases in which it was withheld, because the defendant's liability had been incurred by mere negligence without wilful default. In more modern times, this right of resorting to imprisonment so unreservedly has been challenged in our courts, as being in contravention of the provisions of Magna Charta; and though unsuccessfully, yet certainly public opinion has set in against so unlimited a power in civil cases. The act already referred to has taken it away before final judgment, and a more recent statute has prohibited it even after judgment, where the amount of the debt has not been above £10. The Acts for the Relief of Insolvent Debtors have also, to a great extent, neutralized its value and efficacy in ordinary cases. There are also numerous cases of exemption on public grounds, such as for peers, members of parliament, bankrupts, witnesses, and professional men,

and officers of the court engaged in the discharge of their duties, which occasion disputes and difficulty.

When a debtor is once arrested, if he has no means of paying the debt, he must continue a prisoner in a common goal, or he must undergo the expense and disgrace of obtaining the benefit of the Insolvent Debtors' Act, the effect of which is necessarily to lower his position in society, and damage his prospects and chances of retrieving his affairs and fulfilling his engagements. Now I believe it will be generally admitted that the imprisonment of the person of a debtor in a common goal, for an indefinite period of time, for an ordinary debt contracted without fraud, and in the ordinary course of mercantile business, is too heavy a punishment; and when compared with the measure of punishment inflicted for larceny or violence, appears altogether out of proportion. But it may be said, the law provides the honest debtor with a means of extricating himself from goal, and obtaining his liberty, by passing through the Bankrupt or Insolvent Court. This I cannot but think to be a wrong method of adjusting matters, and too like the judgments of Rhadamanthus, who punished first and inquired afterwards, "*Castigatque auditque dolos.*" If the arrest and imprisonment of an honest but unfortunate debtor be a righteous judgment, for the default of improvidently contracting a debt that he is unable to discharge, it is well; but if the punishment be altogether beyond the measure of the default, every sentence of discharge by the insolvent judge is the condemnation of an unjust arrest. The bankrupt and insolvent code I conceive establish this, that in the eye of our law, no man should be detained in prison for a mere debt, but only for fraudulent conduct in the mode of contracting it, or for withholding his property from its liquidation. But it may be thought to be a valuable means of extorting a disclosure of property concealed, and also of deterring improvident debtors from lightly contracting debts without a chance of payment. So, no doubt, would corporal punishment be; but the question really is, supposing the case of an honest debtor, is it right to punish him without inquiry or investigation, as a preventative against fraud or concealment in others? If the debtor really has no property that can be made available, to what purpose should he be incarcerated in a goal? If, having no property, or probable means of paying his debts, he wantonly contracts them, it is a case clearly of fraud, and richly deserves to be punished by imprisonment, and in its degree as fully as petit larceny. But why not ascertain if the fact be so, in the first instance? If the debtor has property which is known to exist, and cannot be reached, this is a defect in the law which should be remedied directly, and by more legitimate means than the terrors of a prison or the disgrace of public insolvency. If he has property in the English funds, or in the hands of third persons, attach it; if he has an income from a public or private office, let him shew cause why a proportion should not be applied to pay his just debts. Give the most ample effect to the execution

of the court, bring within its range every kind of property of which the debtor is seized or possessed, and give every facility for its realization, and then punish as fraud all attempts at concealment or misappropriation of that property.

It may be said this would materially affect commercial credit, and make men more reserved in their mercantile transactions. So it was said when it was proposed to restrict the right of arrest on mesne process. But I confess I very much doubt the soundness of any trade or business, the security for which rests not on the personal credit and faith-worthiness of the parties, or their actual property, but on a penal sanction and a dread of punishment. The latter may be a necessary function of municipal justice, but should not be the ordinary resort of the creditor, and perhaps never would have been tolerated as such, but for the practical difficulties which still exist in the way of reaching the entire property of the debtor. For example, if the debtor has a large amount of property outstanding in debts due to him, or in leasehold property vested in trustees, or if he have a large income in the way of a salary in a public office, no writ of execution can reach it directly; and the creditor is therefore obliged to resort to an arrest for the purpose of compelling the debtor, when applying for his discharge, to submit to such reasonable terms as the Insolvent Court may think proper to impose upon him; to assign his real property to be sold, his debts to be collected, and a portion of his salary to be applied in liquidation of his debts. Whence the necessity for all this, to realize the fruits of the creditor's judgment? It is chiefly owing to the splitting up of jurisdiction in respect of the same matter between different courts of justice. If his rights are to be ascertained, he must go to the court of law; if he is to realize the fruits of his judgment against the landed property, he must go to a court of equity; and if against the debts or personal income, to a court of insolvency or bankruptcy. There is no one court of justice in the kingdom, in which he can both ascertain his rights and vindicate them to their full extent. There is no one court of justice in which all the property of the debtor, liable to the satisfaction of the debt, can be attached. The bankrupt and insolvent courts are modern excrescences from our courts of equity and law; they complicate the procedure, and double the expense; they possess no advantage which might not be attained without their inconvenience by the court of law or equity itself and perhaps its ordinary staff of officers. The jurisdiction has been already merged in the general jurisdiction of the court of the assistant barrister, with great advantage to the suitor and to the debtor. I believe it would be a great public advantage to extend the principle to the superior courts, and to invest them with the powers of attaching and realizing every part of the property of the debtor for the satisfaction of his debts, and thereby considerably dispense with the necessity for the resort to the use of the writ of *Capias ad Satisfaciendum*.

