PRINCIPLES

OF

EQUITY.

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INTRODUCTION.

EQUITY, ſcarce known to our forefathers, makes at preſent a great figure. Like a plant gradually tending to maturity, it has for ages been increaſing in bulk; ſlowly indeed, but conſtantly: and at what diſtance of time we are to hope for its maturity, is perhaps not eaſy to foretel. Courts of equity, limited originally within narrow bounds, have, in civilized nations, acquired an extent of juriſdiction, that obſcures, in a great meaſure, the courts of law. A revolution ſo ſignal, will move every curious enquirer to attempt, or to wiſh at leaſt, a diſcovery of the cauſe. But vain will be the attempt, till firſt a clear idea be formed of the difference betwixt law and equity. The former we know deals in preciſe rules: but does the latter reſt on conſcience ſolely without any rule? This would be unſafe, while men are judges, liable not leſs to partiality than to error. Nor could a court without rules, ever have attained that height of favour and extent of juriſdiction, which courts of equity enjoy. But if a court of equity be governed by any rules or principles, why are not theſe brought to light in a ſyſtem? One would imagine, that ſuch a ſyſtem ſhould not be uſeful only, but abſolutely neceſſary: and yet writers, far from aiming at a ſyſtem, have not even defined with any accuracy what equity is, nor what are its limits and extent. In ranging ſo wide a field, where there is ſcarce a beaten tract for direction, the utmoſt attention is requiſite. One operation of equity, univerſally acknowledged, is, to remedy imperfections in the common law, which ſometimes is defective, and ſometimes exceeds juſt bounds. This ſuggeſts a hint. As equity is conſtantly oppoſed to common law, a juſt idea of the latter will probably lead to the former. In order to aſcertain preciſely what is meant by common law, a hiſtorical deduction is neceſſary; which I the more chearfully undertake, becauſe this ſubject ſeems not to be put in a clear light by any writer.

AFTER ſtates were formed, and government eſtabliſhed, courts of law were invented to compel individuals to do their duty. This innovation, as generally happens, was, at firſt, confined within narrow bounds. To theſe courts was given power to enforce duties eſſential

to the exiſtence of ſociety; ſuch as that of forbearing to do harm or miſchief. Power was alſo given to enforce duties derived from covenants and promiſes, ſuch of them at leaſt as tend more peculiarly to the well-being of ſociety. The enforcing ſuch capital duties, by eſtabliſhed authority, was a great improvement, which gave full ſatisfaction, without ſuggeſting any thought of proceeding farther. To extend the protection of a court to natural duties of every ſort, would, in a new experiment, have been reckoned too bold. Thus, in the Roman law, we find many pactions left upon conſcience, without receiving any aid from their courts of law. Buying and ſelling only, with a few other covenants eſſential to commercial dealing, were regarded. Our courts of law, in Britain, were originally confined within ſtill narrower bounds. No covenant whatever was by our forefathers countenanced with an action. A contract of buying and ſelling was not *: and as buying and ſelling is of all covenants the moſt uſeful in common life, we are not at liberty to ſuppoſe that any other was more privileged †.

* Reg. Maj. L. 3. cap. 10. Fleta, L. 2. cap. 58. §. 3, & 5.

† See Hiſtorical Law-tracts, tract 2.

BUT when the great advantages of a court of law were experienced, its juriſdiction was gradually extended with univerſal approbation. It was extended, with very few exceptions, to every covenant and every promiſe. It was extended alſo to other matters, till it embraced every obvious duty ariſing in common and ordinary dealings betwixt man and man. But it was extended no farther. Experience diſcovered limits, beyond which it was deemed hazardous to ſtretch this juriſdiction. Cauſes of an extraordinary nature, requiring ſome ſingular remedy, could not be ſafely truſted with the ordinary courts, becauſe no rules were eſtabliſhed to direct their proceedings in ſuch matters; and upon that account, ſuch cauſes were appropriated to the king and council, being the paramount court [a]. Of this nature were actions for proving the tenor or contents of a loſt writ, extraordinary removings againſt tenants poſſeſſing by leaſe, the cauſes of pupils, orphans, and foreigners, complaints againſt judges and officers of the law ‡, and the more atrocious crimes, termed, *The pleas of the crown*. Such extraordinary caſes, multiplying greatly by complex and intricate connections among individuals, daily diſcovered, became a burden too great for the king and council. In order therefore to relieve this court, extraordinary cauſes of a civil nature, were in England devolved

‡ See act 105. p. 1487.

[a] We find the ſame regulation among the Jews: "And Moſes choſe able men out of all "Iſrael, and made them heads over the people, rulers of thouſands, rulers of hundreds, rulers "of fifties, and rulers of tens. And they judged the people at all ſeaſons: the hard cauſes "they brought unto Moſes, but every ſmall matter they judged themſelves *."

* Exodus, chap. xviii. verſes 25, 26.

volved upon the court of chancery; a meaſure the more neceſſary, that the king, occupied with the momentous affairs of government, and with foreign as well as domeſtic tranſactions, had not leiſure for private cauſes. In Scotland, more remote and therefore leſs intereſted in foreign affairs, there was not the ſame neceſſity for this innovation. Our kings however, addicted more to action than ſtudy, neglecting in a great meaſure their privilege of being judges, ſuffered the cauſes peculiar to the king and council to be gradually aſſumed by other ſovereign courts. The eſtabliſhment of the court of chancery in England, made it neceſſary to give a name to the more ordinary branch of law which is the province of the common or ordinary courts. It is termed, *The common law;* and in oppoſition to it, the extraordinary branch devolved on the court of chancery is termed *Equity:* the name being derived from the nature of the juriſdiction, directed leſs by preciſe rules than *ſecundum æquum & bonum*, or according to what the judge in conſcience thinks right [a]. Thus equity, in its proper ſenſe, comprehends every matter of law that by the common law is left without remedy; and ſuppoſing the boundaries of the common law to be aſcertained, there can no longer remain any difficulty about the powers of a court of equity. With reſpect then to the common law, it is evident from the foregoing deduction, that it has not a preciſe natural boundary, but in ſome meaſure is circumſcribed by accident and arbitrary practice. The limits accordingly of common law and equity, vary in different countries, and at different times in the ſame country. We have ſeen, that the common law of Britain was originally not ſo extenſive as at preſent; and inſtances will be mentioned afterwards, which evince, that the common law in Scotland is farther extended than in England. Its limits are perhaps not accurately aſcertained in any country, which is to be regreted, becauſe of the uncertainty that muſt follow in the practice of law. It is lucky however that the diſeaſe is not incurable. A good underſtanding betwixt the judges of the different courts, and juſt notions of law, may, in time, aſcertain theſe limits with ſufficient accuracy.

AMONG a plain people, ſtrangers to refinement and ſubtilties, law-ſuits may be frequent, but never are intricate. Regulations

 reſtraining

[a] AT curiæ ſunto & juriſdictiones, quæ ſtatuant ex arbitrio boni viri & diſcretione ſana, ubi legis norma deficit. Lex enim non ſufficit caſibus, ſed ad ea quæ plerumque accidunt aptatur: ſapientiſſima autem res tempus, (ut ab antiquis dictum eſt,) & novorum caſuum quotidie author & inventor.

BACON de Aug. Scien. L. 8. cap. 3. aphor. 32.

reſtraining individuals from injuring others, and compelling the performance of covenants, compoſed originally the bulk of the common law; and ſingular caſes, unknown in the ordinary courſe of dealings, were reſerved for the court of equity. Theſe two branches, among our rude anceſtors, ſeemed to comprehend every Subject of Law. The more refined duties of morality were, in that early period, little felt, and leſs regarded. But law in this ſimple form cannot long continue ſtationary. In the ſocial ſtate under regular diſcipline, law ripens gradually with the human faculties. Experience diſcovered, that the duties above-mentioned exhauſt not the whole of morality. In the progreſs of ſociety, and in the courſe of practice, many duties were evolved, which, by ripeneſs of diſcernment and growing delicacy of ſentiment, were found to be binding in conſcience. Such duties, or the moſt obvious of them, could no longer be neglected by courts of juſtice; and as they made no part of the common law, they came naturally under the juriſdiction of the court of equity. Theſe more refined duties of the law of nature, making at preſent a great branch of equity, require to be explained with all poſſible accuracy; and, to give ſatisfaction, I ſhall endeavour to trace them from their true ſource in human nature.

THE mind of man, limited in its capacity, cannot at once comprehend many objects; and a ſmall proportion of what it can comprehend, ſuffices to exhauſt the whole ſtock of benevolence that falls to the ſhare of any individual. Diſregarding what hath been taught by viſionary philoſophers, I muſt adhere to a principle laid down by all the practical writers on the laws of nature and nations, That it is our duty to abſtain from injuring others, but that the doing good to thoſe of our own ſpecies, merely as ſuch, is not incumbent on us as a matter of ſtrict duty. It is indeed evident, that univerſal benevolence, inculcated by ſome writers as a duty, would be extremely diſproportioned to the limited capacity of man: his attention behoved to be diſtracted and his duty rendered impracticable, among an endleſs number and variety of objects.

NATURE, or rather the GOD of nature, hath more wiſely adjuſted the duty of man to his limited capacity. Benevolence, it is true, is his duty; but then, the objects of his benevolence are limited in exact conformity to his nature. Diſtreſs never fails to beget compaſſion, which is a ſpecies of benevolence; and the exerciſe of compaſſion, by relieving the diſtreſſed, is acknowledged to

be

be a duty. But, abſtracting from diſtreſs, benevolence is not raiſed unleſs when we have a more ſtrict connection with the perſon than merely that we are of the ſame ſpecies. Hence we may conclude with certainty, that the doing good to one of our own ſpecies, merely as ſuch, never is a duty; for it is a law in our nature, that we are not bound in duty to perform any action to which we are not antecedently prompted by ſome natural principle *. The connections that excite benevolence differ widely in degree, from the moſt remote to the moſt intimate; and benevolence is excited in a juſt proportion to the degree of the connection. Theſe connections, various and widely diffuſed, are at the ſame time fully ſufficient to employ all the benevolence of which human nature is capable, and conſequently to give ample ſcope to the duty of benevolence. The chief objects of benevolence, whether conſidered as a duty or a virtue only, are friends and relations. It is extended to neighbours at home, and countrymen abroad. Some are naturally ſo benevolent, as to beſtow a ſhare on perſons of the ſame profeſſion or calling, and even on thoſe of the ſame name, though a mighty ſlender connection. And thus benevolence, ſucceſſively exerted upon a ſeries of objects, leſſens gradually with the connection, till both become imperceptible.

* See Eſſays on Morality and natural Religion, part 1. Eſſ. 2. ch. 5.

THERE are other connections which, though ſtill more tranſitory, produce a ſenſe of duty. Two perſons ſhut up in the ſame priſon, perhaps for different cauſes, being no way connected but by contiguity and reſemblance of condition, are ſenſible however that to aid and comfort each other is a duty incumbent on them. Two perſons ſhipwrecked upon the ſame deſart iſland, are ſenſible of the like mutual duty. And there is even ſome ſenſe of this kind, among a number of perſons in the ſame ſhip or under the ſame military command.

BUT a ſenſe of duty from connections ſo ſlender, makes no figure among barbarians. The law of nature, or more properly the law of our nature, refines gradually as human nature refines. The moral ſenſe becomes daily more acute by regular diſcipline in a civilized ſociety. Mutual duties among individuals multiply by variety of connections; and benevolence becomes a matter of conſcience in a thouſand inſtances which formerly were altogether diſregarded. With reſpect to the duty of benevolence, a court of equity, at firſt, exerciſeth its juriſdiction with great reſerve, interpoſing in remarkable caſes only where the duty is palpable; but, gathering cou-

rage from ſucceſs, it ventures to enforce this duty in more delicate circumſtances. One caſe throws light upon another. Men, by the reaſoning of the judges, become gradually more acute in diſcerning their duty; the judges become more and more acute in diſtinguiſhing caſes; and this branch of law is imperceptibly moulded into a ſyſtem [a]. In rude ages poſitive acts of benevolence, however peculiar the connection may be, are but faintly perceived to be our duty. Such perceptions become gradually more firm and clear by cuſtom and reflection; and when men are ſo far enlightened, it is the duty as well as honour of judges to interpoſe *.

* See Eſſays on Morality and natural Religion, 2d edition, p. 108.

THIS branch of equitable juriſdiction ſhall be illuſtrated by various examples. When goods by labour, and perhaps with danger, are recovered from the ſea after a ſhipwreck, every one perceives it to be the duty of the proprietor to pay ſalvage. A man ventures his life to ſave a houſe from fire, and is ſucceſsful; no mortal can doubt that he is entitled to a recompence from the proprietor who is benefited. If a man's affairs by his abſence be in diſorder, is not the friend who undertakes the management entitled to demand a ſum equal to what he hath expended, though the ſubject upon which the money was uſefully beſtowed may have afterwards periſhed caſually? Who can doubt of the following propoſition, That I am in the wrong to demand money from my debtor, while I with-hold the ſum I owe him, which perhaps may be his only reſource for doing me juſtice? Such a proceeding, muſt, in the common ſenſe of mankind, appear partial and oppreſſive. By the common law however no remedy is afforded in this caſe, nor in the others mentioned. But equity affords a remedy, by enforcing what in ſuch circumſtances every man perceives and feels to be his duty. I ſhall add but one example more. In a violent ſtorm, the heavieſt goods are thrown overboard, in order to diſburden the ſhip: the proprietors of the goods preſerved by this means from the ſea, muſt be ſenſible that they ought to repair the loſs; for the man who has thus abandoned his goods for the common ſafety, ought to be in no worſe condition than themſelves. Equity dictates this to be their duty; and if they be refractory, a court of equity will interpoſe in behalf of the ſufferer.

IT appears now clearly, that a court of equity commences at the limits of the common law, and enforces benevolence in certain circumſtances

[a] AT curiæ illæ uni viro ne committantur, ſed ex pluribus conſtent. Nec decreta exeant cum ſilentio. Sed judices ſententiæ ſuæ rationes adducant, idque palam, atque adſtante corona: ut quod ipſa poteſtate ſit liberum, fama tamen et exiſtimatione ſit circumſcriptum.
BACON de Aug. Scient. L. 8. cap. 3. aphor. 38.

cumſtances where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is neglected by the common law.

THE duties hitherto mentioned, ariſe from connections independent altogether of conſent. Covenants and promiſes alſo, are the ſource of various connections and of various duties. The moſt obvious of theſe duties, being commonly declared in words, belong to the common law. But every incident that can poſſibly occur in fulfilling a covenant, is ſeldom foreſeen and provided for. Human foreſight is not ſo perfect. And yet a court of common law, in giving judgment upon covenants, conſiders nothing but declared will, neglecting incidents that would have been provided for had they been foreſeen. Further, the inductive motive for making a covenant, and its ultimate purpoſe and intendment, are circumſtances diſregarded at common law. Theſe however are capital circumſtances; and juſtice, where they are neglected, cannot be fulfilled. Hence the powers of a court of equity with reſpect to engagements. It ſupplies the defect of common law, by taking under conſideration every material circumſtance, in order that juſtice may be diſtributed in the moſt perfect manner. It ſometimes ſupplies a defect in words, where will is evidently more extenſive; and ſometimes ſupplies a defect even in will, according to what probably would have been the will of the parties, had they foreſeen the event. By taking ſuch liberty, a covenant is made effectual according to the aim and purpoſe of the contracters; and without ſuch liberty, ſeldom it happens that juſtice can be accurately done.

IN handling this branch of the ſubject, it is not eaſy to ſuppreſs a thought that comes croſs the mind. The juriſdiction of a court of common law, with reſpect to covenants, appears to me odd and unaccountable. To find the juriſdiction of this court limited, as above mentioned, to certain duties of the law of nature, without comprehending the whole, is not ſingular nor ſurpriſing. But with reſpect to the circumſtances that occur in the ſame cauſe, it cannot fail to appear ſingular, that a court ſhould be confined to a few of theſe circumſtances, neglecting others not leſs material in point of juſtice. This reflection will be ſet in a clear light by a ſingle example. Every one knows that an Engliſh double bond was a contrivance to evade the old law of this iſland, which prohibites the taking intereſt for money. The penal part of the ſum is not

intended to be exacted beyond intereſt and coſts. This is confeſſedly the end and purpoſe of a double bond; and yet a court of common law, confined ſtrictly to the words or declared will, is neceſſitated knowingly to commit injuſtice. The moment the term of payment is paſt, when there cannot be either coſts or intereſt, this court, inſtead of pronouncing ſentence for what is really due, *viz.* the ſum borrowed, muſt follow the words of the bond, and give judgment for the double. This defect, in the conſtitution of a court, is too remarkable to have been overlooked. A remedy accordingly is provided, though far from being of the moſt perfect kind, and that is a privilege to apply to the court of equity for redreſs, where the court of common law, by the imperfection of its conſtitution, is forced to act unjuſtly. Far better had it been, either to withdraw covenants altogether from the common law, or to impower the judges of that law to determine according to the principles of juſtice [a]. I need ſcarce obſerve, that the preſent reflection regards England only, where equity and common law are appropriated to different courts. In Scotland and other countries where both belong to the ſame court, the inconvenience mentioned cannot happen. But to return to the gradual extenſion of equity, which is our preſent theme:

A court of equity, by long and various practice, finding its own ſtrength and utility, and impelled by the principle of juſtice, boldly undertakes a matter ſtill more arduous, and that is to correct or mitigate the rigour, and what even in a proper ſenſe may be termed *The injuſtice of common law.* It is not in human foreſight to eſtabliſh any general rule, that, however ſalutary in the main, may not be oppreſſive and unjuſt when applied to ſome ſingular caſes. Every work of man muſt partake of the imperfection of its author; ſometimes falling ſhort of its purpoſe, and ſometimes going beyond it. If, with reſpect to the former, a court of equity be uſeful, it may be pronounced neceſſary with reſpect to the latter. For in ſociety, it is certainly a greater object to prevent legal oppreſſion, which alarms every individual, than to ſupply legal defects, ſcarce regarded but by thoſe immediately concerned. The illuſtrious Bacon, upon this ſubject, expreſſes himſelf with great propriety: "Habeant curiæ pretoriæ poteſtatem tam ſubveniendi "contra rigorem legis, quam ſupplendi defectum legis. Si enim "porrigi debet remedium ei, quem lex preteriit, multo magis ei "quem vulneravit *."

* De Aug. Scient. L. 8. cap. 3. aph. 35.

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a And accordingly, by 4th Annæ, cap. 16. §. 13 the defendant, pending action on a double bond, offering payment of principal intereſt and coſts, ſhall be diſcharged by the court.

ALL the variety of matter hitherto mentioned, is regulated by the principle of juſtice ſolely. It may, at firſt view, be thought, that this takes in the whole compaſs of law, and that there is no remaining field to be occupied by a court of equity. But, upon more narrow inſpection, we find a number of law-caſes into which juſtice enters not, and which therefore muſt be governed by the principle of utility. Expediency requires that theſe be brought under the cognizance of a court; and the court of equity, gaining daily more weight and authority, takes naturally ſuch matters under its juriſdiction. I ſhall give a few examples. A laviſh man ſubmits to have his ſon made his interdictor. This agreement is not unjuſt; but tending to the corruption of manners, by reverſing the order of nature, it is reprobated by a court of equity as *contra bonos mores*. This court goes farther; it diſcountenances many things in themſelves indifferent, merely becauſe of their bad tendency. A *pactum de quota litis* is in itſelf innocent, and may be beneficial equally to the advocate and his client: but being a temptation to advocates to take advantage of their clients, inſtead of ſerving them faithfully, this Court, to prevent miſchief, declares againſt ſuch pactions. A court of equity goes ſtill farther, by conſulting the publick intereſt with relation to matters not otherwiſe bad than by occaſioning unneceſſary trouble and vexation to individuals. Hence the origin of regulations tending to abridge law-ſuits.

A miſchief that affects the whole community figures in the imagination, and will naturally move judges to ſtretch out a preventive hand. But what ſhall we ſay of a miſchief, that affects one perſon only, or but a few. An eſtate, for example, real or perſonal, is left entirely without management, by the infancy of the proprietor, or by his abſence in a remote country. He has no friends, or they are unwilling to interpoſe. It is natural, in this caſe, to apply for publick authority. A court of common law, confined within certain preciſe limits, can give no aid; and therefore it is neceſſary that the court of equity, whoſe powers are boundleſs, ſhould undertake caſes of this kind; and the preventive remedy is eaſy, by naming an adminiſtrator, or, as termed in the Roman law, *Curator bonorum*. A ſimilar example is, where a court of equity gives authority to ſell the land of one under age, when the ſale is neceſſary for payment of debt. To decline interpoſing in this caſe, would be ruinous to the proprietor; for without it, no man will venture to purchaſe from one under age. Here the motive is humanity merely, or private utility: and indeed it would be a great imperfection in law, to aban-

don an innocent perſon to ruin when the remedy is ſo eaſy. In moſt or all of the caſes governed by the motive of publick utility, a court of equity interpoſes as a court properly, giving or denying action, in order to anſwer the end propoſed. But in the caſes now mentioned, and thoſe that are ſimilar, there is ſeldom occaſion for a proceſs. The court acts by magiſterial powers.

THE powers above ſet forth, aſſumed by our courts of equity, are, in effect, the ſame with what were aſſumed by the Roman Prætor, from neceſſity without any expreſs authority. "Jus prætorium eſt "quod prætores introduxerunt, adjuvandi vel ſupplendi vel corri-
* l. 7. § 1. de juſtitia & jure. "gendi juris civilis gratia, propter utilitatem publicam *."

HAVING given a hiſtorical view of a court of equity, from its origin to its preſent extent of power and juriſdiction, I proceed to ſome other general matters, which muſt be premiſed before entering upon particulars. The firſt I ſhall inſiſt on is of the greateſt moment, *viz.* Whether a court of equity be, or ought to be, governed by any general rules. To determine every particular caſe according to what is juſt, equal, and ſalutary, taking in all circumſtances, is undoubtedly the idea of a court of equity in its perfection; and had we angels for judges, ſuch behoved to be their method of proceeding, without regarding general rules: but men are liable to prejudice and error, and for that reaſon cannot ſafely be truſted with unlimited powers. Hence the neceſſity of eſtabliſhing rules, to preſerve uniformity of judgment in matters of equity as well as of common law. The neceſſity is perhaps greater in the former, becauſe of the variety and intricacy of equitable circumſtances. Thus though a particular caſe may require the interpoſition of equity, to correct a wrong or ſupply a defect, yet the judge ought not to interpoſe, unleſs he can found his decree upon ſome rule that is equally applicable to all caſes of the kind. If he be under no limitation, his decrees will appear arbitrary, though ſubſtantially juſt: and, which is ſtill worſe, will often be arbitrary and ſubſtantially unjuſt; for ſuch too frequently is the caſe of human proceedings that are ſubjected to no control. General rules, it is true, muſt often produce decrees, thas in equity as well as at common law are materially unjuſt; for no rule can be equally juſt in its application to a whole claſs of caſes that are far from being the ſame in every circumſtance. But this inconvenience muſt be tolerated, to avoid a greater, that of making judges arbitrary. A court of equity is a happy invention to remedy the errors of common law. But we muſt

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ſtop ſhort ſome where: for courts cannot be eſtabliſhed without end, to be checks one upon another. And hence it is, that, in in the nature of things, there cannot be any other check upon a court of equity but general rules. Bacon expreſſes himſelf upon this ſubject with his uſual elegance and perſpicuity. "Non ſine "cauſa in uſum venerat apud Romanos album Prætoris, in quo "præſcripſit et publicavit quomodo ipſe jus dicturus eſſet. Quo "exemplo judices in curiis prætoriis, regulas ſibi certas (quantum "fieri poteſt) proponere, eaſque publice affigere debent. Etenim "optima eſt lex, quæ minimum relinquit arbitrio judicis, optimus "judex qui minimum ſibi *."

* De Aug. Scient. L. 8. cap. 3. aph. 46.

In peruſing the following treatiſe it will be diſcovered, that the connections regarded by a court of equity ſeldom ariſe from perſonal circumſtances, ſuch as birth, reſemblance of condition, or even blood, but generally from ſubjects, that, in common language, are denominated *goods*. Why ſhould a court, actuated by the ſpirit of refined juſtice, overlook more ſubſtantial ties, to apply itſelf to the groſſer connections ſolely, *viz.* thoſe of intereſt? Doth any connection founded on property make an impreſſion equally ſtrong with that of friendſhip, of blood-relation, or of country? Doth not the law of nature form duties on the latter, more binding in conſcience than on the former? Yet the more conſcientious duties are left to ſhift for themſelves, while the duties founded on intereſt are ſupported and inforced by courts of equity. This, at firſt view, looks like a prevailing attachment to riches; but it is not ſo in reality. The duties ariſing from the connection laſt mentioned, are generally aſcertained and circumſcribed, ſo as to be ſuſceptible of a general rule that governs all caſes of the kind. This is ſeldom the caſe of the other natural duties, which, for that reaſon, muſt be left upon conſcience, without receiving any aid from a court of equity. There are, for example, not many duties more firmly rooted in our nature than that of charity; and, for that reaſon, a court of equity will naturally be tempted to interpoſe in its behalf. But the extent of this duty depends on ſuch a variety of circumſtances, that the wiſeſt heads would in vain labour to bring it under general rules. To truſt therefore with any court a power to direct the charity of individuals, is a remedy which to ſociety would be more hurtful than the diſeaſe; for inſtead of inforcing this duty in any regular manner, it would open a wide door to legal tyranny and oppreſſion. Viewing the matter in this light, it will appear, that ſuch duties are left upon conſcience, not from neglect or inſenſibility, but from

the impoſſibility of a proper remedy. And when ſuch duties can be brought under a general rule, I except not even gratitude though in the main little ſuſceptible of circumſcription, we ſhall ſee afterwards, that a court of equity declines not to interpoſe.

In this work will be found ſeveral inſtances where equity and utility are in oppoſition; and when that happens, the queſtion is, which of them ought to prevail. Equity when it regards the intereſt of a few individuals only, ought to yield to utility when it regards the whole ſociety. It is for this very reaſon that a court of equity is bound to form its decrees upon general rules; for this meaſure regards the whole ſociety by preventing arbitrary proceedings.

It is commonly obſerved, that equitable obligations are leſs ſteady and permanent than thoſe of common law. The reaſon will appear from what follows. A right is permanent or fluctuating, according to the circumſtances upon which it is founded. While theſe remain the ſame, ſo doth the right; when theſe vary, the right varies with them. This applies to both kinds equally. But here lies the difference. The circumſtances that found a right at common law, being always few and weighty, are not variable nor eaſily changed. A bond of borrowed money, for example, muſt ſubſiſt till it be paid. A claim in equity, on the contrary, ſeldom ariſes without a multiplicity of circumſtances, which make it leſs ſteady; for if but a ſingle circumſtance be withdrawn, the claim is no more. Let us ſuppoſe, for example, that an infeftment of annualrent is aſſigned to a creditor for his ſecurity; the creditor or aſſignee thus ſecured, ought to draw his payment out of the intereſt before touching the capital. This is an equitable rule, becauſe it is favourable to the aſſignor or cedent without hurting the aſſignee. But if the cedent have another creditor who arreſts the intereſt, the equitable rule now mentioned ceaſes, and gives place to another, which is, that the aſſignee ought to draw his payment out of the capital, leaving the intereſt to be drawn by the arreſter. Let us next ſuppoſe, that the cedent hath a third creditor, who after the arreſtment adjudges the capital. This new circumſtance varies again the rule of equity. Though the cedent's intereſt weighs not in oppoſition to that of his creditor arreſting, the adjudging creditor and the arreſter are upon a level as to every equitable conſideration. For this reaſon, the aſſignee, who is the preferable or catholic creditor, ought to deal impartially betwixt them. If he

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chuſe not to take his payment out of both ſubjects proportionally, but only out of the capital, or out of the intereſt, he ought to make an aſſignment to the poſtponed creditor, in order to redreſs the inequality. And if he refuſe to do this act of juſtice, a court of equity will interpoſe.

THIS example ſhows the mutability of equitable claims: but there is a cauſe which makes them appear ſtill more mutable than they are in reality. The ſtrongeſt notion is entertained of the ſtability of a right of property; becauſe no man can be deprived of his property but by his own deed. A claim of debt is underſtood to be ſtable, but in an inferior degree; becauſe payment puts an end to it without the will of the creditor. But equitable rights, which commonly accrue to a man without any deed of his, are often loſt in the ſame manner: and they will naturally be deemed tranſitory and fluctuating, when they depend ſo little on the will of the perſons who are poſſeſſed of them.

IN England, where the courts of equity and common law are diſtinct, the boundary betwixt equity and common law, where the legiſlature doth not interpoſe, will remain always the ſame. But in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly. For what originally is a rule in equity, loſes its character when, gathering ſtrength by practice, it is conſidered as common law. Thus the *actio negotiorum geſtorum*, retention, ſalvage, *&c.* are in Scotland ſcarce now conſidered as depending on principles of equity. But by the cultivation of ſociety, and practice of law, nicer and nicer caſes in equity being daily evolved, our notions of equity are preſerved alive; and the additions made to that fund, ſupply what is withdrawn from it and transferred to common law.

WHAT is now ſaid ſuggeſts a queſtion not leſs intricate than important, *viz.* Whether common law and equity ought to be committed to the ſame or to different courts. The profound Bacon gives his opinion in the following words: "Apud nonnullos receptum eſt, "ut juriſdictio, quæ decernit ſecundum æquum & bonum, atque "illa altera, quæ procedit ſecundum jus ſtrictum, iiſdem curiis de- "putentur: apud alios autem, ut diverſis: omnino placet curiarum "ſeparatio. Neque enim ſervabitur diſtinctio caſuum, ſi fiat com- "mixtio juriſdictionum: ſed arbitrium legem tandem trahet *." Of all queſtions, thoſe which concern the conſtitution of a ſtate

* De Aug. Scient. L. 8. cap. 3. aph. 45.

and its police, being the moſt involved in circumſtances, are, for that reaſon, the moſt difficult to be brought under preciſe principles. I pretend not to deliver any opinion on this point; and feeling in myſelf a bias againſt the great authority mentioned, I ſcarce venture to form an opinion. It may be not improper however to hazard a few obſervations preparatory to a more accurate diſcuſſion. I am thoroughly ſenſible of the weight of the argument uſed in the foregoing citation. In the ſcience of juriſprudence it is undoubtedly of great importance, that the boundary betwixt equity and common law be clearly aſcertained; without which we ſhall in vain hope for juſt deciſions. A judge uncertain about the preliminary point, *viz.* whether the caſe belong to equity or common law, cannot have a clear conception what ſentence ought to be pronounced: but a court that judges of both, being relieved from determining the preliminary point, will be apt to loſe ſight altogether of the diſtinction betwixt common law and equity. On the other hand, may it not be urged, that the dividing among different courts things intimately connected, bears hard upon every man who has a claim to proſecute. Before bringing his action he muſt at his peril determine an extreme nice point, *viz.* whether the caſe be governed by common law or by equity. An error in this preliminary point, though not fatal to the cauſe becauſe a remedy is provided, is however productive of much trouble and expence. Nor is the moſt profound knowledge of law ſufficient always to prevent this evil; becauſe it cannot always be foreſeen what plea will be put in for the defendant, whether a plea in equity or at common law. In the next place, to us in Scotland it appears in ſome degree abſurd, to find a court ſo conſtituted, that in many caſes an iniquitous judgment muſt be the reſult. This not only happens frequently with reſpect to covenants, as above mentioned, but will always happen where a claim founded on common law, which muſt be brought before a court of common law, is oppoſed by an equitable defence which cannot be regarded by ſuch a court. Weighing theſe different arguments with ſome attention, the preponderancy ſeems to be on the ſide of an united juriſdiction. I give my reaſon. The ſole inconvenience of an united juriſdiction, *viz.* that it tends to blend common law with equity, may admit a remedy by an inſtitute diſtinguiſhing with accuracy their boundaries: but the inconvenience of a divided juriſdiction admits not any effectual remedy. Theſe hints, at the ſame time, are ſuggeſted with the greateſt diffidence; for I cannot be ignorant of the bias that naturally is produced by cuſtom and eſtabliſhed practice.

In Scotland, as well as in other civilized countries, the king's council was originally the only court that had power to remedy defects, or redreſs injuſtice in common law. To this extraordinary power the court of ſeſſion naturally ſucceeded, as being the ſupreme court in civil matters. For in every well regulated ſociety, this power muſt be truſted with ſome one court, and with none more properly than with that which is ſupreme. It may at firſt ſight appear ſurpriſing, that no mention is made of this extraordinary power in any of the regulations concerning the court of of ſeſſion. Probably the thing was not intended nor thought of. The neceſſity however of ſuch a power, brought it in time to an eſtabliſhment. That the court itſelf had at firſt no notion of being poſſeſſed of this privilege, is evident from the act of ſederunt, 27th November 1592, declaring, "That in time coming they will judge "and decide upon clauſes irritant contained in contracts, tacks, "infeftments, bonds, and obligations, preciſely according to the "words and meaning of the ſame;" which in effect was declaring themſelves a court of common law, not of equity. But the miſtake was ſoon diſcovered. The act of ſederunt wore out of uſe; and now for more than a century, the court of ſeſſion hath acted as a court of equity as well as of common law. Nor is it rare to find powers evolved in practice, which were not in view at the inſtitution of a court. When the Roman Pretor was created to be the ſupreme judge in place of the Conſuls, there is no appearance that any inſtructions were given him concerning matters of equity. And even as to the Engliſh court of chancery, though originally a court of equity, there was not at firſt the leaſt notion entertained of that extenſive juriſdiction to which in later times it hath juſtly arrived.

In Scotland, the union of common law with equity in the ſupreme court, appears to have had an influence upon inferior courts, and to have regulated their powers with reſpect to equity. The rule in general is, that inferior courts are confined to common law: and hence it is that an action founded merely upon equity, ſuch as a reduction upon minority and leſion, upon fraud, *&c.* is not competent before an inferior court. But if againſt a proceſs founded on common law, an equitable defence be proponed, it is the practice of inferior courts to judge of ſuch defence. Imitation of the ſupreme court which judges both of law and equity, ſupported by the inconvenience of removing to another court a proceſs that has perhaps long depended, paved the way to this enlarge-

ment of power. Another thing already taken notice of, tends to enlarge the powers of our inferior courts more and more, which is, that many actions, founded originally on equity, have, by long practice, obtained an eſtabliſhment ſo firm, as to be reckoned branches of the common law. This is the caſe of the *actio negotiorum geſtorum*, of recompence, and many others, which, for that reaſon, are now commonly ſuſtained in inferior courts.

OUR courts of equity have advanced far in ſeconding the laws of nature, but have not perfected their courſe. Every clear and palpable duty is countenanced with an action; but many of the more refined duties, as will be ſeen afterwards, are left ſtill without remedy. Until men, thoroughly humanized, be generally agreed about theſe more refined duties, it is perhaps the more prudent meaſure for a court of equity to leave them upon conſcience. Neither doth this court profeſs to take under its protection every covenant and agreement. Many engagements of various ſorts, the fruits of idleneſs merely, and having no relation to what may be called buſineſs, are too triffling, or too ludicrous, to merit the countenance of law. A court, whether of common law or of equity, cannot preſerve its dignity if it deſcend to ſuch matters. Wagers of all ſorts, whether upon horſes, cocks, or accidental events, are of this ſort. People may amuſe themſelves, and men of eaſy fortunes may paſs their whole time in diverſion, becauſe there is no law againſt it; but ſuch paſtime, contrary to its nature, ought not to be converted into a ſerious matter, by bringing the fruits of it into a court of juſtice. This doctrine ſeems not to have been thoroughly underſtood, when the court of ſeſſion, in a caſe reported by Dirleton, ſuſtained action upon what is called there a *Sponſio ludicra*. A man having taken a piece of gold, under condition to pay back a greater ſum in caſe he ſhould ever be married, was after his marriage ſued for performance. The court ſuſtained proceſs, though ſeveral of the judges were of opinion, that *ſponſiones ludicræ* ought not to be authoriſed *. But in the following remarkable caſe, the court judged better. In the year 1698, a bond was executed of the following tenor: "I Mr. William "Cochran of Kilmaronock, for a certain ſum of money delivered to "me by Mr. John Stewart younger of Blackhall, bind and oblige "me, my heirs and ſucceſſors, to deliver to the ſaid Mr. John "Stewart, his heirs, executors and aſſignees, the ſum of one hun-"dred guineas in gold, and that ſo ſoon as I, or the heirs deſcending "of my body, ſhall ſucceed to the dignity and eſtate of Dundonald."

* 9th Feb. 1676.

This

This ſum being claimed from the heir of the obligor, now become Earl of Dundonald, it was objected, That this being a *ſponſio ludicra* ought not to be countenanced with an action. It was anſwered, That bargains like the preſent are not againſt law; for if purchaſing the hope of ſucceſſion from a remote heir be lawful *, it cannot be unlawful to give him a ſum on condition of receiving a greater when he ſhall ſucceed. If an heir pinched for money procure it upon diſadvantageous terms, equity, it is true, will relieve him: but in the preſent caſe there is no evidence, nor indeed ſuſpicion, of unequality. It was replied, That judges of equity muſt act by a general rule, and muſt either condemn by the lump ſuch ludicrous bargains, or approve them by the lump. If they be indulged where they appear to be fair and equal, they muſt be indulged whatever their circumſtances be; becauſe no preciſe boundary can be fixed betwixt that degree of unequality which is permitted, and that which is condemned. In the next place, it tends not to the good of ſociety to ſuſtain action upon ſuch bargains. They do not advance commerce, nor tend in any degree to promote the comforts of life; why then ſhould a court be bound to ſupport them? It is ſufficient that they are not reprobated, but left upon conſcience and private faith. The court refuſed to ſuſtain action; reſerving it to be conſidered, whether the purſuer, upon proving the extent of the ſum given by him, was entitled to demand it back †.

* See Fountainhall, July 29. 1708. Rag *contra* Brown.

† 7th Feb. 1753. Sir Michael Stewart of Blackhall *contra* Earl of Dundonald.

THE multiplied combinations of individuals in ſociety ſuggeſt rules of equity ſo numerous and various, that in vain would any writer think of collecting all of them. From an undertaking which is in a good meaſure new, all that can be expected is a collection of ſome of the capital caſes that occur the moſt frequently in law-proceedings. This collection will comprehend many rules of equity, ſome of them probably of the moſt extenſive application. Nor will it be without profit, even as to ſubjects omitted; for by diligently obſerving the application of equitable principles to a number of leading caſes, a habit is gradually formed of reaſoning correctly upon matters of equity, which will enable us to apply the ſame principles to new caſes as they occur.

THE author having thus given a general view of his ſubject, ſhall finiſh with explaining his motive for appearing in public. Practiſing lawyers, to whom the ſubject muſt already be familiar, require no inſtruction. This treatiſe is dedicated to the ſtudious in general, ſuch who are fond to improve their minds by every exerciſe of the

rational faculties. Writers upon law are too much confined in their views. Their works, calculated for lawyers only, are involved in a cloud of hard words and terms of art, a language perfectly unknown except to thoſe of the profeſſion. Thus it happens that the knowledge of law, like the hidden myſteries of ſome ancient deity, is confined to its votaries; as if all others were in duty bound to blind and implicit ſubmiſſion. But ſuch ſuperſtition, whatever unhappy progreſs it may have made in religion, never can prevail in law. Men who have life or fortune at ſtake, take the liberty to think for themſelves; and are not leſs ready to accuſe judges for legal oppreſſion, than others for private violence or wrong. Ignorance of law hath in this reſpect a moſt unhappy effect. We all regard with partiality our own intereſt; and it requires knowledge not leſs than candour, to reſiſt the thought of being treated unjuſtly when a court pronounces againſt us. Thus peeviſhneſs and diſcontent ariſe, and are vented againſt the judges of the land. This in a free government is a dangerous and infectious ſpirit, for a remedy to which we cannot be too ſolicitous. Knowledge of thoſe rational principles upon which law is founded I venture to ſuggeſt, as a remedy not leſs efficacious than palatable. Were ſuch knowledge univerſally ſpread, judges who adhere to rational principles, and who, with ſuperior underſtanding, can reconcile law to common ſenſe, would be revered by the whole ſociety. The fame of their integrity, ſupported by men of parts and reading, would deſcend to the loweſt of the people, a thing devoutly to be wiſhed! Nothing tends more to ſweeten the temper, than a conviction of impartiality in judges; by which we hold ourſelves ſecure againſt every inſult or wrong. By this means, peace and concord in ſociety are promoted, and individuals are finely diſciplined to ſubmit with equal deference to all other acts of legal authority. Integrity is not the only duty required in a judge: to behave ſo as to make every one rely upon his integrity, is a duty not leſs eſſential. Deeply impreſſed with theſe notions, the author dedicates his work to every lover of ſcience; and hath endeavoured to explain his ſubject in a manner that requires in the reader no peculiar knowledge of municipal law. In that view he hath avoided terms of art; not indeed with a ſcrupulous nicety, which might look like affectation; but ſo, he hopes, as that with the help of a law-dictionary, what he ſays may eaſily be apprehended.

PRINCIPLES

OF

EQUITY.

ORDER, a beauty in every compoſition, is eſſential in a treatiſe of equity, which comprehends an endleſs variety of matter. To avoid obſcurity and confuſion, we muſt, with the ſtricteſt accuracy, bring under one view things intimately connected, and handle ſeparately things unconnected, or but ſlightly connected. Two great principles, juſtice and utility, govern the proceedings of a court of equity *; and every matter that belongs to this court, is regulated by one or other of theſe principles. Hence a diviſion of the preſent work into two books, the firſt appropriated to juſtice, the ſecond to utility. I propoſe a third book for certain ſubjects, which conſiſt of parts too intimately connected to bear a ſeparation. Each of theſe is handled as one entire whole, inſtead of being broken into parts and handled ſeparately for illuſtrating one or other principle, as is done in the two firſt books.

* See the Introduction.

BOOK I.

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

IN the introduction occaſion was taken to ſhow, that a court of equity is neceſſary, firſt, to ſupply the defects of common law, and next, to correct its rigour or injuſtice. The neceſſity in the former caſe is manifeſt from a principle, that where there is a right it ought to be made effectual; in the latter from

another principle, that for every wrong there ought to be a remedy. In both, the diſpute generally turns upon pecuniary intereſt. But there is a legal intereſt which is not pecuniary, and which, for the ſake of perſpicuity, ought to be handled ſeparately. In this view, the preſent book is divided into three parts. In the firſt are treated, the powers of a court of equity to ſupply defects in the common law with reſpect to pecuniary intereſt. In the ſecond, the powers of a court of equity to correct injuſtice in the common law with reſpect to pecuniary intereſt. And in the third, the powers of a court of equity with reſpect to matters of juſtice that are not pecuniary.

PART I.

Powers of a Court of EQUITY to ſupply what is defective in Common Law with reſpect to pecuniary Intereſt.

OF theſe defects the variety is too great, to be reduced into any regular form. The bulk of them, I preſume, may be comprehended under the following heads. I. Defects in the common law with reſpect to the protecting individuals from harm. II. With reſpect to the natural duty of benevolence. III. With reſpect to rights founded on will. IV. With reſpect to ſtatutes. V. With reſpect to execution.

CHAPTER I.

Defects in Common Law with reſpect to the protecting Individuals from Harm.

THERE cannot be any ſociety among creatures that prey upon each other; and the ſocial ſtate, however beneficial and deſirable, could never have obtained among men, were not they among themſelves reſtrained from doing harm, and protected againſt it. To abſtain from injuring others, is accordingly the primary law of ſociety *; enforced not only by the ſtrongeſt natural ſanctions, but alſo by the moſt cogent that are within the reach of municipal law. By the common law of all civilized nations, of Britain in particular, the more groſs tranſgreſſions of this primary law of ſociety are ſeverely puniſhed; and every tranſgreſſion, without exception, ſubjects the wrong-doer to make full reparation. The common

* See Principles of Morality and natural Religion, part 1. Sect. 2. ch. 8.

common law however regards no injury but what occaſions actual loſs or damage with reſpect to fortune, or actual hurt with reſpect to perſon or reputation[a]: harm of a ſlighter kind paſſes unregarded however groſs the crime may be by which it is occaſioned. This may juſtly be deemed a defect in the common law; for the law of nature has more extenſive views. It prohibits every moral wrong by which one is any way hurt in point of intereſt, though the hurt may not amount to actual loſs or damage. I give the following examples. A man propoſing to place his money upon good ſecurity, is enſnared to lend it to one in labouring circumſtances. This is not actual damage, becauſe the money may poſſibly be recovered: but the money is put in hazard, which is undoubtedly a prejudice. Again, a proprietor of land after executing a minute of ſale with one purchaſer, ſells the land again to another, and transfers the property to him by delivering poſſeſſion. With reſpect to the firſt purchaſer, there is no actual damage: but it is plainly a harm or prejudice, to be diſappointed of a reaſonable, perhaps lucrative, bargain. It would be a blemiſh in the conſtitution of a ſtate, that any wrong ſhould be permitted without providing a remedy. Here the common law is defective; and, for that reaſon, it becomes the province of a court of equity to enforce the law of nature, by

[a] THE common law, in ſome inſtances, ſeems to extend its powers ſomewhat farther. When a priſoner for debt makes an eſcape by the negligence of the jailor, the creditor is hurt in his intereſt, but ſuſtains no actual damage. For it is not certain that he would have recovered his money by detaining the debtor in priſon; and it is poſſible he may recover it notwithſtanding the eſcape. But it is undoubtedly a hurt or prejudice to be deprived of this chance of obtaining payment; and the common law gives reparation by making the jailor liable for the debt, preciſely as equity doth in ſimilar caſes. A meſſenger who neglects to put a caption in execution, affords another inſtance of the ſame kind. By his negligence he is ſaid *litem ſuam facere*, and is ſubjected to the debt. This remarkable variation of the operations of common law in different caſes, requires to be accounted for. Viewing the matter on all ſides, a peculiarity in the nature of a poſitive engagement occurs, which may poſſibly give light. An obligation to fulfil, is involved in the very conception of an agreement. Hence it neceſſarily follows, that the obligee, who ought not to ſuffer in any manner by the want of performance, is entitled upon a breach of agreement to a full equivalent. This equivalent muſt comprehend not only actual damage, but every hurt or prejudice ſuſtained by the obligee; for otherwiſe the equivalent is not full or adequate. Now, the common law, which gives authority to agreements, cannot ſtop ſhort to make them effectual by halves. If at all, they muſt be made effectual according to the intention of parties. This conſideration will, I now perceive, ſerve to explain the foregoing caſes. The undertaking an office, implies an agreement to fulfil the duty of the office in all its branches. The ſuffering a debtor to eſcape by negligence, is in the jailor a breach of agreement, which muſt ſubject him to all the conſequences, whether actual damage, or prejudice only. He has engaged to make up whatever the creditor ſuffers by his negligence; and the common law compels every man to fulfil his engagement, or at leaſt to give a full equivalent. And the ſame reaſoning applies to a meſſenger who neglects to put a caption in execution. This ſeems fairly to account for the adequate reparation that is given upon a breach of agreement. But why, after all, a more confined remedy, where harm is done otherwiſe? This is not ſo eaſily accounted for. It cannot but appear arbitrary, and perhaps whimſical, that when a man, tranſgreſſing the primary law of ſociety, does prejudice to his neighbour, the common law ſhould be more limited in giving reparation, than when that man neglects only to perform his engagement.

ordaining reparation to be made where the miſchief amounts not to actual damage. This branch of the juriſdiction of a court of equity, as enforcing the primary law of ſociety, merits the moſt diſtinguiſhed place, and with it therefore I begin.

