

debtor's property which is privileged from being taken in execution until another has been exhausted. It is clearly not necessary, in any case, during the life of a debtor to exhaust his personal estate as a means of coming at his realty. (*d*)

But if the objection now taken be well founded, then it necessarily follows, that the death of a debtor materially curtails the rights of his creditors; since on that event a creditor's title to relief must depend not merely upon the fact of his debtor having left property enough to pay all his debts; but upon the fact of its being alleged and shewn, that his personal estate is insufficient for that purpose; and also upon its being alleged and shewn, that he, the plaintiff, had, with all due diligence, endeavoured to obtain satisfaction from the personal estate of the deceased; in order thereby to lay a foundation whereon to proceed against the realty.

Hence it follows, if this proposition be correct, that the rights of a creditor are materially affected by the death of the debtor. If the law be so, as between creditor and debtor, then it is certainly true, according to the general rule, that a plaintiff must set forth every fact which constitutes any material portion of the title upon which he asks relief, that he should, in a creditor's suit, expressly allege and shew, that the personal estate of his deceased debtor was insufficient to pay his debts; and that he had used all due diligence in endeavouring to obtain payment from his personal estate to enable him to obtain a sale of his real estate for that purpose.

The matter here presented is one of much importance, since it is not confined to a mere form of practice; but involves the rights of creditors generally; and therefore requires to be fully investigated and carefully considered.

According to the common law, as between individuals, lands were in no way liable to be taken in execution and *sold* for the payment of debts. (*e*) This total exemption of real estate from any such liability, it is said, was a necessary consequence of the principles of the feudal system, which system, softened and divested of most of its odious and pernicious principles, having been incorporated into our code, (*f*) lands were, in like manner, exempted here as in England from being taken in execution and *sold* for the payment of debts. (*g*) According to the feudal sys-

---

(*d*) *Hanson v. Barnes*, 3 G. & J. 359.—(*e*) *Bac. Abr. tit. Execution A.*—(*f*) *Chart. Maryl. art. 5, 18; Kilty Rep. 146; 1786, ch. 45. s. 1; Calvert's lessee v. Eden, 2 H. & McH. 279, 366.*—(*g*) *Kilty Rep. 144.*