Under the writ of *Capias ad Satisfaciendum*, the sheriff's duty is

merely to arrest and lodge in goal the person of the debtor. He is not authorized to receive the amount of the debt, nor is the debtor safe in making payment to him, without the express authority of the plaintiff or his attorney. In the law of distress this defect has been properly remedied, by declaring that payment to the party authorized to make the distress shall be a satisfaction of the rent. Some such provision should be made as to executions, declaring that a payment to the sheriff shall be a discharge of the debt.

If the debtor escape from custody, whether with the consent or by the negligence of the sheriff, he cannot be again taken into custody. It is scarcely worth while examining the reasons on which this principle has been rested; the good sense of it has long since ceased, and the rule should no longer exist.

Having thus far explained the nature of the several writs of execution, I shall add a few words on the manner in which they are obtained, and the extent to which they are available. None of them can be had until after a final judgment is recovered. In the case of the arrest of the debtor's person, this may be anticipated and secured by an arrest on mesne process at any stage of the proceedings, when the court is satisfied that the debtor is likely to abscond, and so far the final efficacy of the writ of *Capias ad Satisfaciendum* is secured by a provisional and interim writ; but in the case of an execution against the goods or the lands of the debtor, there are no means whatever of securing them, and the debtor may dispose of them or convert them into money on the day before the judgment is obtained, and so defeat the execution of the court altogether. No matter what grounds the plaintiff may have for believing that his debtor is holding him at bay, until he can dispose of his available property, he is without a remedy, or a means of preventing it. This I conceive to be a great defect in the law of debtor and creditor, and I believe it renders many of the judgments of the court abortive, and invites fraudulent debtors to take defence and litigate the plainest demands, and drives the creditor to an arrest of the debtor as a last resource, and rather for vindictive than remedial purposes.

I think the court of law in which the action is pending might, where the debtor threatens to remove or dispose of his property to defraud his creditor, be empowered to attach and provisionally to secure it, on a proper indemnity being given by the plaintiff to abide the consequences of his acts, if he should fail to recover judgment. In certain actions where the demand is liquidated, and *prima facie* beyond all dispute, as on bills of exchange and promissory notes, to which real defences are exceedingly rare, this might be done without any appreciable risk.

I have said that the postponement of this power of affecting the property of the defendant, is a temptation to fraudulent debtors to take defence and gain time to consummate their fraud. It assumes another form, and it drives the plaintiff to the most expensive mode of proving his demand, namely, by a record or trial by jury,

because that affords the debtor the greatest amount of delay. Where there is a judgment by default, or on a point of law, in many cases execution can be had forthwith; but if the case be tried by a jury at the assizes or after sittings, no judgment or execution can be had until after the fourth day of the next term, unless the judge on some special circumstances will certify for immediate execution. Thus, if the trial take place in July, no execution can be had till the 5th of November, and not for months after, if any points of law be raised. The Common Law Commissioners for England have properly recommended that judgment and execution shall follow forthwith, unless the judge otherwise order. But still, what is at present called *immediate* execution involves the delay of several days, which may be as prejudicial as so many months; because the trial takes place in the country, the record of the verdict must be thence transmitted to Dublin, and judgment entered there and execution issued, and sometimes transmitted back to the county in which the verdict was given. I think it would be well to consider whether judgment might not be entered forthwith by the clerk at Nisi Prius, or the judge's registrar, in some simpler form, and a writ of execution, signed by the judge, be issued and delivered to the sheriff for immediate execution, on the plaintiff giving when required proper security to abide the ultimate order of the court. It is to be presumed that the verdict of the jury is not unwarranted by the facts and the law of the case, and in ninety-nine cases out of the hundred this presumption will be found to be correct.