ONE general obſervation occurs upon this ſubject, that the prejudices which are repaired by a court of equity cannot for the moſt part, like actual damage, be accurately calculated and converted into a ſum of money. The circumſtances are too complex, and the conſequences too precarious and uncertain, to admit ſuch converſion. The queſtion then is, Of what kind muſt the reparation be? In order to reſolve this queſtion, we muſt firſt ſee how reparation is managed in courts of common law.

REGULATIONS for preventing harm, being merely prohibitory, afford no place for the interpoſition of a court till the wrong be committed. If the wrong be of ſuch a nature as that the party injured can be reſtored to his former ſituation, this method of repairing the injury, as of all the moſt compleat, will be preferred. Thus goods ſtolen are reſtored to the owner; and a diſpoſition of land procured by force or fear, is voided, in order that the proprietor may reaſſume the poſſeſſion. But it ſeldom happens that there is place for a remedy ſo compleat. An obſervation is made in the Roman law, which generally holds, that *factum infectum fieri nequit*; and when this is the caſe, the perſon injured, in place of being reſtored to his former ſituation, muſt be contented with a ſum of money in name of damages.

A pecuniary reparation, as above obſerved, is commonly not adapted to the caſes which come before a court of equity; and the reparations awarded by this court are as far as poſſible of the more compleat kind. The perſon who ſuffers unjuſtly, is relieved and placed in that ſituation to which he is entitled. And this is done by transferring the prejudice from him to the wrong-doer. This will ſcarce be intelligible without examples, which may naturally be claſſed in two different ſections. Firſt, Reparation of a wrong done by a man for his own behoof: and next, Reparation of a wrong done by a man for behoof of another.

SECTION I.

Reparation of a Wrong done by a Man for his own Behoof.

I Begin with caſes where a man, by a wrong done him, is put in hazard of loſs.

A is tenant in tail, remainder to his brother *B* in tail. *A* not knowing of the entail, makes a ſettlement on his wife for life as a jointure, without levying a fine or ſuffering a recovery. *B* who knew of the entail engroſſes this ſettlement, but does not mention any thing of the entail; becauſe, as he confeſſed in his anſwer, if he had ſpoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him. *B* after the brother's death recovered an ejectment againſt the widow by force of the entail. She was relieved in chancery, and a perpetual injunction granted for this wrong in *B* in concealing the entail; which if it had been diſcloſed, the ſettlement would have been made good by a recovery *. Upon this caſe I obſerve, in the firſt place, That the prejudice here done to the wife was not ſuch as could be redreſſed at common law. There was no actual damage, but only riſking the jointure upon the huſband's life: had he ſurvived, no loſs would have happened. In the ſecond place, The connection which *B* had with the parties, partly by blood and partly by being employed to engroſs the ſettlement, made it his duty to inform his brother of the entail; and his ſuppreſſion of the truth was a wrong which it was his duty to repair. And, in the third place, In all caſes of this kind, the proper and natural reparation is to deprive the wrong-doer of the benefit obtained by him wrongfully, in order to beſtow it upon the perſon for whom it was intended; which, in effect, is laying the prejudice or riſk on the wrong-doer. And this is preciſely what was done in the preſent caſe.

* Preced. Chan. 35. Raw *contra* Potts.

IN a caſe which has ſome analogy to that now mentioned, the court of ſeſſion ſtretched the point of equity a great way farther; farther I imagine than can well be juſtified upon any principle of equity that has hitherto been eſtabliſhed. An heireſs's infeftment upon a ſervice to her predeceſſor, being, after her death, challenged in a reduction upon alledged nullities, in order to diſappoint her huſband of his curteſy, the court decreed, That the infeftment not having been challenged till after the death of the heireſs, was

ſufficient to ſupport the curteſy, upon the following ground of equity, That had it been challenged during her life, theſe nullities might and would have been ſupplied *. One is naturally prompted to approve this decree; and yet, in reaſon, there appear unſurmountable difficulties. For, 1*mo*, it is not ſaid, That the purſuer of the reduction was in the knowledge of theſe nullities during the life of his predeceſſor the heireſs. 2*do*, What if they had been known to him? Can ſilence barely be conſidered as criminal, where there is no other connection but that of predeceſſor and ſucceſſor?

* June 1716, Hamilton *contra* Boſwall.

BY a marriage-ſettlement *A* is tenant for life of certain mills, remainder to his firſt ſon in tail. The ſon, knowing of the ſettlement, encourages a perſon, after taking a thirty years leaſe of theſe mills, to lay out conſiderable ſums of money in new buildings and other improvements, intending to have the benefit after his father's death. This is a fraud which ought to be diſcountenanced in equity; and therefore it was decreed, That the leſſee ſhould enjoy for the reſidue of the term that remained unexpired after the father's death †. Here was no actual damage, but only a riſk; for the leſſee would have enjoyed the full benefit of his leaſe had the leſſor lived thirty years. 2*do*, The part the ſon acted was fraudulent, and undoubtedly ſubjected him to make reparation. And, 3*tio*, The proper and natural reparation was to ſecure the leſſee againſt the wrong-doer.

† Abridg. Caſes in Equity, Cap. 47. Sect. B. §. 10.

NEXT in order come caſes where the prejudice is only the intercepting a benefit. The defendant on a treaty of marriage for his daughter with the plaintiff, ſigned a writing compriſing the terms of the agreement. Deſigning afterwards to get looſe from the agreement, he ordered his daughter to entice the plaintiff to deliver up the writing and then marry him. She obeyed her inſtructions; and the defendant ſtood at the corner of the ſtreet to ſee them go by to be married. The plaintiff was relieved on the point of fraud ‡. The plain method of repairing the prejudice here done to the plaintiff, was to hold the writing as good, having been withdrawn by fraud. This deprived the defendant of the benefit he had by his fraud, and brought matters to the ſame iſſue as if he had acted with candor and integrity.

‡ Ibid. Cap. 4. Sect. B. §. 6.

STELLIONATE, which conſiſts in aliening to different perſons the ſame ſubject, is a crime puniſhable by ſtatute ||. But though the ſecond purchaſer, where he has notice of the firſt purchaſe, is acceſſory to the crime of ſtellionate, the puniſhment however is not extended

|| Act 105, p. 1540.

extended to him. Nor does the common law make him liable even for reparation; becauſe the firſt purchaſer cannot qualify actual loſs or damage by being diſappointed of his bargain, but only *lucrum ceſſans*, which the common law regards not. Here then equity muſt interpoſe; and it may be conſidered as interpoſing, either to ſupply a defect in common law with reſpect to reparation, or to redreſs the common law ſupporting unjuſtly a *mala fide* purchaſe. In the firſt view, it makes a part of the preſent ſection: but becauſe of its connection with ſome collateral matters, I chuſe to treat it in the other view, which brings it under Book I. Part II. Chapter I. Section VIII.

SECTION II.

Reparation of a Wrong done by a Man for Behoof of another.

IN puniſhment there appears room for a diſtinction betwixt a principal and an acceſſory. The perſon who aſſiſts in committing a crime for the ſervice merely of another, appears to be leſs guilty than the chief actor who is moved by revenge, by malice, or by avarice. But reparation, which is due upon the ſlighteſt delinquency, admits not this diſtinction. The man who ſuffers unjuſtly is entitled to be repaired of the wrong done him; and every perſon who concurred in the wrong is ſubjected to reparation.

I begin, as in the former ſection, with caſes where a man by a wrong done him is put in hazard of loſs.

A having an incumbrance upon an eſtate, is witneſs to a ſubſequent mortgage, but does not diſcloſe his own incumbrance: for this wrong his incumbrance ſhall be poſtponed *. To offer for ſecurity of money borrowed, a mortgage of land upon which there is a ſubſiſting incumbrance, is a palpable cheat, to which the incumbrancer is acceſſory by countenancing the mortgage and ſubſcribing it as a witneſs. The perſon who thus truſted to the mortgage, runs the riſk of loſing his money, and the equitable reparation is to lay the riſk upon the incumbrancer; or, which comes to the ſame, to poſtpone the incumbrance. This is giving the mortgagee that ſecurity to which he is entitled by his bargain. The following caſes are of the ſame nature. A man having a mortgage upon a leaſehold eſtate, lends the mortgage-deed to the mortgageor, in order to enable him to borrow more money. The mortgagee in this caſe being in combination with the mortgageor to deceive the perſon from whom the money is borrowed, is guilty of a fraud, which, in

* 2 Vern. 151. Clare *contra* Earl of Bedford.

equity, ſubjects him to make reparation; and this was done by poſtponing his mortgage to the ſubſequent incumbrance *. A counſel having a ſtatute from *A*, which he conceals, adviſes *B* to lend *A* *L.* 1000 on a mortgage, and draws the mortgage with a covenant againſt all incumbrances. It was held that the ſtatute ſhould be poſtponed to the mortgage †.

* 2. Vern. 726. Peter *contra* Ruſſell

† New Abridg. of the Law, vol. 2. p. 598. Draper *contra* Borlace.

A being about to lend money to *B* on a mortgage, ſends to enquire of *D*, who had a prior mortgage, whether he had any incumbrance on *B*'s eſtate. If it be proved that *D* denied he had any incumbrance, his mortgage will be poſtponed ‡. A lie being a moral wrong, is ſufficient, independent of all connections, to oblige the wrong-doer to repair the prejudice done by it, even where he has no purpoſe to benefit himſelf.

‡ 2. Vern. 554. Ibbotſon *contra* Rhodes.

NEXT where benefit only is intercepted by the wrong. An eſtate being ſettled by marriage-articles upon the children of the marriage, which eſtate did not belong to the huſband but to his mother, yet ſhe was compelled in equity to make good the ſettlement; becauſe ſhe was preſent when the ſon declared that the eſtate was to come to him after her death, and was alſo one of the inſtrumentary witneſſes ‖. The mother's connection here with the parties-contracters, and the countenance ſhe gave to the contract, made it her duty, without artifice or diſſimulation, to ſpeak out the truth. Her artful ſilence therefore was a wrong, which ſubjected her to repair the prejudice occaſioned by it. The parties could not be reſtored *in integrum*, becauſe marriage had followed. The only reparation then that could be, was to lay the prejudice upon the wrong-doer, by obliging her to make good the ſettlement. Such reparation falls heavy on her, becauſe it deprives her of her property. But in all views it is more equitable that the guilty ſuffer than the innocent.

‖ 2. Vern. 150. Hunſdens *contra* Cheyney.

A gentleman being abroad, and having no children, two of his neareſt relations, who each of them had hopes of a ſettlement, agreed privately, that if the eſtate were diſponed to either, the other ſhould have a certain ſhare. The gentleman thereafter diſponed his eſtate to one of them, reſerving a power to alter. The diſponee ſent his ſon privately to Denmark, where the gentleman was; upon which the former diſpoſition was recalled, and a new diſpoſition granted in favour of the ſon. In a proceſs, after the gentleman's death, to fulfil the agreement, the defence was, That the agreement did

did not take place, becauſe the diſpoſition was not in favour of the defendant, but of his ſon. The court declared the following reply relevant to infer fraud, That the defendant ſent his ſon with the firſt diſpoſition to Denmark, and that the ſame was altered there in order to evade performance of the agreement *. This caſe deſerves peculiar attention. And, in the firſt place, I muſt curſorily obſerve, That the wrong here was, properly ſpeaking, not fraud, becauſe no artifice was uſed to deceive or circumvent. It was obviouſly however a tranſgreſſion of that fair and candid dealing, which the connection of the parties and the nature of the agreement required. But what deſerves chiefly to be obſerved is, That no action could lie on this agreement at common law, nor even in equity, becauſe the event in which it was to be made effectual did not exiſt. The diſpoſition was not to either of the parties, but to the ſon of one of them. Neither could there lie upon the wrong an action at common law for reparation, becauſe the party injured could only qualify *lucrum ceſſans*, not *damnum datum*. But there behoved to be reparation in a court of equity; and as the wrong-doer had no power over the eſtate which was ſettled on his ſon, the only reparation that could be afforded was an equivalent in money. And this is one of the rare caſes where a court of equity muſt give a ſum of money as reparation. And there appears not any reaſon to debar a court of equity from giving a pecuniary reparation, where the circumſtances admit not a reparation more compleat.

* Stair, July 15. 1681, Campbell *contra* Moir.

CHAPTER II.

Defects in Common Law with reſpect to enforcing the natural Duty of Benevolence.

IN the introduction an opportunity offered to ſhow, that the virtue of benevolence is by various connections converted into a duty; and that duties of this kind, being neglected by the common law, are enforced by a court of equity. This opens a wide field of equity, boundleſs in appearance, and which would be ſo in reality, as well as in appearance, were it not for one circumſtance, that the duty of benevolence is much more limited than the virtue. The virtue of benevolence may be exerciſed by a great variety of good offices. It tends often to make additions to the poſitive happineſs of others, as well as to relieve them from diſtreſs or want. But abſtracting from poſitive engagement, the duty of benevolence is always confined to the latter. No connection, no ſituation, nor cir-

cumſtance, makes it my duty to increaſe any man's ſtock, or to make him *locupletior*, as termed in the Roman law. For even in the ſtricteſt of all connections, that of parent and child, I feel not that I am in conſcience or in duty bound, to do more than to preſerve my children from want [a]: all beyond is left upon parental affection. Neither doth gratitude make it my duty to enrich my benefactor, but only to aid and ſupport him, when any ſort of diſtreſs or want calls for help. A favour is indeed ſcarce felt to be ſuch but when it prevents or relieves from harm; and a favour naturally is returned in kind.

IF this doctrine hold, here is a clear circumſcription of equity, ſo far as concerns the preſent chapter. A court of equity cannot force one man, whether by his labour or money, to add to the riches of another; becauſe, abſtracting from a promiſe, no connection ever makes this a duty. What is then left for a court of equity is, in certain circumſtances, to compel perſons to ſave from miſchief thoſe they are connected with, or to relieve them from want or diſtreſs. Benevolence, in this caſe, is a ſtrong impulſe to afford relief; and, in this caſe, benevolence, aſſuming the name of pity or compaſſion, is, by a law in our nature, made a poſitive duty. In all other caſes benevolence is a virtue only, not a duty. The exerciſe is left to our own choice; and the neglect is not puniſhed, though the practice is highly rewarded by the ſatisfaction it affords. In this branch of our nature, a beautiful final cauſe is viſible. The benevolence of man, by want of ability, is confined within narrow bounds: and in order to make the moſt of that ſlender power he has of

[a] THIS propoſition is illuſtrated in the following caſe. Mary Scot, daughter of Scot of Highcheſter, having, by unlucky circumſtances, been reduced to indigence, was alimented by her mother Lady Mary Drummond at the rate of *L.* 20 yearly. Lady Mary, at the approach of death, ſettled all her effects upon Mary Sharp her daughter of another marriage, taking no other notice of her daughter Mary Scot, than recommending her to the charity of Mary Sharp. After the mother's death, Mary Scot brought a proceſs for aliment againſt her ſiſter Mary Sharp, founded chiefly on the ſaid recommendation. A proof was taken of the extent of the effects contained in the ſettlement to the defendant, which amounted to about *L.* 300 *Sterling*. It was pretty obvious, that no action either in law or equity could be founded on the recommendation, very different in its nature from an obligation or a burden. But then it was ſtated, that the purſuer being very young when her father died, was educated by her mother in no ſort of buſineſs by which ſhe could gain a livelihood: and it occurred to the court, that though the *patria poteſtas* is ſuch, that a peer may breed his ſon a cobler, and after putting him in buſineſs with a competent ſtock, is relieved from all further aliment; yet if a ſon be bred as a gentleman, without being inſtructed in any art that can gain him a farthing, he is entitled to be alimented for life; for otherways a palpable abſurdity will follow, that a man may ſtarve his ſon, or leave him to want or beggary. Thus Lady Mary Drummond breeding her daughter to no buſineſs, was, by the law of nature, bound to aliment her for life, or at leaſt till ſhe ſhould be otherways provided for; and the purſuer therefore being a creditor for this aliment, has a good action againſt her mother's repreſentatives. The court accordingly found the purſuer entitled to an aliment of *L.* 12 *Sterling* yearly, and decerned againſt the defendant for the ſame *.

* 8th March 1759. Mary Scot *contra* Mary Sharp.

of doing good, it is wiſely directed where it is moſt uſeful, *viz.* to relieve others from diſtreſs. Here benevolence is made a duty. In other circumſtances man is left to the freedom of his own will, to exert his benevolence or not as he is inclined.

IT appears then, that equity, ſo far as concerns the duty of ſerving others, is not extended beyond pity or compaſſion. But it is circumſcribed within ſtill narrower bounds. Compaſſion, though a natural duty, is not adopted in its utmoſt extent by courts of equity. In many caſes, this duty is too vague and undetermined to be reached by human laws. A court of equity pretends not to interpoſe, but where the duty being clear and preciſe can be brought under general rules *. Some of the connections that occaſion duty ſo preciſe, I ſhall proceed to handle, confining myſelf to thoſe that are in ſome meaſure involved in circumſtances; for the more ſimple connections, ſuch as that of parent and child, require little or no explanation. Though all the duties of this kind that are enforced by a court of equity belong to the principle of juſtice, they may however be divided into different claſſes. The preſent chapter is accordingly divided into two ſections. In the firſt are handled connections that make benevolence a duty when not prejudicial to our intereſt. In the ſecond are handled connections that make benevolence a duty even againſt our intereſt. Theſe connections are diſtinguiſhable from each other ſo clearly, as to prevent any confuſion of ideas; and the foregoing order is choſen, that we may paſs gradually from the ſlighter to the more intimate connections. To prompt a man to ſerve thoſe with whom he is connected, requires not any extraordinary motive, when the good office thwarts not his own intereſt: any ſlight connection is ſufficient to make this a duty, and therefore ſuch connections are firſt diſcuſſed. It requires a much ſtronger connection, to make it our duty to beſtow upon another any part of our ſubſtance. Self-intereſt is not to be overcome but by connections of the moſt intimate kind, which therefore are placed laſt in order.

* See the introduction.

SECTION I.

Connections that make Benevolence a Duty when not prejudicial to our Intereſt.

THE connection I ſhall firſt take under conſideration, is that which ſubſiſts betwixt a creditor and a cautioner. This connection which ſecures the creditor, makes benevolence his duty; ſo

far at leaſt as to aid the cautioner in claiming from the principal debtor what he the cautioner has advanced for him. The creditor has an intuitive perception that this is a moral duty; and every one has the ſame perception. The cautioner ſuffers loſs by the act of the creditor, though not by his fault; and it is the duty of the creditor, ſo far as conſiſtent with his own intereſt, to aſſiſt the cautioner in operating his relief againſt the principal debtor. He ought in particular to make over to the cautioner his bond and the execution done upon it, in order that the cautioner may the more ſpeedily compel the principal debtor to relieve him. The law, favouring this moral act, conſiders the money delivered to the creditor not as payment, but as a valuable conſideration for aſſigning his debt and execution to the cautioner. I cannot explain this better than in the words of Papinian, the moſt eminent of all the writers upon the Roman law. "Cum poſſeſſor unus, expediendi "negotii cauſa, tributorum jure conveniretur; adverſus cæteros, "quorum æque prædia tenentur, ei, qui conventus eſt, actiones a "Fiſco præſtantur: ſcilicet ut omnes, pro modo prædiorum, pecu-"niam tributi conferant: nec inutiliter actiones præſtantur, tametſi "Fiſcus pecuniam ſuam reciperaverit, quia nominum venditorum "pretium acceptum videtur *." From which conſideration it evidently follows, that this aſſignment may be demanded and granted *ex poſt facto*, if the precaution be omitted when the money is paid.

* L 5. de Cenſibus.

FROM the ſame principle it alſo follows, That the creditor is bound to convey to the cautioner every ſeparate ſecurity he has for the debt; and conſequently that if the creditor diſcharge or paſs from his ſeparate ſecurity, the cautioner, ſo far as he ſuffers thereby, hath an exception in equity againſt payment.

I muſt obſerve hiſtorically, that there are many deciſions of the court of ſeſſion, declaring the creditor not bound to grant the aſſignment firſt mentioned. Theſe deciſions, pretty remote in point of time, will not be much regarded, becauſe the rules of equity at that time lay in greater obſcurity than at preſent. And there is an additional reaſon for diſregarding them, that they are not conſiſtent with others relating to the ſame ſubject. If it be laid down as a rule, That the creditor is not bound to aſſign his bond and execution, however beneficial ſuch aſſignment may be to the cautioner by giving him ready execution againſt the principal debtor, it ought to follow, that neither is he bound to aſſign any ſeparate ſecurity. If it be not his duty to ſerve the cautioner in the

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one caſe, it cannot be his duty to ſerve him in the other: and yet it is a rule eſtabliſhed in this court, That the cautioner, making payment of the debt, is entitled to every ſeparate ſecurity of which the creditor is poſſeſſed. One is at no loſs to diſcover the cauſe of this diſcrepancy. When the queſtion is about a ſeparate ſecurity upon which the cautioner's relief may wholly depend, the principle of equity makes a ſtrong impreſſion. Its impreſſion is ſlighter when the queſtion is only about aſſigning the bond, which, when granted, has no other effect but to ſave a proceſs.

IT is of the greater conſequence to ſettle with preciſion the equitable rule that governs queſtions betwixt the creditor and cautioner, becauſe upon it depends wholly, in my apprehenſion, the mutual relief betwixt co-cautioners. Of two cautioners bound for the ſame debt at different times, and in different deeds, one pays the debt upon a diſcharge without an aſſignment; where is the legal foundation which entitles this man to claim the half from his fellow-cautioner? The being bound in different deeds affords no place for ſuppoſing an implied ſtipulation of mutual relief. The co-cautioners are indeed connected by the ſame debt, but then this connection is too ſlight to oblige the one to give away his property in order to make up the other's loſs. Nay, ſuppoſing them bound in the ſame deed, we are not from this ſingle circumſtance to imply a mutual obligation for relief, but rather the contrary, when the clauſe of mutual relief is omitted. For, in general, when an obvious clauſe is left out of a deed, it is natural to aſcribe the omiſſion to deſign rather than to forgetfulneſs. The principal debtor is *ex mandato* bound to relieve all his cautioners: but there is no medium at common law, by which one cautioner can demand relief from another. And, as juſt now obſerved, the connection of being bound for payment of the ſame debt, is too ſlight to entitle that cautioner who pays the whole debt, to be indemnified in part out of the goods of his fellow. It appears then, that the claim of mutual relief among co-cautioners, can have no foundation other than the obligation upon the creditor to aſſign upon payment. This aſſignment in the caſe of a ſingle cautioner muſt be total; in the caſe of ſeveral muſt be *pro rata;* becauſe the creditor is equally connected with each of them. The only difficulty is, that at this rate there is no mutual relief unleſs an aſſignment be actually given. But this difficulty is eaſily ſurmounted. We have ſeen above, that this aſſignment may be granted *ex poſt facto:* hence it is the duty of the creditor to grant this aſſignment at whatever time demanded; and if the creditor

prove refractory, the law will interpoſe to hold an aſſignment as granted, becauſe it ought to be granted. And this ſuppletory or implied legal aſſignment, is the true foundation of the mutual relief among co-cautioners, which obtains both in Scotland and England.

THE creditor, as has been ſaid, being bound to all the cautioners equally, ought not, and therefore cannot legally, give an aſſignment to one in ſuch terms as to lay the burden of the debt upon the reſt, freeing wholly the aſſignee. In what terms then ought the aſſignment to be granted? or when granted without limitation, what effect ought it to have in equity? This is a queſtion of ſome ſubtilty. To permit the aſſignee to demand the whole from any ſingle co-cautioner, deducting only his own part of the debt, is unequal, becauſe it evidently gives the aſſignee an advantage over his fellow-cautioners. On the other hand, the aſſignee is in a worſe ſituation than any other of the cautioners, if no other effect be given to the aſſignment than to draw from each of the co-cautioners ſeparately their proportion of the debt. Upon this plan, the cautioner who pays the debt, is forced to run the circuit of all his co-cautioners; and if one or two prove inſolvent, he muſt renew the ſuit againſt the reſt, to make up the proportions of thoſe who are deficient. To preſerve therefore a real equality among the cautioners, every one of them againſt whom relief is claimed, ought to bear an equal proportion with the aſſignee. For the ſake of perſpicuity, let us ſuppoſe ſix cautioners bound in a bond for ſix hundred pounds. The firſt paying the debt is entitled to claim the half from the ſecond; for a plain reaſon, that the ſecond ought to bear equal burden with the firſt. When the firſt and ſecond again attack the third, they have a claim againſt him each for a hundred pounds; which reſolves in laying the burden of two hundred pounds upon each——and ſo on till the whole cautioners be diſcuſſed. This method not only preſerves equality, but avoids after-reckonings in caſe of inſolvency.

So far clear when relief can be directly obtained. But what if the aſſignee be put to the trouble of adjudging for his relief? In this caſe, the aſſignment is a legal title to lead an adjudication for the whole debt. Equity is ſatisfied, if, by virtue of the adjudication, no more be actually drawn out of the eſtate of any of the co-cautioners, than that co-cautioner is bound to contribute as above. And in leading the adjudication, not even the adjudger's own proportion of the debt ought to be deducted. It is a benefit to the other

other cautioners that the ſecurity be as extenſive as poſſible; for it entitles the adjudger to a greater proportion of the ſubject or price, in competition with extraneous creditors.

ANOTHER connection, of the ſame nature with the former, is that betwixt a creditor who is infeft in two different tenements for his ſecurity, and another creditor who hath an infeftment on one of the tenements, of a later date. Here the two creditors are connected by having the ſame debtor, and a ſecurity upon the ſame ſubject. Hence it follows, as in the former caſe, that if the preferable creditor chuſe arbitrarily to draw his whole payment out of that ſubject in which the ſecond creditor is infeft, the latter for his relief is entitled to an aſſignment of the preferable ſecurity, which can be done upon the conſtruction above mentioned. The ſum recovered by the firſt creditor out of the ſubject on which the ſecond creditor is alſo infeft, is juſtly underſtood to be advanced by the ſecond creditor, being a ſum which he was entitled to, and muſt have drawn had not the firſt creditor interpoſed. And this ſum, ſuppoſed to be paid by the ſecond creditor, is held to be the purchaſe-money of the ſaid conveyance. This conſtruction, preſerving the preferable debt entire in the perſon of the ſecond creditor, entitles him to draw payment of that debt out of the other tenement; and by this equitable conſtruction, matters are reſtored to the ſame condition, as if the firſt creditor had drawn his payment out of the ſeparate ſubject, leaving the other entire for payment of the ſecond creditor. Utility alſo concurs to ſupport this equitable claim. No ſituation with regard to law is attended with more pernicious conſequences, than where a preferable creditor hath it in his power arbitrarily to oppreſs one and relieve others. Judges ought to be jealous of ſuch powers, which will generally be directed by bad motives; often by reſentment, and, which is ſtill worſe, more often by avarice. It is happy therefore for mankind, that two different principles coincide in matters of this kind, to put them upon a juſt and ſalutary footing.

IT is ſcarce neceſſary here to obſerve, That a ſuppoſed conveyance, which may be ſufficient, as above mentioned, to found a claim of relief among co-cautioners, will not anſwer in the preſent caſe. In order to found an execution againſt land there muſt be an infeftment, and this infeftment muſt be conveyed to the perſon who demands execution. Any juſt or equitable conſideration may be ſufficient to found a perſonal action. But even perſonal execution

cannot proceed without a formal warrant, and ſtill leſs real execution.

BUT now, admitting it to be the duty of the preferable creditor to grant an aſſignment, the queſtion is, To what extent? Whether ought the aſſignment to have a total effect, or only to reſtore the diſappointed creditor to that ſituation he would have been in, had the preferable creditor drawn his payment proportionally out of both ſubjects? It will be made appear by and by, that the aſſignment muſt be confined to the latter effect in the caſe of two ſecondary creditors. But there is no equity to limit the aſſignment in this manner, where there is no intereſt in oppoſition but that of the debtor. He has no equitable intereſt to oppoſe a total aſſignment; and the ſecond creditor has an equitable claim to all the aid the firſt creditor can afford him.

THE rules of equity muſt be the ſame in every country where law is cultivated. By the practice of England *, If the creditors ſweep away the perſonal eſtate, the real eſtate will be charged for payment of the legacies. In this caſe, the legatees need no aſſignment to found their equitable claim againſt the heir who ſucceeds to the real eſtate.

* 2. Chancery Cafes 4.

WE proceed to another connection, which is that betwixt the preferable creditor infeft on both tenements, and two ſecondary creditors who are infeft ſeparately, each on a ſingle tenement. The duty of the preferable or catholic creditor with relation to theſe ſecondary creditors, cannot be doubtful conſidering what is ſaid above. Equity as well as expediency bars him from arbitrary meaſures. He is equally connected with his two fellow-creditors, and he muſt act impartially betwixt them. The regular method is, that he draw his payment proportionally out of both tenements; but if, for his own eaſe or conveniency, he chuſe to draw the whole out of one, the poſtponed creditor is entitled to an aſſignment; not indeed total which would be an arbitrary act, but proportional, ſo as to entitle the aſſignee to draw the ſame ſum out of the other ſubject, which he would have drawn out of his own, had the preferable creditor contented himſelf with a proportional draught out of both ſubjects. I need ſcarce mention, that the ſame rule which obtains in the caſe of ſecondary creditors, muſt equally obtain among purchaſers of different parcels of land, which before the purchaſe were all *in cumulo* burdened with an infeftment of annualrent. The ſame

rule

rule of equity is acknowledged in England. A man grants a rent-charge out of all his lands, and afterwards ſells them by parcels to diverſe perſons. The grantee of the rent-charge levies his whole rent from one of theſe purchaſers. This purchaſer ſhall be eaſed in equity by a contribution from the reſt of the purchaſers *.

* Abridg. Caſes in Equity, Cap. 18. Sect. A. §. 1.

A caſe ariſing out of the connection laſt handled muſt not be overlooked, becauſe it will throw light upon the preſent ſubject. Let it be ſuppoſed that the catholic or preferable creditor purchaſes one of the ſecondary debts; will this vary the rule of equity? This purchaſe in itſelf lawful, is not prohibited by any ſtatute, and therefore muſt have its effect. The connection here betwixt the creditors is by no means ſo intimate, as to oblige any one of them, at the expence of his own intereſt, to ſerve another. Againſt the catholic creditor therefore, there is no rule of equity to bar him from drawing full payment of the ſecondary debt out of the tenement which it burdens, reſerving his catholic debt to be made effectual out of the other tenement; though of conſequence the ſecondary creditor upon that tenement is totally diſappointed. This ſecondary creditor has no claim for an aſſignment, total or partial, when the intereſt of the catholic creditor ſtands in oppoſition. But here the connection among the parties muſt, in my apprehenſion, have the following equitable operation, that the catholic creditor, by virtue of his purchaſe, cannot draw more than the ſum he actually paid for it. Equity in this caſe will not allow the one to profit by the other's loſs. But a hint here muſt ſuffice; becauſe the point belongs more properly to another head †.

† Immediately below Sect. 2. Art. 1.

THE following caſe proceeds upon the principle above laid down. The huſband on the marriage charged the lands with a rent-charge for a jointure to his wife, and afterwards deviſed part of theſe lands to the wife. After the huſband's death the heir prayed that the lands deviſed to the wife might bear their proportion of the rent-charge. But the bill was diſmiſſed, becauſe the grantee of the rent-charge may diſtreign in all or any part of the lands for her rent; and there is no equity to abridge her remedy ‡.

‡ 1. Vern. 347.

IF the catholic creditor, after the exiſtence of both ſecondary debts, renounce his infeftment with reſpect to one of the tenements, which makes a clear fund for the ſecondary creditor ſecured upon that tenement; ſuch renounciation ought to have no effect in equity againſt the other ſecondary creditor, becauſe it is an arbitrary deed,

and a direct breach of that impartiality which the catholic creditor is bound to obſerve with relation to the ſecondary creditors. It is in effect the ſame with granting a total aſſignment to one of the ſecondary creditors againſt the other.

IN every one of the caſes above mentioned, the catholic creditor is equally connected with each of the ſecondary creditors, and upon that account is bound to act impartially betwixt them. But this rule of equity cannot take place where the connections are unequal. It holds here as among blood-relations; thoſe who are neareſt to me are entitled to a preference in my favour. The following caſe will be a ſufficient illuſtration. A man takes a bond of borrowed money with a cautioner; obtains afterwards an infeftment from the principal debtor as an additional ſecurity; and laſt of all, another creditor for his ſecurity obtains infeftment upon the ſame ſubject. Here the firſt mentioned creditor has two different means for obtaining payment: he may apply to the cautioner, or he may apply to the land in which he is infeft. He proceeds to execution againſt the land, by which he cuts out the ſecond creditor. Is he bound to grant an aſſignment to the ſecond creditor againſt the cautioner, total or partial? The anſwer is, That the ſecond creditor is in this caſe not entitled to demand an aſſignment. On the contrary, the preferable creditor, taking payment from the cautioner, is bound to give him a total aſſignment; becauſe he is more intimately connected with the cautioner than with the ſecond creditor. A cautionary engagement is an act of pure benevolence; and when a creditor takes hold of this engagement to oblige one man to pay another's debt, this connection makes it evidently the duty of the creditor to aid the cautioner with an aſſignment, in order to repair his loſs; and it proceeds from the ſame intimacy of connection, that, as above mentioned, he is obliged to include in this aſſignment every ſeparate ſecurity he has for the debt. It is his duty accordingly to convey to the cautioner the real ſecurity he got from the principal debtor. Nor is the intereſt of the ſecond creditor regarded in oppoſition; for he is no other way connected with the preferable creditor, but that both of them are creditors to the ſame perſon, and that both of them are infeft on the ſame ſubject for ſecurity.

THE following caſe ſeems to require the interpoſition of a court of equity; and yet whether its powers reach ſo far is doubtful. A man aſſigns to a relation of his *L.* 500 contained in a bond, without any power of revocation, reſerving only his own liferent. Many years

years after, forgetting the aſſignment, he makes his will, naming this ſame relation his executor and reſiduary legatee, bequeathing in the teſtament the foreſaid bond of *L.* 500 to another relation. The teſtator's effects, abſtracting from the bond, not exceeding in value *L.* 500, it becomes to the executor nominate a matter indifferent, whether he accept the teſtament, or betake himſelf to his own bond. But it is not indifferent to others. For if he undertake the office of executor, he muſt convey the bond to the ſpecial legatee: if he cling to the bond, rejecting the office, the teſtament falls to the ground, and the next of kin will take the effects, leaving nothing to the ſpecial legatee. The intereſt of others ought not to depend on the arbitrary will of the executor nominate; and yet, ſo far as appears, there is no place here for the interpoſition of equity. The privilege of accepting or rejecting a right no man can be deprived of; and, admitting this privilege, the conſequences that follow ſeem to be out of the reach of equity.

LAND-ESTATES having a common boundary, form ſuch a connection betwixt the proprietors, as to make certain acts of benevolence their duty, which belong to the preſent ſubject. To ſave my ground from water flowing upon it from a neighbouring field, a court of equity will entitle me to repair a bulwark within that field, provided the reparation damage not the proprietor *. The following is a ſimilar caſe. The courſe of a rivulet which ſerves my mill happens to be diverted, a torrent having filled with ſtones or mud the channel in my neighbour's ground above. I will be permitted to remove the obſtruction though in my neighbour's property, in order to reſtore the rivulet to its natural channel. My neighbour is bound to ſuffer this operation, becauſe it relieves me from damage without harming his property.

* l. 2. §. 5. in fine, de aqua & aquæ pluviæ arcen.

BUT in order to procure any actual profit, or to make myſelf *locupletior*, equity will not interpoſe or entitle me to make any alteration in my neighbour's property, even where he cannot alledge any prejudice by the alteration. The reaſon is given above, That equity never obliges any man, whether by acting or ſuffering, to increaſe the riches of another. Thus the Earl of Eglinton having built a mill upon the river of Irvine, and ſtretched a dam-dike croſs the channel, which occaſioned a reſtagnation to the prejudice of a ſuperior mill, Fairly the proprietor of this mill brought a proceſs, complaining that his mill was hurt by the back-water, and concluding that the Earl's dam-dike be demoliſhed, or ſo altered as to

give a free courſe to the river. The reſtagnation being acknowledged, the Earl offered to raiſe the purſuer's mill-wheel ten inches, which would make the mill go as well as formerly; offering ſecurity at the ſame time againſt all future damage; and urged, that to refuſe ſubmitting to this alteration would be acting *in emulationem vicini*, which the law doth not indulge. The court judged the defendant's dam-dike to be an incroachment on the purſuer's property, and ordained the ſame to be removed or taken down ſo far as it occaſioned the reſtagnation *.

* Jan. 27. 1744. Fairly *contra* Earl of Eglinton.

SECTION II.

Connections that make Benevolence a Duty even againſt our Intereſt.

THE ſubject of this ſection, by the multiplicity and variety of its circumſtances, being involved in ſome degree of obſcurity and intricacy, requires to its explanation order as well as accuracy. The ſection may be divided into two branches, clearly diſtinguiſhable from each other. The firſt, where gain made by one is applied to make up another's loſs: the ſecond, where one not a gainer is obliged to make up another's loſs. I proceed in this order, being that which is laid down in the beginning of the chapter. For if it require an intimate connection to oblige one man out of his gain to repair another's loſs, the connection muſt be ſtill more intimate that obliges one who has made no gain to repair another's loſs.

ARTICLE I.

Gain made by one applied to repair another's Loſs.

IT will evidently appear without an argument, That there cannot be ſuch a thing in law as the taking any man's gain from him, to repair the loſs ſuſtained by another, unleſs there be ſome connection betwixt the loſs and gain, as well as betwixt the perſons. This connection betwixt the loſs and gain, is a capital circumſtance in the preſent ſpeculation. The connections hitherto mentioned relate to perſons: this relates to things; and forms at the ſame time a perſonal connection. If, for example, I lay out my money upon a ſubject as belonging to myſelf, which is afterwards diſcovered to be the property of another, my loſs in this caſe is intimately connected with his gain, becauſe in effect my money comes into his pocket. This circumſtance at the ſame time connects me with the true proprietor. In examining the preſent ſubject, it will be of uſe to preſerve theſe two views diſtinct.

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THIS connection betwixt the loſs and gain may be more or leſs intimate. And its different degrees of intimacy ought to be carefully noted; becauſe it is reaſonable to preſume, what will be found true by induction, That a man's duty to apply his gain for repairing another's loſs, depends greatly on the ſtrength of this connection. When it exiſts in the higheſt degree, there is ſcarce requiſite any other circumſtance to found the obligation. In its lower degrees no obligation ariſes, unleſs the perſons be otherways ſtrongly connected. Proceeding then to trace theſe degrees, the loweſt I ſhall have occaſion to mention, is where the loſs and gain are connected by their relation to the ſame ſubject. For example, A man purchaſes at a low rate one of the preferable debts upon a bankrupt eſtate, and upon a ſale of the eſtate draws more than the tranſacted ſum. He gains while his fellow-creditors loſe conſiderably. The next degree going upwards, is where my gain is the occaſion of another's loſs. For example, A merchant foreſeeing a ſcarcity, purchaſes all the corn he can find in the neighbourhood, with a view to make great profit. Before he opens his granaries, I import a large cargo from abroad, parceling it out at a moderate price, under what my brother-merchant paid for his cargo; by which means he loſes conſiderably. The third pretty much upon a level with the former, is where another's loſs is the occaſion of my gain. For example, My ſhip loaded with corn proceeds in a direct courſe, in company with another, to a port where there is a ſcarcity: the other ſhip being foundered in a ſtorm, and the cargo loſt, my cargo by that means draws a better price. The fourth connection is more intimate, the loſs and the gain proceeding from the ſame cauſe. In the caſe laſt mentioned, ſuppoſe the weaker veſſel daſhed againſt the other in a ſtorm is ſunk: here the ſame cauſe by which the one proprietor loſes proves beneficial to the other. The laſt connection I ſhall mention, and the compleateſt that can be, is where that which is loſt by the one is gained by the other; or, in other words, where the money or effects of which the one is deprived, are either in the other's poſſeſſion, or converted to his benefit. This is the caſe firſt of all mentioned, of money laid out by a *bona fide poſſeſſor* in meliorating a ſubject, which is afterwards claimed by the proprietor. The money that the former loſes is gained by the latter.

To put the foregoing connections, perſonal and real, in ſome order, I begin with thoſe caſes where the application of one's gain to make up another's loſs, ariſes from the ſtronger perſonal con-

nections joined with the weaker connections betwixt the profit and loſs. And to theſe will ſucceed caſes where the profit and loſs are connected in a ſtricter manner, and are joined with ſome of the ſlighter perſonal connections.

A caſe occaſionally mentioned above, belonging to the firſt claſs, ſhall lead the way. There are three creditors cloſely connected; firſt, by their relation to the ſame debtor who is bankrupt; and next, one is a preferable creditor over two ſubjects, the other two being ſecured each of them upon one of the ſubjects ſeparately. The catholic creditor purchaſes one of the ſecondary debts under the value; and by drawing compleat payment of both debts, is a gainer by his purchaſe; and the queſtion is, Whether equity will ſuffer him to retain his gain againſt the other ſecondary creditor, who is thus cut out of his ſecurity. It cannot indeed be qualified here, that any ſubject which formerly belonged to the one is tranſferred to the other, or converted to his uſe. But then the loſs and gain are neceſſarily connected by having a common cauſe, *viz.* the purchaſe made by the catholic creditor. This connection betwixt the loſs and gain, joined with the perſonal connections above mentioned, make it the duty of the catholic creditor to communicate his profit, in order to repair in ſome degree the loſs which the other creditor ſuſtains. And one may with confidence deliver this opinion, when the following circumſtance is added, That the loſs was occaſioned by the fact and deed of the catholic creditor, making a purchaſe that he was ſenſible would hurt his fellow-creditor.

THE next caſe in order, is of two aſſignees to the ſame bond ignorant of each other. The cedent finds means to draw the purchaſe-money from both, and walks off in a ſtate of bankruptcy. The latter aſſignment being firſt intimated will be preferred. But to what extent? Will he be preferred for the whole ſum in the bond, or only for the tranſacted ſum? The circumſtances of this caſe favour the poſtponed aſſignee, though they have not the ſame weight with thoſe in the former. The material difference is, That the aſſignee here preferred, made his purchaſe without knowing of his competitor, and conſequently without any notion of diſtreſſing him. The perſonal connection however, joined with the neceſſary connection betwixt the loſs and gain, are, in my apprehenſion, ſufficient to deprive the laſt aſſignee of his gain, in order to make up the loſs ſuſtained by the firſt. The caſe is more doubtful where the

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firſt conveyance is firſt compleated; becauſe it may appear hard that the intervention of a ſecond purchaſer ſhould deprive the firſt purchaſer of the profit of his bargain. I leave this point to be ripened by time and mature deliberation. The progreſs of equity is ſlow, though conſtant, towards the moſt delicate points of natural juſtice. If at preſent it be thought that a court of equity hath not ſufficient authority to interpoſe in this caſe, a different way of thinking probably will hereafter prevail.