The Writ of Execution can only be procured within a year and a day after the judgment of the court is given, after which no writ of execution can be issued until the judgment is revived, in ordinary cases. This rule originated in a very proper precaution, that judgments should not be allowed to lie dormant for ever, to be executed at any time, and that after the lapse of a reasonable time it should be presumed they were satisfied. The writ of Scire Facias is used not merely to bring new parties into privity with the suit, as in the case of the death of a plaintiff or defendant, or the marriage of a female plaintiff or defendant, but also to revive the judgment after the lapse of a year and a day. Its supposed object is to summon the party to shew cause why execution should not be given of the judgment already obtained. To this the defendant is entitled to plead payment of the *entire* amount of the judgment, with various other pleas. To these pleas there may be replications and rejoinders, and demurrers and trials at Nisi Prius, respecting the right to issue execution on the judgment so recovered. The Scire Facias is obtained as a matter of course within ten years, and without any affidavit of the judgment being still unsatisfied; after that period the court requires an explanation by affidavit, before they permit the writ to issue. The Common Law Commissioners have recommended that a writ of Scire Facias shall be unnecessary (unless on the change of parties) within six years, and that within

that time execution may issue on the judgment without a revival. While I concur with the commissioners in thinking that the proceeding by *scire facias* is a very tedious and expensive one to ascertain a fact easy of determination, still I cannot but also think there was great good sense in the common law requiring that where execution had been delayed beyond a reasonable or usual time, the natural presumption that some arrangement had been entered into should be rebutted; and I think that six years would be too long a period of time to leave it in the discretion of the plaintiff to enforce his judgment, without the leave of the court on an affidavit that the judgment was still unsatisfied. But with this restriction, of requiring the leave of the court on special application, and notice to the opposite party where execution had been delayed beyond a year, I think the whole system of *scire facias* might be safely and satisfactorily abolished.

I am rather confirmed in this latter suggestion by a recommendation of the same commissioners, in respect of another stage of the proceedings, namely, where it is sought to supersede the execution and reverse the judgment for error in point of law or fact. In this case they recommend, and I think wisely, that the independent proceeding by writ of error (which was a new and substantive proceeding like the writ of *Scire Facias*) should be abolished; and that advantage of grounds of error shall be taken by a step in the cause, and by a mere suggestion on the record, without writs, assignments, and joinders. I am surprised that they did not see the suitability of a similar amendment in the intermediate step, and the uselessness and inconvenience of having two independent records, and in fact two or more distinct suits, respecting the same identical demand. The Court of Chancery has gotten rid of the nuisance of bills of revivor on abatements, and the courts of law should be relieved from a like anomaly of a secondary record, unless perhaps in the case of new parties.

The writ of execution is directed to the sheriff of some particular county, and can be executed by none other. Thus, a *capias* may be directed to the sheriff of the city of Dublin, and if the debtor be walking at large in the county of Dublin he cannot be touched, until a duplicate, or alias writ, is procured, directed to the latter sheriff. So, if an execution against the goods be issued to the sheriff of the county of Meath, and it afterwards turn out that defendant's property is in the county of Kildare, the writ cannot be transferred to the sheriff of the adjoining county, but a new writ must be procured; and while this is being done, the debtor may have left the kingdom, or disposed of his chattel property. It is difficult to see the necessity of thus directing the writ to the sheriff of a particular county, or why it might not be addressed to all the sheriffs and coroners in Ireland, and executed by any one of them in whose hands it may be placed, or to whom it may be afterwards transferred. The *capias ad respondendum*, by which the action was commenced, was directed to a particular sheriff; but

a recent act of parliament has made the new writ of summons capable of being served in any county in Ireland; and I can see no objection to allowing the writ of execution to be of force equally in every county in the kingdom, so that it may be transferred from one sheriff to another, according as the debtor's person or property is removed. It would obviate the necessity and expense of several concurrent writs. It would, however, be right that if a writ were withdrawn from the hands of a sheriff, he should be exempt from all responsibility for neglect in its non-execution, as the withdrawal has deprived him of the means of retrieving his error.