ONE thing is certain, that in the Engliſh court of chancery there would be no heſitation to apply equity to this caſe. This court extends the remedy a great way farther, farther indeed than I can diſcover any juſt foundation for. A ſtranger who purchaſes a prior incumbrance, can draw no more from the other incumbrancers than he really paid *. And to juſtify this extraordinary opinion, it is ſaid, "That the taking away one man's gain to make up another's "loſs is making them both equal." This argument, if it prove any thing, proves too much, for it will apply to any two perſons indifferently who have not the ſmalleſt connection, ſuppoſing only the one to have made a profitable, the other a loſing bargain. There ought to be ſome connection to found a demand in equity. The perſons ought to be connected by a common concern; and the loſs and gain ought to be connected, ſo at leaſt as that the one is the occaſion of the other. The firſt connection only, is found in this caſe. A ſtranger who purchaſes a prior incumbrance is indeed, by a common ſubject, connected with the other incumbrancers. But is it true, that by his purchaſe the other incumbrancers are hurt or prejudiced in any manner? By no means; for when he claims the debt in its utmoſt extent, it is no more than what his author was entitled to do. Conſidering the rule of chancery in this view, it muſt appear exceeding whimſical. It deprives a man of the benefit of a lucrative bargain, the fruit of his own induſtry, to beſtow it, upon whom? Not upon any perſon who is hurt by the bargain, but upon thoſe who are in no worſe condition than they were before the bargain was made. Neither am I clear, that this rule can be ſupported upon a principle of utility. For though it is preventive of hard and unequal bargains, yet as no prudent man will purchaſe an incumbrance upon ſuch a condition, it in effect comes to be a total prohibition of ſuch purchaſes, which would prove a great inconveniency to many whoſe funds are locked up by the bankruptcy of their debtors.

* 1. Vern. 476.

THAT an heir acquiring an incumbrance ſhould be allowed no more than what he really paid, or, which comes to the ſame, that he ſhould be bound to communicate eaſes, is a propoſition more agreeable to the principles of equity. This is the law of England *, and it is the law of Scotland with regard to heirs who take the benefit of an inventory. But the heir, with us at leaſt, is in a ſingular caſe, very different from that of a ſtranger. He hath in his hand the fund for payment of the creditors, which it is his duty faithfully to apply to their uſe; and therefore to bargain with a creditor for a leſs ſum than the creditor is entitled to draw out of the common fund, is a wrong done by the heir, which ought to deprive him of the benefit of his purchaſe: and as the cedent cannot claim this benefit againſt his own deed, it is juſtly communicated to the other creditors, to make up to them in part what they loſe by the deficiency of the common fund.

* 1. Salkeld 155.

A cautioner upon making payment obtaining an eaſe, muſt communicate the ſame to the principal debtor, upon a plain ground in common law, that being ſecure of his relief from the principal debtor, he can have no claim but to be kept *indemnis*. But after the bankruptcy of the principal debtor, upon what foundation either of ſtrict law or equity one cautioner is bound to communicate eaſes to another, I ſee not unleſs there be an agreement to that purpoſe. And yet this is the prevailing, I may ſay the eſtabliſhed, opinion. I am aware of the reaſon commonly aſſigned, that cautioners for the ſame debt are to be conſidered as in a ſociety; obliged to bear the loſs equally. But this, I doubt, is arguing in a circle. They reſemble a ſociety, becauſe the loſs muſt be equal; and the loſs muſt be equal, becauſe they reſemble a ſociety. We muſt therefore go more accurately to work. In the firſt place, Let us examine whether an obligation for mutual relief may not be implied. This implication, at beſt doubtful, ſuppoſes the cautioners to have ſubſcribed in a body. And therefore, to leave no room for an implied obligation, we need but ſuppoſe, that two perſons ignorant of each other become cautioners at different times, and in different deeds. It appears then, that common law affords not an obligation for mutual relief. The matter is ſtill more clear with regard to equity. For though the connection betwixt the cautioners may be ſo ſtrict, as to oblige one to part with his gain to make up another's loſs, it cannot be thought ſufficiently ſtrict, to oblige one who makes no gain to make up another's loſs; which is the caſe of the cautioner who obtains an eaſe, ſuppoſing that eaſe to be leſs than his ſhare

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of the debt. Upon the whole, my notion is, That if a cautioner, in the view of objections againſt the debt, or in the view of any circumſtance which regards the principal debtor, obtain an eaſe, he is bound to communicate that eaſe to his fellow-cautioner, upon the following rational conſtruction, that he acted for the common behoof. This clearly enough appears to be the *ratio decidendi* in the caſe reported by Stair, July 27. 1672, Brodie *contra* Keith. But if upon prompt payment by one cautioner after the failure of others, or upon any conſideration perſonal to the cautioner, an eaſe be given; equity, I think, obliges not the cautioner to communicate the benefit to his fellow-cautioners. And this was decreed, Stair, July 8. 1664, Niſbet *contra* Leſly.

NEXT in order come thoſe caſes where the loſs and gain, connected in the ſtricteſt manner, are joined with ſome of the ſlighter perſonal connections. To this claſs chiefly relates a maxim in the Roman law, *Quod nemo debet locupletari aliena jactura;* for in the application of this maxim it muſt occur, even at firſt view, that the connection betwixt the loſs and gain ought to be extremely intimate, when the maxim is expreſſed in general terms without requiring any perſonal connection whatever. This maxim, making a great figure in law, merits the utmoſt attention; and to give a commentary upon it, may perhaps be the beſt method of treating the preſent ſubject. The commentary is reſolvable into two branches. In the firſt ſhall be examined, what degree of connection betwixt loſs and gain is requiſite, to make it the duty of one to part with gain for repairing the loſs of another. The purpoſe of the ſecond is, to aſcertain what in the ſenſe of this maxim is to be underſtood *Loſs* and what *Gain*.

Nemo debet locupletari aliena jactura, or, no perſon ought to profit *by* another's loſs, implies a connection betwixt the loſs and gain. It implies that the gain ariſes *by* the loſs, or *by means* of the loſs. Taking therefore the maxim as expreſſed, it ought to take place, wherever the gain is occaſioned by the loſs, or is the occaſion of the loſs. But this certainly is not good law. Reviewing the caſes mentioned in the beginning of the preſent article, we find ſeveral of them that come under this deſcription. One merchant by underſelling another, makes profit by another's loſs. The gain here is the occaſion of the loſs, yet no obligation ariſes betwixt the parties. Again, in a ſtorm two veſſels loaded with grain are daſhed againſt each other, and the weaker is ſunk; by which means the cargo in

the ſtronger ſhip ſells at a higher price. Here the ſame cauſe which proves deſtructive to the one merchant, is profitable to the other; yet neither here is there any obligation. No man who in ſuch circumſtances makes profit, finds himſelf bound in conſcience to lay out his profit for repairing the other's loſs. It would appear then, that, abſtracting from perſonal connection, the real connection betwixt the loſs and gain, to found an obligation in terms of the maxim, muſt be ſo intimate, as that what is loſt by the one accrues really to the other. The moſt noted caſe of this kind, is where the poſſeſſor of a ſubject, which he *bona fide* conſiders to be his own, lays out his money on reparations and meliorations, intending nothing but his own benefit. The true proprietor claims the ſubject in a proceſs, and prevails. He is profited by the meliorations, and the money beſtowed on theſe meliorations comes into his pocket, or, which is the ſame, is converted to his uſe. Every one muſt be ſenſible in this caſe of a hardſhip that requires a remedy; and it muſt be the wiſh of every diſintereſted perſon, that the *bona fide poſſeſſor* be relieved from this hardſhip. That the common law affords no relief, will be evident at firſt ſight. The labour and money of the *bona fide poſſeſſor* is ſunk in the ſubject, and has no longer any ſeparate exiſtence upon which to found a *rei vindicatio* or claim of property. The true proprietor at the ſame time in claiming the ſubject, does no more but exerciſe his own right, which cannot ſubject him perſonally to any demand at the inſtance of the *bona fine poſſeſſor*. If then there be a remedy, it can have no other foundation but equity; and that there is a remedy in equity will appear from the following conſiderations. Man being a fallible creature, ſociety would be an uncomfortable ſtate were individuals diſpoſed in every inſtance to take advantage of the miſtakes and errors of others. But the Author of our nature, has more harmoniouſly adjuſted its different branches to each other. To prevent the uncomfortable and ſometimes fatal conſequences of human imbecillity, we are endued by nature with a ſenſe, which dictates to every man, That, in certain caſes, it is wrong and unjuſt for him to take advantage of the errors or miſtakes of thoſe he deals with. To make it a law in our nature never to take advantage of error in any caſe, would be giving too much indulgence to indolence and remiſſion of mind, tending to make us neglect the improvement of our rational faculties. On the other hand, to make it lawful to take advantage of error in every caſe would be too rigorous, conſidering how difficult it is for a man to be always upon his guard. The Author of our nature has happily moulded it ſo as to avoid

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theſe extremes. No man is conſcious of wrong when he takes advantage of an error committed by another to ſave himſelf from loſs. If there muſt be a loſs, natural juſtice dictates, that it ought to reſt upon the perſon who has committed an error, however innocently, rather than upon him who has been careful to avoid all error. But *in lucro captando*, the moral ſenſe teaches a different leſſon. Every one is conſcious of wrong, when an error is laid hold of to make gain by it. The conſciouſneſs of injuſtice, when ſuch advantage is taken, is indeed inferior in degree, but the ſame in kind with the injuſtice of robbing an innocent perſon of his goods or of his reputation.

THIS doctrine is ſupported by utility as well as by juſtice. Induſtry ought to be encouraged; and chance as much as poſſible ought to be excluded from all dealings, in order that individuals may promiſe to themſelves the fruits of their own induſtry. This affords a freſh inſtance of that beautiful harmony which ſubſiſts betwixt the internal and external conſtitution of man. A regular chain of cauſes and effects, leaving little or nothing to accident, is advantageous externally by promoting induſtry, and is not leſs ſo internally by the delight it affords the human mind. No ſcene is more diſguſtful than to imagine all things going on by chance, without order or connection. When a court of equity therefore preſerves to every man, as much as poſſible, the fruits of his own induſtry, ſuch proceeding, by rectifying the diſorders of chance, is authoriſed by utility as well as by juſtice. And hence it is a principle of morality, founded both on the nature of man and on the intereſts of ſociety, That we ought not to make gain by another's error.

THIS principle is directly applicable to the caſe above mentioned. The titles of land-property are intricate, and often uncertain. Inſtances are frequent, where a man in poſſeſſion of land, the property of another, is led by unavoidable error to conſider it as belonging to himſelf. His money is beſtowed without heſitation in repairing and meliorating the ſubject. Equity will not permit the true owner to profit by ſuch miſtake, and in effect to pocket the money of the innocent poſſeſſor; and a court of equity interpoſes to oblige the owner to make up the loſs ſo far as he is *locupletior*. Thus the poſſeſſor of a tenement, having, upon the faith and belief of its being his own, made conſiderable meliorations, was, after voiding his title, found entitled to claim from the proprietor the expence of

ſuch meliorations as were profitable to him by raiſing the rent of his tenement *. In all caſes of this kind, it can be qualified in the ſtricteſt manner, that what is loſt to the one accrues to the other. The maxim then muſt be underſtood in this limited ſenſe; for no connection betwixt the loſs and gain inferior in degree to this, will, independent of perſonal connections, be a ſufficient foundation for a claim in equity againſt the perſon who gains, to make up the other's loſs.

* Stair, Jan. 18. 1676, Binning *contra* Brotherſtanes.

IT will not be thought an unneceſſary digreſſion to obſerve a peculiarity in the Roman law with reſpect to this matter. As that law ſtood originally, the *bona fide poſſeſſor* had no claim for his expences. This did not proceed from ignorance of equity, but from want of a *formula* to authorize the action; for at firſt when brieves or forms of action were invented †, this claim was not thought of. But an exception was ſoon thought of to entitle the *bona fide poſſeſſor* to retain the ſubject, till he got payment of his expence. And this exception the judges could have no difficulty to ſuſtain, becauſe they were fettered as to actions only, not as to exceptions, which were not ſubjected to any *formula*. The inconvenient reſtraint of theſe *formulæ* was in time broke through, and *actiones in factum*, or *upon the caſe*, were introduced, which were not confined to any *formula*. After this innovation, the ſame equity that gave an exception produced alſo an *actio in factum*; and the *bona fide poſſeſſor* was made ſecure as to his expences in all caſes, *viz.* by an exception while he remained in poſſeſſion, and by an action if he happened to loſe the poſſeſſion.

† See Hiſtorical Law-tracts, Tract 8.

ANOTHER caſe, differing nothing from the former in effect, though conſiderably in its circumſtances, is where a perſon upon a ſuppoſed or fictitious mandate, purchaſes goods, or borrows money from me for the uſe of another. The ſuppoſed mandant is not liable, becauſe he gave no commiſſion: but if I can prove that the money or goods were actually applied for his uſe, equity affords me a claim againſt him, ſo far as he is a gainer. Thus, in a purſuit for payment of merchant-goods purchaſed in name of the defendant and applied to his uſe, the defendant inſiſted, that he had given no commiſſion, and that if his name was uſed without his authority he could not be liable. "It was decreed, That the goods being "applied to the defendant's uſe, he was liable, unleſs he could "prove that he paid the price to the perſon who beſpoke the "goods ‡." This caſe, like the former, reſts entirely upon the real

‡ Stair, Feb. 20. 1669, Bruce *contra* Stanhope.

connection

connection betwixt the loſs and gain, independent of which there was no perſonal connection betwixt the parties. And in the preſent caſe, perhaps more clearly than in the former, every one muſt be ſenſible, that the man who reaps the benefit is in duty bound to repair the other's loſs. And hence the action *de in rem verſo*, the name of which we borrow from the Romans. In a caſe preciſely ſimilar, the court inclined to ſuſtain it relevant to aſſoilzie or acquit the defendant, that the goods were gifted to him by the perſon who purchaſed them in his name. But as donation is not preſumed, he was found liable, becauſe he could not bring evidence of the alledged donation *. In this caſe, upon the ſuppoſition of a gift, it could not be well qualified that the defendant was *locupletior*. A man will ſpend liberally what he conſiders as a preſent, though he would not lay out his money to purchaſe ſuch a thing. But this belongs more properly to the other branch, concerning what preciſely is to be eſteemed gain and what loſs, which comes afterwards.

* July 1726, Hawthorn *contra* Urquhart.

IF in the caſes above mentioned, where there is ſcarce any perſonal connection, a relief in equity be given, there ought to be ſtill leſs doubt about this relief in the following caſes, where, to the moſt intimate connection betwixt loſs and gain, there is ſuperadded a perſonal connection not of the ſlighteſt kind. If one of many connected by a common concern, undertake a negotiation, which, being ſucceſsful, muſt be equally profitable to all, he hath a claim in equity for the expence laid out by him *in re communi*, he himſelf bearing a ſhare in proportion to his intereſt. He is not officious in laying out his money, when it is neceſſary for his own advantage; and it would be groſs injuſtice in his partners, to lay hold of the advantage procured by him, without refunding what he is out of pocket, eſpecially when he runs all the riſk. Thus one of three joint proprietors of a mill having raiſed a declarator of thirlage, which the others diſclaimed, and having notwithſtanding inſiſted in the proceſs till he obtained a decree, the others who reaped the profit equally with him, were made liable for their ſhare of the expence †. And one of many co-creditors having obtained a judgment againſt the debtor's relict, finding her liable to pay her huſband's debts, the other creditors who ſhared the benefit were decreed to contribute to the expence ‡. For the ſame reaſon, where a tenement deſtroyed by fire was rebuilt by a liferenter, the proprietor, after the liferenter's death, was made liable for the expence of rebuilding, ſo far as he was *lucratus* thereby ‖. And if rebuilt by the proprietor, the liferenter will be liable for the intereſt of the

† Stair, Jan. 6. 1676, Forbes *contra* Roſs.

‡ Bruce, July 30. 1715, Creditors of Calderwood *contra* Borthwick.

‖ Forbes, Feb. 20. 1706, Halliday *contra* Garden.

ſum expended ſo far as he is *lucratus* [a]. Action was ſuſtained at the inſtance of a wadſetter for declaring, that his intended reparation of a harbour in the wadſet lands, would be profitable to the reverſer, and that the reverſer, upon redemption, ſhould be bound to repay the expence thereof [b]. Upon the ſame principle, if a leſſee erect any buildings by which the proprietor is evidently *lucratus* at the end of the leaſe, there is a claim in equity for the expence of the meliorations. But reparations, though extenſive, will ſcarce be allowed where the leſſee is bound to uphold the houſes, becauſe a leſſee who beſtows ſuch reparation without his landlord's concurrence, is underſtood to lay out his money in order to fulfil his obligation, without any proſpect of retribution [c]. The preſent miniſter was found not liable for the meliorations of the glebe made by his predeceſſor [d]. But what if meliorations be made, incloſing, draining, ſtoning, *&c.* which are clearly profitable to all future poſſeſſors? If the expence of theſe, in proportion to the benefit, be not in ſome way refunded, glebes will reſt in their original ſtate for ever. I do not ſay, that the miniſter immediately ſucceeding ought to be liable for the whole of this expence: for as the benefit is ſuppoſed to be perpetual, the burden ought to be equally ſo; which ſuggeſts the following opinion, That the ſum total of the expence ought to be converted into a perpetual annuity, to be paid by the miniſters of this pariſh; for the only equitable method is to make each contribute in proportion to the benefit he receives.

[a] Stair, Jan. 24. 1682, Haket *contra* Watt.

[b] Durie, July 22. 1626, Moriſon *contra* Earl of Lothian.

[c] Gilmour, Feb. 1664, Hodge *contra* Brown.

[d] Nicolſon (Kirkmen) June 14. 1623. Dunbar *contra* Hay

THE following caſes belong undoubtedly to the maxim of equity under conſideration, taken in its ſtricteſt ſenſe; and yet were judged by common law, neglecting the equitable remedy. A man furniſhed corn for ſowing the ground, and ſtraw for feeding the cattle, of a tenant who was in low circumſtances, and who was ſoon thereafter denounced upon a horning. This man was judged to have no claim againſt the donator of eſcheat, though the donator reaped the whole profit of the furniſhing [e]. In a ſhipwreck, part of the cargo being fiſhed out of the ſea and ſaved, was delivered to the owners for payment of the ſalvage. The proprietor of the ſhip claiming the freight of the goods ſaved, *pro rata itineris*, the freighters admitted the claim, but inſiſted, that as the ſalvage was beneficial to him on account of his freight, as well as to them on account of their goods, he ought to pay a proportion of the expence. His anſwer was ſuſtained to free him from any part, *viz.* that the expence was wholly laid out in recovering the freighter's goods, and therefore that they only ought to be liable [f]. The anſwer here ſuſtained reſolves into the following

[e] Dirleton, June 12. 1667, Lumſdane *contra* Summers.

[f] Jan. 18. 1735. Lutwitch *contra* Gray.

following propoſition, That he only is liable whoſe benefit is intended, which is certainly not good in equity. At this rate the *bona fide poſſeſſor*, who in meliorating the ſubject intends his own benefit ſolely, has no claim againſt the proprietor. Here the freighters and the proprietor of the ſhip were connected by a common intereſt. The recovering the goods from ſhipwreck was beneficial to both parties; to the freighters, becauſe it puts them again in poſſeſſion of their own goods, and to the proprietor of the ſhip, becauſe it gave him a claim for freight. The ſalvage accordingly was truly *in rem verſum* of the proprietor, as well as of the freighters; and for that reaſon both ought to contribute in proportion to the benefit received.

HAVING endeavoured to aſcertain, with all poſſible accuracy, that degree of connection betwixt the loſs and gain, which is requiſite to afford a relief in equity, by obliging the perſon who gains to make up the other's loſs, I proceed to the other branch, which is to aſcertain the preciſe meaning of loſs and gain as underſtood in the maxim. And the firſt doubt that occurs is, Whether the term *locupletior* comprehend every real benefit, as well prevention of loſs as poſitive increaſe of fortune; or whether it be confined to the latter. I explain myſelf by examples. When a *bona fide poſſeſſor* rears a new edifice upon another man's ground, this is a poſitive acceſſion to the ſubject, which makes the proprietor *locupletior* in the ſtricteſt ſenſe of the word. It may happen on the other hand, that the money laid out by the *bona fide poſſeſſor* is directed to prevent miſchief; as where he fortifies the bank of a river againſt its encroachments, where he ſupports a tottering edifice, or where he tranſacts a claim that threatened to carry off the property. Will the maxim apply to caſes of this nature, where loſs is only prevented without any poſitive increaſe of wealth or fortune? When a work is done that prevents loſs, the ſubject is thereby improved and made of greater value. A bulwark that prevents the encroachments of a river makes the land ſell at a higher price; and a real acceſſion, ſuch as a houſe built, or land incloſed, will not do more. The only difference is, that a poſitive acceſſion makes a man richer than he formerly was; a work done to prevent loſs makes him only richer than he would have been had the work been left undone. This difference is too ſlight to have any effect in equity. The proprietor gains by both equally; and in both caſes equally he will feel himſelf bound in juſtice to make up the loſs out of his gain. A *bona fide poſſeſſor* who claims money laid out by him to ſupport a tottering edifice, is *certans de damno evitando* as well as where he claims

money laid out upon meliorations; and the proprietor claiming the ſubject, is *certans de lucro captando* in the one caſe as well as in the other. But in this competition, equity prefers the claim of him who is *certans de damno evitando;* for, as obſerved above, there is in human nature a clear ſenſe of wrong, where a man avails himſelf of an error to make profit at another's expence. Nor does the principle of utility make any diſtinction. It is a great object in ſociety to rectify the diſorders of chance; and to preſerve to every man, as much as poſſible, the fruits of his own induſtry. In this view, it makes no difference, whether a man's induſtry has been applied to prevent loſs, or to make a real acceſſion to his fortune. In the caſes accordingly that have occurred, I find no diſtinction made; and in thoſe which follow there was no benefit qualified but what aroſe from preventing loſs. A ſhip being ranſomed from a privateer, every perſon benefited muſt contribute a proportion of the ranſom *. A written teſtament being voided for informality, the executor nominate was allowed the expence of confirming the teſtament, becauſe to the executrix *qua* next in kin, purſuer of the reduction, it was profitable by ſaving her the expence of a confirmation †.

* Fountainhall, June 29. 1710, Ritchie *contra* Lord Salton.

† Fountainhall, Feb. 26. 1712, Moncrieff *contra* Monypenny.

From what is ſaid it may poſſibly be thought, that the foregoing rule of equity is applicable wherever it can be ſubſumed, that the loſs ſuſtained by one has accrued to the benefit of another. But this will be found a raſh concluſion, when it is conſidered, that one may be benefited without being in any proper ſenſe *locupletior*, or a gainer upon the whole. I give an example. A man erecting a large tenement in a burrow, becomes bankrupt by overſtretching his credit. This new tenement, being the chief part of his ſubſtance, is adjudged by his creditors for ſums beyond the value. In the mean time, the tradeſmen and the furniſhers of materials for the building, truſting to a claim in equity, forbear to adjudge. They are loſers to the extent of the value of their work and furniſhings, which accruing to the adjudgers, makes them in one ſenſe *locupletiores;* as by this means they will draw perhaps ten ſhillings in the pound inſtead of five. Are the adjudgers then, in terms of the maxim, bound to yield this profit, in order to pay the workmen and furniſhers? By no means. For here the benefit is partial only, and produceth not upon the whole actual profit. On the contrary, the adjudgers, even after this benefit, are equally with their competitors *certantes de damno evitando*. The court of ſeſſion accordingly refuſed to ſuſtain the claim of the tradeſmen and furniſhers ‡. Hence appears a remarkable difference betwixt property and perſonal obligation.

‡ Dec. 4. 1735. Burns *contra* Creditors of M'Clellan.

gation. Money laid out upon a ſubject by the *bona fide poſſeſſor*, whether for melioration or to preſerve it from damage, makes the proprietor *locupletior*, and a *captator lucri ex aliena jactura*. But tho' a creditor be benefited by another's loſs, ſo as by that means to draw a greater proportion of his debt, he is not however a gainer upon the whole, but is ſtill *certans de damno evitando*. And when the parties are thus *in pari caſu*, a court of equity cannot interpoſe, but muſt leave them to the common law.

I add another limitation, which is not peculiar to the maxim under conſideration, but ariſes from the very conſtitution of a court of equity. It is not ſufficient that there be gain, even in the ſtricteſt ſenſe: it is neceſſary that the gain be clear and certain; for otherwiſe a court of equity muſt not undertake to repair the loſs out of that gain. The principle of utility, in order to prevent arbitrary proceedings, prohibits a court of equity to take under conſideration a conjectural loſs or a conjectural gain, becauſe ſuch loſs or gain can never be brought under a general rule. I give the following illuſtrations. Two heretors having each of them a ſalmon-fiſhing in the ſame part of a river, are in uſe to exerciſe their rights alternately. One is interrupted for ſome time by a ſuit at the inſtance of a third party. The other by this means has more capture than uſual, though he varies not his manner of fiſhing. What the one loſes by the interruption is probably gained by the other, at leaſt in ſome meaſure. But as what goes from the one to the other cannot here be aſcertained with any degree of certainty, a court of equity muſt not interpoſe. Again, a tenant upon the faith of a long leaſe, lays out conſiderable ſums upon improving his land and reaps the benefit a few years. But the landlord who holds the land by a military tenure, dies ſuddenly in the flower of his age, leaving an infant heir: the land by this means comes into the ſuperior's hand, and the leaſe is ſuperceded during the ward. Here a great part of the extraordinary meliorations which the leſſee intended for his own benefit, are converted to the uſe of the ſuperior. Yet equity cannot interpoſe, becauſe no general rule can be laid down for aſcertaining the gain made by the ſuperior. I have one caſe to cite which confirms this doctrine. In an action at a Tercer's inſtance for a third of the rents levied by the fiar, the court refuſed to ſuſtain a deduction claimed by the defendant, *viz.* a third of the factor-fee paid by him for levying the rents, though it was urged, that the purſuer could not have levied her third with leſs expence *. The loſs here was not aſcertained, and was ſcarce capable

* Durie, March 27. 1634, Lady Dunfermline *contra* her ſon.

of being aſcertained; for no one could ſay what leſs the factor would have accepted for levying two thirds of the rent than for levying the whole. Neither was the profit capable to be aſcertained. The Lady herſelf might have uplifted her ſhare, or have got a friend to ſerve her *gratis*.

I ſhall cloſe with one further limitation, which regards not only the preſent ſubject, but every claim that can be founded on equity. Courts of equity are introduced in every country to enforce natural juſtice, and by no means to give aid to any wrong. Whence it follows, that no man can be entitled to the aid of a court of equity, when that aid becomes neceſſary by his own fault. For this reaſon, when the proprietor is made liable for the expence of profitable meliorations, this can only be when the meliorations were made *bona fide* by a perſon reaſonably intending his own profit, and not ſuſpecting any hazard. It is laid down however in the Roman law, That the neceſſary expence laid out in upholding the ſubject, may be claimed by the *mala fide poſſeſſor* *. If ſuch reparations be made while the proprietor is ignorant of his right, and the ruin of the edifice be thereby prevented, there poſſibly may be a foundation in utility for the claim: but I deny there can be any foundation in juſtice. And therefore, if a tenant, after being ejected by legal execution, ſhall obſtinately perſiſt to plow and ſow, he ought to have no claim for his ſeed or labour. The claim in theſe circumſtances hath no foundation either in juſtice or utility; yet the claim was ſuſtained †.

* L. 5. C. de rei vindic:

† Stair, Feb. 22. 1671, Gordon *contra* Macculloch.

ARTICLE II.

One not a gainer bound to repair another's loſs.

IT appears even at firſt view, that the connection muſt be not a little ſingular, which can produce ſo ſtrong an effect, as to oblige a man who has not made profit to diminiſh his ſtock by making up another's loſs. This ſingular connection I ſhall proceed to explain. A man who, in purſuance of a mandate or commiſſion, lays out his own money for the ſervice of another, has a good claim for retribution, whether the money be profitably expended or not. To found an action at common law, it is ſufficient that the money is laid out according to order. But in human affairs certain circumſtances and ſituations frequently occur that make a proper ſubject for a covenant; ſo proper indeed, that if there happen to be no covenant we are apt to aſcribe the omiſſion to ſome unforeſeen accident.

cident. In caſes of this nature, for which there is no remedy at common law, equity affords the ſame remedy in all reſpects that the common law gives where a covenant is actually made. The following is a proper example. A ſudden call forces me abroad, without having time to regulate my affairs. They go into diſorder in my abſence, and a friend, in order to ſerve me, undertakes the management. Here nothing prevents a mandate or commiſſion but want of opportunity; and it is juſtly ſuppoſed, that I would have gladly given the commiſſion to my friend, had I known his good intentions towards me. Equity accordingly, fulfilling what would have been my will had the event been foreſeen, holds the mandate as granted, and gives the ſame actions on both ſides that the common law gives in purſuance of a mandate. Caſes accordingly of this nature, where the ſame relief is given that would be given upon an expreſs covenant, are, in the Roman law, termed *Quaſi-contractus*. This leads directly to the *actio negotiorum geſtorum*. If I am profited by what my friend expends upon my affairs, he is entitled, according to the doctrine of the firſt article, to have his loſs made up out of my gain. But what if, after beſtowing his money and labour with the utmoſt precaution, the undertaking prove unſucceſsful? What if, after laying out his money profitably, the benefit be loſt to me by the caſual deſtruction of the ſubject? It would not be juſt, that this friend who acted ſolely for my intereſt ſhould run the riſk. Equity therefore interpoſes and makes me liable, as the common law would do had I given a mandate or commiſſion. This doctrine is laid down by Ulpian in clear terms. "Is autem, qui negotiorum geſtorum agit, "non ſolum ſi effectum habuit negotium quod geſſit, actione ita "utetur: ſed ſufficit, ſi utiliter geſſit, etſi effectum non habuit ne-"gotium. Et ideo, ſi inſulam fulſit, vel ſervum ægrum curavit, "etiamſi inſula exuſta eſt, vel ſervus obiit, aget negotiorum geſto-"rum. Idque et Labeo probat *." And I muſt obſerve, that utility joins with material juſtice in ſupport of this doctrine. For is it not enough that a friend beſtows his money and pains, without riſking his money, even when laid out with the greateſt prudence? Inſtead of inviting men to ſerve their friends in time of need, ſuch riſk would be a great diſcouragement.

* l. 10. §. 1. de negot. geſt.

FROM what is above laid down it appears clear, that the man who undertakes my affairs, not with a view to my ſervice, but to his own, is not entitled to the *actio negotiorum geſtorum*. But in caſe I happen to be a gainer by his means, is he entitled in equity to have his loſs repaired out of my gain? This queſtion is anſwered

above, treating of money laid out upon my ſubject by a *mala fide poſſeſſor;* and it is anſwered in the negative, becauſe wrong can never be a foundation of a claim in equity. Yet Julianus, one of the moſt acute of the Roman writers, anſwers the queſtion in the affirmative. Speaking of one who *mala fide* meddles in my affairs, he lays down the following rule. "Ipſe tamen, ſi circa res meas aliquid impen- "derit, non in id quod ei abeſt, quia improbe ad negotia mea "acceſſit, ſed in quod ego locupletior factus ſum, habet contra me "actionem *." It appears at the ſame time from *l. ult. C. de negot. geſt.* that this author was of a different opinion, where the management of a man's affairs were continued againſt his will, for there no action was given. This, in my apprehenſion, is eſtabliſhing a diſtinction without a difference. For no man can hope for my conſent to continue the management of my affairs, when he entered upon the management not to ſerve me but to ſerve himſelf. A prohibition involved in the nature of the thing is equal to an expreſs prohibition.

* l. 6. §. 3. de negot. geſt.

THE maſter of the ſhip, or any man who ranſoms the cargo from a privateer, is, by the doctrine laid down in the firſt article of this ſection, entitled to claim from the owners of the cargo, the money thus laid out upon their account. They are profiters by the tranſaction, and they ought to indemnify him. But what if the cargo be afterwards loſt in a ſtorm at ſea, or by robbery at land? The owners are not now profiters by the ranſom, and they cannot be made liable upon the principle *quod nemo debet locupletari aliena jactura.* They are however liable upon the principle here explained. The ranſomer is conſidered in the ſame light as if he had acted by commiſſion; and the owners are in equity bound to him, not leſs ſtrictly than if they had granted a commiſſion. Where equity lays hold of one man's gain to make up another's loſs, it is not ſufficient that there have been gain ſometime or other. It is implied in the very nature of the claim, that there muſt be gain at the time of the demand; for if there be no gain at preſent, there is no ſubject to be laid hold of by a court of equity for making up the loſs. But when there is a ground in equity for making a man liable as if he had made an agreement, variation in circumſtances can have no effect upon this claim more than upon a claim at common law founded upon an agreement actually made.

THE *Lex Rhodia de jactu* is a celebrated maritim regulation, that has prevailed among all civilized nations ancient and modern. When in

in a ſtorm weighty goods of little value are thrown overboard to diſburden the ſhip, the owners of the remaining cargo muſt contribute to make up the loſs. This caſe, as to the obligation of retribution, is of the ſame nature with that now mentioned, and depends on the ſame principles. The throwing over-board weighty goods of little value, is extremely beneficial to the owners of the more precious goods, which by that means are preſerved; and, according to the foregoing doctrine, theſe owners ought to contribute for making up the loſs of the goods thrown into the ſea, preciſely as if there had been a formal covenant to that effect. But what if the whole cargo be afterwards loſt, and that eventually there be no benefit? If loſt at ſea in the ſame voyage, the owner of the goods which were thrown overboard has certainly no claim, becauſe at any rate he would have loſt his goods along with the reſt of the cargo. And it will be remarked, that this circumſtance would afford a good defence againſt a contribution, had there even been an actual agreement for throwing overboard the coarſeſt goods in place of the more valuable. But ſuppoſing the cargo to be loſt at land, by robbers, for example, or fire, it appears to me that the claim ſtands good notwithſtanding. For nothing but want of time prevented an explicite agreement for ſubſtituting coarſe goods in place of the more valuable; and equity conſiders the caſe as if the agreement had been made. In this view the owners of the goods which were preſerved from being thrown into the ſea, muſt contribute, whether at preſent they be profiters or not. The robbery or fire will afford them no defence; becauſe it can never be made certain, that the coarſe goods, had they not been thrown overboard, would have ſuffered the ſame fate.

IT is a much nicer queſtion, whether the goods ſaved from the ſea ought to contribute according to their weight or according to their value. The latter rule is eſpouſed in the Roman law. "Cum "in eadem nave varia mercium genera complures mercatores coe-"giſſent, prætereaque multi vectores, ſervi liberique in ea navigarent, "tempeſtate gravi orta, neceſſario jactura facta erat. Quæſita deinde "ſunt hæc: An omnes jacturam præſtare oporteat, & ſi qui tales "merces impoſuiſſent, quibus navis non oneraretur, velut gemmas, "margaritas? et quæ portio præſtanda eſt? Et an etiam pro liberis "capitibus dari oporteat? Et qua actione ea res expediri poſſit? "Placuit, omnes, quorum interfuiſſet jacturam fieri, conferre opor-"tere, quia id tributum obſervatæ res deberent: itaque dominum "etiam navis pro portione obligatum eſſe. Jacturæ ſummam pro

"rerum pretio diſtribui oportet. Corporum liberorum eſtimationem "nullam fieri poſſe *." This rule is adopted by all the commercial nations in Europe, without a ſingle exception, ſo far as I can learn. And in purſuance of the rule, a doctrine begins to reliſh with judges, That the owner of the ſhip ought to contribute, becauſe by throwing overboard the goods in queſtion, which prevented a ſhipwreck, his claim for freight is preſerved to him. Thus if goods be thrown overboard in ſtreſs of weather, or in danger and juſt fear of an enemy, in order to ſave the ſhip and the reſt of the cargo, that which is ſaved ſhall contribute to repair that which is loſt, and the owners of the ſhip ſhall contribute in proportion †.

* l. 2. §. 2 de l. Rhodia de jactu.

† Shower's Caſes in Parliament 19.

GREATER authorities than the foregoing cannot well be; and yet no authority ought to ſupercede reaſoning and enquiry. It is not in my power to baniſh an impreſſion I have, That the rule of contribution ought to be weight, not value; and whether, after all, the impreſſion ought to be baniſhed, muſt be declared by reaſon not authority. In every caſe where a man gives away his money or his goods for behoof of a plurality connected by a common intereſt, two things are evident, firſt, That his equitable claim for a recompence cannot exceed the loſs he has ſuſtained; and next, That each individual is liable to make up the loſs of that part which was given away on his account. When a ranſome is paid to a privateer for the ſhip and cargo, a part of the money is underſtood to be advanced for each proprietor in proportion to the value of his goods, and that ſhare he muſt contribute, being laid out upon his account, or for his ſervice. That the ſame rule is applicable where a ſhip is ſaved by abandoning part of its cargo, is far from being clear. Let us examine the matter attentively, ſtep by ſtep. The cargo in a violent ſtorm is found too weighty for the ſhip, which muſt be diſburdened of part, let us ſuppoſe the one half. In what manner is this to be done? The anſwer would be eaſy, were there leiſure and opportunity for a regular operation. Each perſon who has the weight of a pound aboard, behoved to throw the half into the ſea; for in ſtrict juſtice one perſon is not bound to abandon a greater proportion than another. This method however is ſeldom or never practicable, becauſe in a hurry the goods at hand muſt be heaved over; and were it practicable, it would not be for the common intereſt, to abandon goods of little weight and great value, along with goods of great weight and little value. Hence it comes to be the common intereſt, and, without aſking queſtions, the common practice, to abandon goods the value of which bears no proportion

to

to their weight. This being done for the common intereſt, entitles the proprietor of theſe goods to a recompence from thoſe for whoſe ſervice the goods were abandoned. Now the ſervice done to each proprietor is, in place of abandoning his valuable goods, to have others ſubſtituted of meaner quality; and for ſuch ſervice all the recompence that can be claimed in equity is the value of the goods ſo ſubſtituted. Let us ſuppoſe with reſpect to any owner in particular, that regularly he was bound to throw overboard twenty ounces of his goods; all he is bound to contribute, is the value of twenty ounces of the goods that in place of his own were actually thrown overboard. In a word, this ſhort-hand way of throwing into the ſea the leaſt valuable goods, appears to me in the ſame light, as if the ſeveral owners of the more valuable part of the cargo, had each of them purchaſed a quantity of the mean goods to be thrown into the ſea in place of their own.

I cannot help at the ſame time obſerving, that the doctrine of the Roman law appears very uncouth in ſome of its conſequences. Jewels, and I may add bank bills, are made to contribute to make up the loſs, though they contribute not in any degree to the diſtreſs; nor is a ſingle ounce thrown overboard upon their account: nay the ſhip itſelf is made to contribute, though the *jactura* is made neceſſary, not by the weight of the ſhip but by that of the cargo. On the other hand, paſſengers are exempted altogether from contributing, for a very whimſical reaſon, That the value of a free man cannot be eſtimated in money: and yet paſſengers in many inſtances make a great part of the load. If they contribute to the neceſſity of diſburdening the ſhip, for what good reaſon ought they to be exempted from contributing to make up the loſs of the goods which were thrown into the ſea upon their account?

CHAPTER III.

Defects in Common Law with reſpect to Rights founded on Will.

TO every covenant there belong certain capital articles that are rarely neglected: in a bargain and ſale, for example, the price is ſeldom forgot. But it is not leſs rare to foreſee and provide for every incident that may occur in fulfilling a covenant. Further, when a covenant is taken down in writing, it is not always eaſy to avoid miſtakes: articles ſometimes are miſappre-

hended, ſometimes omitted. To remedy ſuch errors, though they obviouſly require a remedy, belongs not to a court of common law. In ſuch a court, the words of a covenant, or of any other deed, are the only rule for judging, becauſe words are the only *legal* evidence of will. A defect of will cannot be ſupplied, nor a miſtake in writing rectified. Hence, with reſpect to matters of this kind, the neceſſity of a court of equity, which, authorized by the principle of juſtice, ventures to correct words by circumſtances, and to ſupply omiſſions in will, by conjecturing what would have been the will of the parties had they foreſeen the event. This, in law-language, is to judge according to the preſumed or implied will of the parties: not that any will was interpoſed, but only that equity directs the ſame thing to be done, which it is probable the parties themſelves would have directed, had their foreſight reached ſo far.

WORDS and writing are imperfect or erroneous, when they do not truly expreſs the will of parties. Will itſelf is defective when any article is omitted that ought to have been under the conſideration of parties. Theſe two ſubjects, being diſtinct, muſt be handled ſeparately.

SECTION I.

Imperfection in the Words or Writing by which Will is declared.

THE words in which will is expreſſed, are a large field for a court of equity. Every act of will to make it binding requires two perſons; one who conſents to be bound, and one in whoſe favours the conſent is interpoſed. This new relation betwixt an obligor and an obligee muſt be compleated by words at leaſt, ſignifying to the latter the will of the former; for nothing that is circumſcribed within the mind can be obligatory. Words, at the ſame time, are not always depended on as evidence of will. Words are tranſitory, and apt to eſcape the memory; and for that reaſon, in matters of conſequence, the precaution is commonly uſed to take down the words in writing. But a man, in expreſſing even his own thoughts, is not always happy in his terms. Errors may creep in, which are often multiplied when improper words are uſed in writing. Words and writing may inadvertently go beyond, or fall ſhort of will and conſent. The common law in neither caſe affords a remedy. This rigour is ſoftened by a court of equity. It admits words and writing to be indeed the proper, but not the only evidence of will. Senſible that words and writing are ſometimes erroneous,

neous, it endeavours if poſſible to reach will, which is the only ſubſtantial part; and if, from the end and purpoſe of the engagement, from collateral circumſtances, or other ſatisfying evidence, the will of the obligor can be gathered independent of the words, the will ſo aſcertained is juſtly made the rule of judgment. The ſole purpoſe of words is to bear teſtimony of will; and if their teſtimony prove falſe, they are juſtly diſregarded. This branch of equitable juriſdiction, which obviouſly reaches ſingle deeds as well as covenants, is founded on the principle of juſtice; becauſe every man feels himſelf bound by the conſent he really interpoſed, without relation to words or writing, which ſtand in place of evidence only.

I proceed to examples. In England where eſtates are ſettled by will, it is the practice to ſupply any defect in the words, in order to ſupport the will of the deviſor. But then it is a rule, That the will muſt be clear and evident; for otherwiſe the court may be in hazard of forfeiting the heir at law, contrary to the will of his anceſtor. Thus where a man deviſes land to his heir after the death of his wife, this is a good deviſe to the wife for life by neceſſary implication. For by the words of the will, the heir is not to have it during her life: and if ſhe have it not, none elſe can, for the executors cannot intermeddle *. But if a man deviſe his land to a ſtranger after the death of his wife, this does not neceſſarily infer that the wife ſhould have the eſtate for life: it is but declaring at what time the ſtranger's eſtate ſhall commence; and in the mean time the heir ſhall have the land †. *N. B.* This is a proper example of a maxim in the Roman law, *Poſitus in conditione, non cenſetur poſitus in inſtitutione.* An executor being named with the uſual power of intermeddling with the whole money and effects of the deceaſed, the following clauſe ſubjoined, "And I hereby debar and ſeclude all others from any right or intereſt in my ſaid executry," was held by the court to import an univerſal legacy in favour of the executor ‡. A man having two nephews who were his heirs at law, made a ſettlement in their favours, dividing his particular farms betwixt them, intending probably an equal diviſion. But in the enumeration of the particular lands, a farm was left out by the omiſſion of the clerk, which, as the ſcrivener ſwore, was intended for the plaintiff. The court conſidering that the ſettlement was voluntary or gratuitous, refuſed to amend the miſtake, leaving the farm to deſcend equally betwixt the nephews ‖. For here it was not abſolutely clear that the maker of the deed intended an equal diviſion.

* New Abridg. of the Law, vol. II. p. 66.

† Ibid.

‡ Feb. 1. 1739. John Beizly *contra* Gabriel Napier.

‖ 1. Vernon 37.

IN the caſes now mentioned, writing indeed is neceſſary in the way of evidence, but not as an eſſential ſolemnity. It is of no conſequence what words be uſed in the ſettlement of a land-eſtate, or in the nomination of an executor, provided the will of the maker be ſufficiently aſcertained. But in ſeveral tranſactions, writing not only ſtands for evidence, but is beſides an indiſpenſible ſolemnity. Land cannot be conveyed without a procuratory or a precept, which muſt be in a ſet form of words. A man may lend his money upon a verbal paction, but he cannot proceed directly to execution, unleſs he have a formal bond containing a clauſe of regiſtration authoriſing execution. Neither can ſuch a bond be conveyed to a purchaſer otherways than by a formal aſſignment in writing. Here a new ſpeculation ariſes, What power a court of equity hath over a writing of this kind. It may happen in this as in ordinary caſes, that the words erroneouſly extend farther than the will of the granter; and they may happen to be more limited. Muſt the words in all caſes be the ſovereign rule? By no means. Though in certain tranſactions writ is an eſſential ſolemnity, it follows not that the words ſolely muſt be regarded without relation to will. To bind a man by words where he hath not interpoſed his conſent, is contradictory to the moſt obvious principles of juſtice. Hence it neceſſarily follows, that a deed of this kind, may, by a court of equity, be limited to a narrower effect than the words naturally import; and that this ought to be done, when from the context, from the intendment of the deed, or from other convincing circumſtances, it can be certainly gathered, that the words by miſtake go beyond the will. But as this branch belongs to the ſecond part, the oppoſite branch where the words fall ſhort of the will is our preſent theme. In ordinary caſes the defect of words may be ſupplied, and force given to will ſuppoſing it clearly aſcertained. But in a deed to which writ is eſſential, this cannot be done. A court of equity muſt ſupply the defects of law, and mitigate its exceſſes; but in no caſe can this court proceed in contradiction to law. To make writ an eſſential ſolemnity, is in other words to declare, That action muſt not be ſuſtained except ſo far as authorized by writ. However clear therefore will may be, a court of equity hath not authority to ſuſtain action upon it, independent of the words where theſe are made eſſential; for this, in effect, would be to overturn the law. Where the words are broader than the will of the granter, it may be ſaid, not improperly, *Quod fecit non voluit.* On the other hand, if the granter's will, by defect of words, be diſappointed, all that can be ſaid is, *Quod voluit non fecit.* A caſe which really happened

pened is a notable illuſtration of this doctrine. A bond of corroboration granted by the debtor with a cautioner was of the following tenor. "And ſeeing the foreſaid principal ſum of 1000 "merks and intereſt ſince Martinmas 1742 are reſting unpaid; and "that *A* the creditor is willing to ſupercede payment till the term "aftermentioned upon *B* the debtor's granting the preſent corro-"borative ſecurity with *C* his cautioner; therefore *B* and *C* bind "and oblige them, conjunctly and ſeverally, *&c.* to content and "pay to *A* in liferent, and to her children in fee, equally among "them, and failing any of them by deceaſe, to the ſurvivers their "heirs or aſſignees in fee, and that at Whitſunday 1744, with 200 "merks of penalty, together with the due and ordinary annual-"rent of the ſaid principal ſum from the ſaid term of Martinmas "1742, *&c.*" Here the obligatory clauſe is imperfect, there being no mention in it of the principal ſum corroborated, *viz.* the 1000 merks, but only of the intereſt, a pure omiſſion or overſight of the writer. In a ſuit upon this bond of corroboration againſt the heir of the cautioner it was objected, That upon this bond no action could lie for payment of the principal ſum. It was obvious to the court, that the bond in queſtion, though defective in the moſt eſſential part, afforded however clear evidence of *C*'s conſent to be bound as cautioner. But then it occurred, that a cautionary engagement is one of thoſe deeds that require writing, not only in point of evidence, but alſo in point of ſolemnity. A formal bond of corroboration fulfils the law in both points. But a defective bond, like the preſent, whatever evidence it may afford, is as nothing in point of ſolemnity: it is ſtill leſs formal than if it wanted any of the requiſites of the act 1681. Action accordingly was denied; for action cannot be ſuſtained upon conſent alone where a formal deed is eſſential *.