The several writs I have mentioned being open to the plaintiff, he is at liberty to resort to any one of them singly, or to try all of them consecutively; but he cannot make use of more than one of them at a time; and if he has made any seizure of the goods, however trifling, his right to all other redress is suspended, until the writ is returned with the sheriff's certificate of the value of the property seized, and that there was no property of the kind to cover the balance. So, in like manner, if he take the person of the debtor into custody, this at the common law was deemed a satisfaction of the debt, and no other execution could be had while the debtor lived; and such is the law in England still; though, by a peculiar statute in Ireland, the execution of the body does not prejudice that against the goods; but if the latter be afterwards resorted to, it will entitle the debtor to his discharge from arrest. So, also, if an elegit were awarded, and one acre of land returned under it, it precluded the plaintiff from resorting to any other remedy for his debt, except a further elegit of other lands. So that, in point of fact, the several writs obstructed each other, and the partial efficacy of any one of them involved the superseding of the others. That the goods, the lands, and the person of the debtor should all be held liable to make a common satisfaction to the creditor, and yet all be pursued by different writs entrusted to different hands, and yet that the success of any one of them should have such an effect on the validity of the others, was, to say the least of it, certainly inconvenient and unfortunate.

Such, gentlemen, is the history and character of the several writs of execution now in use to enforce the judgments of our courts of justice, in respect of the debts and contracts that are entered into in commercial life. That they do, all of them conjointly, carry out the grand object of realising the debt as effectually and as suitably as they might, I cannot affirm; nor can I say that they are very simple or intelligible; or that they convey any very definite idea of the nature of the judgment they were used to enforce. This, I think, will appear from an examination of the form of the writs in the appendix which I have added, as perhaps most of you have never seen a writ of execution, and never desire to see one in its actual reality. The writs I have copied are the simplest forms in use. They undergo an infinite variation, according as the action happens to be in the Court of Queen's Bench, Com-

mon Pleas, or Exchequer; and as the writ is addressed to the sheriff, the coroner, or to elizors; or as the action is in debt, covenant, or case, or assumpsit or detinue, and as the execution is on scire facias or by or against different parties. Now these mandates, though very intelligible to the bailiff, who executes them, are anything but well calculated to apprise an unlearned person of the nature of the authority with which the sheriff is armed; and the debtor, although he has an idea of the object of the writ, being aware of the pendency of the action, might well be puzzled to know what Her Majesty Queen Victoria had to do with the matter, and why her royal style and titles should be set forth so fully, without a word of intimation from what court the process issues, except that it is witnessed by the Right Honourable Francis Blackburne, at the Queen's Courts, Dublin. He might also be surprised at the inconsistency of the Queen directing the sheriff, in the body of the writ, to levy £1,000, and the attorney by a memorandum at the foot certifying him only to levy £100.

It certainly would seem that every proceeding of a court of justice, more especially that by which its vindictive powers are called into exercise, should be couched in plain and intelligible language: and that this process, by which the real estate, the household property, and the personal liberty of the debtor may be affected, should be such that the debtor himself may comprehend its true import and effect, without recourse to a lawyer, and that he should not be one moment at the mercy of an extortionate bailiff. If the judgments of the court were of a more simple nature than they are at present, (and in the ordinary case of a mere money demand, the judgment might be conceived in half a dozen lines,) the writ of execution might be altogether dispensed with as a separate document, and a copy of the judgment, embodying the award of execution, as in the County Courts, might, when sealed with the seal of the court, be the sheriff's authority for executing the judgment. It would at least convey a reasonable explanation of the proceeding, and of the judgment on which it was based.

Having thus far stated the nature and the supposed defects of the process by which the judgments of our courts of justice are to be carried into effect, I have for the most part already suggested the improvements of which I conceive it to be capable. I am well aware that it is more easy to suggest defects than to point out suitable remedies; but though I am fully sensible of this, and might excuse myself, from the scope of the inquiry I have undertaken, from entering into a consideration of these amendments, yet I feel I should not be acting frankly if I did not avow my own opinions on the matter, leaving it to you to attach such weight to them as they deserve. I therefore will submit to you, as the results of my inquiry, the following considerations.