* June 2. 1749. Colt *contra* Angus.

THE following caſe concerning a regiſtrable bond, or, as termed in England, a bond in judgment, is another inſtance of refuſing to ſupply a defect in words. A bond for a ſum of money bore the following clauſe, *with intereſt and penalty*, without ſpecifying any ſum in name of penalty. The creditor moved the court to ſupply the omiſſion, by naming the fifth part of the principal ſum, being the conſtant rule as to conſenſual penalties. There could be no doubt of the granter's intention; and yet the court juſtly thought that they had not power to ſupply the defect †.

† Fountainhall. Jan. 6. 1705, Leſly *contra* Ogilvie.

BUT though a defect in a writ that is eſſential in point of ſolemnity, cannot be ſupplied ſo as to give it the full effect that law gives to ſuch a deed, it may notwithſtanding be regarded by a court of equity in point of evidence. A bond of borrowed money, for example, null by the act 1681 becauſe the writer's name is neglected, may, in conjunction with other evidence, be produced in an action for payment, in order to prove delivery of the money as a loan, and conſequently to found a decree for repayment.

SECTION II.

Defective Will.

NOT many branches of law lie under greater obſcurity than that which makes the ſubject of the preſent ſection. The inſtances are numerous where a court of equity hath interpoſed to ſupply defective covenants and deeds, in order to accompliſh their end or purpoſe. Nor are the inſtances fewer in number where this interpoſition has been refuſed. We are left in a labyrinth without a clue to guide us. A noted diviſion of covenants in the Roman law, *viz. bonæ fidei* and *ſtricti juris*, may poſſibly afford a clue. The former are ſuch where equity can be applied to remedy defects and inequalites: the latter affording no place for equity, are judged by the common law. But what contracts are to be reckoned *bonæ fidei*, and what *ſtricti juris*, the Roman writers are not agreed. Some of the commentators indeed give us liſts or catalogues; but they pretend not to lay down any rule by which the one ſort may be diſtinguiſhed from the other. In applying equity to deeds and covenants, the ſlight and ſuperficial notice that is generally taken of their purpoſe and intendment, is one great ſource of obſcurity. This matter is not ſet in a clear light by the Roman writers, though ſeveral of them ſhow great ſagacity in evolving equitable principles. I ſhall endeavour to ſupply this defect in the cleareſt manner I am able. Every perſon who enters into a covenant, or executes a deed, has an event in view which he propoſes to accompliſh; and he appoints certain things to be done in order to bring about the event. A covenant therefore, or a deed, conſidered in its true light, is means concerted for accompliſhing ſome end or purpoſe. The means thus concerted are not always proportioned to the end propoſed. It comes to be diſcovered, that ſometimes they go beyond the end, and ſometimes fall ſhort of it. The former caſe comes in afterwards: the latter is our preſent theme.

To

To come at a general rule for determining when it is that a court of equity may interpoſe to ſupply defective means, in order to fulfil a deed or covenant, the following conſideration is of importance. The chief province of a court of equity is to make rights effectual, where the common law gives no aid. The principle of juſtice demands this meaſure; and it would be a groſs defect in the law of any country to leave any valuable right without a remedy. Hence, with reſpect to every ſort of engagement, it follows clearly, That wherever a right ariſes upon it to any perſon, juſtice directs that the engagement be made effectual, if not by a court of common law, at leaſt by a court of equity. I give for illuſtration the following examples. A mortgage or contract of wadſet contains the uſual clauſe for conſigning the money in caſe it be refuſed. The place of conſignation is agreed on, but the parties forget to name a conſignator. In this caſe a court of equity ought to name a conſignator; for it would be unjuſt that the omiſſion ſhould bar the proprietor from redeeming his land. Again, I deliver a cargo of wheat, and refer the price to a third party, who refuſes to determine. The wheat in the mean time being conſumed by the purchaſer, juſtice requires that the price be aſcertained by a court of equity; for otherwiſe I am forfeited of a ſum to which I have a good claim.

UPON this head of covenants, one would ſcarce think it neceſſary to mention as a caveat, that a court of equity ought not to interpoſe till it be firſt certain that there is a defect; for otherwiſe it may be in hazard of overturning expreſs paction, and of creating a right beyond what was intended. I give the following example. A ſum of *L.* 120 was given with an apprentice; and by the articles it was provided, that if the maſter died within a year, *L.* 60 ſhould be returned. The maſter being ſick when the articles were executed, and dying within three weeks, the bill was to have a greater ſum returned. And though the parties themſelves had provided for this very accident, yet it was decreed, in direct oppoſition to the covenant, that 100 guineas ſhould be paid back *.

* 1. Vernon 466.

WITH reſpect to a gratuitous deed, whether juſtice require the interpoſition of a court of equity to ſupply the want of means or articles, I proceed to examine. A gratuitous diſponee, for example, has a right, ſo far as the will of the granter is interpoſed; and ſo far the deed is made effectual at common law. But with reſpect to an event not foreſeen, and conſequently not provided for in the deed by proper means or articles correſponding to ſuch event, the

diſponee has no claim in juſtice. For in general, when a deed draws its obligatory force from the will merely of the granter, without any other cauſe, no right can be generated except ſo far as will is actually interpoſed. This doctrine will be ſufficiently illuſtrated by the following example. A gratuitous bond executed by a minor, being revoked and voided by the heir of the granter, the creditor inſiſted for an equivalent out of the moveables, upon the following ground, That the bond implied a legacy, which the minor could grant, as minority is no bar to the making a teſtament. It could not be doubted that the minor who granted a bond to be effectual againſt himſelf, would have given a legacy in place of it, had he foreſeen the heir's challenge. But as the minor had not exerted any act of will with relation to this point, the court refuſed to interpoſe, or to tranſubſtantiate the bond into a legacy *.

* Fountainhall, Dec. 15. 1698, Straton *contra* Wight.

UTILITY is the only other principle that can authorize the interpoſition of a court of equity in any matter of law; and if this principle tend not to give effect to a gratuitous deed, farther than the granter has actually interpoſed his will, it muſt be evident that ſuch a deed is altogether beyond the reach of a court of equity. Gratuitous deeds are beneficial to ſociety as exertions of kindneſs and generoſity: but however beneficial, they are certainly not eſſential to ſociety, which may ſubſiſt in vigour without them. Now it belongs to the legiſlature only, to enact regulations for advancing the poſitive good or happineſs of ſociety. A court of equity, acting upon the principle of utility, is confined to the more humble province of preventing miſchief. So far this court is uſeful, if not neceſſary. But hitherto, in Britain at leaſt, its powers have not been farther extended; becauſe it has appeared unneceſſary to truſt with it more ample powers †.

† See book 1. chap. 2. at the beginning.

BUT though means cannot be ſupplied in favour of a donee to give him a more beneficial right than is actually granted, yet undoubtedly his right may be limited or burdened in equity, ſo as to make it anſwer more perfectly the purpoſes of the donor. For gratitude binds the donee in conſcience, to obey not only the donor's declared will, but even what would have been his will as to any incident had it been foreſeen; and it belongs to a court of equity to inforce the duty of gratitude, as well as other natural duties that are neglected by the common law. The equitable obligation upon a tenant in tail to extinguiſh the annual burdens, is a proper example of this doctrine, as will be ſeen at the cloſe of the preſent ſection.

UPON

UPON the whole it appears, that the power of a court of equity, with reſpect to imperfect deeds or covenants, is regulated by the principle of juſtice; and that this court cannot interpoſe to ſupply the overſight of parties, unleſs to make right effectual. I now proceed to apply this rule to particular caſes. With reſpect to covenants, in the firſt place, It is the current practice of the court of ſeſſion to ſupply omitted articles that are neceſſary for compleating the ultimate purpoſe of the contracters; and the powers of the court here are ſo evidently founded on juſtice, that it would be loſing time to multiply inſtances. I ſhall therefore confine myſelf to a few that appear ſomewhat curious. In a bargain of ſale the price is referred to a third party. There is no performance on either ſide, and the referee dies ſuddenly without determining the price. Here there is no remedy at common law, becauſe there is no price aſcertained. But upon application of either party, can a court of equity aſcertain the price, in order to make the bargain effectual? This queſtion will depend upon the conſtruction that is given to the bargain. If the reference be taken ſtrictly as a condition, and that the parties intend not to be bound otherwiſe than by the judgment of the referee, equity, it is evident, cannot be applied; for it is a conditional bargain never purified. But if, on the other hand, it was the intention of the parties that the bargain ſhould in all events be effectual, the reference to the third party muſt be held as a means only for accompliſhing the end in view; and the failure of one means has no other effect than to make it neceſſary to employ others. Conſidering the bargain in the light laſt mentioned, it beſtows a right upon each party, which ought to be made effectual. If parties had foreſeen that the referee might die without fixing the price, they would have provided a remedy; and juſtice calls upon a court of equity to ſupply the defect. In a word, wherever articles are concerted for accompliſhing the purpoſed end, and are conſidered as means only, without being converted into a condition, a court of equity ought to ſupply other means if theſe prove inſufficient.

AND this paves the way to another caſe, which may frequently occur. In a minute of ſale of land, a term is named for the purchaſer's entry, and for payment of the price. By ſome accident, the matter lies over till the term elapſe, without a demand on either ſide for performance. At common law the minute of ſale is rendered ineffectual; becauſe neither party can make a claim in terms of the covenant. The poſſeſſion cannot be delivered, nor the price paid, at the term ſtipulated, after that term is elapſed. Neither can

a court of common law give damages for not-performance, becauſe neither party has been *in mora*. The purchaſer was guilty of no failure in not paying the price when poſſeſſion was not offered, nor the vender in not delivering poſſeſſion when the price was not offered. Laying then aſide a court of common law, the queſtion is, whether a court of equity can interpoſe to make the bargain effectual? This queſtion is not ſo dubious as the former. A term ſpecified for performance is not readily ſuppoſed to imply a condition: it is conſidered only as a means to bring about the end propoſed; and when it proves ineffectual, it is the province of a court of equity to ſupply other means; that is, in the preſent caſe, to name another day for performance. This is what the parties themſelves would have done, had they foreſeen the event. It muſt be obſerved further upon this head, that the naming a new term for performance muſt vary the articles of the original agreement. The price cannot bear intereſt from the term named in the minute, becauſe the purchaſer was not bound to pay the price until he ſhould get poſſeſſion: nor is the vender liable to account for the rents from the term named for ſurrendering the poſſeſſion, becauſe he could not be bound to ſurrender till the price was offered. Theſe ſeveral preſtations muſt take place from the new term named by the court of equity.

SUPPOSING now a *mora* on one ſide. The purchaſer, for example, demands performance of the minute of ſale at the term ſtipulated; and years paſs in diſcuſſing the vender's defences. A court of law, in this caſe, can award damages for non-performance: but ſpecific performance, if demanded, muſt be obtained from a court of equity [a]. Suppoſing next, after all defences are repelled, that the purchaſer inſiſts for ſpecific performance. What doth equity ſuggeſt in this caſe; for now, the term of performance being paſt, the original articles cannot be fulfilled? One thing is evident, that the purchaſer muſt not ſuffer by the vender's failure: and therefore

[a] THAT a court of common law has not power to order ſpecific performance of a covenant, will appear as follows. Before the term of performance there can be no ground for a proceſs or complaint that may give occaſion to ſuch an order; and after the term is paſt, performance, in the preciſe terms of the covenant, becomes impreſtable. A court of common law, confined to the words of a deed, hath not power to ſubſtitute equivalents. All that can be done is to award damages againſt the party who fails to perform. Even a bond of borrowed money is not an exception, for after the term of payment is paſt, the ſum is ordered to be paid, not as performance of the obligation, but as damage for not performance. Specific performance belongs then to the court of equity, which, as ſaid in the text, regards the term ſtipulated for performance, as a means only for fulfilling the purpoſe of the contracters. Juſtice requires that this purpoſe be fulfilled; and if the term ſtipulated be paſt, another term for performance is named by the court.

fore a court of equity, though it muſt name a new term for performance, may however, if the purchaſer inſiſt upon it, appoint an account to be made upon the footing of the original articles. If the rent, for example, exceed the intereſt of the money, the balance, may be juſtly claimed by the purchaſer, becauſe he would have had the benefit of that exceſs if the vender had performed as he ought to have done. But now, what if the intereſt of the price, as uſual, exceed the neat rent? The vender will not be entitled to the difference; for the purchaſer was not bound to pay the price till poſſeſſion was offered him, and he could not be liable for intereſt before the principal ſum was due. In a word, the purchaſer has a claim for damage in the former caſe; becauſe, where the rent exceeds the intereſt, he can qualify damage by the delay of performance. But in the latter caſe, where the intereſt exceeds the rent, the purchaſer, inſtead of loſing, gains by the delay, and upon that account has no damage to claim. This at firſt view may be thought to claſh with the maxim *Cujus commodum ejus debet eſſe incommodum.* Doth it not ſeem unjuſt, that the purchaſer ſhould have an option to claim the rents from the beginning, or only from the preſent time, as beſt ſuits his intereſt? It may ſeem ſo at firſt view, but there is no injuſtice in reality: the purchaſer's option ariſeth juſtly from the failure of his party; which ſhows that the foregoing maxim obtains betwixt perſons only who are upon an equal footing, not where the one is guilty of a fault reſpecting the other. I need ſcarce add, that the ſame option that is given to the purchaſer where the vender is *in mora*, is given to the vender where the purchaſer is *in mora*.

A man having ſold land, took a backbond, obliging the purchaſer to re-diſpone in caſe the vender ſhall repay the price betwixt and a preciſe day. The vender having died in the interim, the land was found legally redeemed upon the heir's making offer of the price at the term mentioned in the backbond *. For though the reverſion was perſonal to the vender, yet here was a *caſus incogitatus*, which might be ſupplied by a court of equity, according to what would probably have been covenanted had the event been foreſeen.

* Stair, Jan. 9. 1662, Earl Murray *contra* Grant.

A gentleman having given a bond of proviſion to his ſiſter for 3000 merks, took a backbond from her, importing, "That it being "rather too great for his circumſtances, therefore ſhe conſented, "that the ſame ſhould be mitigated by friends to be choſen *hinc*

" *inde*, her mother being always one." After the mother's deceaſe, the brother's creditors inſiſting for a mitigation *ſecundum arbitrium boni viri*, it was anſwered, That the condition of the mitigation had failed, the mother being now dead; and therefore the bond muſt ſubſiſt *in totum*, as if this power of reſtricting had never been. The court would not interpoſe in this caſe, and the bond was ſuſtained *in totum* *. Suppoſing the backbond to be merely a gratuitous deed, in which view it ſeems to have been taken, the deciſion is juſt. But I cannot enter into this view. I conceive the backbond to be the counter-part of the bond, and that both of them make parts of a mutual engagement. From the very terms of this engagement, the brother was entitled to a mitigation of the ſum contained in his bond; and therefore, ſince the method laid down for mitigation failed, juſtice required other means to be ſubſtituted.

* Feb. 19. 1734. Corſan *contra* Maxwell of Barncleugh.

UPON the head of covenants I ſhall add but one other example. A married woman agrees with her huſband to give a ſecurity out of land her own property, for payment of his debts; and after his death the debts are paid accordingly. Has ſhe a claim againſt her huſband's repreſentatives for an equivalent? None at common law; becauſe there is no ſtipulation to that effect. Whether a claim ought to be ſuſtained in equity, depends upon the conſtruction of the tranſaction. If intended a donation, there is no claim: but if intended a cautionary engagement only, which *in dubio* ought to be preſumed, the huſband was undoubtedly bound in conſcience for an equivalent; and juſtice calls for the power of a court of equity to make the obligation effectual. This is doing no more than ſupplying as uſual an article omitted; for had the matter been thought of, a clauſe would have been added for indemnifying the wife. And the deciſions of the court of ſeſſion are all of them agreeable to this doctrine †.

† Stair, Jan. 11. 1679, Bowie *contra* Corbet. Fountainhall, July 16. 1696, Leiſhman *contra* Nicols Nov. 29. 1728, Trail of Sabae *contra* Moodie.

WITH reſpect to deciſions relative to ſingle deeds, the will of the granter, as obſerved above, is the ſole determining circumſtance; and for illuſtrating the doctrine eſtabliſhed in this ſection, it will be proper to ſtate the moſt remarkable of theſe deciſions with obſervations.

A gratuitous diſpoſition of an heretable ſubject being voided, becauſe granted on death-bed, the diſponee inſiſted againſt the executor for the value, founding his claim upon the will of the deceaſed, preſumed from the deed, of which the natural conſtruction is,

" That

" That if the diſpoſition by any means prove ineffectual, the diſ-
" ponee ſhall be entitled to an equivalent." Anſwered, 1*mo*, The voidance of the diſpoſition, as granted on death-bed, was a *caſus incogitatus*, about which no perſon can ſay what would have been the will of the diſponer had he foreſeen the event. 2*do*, Suppoſing it probable in the higheſt degree, that the diſponer would have provided an equivalent had he foreſeen the event, yet in fact as he has not interpoſed any will in this matter, judges have no power to ſupply the defect. The court was of opinion, that the diſpoſition could not affect the executry either as a debt or as a legacy *. This is a juſt decree; for a gratuitous deed, which has no foundation other than will merely, cannot be ſupported in any particular, except ſo far as will is actually interpoſed. This deciſion is of the ſame nature with one formerly mentioned, Straton *contra* Wight; and both of them coincide with the rule in the Roman law about a *legatum rei alienæ*. If the teſtator leave a ſpecial legacy of a ſubject, which after his death is diſcovered to be the property of a ſtranger, the heir is not bound to give an equivalent, becauſe here *deficit voluntas teſtatoris;* unleſs the legatee can give evidence of the teſtator's knowledge that the ſubject did not belong to him. Upon that ſuppoſition it behoved to be the teſtator's will, that his heir ſhould purchaſe the ſubject for behoof of the legatee, which therefore ought to be obeyed by the heir †.

* Dirleton 12. Stair, Nov. 26. 1674, Paton *contra* Stirling. Fountainhall, Nov. 22. 1698, Cumming *contra* Cumming.

† §. 4. Inſtit. de legatis.

BUT the court of ſeſſion has not adhered ſo ſtrictly to principles in other inſtances. A man imagining his wife to be with child, left a legacy to a ſtranger in the following terms, " That if a male " child was brought forth, the ſum ſhould be 4000 merks, and if " a female child, 5000 merks." It proved eventually that the wife produced no child; and the queſtion was, whether any ſum was due to the legatee, and what that ſum ſhould be. The court judged the higheſt ſum due *ex preſumpta voluntate teſtatoris*. For if he intended a legacy even in the caſe of a child, much more where he had no children ‡. Here was a *caſus incogitatus* about which the teſtator had interpoſed no will. The legatee therefore had no claim, and the court cannot make a will for any man. It is not a good reaſon for depriving a man's natural heirs of a ſum, that the teſtator himſelf would have probably done the ſame, had he foreſeen the event. At this rate, had the teſtator's wife brought forth twins, ſome part of the legacy muſt have been due, and this part muſt have been determined by the arbitrary will of the judges. There would be no bounds to the powers of a court of equity were

‡ Dirleton, July 18. 1666, Wedderburn *contra* Scrymzeour.

this admitted; and equity would deviate into iniquity. I venture to urge this boldly, even againſt the Roman law, in which the very thing is done that is here condemned. "Si ita ſcriptum ſit, *Si* "*filius mihi natus fuerit, ex beſſe heres eſto, ex reliqua parte uxor mea* "*heres eſto: ſi vero filia mihi nata fuerit, ex triente heres eſto, ex re-* "*liqua parte uxor heres eſto;* et filius et filia nati eſſent: dicendum "eſt, aſſem diſtribuendum eſſe in ſeptem partes, ut ex his filius "quatuor, uxor duas, filia unam partem habeat: ita enim ſecundum "voluntatem teſtantis, filius altero tanto amplius habebit quam "uxor, item uxor altero tanto amplius quam filia. Licet enim "ſubtili juris regulæ conveniebat, ruptum fieri teſtamentum, atta-"men quum ex utroque nato teſtator voluerit uxorem aliquid ha-"bere, ideo ad hujuſmodi ſententiam humanitate ſuggerente de-"curſum eſt; quod etiam Juventio Celſo apertiſſime placuit *." * l. 13. pr: de liberis & poſthumis heredibus inſtituendis.

IN a contract of marriage there was the following clauſe: "And "in caſe there ſhall happen to be only one daughter, he obliges "him to pay the ſum of 18,000 merks, if there be two daughters, "the ſum of 20,000 merks, whereof 11,000 to the eldeſt and "9000 to the youngeſt; and if there be three daughters, the ſum "of 30,000 merks, 12,000 to the eldeſt, 10,000 to the ſecond, "and 8000 to the youngeſt." A fourth daughter having exiſted of the marriage, the queſtion occurred, whether ſhe could have any ſhare of the 30,000 merks, upon the preſumed will of the father, or be left to inſiſt for her legal proviſion *ab inteſtato*. The court decreed a proportion of the 30,000 merks to the fourth daughter, and that her proportion, ſuitable to the proviſion made in the contract of marriage, muſt be 4500 merks; ſo as to reſtrict the eldeſt daughter to 10,500 merks, the ſecond to 8500 merks, and the third to 6500 merks †." It was undoubtedly the father's purpoſe to provide all the children he expected from that marriage; but the exiſtence of a fourth daughter was a *caſus incogitatus* for which no proviſion was made. A judge muſt have a ſtrong impulſe to make a ſettlement upon a child neglected by overſight and not of deſign. But if a court of equity undertake in any caſe to make a proviſion for a child, who is omitted by the father, it is but one ſtep farther to make a proviſion to children in every caſe where it was intended, though left undone; as, for example, where a bond is writ out but not ſigned, or ſigned by the granter but not by the witneſſes. I imagine, that our judges have been miſled here, as in many other inſtances, by a blind attachment to the Roman law, from which the deciſion now mentioned is copied. "Clemens

† July 18. 1729. Anderſon *contra* Anderſon.

"Patronus

" Patronus teſtamento caverat, *ut ſi ſibi filius natus fuiſſet, heres*
" *eſſet: ſi duo filii, ex æquis partibus heredes eſſent: ſi duæ filiæ, ſimi-*
" *liter: ſi filius et filia, filio duas partes, filiæ tertiam dederat.* Duobis
" filiis et filia natis, quærebatur quemadmodum in propoſita ſpecie
" partes faciemus: cum filii debeant pares, vel etiam ſinguli duplo
" plus quam ſoror accipere. Quinque igitur partes fieri oportet, ut
" ex his binas maſculi, unam femina accipiat *." * l. 81. pr. de heredibus inſtituendis

To have a juſt conception of the following caſes, it is neceſſary to diſtinguiſh the end propoſed by granting a deed, from the means contrived to bring about that end. By overlooking that diſtinction the will of the granter is often miſapprehended. One in an overly view is apt to conſider the means as ultimate, and conſequently to admit of no other means, though theſe named by the granter prove deficient. But the granter's will is beſt aſcertained from adverting to the end propoſed by him; and if it appear, that the means named in the deed are choſen with no other view than to advance that end, it is the duty of a court of equity, where theſe prove deficient, to ſupply other means in order to fulfil the will of the granter. Take the following example. The miniſter of Weem, in a deed of mortification, ſettled his funds upon five truſtees and their ſucceſſors, for the uſe of the ſchoolmaſters of that pariſh, declaring the major part of the truſtees to be a quorum. Two only of the truſtees having accepted and intermeddled with the funds without applying the ſame, a proceſs was brought againſt them by the repreſentatives of the miniſter, claiming the funds upon the following medium, That the deed of mortification is ineffectual, not having been compleated by acceptance of a quorum of the truſtees. It was anſwered, That by the deed of mortification aſſigning the funds to the truſtees for the uſe of the ſchoolmaſters of Weem, a right was veſted in theſe ſchoolmaſters, which the truſtees, by not-acceptance, could not defeat; and that ſuppoſe the whole of them had refuſed to accept, an action would lie againſt them at the inſtance of the ſchoolmaſter to denude in favour of other truſtees to be named by the court. The deed of mortification was ſuſtained; the court being of opinion that it would have been effectual though the whole truſtees had declined acceptance †. In this caſe it was evidently the purpoſe of the granter, in all events, to make a proviſion for the ſchoolmaſters of Weem; and the naming truſtees muſt be conſidered as a means only choſen by him to fulfil his purpoſe. Juſtice requires that when ſuch means fail, others ſhould be ſubſtituted; and therefore if the court of

† Decem. 1752, Campbell *contra* Campbell of Monzie and Campbell of Achallader.

ſeſſion had declined to interpoſe in this caſe, it would have been defeating the granter's will inſtead of fulfilling it. I illuſtrate this doctrine by an oppoſite inſtance, where the means choſen by the maker of the deed appeared to be ultimate, and not to admit of a ſubſtitution. Lady Preſtonfield executed a ſettlement of conſiderable funds to Sir John Cunninghame her eldeſt ſon and Anne Cunninghame her eldeſt daughter, as truſtees for the ends and purpoſes following. 1*mo*, The yearly intereſt to be applied for the education and ſupport of ſuch of the granter's deſcendants as ſhould happen to be in want, or ſtand in need thereof, and that at the diſcretion of the truſtees. 2*do*, Failing deſcendants, the capital is to return to her neareſt heirs. The truſtees declining to accept this whimſical ſettlement, a proceſs for voiding it was brought by the heir at law, in which were called all the exiſting deſcendants of the maker. It was urged, that by this ſettlement there was no right veſted in the defendants, or in any other the deſcendants of the maker; becauſe all was left upon the diſcretion of the truſtees, who could not be compelled by law, ſuppoſing their acceptance, to give a penny to any particular deſcendant; that the ſettlement was void by the non-acceptance of the truſtees; that the funds thereby belonged to the purſuer heir at law; and that there was no equity to deprive the purſuer of his property for the behoof of the defendants, who had in no event a legal claim. The deed was declared void by the non-acceptance of the truſtees *. Here the court juſtly refuſed to ſupply other means for making the will of the deceaſed effectual, becauſe, by the whole tenor of the ſettlement, it appeared to be her will, that all ſhould be left upon the diſcretion of the truſtees named, and no purpoſe was expreſſed to give her deſcendants any right independent of theſe truſtees.

* Jan. 22. 1758, Sir Alexr. Dick *contra* Mrs. Ferguſon and her children.

COLONEL CAMPBELL being bound in his contract of marriage to ſecure the ſum of 40,000 merks, and the conqueſt during the marriage, to himſelf and ſpouſe in conjunct fee and liferent, and to the children to be procreated of the marriage in fee; did, by a death-bed deed, ſettle all upon his eldeſt ſon, burdened with the ſum of 30,000 merks to his younger children, to take place in caſe their mother ſhould give up her claim to the liferent of the conqueſt, and reſtrict herſelf to a leſs jointure; otherways theſe proviſions to be void; in which event it was left upon the Duke of Argyll and Earl of Iſlay, to name ſuch proviſions to the children as they ſhould ſee convenient. The referees having declined to accept the truſt repoſed in them, the queſtion occurred

betwixt

betwixt the heir and younger children, Whether the powers of the referees were devolved upon the court of ſeſſion to determine proviſions to the younger children *ſecundum arbitrium boni viri;* or whether the younger children were to be left to the claim they had by the contract of marriage? The court was of opinion, that the Duke of Argyll and Earl of Iſlay having declined to execute the powers veſted in them by Colonel Campbell, their powers are not devolved upon this court *tanquam boni viri* *. This deciſion cannot be juſtified upon any ground other than that of holding the determination of the Duke of Argyll and Earl of Iſlay as a condition, without which the children were not to have a proviſion. The ſettlement appears to me in a very different light. The Colonel's will to provide his younger children in all events, is clearly expreſſed. As he was doubtful what the ſum ſhould be in caſe their mother inſiſted upon her jointure, he left it upon the referees to name the ſum, not doubting their acceptance. This reference I conſider to be the means choſen by the Colonel for accompliſhing his purpoſe of providing his children; but not ſo as to exclude all other means. His younger children were entitled to a proviſion by his will; and failing the means choſen by him for aſcertaining the extent, juſtice required that other means ſhould be ſubſtituted, in order to make their claim effectual. This caſe reſembles very much that above mentioned concerning a ſum ſettled upon truſtees for the uſe of the ſchoolmaſters of Weem. The ſettlement upon truſtees was a means only for making the mortification effectual; and the failure of the truſtees, could have no other effect than to make way for ſupplying other means.

* Dec. 22. 1739. Campbell *contra* Campbells.

THE deciſions laſt mentioned lead naturally to conditional bonds or grants, which, with relation to the ſubject under conſideration, may be diſtinguiſhed into two kinds. One is where the condition is ultimate; as for example, a bond for money granted to a young woman upon condition of her being married to a man named, or a bond for money to a young man upon condition of his entering into holy orders. The other is where the condition is a means to a certain end; as for example, a bond for a ſum of money to a young woman upon condition of her marrying with conſent of certain friends named. Conditions of the firſt kind are taken ſtrictly, and the ſum is not due unleſs the condition be purified. This is requiſite in the common law; and not leſs ſo in equity, becauſe juſtice requires that a man's will be made effectual. To judge aright of the other kind, we ought to lay the chief weight upon

the ultimate purpoſe of the granter. In the caſe now mentioned, the condition in the bond, confining the young woman to take the advice of certain friends to her marriage, is evidently calculated to prevent an unſuitable match. If ſhe therefore marry ſuitably, or ſuppoſe above her rank, though without conſulting them about her marriage, I pronounce that the bond ought to be effectual in equity, though it would be diſregarded by a court of common law. If the condition was adjected as a means only to prevent an unſuitable match, the granter's ultimate purpoſe is fulfilled by her marrying ſuitably; and the bond for that reaſon ought to be due in equity. Means are employed in order to an end; and if the end be accompliſhed, the means have had all the effect that was intended, and it would be unjuſt to give them any further effect. To think otherways involves an evident abſurdity, that of preferring the means to the end. I am aware, that in Scotland we are taught a different doctrine. In bonds of the kind under conſideration, a diſtinction is made betwixt a ſuſpenſive condition and one that is reſolutive. If the bond to the young woman contain a reſolutive condition only, *viz.* if ſhe marry without conſent ſhe ſhall forfeit the bond, it is admitted, that the forfeiture will not take effect unleſs ſhe marry unſuitably. But it is held by every one, that a ſuſpenſive condition, ſuch as that above mentioned, muſt be performed in the preciſe terms of the clauſe; becauſe, ſay they, the will of the granter muſt be the rule; and no court has power to vary a conditional grant, or to transform it into one that is pure and ſimple. This argument is concluſive where a condition is ultimate, whether ſuſpenſive or reſolutive; but far otherways where the condition is a means to an end. It is true, that the will of the granter muſt be the rule: but then, in order to aſcertain what was truly the granter's will, we ought to regard chiefly the end which the granter had in view, without laying any weight upon the means, except ſo far as they contribute to that end. Let us try the force of this reaſoning, by bringing it down to common apprehenſion. Why is a reſolutive condition diſregarded, where the creditor marries ſuitably? For what other reaſon, than that this reſolutive condition is conſidered as a means to an end, and that if the end be accompliſhed, the means have all the effect that was intended? Is not this reaſoning applicable equally to the ſuſpenſive condition under conſideration? No man of plain underſtanding, unacquainted with law, will diſcover any difference. And accordingly in the latter practice of the Engliſh court of chancery this diffrence ſeems to be diſregarded. A portion of *L.* 8000 is given to a woman provided ſhe marry with conſent of *A;* and if ſhe marry without his conſent, ſhe ſhall

have

have but a *L.* 100 yearly. She was relieved though ſhe married without conſent; for the proviſo is *in terrorem* only. *.

* Abridg. Caſes in Equity, chap. 17. Sect. C. §. 1.

I ſhall cloſe this ſection with a queſtion anſwered above in a curſory manner, but reſerved to be more deliberately diſcuſſed, *viz.* Whether every tenant in tail be bound to extinguiſh the annual burdens ariſing during his poſſeſſion, ſo as to tranſmit to the heirs of entail the eſtate in as good condition as when he received it? To treat this queſtion accurately, we muſt begin with conſidering how the common law ſtands. In the firſt place, Feu-duties, ceſs, and tiend, are *debita fructuum*, and at common law afford an action for payment againſt every perſon who levies the rents, and againſt a tenant in tail in particular. With reſpect then to the foregoing articles, there is no occaſion for equity: the common law burdens every tenant in tail with what of them become due during his poſſeſſion.

THE entailer's perſonal debts are not a burden upon the fruits, but only upon the heirs of entail perſonally; and therefore, the foregoing medium for making the tenant in tail liable to relieve the heirs of entail of the current intereſt, fails here; and the queſtion is, Whether there be any other medium ſubjecting him at common law? We muſt ſeparate from this queſtion, the diviſion of burdens betwixt heir and executor. If a tenant in tail leave any moveable eſtate, it will no doubt be charged at common law with the arrears of intereſt, and with every moveable ſum principal or intereſt. But ſuppoſing no moveable eſtate left, and that the tenant in tail dies, leaving a land-eſtate of his own that deſcends to a ſet of heirs different from thoſe contained in the entail, the arrears of intereſt ariſing from the entailer's debts, will, with the principal, remain a debt upon the entailed eſtate; unleſs it can be made out, that the tenant in tail became bound to relieve the heirs of entail of theſe arrears: and if this can be made out, the arrears will be a charge upon his own eſtate.

AN heir in a fee-ſimple is, no doubt, liable to the debts of his predeceſſor, and every heir is ſo liable ſucceſſively. But this obligation reſpects the creditors only, and affords no relief to one heir againſt another either for principal or intereſt. Does an entail make a difference at common law? A tenant in tail poſſeſſes the rents; but then theſe rents are his own property juſt as much as if the eſtate were a fee-ſimple; and the conſuming rents belonging to himſelf cannot ſubject one man to the debts of another; at leaſt not

more in an entail than in a fee-ſimple. Hence it appears clear, That at common law a tenant in tail is not bound to relieve the heirs of entail of any growing burden unleſs what is a *debitum fructuum.*

A court of equity, leſs confined than a court of common law, conſiders what would have been the will of the entailer had this matter occurred to him. In making an entail, it ſeems clearly the intention of the entailer, that, bating the order of ſucceſſion, all the heirs of entail ſhall have equal benefit and equal burden; and particularly that as each enjoys the whole rents during his poſſeſſion, each ſhall ſatisfy the current burdens ariſing during that period. It cannot be ſuppoſed the intention of any reaſonable man, to leave his heirs not only to be burdened unequally, but to be favoured or burdened at the arbitrary will of creditors. A court of equity therefore, when it binds each tenant in tail to pay the intereſt that ariſes during his poſſeſſion, which, in effect, is burdening them all equally, does no more but interpoſe its ordinary power of ſupplying a defect in will, by appointing that to be done which the maker of the entail would himſelf have appointed had the thing occurred to him, and which therefore the tenant in tail is bound to do in gratitude to his benefactor. This rule accordingly obtains in England, as where a proprietor of land, after charging it with a ſum of money, deviſes it to one for life, remainder to another in fee. Equity will compel the tenant for life to pay the arrears due on the rent-charge, that all may not fall upon the remainder-man *.

* 1. Chancery Caſes 223.

A tenant by curteſy is, like a tenant in tail, bound to extinguiſh the current burdens. The curteſy is eſtabliſhed by cuſtomary law; and a court of equity is entitled to ſupply any defect in law, whether written or cuſtomary, in order to make the law rational. The law by continuing in the huſband poſſeſſion of the wife's eſtate, intends no more but to give him the enjoyment of it for life, without waſte, confining him to act like a *bonus paterfamilias* †.

† Decreed Home, Jan. 3. 1717, Anna Monteith.

CHAPTER IV.

Defects in Common Law with reſpect to Statutes.

CONSIDERING the hiſtory of a court of common law and its limited nature, there is no reaſon for giving it more power over ſtatutes than over private deeds. With reſpect to both it is confined to judge according to the latter, and muſt not

not pretend to found any deciſion upon the ſpirit and meaning in oppoſition to the words. And yet the words of a ſtatute correſpond not always to the will of the legiſlature; nor are the things enacted proper means always to anſwer the end in view; falling ſometimes ſhort of the end, and ſometimes going beyond it. Hence in making ſtatutes effectual, there is the ſame neceſſity for the interpoſition of a court of equity to ſupply defects and correct exceſſes, that there is in making deeds and covenants effectual. It appears then, that in order to form an accurate judgment of the powers of a court of equity with reſpect to ſtatutes, it is neceſſary, as a preliminary point, to aſcertain how far they come under the powers of a court of common law; and with that point I ſhall commence the enquiry.

SUBMISSION to a regular government is univerſally acknowledged to be a duty: but the true foundation of this duty ſeems to lie in obſcurity, though ſcarce any other topic has filled more volumes. Many writers derive this duty from an original contract betwixt the king and his people. Be it ſo. But then, what binds thoſe who follow in ſucceſſion? for a contract binds thoſe only who are parties to it; not to mention that governments were eſtabliſhed long before contracts were of any conſiderable authority *. Others, diſſatisfied with this narrow foundation, endeavour to aſſign one more extenſive, deriving the foregoing duty from what is termed in the Roman law a *Quaſi-contract*. "It is a rule, they ſay, in law, "and in common ſenſe, That a man who lays hold of a benefit, "muſt take it with its conditions, and ſubmit to its neceſſary con- "ſequences. Thus one who accepts a ſucceſſion, muſt pay the an- "ceſtor's debts: he is preſumed to agree to this condition, and "is not leſs firmly bound than by an explicite engagement. In "point of government, protection and ſubmiſſion are reciprocal; "and the taking protection from a lawful government, infers a con- "ſent to ſubmit to its laws." Reaſon, I acknowledge, teaches this doctrine; but to ſupport a duty of ſuch weight and importance, reaſon is a foundation too feeble. How ſmall is the number of thoſe who are capable to apprehend the foregoing reaſoning? And how much ſmaller the number of thoſe who apprehend it ſo clearly as to be ſteadily influenced by it? I am inclined therefore to think that this important duty has a more ſolid foundation; and comparing it with other moral duties, I find no reaſon to doubt, that, like them, it is deeply rooted in human nature †. If a man be a ſocial being, and government eſſential to ſociety, it is not conformable to the analogy of nature that we ſhould be left to an argument for inveſti-

* See Hiſtorical Law-tracts, Tract 2.

† See Eſſays on the Principles of Morality and Natural Religion, Part 1. Eſſ. 2. ch. 7.

gating the duty we owe our rulers. If juſtice, veracity, gratitude, and other private duties, be ſupported and enforced by the moral ſenſe, it would be ſtrange that nature ſhould be deficient with reſpect to the public duty only. But nature is not deficient in any branch of the human conſtitution. Government is not leſs neceſſary to ſociety, than ſociety to man; and by the very frame of our nature we are fitted for government as well as for ſociety. To form originally a ſtate or ſociety under government, there can be no means, it is true, other than compact. But this foundation is far from being ſufficient to ſupport a ſtate after it is formed, and to preſerve it through any courſe of time. The continuance of a ſtate, and of the authority of government over multitudes who never have occaſion to promiſe ſubmiſſion, muſt depend on a different principle. The moral ſenſe which binds individuals to be juſt to each other, binds them equally to ſubmit to the laws of their ſociety; and we have a clear conviction that this is our duty. The ſtrength of this conviction is no where more viſible than in a diſciplined army. There the duty of ſubmiſſion is exerted every moment at the hazard of life; and frequently where the hazard is imminent, and death almoſt certain. In a word, what reaſon ſhows to be neceſſary in ſociety, is, by the moral ſenſe, made an indiſpenſible duty. We have a ſenſe of fitneſs and rectitude in ſubmitting to the laws of our ſociety; and we have a ſenſe of wrong, of guilt, and of meriting puniſhment, when we tranſgreſs them [a].

HENCE

[a] THE ſenſe of duty in ſubmitting to the authority of a government, is in ſome inſtances ſo weak, as that I ſhall not be ſurpriſed to find its exiſtence called in queſtion. We have examples without end, of every art put in practice to evade payment of taxes. It is almoſt become a maxim, that cheating the government is no fault. In examining this matter, it would not be fair to take under conſideration ſtatutes relating to juſtice, which is binding independent of municipal law. Conſider only things left indifferent by the law of nature, and which are regulated by ſtatute for the good of ſociety; the laws, for example, againſt uſury, againſt exporting corn in time of dearth, and many that will occur upon the firſt reflection. Every man of virtue will find himſelf bound in conſcience to ſubmit to ſuch laws. Nay even with reſpect to thoſe who by intereſt are moved to tranſgreſs them, I venture to affirm, that the firſt acts, at leaſt, of tranſgreſſion, are ſeldom perpetrated with a quiet mind. I will not even except what is called ſmuggling; though private intereſt authorized by example, and the trifle that is loſt to the public by any ſingle act of tranſgreſſion, obſcure generally the conſciouſneſs of wrong; and perhaps after repeated acts, which harden individuals in iniquity, make it vaniſh altogether. It muſt however be acknowledged, that the moral ſenſe, uniform as to the laws of nature, operates with very different degrees of force with relation to municipal law. The laws of a free government, directed for the good of the ſociety and peculiarly tender of the liberty of the ſubject, have great and univerſal influence. They are obeyed chearfully, and as a matter of ſtrict duty. The laws of a deſpotic government, on the contrary, calculated chiefly to advance the power or ſecure the perſon of a tyrant, require military force to make them effectual; for conſcience ſcarce interpoſeth in their behalf. And hence the great ſuperiority of a free ſtate, with reſpect to the power of the governors as well as the happineſs of the ſubjects, over every kingdom that in any degree is deſpotic or tyrannical.

HENCE it clearly follows, that every voluntary tranſgreſſion of what is ordered to be done by a ſtatute or prohibited, is a moral wrong, and a tranſgreſſion of the law of nature. This doctrine will be found of great importance in the preſent enquiry.

MANY differences among ſtatutes muſt be kept in view, in order to aſcertain the powers of a court of common law concerning them. Some ſtatutes are compulſory, others prohibitory; ſome reſpect individuals, others the public only; of ſome the tranſgreſſion occaſions damage, of others not; to ſome a penalty is annexed, others reſt upon authority merely.

I begin with theſe which reſt upon authority merely, without annexing any penalty to the tranſgreſſion. The neglect of a compulſory ſtatute of this kind ordering a thing to be done, will found an action at common law to thoſe who have intereſt, compelling the defendant either to obey the ſtatute or to pay damages. If, again, the tranſgreſſion of a prohibitory ſtatute of the ſame kind forbidding a thing to be done, harm any perſon, the duty of the court is obvious. The harm muſt be redreſſed by voiding the act where it can be voided, ſuch as an alienation after inhibition; and where the harm is incapable of this remedy, damages muſt be awarded. This is fulfilling the will of the legiſlature, being all that is intended by ſuch ſtatutes.

BUT from diſobeying a ſtatute prejudice often enſues, which not being pecuniary cannot be repaired by awarding a ſum in name of damages. Statutes relating to the public are generally of this nature; and many alſo in which individuals are immediately concerned [a]. To clear this point we muſt diſtinguiſh as formerly betwixt compulſory and prohibitory ſtatutes. The tranſgreſſion of a prohibitory ſtatute is a direct contempt of legal authority, and conſequently a moral wrong, which ought to be repreſſed; and it muſt neceſſarily be the purpoſe of the legiſlature to leave the remedy to a court of law, where the prohibition is not enforced by a particular ſanction. This is a clear inference, unleſs we ſuppoſe the legiſlature guilty of an abſurdity, *viz.* prohibiting a thing to be done, and yet leaving individuals at liberty to diſobey with impunity. To make the will of the legiſlature effectual in this caſe, dif-

[a] THIS branch, by the general diſtribution, ought regularly to be handled afterwards, Part III. of this firſt book; but by joining it here to other matters with which it is intimately connected, I thought it would appear in a clearer light.

ferent means muſt be employed according to the nature of the ſubject. If an act done *prohibente lege* can be undone, the moſt effectual method of repreſſing the wrong is to void the act. If the act cannot be undone, the only means left is puniſhment. And accordingly it is a rule in the law of England, that an offender for his contempt of the law, may be fined and impriſoned at the king's ſuit * [a].

* 2. Inſtit. 163.

ON the other hand, the tranſgreſſion of a compulſory ſtatute ordering a thing to be done, infers not neceſſarily a contempt of legal authority. It may be an act of omiſſion only, which is not criminal; and it will always be conſtructed to be ſuch, unleſs from collateral circumſtances it be made evident, that there was a poſitive intention to contemn the law. Suppoſing then the tranſgreſſion to be an act of omiſſion only, there is no place for puniſhment like what there is when the tranſgreſſion is an act of commiſſion. What then is to be done, in order to fulfil the will of the legiſlature? The court obviouſly has no other means, but to order the ſtatute to be fulfilled. If this order be alſo diſobeyed, a criminal contempt muſt be the conſtruction of the perſon's behaviour, to be followed, as in the former caſe, with a proper puniſhment. Or the court may order the thing to be done under a penalty. I give an example. The freeholders are by ſtatute bound to convene at Michaelmas, in order to receive upon the roll perſons qualified; but no penalty is added to compel obedience. In *odium* of a freeholder who deſires to be put upon the roll, they forbear to meet. What is the remedy here where there is no pecuniary damage? The court of ſeſſion may appoint them to meet under a penalty. For, in general, if it be the duty of judges to order the end, they muſt uſe ſuch means as are in their power. And if this can be done with reſpect to a private perſon, it follows, that where a thing is ordered to be done for the good of the public, it belongs to the court of ſeſſion, upon application of the king's advocate, to order the thing to be done under a penalty.

WHAT

[a] IF this doctrine to any one appear ſingular, let it be conſidered, that the power inſiſted on is only that of authoriſing a proper puniſhment for a crime after it is committed, which is no novelty in law. Every crime committed againſt the law of nature, may be puniſhed at the diſcretion of the judge, where the legiſlature has not appointed a particular puniſhment; and I have made it evident above, that a contempt of legal authority is a crime againſt the law of nature. But to ſupport this in the preſent caſe, an argument from analogy is very little neceſſary; for, as obſerved above, it is obviouſly derived from the will of the legiſlature. I ſhall only add, that the power of naming a puniſhment for a crime after it is committed, is greatly inferior to that of making a table of puniſhments for crimes that may be committed hereafter, which is a capital branch of the legiſlative authority.

WHAT next come under conſideration are ſtatutes forbiding things to be done under a penalty; for to the omiſſion of a thing ordered to be done, a penalty is ſeldom annexed. Theſe are diſtinguiſhable into two kinds. The firſt regard the more noxious evils which the legiſlature prohibits abſolutely; leaving the courts of law to employ all the means in their power for repreſſing them; but adding a penalty beforehand, becauſe that check is not in the power of courts of law. The ſecond regard ſlighter evils, to repreſs which no other means are intended to be applied but a pecuniary penalty only. Both kinds are equally binding in conſcience; for in every caſe it is a moral wrong to diſobey the law. But then diſobedience to a ſtatute of the ſecond claſs, is attended with no other conſequence than payment of the penalty; whereas the penalty in the firſt claſs is due, as we ſay, *by and attour performance;* and for that reaſon, a court of law, beſides inflicting the penalty, is bound to uſe all the means in its power to make the will of the legiſlature effectual, in the ſame manner as if there were no penalty. And even ſuppoſing the act prohibited to be capable of being voided by the ſentence of a court, the penalty ought ſtill to be inflicted; for otherwiſe it will loſe its influence as a prohibitory means.

PROHIBITORY ſtatutes are often ſo inaccurately expreſſed as to leave it doubtful, whether the penalty be intended the only means of repreſſing the evil, or one of the means only. This defect occaſions in courts of law, much conjectural reaſoning and many arbitrary judgments. The capital circumſtance for aſcertaining the difference, appears to be the nature of the evil prohibited. With reſpect to every evil of a pernicious nature and which hath a general bad tendency, it ought to be held the will of the legiſlature to give no quarter. And conſequently, beſides inflicting the penalty, it is the duty of courts of law to uſe every other mean to make this will effectual. With reſpect again to evils of a leſs pernicious or leſs extenſive nature, it ought to be held the intention of the legiſlature, to leave no power with judges beyond inflicting the penalty. This doctrine will be illuſtrated by the following examples. By the act 52. p. 1587, "He who bargains for greater profit "than 10 *per cent.* ſhall be puniſhed as an uſurer." Here is a penalty without declaring ſuch bargains null: and yet it has ever been held the intendment of this act, to diſcharge uſury totally; and the penalty is deemed to be added as one means only of making the prohibition effectual. There was accordingly never any difficulty of ſuſtaining

action for voiding uſurious bargains, nor even of making the lender liable for the ſums received by him above the legal intereſt. This then is held to be a ſtatute of the firſt claſs. The following ſtatutes belong to the ſecond claſs. An excluſive privilege of printing books is given to the authors and their aſſigns for the term of fourteen years. Any perſon who within the time limited prints or imports any ſuch book, ſhall forfeit the ſame to the proprietor, and one penny for every ſheet found in his cuſtody; the half to the king, and the other half to whoever ſhall ſue for the ſame [a]. With reſpect to the monoply granted by this ſtatute, it has been juſtly eſtabliſhed, that a court of law is confined to the penalty, and cannot apply other means for making it effectual, not even an action of damages againſt an interloper [b]. "Members of the college "of juſtice are diſcharged to buy any lands, tiends, *&c.* the pro- "perty of which is controverted in a proceſs, under the certification "of loſing their office [c]." The evil here being neither ſo pernicious nor ſo extenſive as uſury, it has been always held the ſenſe of the ſtatute, to be ſatisfied with the penalty, without giving authority to void ſuch bargains. The *lex furia* among the Romans, prohibiting legacies above a certain ſum, is held to be a law of this kind. Legacies above that ſum were not voided, the penalty only was exacted [d].

[a] 8. Ann. 18.

[b] June 7. 1748. Bookſellers of London *contra* Bookſellers of Edinburgh and Glaſgow.

[c] Act 216. p. 1594.

[d] Voet de legibus, §. 16. See Grotius de jure belli, L. 2. cap. 5. §. 16.

WITH reſpect to the ſtatutes laſt mentioned, and others that come under the ſame claſs, I obſerve with regret, that their intendment has generally been miſapprehended. It is the practice of the court of ſeſſion, while they inflict the penalty, to ſupport with their authority that very thing which is prohibited under the penalty. Thus a member of the college of juſtice buying land while the property is controverted in a proceſs, is deprived of his office; and yet with the ſame breath action is ſuſtained to him, to make the minute of ſale effectual [e]. This, in effect, is conſidering the ſtatute not as prohibitory of ſuch purchaſes, but merely as laying a tax upon them, ſimilar to what at preſent is laid upon plate, coaches, *&c.* I muſt take the liberty to ſay, That there cannot be a more groſs miſapprehenſion of the ſpirit or intendment of any ſtatute than this conſtruction. Comparing together the ſtatutes contained in both claſſes, the only difference concerns the means employed for making the prohibition effectual. Other means beſides the penalty may be employed by courts of law to repreſs the more noxious evils. With reſpect to the leſs noxious, all that can be done in the way of reſtraint is to inflict the penalty.

[e] Haddington, June 5 1611, Cunninghame *contra* Maxwell. Durie, July 30. 1635, Richardſon *contra* Sinclair. Fountainhall, Dec. 20. 1683, Purves *contra* Keith

But

But every one upon cool reflection muſt be of opinion, that with reſpect to the prohibition both claſſes coincide. It muſt be the will of the legiſlature to repreſs the leſſer evils as well as the greater; becauſe both in different degrees are hurtful to the ſociety in general, or to part of it. This diſpute is of no ſlight importance. If I have ſet in a juſt light the ſpirit and intendment of the foregoing ſtatutes, it follows of neceſſary conſequence, that no court of law ought to interpoſe for ſupporting any act prohibited in ſtatutes of the ſecond claſs, more than for ſupporting acts prohibited in ſtatutes of the firſt claſs. Courts of law were inſtituted to enforce the will of the national legiſlator, as well as of the Great Legiſlator of the univerſe, and to put in execution municipal laws as well as thoſe of nature. What ſhall we ſay then of a court that countenances an act prohibited by a ſtatute, or authoriſes any thing contradictory to the will of the legiſlator? What elſe can we juſtly ſay, but that ſuch proceeding, repugnant to the very deſign of its inſtitution, is a direct breach of truſt by acting in oppoſition or defiance of the law? It is a breach of truſt of the ſame nature, though not the ſame in degree, with that of ſuſtaining proceſs for a bribe promiſed for committing murder or robbery. With regard then to ſtatutes of this kind, though a court is confined to the penalty, and cannot inflict any other puniſhment, it doth by no means follow, that action ought to be ſuſtained for making the act prohibited effectual, On the contrary, to ſuſtain action would be flying in the face of the legiſlature. The ſtatute laſt mentioned, for example, concerning members of the college of juſtice, is ſatisfied with the penalty of deprivation, without declaring the bargain null; and therefore to ſuſtain a reduction of the bargain would be to puniſh beyond the intention of the ſtatute. But whether action ſhould be ſuſtained to make the bargain effectual, is a conſideration of a very different nature. The refuſing action in this caſe is made neceſſary by the very conſtitution of a court of law; it being inconſiſtent with the deſign of its inſtitution, to inforce any contract or any deed prohibited by ſtatute. It follows indeed by this means, that it is left optional to the vender to fulfil the contract or not at his pleaſure; for if a court of law cannot interpoſe, he is under no legal compulſion. Nor is this a novelty. In many caſes beſides the preſent the rule is applicable *Quod potior eſt conditio poſſidentis*, where an action will not be given to compel performance, and yet if performance be made, an action will as little be given to recall it *.

* See Book 1. Part 2. Chap. 1. Sect. 2.

PONDERING this ſubject ſedately and attentively, I can never ceaſe wondering to find the opinion I have been combating extended to a much ſtronger caſe, where there is no dubiety of will, and where the purpoſe of the legiſlature to make an abſolute prohibition is clearly expreſſed, The caſe I have in view, is of certain goods prohibited to be imported into this iſland, or prohibited to be imported from certain places named. To import ſuch goods, or to bargain about their importation, is clearly a contempt of legal authority, and conſequently a moral wrong, which the ſmuggler's conſcience ought to check him for, and which it will check him for, if he be not already a hardened ſinner. And yet, by miſtaking the nature of prohibitory laws, actions in the court of ſeſſion are every day ſuſtained for making ſuch ſmuggling contracts effectual. "Non dubium eſt, in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem. Nec pœnas inſertas legibus evitabit, qui ſe contra juris ſententiam fæva prærogativa verborum fraudulenter excuſat. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus ſubſecutum, qui contrahunt lege contrahere prohibente. Quod ad omnes etiam legum interpretationes, tam veteres quam novellas, trahi generaliter imperamus; ut legiſlatori quod fieri non vult, tantum prohibuiſſe ſufficiat: cæteraque, quaſi expreſſa, ex legis liceat voluntate colligere: hoc eſt, ut ea, quæ lege fieri prohibentur, ſi fuerint facta, non ſolum inutilia, ſed pro infectis etiam habeantur: licet legiſlator fieri prohibuerit tantum, nec ſpecialiter dixerit *inutile eſſe debere quod factum eſt* *." * l. 5, C. de legibus.

So much upon the powers of a court of common law with reſpect to ſtatutes. Upon the whole it appears, that this court is confined to the will of the legiſlature as expreſſed in the ſtatutory words. It has no power to rectify the words, nor to apply any means for making the purpoſe of the legiſlature effectual other than theſe directed by the legiſlature, however defective they may be. This imperfection is remedied by a court of equity, which enjoys, and ought to enjoy, the ſame powers with reſpect to ſtatutes that are explained above with reſpect to deeds and covenants. To give a juſt notion of theſe powers concerning the preſent ſubject, the following diſtinction will contribute. Statutes, ſo far as they regard matter of law, and come under the cognizance of a court of equity, may be divided into two claſſes. Firſt, Thoſe which have juſtice for their object, by ſupplying the defects, or correcting the injuſtice of common law. Second, Thoſe which have utility for their

ſole

ſole object. Statutes of the firſt claſs are intended for no other purpoſe but to enlarge the juriſdiction of courts of common law, by impowering them to diſtribute juſtice where their ordinary powers reach not. Such ſtatutes are not neceſſary to a court of equity, which, by its original conſtitution, can ſupply the defects and correct the injuſtice of law. But ſuch ſtatutes have the effect to limit the juriſdiction of a court of equity; for the remedies afforded by them muſt be put in execution by the courts of common law, and no longer by a court of equity. All that is left to a court of equity concerning a ſtatute of this kind, is to ſupply the defects and correct the injuſtice of the common law, ſo far as the ſtatute is incompleat or imperfect. This, in effect, is ſupplying the defects of the ſtatute. But it is not a new power beſtowed upon a court of equity as to ſtatutes that are imperfect: the court only goes on to exerciſe its wonted powers with reſpect to matters of juſtice that are left with it by the ſtatute, and not beſtowed upon courts of common law. I explain myſelf by an example. When goods are wrongouſly taken away, the common law of England gave an action for reſtitution to none but to the proprietor; and therefore when the goods of a monaſtery were pillaged during a vacancy, the ſucceeding abbot had no action. This defect in law with reſpect to material juſtice, would probably have been left to the court of chancery, had its powers been evolved when the ſtatute of Marlebirge ſupplying the defect was made *. But no other remedy occurring, that ſtatute empowers the judges of common law to ſuſtain action. Had the ſtatute never exiſted, action would undoubtedly have been ſuſtained in the court of chancery. All the power that remains now with that court is to ſuſtain action where the ſtatute is defective. The ſtatute enacts, "That the ſucceſſor ſhall have an action againſt ſuch tranſgreſſor "for reſtoring the goods of the monaſtery." Attending to the words ſingly, which a court of common law muſt do, the remedy is incompleat; for trees cut down and carried off are not mentioned. This defect in the ſtatute is ſupplied by the court of chancery. And Coke obſerves, that a ſtatute which gives remedy for a wrong done, ſhall be taken by equity. After all, it makes no material difference, whether ſuch interpoſition of a court of equity be conſidered as ſupplying defects in common law, or as ſupplying defects in ſtatutes. It is ſtill enforcing juſtice in matters which come not under the powers of a court of common law.

* 52. Henry III. cap. 29.

STATUTES again that have utility for their object are of two kinds, Firſt, Thoſe which are calculated for promoting the poſitive good and happineſs of the ſociety in general, or of ſome of its members in particular. Second, Thoſe which are calculated for preventing miſchief ſolely. Defective ſtatutes of the latter kind may be ſupplied by a court of equity; becauſe, even independent of a ſtatute, that court hath power to make regulations for preventing miſchief. But that court hath not, more than a court of common law, any power to ſupply defective ſtatutes of the former kind; becauſe it is not impowered originally to interpoſe in any matter that hath no other tendency than merely to promote the poſitive good of the ſociety. But this is only mentioned here to give a general view of the ſubject: for the powers of a court of equity as directed by utility are the ſubject of the next book.

HAVING ſaid ſo much in general, it is time to deſcend to particulars, which muſt be diſtributed into two ſections, preciſely as in the former chapter. Firſt, Where the words fall ſhort of the will of the legiſlature. Second, Where the means preſcribed anſwer not fully the end propoſed by the legiſlature.

SECTION I.

Where the Words of a Statute are ſhort of the Will of the Legiſlature.

IN order to fulfil juſtice, the will of the legiſlature may be made effectual by a court of equity, whatever defect there may be in the words. Take the following examples. In the Roman law Ulpian mentions the following edict. "Si quis id quod, juriſdic-" tionis perpetuæ cauſa, in albo, vel in charta, vel in alia materia " propoſitum erit, dolo malo corruperit: datur in eum quingen-" torum aureorum judicium, quod populare eſt." Upon this edict Ulpian gives the following opinion. "Quod ſi, dum proponitur, " vel ante propoſitionem, quis corruperit: edicti quidem verba ceſſa-" bunt, Pomponius autem ait ſententiam edicti porrigendam eſſe " ad hæc *."

* l. 7. §. 2. de juriſdic:

"ORATIO imperatorum Antonini & Commodi, quæ quaſdam " nuptias in perſonam ſenatorum inhibuit, de ſponſalibus nihil " locuta eſt: recte tamen dicitur, etiam ſponſalia in his caſibus " ipſo jure nullius eſſe momenti: ut ſuppleatur, quod orationi " deeſt †."

† l. 16. de ſponſalibus.

"LEX

"LEX Julia, quæ de dotali prædio proſpexit, ne id marito liceat "obligare, aut alienare, plenius interpretanda eſt: ut etiam de "ſponſo idem juris ſit, quod de marito *."

* l. 4. de fundo dotali.

BY the ſtatute of Gloceſter, "A man ſhall have a writ of waſte "againſt him who holdeth for term of life or of years †." This ſtatute, which ſupplies a defect in the common law, is extended againſt one who poſſeſſes for half a year or a quarter. For (ſays Coke) a tenant for half a year being within the ſame miſchief ſhall be within the ſame remedy, though it be out of the letter of the law ‡.

† 6. Edward I. cap. 5.

‡ 1 Inſtit. 54. b.

IN the act of Charles II. impoſing a tax on malt-liquors, there are no words directing the tax to be paid, but only a penalty in caſe of not payment. The exchequer, which, like the ſeſſion, is a court both of common law and of equity, ſupplies the defect, and, in order to fulfil the intendment of this ſtatute, ſuſtains an action for payment of the tax.

SECTION II.

Where the Means preſcribed in a Statute anſwer not fully the End propoſed by the Legiſlature.

IT is chiefly to ſtatutes belonging to this ſection that the following paſſage is applicable. "Non poſſunt omnes articuli ſingillatim "aut legibus aut ſenatus conſultis comprehendi: ſed cum in aliqua "cauſa ſententia eorum manifeſta eſt, is, qui juriſdictioni præeſt, ad "ſimilia procedere, atque ita jus dicere debet. Nam ut ait Pedius, "quotiens lege aliquid, unum vel alterum introductum eſt, bona "occaſio eſt, cætera, quæ tendunt ad eandem utilitatem, vel inter-"pretatione vel certe juriſdictione, ſuppleri ‖."

‖ l. 12 & 13 de legibus.

AN heir, whether apparent only, or entered *cum beneficio*, cannot act more juſtly with reſpect to his predeceſſor's creditors than to bring his predeceſſor's eſtate to a judicial ſale. The price goes to the creditors, which is all they are entitled to in juſtice; and the ſurplus, if any be, goes to the heir, without ſubjecting him to trouble or riſk. The act 24. p. 1695 was accordingly made, impowering the heir apparent to bring to a roup or public auction his predeceſſor's eſtate whether bankrupt or not. But as there is a ſolid foundation in juſtice for extending this privilege to the heir entered *cum beneficio*, he is underſtood as omitted *per incuriam;* and the court

of ſeſſion ſupplied the defect, by ſuſtaining a proceſs at the inſtance of the heir *cum beneficio* for ſelling his predeceſſor's eſtate *.

* Feb. 27. 1751. Patrick Blair.

THE following ſtatutes, though made to correct the rigor or injuſtice of common law, belong to this ſection, becauſe their defects are remedied by a court of equity. This remedy may indeed be conſidered in different views, either as correcting the injuſtice of common law, or as ſupplying defects in ſtatutes; and ſince we are talking in general of defective ſtatutes, I thought it the more diſtinct method to conſider the matter in the latter view.

BY the common law of Scotland, a man's creditors after his death had no preference upon his eſtate. The property was tranſferred to his heir, and the heir's creditors came in for their ſhare. This was groſs injuſtice, and yet the claim of the heir's creditors was founded clearly upon common law. This therefore is an inſtance, not of a defect in common law, but of a poſitive wrong, by ſuſtaining to the heir's creditors a claim to the anceſtor's eſtate, which juſtly they have not till the anceſtor's creditors be paid. The act 24. p. 1661, made to redreſs the injuſtice of the common law in this particular, declares, "That the creditors of the predeceſſor "doing diligence againſt the apparent heir, and againſt the real "eſtate which belonged to the defunct, within the ſpace of three "years after his death, ſhall be preferred to the creditors of the "apparent heir." The remedy here reaching the real eſtate only, the court of ſeſſion completed the remedy, by extending it to the perſonal eſtate †, and alſo to a perſonal bond limited to a ſubſtitute named ‡. And as being a court of equity it was well authorized to make this extenſion; for to withdraw from the predeceſſor's creditors part of his perſonal eſtate, is not leſs unjuſt than to withdraw from them part of his real eſtate.

† Stair, Dec. 16. 1674, Kilhead *contra* Irvine.

‡ Forbes, Feb. 9. 1711, Graham *contra* M'Queen.

ONE ſtatute there is, or rather clauſe in a ſtatute, which affords a plentiful harveſt of inſtances. By the principles of common law an heir is entitled to continue the poſſeſſion of his anceſtor; and formerly if he could colour his poſſeſſion with any ſort of title, however obſolete or defective, he enjoyed the rents; and commonly beſtowed a ſhare to prevent the creditors from drawing payment out of the eſtate ||. Among many remedies for this flagrant injuſtice, there is a clauſe in the act 62. p. 1661, enacting, "That "in caſe the apparent heir of any debtor ſhall acquire right to "an expired appriſing, the ſame ſhall be redeemable from him, his heirs

|| See Hiſtorical Law tracts, Tract 12 towards the cloſe.

"heirs and ſucceſſors within ten years after acquiring of the ſame, "by the poſterior appriſers, upon payment of the purchaſe-money." This clauſe almoſt in every one of its circumſtances has been extended beyond the words, in order to compleat the remedy intended by the legiſlature. For, *1mo*, Though the remedy is afforded to appriſers only, it is extended to perſonal creditors. *2do*, It has been extended even to an heir of entail, impowering him to redeem an appriſing of his entailed lands after it was purchaſed by the heir of line. *3tio*, Though no purchaſe is mentioned in this clauſe but what is made by the heir apparent, the remedy however is extended againſt a preſumptive heir, who cannot be heir-apparent while his anceſtor is alive. *4to*, It was extended againſt a purchaſer who was indeed an heir-apparent, but not, in terms of the ſtatute, the apparent heir of the debtor. It was judged that an appriſing led both againſt principal and cautioner, and purchaſed by the heir-apparent of the principal, might be redeemed by the creditors of the cautioner. This was a ſtretch, but not beyond the bounds of equity. The cautioner himſelf, as creditor for relief, could have redeemed this appriſing in terms of the ſtatute; and it was thought that every privilege competent to a debtor ought to be extended to his creditors, in order to make their claims effectual. *5to*, The privilege is extended to redeem an appriſing during the legal, though the ſtatute mentions only an expired appriſing. And, *laſtly*, Though the privilege of redemption is limited to ten years after the purchaſe made by the heir-apparent, it was judged, that the ten years begin not to run but from the time that the purchaſe is known to the creditors. Theſe deciſions all of them are to be found in the Dictionary, vol. I. pag. 359.

CHAPTER V.

Defects of Common Law with reſpect to Execution.

IT is natural to believe, and it holds in fact, that the different executions for payment of debt founded on common law, are adapted to thoſe caſes only which the moſt frequently occur in practice. Upon a debtor's failing to make payment, his land is attached by an appriſing, his moveables by poinding, and the debts due him by arreſtment and furthcoming. But experience diſcovered many profitable ſubjects of a peculiar nature, that cannot be brought under any of the foregoing executions. And even with reſpect to common ſubjects, ſeveral peculiar circumſtances were diſ-

covered where theſe executions could not be applied. A court of common law, which cannot in any article exceed the bounds of common law, has not power to ſupply any of theſe defects. This power is reſerved to a court of equity acting upon a principle of juſtice, often above mentioned, that wherever there is a right it ought to be made effectual.

THE common law is defective with reſpect to a variety of ſubjects that cannot be attached by any of its executions, a reverſion, for example, a bond ſecluding executors, a ſum of money with which a diſpoſition of land is burdened, *&c.* Theſe are all carried by an adjudication authorized by the ſovereign court. They could not be carried by an appriſing in the form of common law: nor can they be carried by an adjudication put in place of an appriſing by the act 1672, which by the act itſelf is confined to land, and to what rights are properly acceſſory to land, real ſervitudes, for example, and ſuch like. But this is not all. There are many other rights and privileges, to attach which no execution is provided. A debtor has, for example, a well founded claim for voiding a deed granted by him in his minority greatly to his hurt and leſion: but he is bankrupt, and perverſely declines a proceſs, becauſe the benefit muſt accrue to his creditors: he will neither convey his privilege to them, nor inſiſt on it himſelf. A reduction on the head of death-bed is an example of the ſame kind. There are many others. If a man fail to purge an irritancy, the common law permits not his creditors to purge in his name; and they cannot in their own, unleſs the privilege be conveyed to them. A court of equity ſteps in to ſupply theſe defects of common law; and, without neceſſity either of a voluntary or judicial conveyance, entitles creditors at ſhort-hand to avail themſelves of ſuch privileges. They are impowered to proſecute the ſame for their own advantage, in the ſame manner as if the debtor had done them juſtice by making a conveyance in their favours.

IN the next place, With reſpect to circumſtances where the executions of the common law cannot take place, I give the following inſtances. Firſt, The appriſings of common law reach land only, of which the property is veſted in the debtor. The appriſing a minute of ſale of land, and a diſpoſition without infeftment, was introduced by the ſovereign court.

SECOND,

SECOND, *A* is creditor to *B*, and *B* to *C*. The debt due by *C* to *B* is transferred to *A* by a decree of furthcoming upon an arreſtment laid in the hands of *C*. But what if before *A* proceed to execution *C* die, and no perſon is found who will repreſent him? In this caſe there is no place for an arreſtment; and yet *A* ought not to be diſappointed of his payment. The court of ſeſſion muſt ſupply the defect, by adjudging to *A* the debt due by *C* to *B*.

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

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

* Durie, Feb. 5. 1624, Wood *contra* Waddell.

A proceſs of furthcoming is in a different condition; for being held neceſſary to compleat the right of the arreſter, it may in that view proceed before the term of payment of the debt arreſted *. The ſame holds in a proceſs for poinding the ground, where it becomes neceſſary to compleat a baſe infeftment by making it public †.

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

† Gilmour, Feb. 1662, Douglas *contra* tenants of Kinglaſſie.

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

‡ Stair, July 17. 1678, Laird Pitmedden *contra* Patersons. Home, Feb. 27 1728, Meres *contra* York-building Company.

‖ 1. Chancery Caſes 121.

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

FIFTH, The common law reacheth no man but while he continues within the bounds of its juriſdiction. If a debtor therefore be out of the country, a judgment cannot paſs againſt him, becauſe he cannot be cited to appear in court; and execution cannot be iſſued againſt his effects without a judgment. This defect, which interrupts the courſe of juſtice, is in Scotland remedied by a citation at the market-croſs of Edinburgh, pier and ſhore of Leith, introduced by the ſovereign court, acting upon the foregoing principle, That

That wherever there is a right, it ought to be made effectual. In England, a perſon abroad cannot be cited to appear even in the court of chancery. This court however affords a remedy. It will not warrant a citation againſt any perſon who is not within the juriſdiction of the court: but it will appoint notice to be given the debtor; and if he appear not in his own defence, the court will out of his effects decree ſatisfaction to the creditor. Thus upon an affidavit that the defendant was gone into Holland to avoid the plaintiff's demand againſt him, and he having been arreſted on an attachment, and a *Cepi Corpus* returned by the ſheriff, the court of chancery granted a ſequeſtration of the real and perſonal eſtate *. By virtue of the ſame power ſupplying the defects of common law, the court of ſeſſion gives authority to attach moveables in this country belonging to a foreigner, in order to convert them into money for payment of the creditor who applies for the attachment. Where a debtor, lurking ſomewhere in Scotland, cannot be diſcovered, the court of ſeſſion makes no difficulty to order him to be cited at that head burgh with which he appears to have the greateſt connection.

* 1. Vernon 344.

IN the third place, The executions of the common law, even where there is ſufficiency of effects, fall ſometimes ſhort of the end propoſed by them, *viz.* that of operating payment. I give for example the Engliſh writ *Elegit*, that which correſponds the neareſt to our adjudication. The chief difference is, that an *Elegit* is a legal ſecurity only, and transfers not the property to the creditor. Hence it follows, that though the intereſt of the debt exceed the rent of the land, the creditor muſt be ſatisfied with the poſſeſſion; and hath no means by the common law to obtain payment of his capital, or in place of it to obtain the property of the land. But as in this caſe the execution is obviouſly imperfect, hurting the creditor without benefiting the debtor, the court of chancery will ſupply the defect, by ordering the land to be ſold for payment of the debt.

LASTLY, Beſides payment of debt, execution is ſometimes neceſſary for making other claims effectual; and here alſo the common law is imperfect. To remedy this imperfection, adjudications in implement, declaratory adjudications, *&c.* were in Scotland invented by the ſovereign court.

PART II.

Powers of a Court of EQUITY to correct the Injuſtice of Common Law with reſpect to pecuniary Intereſt.

IN the introduction is explained the neceſſity of a court of equity to correct the injuſtice of common law, as well as to ſupply its defects. A court of common law, as there ſet furth, is governed by a few general rules eſtabliſhed when law was in its infancy, and which at that time were deemed ſufficient. But experience having diſcovered numberleſs caſes to which theſe rules did not extend, and caſes not fewer in number that behoved to be excepted from them, a court of equity became neceſſary. The neceſſity of ſupplying defects ariſes from a principle ſacred in all well regulated ſocieties, "That wherever there is a "right it ought to be made effectual." The neceſſity of making exceptions and thereby correcting injuſtice, ariſes from another principle not leſs ſacred, "That there ought to be a remedy for every "wrong, not even excepting what is committed by authority of "law." We have had occaſion to ſee how imperfect the common law is, leaving juſtice to ſhift frequently for itſelf, without any ſupport. We are now to enter upon a number of particulars, in which the common law exceeds juſt bounds and unwarily authoriſes oppreſſion and wrong. This proceeds from the unavoidable imperfection of general rules; which never are ſo cautiouſly framed, as without exception to be rational or juſt in every caſe they comprehend. A court of common law however cannot afford a remedy, becauſe it is tied down to the letter of the law. The privilege of diſtinguiſhing betwixt will interpoſed in general terms, and what would have been the will of the legiſlature upon a ſingular caſe had it been foreſeen, is reſerved to courts of equity; and a juriſdiction is beſtowed upon ſuch courts, to reſtrain the operation of common law in every caſe where a rule extends beyond its profeſſed aim and purpoſe. We find daily inſtances of oppreſſive claims clearly founded on a general rule of common law, applied to ſome ſingular caſe out of the reaſon of the law. In every caſe of this kind, it is the duty of a court of equity to interpoſe, by denying action upon ſuch a claim. To truſt this power with ſome perſon, or ſome court, is evidently a matter of neceſſity; for otherways wrong would be authorized without control. With reſpect to another particular formerly mentioned, a court of common law

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is equally imperfect, *viz.* that it is bound to judge by the words even where they differ from will. By this means, ſtatutes are often extended beyond the will and purpoſe of the legiſlature, and covenants beyond the will and purpoſe of the contracters. The injuſtice thus occaſioned cannot otherways be redreſſed than by a court of equity.

IN handling the matters that belong to this part, I can diſcover no method more diſtinct than the following. Firſt, Injuſtice of common law with reſpect to rights founded on will. Second, Injuſtice with reſpect to ſtatutes. Third, Injuſtice with reſpect to actions at law. Fourth, Injuſtice in making debts effectual.

CHAPTER I.

Injuſtice of Common Law with reſpect to Rights founded on Will.

THE common law with reſpect to deeds, covenants, and other acts of will, confines its view to two circumſtances. Firſt, Whether will was actually interpoſed: next, In what words it is declared. A writing may have the appearance of an engagement without the reality. One through force or fear may be compelled to utter certain words, or to ſubſcribe a certain writing, without intending mentally to be bound. This circumſtance muſt weigh even in a court of common law, becauſe in reality there is no obligation. But once admitting an obligation, a court of common law muſt interpoſe its authority to make it effectual. That it was brought about by fraud, by error, or by oppreſſion, will not be regarded; and as little that the articles covenanted go beyond the intention of parties, or that the words go beyond the articles that were really concerted. Theſe and many other particulars concerning acts of will creative of right or obligation, are appropriated to a court of equity; and juſtice requires that due weight be laid upon each of them.

THE great extent of matter that comes under this chapter, demands peculiar care in diſtribution. I have been obliged to divide it into many ſections, a catalogue too long to be inſerted here; and they will be ſeen in their order.

SECTION I.

Where a Writing reacheth inadvertently beyond Will.

THE power of a court of equity to limit a deed within narrower bounds than the words naturally import, is already explained *. It is made evident, that this ought to be done, when from the context, from the end and purpoſe of the deed, or from other circumſtances, it can with certainty be gathered, that the words by miſtake go beyond the will. It is alſo made evident, that this power comprehends grants as well as covenants, not even excepting deeds where writ is an eſſential ſolemnity. Hence a rule in daily practice, That however expreſs the words may be, a court of equity gives no force to a deed beyond the will of the granter. This rule is finely illuſtrated by the following caſe. John Campbell provoſt of Edinburgh, did, in July 1734, make a ſettlement of the whole effects that ſhould belong to him at the time of his death, to William his eldeſt ſon, with the burden of proviſions to his other children, Matthew, Daniel, and Margaret. Daniel being at ſea in a voyage from the Eaſt-Indies, made his will May 1739, in which he "gives and bequeaths all his goods money and effects "to John Campbell his father, and in caſe of John's deceaſe, to "his beloved ſiſter Margaret." The teſtator died at ſea in the ſame month of May, and in June following John the father alſo died, without hearing of Daniel's death, or of the will made by him. William the eldeſt brother brought an action againſt Margaret and her huſband, concluding, That Daniel's effects being veſted in the father, were conveyed to him the purſuer by the father's ſettlement; and that the ſubſtitution in favour of Margaret contained in Daniel's will was thereby altered. It was anſwered, That nothing more was or could be intended by the provoſt, than to ſet aſide his heirs *ab inteſtato*, by ſettling his proper eſtate upon his eldeſt ſon; and by no means to alter the ſubſtitution in his ſon Daniel's teſtament, of which he was ignorant. That words are not alone, without intention, ſufficient to found a claim, and therefore that the preſent action ought not to be ſuſtained. "The court "judged, that the general diſpoſition in 1734, granted by John "Campbell to his ſon the purſuer, ſeveral years before Daniel's will "had a being, does not evacuate the ſubſtitution in the ſaid will †."

* Part 1. Ch. 3. Sect. 1.

† June 13. 1740. Campbell *contra* his ſiſter.

THE ſame rule applies to general clauſes in diſcharges, ſubmiſſions, aſſignments, *&c.* which are limited by equity, when it evidently

dently appears that the words are more extenſive than the will. Thus a general ſubmiſſion of all matters debateable is not underſtood to reach land or other heretable rights *: and a general clauſe in a ſubmiſſion was not extended to matters of greater conſequence than theſe expreſſed †. *A* had a judgment of *L.* 6000 againſt *B.* *B* gave *A* a legacy of *L.* 5 and died. *A*, on receipt of this *L.* 5, gave the executor of *B* a releaſe in the following words: "I acknowledge to have received of *C* five pound left me "as a legacy by *B*, and do releaſe to him all demands which I "againſt him as executor of *B* can have for any matter whatever." It was adjudged, that the generality of the words *all demands* ſhould be reſtrained by the particular occaſion mentioned in the former part thereof, *viz.* the receipt of the *L.* 5 legacy, and ſhould not be a diſcharge of the judgment ‡.

* Hope, (arbiter) March 4. 1612, Paterſon *contra* Forret

† Haddington, Mar. 4. 1607, Inchaffray *contra* Oliphant.

‡ Abridg. Caſes in Equity, Ch. 25. Sect. C. Note at the end.

IF equity will not ſuſtain a deed beyond the intention of the granter, much leſs will it ſuſtain a deed contrary to intention. Charles Farquharſon writer, being in a ſickly condition, and apprehenſive of death, executed in the year 1721 a ſettlement of all the effects real and perſonal that he ſhould be poſſeſſed of at his death, in favour of his eldeſt brother Patrick Farquharſon of Inverey and his heirs and aſſigneys; reſerving a power to alter, and diſpenſing with the delivery. Charles was at that time a bachelor, and died ſo. He recovered however his health, and not only ſurvived his brother Patrick, but alſo his brother's two ſons, who ſucceſſively enjoyed the eſtate of Inverey. Patrick left daughters; but as the inveſtitures of the eſtate were taken to heirs-male, Charles ſucceeded, died in poſſeſſion of the eſtate, and tranſmitted the ſame to the next heir-male. Againſt this heir-male a proceſs was brought by the daughters of Patrick, founded upon the above mentioned ſettlement 1721; ſubſuming, That Charles the maker died infeft in the ſaid eſtate of Inverey, and therefore that this eſtate, by force of the ſaid ſettlement, and by the expreſs tenor of it, muſt go to the purſuers as being the heirs of Patrick Farquharſon. It was anſwered by the heir-male, That Charles's evident purpoſe and intention, in making this deed, was to augment the family-eſtate, by ſettling his own acquiſitions upon Patrick the head of the family; that this purpoſe was fulfilled by the preſent ſituation of affairs, and by both eſtates being centered in the defendant the preſent head of the family; that the purſuers demand of ſeparating the two eſtates, and of taking from the repreſentative of the family the family-eſtate itſelf, was contradictory to the ſaid purpoſe: and therefore,

ſuppoſing the action to be founded on the words of the deed, a court of equity will not ſuſtain an action that tends to give words an effect not only without intention, but even in contradiction to it. "The court judged, That the purſuers had no action upon "the deed 1721 to oblige the defendant to denude of the eſtate of "Inverey *."

* Feb. 10. 1756. Heirs of line of Patrick Farquharſon *contra* Heir-male.

WHERE a man provides a ſum to his creditor, without declaring it to be in ſatisfaction, both ſums are due by the common law. But a court of equity will decree it to be in ſatisfaction, if it appear that the words are more extenſive than the will of the granter; and the following rule is generally obſerved, *Quod debitor non preſumitur donare.* Thus a man being bound for *L.* 10 yearly to his daughter, gave her at her marriage a portion of *L.* 200; decreed that the annuity ſhould be included in the portion †. But where a man leaves a legacy to his creditor, this cannot be conſtructed as ſatisfaction; for in that caſe it would not be a legacy or donation.

† Tothill's Reports, 78.

SECTION II.

Where the Means concerted reach inadvertantly beyond the End propoſed.

THE doctrine concerning the nature of obligatory acts of will is explained above ‡. Every man who makes a covenant or executes a deed, has an event in view which he propoſes to accompliſh by means of the covenant or deed. A covenant therefore and a deed are in reality means concerted for accompliſhing ſome end or purpoſe. They are not however always proportioned to the end in view. They ſometimes fall ſhort of the end, and ſometimes go beyond it. The former caſe is diſcuſſed, and the latter is the ſubject of the preſent ſection.

‡ Part 1. Ch. 3. Sect. 2.

I muſt premiſe, that the end propoſed in every obligatory act of will, ought to be lawful, without which no countenance will be given to it in any court: for to make effectual an unlawful act, is inconſiſtent with the very nature of courts of law. Thus a bond granted by a woman, binding her to pay a ſum if ſhe ſhould marry, is unlawful, as tending to bar procreation; and therefore will be rejected even by a court of common law. And the ſame fate will attend every obligation granted *ob turpem cauſam*; a bond, for example, granted to a woman as a bribe or temptation to commit fornication. So far there is no occaſion for a court of equity. But now ſuppoſe an obligation of this kind has been fulfilled by payment,

ment, a court of common law cannot ſuſtain an action for recalling the money. Neither can the action be ſuſtained in equity; for the perſon who pays is not leſs guilty than the perſon who receives payment. And in general, no action lies in equity more than at common law, to recall money paid voluntarily. The perſon who receives payment, may, it is true, be juſtly deprived of the money he has gained by an unlawful act: but the power of forfeiture is a prerogative of the legiſlature, and is not truſted with any court. Hence the maxim of the Roman law, that *in turpi cauſa potior eſt conditio poſſidentis.*

SUPPOSING now the end propoſed to be lawful; a court of common law makes no other enquiry but what acts of will were really exerted, which are made effectual without the leaſt regard to conſequences. A court of equity, more at liberty to follow the dictates of refined juſtice, conſiders every deed in its true light of a means employed to bring about ſome event; and in this light refuſes to give force to it, farther than as conducive to the purpoſed event. In all matters whatever, as well as in matters of law, the end is the capital circumſtance; and means are regarded ſo far only as they contribute to the end. For a court then to put a deed or covenant in execution beyond the purpoſed end, involves the abſurdity of preferring the means to the end, of making that ſubordinate which is principal, and that principal which is ſubordinate. Such proceeding would be unjuſt as well as abſurd. No man in conſcience feels himſelf bound to perform any promiſe or covenant, further than as it contributes to the end or event for the accompliſhing of which it was made. And it is inconſiſtent with the very nature of a court of equity, to compel a man to perform any act where he is not antecedently bound in conſcience and duty.

IRRITANT clauſes in grants and other ſingle deeds, produce frequently more ſevere conſequences than are intended by the maker. There is a great variety of ſuch clauſes; but there is no occaſion to be ſolicitous about diſtinguiſhing them from each other; for equity conſidering them all as means, gives no effect to any of them farther than as they contribute to make the end effectual. A noted irritancy is what is frequently contained in bonds of proviſion to young women, "That the bond ſhall be void if ſhe marry without conſent of ſuch and ſuch perſons." This irritancy I have had occaſion to diſcuſe above *; and have endeavoured to make out, that whether expreſſed as a ſuſpenſive or reſolutive condition,

* Part 1. Ch. 3. Sect. 2.

the bond is due, though the creditor marry without conſent, provided ſhe marry not below her rank. An irritancy of this kind, is conceived to be *in terrorem* only, and in order to be a compulſion upon the creditor to make a right choice. From which conception it clearly follows, that if a right choice be made, the irritant clauſe has had its full effect; and to give it in this caſe the effect of a forfeiture, is going beyond the purpoſe of the granter, and the end intended by the irritancy. I have reſumed the reaſoning here, becauſe, if I miſtake not, it is equally applicable to every other irritancy. And with reſpect to the irritancy under conſideration, I muſt obſerve, that it affords one of the rare examples where a court of equity ought to interpoſe, though without the aid of any general rule: for there evidently can be no ſtandard of what is a ſuitable or inſuitable match. But the ſeverity of ſuch irritancies, which are often innocently incurred, renders the interpoſition of equity neceſſary. At the ſame time, where the match is not actually diſgraceful, there is little danger of arbitrary meaſures. The opinion of a court of equity, where the caſe is doubtful, will naturally lean to the milder ſide, by relieving from the forfeiture a young woman, who is ſufficiently puniſhed by an imprudent match, without adding to her diſtreſs, and depriving her of her fortune. Equity however, as mentioned in the place above cited, is not commonly carried to ſuch refinement. It is not the practice to prolong the term where the condition is ſuſpenſive, or precedent, as termed in England [a]. Take another example that comes under the ſame rule of equity. A claim is tranſacted, and a leſs ſum accepted, upon condition that the ſame be paid at a day certain, otherwiſe the tranſaction to be void. The irritancy here being evidently calculated *in terrorem*, and to compel payment of the tranſacted ſum, it is admitted, that where the clauſe is reſolutive, equity will relieve againſt it after the ſtipulated term is elapſed, provided the tranſacted ſum be paid before a proceſs is raiſed, otherwiſe where the clauſe is ſuſpenſive. But in my apprehenſion there is the ſame equitable ground for relief, whether the clauſe be ſuſpenſive or reſolutive. The form may be different, but the intention is the ſame in both. Suppoſing then the tranſacted ſum to be payable wholly at one term, equity requires a declarator of irritancy whether the clauſe be

a AND yet this in England is ſometimes done. One having three daughters deviſes lands to his eldeſt, upon condition that within ſix months after his death ſhe pay certain ſums to her two other ſiſters, and if ſhe fail he deviſes the lands to his ſecond daughter on the like condition. The court may enlarge the time for payment, though the premiſes are deviſed over. And in all caſes where compenſation can be made for the delay, the court may diſpenſe with the time, though even in the caſe of a condition precedent *.

* Abridg. Caſes in Equity, Ch. 17. Sect. B. §. 5.

be ſuſpenſive or reſolutive. In this proceſs the defendant ought to be admitted to purge his failure by offering payment of the tranſacted ſum, otherways the tranſaction will be voided. The caſe is different where the tranſacted ſum is to be paid in parcels and at different periods, as for example, where an annuity is tranſacted for a leſs yearly ſum. A court of equity will ſcarce interpoſe in this caſe, but leave the irritancy to take place *ipſo facto*, by the rules of common law; for if the irritant clauſe be not in this caſe permitted to have its effect *ipſo facto*, it will be altogether ineffectual, and be no compulſion to make payment. If a declarator be neceſſary, the defendant muſt be admitted to purge before ſentence; and if it be at all neceſſary, it muſt be renewed every term where there is a failure of payment. This would be unjuſt, becauſe it reduces the creditor to the ſame difficulties of recovering his tranſacted ſum that he had with reſpect to his original ſum; which, in effect, is to forfeit the creditor for his moderation, in place of forfeiting the debtor for his ingratitude.