Firstly As to the creditor's right of resorting to the personal property of his debtor, that the notion of the old common law

was a sound one in the main, that the remedy for satisfaction of personal contracts should be chiefly and primarily directed against the goods and chattels or personal property of the debtor. The great defect of our jurisprudence has been, that starting with the notion of property as it existed in the time of the first Edwards, it has not advanced one step beyond that, although society and property have been undergoing every kind of alteration and enlargement. There existed no expansive principle in our system of common law, no method of accommodating itself to the altering phases of the community, and hence has sprung up a collateral, controlling, and in many cases conflicting system of equity, which has perplexed and complicated our jurisprudence, and caused great dissatisfaction and discontent to a large porion of the public. While the Bankrupt and Insolvent Courts have comprehended all kinds of property, whether real or personal, equitable or legal, choses in action or in possession, the writ of *Fieri Facias* is still circumscribed within the limits of property as it existed and was understood seven hundred years ago; with a few exceptions, made within the last ten or fifteen years. Its efficacy might be extended to every species of personal property that can be reached, the debts, the interests legal and equitable, and the income of what kind soever. And a more direct and summary mode might be provided, of determining the right of property in disputed cases, than at present exists.

Secondly. As to the land. We have learned in Ireland, from a dear experience, the evils of a divided responsibility as to landed property, and of having one person in receipt of the rents and profits without the ownership, and of another person having the ownership without the rents and profits. It is time that the system of receiverships and elegits should be discontinued, except in extreme cases; and if the creditor is to have any remedy against the land, it should be exclusively a right of sale, so as to effect its speedy transfer into other hands. Perhaps the feudal notion of the peculiar immunity of land from being made available as a fund for the payment of debts, is not suitable to the present state of society. In the case of the death of the debtor, the law still declares the land to be assets for payment of his debts, and it is plain the greatest facilities should be given for its transfer from the hands of those who are unable to discharge their obligations to their fellow citizens. Landed property is, of all others, that by which society is most injured by its retention by insolvent owners; and it is difficult to suggest a reason why the machinery of a court of law might not be adapted to the sale of real property, for the satisfaction of the debts of the owner.

Thirdly. As to the person of the debtor, it seems probable that if proper facilities were given for reaching and realizing all the available property of the debtor, the power of imprisonment might be confined to the punishment of fraud and concealment, and that the moral force of the punishment would be thereby immensely

increased. The expense of and necessity for bankruptcy and insolvency proceedings might be to a great extent avoided, while in cases of danger the courts of law might be entrusted with the power of closing the affairs of the debtor, and appointing an assignee or receiver to collect his debts and manage his property.

Fourthly. Perhaps it would be well to enable the sheriff, or the person entrusted with his warrant, to arrest the person of the debtor, to receive the debt, and give a valid discharge for it.

Fifthly. It would appear that the present rule of law should be abrogated, by which the escape of the debtor from arrest, whether by the negligence or consent of the sheriff, is a discharge of the debt, or a discharge of the person of the debtor.

Sixthly. As to the form of the process of execution. As the writ of *elegit* is now deprived of its only value, it might safely be altogether abolished. The writ of *capias ad satisfaciendum* might, perhaps, safely be brought back to its early character, and made an extraordinary proceeding, more in the nature of a punishment of misconduct than an execution of the civil rights of the suitor. Like the *capias ad respondendum* on mesne process, it would then become an independent and collateral proceeding. This would reduce the process of execution to one writ, which might be called the Writ of Execution. Possibly its form and scope might to some extent be assimilated to that of the ancient writ of *Extent*, the process by which the crown levied its debts from the person, chattels, and lands of its debtor. It might be a writ requiring the sheriff first to levy the debt and costs off the goods and chattels of the debtor, and that if they were insufficient to pay the debt, to inquire into and take the lands of the debtor. Under this writ the sheriff first sold the goods and chattels, if he could find any; and if they were insufficient, he held an inquisition to ascertain whether the particular lands which the creditor averred to be the lands of the debtor belonged to him; at which inquiry all parties interested were entitled to appear and dispute the matter. If the jury found the lands to be the debtor's, the Court of Exchequer, on the application of the Attorney General, ordered the estate and interest of the debtor to be sold in a summary manner, and a conveyance to be made to the purchaser by the Remembrancer. If there was a mortgage, they sold the equity of redemption, and ascertained the amount due to the mortgagee: so if there were a claim for dower. Now if this proceeding were safe and practicable for the crown, there appears no substantial impediment to its application to the debts of the subject, with a vastly more improved registry of claims, and more perfect machinery for ascertaining titles to lands, and of extensively publishing the judicial procedure of the court. Very many think that the distinction between freehold and chattel property, and the immunities which the former enjoyed, are not conducive to the welfare of society, or suitable to the exigencies of the times.

Seventhly. In cases in which the judgment of the court is likely

to be defeated by fraud or contrivance, it is suggested that it would be safe and judicious to secure its ultimate effectuation, by an interim attachment of the property of the debtor, on an order of a judge and a sufficient counter-security being given for it, and to expedite the judgment and execution by enabling the judge at the assizes to sign the judgment and execution in some simple form.