THE irritancies that make the greateſt figure in our law are what have been contrived for the ſecurity of entails. Theſe irritancies ſo far as directed againſt the proprietor, to prevent dilapidation, and other acts of contravention, cannot be other than reſolutive conditions; and if ſo expreſſed as to make the right voidable only, there can be no doubt that any act of contravention may be purged before challenge, and even before ſentence upon a proceſs of declarator. The difficulty is greater where an act of contravention is declared to be an *ipſo facto* forfeiture. One thing is clear, that the will of the maker of the entail muſt be the rule; and if his will be expreſſed in clear terms againſt admitting the tenant in tail to purge, a court of equity cannot interpoſe to relieve from the irritancy. But if there be the leaſt doubt about the maker's will, an irritant clauſe will be conſidered as added *in terrorem* only, to prevent dilapidation, and not to forfeit the tenant in tail for behoof of a ſubſtitute, who being poſtponed to the tenant in tail, muſt have been leſs regarded by the entailer. This rational conſtruction of an irritant clauſe, makes way for purging acts of contravention; becauſe, by forcing this to be done, which preſerves the eſtate entire, an irritant clauſe has all the effect that it ought to have, or that it was intended to have. The irritancy here is preciſely ſimilar to that contained in a bond of proviſion to a young woman, declaring it to be void if ſhe marry without conſent of certain friends named.

To maintain, That an irritant clauſe forfeiting *ipſo facto* upon contravention, muſt have its effect in the preciſe terms of the clauſe, and muſt bar the contravener from purging, is in effect to maintain, That the irritancy was chiefly intended in favour of the ſubſtitute to give him a chance for the property, and not to ſecure the eſtate againſt dilapidations; which puts an irritant clauſe upon the ſame footing, as if the ſubſtitute had been called to take the eſtate upon any fortuitous event, *ſi navis ex Aſia venerit* for example. But a deed of entail conceived in the ordinary form admits not this conſtruction. The favour of the entailer is ſignified by the order in which the heirs are called to the ſucceſſion. The tenant in tail muſt be underſtood a greater favourite than any who is ſubſtituted to him. And therefore, when the tenant in tail is, by the will of the entailer, ſubjected to a forfeiture, it would be abſurd to conſider the forfeiture as chiefly intended for the benefit of the ſubſtitutes, when it is evidently intended for no other purpoſe but to ſecure the entail, and to prevent the tenant in tail from aliening.

THE act 1685 concerning tailzies declares, "That if the pro- "viſions and irritant clauſes are not repeated in the rights and "conveyances by which the heirs of tailzie bruck or enjoy the "eſtate, the omiſſion ſhall import a contravention of the irritant "and reſolutive clauſes againſt the perſon and his heirs who ſhall "omit to inſert the ſame, whereby the eſtate ſhall *ipſo facto* fall, "accreſce and be devolved upon the next heir of tailzie, but ſhall "not militate againſt creditors, *&c.*" If the words of this clauſe be followed out ſtrictly, the act of contravention will not be purgeable. But the words of a ſtatute are not binding in equity where they reach beyond the purpoſe of the legiſlature. We cannot ſuppoſe that the legiſlature intended to be more rigid in ſecuring entails than entailers themſelves commonly are. And therefore, notwithſtanding the words in which this irritancy is expreſſed, a tenant in tail incurring the irritancy ought to be admitted to purge the act of contravention, by ingroſſing in the title-deeds the irritant and reſolutive clauſes, which fulfils the purpoſe of the legiſlature. This ſtatutory irritancy, according to ſtrict order, ought to come in afterwards *. But it appears in a better light when joined with the other irritancies in entails.

* viz. Ch. 2. Sect. 2. of this part.

THE irritancies hitherto mentioned relate to grants and ſingle deeds. I proceed to an example of a conventional irritancy, *viz.* an irritancy *ob non ſolutum canonem* contained in a tack or feu-right.

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Such a clauſe expreſſed ſo as to make the right voidable only upon failure of payment is juſt and equal, becauſe, by a declarator of irritancy, it ſecures to the ſuperior or landlord payment of what is due him; and at the ſame time affords to the vaſſal or tenant an opportunity to purge the irritancy by payment. And even ſuppoſing the clauſe ſo expreſſed as to make failure of payment an *ipſo facto* forfeiture, it will be held by a court of equity, That the means here choſen reach inadvertently beyond the will and intention of the parties-contracters; and a declarator of irritancy will ſtill be neceſſary, in order to afford an opportunity of purging the irritancy. By giving this relief the conventional irritancy is put upon the ſame footing with the ſtatutory irritancy *ob non ſolutum canonem*, which will be handled afterwards *.

* Part 2. Ch. 2. Sect. 2.

THE plaintiff, tenant for life of a copy-hold eſtate, felled trees, which at a court-baron was found a waſte by the homage and conſequently a forfeiture. The bill was to be relieved againſt the forfeiture, offering ſatisfaction if it appeared to be waſte. The court decreed an iſſue, to try "Whether the primary intention in felling the trees was to do waſte;" declaring, That in caſe of a wilful forfeiture, it would not relieve †. This is averſe from the true ſpirit of equity, which leans to general rules in order to prevent arbitrary meaſures. Better far to interprete clauſes of this nature as making the right forfeitable only, and not an *ipſo facto* forfeiture, which, upon offering ſatisfaction before a proceſs brought, or pending the proceſs, will relieve from the forfeiture.

† 1. Chancery Cafes 95.

A ſettlement being made upon a young woman, proviſo that ſhe marry with the conſent of certain perſons, the conſent to be declared in writing, a conſent by parole was deemed ſufficient ‡. For writing was required in the way of evidence only; and it was not underſtood to be the will of the maker to exclude other evidence that might be ſufficient.

‡ 1. Modern Reports 310.

SECTION III.

Where the Means concerted tend not to bring about the purpoſed End or Event.

FROM conſidering an obligatory act of will as a means to an end, it clearly follows in reaſon, that its legal force and efficacy muſt depend upon the greater or leſs degree of its aptitude to bring about the propoſed end. A covenant calculated in the moſt

accurate manner and with perfect foreſight to bring on the deſired event, is binding in reaſon as well as in conſcience. For what poſſible objection can there lie againſt performance? If a covenant in any article fall ſhort of the deſired event, the defect is ſupplied by a court of equity, and if it go beyond, the exceſs is reſtrained by the ſame court; acting in both caſes to make the means correſpond to the end, which in every act of will is the capital point. Theſe particulars are diſcuſſed in the foregoing part of this work. But we have not yet exhauſted all the conſequences that follow from conſidering an obligatory act of will as a means to an end. It may be erroneouſly made, ſo as not to tend in any article to the end or event propoſed by it. Or it may be made with a view to a certain event expected to happen, in place of which another event happens which was not expected. In caſes of this nature there is no place for rectification. The deed muſt either be made effectual without regard to the end, or it muſt be voided altogether. A court of common law, regarding the words only, will make it effectual; which reſolves into conſidering the deed as ultimate, and not, as it truly is, a means to an end. But juſtice teacheth a different doctrine, which will clearly appear from the following deduction. A rational man when he promiſes, when he contracts, or, in general, when he acts, has ſome end in view which he purpoſes to accompliſh. Sometimes the very thing one engages to do is the end propoſed, as when a man grants a bond for payment of borrowed money. The payment covenanted is the end of the engagement; and when the payment is made, the engagement has its full effect, by accompliſhing the end propoſed by it. But, for the moſt part, the thing pactioned to be done, is conſidered as a means to ſome farther end; as where I buy a horſe as a ſtallion. The contract is a means for acquiring the property of the horſe, and the acquiſition is the means for raiſing a breed of horſes. Whether the thing a man immediately engages to perform, is to be deemed the ultimate end of the engagement, or a means only to a farther end, if not cleared by the words, muſt be gathered from the nature of the ſubject. And in all engagements this point is neceſſary to be aſcertained; becauſe the engaging to perform any act as a means, is evidently different from the engaging to perform it abſolutely, or as an end. In the latter caſe one is bound in reaſon as well as in conſcience; for no more is demanded from him than what he agreed to perform with a full view of all conſequences. But in the former, a man is not bound, if the thing he agreed to perform is diſcovered not to be a means to the end propoſed. He agreed to the thing

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as a means only, not abſolutely; and if the thing prove not to be a means, neither reaſon nor conſcience binds him to perform; becauſe this caſe is not comprehended in the engagement, or rather is excluded from it. I need go no farther than the foregoing example for illuſtration. The horſe I bought as a ſtallion happens by ſome accident to be gelt before delivery. I am not bound to accept the horſe, or pay the price; becauſe I bought him not ſingly as a horſe, but as a ſtallion in order to breed horſes.

WITH reſpect then to the caſes that belong to the preſent ſection, we diſcover a new operation of equity. Hitherto its operation has been to ſupport deeds and covenants, by adjuſting them as means to the propoſed end. But here the operation of equity is directly oppoſite, *viz.* to void deeds and covenants where they prove altogether ineffectual as means. Writers upon law, who find it ſometimes difficult to trace matters to their true ſource, take an eaſy method for explaining this operation of equity. They ſuppoſe the engagement to be conditional; as if it were expreſsly provided, that it ſhall not bind unleſs it prove a means to the end propoſed; and this ſuppoſition or fiction is termed an implied condition. But fictions in law are a very unſatisfactory method of ſolving difficulties.

THE moſt noted caſe that comes under this ſection, is where goods by ſome latent inſufficiency anſwer not the purpoſe for which they are bought. Though the vender be in *bona fide*, yet the purchaſer is relieved in equity from performance, becauſe the bargain, being a means to an end, doth not anſwer the end propoſed by it.

AN inſolvent debtor makes a truſt-right in favour of his creditors, and, among his other ſubjects, diſpones to the truſtees his intereſt in a company-ſtock. The truſtees enter on the management, and lay hold of a part of the company-goods, in proportion to the intereſt of the debtor. A ſtranger, who, by furniſhing goods to the company, was clearly preferable upon the company-ſtock before the bankrupt's private creditors, being however ignorant of his preference, accedes to the truſt-right, and agrees to an equal diſtribution of the bankrupt's effects. Soon thereafter he comes to the knowledge of his privilege, and retracts while matters are yet entire. *Quæritur*, Is he bound by his agreement? He undoubtedly draws by it all the benefit he had a proſpect of; and conſidering the engage-

ment ſingly without relation to the end, he is bound; and ſo ſays the common law. But equity goes more accurately to work. It conſiders the end and purpoſe of the agreement, which is, that of the bankrupt's effects the ſtranger ſhall draw ſuch proportion as he is entitled to by law. The means concerted, *viz.* that he ſhall draw an equal proportion, correſpond not to this end or purpoſe, but to a very different end; for by it the ſtranger draws leſs than he is entitled to, and the other creditors more. Equity relieves from an engagement where ſuch is the unexpected reſult. For an engagement is obligatory ſo far only as it contributes to the purpoſed event; and there is no authority from the intendment of parties to make it further obligatory.

To prevent miſtakes in the application of the foregoing doctrine, it is neceſſary to be obſerved, That the end which makes an engagement obligatory, is not any motive or purpoſe concealed within the mind of the one or other party, but that purpoſe which is ſpoke out, or underſtood by the parties concerned to be the motive of the engagement; for a thought retained within the mind, cannot have the effect to qualify an obligation more than to creat it. The overlooking this diſtinction has led Puffendorff into a groſs error. He puts the caſe *, That a man upon a falſe report of all his horſes being deſtroyed, makes a contract for a new cargo. His opinion is, That in equity the purchaſer is not bound. This opinion reliſhes too much of a college-philoſopher, unacquainted with the world and its commerce. Were errors of this kind indulged with a remedy, there would be no end of law-ſuits. At this rate, if I purchaſe a quantity of body or table linen, ignorant at the time of a legacy left me of ſuch goods, I ought to be relieved in equity againſt the purchaſe, which now I have no occaſion for. And for the ſame reaſon, if I purchaſe a horſe by commiſſion for a friend, who happens to be dead at the time of the purchaſe, there muſt be a relief in equity, though I made the purchaſe in my own name. But there is no foundation for this in equity more than at common law. If a ſubject anſwer the purpoſe for which it is purchaſed, the vender has no farther concern: he is entitled upon delivery to demand the price, without regarding any private or extrinſic motive that might have led his party to make the purchaſe. In a word, a man who expoſes his goods to ſale muſt anſwer for their ſufficiency; becauſe there is no obligation in equity to pay a price for goods that anſwer not the purpoſe for which they are ſold by the one, and bought by the other. But if a purchaſer be led into an error or miſtake

† L. 3. cap. 6. §. 7.

miſtake that regards not the ſubject nor the vender, the conſequences muſt reſt upon himſelf.

HAVING laid open the foundation in equity for giving relief againſt a covenant, where performance will not anſwer the end propoſed by it, I proceed to examine whether there be any relief in equity after the covenant is fulfilled. I buy, for example, a lame horſe unfit for work: but this defect is not diſcovered till the horſe is delivered and the price paid. If the vender has engaged to warrant the horſe as ſufficient, he is liable at common law to fulfil his covenant. But ſuppoſing this paction not to have been interpoſed, it appears to me not at all clear, that there is any foundation in equity for voiding the ſale thus compleated. The horſe is now my property by the purchaſe, and the price is equally the vender's property. If he knew that the horſe was lame, he is guilty of a wrong that ought to ſubject him to the higheſt damages. But ſuppoſing him *in bona fide*, I cannot diſcover a medium upon which I can found any claim againſt him. The ground of equity which relieves me from being forced to pay for a horſe that can be of no uſe, turns now againſt me in favour of the vender. For why ſhould he be bound to take my horſe that can be of no uſe to him, more than I was formerly bound to take his horſe that could be of no uſe to me? The Roman law indeed gave an *actio redhibitoria* in this caſe, obliging the vender to take back the horſe and to return the price: but I diſcover a reaſon for this in the principles of the Roman law, which will not ſquare with our practice, nor with that of any other commercial country. To covenants where equality is intended, the Roman Pretor applied equity, ſo as never to allow of any conſiderable inequality. Hence the *actio quanti minoris*, which was given to a purchaſer who by ignorance or error paid more for a ſubject than it is intrinſically worth. And it follows upon the ſame plan of equity, that if a ſubject be purchaſed which is good for nothing, the *actio quanti minoris* muſt reſolve into an *actio redhibitoria*. But equity may be carried ſo far as to be prejudicial to commerce by encouraging law-ſuits. For this reaſon we admit not of the action *quanti minoris*. The great principle of utility rejects it, experience having demonſtrated, that it is a great interruption to the free courſe of commerce. The ſame principle of utility rejects the *actio redhibitoria* ſo far as founded on inequality; and after a ſale is compleated by delivery, I have endeavoured to ſhow, that if inequality be rejected, there is no foundation for the *actio redhibitoria*. In Scotland however, though the *actio quanti minoris* is rejected, the

actio redhibitoria is admitted where there is a latent inſufficiency that unqualifies the ſubject for the end with a view to which it was purchaſed. This practice, as appears to me, is out of all rule. If we adhere ſtrictly to equity without regarding utility, we ought to ſuſtain the *actio quanti minoris* as well as the *actio redhibitoria*. But if we give way to utility, the great law in commercial dealings, we ought to ſuſtain neither. To indulge diſputes about the true value of every commercial ſubject would deſtroy commerce: and for that reaſon, equity, which has no other object but the intereſt of a ſingle perſon, muſt yield to utility which regards the whole ſociety.

THE doctrine above delivered will be finely illuſtrated by applying it to erroneous payment or *ſolutio indebiti*, which makes a great figure in the Roman law. Of erroneous payment there are two kinds clearly diſtinguiſhable from each other; one where a debt is erroneouſly ſuppoſed that is extinguiſhed, or perhaps never exiſted, and one where there is really a debt, but the perſon who pays is not debtor.

To explain what equity dictates with reſpect to erroneous payment of the firſt kind, ſeveral caſes ſhall be ſtated that give light to each other. I begin with the caſe of a bonded debt, which, after being extinguiſhed by payment, is purchaſed *bona fide* for a valuable conſideration; and the debtor's heir, ignorant of the extinction, grants a bond of corroboration to the aſſignee. After the granting this bond of corroboration, but before payment, the extinction of the bond corroborated comes to be diſcovered; and, to make the queſtion of importance, we ſhall ſuppoſe the cedent or aſſignor to be bankrupt, and that his bankruptcy happened after the date of the bond of corroboration. Both parties here are *certantes de damno evitando*. If the bond of corroboration be made effectual, the debtor is forced to pay a debt that is not due. If on the other hand he be relieved from it, the aſſignee loſes the valuable conſideration he paid to the cedent. What does equity rule in this caſe? Upon the principle above laid down, it relieves againſt the bond of corroboration. A corroborative ſecurity is not intended to create a new debt, but only to ſecure the payment of one already due; and for that preciſe reaſon, no claim can in equity be founded on the bond of corroboration independent of the debt corroborated. If the debt corroborated be imaginary only, the bond of corroboration muſt go for nothing. It poſſibly may be worded in abſolute terms, *viz.* to pay the ſum ſtipulated at a preciſe day. But words againſt

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or beyond intention cannot operate in equity. For this reaſon I cannot agree to the following opinion: "Si quis indebitam pecuniam, per errorem, juſſu mulieris, ſponſo ejus promiſiſſet, et nuptiæ ſecutæ fuiſſent, exceptione doli mali uti non poteſt. Maritus enim ſuum negotium gerit: et nihil dolo facit, nec decipiendus eſt; quod fit, ſi cogatur indotatam uxorem habere. Itaque adverſus mulierem condictio ei competit: ut aut repetat ab ea quod marito dedit, aut ut liberetur, ſi nondum ſolverit *." This reaſoning is not ſatisfactory. The huſband indeed is not *in mala fide* to demand what is promiſed him: but neither is his party *in mala fide* for refuſing to pay a debt a ſecond time. And equity will not compel a man to perform a promiſe, when performance cannot anſwer the end for which the promiſe was made.

* l. 9. §. 1. de condic. cauſa data.

LET us next ſuppoſe, that the ſum contained in the bond of corroboration is actually paid. Whether in this caſe is the aſſignee bound to reſtore the money, when it is diſcovered that the debt corroborated was imaginary only, and that there was no ſuch debt due? Neither equity nor common law gives relief in this caſe. The property of the money paid is transferred to the aſſignee; and it is an inviolable rule of equity as well as of common law, That no man can be forfeited of his property who is guilty of no fault. Neither is the money in his hands *ſine cauſa*, becauſe it goes no farther than to make up to him what he paid for the aſſignment. Comparing this caſe with the former, the matter turns out as it frequently doth in point of equity, *quod potior eſt conditio poſſidentis*. If the ſum be promiſed only, equity relieves from payment: but if it be paid, there is no foundation in equity for depriving the aſſignee of his property. Thus a creditor, after obtaining a partial payment, aſſigned the whole ſum for ſecurity of a debt due by him to the aſſignee. The aſſignee, having got payment of the whole from the debtor ignorant of the former payment, was, upon diſcovery of the fact, ſued for reſtitution *condictione indebiti*. He put his defence upon *l.* 44. *condic. indeb.* inſiſting, that he received no more than what was due to him by the cedent, that *ſuum recepit*, and that he was not bound to reſtore what he got in payment of a juſt debt. The defence accordingly was ſuſtained †. The following deciſion is of the ſame nature. An heir having ignorantly paid a debt to an aſſignee for a valuable conſideration, and ſeveral years thereafter having diſcovered that his anceſtor had paid the debt to the cedent, he inſiſted in a *condictio indebiti* againſt the aſſignee, and the defendant was aſſoilzied ‡. I mention this caſe the

† Stair, Feb. 23. 1681. Earl Mar *contra* Earl Callander.

‡ July 24. 1723. Duke of Argyll *contra* Repreſentatives of Lord Halcraig.

the rather, becauſe, along with the general defence above mentioned that a man cannot be deprived of his property who is not guilty of any fault, a ſeparate defence in equity aroſe from the following circumſtance, that after the erroneous payment the cedent became bankrupt. Laying hold of this circumſtance, the aſſignee argued, That, truſting to the payment, he had neglected to ſecure himſelf by an action of warrandice, which would have been effectual to him while the cedent continued ſolvent; and that the cedent's bankruptcy ought not to affect him but the purſuer, by whoſe miſtake the loſs was occaſioned. What is ſaid above will clearly ſhow, that the following deciſion is erroneous. An executor-creditor having confirmed a debt as due to the deceaſed, and having upon that title obtained payment from the debtor's heir, was decerned to reſtore the money, it being afterwards diſcovered, that the debt had been paid to the original creditor *.

* Stair, Gosford, Jan. 10. 1673, Ramſay *contra* Robertſon.

WE proceed to the caſe where there is really a debt, but where the perſon who pays is not debtor. This caſe ſeems to have divided the writers on the Roman law. To the perſon who thus pays erroneouſly, Pomponius affords a *condictio indebiti* †. Paulus does the ſame ‡. Yet this ſame Paulus in another treatiſe refuſes action ||. The ſolution of this queſtion ſeems not to be difficult. A man pays a debt due by another, thinking by miſtake that he himſelf is debtor. The ſum here delivered to the creditor, operates neceſſarily an extinction of the debt. It is delivered with that intention, and is accepted with the ſame intention. Every circumſtance is here found that is neceſſary to extinguiſh the debt. If the debt then be extinguiſhed, no claim can lie againſt the *quondam* creditor, either in law or equity, for reſtoring the money; and all that remains to the perſon who has thus paid erroneouſly, is an action againſt the true debtor for the ſum paid to the creditor; which hath a good foundation in equity upon the following principle *Quod nemo debet locupletari aliena jactura.*

† l. 19. §. 1. de condic. indeb.

‡ l. 65. §. ult. eod.

|| l. 44. eodem.

SECTION IV.

Where proviſion is made for an expected event that never happens.

IN the former ſection it is endeavoured to be made out, That an engagement made in order to bring about a certain event, is not effectual in equity where it anſwers not that purpoſe. It is ſtill more obvious, that an engagement providing for an expected event that never exiſts, ought not to be made effectual. If a court in this

this caſe compel performance, it muſt be upon words merely independent of will; for proviſion was made for an event that never happened, and not for the event that has happened in place of what was expected. With reſpect to engagements that come under the ſection immediately foregoing, it is obſerved, that equity voids them altogether. And its operation is the ſame with reſpect to the engagements that come under the preſent ſection.

I ſhall proceed to illuſtrate this doctrine by ſeveral curious examples. An old man having no proſpect of iſſue, becauſe he had no intention to marry, ſettles his eſtate upon a near relation. He takes a different thought, marries, and dies ſuddenly, leaving his wife in a ſtate of pregnancy. A male child is born and claims the eſtate. How ſhall a court of equity behave in this nice caſe? Not only the words of the deed, but even the will of the maker, declared at the time, plead in favour of the diſponee; and therefore it is effectual at common law. But then the event comes out different from what the maker had in view. His purpoſe was to prefer the diſponee either as his neareſt or as his favourite relation; but he had no purpoſe to prefer the diſponee to his own children; and had he foreſeen this event, he undoubtedly would have guarded againſt it. A deed therefore of this nature, calculated for an event that has not taken place, ought not to be effectual in equity. There cannot be a better reaſon for voiding it, than that in the event which has happened the granter never intended it ſhould be effectual. I endeavour to confirm this reaſoning by the following reflections. A man's will occaſioned by error or overſight, ought not to be regarded in oppoſition to what evidently would have been his will had all circumſtances been in view. It is no doubt one of the moſt uſeful branches of judicial power, to give the utmoſt effect to the ſettlements of thoſe who are no longer in this world to act for themſelves. A man dies in peace, when he truſts that his deeds will be made effectual, fairly and candidly, according to his intention. But it is neither humanity with reſpect to the deceaſed, nor juſtice with reſpect to the living, to enforce a ſettlement in an event which the maker would avoid with horror were he alive. Equity therefore will never interpoſe in favour of ſuch a deed. And it contributes in the higheſt degree to peace of mind, that a man in his laſt moments can with aſſurance rely upon the juſtice of the laws of his country; entertaining a full conviction, that, after his death, his concerns will be regulated in the ſame manner as if he himſelf had the direction of them.

THE following caſe is preciſely of the ſame nature. A man having lent a ſum and taken a bond for the ſame, payable to himſelf, and to his children *nominatim* in fee, equally and proportionally, with this proviſion, "That in caſe of the deceaſe of any of the "ſaids children, the ſhare of the predeceaſing child ſhall be equally "divided among the ſurvivers;" and one of the children a ſon, having predeceaſed his father, leaving iſſue, the queſtion occurred, Whether his ſhare of the bond did not, in terms of the ſaid clauſe, accrue to the ſurvivers, excluſive of his iſſue. The court was of opinion, that the granter did not intend to exclude the iſſue of any of his predeceaſing children; that he would have provided for ſaid iſſue had the event been foreſeen; and upon this medium they preferred the iſſue of the predeceaſing ſon *. Papinian, the greateſt of the Roman lawyers, gives the ſame opinion in a ſimilar caſe. "Cum avus filium ac nepotem ex altero filio heredes inſtituiſſet, "a nepote petiit, ut *ſi intra annum trigeſimum moreretur, hereditatem* "*patruo ſuo reſtitueret:* nepos, liberis relictis, intra ætatem ſupra-"ſcriptum vita deceſſit: fidei-commiſſi conditionem, conjectura pie-"tatis, reſpondi defeciſſe, quod minus ſcriptum, quam dictum fuerat, "inveniretur †." This opinion, as will be evident from what is above laid down, is founded on ſubſtantial equity. The reaſon however given by our author appears to be ſlight and precarious. He ſuppoſes, that the teſtator declaring his will, had provided for the iſſue of his grandchild, but that this proviſion had been caſually omitted by the writer. This is cutting the Gordian knot inſtead of untying it. For what if this event was really overlooked? Suppoſing this to be the fact, we are left without a reaſon. The ſolid foundation of the opinion is, that a deed ought not to be made effectual in equity, when by overſight it extends to an event that was not in the view of the granter. So much eaſier it is to judge or perceive what is right, than to give a ſolid reaſon for our judgment.

* Nov. 21. 1738. Magiſtrates of Montroſe *contra* Robertſon.

† l. 102. de cond. demonſt. & cauſis.

THE ſame rule holds where the granter is alive, ſuppoſing only he have put it out of his power to alter; for ſo long as the deed is under his own power, he has no occaſion for an equitable relief. When an obligation is ſought to be made effectual in an unexpected event, a court of equity denies its authority. The plaintiff is unjuſt in his demand; and this muſt furniſh an objection to the defendant whoever he be, whether the granter or the heir of the granter. This rule with reſpect to the living ſhall be illuſtrated by ſeveral examples. A diſpoſition of land granted by a man to his wife was ratified by the heir, who in the ſame deed bound himſelf

ſelf to purge incumbrances affecting the land, "upon the view and "in contemplation of ſucceeding to the reſt of the eſtate," as expreſſed in the deed of ratification. The heir being charged by the widow to purge incumbrances, the following reaſon of ſuſpenſion was ſuſtained, that the heir was excluded by an expired appriſing of the whole eſtate, of which he was ignorant when he granted the ratification; and that this fact muſt liberate him from his obligation, to grant which he could have no other motive but his proſpect of enjoying the eſtate *. Equity here juſtly relieved from performance of an obligation in an event which was not foreſeen, and which would have been guarded againſt had it been foreſeen.

* Fountainhall, Dec. 19. 1684, Home. Mar. 1685 Dutcheſs of Lauderdale *contra* Earl of Lauderdale.

No perſon can heſitate about the application of this rule to unforeſeen events, which are brought about, not caſually, but by the perſon in whoſe favours the deed is granted. A man having no male iſſue, ſettled his whole eſtate, real and perſonal, upon his eldeſt daughter, with the following proviſo, That ſhe ſhould pay 10,000 merks to her two ſiſters. The diſpoſition, being granted on death-bed, was challenged by theſe ſiſters, and voided as to the land-eſtate. The queſtion enſued, Whether they who by their challenge got more than the 10,000 merks, had a claim for this ſum over and above. They urged their father's expreſs will. But it being anſwered, That having overturned their father's will, they could not claim upon it; their claim was diſmiſſed †. Here was not only an unexpected event, which would have been guarded againſt had it been foreſeen, but further, the event, repugnant to the will of the granter, was the operation of perſons honoured by the deed, and their ingratitude juſtly barred them from taking any benefit by it. The following is a ſimilar caſe. John Earl of Dundonald, by a bond of entail, made a ſettlement of his land-eſtate on his heirs-male. At the ſame time he ſettled his moveables by will, and alſo executed bonds of proviſion in favour of his daughters. Theſe ſeveral deeds executed *unico contextu*, and remaining with the granter undelivered, made a compleat ſettlement of his eſtate real and perſonal; and proved it to be his intention, that his daughters ſhould take nothing from him but their proviſions. After the Earl's death, it being diſcovered, that ſome of the lands contained in his entail had not been veſted in him, but ſtill remained *in hereditate jacente* of a remote predeceſſor, the daughters as heirs of line laid claim to theſe lands. It was objected, That they could not alſo claim their proviſions, which were given them plainly in the view of being excluded totally from the ſucceſſion; and that a

† Stair, Feb. 1. 1671, Pringle *contra* Pringle.

deed cannot be effectual in an event not foreſeen, and which would have been guarded againſt had it been foreſeen. "The court judged, "That the ladies could not claim their bonds of proviſion and like-"wiſe the lands as heirs of line; but that they might claim one "or other at their option *.

* Feb. 20. 1729. Counteſs of Strathmore and Lady Katharine Cochran *contra* Marquis of Clydſdale and Earl of Dundonald.

FROM the doctrine thus illuſtrated, it may be eſtabliſhed as another rule in equity, That a perſon honoured in a deed, who counteracts the will of the granter declared in the deed, can take no benefit by it.

REFLECTING upon the foregoing doctrine, we perceive a remarkable difference betwixt a donation compleated by a transference of property, and a donation incompleated, which requires an action againſt the donor or his heirs. In the former caſe, no unforeſeen event will be ſufficient to reſtore the property to the donor. There is no principle of law or equity upon which ſuch an action can be founded. In the latter caſe, an unforeſeen event makes it the duty of a court of equity to deny action, and conſequently to render the donation ineffectual, unleſs the granter or his heir be ſo ſcrupulouſly moral, as of their own accord to fulfil it.

DONATIONS *mortis cauſa* are regulated by the ſame principle. A man having a near proſpect of death, executes a deed in favour of a relation or friend. Contrary to expectation he recovers and ſurvives this deed many years. It is no doubt effectual at common law; but the heirs of the granter are relieved in equity, becauſe it was made with a view to an event that did not happen.

SECTION V.

Relief afforded in Equity againſt an obligatory Act of Will procured from a Perſon weak and facile.

THE views of a court of equity are too extenſive to ſuffer its attention to be limited to perſons under age, who have not arrived at maturity of judgment. As many perſons of full age have a natural imbecillity, which lays them open to the crafty and deſigning, equity will relieve ſuch from every unequal bargain that appears to be the reſult of undue influence. The pious care of a court of equity, watchful over the intereſts of individuals, is extended ſtill farther. Men pinched by the narrowneſs and diſorder of their circumſtances, are often forced to yield to oppreſſion, and to ſubmit

to

to unreaſonable and rigorous conditions. Againſt theſe equity always affords relief, where the court can ſquare its decrees by general rules.

BECAUSE of the variety of matter that comes under this ſection, it muſt be ſplit into parts or articles.

ARTICLE I.

Deeds or Obligations procured from Perſons weak and facile.

THE practice of the court of ſeſſion with relation to matters of this kind, has not hitherto been brought under any preciſe rules. The nature of the bargain, equal or unequal, muſt have a great influence; and yet this circumſtance admits not any general rule. It is certainly the ſafeſt courſe to lean to the common law, and to refuſe relief unleſs where the inequality is conſpicuous. In this caſe, a court of equity, however reſerved as to matters that are in a great meaſure arbitrary, cannot avoid lending a helping hand, where the groſs inequality is occaſioned by imbecillity on the one ſide and undue influence on the other.

I begin with deeds granted by perſons under age, who by law are preſumed weak and facile. A reduction upon the head of minority and leſion, unknown in the common law, is an action given by a court of equity, in order to ſet aſide any unequal covenant or deed obtained during the weakneſs and imbecillity of nonage. But a court of equity will never ſet aſide a deed, though granted in nonage, when it proceeds from a virtuous and rational motive, and is ſo far from being an effect of imbecillity, that it would be a laudable deed in a man of full age. I give the following examples. A young man under age, happening to ſucceed to an opulent fortune, and full of gratitude to a near relation who had alimented and educated him when he had nothing of his own, grants to this relation a remuneratory bond for a moderate ſum, and dies ſtill under age. A court of equity will not permit this bond to be voided by the minor's heir upon the head of minority and leſion, becauſe the granting ſuch a bond is a rational act and by no means the effect of imbecillity. Gratitude is a moral duty, and the young man was bound in conſcience to make a grateful return. A court of equity, it is true, ſeldom has an opportunity to inforce the duty of gratitude, becauſe this duty can ſeldom be brought under general rules. But here the grateful return being aſcertained by the young

man himſelf, a court of equity may ſafely interpoſe its authority to make the grateful act effectual. I put another caſe, where the rational motive is not altogether ſo cogent. A man of an opulent fortune dies ſuddenly without making proviſions for his younger children. His eldeſt ſon and heir ſupplies this omiſſion, by giving them ſuitable proviſions, and dies under age. A court of equity would deviate from the ſpirit of its inſtitution, if it ſhould authorize a reduction of theſe proviſions by the granter's heir, upon the head of minority and leſion. The minor, it is true, was not under an explicite obligation to provide his brothers and ſiſters: but it was a rational and laudable deed, which therefore juſtice ought to ſupport.

THE ſame doctrine is applicable to thoſe who have a natural imbecillity which continues for life. A deed granted by ſuch a perſon is not voided by a court of equity, unleſs it appear irrational and the effect of imbecillity. Where this is the caſe, it becomes indeed neceſſary that a court of equity interpoſe, though there can be no general rule for direction.

MANY deciſions have been given on this point that ſeem not to accord quite well together. I ſhall confine myſelf to a few, which may ſerve to illuſtrate the doctrine here inculcated. From a debtor proved to be weak and facile, diſpoſitions being elicited at different times of valuable ſubjects, for ſecurity and payment of trifling patched up claims; and the diſponee having at laſt obtained a total diſcharge of the reverſion for an inconſiderable ſum, the debtor at that time being much pinched in his circumſtances; the court, viewing the facility and weakneſs of the debtor, and the great inequality of the bargain, judged theſe circumſtances ſufficient to preſume undue influence on the part of the creditor, and therefore voided the diſcharge *. Jean Mackie heireſs of Maidland having diſponed ſeveral parcels of land lying about the town of Wigton to perſons who were moſtly inn-keepers there, a reduction was brought upon the head of fraud and circumvention, by her ſiſter next heir in virtue of a ſettlement. It came out upon proof, 1ſt, That Jean Mackie was a habitual drunkard; that ſhe ſold her very cloaths to purchaſe drink, ſcarce leaving herſelf a rag to cover her nakedneſs; and that by bribing her with a few ſhillings, it was in the power of any one to make her accept a bill for a large ſum, or to make her diſpone any part of her land. 2dly, That the diſpoſitions challenged were granted for no adequate cauſe. The court accordingly voided

* Feb. 13. 1729. Maitland *contra* Ferguſon.

voided theſe diſpoſitions *. Upon this caſe I muſt obſerve, that though fraud and circumvention were libelled, which is a common but ſlovenly practice in all reductions of this ſort, we ought not however by this circumſtance to be led into a wrong conception of the point. There was not the leaſt evidence that Jean was impoſed upon or circumvened in any manner. Nor was there any neceſſity for recurring to ſuch artifice: a little drink, or a few ſhillings to purchaſe it, would have tempted her at any time, drunk or ſober, to diſpone any of her ſubjects. And ſhe herſelf being called as a witneſs, deponed, That ſhe granted theſe diſpoſitions freely, knowing well what ſhe did. Where then lies the ground of reduction? Plainly here. It is undoubtedly an immoral act, to take advantage of weak perſons who are incapable to reſiſt certain temptations, thereby to ſtrip them of their goods. To juſtify ſuch an act, the conſent of the perſon injured can have no authority more than the conſent of a child. With reſpect to the end, it is not leſs criminal than theft or robbery: they differ only ſlightly as to the means. Where a facile man of his own accord executes a deed, however fooliſh, in favour of a perſon who has uſed no undue influence by fraud, by impoſition, or by throwing temptations in the way, ſuch a deed is not ſet aſide however great the leſion may be.

* Nov. 24. 1752. Mackie *contra* Maxwell; &c.

In a proceſs at the inſtance of a brother next of kin for voiding a teſtament made by his deceaſed ſiſter in favour of a ſtranger, it came out upon proof, That ſometime before making the teſtament, the teſtatrix, being ſeized with madneſs, was locked up; and that not long after making the teſtament her madneſs recurred, and continued till her death; that at the time of the teſtament ſhe was in a wavering ſtate, ſometimes better, ſometimes worſe; in ſome particulars rational, in others little better than delirious, never perfectly ſound of mind. In particular, it appeared from the proof, that when in better health ſhe expreſſed much affection for her brother the purſuer, but that when the diſeaſe was more upon her, ſhe appeared to have ſome grudge or reſentment at him without any cauſe. The teſtament was holograph, and the ſcroll ſhe copied was furniſhed by the defendant, in whoſe favour the teſtament was made, who had ready acceſs to her at all times while her brother lived at a diſtance. In reaſoning upon this caſe it was yielded, that the woman was capable of making a teſtament, and that the teſtament challenged might be effectual at common law. But then it was urged, That though a teſtament made in the condition of mind above deſcribed, preferring one relation before another, a ſon before a

father, or a ſiſter before a brother, might be ſupported in equity as well as at common law; yet that the teſtament in queſtion, proceeding not from rational views but from a diſeaſed mind occaſioning a cauſeleſs reſentment againſt the purſuer, ought not to be ſupported in equity, being a deed which the teſtatrix herſelf muſt have been aſhamed of had ſhe recovered her health. Weight alſo was laid upon the following circumſtance, That the teſtament was made *remotis arbitris*, and kept a dead ſecret; which ſhowed not only the defendant's undue influence, but alſo his conſciouſneſs, that had the teſtatrix been open to advice ſhe would have been eaſily diverted from making ſo irrational a ſettlement. In this view, it was conſidered as a wrong in him to take from her, in theſe circumſtances, ſuch an irrational deed; and conſequently that he ought to be reſtrained in equity from taking any benefit by it. The teſtament was voided *.

* Jan. 26. 1759, Tulloch *contra* Viſcount of Arbuthnot

ARTICLE II.

Of an Obligation or Deed procured by Fraud.

ALL poſitive loſs or damage that one ſuffers unjuſtly, whether by fraud or other means, is repaired in a court of common law. Fraud that occaſions harm of a leſs direct kind is repaired in a court of equity †. With reſpect again to a covenant or ſingle deed procured by fraud, redreſs cannot be obtained but in a court of equity. For, with reſpect to all engagements in general, a court of common law is not at liberty to take under conſideration the inductive cauſe or motive: it is confined to one particular, *viz.* whether conſent was or was not interpoſed. If there be no conſent, the court muſt pronounce that there is no engagement: if conſent was actually given, there exiſts an obligation to which the common law gives force by whatever means the conſent was obtained. In old Rome accordingly, reſtitution againſt fraud was a branch of the Pretorian law. In England, all covins frauds and deceits, for which there is no remedy at common law, are and were always redreſſed in the court of chancery ‡. And the ſame thing no doubt obtains in Scotland.

† Book I. Part I. Chap. I.

‡ Coke, 4. Inſt. 84.

THE bulk of the matters that come under this article are governed by the following principle of equity, That no man is ſuffered to take benefit by his own fraud. And upon authority of this principle, a court of equity not only refuſes action for performance of an agreement brought about by fraud, but alſo, upon application of

of the perſon defrauded, ſets aſide or voids ſuch agreement. A few examples may be proper, and a few ſhall ſuffice. The following caſe regards the firſt branch, That of refuſing action. *A* having failed in his trade, compounded with his creditors at ſo much *per* pound, to be paid at a time certain. Some of the creditors refuſing to ſtand to the agreement, he brought his bill to compel a ſpecific performance [a]. But it appearing that *A*, to draw in the reſt of the creditors, had underhand made an agreement with ſome of them to pay their whole debts, though they were ſeemingly to accept of the compoſition, which was a deceit upon the reſt of the creditors, the court would not decree the agreement, nor relieve the plaintiff, but diſmiſſed his bill [b].

[a] See Note, foot of page 48.

[b] 2. Vernon 71. Child *contra* Danbridge.

THE following caſes regard the ſecond branch, That of voiding the deed. A bill of exchange fraudfully procured was ſet aſide by a bill in chancery [c]. A policy of inſurance was alſo ſet aſide by a bill in chancery upon fraud [d].

[c] 2. Vern. 123.

[d] 2. Vern. 206.

WHAT if a man have benefit by another's fraud to which he has no acceſſion? In handling this point we muſt make a progreſs through different caſes. The firſt is a mutual contract, which is always made effectual where the parties themſelves are guilty of no wrong. Where fraud produces no inequality, it is nothing: and even ſuppoſing a great inequality, the principle of utility, for the ſake of commerce, ſupports the contract [e]. Second, With reſpect to a gratuitous deed which makes the receiver *locupletior*, equity will not permit ſuch deed to be made effectual where it is brought about by the fraud of a third party. 'Tis ſufficient that a donation be made effectual by law when it proceeds from the deliberate will of the maker; but it can never contribute to the good of ſociety in general, or to the ſatisfaction of individuals, to compel any man to fulfil a gratuitous promiſe which was drawn from him by impoſition. Third, If property be transferred whether in purſuance of a mutual contract or of a donation, the acquirer cannot be deprived of his property though the transference was brought about by the fraud of a third party. For it is a general rule, That no man can be forfeited of his property but by his own conſent or by his own fault. Thus a ſecond diſpoſition of land, though gratuitous, with the firſt infeftment, is preferred before the firſt diſpoſition without infeftment, though for a valuable conſideration. But if by ſuch preference the gratuitous diſponee be made *locupletior aliena jactura*, he may hold the land, but he muſt be ſubjected for the value to his party [f].

[e] See Book 1. Part 2. Chap. 1. Sect. 3.

[f] Forbes, Jan. 24. 1706, Wilſon *contra* Lord Saline.

ARTICLE III.

Extortion.

IT is uſury by ſtatute to bargain with a debtor for more than the legal intereſt; but it is not uſury to take a proper wadſet even where the rent of the land exceeds the intereſt of the money. For the creditor who accepts the rent in place of intereſt, takes upon himſelf the hazard of the inſolvency of the tenants; and this hazard, however ſmall, ſaves from uſury, which conſiſts in ſtipulating a yearly ſum certain above the legal intereſt. But though ſuch a bargain, where the rent exceeds the legal intereſt, is not, ſtrictly ſpeaking, uſury, it is rigorous and oppreſſive, and plainly ſpeaks out the want of credit in the perſon who ſubmits to it. Upon this account, it might be thought a proper ſubject for the interpoſition of equity, did we not reflect that all wadſets are not lucrative. When ſuch is the caſe, what ſhall be the judge's conduct? Muſt he give an opinion upon every wadſet according to its peculiar circumſtances, or ought his judgment to be directed by ſome rule that is applicable to all caſes of the kind? The former opens a door to arbitrary proceedings: the latter fettering a judge, forces him often to do what is materially unjuſt. Here equity, regarding individuals, weighs in the one ſcale, and in the other, utility regarding the whole ſociety. The latter being by far the more weighty conſideration, muſt preponderate. And it is for this reaſon only that wadſets, even the moſt lucrative, are tolerated; for it is not ſafe to give any redreſs in equity.

WE proceed to a different caſe. A debtor ſtanding perſonally bound for payment of the legal intereſt, is compelled to give an additional real ſecurity, by infefting the creditor in certain lands the rent of which is paid in corn, with this proviſo, "That the cre- "ditor if he chuſe to levy the rents for his payment, ſhall not be "ſubjected to an accompt, but ſhall hold the rents in lieu of his in- "tereſt." This, from what is obſerved above, is not uſury; becauſe the value of the corn, however much above the intereſt in common years, may poſſibly fall below it. But as the creditor is in all events ſecure of his intereſt by having his debtor bound perſonally, and may often draw more than his intereſt by levying the rent when corn ſells high, equity will relieve againſt the inequality of this bargain. For here the court may follow a general rule, applicable to all caſes of the kind, and which affords a remedy

equally

equally compleat in every ſingle caſe. The rule is to oblige the creditor to account for every farthing he receives more than his intereſt, and to impute the ſame into his capital. In the caſe of a proper wadſet this rule would be unjuſt, becauſe the creditor has a chance of getting leſs than his intereſt, which ought to be compenſated with ſome benefit beyond the ordinary profit of money. And if the door be once opened to an extraordinary benefit, a preciſe boundary cannot be aſcertained betwixt more and leſs. But the covenant now mentioned is in its very conception oppreſſive, and the creditor may juſtly be deprived of the extraordinary benefit he draws from it, when he is, in all events, ſecure of the legal intereſt.

EVERY benefit taken indirectly by a creditor, for the granting which no impulſive cauſe appears, other than the money lent, will be voided as oppreſſive. Thus an aſſignment to a leaſe was voided, being granted of the ſame date with a bond of borrowed money, and acknowledged to have had no other cauſe *. At the time of granting an heretable bond of corroboration the debtor engaged himſelf by a ſeparate writing, That in caſe he ſhould have occaſion to ſell the land, the creditor ſhould have it for a price named. The price appeared to be equal, and yet the paction was voided, as obtained by oppreſſion †. Upon the ſame medium, a bond for a ſum taken from the principal debtor by his cautioner, as a reward for lending his credit, was voided ‡.

* Fountainhall, June 20. 1696, Sutherland *contra* Sinclair.

† Nov. 30. 1736, Brown *contra* Muir.

‡ Forbes 24. Fountainhall, Jan. 27. 1711, King *contra* Ker.

RIGOROUS creditors go ſometimes differently to work. If they dare not venture upon greater profit directly than is permitted by law, they aim at it indirectly, by ſtipulating ſevere irritancies upon failure of payment. One of the ſtipulations of this ſort, that makes the greateſt figure in our law, is, That if the ſum lent upon a wadſet or pledge be not repaid at the term covenanted, the property of the wadſet or pledge ſhall, *ipſo facto*, be transferred to the creditor in ſatisfaction of the debt. It is this paction, which in the Roman law is named *Lex commiſſoria in pignoribus*, and which in that law ſeems to be totally reprobated ‖. With us it muſt be effectual at common law, becauſe there is no ſtatute againſt it. But then as fundamentally it is of the ſame nature with an irritancy *ob non ſolutum canonem*, and is a hard and rigorous condition, involving the innocent in the ſame puniſhment with the guilty, a court of equity will interpoſe to give relief. And this can be done by following a general rule, that is applicable to all caſes of the kind: the clauſe is ſo conſtructed as to make the tranference of the

‖ l. ult. C. de pactis pignorum.

property to depend on the will of the creditor, in place of transferring it to him *ipſo facto*, perhaps againſt his will. The debtor conſequently is admitted to redeem his pledge by payment at any time, until a declarator be brought by the creditor ſignifying his will to hold the pledge in place of his money. And this proceſs affords the debtor an opportunity to purge his failure by payment; which is all that in fair dealing the creditor can demand. And thus the declarator ſerves a double purpoſe. It declares the creditor's option to take the land in place of his money; and it relieves the debtor from the hardſhip of a penal irritancy, by furniſhing him an opportunity to purge.

HENCE it follows, That the power of redeeming the wadſet or pledge belongs to the debtor, in all caſes, whether the bargain be lucrative or not. A declarator being neceſſary, the property cannot thereby be transferred to the creditor, unleſs the debtor decline to redeem his pledge: and this option he muſt have, whether the creditor have made profit or not by the poſſeſſion of the pledge. Suppoſing a proper wadſet granted, by which the creditor makes more than the intereſt of his money, juſtice requires, that the debtor have a power to redeem even after the term limited, until the equity of redemption be forecloſed by a declarator; and if a declarator be neceſſary, as is proved, the debtor muſt have the ſame privilege, even where the creditor has drawn leſs than his intereſt.

A very material difference however will be obſerved in equity, betwixt a proper wadſet with a *pactum legis commiſſoriæ*, and a proper wadſet where the term of redemption is not limited. In the latter caſe, the parties ſtand upon an equal footing. The creditor may demand his money when he pleaſes; and he has no claim for intereſt, becauſe of his agreement to accept the rents in place of intereſt. The debtor on the other hand may redeem his land when he pleaſes, upon repayment of the ſum borrowed, without being liable to any intereſt becauſe of the ſaid agreement. But the matter turns out differently in equity, where the power of redemption is by paction limited to a certain term. There being no limitation upon the creditor, he may demand his money when he pleaſes; and he has no claim for intereſt even though the rents have fallen ſhort of the intereſt. But if the debtor inſiſt upon the equity of redemption after the term to which the redemption is limited, he muſt, beſides repaying the ſum borrowed, lay his account to make good the intereſt, ſo far as the rent of the land has proved deficient: for impartiality

partiality is eſſential to a court of equity. If the one party be relieved againſt the rigor of a covenant, the other has the ſame claim. After taking the land from the creditor contrary to paction, it would be groſs injuſtice to hold the paction good againſt him, by limiting him to leſs intereſt than he is entitled to by law upon an ordinary loan [a].

FROM what is ſaid it will be clear, That a power of redeeming within a limited time annexed to a proper ſale for an adequate price, cannot be exerciſed after the term limited for the redemption is paſt. The purchaſer, to whom the property was transferred from the beginning, has no occaſion for a declarator; nor doth equity require the time for redemption to be enlarged contrary to paction, in a caſe where an adequate price is given for the ſubject.

MANY other hard and oppreſſive conditions in bonds of borrowed money, invented by rigorous creditors for their own conveniency, without the leaſt regard to humanity or equity, were repreſſed by the act 140. p. 1592. And by the authority of that ſtatute, ſuch pactions may be brought under challenge in courts of common law, againſt which otherwiſe no remedy could be afforded except in a court of equity.

IT was perhaps the ſtatute now mentioned which miſled the court of ſeſſion into an opinion, that it belongs to the legiſlature ſolely to repreſs ſuch rigorous conditions in agreements as are ſtated above. One thing is certain, that immediately after the ſtatute there is an act of ſederunt, November 27. 1592, in which the court "declares, "That in time coming they will judge and decide upon "clauſes irritant contained in contracts, tacks, infeftments, bonds, "and obligations, preciſely according to the words and meaning "of the ſame." Such a reſolution, proper for a court of common law, is inconſiſtent with the nature of a court of equity. The miſtake was ſoon diſcovered. The act of ſederunt wore out of obſervance; and now for a long time the court of ſeſſion has acted as a court of equity in this as well as in other matters.

Pacta contra fidem tabularum nuptialium belong to this article. Such private pactions betwixt the bridegroom and his father, contrary to the faith of the public treaty of marriage, are fraudulent as to

[a] To this caſe is applicable an Engliſh maxim of equity, "That he that demands equity muſt "give equity."

the wife and children, who will be relieved upon the head of fraud. But the huſband cannot be relieved upon that head, becauſe as to him there is no fraud: he is relieved upon the head of extortion. Every ſuch private paction is, by conſtruction of law, extorted from him; and the conſtruction is juſt, conſidering his dependent ſituation: the fear of breaking off the marriage-treaty, leaves him not at liberty to refuſe any hard terms that may be impoſed by his father who ſettles the eſtate upon him. With reſpect to the firſt point, *viz.* the relief granted to the wife and children upon the head of fraud, I ſhall mention a few caſes by way of illuſtration. In a contract of marriage the eſtate was ſettled upon the bridegroom by his father; and the tocher was taken payable to the father, which he accepted for ſatisfaction of the debts he owed and for proviſions to his younger children. The ſon thereafter having privately before the marriage granted bond for a certain ſum to the father, it was voided at the wife's inſtance as *contra fidem tabularum nuptialium* *. Hugh Campbell of Calder, in the marriage-articles of his ſon Sir Alexander, became bound to provide the family-eſtate to him and the heirs-male of the marriage, "free of all charge and burden." He at the ſame time privately obtained from his ſon a promiſe to grant him a faculty of burdening the eſtate with *L.* 2000 *Sterl.* to his younger children; which promiſe Sir Alexander fulfilled after the marriage, by granting the faculty upon a narrative "of the promiſe, "and that the marriage-articles were in compliance with the bride's "friends, that there might be no ſtop to the marriage." In a ſuit againſt the heirs of the marriage for payment of the ſaid ſum at the inſtance of Hugh's younger children in whoſe favours the faculty was exerced, the defendants were aſſoilzied, the deed granting the faculty being *in fraudem pactorum nuptialium* †. The following deciſions relate to the other branch, *viz.* oppreſſion, entitling the huſband himſelf to reduce his own deed. A man, after ſettling his eſtate upon his eldeſt ſon, in that ſon's contract of marriage warranting it to be worth 8000 merks of yearly rent, did, before the marriage, take a diſcharge from his ſon of the ſaid obligation. The eſtate ſettled on the ſon falling ſhort of the rent warranted, he inſiſted in a proceſs againſt his father's other repreſentatives for voiding the diſcharge; and the ſame accordingly was voided as *contra fidem* ‡. A diſcharge of part of the tocher, before the marriage was ſolemnized, was voided as *contra fidem*, at the inſtance of the granter himſelf, becauſe it was taken from him privately without the concurrence of the friends whom he had engaged to aſſiſt him in the marriage-treaty ‖. In England the ſame rule of equity obtains;

* Stair, July 21. 1668, Paton *contra* Paton.

† Feb. 8. 1718. Pollock *contra* Campbell of Calder.

‡ Forbes, Jan. 28. 1709, M'Guffock *contra* Blairs.

‖ Home, Nov. 22. 1716, Viſcount of Arbuthnot *contra* Moriſon of Preſtongrange.

obtains; and it is held, that where the ſon, without privity of the father or parent, treating the match, gives a bond to refund any part of the portion, it is voidable [a]. Thus the bridegroom's mother ſurrenders part of her jointure to enable her ſon to make a ſettlement upon the bride, and the bride's father agrees to give *L.* 3000 portion. The bridegroom, without privity of his mother, gives a bond to the bride's father to pay back *L.* 1000 of the portion at the end of ſeven years. Decreed that the bond ſhall be delivered up as obtained in fraud of the marriage-agreement [b]. On the marriage of Sir Henry Chancey's ſon with Sir Richard Butler's daughter, it was agreed, that the young couple ſhould have ſo much for preſent maintenance. The ſon privately agrees with his father to releaſe part. The agreement was ſet aſide, though the ſon, as was urged, gave nothing but his own, and might diſpoſe of his preſent maintenance as he thought fit [c].

[a] Abridg. Caſes in Equity, Ch. 13. Sect. E. §. 1.

[b] Ibid. §. 2.

[c] Ibid. §. 3.

I promiſe a man a ſum not to rob me. Equity will relieve me by denying action for payment; and by affording me an action for reſtoring the money if paid. The latter action is in the Roman law ſtiled *Condictio ob injuſtam cauſam.* In general, it is extortion for a man to take money to do what is his duty. He holds the money *ſine juſta cauſa,* and he ought in conſcience to reſtore it. Thus it is extortion for a tutor to take a ſum from his pupil's mother for granting a factory to her [d]. And it was found extortion in a man to take a bond from one whoſe curator he had been, before he would deliver up the family writings [e].

[d] Durie, penult. Feb. 1639, Muſſiet *contra* Dog.

[e] Nicolſon, (*turpis cauſa*) July 24. 1634, Roſſie *contra* her curators.

A bargain of hazard with a young heir, to have double or treble the ſum lent after the death of his father, or other contingency, is not always ſet aſide in equity; for then it would be very difficult to deal with an heir in the life of his anceſtor. But if ſuch bargain appear very unreaſonable, it is ſet aſide upon payment of what was really lent with intereſt [f]. One entitled to an eſtate after the death of two tenants for life, takes *L.* 350 to pay *L.* 700 when the lives ſhould fall, and mortgages the eſtate as a ſecurity. Though both the tenants for life died within two years, yet the bargain being equal, no relief was given againſt it [g]. A young man, preſumptive heir to an eſtate tail of *L.* 800 yearly, being caſt off by his father, and deſtitute of all means of livelihood, made an abſolute conveyance of his remainder in tail to *I. S.* and his heirs, upon conſideration of *L.* 30 paid him in money, and a ſecurity for *L.* 20 yearly during the joint lives of him and his father. Though the father

[f] Abridg. Caſes in Equity, Ch. 13. Sect. G. §. 1. Note.

[g] Ibid. Chap. 32. Sect. I. §. 2.

lived ten years after this tranſaction, and though *I. S.* would have loſt his money had the heir died during his father's life, yet the heir was relieved againſt the conveyance *. The plaintiff a young man who had a narrow allowance from his father, on whoſe death a great eſtate was to deſcend to him in tail, having in the year 1675 borrowed *L.* 1000 from the defendant, became bound, in caſe he ſurvived his father, to pay the defendant *L.* 5000 within a month after his father's death, with intereſt thereafter, but that if he did not outlive his father, the money ſhould not be repaid. After the father's death, which happened *anno* 1679, the plaintiff brought his bill upon the head of fraud and extortion, to be relieved of this bargain, upon repayment of the ſum borrowed with intereſt. The cauſe came firſt before the Lord Nottinghame, who decreed the bargain to be effectual. But upon a re-hearing before Lord Chancellor Jeffries, it was inſiſted, That the clauſe freeing the plaintiff from the debt if he died before his father, did not in reaſon difference the caſe from any other bargain made by an heir of entail, to be performed at the death of the tenant in tail; for in all ſuch caſes the debt is loſt of courſe upon predeceaſe of the heir of entail; and therefore that this clauſe, evidently contrived to colour a bargain which to the defendant himſelf muſt have appeared inconſcionable, was in reality a circumſtance againſt him. Though in this caſe there was no proof of fraud, or of any practice uſed to draw the plaintiff into the bargain, yet becauſe of the inconſcionableneſs of the bargain the plaintiff was relieved againſt it †. In the year 1730, the Earl of Peterborough, then Lord Mordaunt, granted bond at London, after the Engliſh form, to Dr. William Abercromby, bearing, "That *L.* 210 was then advanced to his Lordſhip, and "that if he ſhould happen to ſurvive the Earl of Peterborough "his grandfather, he was to pay *L.* 840 to the Doctor two months "after the Earl's death; and if he the Lord Mordaunt died in "the lifetime of the Earl the obligation was to be void." Upon the death of the Earl of Peterborough, which happened about five years after the date of the bond, an action was brought in the court of ſeſſion againſt the Lord Mordaunt, now Earl of Peterborough, for payment; and the court, upon authority of the caſe immediately foregoing, unanimouſly judged, that the bond ſhould only ſubſiſt for the ſum actually borrowed with the intereſt ‡.

* Abridg. Caſes in Equity, Ch. 32. Sect. I. §. 1.

† 2. Vernon 14. Berny *contra* Pitt.

‡ July 13. 1725, Dr. William Abercromby *contra* Earl of Peterborough.

SECTION VI.

Relief afforded in Equity againſt an Engagement occaſioned by Error.

ERROR may be diſtinguiſhed into two kinds. One prevents conſent altogether; as for example, where the purchaſer has one ſubject in view and the vender another. In this caſe there is no bargain; for the parties agree not in the ſame thing. This can only happen in covenants; and as no obligation can ariſe where there is no agreement, ſuch a covenant, if it can be called ſo, is void by the common law; and there is no occaſion for the interpoſition of equity. The other kind is where the error is not ſuch as to prevent conſent, but is a motive only for entering into an engagement. An error of this kind may happen in ſingle deeds as well as in covenants; and as here will or conſent is really interpoſed, the deed muſt be effectual at common law; and the queſtion is, Whether, or how far, there ought to be a relief in equity on account of the error?

A maxim above laid down * will pave the way to the ſolution of this queſtion, *viz.* that one *certans de damno evitando* may lawfully take advantage of an error committed by another; but that juſtice forbids ſuch advantage to be taken in order to make poſitive gain by it. From the inveſtigation of this maxim in the place cited, it will appear that juſtice makes no diſtinction betwixt an error in fact and an error in law. One difference indeed there is, which belongs not to the preſent head, that an error in law is not ſo readily preſumed as an error in fact.

* Part 1. Ch. 2. Sect. 2.

I ſhall begin with ſhowing what influence an error has with relation to grants and other ſingle deeds. Some are purely gratuitous, ſome are founded on an antecedent rational cauſe. Such cauſe muſt in all events ſupport the deed, becauſe juſtice will not permit the maker to ſeek reſtitution againſt a deed which it was rational to grant. And ſuppoſing him to be bound in conſcience only, a court of equity will not void an honeſt deed, though occaſioned by an erroneous motive. A rich man, for example, executes a bond in favour of an indigent relation, moved by an erroneous belief, that this relation had behaved gallantly in a battle where he was not even preſent. Equity will not relieve the granter againſt this deed, being in itſelf rational, and which at any rate is a matter of charity.

The creditor, it is true, gains by the error: but then it cannot be ſaid that he lays hold of this error to hurt the granter of the bond; becauſe a man cannot be ſaid to be hurt by doing an act of generoſity or charity.

EQUITY therefore relieves not from error, except with relation to deeds purely gratuitous; ſuch as donations, legacies, *&c.* nor with relation to theſe, unleſs where the motive or impulſive cauſe of granting is erroneous. An error the diſcovery of which would not have totally prevented the deed, cannot at all be regarded. A gratuitous deed muſt be ſuſtained in whole or voided in whole, becauſe there is not here as in covenants any meaſure of equality or inequality. With reſpect then to a gratuitous deed the impulſive cauſe of which is erroneous, juſtice requires that the granter be relieved from performance. He feels himſelf not bound in conſcience; and the grantee's conſcience dictates to him, that he ought not to make profit by the granter's error. To this purpoſe Papinian. "Falſam cauſam legato non obeſſe, verius eſt: quia ratio legandi "legato non cohæret. Sed plerumque doli exceptio locum habebit, "ſi probetur alias legaturus non fuiſſe *."

* L. 72. § 6. de condition. & demonſtr.

THE opinion here delivered points at a deſtinction to which attention ought to be given, becauſe it has great influence in practice. In deeds merely gratuitous, the cauſe of granting ſpecified in the writing, is not always the true impulſive cauſe. It is common to have a ſecret and a revealed will; and the oſtenſible cauſe mentioned in the deed, differs frequently from the real motive which remains in the breaſt of the granter. Now, if there be no error in the true impulſive cauſe, the deed evidently muſt be effectual, however erroneous the oſtenſible cauſe may be. Hence it appears, that Papinian's rule *Quod ratio legandi legato non cohæret* applies to the oſtenſible cauſe only. And therefore the following texts of the *Corpus Juris* muſt be underſtood to refer to the common law; for they are certainly wrong in point of equity. "Longe magis legato falſa "cauſa adjecta non nocet: veluti cum quis ita dixerit *Titio, quia "me abſente negotia mea curavit, ſtichum do, lego.* Vel ita, *Titio, "quia patrocinio ejus capitali crimine liberatus ſum, ſtichum do, lego.* "Licet enim neque negotia teſtatoris unquam geſſerit Titius, neque "patrocinio ejus liberatus ſit, legatum tamen valet. Sed ſi condi-"tionaliter enunciata fuerit cauſa, aliud juris eſt: veluti hoc modo, "*Titio ſi negotia mea curaverit, fundum meum do, lego* †". Again, "Quod autem juris eſt in falſa demonſtratione, hoc vel magis eſt

† § 31. Inſtit. de Legatis.

in

" in falſa cauſa. Veluti ita, *Titio fundum do, quia negotia mea cura-*
" *vit.* Item, *Fundum Titius filius meus præcipito, quia frater ejus*
" *ex arca tot aureos ſumpſit*: licet enim frater hujus pecuniam ex
" arca non ſumpſit, utile legatum eſt *." Where the cauſe ſpeci-
fied in the deed appears to be the true impulſive cauſe, which ſeems
to be ſuppoſed in the texts now cited, it cannot be doubted that a
relief will be afforded in equity, provided it be made evident, that
the grant owes its exiſtence purely to error. Of this there is one
remarkable inſtance in the Roman law, which is a fine illuſtra-
tion of the doctrine here inculcated. " Pactumeius Androſthenes
" Pactumeiam magnam filiam Pactumeii magni ex aſſe heredem in-
" ſtituerat: eique patrem ejus ſubſtituerat. Pactumeio magno oc-
" ciſo, et rumore perlato, quaſi filia quoque ejus mortua, mutavit
" teſtamentum, Noviumque Rufum heredem inſtituit hac præfatione:
" *Quia heredes quos volui habere mihi, continere non potui, Novius*
" *Rufus heres eſto.* Pactumeia magna ſupplicavit imperatores noſtros;
" et cognitione ſuſcepta, licet modus inſtitutione contineretur, quia
" *falſus* non ſolet obeſſe, tamen ex voluntate teſtantis putavit im-
" perator ei ſubveniendum. Igitur pronunciavit, *hereditatem ad*
" *magnam pertinere, ſed legata ex poſteriore teſtamento eam præſtare*
" *debere, proinde atque ſi in poſterioribus tabulis ipſa fuiſſet heres*
" *ſcripta* †." In this caſe two ſeparate foundations of an equi-
table relief appear in a clear light. Firſt, A ſettlement cauſed by
error. Secondly, A proviſion made by a ſettlement for a figured
event, not for that which really exiſted ‡. Juſtice therefore inter-
poſes againſt ſuch a ſettlement; becauſe to ſuſtain it would be the
ſame as diſinheriting the favourite heir, contrary to the intention
of the maker.

* l. 17. §. 2. de condit. & demonſt.

† l. ult. de hered. inſtit.

‡ See Sect. 4. of the preſent chapter.

WITH reſpect to the legacies contained in the later teſtament,
againſt which no relief was granted, the opinion delivered appears
well founded. For though the teſtator was determined by an
erroneous motive, to make the teſtament ſo far as concerned Rufus
the heir; there was no evidence nor preſumption that he was de-
termined by the ſame error to make the legacies.

THE doctrine of error with reſpect to mutual contracts will be
found to coincide with a doctrine above laid down, *viz.* That a co-
venant is not binding in equity unleſs it ſerve as means to bring
about the end propoſed by it ‖. To make a covenant ſo unhappily
as not to anſwer the purpoſed end, muſt always proceed from error;
and an error of this kind ought to relieve from performance, be-

‖ Sect. 3. of the preſent chapter.

cauſe no man feels himſelf bound in conſcience to fulfil ſuch an engagement. Any other error of leſs importance will not be regarded. I purchaſe, for example, a teleſcope, judging it to be mounted with ſilver; equity will not relieve me from the bargain though the mounting proves to be of a baſer metal. The ſame of a watch, the caſe of which I take to be gold, though it be only ſilver gilt. The ornaments of an inſtrument or machine have no relation to uſe; and if the ſubject purchaſed anſwer its end, the chief view of the purchaſer is obtained. The moſt that could be made of an error as to other circumſtances, is to found a claim in equity for abating the price in order to make the bargain ſtrictly equal; and this was done by the Roman law, which annulls every ſale where the leſion or prejudice is *ultra duplum* *. But a claim of this nature, as prejudicial to commerce, is oppoſed by the principle of utility, and for that reaſon is rejected in moſt commercial countries †.

* L. 2. C. de rescind. vend.

† Sect. 3. of the Principles.

THIS matter may be conſidered in a different light. No man is bound to fulfil a gratuitous deed, to grant which he was moved by an error. The ſame rule may be juſtly applied to covenants; and will bring out the concluſion that is laid down above. It will never be preſumed, that a covenant which anſwers the end propoſed by it is occaſioned by error; and with reſpect to any other error, it will only be preſumed, that the diſcovery would have produced a more equal bargain, but not have prevented it altogether.

To illuſtrate the coincidence of the doctrine about error with that above ſet forth, which conſiders an engagement as a means to an end, I ſhall add a few words about tranſactions. A tranſaction putting an end to any matter in controverſy or diſpute, muſt be effectual. A deed will never be preſumed to proceed from error, where there is a juſt or rational motive for making it. A tranſaction again muſt be effectual in equity, if it anſwer the end propoſed by it, *viz.* to put an end to a law-ſuit, or any matter in controverſy. On the other hand, if a man be moved to make a tranſaction upon ſuppoſition of a claim which has no foundation, an error of this kind will undoubtedly entitle him to be relieved in equity. "Si ex falſis inſtrumentis tranſactiones vel pactiones initæ "fuerint, quamvis jusjurandum de his interpoſitum ſit, etiam civi- "liter falſo revelato, eas retractari præcipimus; ita demum, ut ſi "de pluribus cauſis vel capitulis eædem pactiones ſeu tranſactiones "initæ fuerint, illa tantummodo cauſa vel pars retractetur, que ex "falſo

" falſo inſtrumento compoſito convicta fuerit, aliis capitulis firmis " manentibus *." Here the motive for making the tranſaction muſt have been erroneous. The tranſaction at the ſame time is not a means to the end propoſed by it, which was to extinguiſh a doubtful claim; and here there was no claim.

* l. 42. C. de tranſaction.

ONE indeed may be moved by error to make an unequal tranſaction, which would be corrected by equity did not utility ſtand in the way; for to extinguiſh law-ſuits and controverſies, the great ſource of idleneſs and diſcord, is not advantageous to thoſe only who deal in commerce, but to all. Upon this account no inequality, however great, ought to be regarded in a tranſaction where there is no other cauſe for giving relief. An interpoſition, even in the ſtrongeſt caſe, muſt give encouragement to law-ſuits; for if one obtain redreſs, others will hope for it who have not ſo good a claim. It will have ſtill a worſe effect by making judges arbitrary, who in ſuch a caſe can have no general rule to direct their decrees.

SECTION VII.

Relief afforded againſt a Covenant to that Party whoſe benefit was chiefly intended.

HAVE we in Scotland any action ſimilar to what in the Roman law is termed *Condictio cauſa data cauſa non ſecuta?* Voet upon the title *Condictio cauſa data, &c.* ſays, That the *condictio ex pœnitentia* is not admitted in modern practice, becauſe every paction is now obligatory. It may indeed appear ſingular, that there ſhould be a covenant of ſuch a nature, as to afford on the one ſide an exception founded on *pœnitentia* merely, or change of mind, and not on the other. I incline however to be of opinion, that this privilege hath an equitable foundation in every caſe where the covenant is made chiefly or ſolely for the benefit of one of the contracters, and where of conſequence it is indifferent to the other whether the covenant be performed or not. For example, I promiſe a man a ſum of money to manumit his ſlave. This man is not intereſted to demand performance of the promiſe, becauſe he gains no more by the money than he loſes by the manumiſſion. Therefore, from the nature of the thing, the privilege of repentance ought to be indulged me. The common law however in this caſe affords me no relief, becauſe every covenant is binding by the common law. But it is the province of a court of equity to afford relief where the common law is oppreſſive.

WITH reſpect to covenants in which both parties are intereſted, but the one much, the other little, it appears to me, That the party chiefly intereſted may be relieved in equity, where performance will be prejudicial to him. For example, I bargain with an undertaker to build me a dwelling-houſe for a certain ſum, according to a plan concerted. Before the work is begun, the plan is diſcovered to be faulty in many capital articles, and upon the whole to be ill contrived. Am I bound notwithſtanding to fulfil my covenant with the undertaker? This would be hard, and ſcarce agreeable to the benevolence of juſtice. Suppoſe again, that, upon a more narrow inſpection into my affairs, the ſum agreed on for building is found to be more than I can afford. Or what if in the interim I ſucceed to an eſtate with a good houſe upon it; or am invited by an employment to ſettle elſewhere? If I am relieved the undertaker loſes little, being at liberty to accept of employment from others: but if I be rigidly tied by my engagement, a great intereſt on my ſide is ſacrificed to a ſmall intereſt on his. Covenants intended for the ſupport of ſociety, and to connect individuals by mutual good offices, ought not to be ſtretched to their ruin. The ſole difficulty is, to determine in what caſes a court of equity ſhould interpoſe. This is a delicate point; for it will not be thought that it ought to interpoſe in every covenant that is not ſtrictly equal. It is undoubtedly the ſafeſt courſe to refuſe the aid of the court, unleſs where the circumſtances are ſo ſtrong as to afford a clear conviction of the hardſhip of performance.

SOME covenants are of ſuch a nature, and of ſuch important conſequences, that to each party there is *locus pœnitentiæ* before performance. A contract of marriage is one of theſe; and for that reaſon, a bond granted by a woman to marry the obligee under the penalty of a ſum, will not be effectual in equity *. Upon the ſame principle there is *locus pœnitentiæ* to get free from a verbal bargain about land.

* 2 Vernon 102.

SECTION VIII.

Perſonal Circumſtances that unhinge in Equity legal Rights founded on Will.

SO far of equity founded on the circumſtances of the engagement. The circumſtances handled in the preſent ſection are merely perſonal, relating to the perſons engaged and not to the matter of the engagement. In making effectual a purchaſe, three circumſtances

circumſtances only are regarded by a court of common law, firſt, Whether the vender was proprietor; next, Whether his conſent was interpoſed to transfer the ſubject to the purchaſer; and laſt, Whether delivery was accordingly made. Yet many things may be figured that ought to render ineffectual a purchaſe attended with theſe circumſtances all of them. I give for an example a prior engagement to alien the ſubject to another. Stellionate is a crime puniſhable by ſtatute: and yet, as I have had occaſion to obſerve *, a purchaſer is ſecure by the common law, even where he is *in mala fide* by having notice of the prior engagement. Such wrong is redreſſed in a court of equity; and it is redreſſed in the moſt natural and moſt compleat manner, by annulling the ſecond purchaſe, and reſtoring the firſt purchaſer to his former ſituation. This ſtep in favour of the latter is juſt, being the proper reparation of the wrong done him; and it is not leſs juſt againſt the former, becauſe to him the rule applies, that no man is ſuffered to take benefit by any wrong he himſelf commits. This rule is obviouſly agreeable to the principles of juſtice, and to the common ſenſe of mankind. It holds accordingly in general, That though a ſecond purchaſer, whoſe title is firſt compleated, is at common law preferable to the firſt purchaſer, yet the firſt purchaſer will in equity be preferred, if his right was known to the other before his purchaſe. This ſhort-hand method of preferring the incompleat title, is in effect the ſame with voiding that which is compleat. Thus if *A*, having notice that lands were contracted to be ſold to *B*, purchaſe theſe lands, ſuch purchaſe will be voided in equity †. Again, in a caſe of two purchaſers of the ſame land in Yorkſhire, where the ſecond purchaſer, having notice of the firſt purchaſe, and that it was not regiſtered, went on and purchaſed, and got his purchaſe regiſtered, it was decreed, that the firſt purchaſer was preferable ‡. *A* purchaſed land, having notice of a ſettlement by which it appeared, that the vender was but tenant for life, remainder to his ſons in tail-male, and afterwards ſold the land to *B*, who had no notice of the ſettlement. Upon a bill brought by the eldeſt ſon after the death of his father againſt *A* and *B*, it was decreed, That as to *B* who was purchaſer without notice the bill ſhould be diſmiſſed; but that *A* ſhould account for the purchaſe-money he received, with intereſt from the death of the tenant for life ‖ [a].

* Part 1. Ch. 1. Sect. 1.

† Abridg. Caſes in Equity, Ch. 42. Sect. A. §. 1.

‡ Ibid. Chap. 47 Sect. B. §. 12.

‖ Ibid. Chap. 42. Sect. A. §. 5.

a FROM this and other ſimilar caſes contained in the chancery reports, one would imagine it to be a rule eſtabliſhed in England, that a *bona fide* purchaſer, even from a perſon who has no right, is ſecure in equity. But if ſuch purchaſer be ſecure, it cannot be upon any principle in equity: for equity forfeits no man of his property unleſs he be guilty of ſome wrong; and though

WE next put the caſe, that a man purchaſes a ſubject which he knows to be attached by inchoated execution. The diſponing a ſubject thus legally attached is not, ſtrictly ſpeaking, ſtellionate, becauſe it comes not under the definition of granting double rights. But an endeavour to diſappoint the creditor, by withdrawing the ſubject from his execution, is undoubtedly a moral wrong, to which the purchaſer is acceſſory if he had notice of the execution. And for that reaſon, though the purchaſer's title be firſt compleated, the creditor will be preferred in a court of equity, in order to repair the prejudice done him. Thus an adjudication, if not compleated by infeftment before expiry of the legal, bars not the debtor from aliening the ſubject for a valuable conſideration; and the purchaſer firſt infeft will at common law be preferable to the adjudger. But if the purchaſer when he made his bargain had notice of the adjudication, his acceſſion to the wrong done by his author, entitles the adjudger to a preference in equity. This was decreed in a ſimilar caſe. The porteur of a bill of exchange, having indorſed the ſame for ready money after it was attached by an arreſtment laid in the hands of the acceptor, the arreſter was preferred to the onerous indorſee, for the reaſon above mentioned, that the latter when he took the indorſation was in the knowledge of the arreſtment *.

* June 1728. Competition betwixt Logan and M'Caul.

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

SUCH is the relief that by equity is afforded in favour of the equitable claim againſt a purchaſe made *mala fide*. Let us now ſuppoſe that a purchaſe is fairly made without notice, and that the property is transferred to the purchaſer. I put a ſtrong caſe, that a man

though a *bona fide* purchaſe be an equitable title, the title of the true proprietor claiming his ſubject is not leſs ſo. If a *bona fide* purchaſer from a perſon who has no right be preferred before the former proprietor, this preference can have no other foundation than the common law. That ſuch was once the common law is certain *; and if the decrees above mentioned be juſt, it would appear that the law of England continues the ſame to this day.

* Hiſtorical Law-Tracts, Tract 3.

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

THERE are other perſonal circumſtances that unhinge in equity legal rights founded on will. The more intimate perſonal connections have this effect in certain circumſtances. Let us ſuppoſe that a man having two eſtates, ſettles them upon *A* and *B* his two ſons; and that *A* diſcovering, perhaps accidentally, a defect in his father's title to the eſtate ſettled upon *B*, acquires a preferable title, and claims that eſtate from his brother. This palpable tranſgreſſion not only of gratitude, but of parental affection, was never committed by any perſon with a quiet mind. And yet upon the principles of common law this odious man muſt prevail. But a court of equity will interpoſe. It will not permit *A* to accuſe himſelf, by maintaining that he made the purchaſe for his own behoof. It will hold the purchaſe as made for behoof of his brother, and afford him no claim beyond the ſum expended in making the purchaſe. The maxim, *Quod nemo debet locupletari aliena jactura*, obtains here as well as in many other caſes. The application only is different. In the caſes above mentioned it is made the foundation of an action. In the preſent caſe it anſwers the purpoſe effectually, to make it the foundation of an exception. Thus the relation of blood, when intimate, has the ſame effect in equity with the relation of tutor and

pupil, conſtructing every title purchaſed by the tutor, with relation to his pupil's eſtate, to be purchaſed for behoof of the latter.

I obſerve with pleaſure, that in our practice this doctrine is carried into connections leſs intimate than thoſe above mentioned. I give for an example the relation of ſuperior and vaſſal. When land is held ward, and the ſuperior is under age, a gift of his ward is effectual againſt his vaſſal as well as againſt himſelf. But where the gift of ward was taken for behoof of the ſuperior, it was the opinion of the court that the vaſſal had alſo the benefit thereof upon paying his proportion of the compoſition *. Againſt this opinion it was urged, That the vaſſal behoved to lay his account with being liable to all the caſualties ariſing from the nature of his right; and that there was no reaſon for limiting the ſuperiors claim, more than that of any other donator. But it was anſwered, That the relation betwixt ſuperior and vaſſal is ſuch, as that the ſuperior cannot *bona fide* take advantage againſt his vaſſal of a caſualty occaſioned by his own minority. The ſame rule was applied to a gift of marriage taken for behoof of the ſuperior †. And it appearing that the ſuperior had obtained this gift for alledged good ſervices, without paying any compoſition, the benefit was communicated to the vaſſal without obliging him to pay any ſum ‡.

* Dirleton, Dec. t. 1576, Nicolſon *contra* [illegible]

† Harcaſe, (Ward and Marriage) Jan. 1686, Drummelzier *contra* Murray of Stanhope.

‡ Ibid.

IF a purchaſer of land, diſcovering a defect in the title derived to him from his author, ſecure himſelf by acquiring the preferable title, the common law will not permit him to found upon this new acquired title as a ground of eviction to make his author, bound in abſolute warrandice, liable for the value of the ſubject. The purchaſer is not entitled to the value unleſs the land be actually evicted from him. The vender indeed is bound to ſecure him againſt every ground of eviction. He would have done ſo in the preſent caſe by compounding the claim had he not been prevented by the purchaſer: and, as the caſe now ſtands, the purchaſer cannot have any claim upon the warrandice beyond the ſum he paid for the title. This point is ſtill more clear upon the principle of equity above mentioned. The connection is ſo intimate betwixt a purchaſer and a vender bound in abſolute warrandice, that every tranſaction made by the former, with relation to the ſubject purchaſed, is deemed to be for behoof of both.

BUT now ſuppoſing ſeveral parcels of land to be comprehended under one title-deed. One parcel is ſold with abſolute warrandice; and

and the purchaſer, diſcovering the ſaid title-deed to be imperfect, acquires from a third party a preferable title to the whole parcels. He is no doubt bound to communicate the benefit of this acquiſition to the vender, ſo far as regards the parcel he purchaſed. But there is nothing at common law to bar him from evicting the other parcels from the vender. Whether a relief can be afforded in equity is doubtful. The connection betwixt the parties is pretty intimate. The purchaſer is bound to communicate to the vender the benefit of his acquiſition with reſpect to one parcel, and it is natural to extend the ſame remedy to the whole. One caſe of this nature occurred in the court of ſeſſion. A man having right to ſeveral ſubjects contained in an adjudication, ſold one of them with abſolute warrandice, and the purchaſer having acquired a title preferable to his author's adjudication, claimed the ſubjects that were not diſponed to him. The court refuſed to ſuſtain this claim farther than for the ſum paid for the preferable title *. It is not certain whether this decree was laid upon the principle above mentioned. For what moved ſome of the judges was the danger of permitting a purchaſer acquainted with the title-deeds of his author, to take advantage of his knowledge by picking up preferable titles; and that this as an unfair practice ought to be prohibited.

* Feb. 21. 1741. James Drummond *contra* Brown and Miln.

SECTION IX.

Equity ſometimes interpoſes to ſupport a Deed that is void by the Common Law.

HITHERTO of the operation of equity to rectify or void deeds that are unjuſtly ſupported by common law. In the preſent ſection equity has an operation directly oppoſite, which is, to ſupport deeds that are void at common law. This ſection may be diſtinguiſhed into two articles. Firſt, Deeds void at common law, ſupported wholly in equity. Secondly, Such deeds ſupported in part only.

ARTICLE I.

Deeds void at Common Law, ſupported wholly in Equity.

A MAN makes a ſettlement of his eſtate on his eldeſt ſon in tail, with a power, by deed or will under ſeal, to charge the lands with any ſum not exceeding *L.* 500. He prepares a deed and gets it ingroſſed, by which he appoints the *L.* 500 to his

younger children, but dies before it is ſigned or ſealed; yet this in equity ſhall amount to a good execution of his power, the ſubſtance being performed *. Here there could be no doubt about the man's will, to aſcertain which it was enjoined that it ſhould be exerted by deed or will under ſeal. And the man's ſudden death during the courſe of execution, would have been provided for had it been foreſeen.

* Abridg. Caſes in Equity, Ch. 44. Sect. B. §. 14.

PROVOST ABERDEIN inclining to have a country-ſeat near the town of Aberdeen, and finding that Farquharſon of Invercauld was willing to ſell the lands of Crabſton, within three miles of that town, the parties exchanged miſſive letters, agreeing, That the land ſhould be diſponed to the Provoſt in liferent, and to any of his children he ſhould pleaſe in fee, and that the price ſhould be *L.* 3900 *Sterling*. In proſecution of this agreement, the writings of the eſtate were delivered to a writer, who, by the Provoſt's orders, made out a ſcroll of the diſpoſition to be granted by Invercauld, to the Provoſt in liferent, and to Alexander the only ſon of his ſecond marriage in fee: and the ſcroll being reviſed by the Provoſt, was, upon the 12th June 1756, extended, and diſpatched to Invercauld at his country-ſeat, incloſed in the following letter ſubſcribed by the Provoſt: "This will come along with the "amended diſpoſition, and upon its being delivered to me duly "ſigned, I am to put the bond for the price in the hand of your "doer." Invercauld not being at home, the packet was delivered to his lady. So ſoon as he returned home, which was on the 21ſt of the ſaid month of June, he ſubſcribed the diſpoſition and ſent it with a truſty hand to Aberdeen to be delivered to the Provoſt. But the Provoſt, being taken ſuddenly ill, died on the 24th June, a few hours before the expreſs arrived at Aberdeen; by which means it came that the diſpoſition was not delivered to him, nor the bond for the price granted by him. This unforeſeen accident gave riſe to a queſtion betwixt Robert the Provoſt's eldeſt ſon and heir, and the ſaid Alexander ſon of the ſecond marriage. For Robert it was pleaded, That to compleat the ſaid diſpoſition and to make it an effectual ſettlement of the lands of Crabſton, the Provoſt's acceptance was requiſite; that this act not having been interpoſed, the diſpoſition remained an undelivered evident, not leſs ineffectual than if it had wanted the ſubſcription of the granter; and that, laying aſide this incompleated deed, the Provoſt's claim to the lands of Crabſton, reſting upon the

the mutual miſſives, muſt deſcend to his heir at law, ſeeing none of his children is named in theſe miſſives. It was admitted for Alexander the ſon of the ſecond marriage, That the foregoing concluſion is indeed founded on the ſtrict principles of the common law. But then it was contended, That the common law, in beſtowing the eſtate of Crabſton contrary to the expreſs will of the purchaſer, is ſo far unjuſt; and therefore that it is the duty of the court of ſeſſion, as a court of equity, to correct this injuſtice by making effectual the purchaſer's will. The ſon of the ſecond marriage was accordingly preferred *.

* Dec. 13. 1754. Alex. Aberdein *contra* Robert Aberdein.

ARTICLE II.

Deeds totally void at Common Law ſupported in Part by Equity.

A PRINCIPLE in logics, That will without power cannot operate any effect, applies to law-matters, and is expreſſed as follows, That a deed *ultra vires* is null and void. The common law adheres rigidly to this principle, without diſtinguiſhing whether the deed be totally beyond the power of the maker or in part only. It is conſidered as one deed, and that therefore it muſt be intirely effectual or intirely void. The diſtinction is reſerved to a court of equity, which gives force to every rational deed ſo far as the maker's power extends.

THIS doctrine ſhall be illuſtrated by proper examples. If one having power to make a leaſe for ten years makes it for twenty, this leaſe is in equity good for ten years †. For here the will to give a leaſe for ten years is neceſſarily implied in the leaſe made for twenty; and juſtice therefore requires, that the leaſe ſtand good for ten years, becauſe ſo far will is ſupported by power. A tack ſet by a parſon for more than three years without conſent of the patron, is at common law void totally, but in equity is ſuſtained for the three years ‡. But a college having ſet a perpetual leaſe of their tiends for 50 merks yearly, which tiends were yearly worth 200 merks, and the leaſe being challenged for want of power in the makers, who could not give ſuch a leaſe without an adequate conſideration, it was found totally null, and not ſuſtained for any limited time or higher duty ‖. For a court of equity as well as a court of common law muſt act by general rules. And here there was no rule for aſcertaining either the endurance of the leaſe or the extent of the duty. Further, a court of equity may ſeparate a

† 1. Chancery Caſes 23.

‡ Stair, July 18, 1668, Johnſton *contra* pariſhioners of Hoddam.

‖ Stair, July 23, 1669, Old college of Aberdeen *contra* the town.

deed into its conſtituent parts, and ſupport the maker's will ſo far as he had power: but here the limiting the endurance and augmenting the duty ſo as to correſpond to the power of the makers, would be to frame a new leaſe varying in every article from the will of the makers of the leaſe challenged.

THE ſettlement of an eſtate by marriage-articles upon the heir of the marriage, is not intended to bar the huſband from a ſecond marriage in caſe of his ſurvivance; nor conſequently to bar him from making rational proviſions to the iſſue of that marriage. Let us ſuppoſe now that a man in theſe circumſtances makes exorbitant proviſions to his children of the ſecond marriage, ſettling upon them his whole eſtate, or the greater part. This ſettlement is voidable at common law as a breach of engagement; and it is a matter of delicacy for a court of equity to interpoſe where they have no general rule for direction. Juſtice however demands an interpoſition, that children, to whom the father certainly intended to give all in his power, may not be left intirely deſtitute. Nor would it correſpond to the common ſenſe of mankind, that children ſhould ſuffer as much by exceſs of affection in their father as by his utter neglect. In this caſe therefore the court of ſeſſion interpoſes, by reſtricting the proviſions within rational bounds, ſuch as are conſiſtent with the engagement the father came under in his firſt contract of marriage. The court however never interpoſes but in caſe of neceſſity: for if the common law afford any means for providing the children, theſe means are always preferred. If this obſervation appear obſcure, it will be put in a clear light by the following caſe. Colonel Campbell, by marriage-articles, being bound to provide to the iſſue thereof the ſum of 40,000 merks with the conqueſt, did, by a death-bed ſettlement, appoint his eldeſt ſon to be heir and executor, and left it upon the Duke of Argyll and Earl of Iſlay to name rational proviſions to his younger children. The referees having declined to execute the truſt repoſed in them, the younger children inſiſted to have the ſettlement voided, as contradictory to the marriage-articles. It was pleaded for the heir, That the Colonel had a power to divide the ſpecial ſum and conqueſt, by giving more to one child and leſs to another; and though the whole happens to be ſettled on the eldeſt ſon by accident, not by intention, yet that this inequality, ſuppoſing it to have been intended, is no foundation for voiding the ſettlement totally, but only to bring in the younger children for a moderate ſhare. The court voided the

ſettlement

ſettlement totally; which entitled the children each of them to an equal ſhare of the ſubjects provided to them in the marriage-contract *. The court muſt interpoſe where the rigor of the common law deprives the younger children of all. But in the preſent caſe the ſettlement was void at common law, and the younger children being ſufficiently provided by the contract of marriage, there was no neceſſity for an equitable interpoſition.

* Dec. 22. 1739. Campbell *contra* Campbells.

IT being the profeſſed intention of parties entering into a ſubmiſſion to put an end to all the diſputes that are ſubmitted, arbiters are choſen to fulfil that intention, who are bound by acceptance to execute the commiſſion given them. Hence an award or decreet-arbitral is void at common law, if any article ſubmitted be left undecided, becauſe in that caſe the commiſſion is not executed. This is equitable as well as legal where the ſubmiſſion contains mutual claims, it being groſsly partial to aſcertain the claims of one of the parties, while the other is left to an action. But where the claims are all on one ſide, and ſome of them only determined, equity will ſupport the award, which, ſo far as it goes, is beneficial to the parties; for it is always better to have ſome of their diſputes determined than none at all. This however goes upon the ſuppoſition, that no objection in equity lies againſt the award ſo far as it goes: for if a deed be null at common law, a court of equity will never ſupport it, except ſo far as it is juſt.