Eighthly. It is submitted that the proceeding by way of scire facias to revive judgments in respect of mere lapse of time, might be dispensed with, and an application to the court substituted as a means of ascertaining the continuance of the plaintiff's right to execution.

Ninthly. The writ of execution might perhaps be expressed in some simple and intelligible form, and be of force throughout the kingdom, and not merely in some particular county, to the sheriff of which it is specially addressed.

With the foregoing suggestions, I beg leave

To subscribe myself, gentlemen, as

Your faithful and obedient servant,

WILLIAM DWYER FERGUSON.

APPENDIX.

1. *Form of Writ of Fieri Facias in action of Debt for the Plaintiff in the Court of Queen's Bench.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith and soforth, To the Sheriff of the County of Meath, greeting. We command you, that of the goods and chattels of John Doe in your bailiwick, you cause to be levied as well a certain debt of £500 which Richard Roe in our Court before us at the Queen's Courts recovered against him, as £25, which to the said Richard Roe in our said Court here was adjudged for his damages which he sustained by reason of detaining said debt, whereof he is convicted as appears to us of record, and have that money before us at the Queen's Courts on the 1st day of December, 1851, to be rendered to the said Richard Roe for his debt and damages aforesaid, and that you do all such things as by the statute passed in the 3rd and 4th year of our reign you are authorized and required to do in that behalf, and have there this writ. Witness the Right Honourable Francis Blackburne, at the Queen's Courts, the 1st day of November, 1851, in the 13th year of our reign. Sum due £120, which sum you are to levy, together with interest on said sum of £120, at the rate of £4 per centum per annum, from the 20th day of October, 1851.

RICHARD GREER, Attorney.

2. *Form of Writ of Capias ad Satisfaciendum in debt in Queen's Bench.*

VICTORIA [&c. as in form 1.] To the Sheriff of the County of Meath, greeting. We command you, that you take John Doe, if he can be found in your bailiwick, and him safely keep, so that you may bring his body before us at the Queen's Courts, on the 2nd day of November next coming, to satisfy Richard Roe, as well a certain debt of £500 which the said Richard Roe in our Court before us at the Queen's Courts recovered against him, as £25, which the said Richard Roe in our said Court was adjudged for his damages which he sustained by reason of detaining said debt, whereof he is convicted as appears to us of record, and have there this writ. Witness [&c. as in form 1].

Sum due £120. } Which sum is due to the said Richard Roe, together with interest
20th Oct. 1851. } on the said sum of £120, at the rate of £4 per centum per annum,
from the 1st day of October, 1851, in which also the said Richard Roe is to be satisfied.

RICHARD GREER, Attorney.

3. *Form of Elegit in debt in Queen's Bench.*

[As this writ is virtually abolished, it is unnecessary to extend this appendix further. It is three times as long, and as unintelligible as the forms above copied.]

REPORTS ALREADY PUBLISHED BY THE SOCIETY.

- I. On the Legislative Measures requisite to facilitate the adoption of Commercial Contracts respecting the occupation of land in Ireland. By Robert Longfield, Esq.
- II. On the Patent Laws. By James A. Lawson, Esq. LL.D.

REPORTS IN PREPARATION.

- IV. On the merits of Chevalier Claussen's process for converting Flax into a substance resembling Cotton. By Professor Apjohn.
- V. On the Taxes on Law Proceedings. By John O'Hagan, Esq.
- VI. On the Systems of Registration of Dealings with Land adopted in the United States of America and on the continent of Europe, with a view to ascertain the most convenient plan for constructing a Land Index founded on a Public Map as the basis of a General Register. By Edward G. Mayne, Esq.
- VII. On the Laws respecting the Transfer and Mortgaging of Land in the United States and on the continent of Europe, with a view to ascertain the changes required in the law of Ireland to render the legal formalities on the sale and mortgaging of land more cheap, certain, and expeditious than at present. By Robert Longfield, Esq.
- VIII. On the present state of the Law and Practice in Ireland with respect to Wills, with a view to have all wills proved and registered at the domicile of the deceased, and to have the jurisdiction with respect to legacies, devises, the administration of assets, and the validity of wills consolidated and vested in the same courts. By James A. Lawson, Esq. LL.D.
- IX. On the Laws of Foreign Countries with respect to Partnerships of limited liability, and on the policy of allowing the general formation of such partnerships in the United Kingdom. By Henry Colles, Esq.