WHEN arbiters take upon them to determine articles that are not ſubmitted, the award or decreet-arbitral is at common law void, even with reſpect to the articles ſubmitted; becauſe it is conſidered as one intire act, which muſt be wholly effectual or wholly void. Equity goes more accurately to work. It ſeparates the articles ſubmitted from thoſe not ſubmitted, and ſuſtains the award ſo far as the arbiters were veſted with proper powers. Thus if two ſubmit all actions ſubſiſting at the date of the ſubmiſſion, and the arbitrators award a releaſe of all actions to the time of the award, the award ſhall be good for what is in the ſubmiſſion, and void for the reſidue only †. A decreet-arbitral being challenged, as *ultra vires compromiſſi*, with reſpect to mutual general diſcharges, which were ordered to be granted, though ſome particular claims only were ſubmitted; the decreet-arbitral was ſuſtained ſo far as it related to the articles ſubmitted, and voided only as to the general diſcharges ‡.

† New Abridg. of the Law, vol. 1. pag. 139, 140.

‡ Fountainhall, Dec. 25. 1702, Crawford *contra* Hamilton.

BY the act 80. p. 1579, "all deeds of great importance muſt "be ſubſcribed and ſealed by the parties if they can write, other- "wiſe by two notaries before four witneſſes preſent at the time, "and deſigned by their dwelling-places; and the deeds wanting "theſe formalities ſhall make no faith." With reſpect to this ſtatute, it is fixed by the court of ſeſſion, that a deed is of great importance when what is claimed upon it exceeds in value *L.* 100. And upon the ſtatute thus conſtructed, it has often been diſputed in the court of ſeſſion, Whether a bond for a greater ſum than *L.* 100 ſubſcribed by one notary only and four witneſſes, or two notaries and three witneſſes be void, or whether it ought to be ſuſtained to the extent of *L.* 100. A court of common law, adhering to the words of the ſtatute, will void ſuch bond *in totum*. And ſuch was the practice originally of the court of ſeſſion *. But a court of equity regarding the purpoſe of the legiſlature, which is to make additional checks againſt falſehood in matters of importance, will ſupport ſuch deeds to the extent of *L.* 100. For a deed becomes of ſmall importance when reduced to that ſum, and ought to be ſupported upon the ordinary checks. And accordingly the court of ſeſſion, acting in later times as a court of equity, ſupports ſuch bonds to the extent of *L.* 100 †. But in applying the rules of equity to this caſe, the bond ought to be for a valuable conſideration, or at leaſt be a rational act. For if irrational, it is not entitled to any ſupport from equity.

* Hope, (Obligation) Nov. 29. 1616. Gibſon *contra* Executors of Edgar. Durie, Nov. 13. 1623, Mariſhall *contra* Mariſhall.

† Dictionary of Deciſions, (Indiviſible.)

ORAL evidence is not ſuſtained in Scotland to prove a verbal legacy exceeding *L.* 100; but if it be reſtricted to that ſum, witneſſes are admitted ‡.

‡ Durie, July 7. 1629, Wallace *contra* Muir. Durie, Dec. 1. 1629, Executrix of Scot *contra* Raes.

CHAPTER II.

Injuſtice of Common Law with reſpect to Statutes.

THE power of a court of equity, to redreſs the injuſtice of common law with reſpect to engagements, and with reſpect to ſtatutes, is founded on the ſame principle, *viz.* that there ought to be a remedy for every wrong. It is obſerved above ‖, That the words of a ſtatute coreſpond not always to the will of the legiſlature; and that the things enacted prove not always proper means to anſwer the end in view. Such errors may lead to injuſtice, which cannot be redreſſed by a court of common law, becauſe that court is bound to judge by the letter of the ſtatute. And hence the

‖ Part 1. Ch. 4. in the beginning.

the neceſſity of a court of equity, to redreſs the injuſtice of courts of common law with reſpect to ſtatutes, as well as with reſpect to deeds and covenants.

THIS chapter is naturally diviſible into the following ſections. Firſt, Where the words reach inadvertantly beyond the will of the legiſlature. Secondly, Where the means enacted reach inadvertantly beyond the end or event purpoſed by the legiſlature.

SECTION I.

Where the Words reach inadvertantly beyond the Will of the Legiſlature.

THE act 83. p. 1579, introducing a triennial preſcription of ſhop accompts, *&c.* is directed to the judges, enacting, "That they "ſhall not ſuſtain action after three years," without making any diſtinction betwixt natives and foreigners: nor is their reaſon for making a diſtinction; for every ſtatute concerning preſcription, being calculated to furniſh an exception to the defendant, is an inſtruction to the judge to ſuſtain that exception. And as every perſonal action muſt be brought where the debtor reſides, it follows from the nature of the thing, that the preſcription of his country muſt be the rule. A foreigner therefore who has a claim againſt an inhabitant of this country, ought to lay his account, that his action, which muſt be brought here, will be regulated by the Scotch preſcription. When ſuch is the law of preſcription in general, and of the act 1579 in particular, I cannot avoid condemning the following deciſion. "In a purſuit for an account of drugs, furniſhed "from time to time by a London druggiſt to an Edinburgh apo- "thecary, the court repelled the defence of the triennial preſcrip- "tion, and decreed, That the act of limitation in England, being "the *locus contractus*, muſt be the rule *." This deciſion is erroneous, not only for the reaſon above given, but alſo for a ſeparate reaſon. The Engliſh ſtatute of limitation has no authority with us, otherwiſe than as inferring a preſumption of payment from the delay of bringing an action within ſix years; and this preſumption cannot ariſe where the debtor is abroad, either in Scotland or beyond ſeas.

* Nov. 1731, Fulks *contra* Aikenhead.

IF the preſcription of the country where the debtor dwells be the rule, which every creditor foreign or domeſtic ought to have in view, it follows neceſſarily, That a defendant, to take advantage of the preſcription of the country where the action is brought againſt

him, muſt be able to qualify his reſidence there during the whole courſe of the preſcription. While the debtor reſides in England, for example, or in Holland, the creditor has no reaſon to be upon his guard againſt the Scotch triennial preſcription. And ſuppoſing the action to be brought the next day after the debtor ſettles in Scotland, it would be abſurd that the creditor ſhould be cut out by the triennial preſcription. I illuſtrate this doctrine by a plain caſe. A ſhopkeeper in London furniſhes goods to a man who has his reſidence there. The creditor truſting to the Engliſh ſtatute of limitation, reckons himſelf ſecure if he bring his action within ſix years. But he is forced to bring his action in Scotland to which the debtor retires after three years. It would in this caſe be groſs injuſtice, to ſuſtain the Scotch triennial preſcription as a bar to the action. This never could be the intention of our legiſlature; and in this view the words of the act 1579 are unwarrily too extenſive, forbidding action after three years, without limiting the defence to the caſe where the defendant has been all that time in Scotland. The words of the ſtatute therefore ought to be limited to the caſe now mentioned, which will make them correſpond to juſtice and to the intendment of the legiſlature.

BY the ſtatute 9th Annæ, cap. 13. "The perſon who at one time "loſes the ſum or value of ten pounds *Sterling* at game, and pays "the ſame, ſhall be at liberty within three months to ſue for and "recover the money or goods ſo loſt, with coſts of ſuit. And "in caſe the loſer ſhall not within the time foreſaid really and "*bona fide* bring his action, it ſhall be lawful for any one to ſue "for the ſame and triple value thereof with coſts of ſuit." Here there is no limitation mentioned with reſpect to the popular action: nor ſo far as concerns England is it neceſſary, becauſe, by the Engliſh ſtatute 31ſt Eliz. cap. 5. "no action ſhall be ſuſtained "upon any penal ſtatute made or to be made, unleſs within one "year of the offence."

A limiting clauſe was neceſſary with regard to Scotland only, to which the ſaid ſtatute of Elizabeth reacheth not; and therefore as there is no limitation expreſſed in the act, a court of common law in Scotland muſt ſuſtain the popular action for forty years, contrary evidently to the will of the legiſlature, which never intended a penal ſtatute to be perpetual in Scotland, that in England is circumſcribed within a year. It belongs therefore to a court of equity to limit the words of the ſtatute, ſo as to correſpond to the

will

will of the legiſlature, and conſequently to deny action if not brought within one year of the offence. Hence in the deciſion January 19. 1737, Murray *contra* Cowan, where an action was ſuſtained even after the year for recovering money loſt at play with the triple value, it clearly appears, that the court of ſeſſion acted as a court of common law, and not as a court of equity.

BY the act 5. p. 1695, it is enacted, "That hereafter no man "binding for and with another conjunctly and ſeverally, in any "bond or contract for ſums of money, ſhall be bound longer than "ſeven years after the date of the bond." It appearing to the court, from the nature of the thing and from other clauſes in the ſtatute, that the words are too extenſive, and that the privilege was intended for none but for cautioners upon whoſe faith money is lent, they have for that reaſon been always in uſe to reſtrict the words, and to deny the privilege to other cautioners.

THE act 24. p. 1695, for making effectual the debts of heirs who after three years poſſeſſion die in apparency, is plainly calculated for debts only that are contracted for a valuable conſideration. The act however is expreſſed in ſuch extenſive terms, as to comprehend debts and deeds, gratuitous as well as for a valuable conſideration. The court therefore reſtricting the words to the ſenſe of the ſtatute, never ſuſtain action upon this ſtatute to gratuitous creditors.

THE following is an inſtance from the Roman law with reſpect to the *hereditatis petitio*, of words reaching inadvertently beyond the will of the legiſlator. "Illud quoque quod in oratione Divi "Hadriani eſt, *ut poſt acceptum judicium id actori præſtetur, quod "habiturus eſſet, ſi eo tempore, quo petit, reſtituta eſſet hereditas*, in- "terdum durum eſt: quid enim, ſi poſt litem conteſtatam man- "cipia, aut jumenta, aut pecora deperierint? Damnari debebit ſe- "cundum verba orationis: quia potuit petitor, reſtituta hereditate, "diſtraxiſſe ea. Et hoc juſtum eſſe in ſpecialibus petitionibus "Proculo placet. Caſſius contra ſenſit. In prædonis perſona Pro- "culus recte exiſtimat: in bonæ fidei poſſeſſoribus Caſſius. Nec "enim debet poſſeſſor aut mortalitatem præſtare, aut propter me- "tum hujus periculi temere indefenſum jus ſuum relinquere *."

* l. 40. de hereditatis petitione.

SECTION II.

Where the means enacted reach inadvertantly beyond the End or Event purpoſed by the Legiſlature.

WE have ſeen many examples of the interpoſition of a court of equity to rectify engagements where the means employed go unwarily beyond the end propoſed by them *. When this happens in ſtatutes, there is the ſame reaſon for a rectification; of which take the following examples. By the act 250. p. 1597, "Vaſſals failing to pay their feu-duties for the ſpace of two years, "ſhall forfeit their feu-rights, in the ſame manner as if a clauſe "irritant were engroſſed in the infeftment." This ſtatute, which provides a remedy againſt the obſtinacy or negligence of an undutiful vaſſal, was ſurely never intended to be a trap for the innocent, by forfeiting thoſe who have failed in payment through ignorance or inability. It appears then, that the forfeiture here choſen to enforce the regular payment of feu-duties, and which is juſtly applied againſt the obſtinate, reaches unwarily beyond the end propoſed, by comprehending the innocent. It would be unjuſt to apply it in this caſe, and therefore a court of equity ought to afford a remedy. But by what general rule can a court of equity proceed, in ſeparating thoſe who deſerve to ſuffer by the ſtatute from thoſe who ought to be relieved againſt it? The endleſs variety of circumſtances that muſt be taken under conſideration, are incapable to be reduced under general rules. What then is to be done? There are evidently but two methods. The one is to involve the innocent with the guilty, by adhering ſtrictly to the ſtatute; which is done by courts of common law: the other is to give the ſtatute a milder conſtruction, yet ſuch as may ſufficiently fulfil its intendment and purpoſe; which is done by a court of equity, holding that the delay of payment makes the right voidable only, inſtead of voiding it *ipſo facto*. This conſtruction, which makes it neceſſary for the ſuperior to inſiſt in a declarator of irritancy or forfeiture in order to void the right, gives the vaſſal an opportunity to prevent the forfeiture, by paying up all arrears. By this method, it is true, the guilty may eſcape with the innocent: but this is far more eligible in common juſtice, than that the innocent be puniſhed with the guilty. Nor can the ſuperior juſtly complain of this equitable mitigation, when it reſerves to him all the advantages that were intended by the ſtatute.

* Part 2. Ch. 1. Sect 2.

AN adjudication during the legal is a *pignus prætorium:* and expiry of the legal is held to transfer the property from the debtor to the creditor; preciſely as in a wadſet or mortgage, where the redemption is limited within a day certain. Yet the rule, which with relation to a wadſet, affords an equity of redemption after the ſtipulated term of redemption is paſt *, has never been extended, directly at leaſt, to relieve againſt an expired legal. The reaſon of the difference cannot be, that the term of redemption of an adjudication is aſcertained by ſtatute, and of a wadſet by conſent only: for equity relieves from ſtatutory as well as from conventional forfeitures, of which we have one remarkable inſtance above. Nay, in that inſtance, which is of annulling a feu *ob non ſolutum canonem*, the court uſes more freedom with the ſtatutory irritancy than with that which is founded on conſent: and perhaps not without reaſon; for a man may voluntarily ſubmit to hard conditions, which the law will not impoſe upon him. This ſubject therefore is curious, and merits peculiar attention.

* Part 2. Ch. 1. Sect. 5. Article 2.

IN a poinding of moveables the debtor has not an equity of redemption, becauſe the moveables are transferred to the creditor at a juſt value. The ſame being originally the caſe of an appriſing of land, the legal reverſion of ſeven years introduced by the act 36. p. 1469, was in reality a privilege beſtowed upon the debtor, without any foundation in equity; and therefore equity could not ſupport an extenſion of the reverſion one hour beyond the time limited by the ſtatute. But the nature of an appriſing was totally reverſed by an oppreſſive and diſhoneſt practice of attaching land for payment of debt, without preſerving any meaſure betwixt the debt and the value of the land; by which great portions of land were ſometimes carried off for payment of inconſiderable ſums. An appriſing, as originally conſtituted, was a judicial ſale for a juſt price: but an execution, by which land at random is attached for payment of debt without regarding its value, cannot poſſibly be a ſale for a juſt price. It ought to have been reprobated as without any foundation in law. But indulging it with the utmoſt favour, it would be flagrant injuſtice to hold it for any thing better than a *pignus prætorium*, a ſecurity for payment of debt. Accordingly the act 6. p. 1621 conſiders it in that light, enacting, "That appriſers ſhall "be accountable for their intromiſſions within the legal, firſt in ex"tinction of the intereſt, and thereafter of the capital;" which, in effect is declaring the property to remain with the debtor, as no man is bound to account for rents that are his own. And it is

conſidered in the ſame light by the act 62. p. 1661, "ranking *pari* "*paſſu* with the firſt effectual appriſing, all other appriſings led within "year and day of it." Creditors real or perſonal may be ranked upon a common ſubject *pari paſſu*, or in what order the legiſlature thinks proper; but ſuch ranking is incompatible with the nature of property [a].

AN appriſing then, according to its later model, or in place of it an adjudication, is, during the legal, a *pignus prætorium* only, or a judicial ſecurity for debt. Its nature varies after expiration of the legal; for it is then converted into a title of property, the property of the land being transferred to the creditor in ſatisfaction of his debt, leaving no power of redemption to the *quondam* debtor. Such was originally the operation of an appriſing upon expiry of the legal; and it behoved to have the ſame operation even after its form was altered, becauſe by the ſaid act 1621, the appriſer is made accountable for the rents levied by him during the legal only. If he be not accountable after, it can be for no other reaſon than that the land is held to be his property. Hence it appears that an appriſing, and conſequently an adjudication in its place, reſembles in every article an improper wadſet to which a *pactum legis commiſſoriæ* is annexed.

THUS ſtands an appriſing or adjudication by common and ſtatute law; and we are now to conſider what ought to be the operation of equity. According to the original form of an appriſing, requiring a ſtrict equality betwixt the debt and the value of the land, it was rational and juſt, that the property of the land ſhould be inſtantly transferred to the creditor in ſatisfaction of the debt; but it could no longer be rational or juſt to transfer the property after it became cuſtomary to attach land at random without regarding its extent. The debtor's whole land-eſtate was appriſed, and is now adjudged by every ſingle creditor, however ſmall his debt may be: and therefore to transfer to an appriſer or adjudger the property of the land *ipſo facto*, upon the debtor's failure to make payment within the legal, is a penal irritancy of the ſevereſt kind; for which a remedy ought to be given in equity as well as againſt the *lex commiſſoria in pignoribus*. On the other hand, this *ipſo facto* transference of

[a] STAIR declares poſitively for this doctrine. "An appriſing is truly a *pignus prætorium*: "the debtor is not denuded, but his infeftment ſtands. And if the appriſing be ſatisfied within "the legal, it is extinguiſhed, and the debtor need not be re-inveſted. Therefore he may re- "ceive vaſſals during the legal; and if he die during the legal, his apparent heir, intromitting "with the mails and duties, doth behave himſelf as heir *." * Book 2. Tit. 10 §. 1.

of the property is penal upon the creditor where the land adjudged by him happens to be leſs in value than his debt. In this caſe it would be glaring injuſtice to force the land upon him in place of his debt. Nay more, it is repugnant to firſt principles, that a man ſhould be compelled to take land for his debt, however valuable the land may be. It may be his choice to continue poſſeſſion as creditor after the legal as well as before; and this muſt be underſtood his choice, if he do no act importing the contrary. To relieve the creditor as well as debtor from the foregoing hardſhips, equity ſteers a middle courſe. It admits not the property to be transferred *ipſo facto* upon expiry of the legal. It makes the property to be only transferable at the option of the creditor; and if he chuſe the land in place of his money, it requires him to ſignify his will, by inſiſting in a proceſs declaring that the legal is expired and that the debtor is no longer entitled to redeem the land. This proceſs removes all hardſhips. Land is not impoſed upon the creditor againſt his will. The debtor on the other hand has an opportunity to purge his failure, by making payment; and if he ſuffer a decree to paſs without offering payment, it is juſt that the land for ever ſhould remain with the creditor in ſatisfaction of the debt; for judicial proceedings ought not for ever to be kept in ſuſpenſe. Thus, though at common law the property is transferred *ipſo facto* upon expiry of the legal, yet as this is really a penal irritancy both on the debtor and creditor, a court of equity ought to interpoſe to give redreſs againſt the rigor of the common law; and we find the equitable redreſs to be preciſely the ſame that is given with reſpect to the *lex commiſſoria in pignoribus*. The law is ſo conſtructed as to make the property transferable only, and not to be transferred but by the intervention of a declarator. And the declarator here ſerves the ſame double purpoſe that it ſerves in the *lex commiſſoria in pignoribus*, It is a declaration of the creditor's will to accept the land for his money; and it relieves the debtor from the forfeiture of a penal irritancy, by admitting him to purge at any time before the declaratory decree paſs.

WE proceed to examine how far the practice of the court of ſeſſion concerning appriſings and adjudications is conformable to the principles of equity above laid down. And I muſt prepare my reader before-hand to expect here the ſame wavering and fluctuation betwixt common law and equity, that in the courſe of this work is diſcovered in many other inſtances. I obſerve in the firſt place, That though the court, adhering to common law, has not hitherto

ſuſtained to the debtor an equity of redemption after expiry of the legal, yet that the ſame thing in effect is done indirectly, through the influence of equity. Some pretext or other of informality is always laid hold of to open an expired legal, in order to afford the debtor an opportunity to redeem his land by payment of the debt. And this matter has been carried ſo far, as to open the legal to the effect ſolely of entitling the debtor to make payment, holding the legal as expired with reſpect to other effects, ſuch as that of relieving the creditor from accounting for the rents levied by him, unleſs during the ten years that the legal is current by ſtatute *. Here is a ſtrange jumble betwixt common law and equity. The freeing the creditor from accounting for the rents after the lapſe of the ten years, ſuppoſes the property to have been transferred to him *ipſo facto* by the lapſe of theſe years, which indeed is the caſe by the common law. The admitting again payment, to be made after the ten years, is ſuppoſing, upon principles of equity, that the property is not transferred before a declarator of expiry of the legal; for upon no other ſuppoſition can payment be forced upon the adjudger after the ſtatutory reverſion is expired.

* Forbes, Feb. 2. 1711, Guthrie *contra* Gordon.

IN another particular our practice is ſtill leſs conſiſtent, if poſſible, with any juſt principles. With reſpect to the adjudger, it is juſtly held, that the debt due to him cannot be extinguiſhed without his conſent, and that land cannot be impoſed on him in place of it. And it is univerſally acknowledged to be a conſequence from theſe premiſſes, That, even after the legal is expired, the adjudger muſt have an option, to adhere to his debt or to take the land in place of it. This rule is eſtabliſhed in our preſent practice; and what man is ſo blind as not to perceive what follows from the rule? An adjudger, upon whoſe will it depends to continue to be a creditor or to take himſelf to the land in place of his debt, cannot already be proprietor of that land. Before the property can be transferred to him, he muſt interpoſe his will, which is done by a declarator. So far our practice proceeds upon juſt principles: but whether what is held with reſpect to the debtor be conſiſtent with that practice we next enquire. Adhering ſtrictly to common law, we hold, that the debtor's power of redemption is confined within the legal, that by expiry of the legal he is forfeited *ipſo facto* of his property, and that thereafter he has no power to redeem or to purge his failure of payment. Here we find a flat contradiction among our notions, and an inconſiſtency in our practice. With reſpect to the creditor, the property is not his, till he chuſe to inſiſt in a declarator of expiry

of

of the legal. With reſpect to the debtor again, the property without a declarator is loſt to him *ipſo facto*, by expiry of the legal. Can any man ſay who it is that has the property in the interim? Theſe notions with reſpect to the ſame point cannot be reconciled; but the cauſe of them may be accounted for. In all our practice we find a ſtrong leaning to creditors in oppoſition to their debtors. A propenſity in favour of creditors hath beſtowed upon an appriſer the equitable privilege of an option betwixt the debt and the land upon which it is ſecured. The rigor on the other hand with which debtors are treated, has confined them to the common law and denied them the equitable privilege of purging an irritant clauſe at any time before the door be ſhut againſt them by a declaratory decree.

I proceed to other caſes, where the means enacted reach unwarily beyond the purpoſe of the legiſlature. The act 6. p. 1672 requires, "That all executions of ſummons ſhall bear expreſsly the "names and deſignations of the purſuers and defenders." This regulation was neceſſary in order to connect the execution with the ſummons. For as at that period it was common to write an execution upon a paper apart, bearing a reference in general to the ſummons, in the following manner, "That the parties within ex-"preſſed were lawfully cited, *&c.*" the execution of one ſummons might be applied to any other, ſo as to become legal evidence of a citation that was never given. But as there can be no opportunity for this abuſe when an execution is writ upon the back of the ſummons, it belongs to a court of equity to relieve from the enacting clauſe ſo far as it goes beyond the end propoſed by the legiſlature; which is done by declaring, that it is not neceſſary to name the purſuers and defenders when the execution is writ on the back of the ſummons *.

* Feb. 20. 1753. Sir William Dunbar *contra* John Macleod younger of Macleod.

By the 34th & 35th Henry VIII. cap. 5. §. 14. it is declared, That a will or teſtament made of any manors, lands, *&c.* by a feme covert ſhall not be effectual in law. This could not be intended to render ineffectual a will made by a woman whoſe huſband is baniſhed for life by act of parliament. And accordingly ſuch will was ſuſtained †.

† 2. Vernon 107.

The ſtatutes introducing the poſitive and negative preſcriptions, have for their object public utility; and conſequently when any defect in theſe ſtatutes is ſupplied by a court of equity, this muſt alſo

be upon the ſame principle. This leads me, according to the eſtabliſhed diſtribution, to handle that ſubject in the next book, which contains the proceedings of a court of equity acting upon the principle of utility. But to mitigate theſe ſtatutes with reſpect to articles that happen to be oppreſſive or unjuſt, is a branch of the preſent ſubject; and to examples of this kind I therefore proceed. The common law, which limits not actions within any time, affords great opportunity for unjuſt claims, which, however ill founded originally, are brought ſo late as to be ſecure againſt all detection. It is not wrong in the common law to ſuſtain an old claim, for a claim may be very old and yet very juſt. But then to ſuſtain claims without any limitation of time, muſt obviouſly give great ſcope to fraud oppreſſion and forgery, and for that reaſon public utility required a limitation. Upon that principle the ſtatutes 1469 and 1474 were made, denying action upon debts and other claims beyond forty years. A court of common law proceeding upon theſe ſtatutes, cannot ſuſtain action after forty years, even where a claim is evidently well founded, as where it is proved to be ſo by referring it to the oath of the defendant. In this caſe the means enacted go evidently beyond the end. The legiſlature had no other purpoſe than to ſecure againſt ſuſpicious and ill founded claims, not to cut off any juſt debt; and in this view nothing farther could be intended than to introduce a preſumption againſt every claim brought after forty years; reſerving to the purſuer to bring poſitive evidence of its being a ſubſiſting claim and juſtly due. Yet the court of ſeſſion, acting as a court of common law, did in one caſe refuſe to ſuſtain action after the forty years, though the debt was offered to be proved by the oath of the defendant *. In another point again, they act properly as a court of equity. Perſons under age are relieved from the effect of theſe ſtatutes, for an extreme good reaſon, that no preſumption can lie againſt a creditor while under age for delaying to bring his action.

* Fountainhall, Dec. 7. 1703, Napier *contra* Campbell.

THE ſame conſtruction in equity is given to the Engliſh act of limitation concerning perſonal actions. For it is held, That a bare acknowledgment of the debt is ſufficient to bar the limitation †; importing, that the legiſlature intended not to extinguiſh a juſt debt, but only to introduce a preſumption of payment. But with this doctrine I cannot reconcile what ſeems to be eſtabliſhed in the Engliſh courts of equity, "That if a man by will or deed ſubject "his land to the payment of his debts, debts barred by the ſtatute "of limitations ſhall be paid; for they are debts in equity, and the "ſtatute

† Abridg. of the Law, vol. III. p. 517.

" ſtatute hath not extinguiſhed the obligation, though it hath " taken away the remedy *." This differs widely from the equitable conſtruction of the ſtatute. For if its intendment be to preſume ſuch debts paid, they cannot even in equity be conſidered as debts, unleſs the ſtatutory preſumption be removed by contrary evidence. The following caſe proceeds upon the ſame miſapprehenſion of the ſtatute: " It hath alſo been ruled in equity, that if " a man has a debt due to him by note, or a book-debt, and has " made no demand of it for ſix years, ſo that he is barred by the " ſtatute of limitations; yet if the debtor or his executor, after " the ſix years, puts out an advertiſement in the Gazette, or any " other News Paper, That all perſons who have any debts owing to " them, may apply to ſuch a place, and that they ſhall be paid; " this, though general, (and therefore might be intended of legal " ſubſiſting debts only) yet amounts to ſuch an acknowledgment " of that debt which was barred, as will revive the right and " bring it out of the ſtatute again †."

* Abridg. of the Law, vol. III. p. 518.

† Ibid.

To the caſe firſt mentioned of referring a debt to the defendant's oath, a maxim in the law of England obviouſly applies, " That a " caſe out of the miſchief, is out of the meaning of the law, " though it be within the letter." A claim, of whatever age, referred to the defendant's oath, is plainly out of the miſchief intended to be remedied by the foregoing ſtatutes; and therefore ought not to be regulated by the words, which in this caſe go beyond the end propoſed. Coke ‡ illuſtrates this maxim by the following example. The common law of England ſuffered goods taken by diſtreſs to be driven where the creditor pleaſed, which was miſchievous, becauſe the tenant, who muſt give his cattle ſuſtenance, could have no knowledge where they were. This miſchief was remedied by ſtatute 3. Edward I. cap 16. enacting, " That goods taken by diſtreſs ſhall not be carried out of the " ſhire where they are taken." Yet, ſays our author, if the tenancy be in one county and the manor in another, the lord may drive the diſtreſs to his manor, contrary to the words of the ſtatute; for the tenant, by doing of ſuit and ſervice to the manor, is preſumed to know what is done there.

‡ 2. Inſtit. 106.

EQUITY is alſo applied to mitigate the rigor of ſtatute-law with reſpect to evidence. By the Engliſh ſtatute of frauds and perjuries ‖, it is enacted, " That all leaſes, eſtates, intereſts of freehold or

‖ 29. Ch. 2. cap. 3.

" terms of years, made or created by parole and not put in writing, " ſhall have the force and effect of leaſes or eſtates at will only." In the conſtruction of this ſtatute the following point was reſolved, That if there be a parole agreement for the purchaſe of land, and that in a bill brought for a ſpecific execution the ſubſtance of the agreement be ſet forth in the bill, and confeſſed in the defendant's anſwer, the court will decree a ſpecific execution, becauſe in this caſe there is no danger of perjury, which was the only thing the ſtatute intended to prevent *. Again, whatever evidence may be required by law, yet it would be unjuſt to ſuffer any man to take advantage of the defect of evidence, when the defect is occaſioned by his own fraud. And accordingly there are many inſtances in the Engliſh law-books, where a parole agreement intended to be reduced in writing, but prevented by fraud, has been decreed in equity, notwithſtanding the ſtatute of frauds and perjuries. Thus upon a marriage-treaty, inſtructions given by the huſband to draw a ſettlement are by him privately countermanded: after which he draws in the woman, upon the faith of the ſettlement, to marry him. The parole agreement will be decreed in equity †.

* Abridg. Caſes in Equity, Ch. 4. Sect. B. §. 3.

† Ibid. §. 4.

STATUTORY irritancies in an entail are handled Chapter I. of this Part, Sect. II.

CHAPTER III.

Injuſtice of Common Law with reſpect to Actions at Law.

A COURT of common law conſiders only whether the action be founded in law. A court of equity adds another conſideration, whether it be juſt or fair in the purſuer to inſiſt in the action. If not, the court will lay hold of that circumſtance as a perſonal objection againſt the purſuer. This is the meaning of the *generalis exceptio doli*, ſo frequent among the Roman writers; *dolus* in the Roman law being a generic term, comprehending every act of injuſtice or of unfair dealing. Of theſe perſonal objections there are ſuch variety, that deſpairing to bring them into any regular form, I muſt be ſatisfied to throw looſely together a few of the moſt noted examples that have occurred in our practice.

IF a gratuitous diſpoſition be granted with a proviſo that the diſponee ſhall perform a certain fact, the diſponee's acceptance of the

the deed, importing his conſent to every clauſe in it, ſubjects him at common law to performance. But let us ſuppoſe a caſe where this circumſtance cannot occur. A man, for example, makes a ſettlement of his eſtate, burdening his heir with a legacy to certain perſons named; and afterwards in a ſeparate deed appoints theſe perſons to be tutors to his children. Here the legacy is given pure, without any condition; and therefore, conſidering the terms of the legacy ſingly, it is due whether the legatees undertake the tutory or not. But every one muſt be ſenſible, that to decline the truſt repoſed in them is an act of ingratitude, and that theſe gentlemen are in conſcience bound either to undertake the tutory or to ſurrender the legacy. If therefore they be ſo unjuſt as to claim the legacy without undertaking the truſt, the *generalis exceptio doli* will be ſuſtained againſt them; or, to talk in the language of our law, they will be removed from claiming *perſonali objectione**.

* See Dirleton, Jun. 16. 1675, Thomſon *contra* Ogilvie.

MANY inſtances like the foregoing are found in the Roman law. A *libertus* claiming a legacy left him by his patron, will be removed *perſonali objectione* if he have been guilty of ingratitude to his patron; even where the act of ingratitude is otherways laudable, as where after the death of his patron the *libertus* gave information againſt him as a trader in prohibited goods †. But the connection betwixt a maſter and his manumitted ſlave was ſo intimate, as to make a ſtep of this nature be reckoned highly ingrateful. Again, a legatee who conceals a teſtament in order to diſappoint the effect of it, is for his ingratitude to the teſtator removed *perſonali objectione* from claiming his legacy ‡. I ſhall add but one other example. "Meminiſſe autem oportebit, eum, qui teſtamentum in-
" officioſum improbe dixit & non obtinuit, id quod in teſtamento
" accepit perdere, et id fiſco vindicari quaſi indigno ablatum. Sed
" ei demum aufertur quod teſtamento datum eſt, qui uſque ad
" ſententiam judicum, lite improba, perſeveraverit: cæterum, ſi
" ante ſententiam deſtitit vel deceſſit, non ei aufertur quod da-
" tum eſt ‖."

† l. 1. de his quæ ut indign.

‡ l. 25. C. de Legatis.

‖ l. 8. §. 14. de inoff. teſt.

WHEN a man is thus deprived of a good claim by a perſonal objection, the queſtion is, what becomes of the ſubject? whether doth it accrue to the fiſk as *bona vacantia*, or is it left with the perſon who is ſubjected to the claim? Ulpian, in the text laſt cited, gives his opinion for the fiſk; probably upon the ground above ſuggeſted, that the legacy becomes a ſubject without a proprietor; and

if no perſon can claim, it muſt go to the fiſk. Paulus takes the other ſide. "Amittere id quod teſtamento meruit, et eum, placuit, "qui tutor datus excuſavit ſe a tutela. Sed hoc legatum, quod "tutori denegatur, non ad fiſcum transfertur, ſed filio relinquitur "cujus utilitates deſertæ ſunt *." And this ſeems to be the more ſolid opinion. Though the legatee be deprived *perſonali objectione* from claiming, he ſtill is in law proprietor, and the ſubject cannot be reckoned *inter bona vacantia*. This removes the crown; and what follows is natural and ſimple, that the legacy muſt remain with the heir, ſince it cannot be claimed by the legatee. Nay, it ſeems equitable that the legacy ſhould remain with the heir, as a *ſolatium* for that diſtreſs of mind which even an heir muſt feel, when he is treated ingratefully by thoſe who have received favours from his anceſtor. In our law accordingly the legacy is allowed to remain with the heir. Equity deprives the wrong-doer of his legacy, and equity beſtows it on the family who are burdened with it.

* l. 5. 9. 2. de his quæ ut indign.

IN a ranking, a creditor craved preference for his debt out of the debtor's eſcheat, which he alledged was fallen by a denunciation upon his horning. Anſwered, That the eſcheat was not fallen, becauſe the debtor was relaxed; and though the relaxation was informal, yet the creditor had conſented to it. The court ſuſtained the creditor's conſent to the relaxation relevant to exclude him *perſonali objectione* from challenging the ſame †. In a competition betwixt two annualrenters, the firſt of whom was bound to the ſecond as cautioner, the firſt claimed preference; and it was objected by the other, That however preferable in itſelf the cautioner's infeftment might be, it was unjuſt however in him to exclude a creditor, whoſe debt he was bound to pay. The court refuſed to ſuſtain this perſonal objection; leaving the ſecond annualrenter to inſiſt perſonally againſt the firſt as cautioner ‡. This was acting as a court of common law, not as a court of equity.

† Forbes, Feb. 10. 1710, Wallace *contra* creditors of Spot.

‡ Forbes, June 28. 1711, Baird *contra* Mortimer.

A perſonal objection may lie againſt a defendant pleading an exception, as well as againſt a plaintiff inſiſting in an action. A man, contrary to conſcience, is not allowed to make a defence more than to make a claim. A defendant being ſued for his tack-duty, ſwore that he had no tack. Being afterwards ſued to remove, he produced a current tack. He was barred *perſonali objectione* from founding any defence upon this tack ‖. A cautioner for a curator being ſued for a ſum levied by the curator as ſuch, moved the following

‖ Maitland, Dec. 7. 1563, Lord Innerquharratie *contra* Ogilvies.

lowing objection, That the curator had no right by reaſon of a prior act of curatry ſtanding unreduced. It being againſt conſcience for a man to evade thus the performance of his own engagement, he was repelled *perſonali objectione* from pleading the defence [a]. A perſon interdicted inſiſting in an action againſt his interdictor for looſing the interdiction, it was objected, That the purſuer being denunced rebel upon a horning, was barred thereby from appearing in court either as a purſuer or defendant. The court would not allow this objection, though good in itſelf, to be moved on the part of the defendant, whoſe duty it was as interdictor, to take care of the purſuer, and even to free him from the interdiction, unleſs he could alledge a juſt reaſon for denying the purſuer that privilege [b]. A verbal promiſe to diſpone land is not made effectual in equity, which would be flying in the face of the common law, giving *locus pœnitentiæ* unleſs writ be interpoſed. But where an action to compel performance was laid upon a diſpoſition the defendant was barred *perſonali objectione* from objecting a nullity, becauſe he had verbally agreed to ratify the diſpoſition [c]. A court of equity declining to ſuſtain action upon a verbal promiſe to diſpone land, acts not unjuſtly; but only refuſes to lend its authority to a juſt claim that is rejected by the common law. But it is repugnant to the very nature of a court to authorize either an unjuſt claim or an unjuſt defence, which would be a poſitive act of injuſtice. A bill of exchange granted by an advocate to his client, was objected to by the former becauſe it bore a penalty. The defendant was barred *perſonali objectione* from inſiſting upon this nullity [d].

[a] Durie, Dec. 5. 1627, Rollock *contra* Croſbies.

[b] Haddington, March 3. 1607, Earl Athole *contra* Edzel

[c] Feb. 22. 1745. Chriſties *contra* Chriſtie.

[d] Nov. 26. 1743, Garden of Troup *contra* Mr. Thomas Rigg Advocate.

THE firſt thing conſidered in a proceſs is the purſuer's title; and where it appears inſufficient, it is the province of the judge to refuſe proceſs, even though no objection be made by the defendant. Hence it follows, that the defendant cannot be removed *perſonali objectione* from urging any objection againſt the purſuer's title. Thus againſt a poinding of the ground which cannot proceed but upon an infeftment, it being objected, That the purſuer was not infeft; and it being anſwered, That the defendant, who was alſo ſuperior, had been charged to infeft the purſuer, and that he could not move an objection which aroſe from his own fault; the court judged, That no perſonal objection againſt the defendant can ſupply the want of a title; that a perſonal objection may bar a defendant from pleading an exception, but cannot ſupport an action without a title [e].

[e] Durie, June 20. 1627, Laird Touch *contra* Laird Hardies-mill. Stair, Gosford, June 25. 1668, Heriot *contra* town of Edinburgh.

CHAPTER IV.

Injuſtice of Common Law in making Debts effectual.

IN making debts effectual by payment, we find daily inſtances of oppreſſion, ſometimes by the creditor, ſometimes by the debtor, authorized by one or other general rule of common law, which happens to be unjuſt when applied to ſome ſingular caſe out of the reaſon of the rule. In every caſe of this kind, it is the duty of a court of equity, to interpoſe and to relieve from the oppreſſion. To truſt this power with ſome court is evidently a matter of neceſſity, for otherwiſe wrong would be authorized without remedy. Such oppreſſion appears in different ſhapes and in different circumſtances, which I ſhall endeavour to diſtinguiſh by arranging them under different heads; beginning with the oppreſſion a creditor may commit under protection of common law, and then proceeding to what may be committed by a debtor.

SECTION I.

Injuſtice of Common Law with reſpect to Compenſation.

BY the common law of this land, when a debtor is ſued for payment it will be no defence that the plaintiff owes him an equivalent ſum. This ſum he may demand in a ſeparate action; but in the mean time, if he make not payment of the ſum demanded from him, a decree will iſſue againſt him to be followed with execution. Now this is rigorous, or rather unjuſt. For, with reſpect to the purſuer or plaintiff, unleſs he mean to oppreſs, he cannot wiſh better payment than to be diſcharged of the debt he owes the defendant. And, with reſpect to the defendant, it is rank injuſtice to ſubject him to the moſt rigorous execution for failing to pay a debt, when poſſibly the only means he has for payment is that very ſum which the purſuer detains from him. To that act of injuſtice however the common law lends its authority, by a general rule empowering every creditor to proceed to execution when his debtor fails to make payment. But that rule, however juſt in the main, was never intended to take place in the preſent caſe; and therefore a court of equity remedies an act of injuſtice occaſioned by a too extenſive application of the rule beyond the reaſon and aim of the law. The remedy is applied in the ſimpleſt and moſt effectual manner, by ordering an accompt in place of payment,

ment, and the one debt to be hit off againſt the other. This is termed the privilege of compenſation, which always furniſhes a good defence againſt payment where there is a counter-claim. Compenſation accordingly was in old Rome ſuſtained before the Pretor, and in England has long been received in courts of equity. In Scotland indeed it has the authority of a ſtatute *; which it ſeems was thought neceſſary, becauſe at that period the court of ſeſſion was probably not underſtood to be a court of equity †. But perhaps there was a further view, *viz.* to introduce compenſation as a defence into courts of common law; and with that preciſe view did compenſation lately obtain the authority of a ſtatute in England ‡. The defence of compenſation was always admitted in the court of chancery; but by authority of the ſtatute, it is now alſo admitted in courts of common law.

* Act 143. p. 1592.

† See the Introduction.

‡ 2. Geo. II. cap. 22. §. 11.

IN applying the foregoing ſtatute introducing compenſation, a court of equity hath more extenſive powers than a court of common law. A court of common law is tied to the letter of the ſtatute, and has no privilege to enquire into its motive. But the court of ſeſſion as a court of equity, may ſupply its defects and correct its exceſſes. Yet I know not by what miſapprehenſion, the court of ſeſſion with regard to this ſtatute hath always conſidered itſelf as a court of common law, and not as a court of equity; a miſapprehenſion the leſs excuſable conſidering the ſubject of the ſtatute, a matter of equity which the court itſelf could have introduced had the ſtatute never been made. I ſhall make this reflection plain, by entering upon particulars. The ſtatute authoriſes compenſation to be proponed in the original proceſs only by way of exception, and gives no authority to propone it whether in the reduction or ſuſpenſion of a decree. The words are, "That "a liquid debt be admitted by way of exception before decreet by "all judges, but not in a ſuſpenſion or reduction of the decreet." This limitation is proper in two views. The firſt is, that if a defendant omit or forbear to plead compenſation in the original proceſs, the judgment is notwithſtanding juſt; and the forbearing or omitting to uſe a privilege given by law, is not a good ground for challenging a judgment whether in a ſuſpenſion or reduction. The other view is, that it would afford too great ſcope for litigioſity were defendants indulged to reſerve their articles of compenſation as a ground for ſuſpenſion or reduction. Attending to theſe views, both of them, a judgment purely in abſence ought not to bar compenſation, becauſe judgments are often pronounced when the party

hath not an opportunity to appear. For that reaſon, a party who is reſtored to his defences in a ſuſpenſion, upon ſhowing that his abſence was not contumacious, ought to be at liberty to plead every defence, whether in equity or at common law. And yet our judges conſtantly reject compenſation when pleaded in a ſuſpenſion of a decree in abſence, though that caſe comes not under the reaſon and motive of the ſtatute. The ſtatute, in my apprehenſion, admits of ſtill greater latitude, which is, that after a decree *in foro* is ſuſpended for any good reaſon, compenſation may be received in diſcuſſing the ſuſpenſion; for the ſtatute goes no farther than to prohibit a decree to be ſuſpended merely upon compenſation. But when a cauſe is brought under review by ſuſpenſion upon iniquity committed in the original proceſs, it can have no bad effect to admit compenſation. On the contrary, it is beneficial to both by preventing a new law-ſuit.

IF the deciſions of the court of ſeſſion upon the different articles of this ſtatute ſhow a ſlaviſh dependance on the common law, the deciſions which regulate caſes of compenſation not provided for by the ſtatute breathe a freer ſpirit, being governed by true principles of equity. I proceed to examine theſe caſes. The firſt that preſents itſelf, is where, of the two concurring debts, one only bears intereſt. What ſhall be the effect of compenſation in that caſe? Shall the principal and intereſt be brought down to the time of pleading compenſation, and be ſet off at that period againſt the other debt which bears not intereſt? Or ſhall the accompt be inſtituted as at the time of the concourſe, as if from that period intereſt were no longer due? Equity evidently concludes for the latter. For it conſiders, that each had the uſe of the other's money; and therefore that it is not juſt the one ſhould have a claim for intereſt while the other has none. Intereſt is a premium for the uſe of money, and my creditor in effect gets that premium by having from me the uſe of an equivalent ſum. And accordingly it is the conſtant practice of the court to ſtay the courſe of intereſt from the time the two debts concur. But this obviouſly can only hold where the compenſation is mutual. A debtor who cannot retain by compenſation is ſuppoſed to have the money always ready to meet a demand. In this ſituation it would be unjuſt to oblige him to pay *5 per cent.* premium, or any premium, for money which muſt lie dead in his hand without being put to any uſe; and it would be equally unjuſt to make the claim for that money operate *retro*, in order to cut down a debt due to him bearing intereſt, which,

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in effect, is making the dead ſum bear intereſt againſt him. Example: A tackſman lends a conſiderable ſum to his landlord, agreeing in the bond to ſuſpend the payment during the currency of the tack, but ſtipulating to himſelf a power to retain the intereſt annually out of the tack-duty. The tackſman makes punctual payment of the ſurplus tack-duties, ſo often as demanded: but by ſome diſorder in the landlord's affairs a conſiderable arrear is allowed to remain in the hands of the tackſman. The landlord endeavouring to make the tack-duties in arrear operate *retro* againſt the bonded debt, ſo as to extinguiſh ſome part of the principal annually, the *retro*-operation was not admitted in this caſe; becauſe the payment of the bonded debt being ſuſpended during the currency of the tack, the tackſman had no ground of compenſation to entitle him to retain and make profit of the ſurplus tack-duties in arrear; which therefore he behoved to have in his pocket ready to be paid on demand; and for that reaſon it would be unjuſt to make him pay intereſt for this ſum; or, which comes to the ſame, it would be unjuſt to make it operate *retro*, by applying it annually in extinction of the bonded debt bearing intereſt *.

* July 21. 1756, Campbell *contra* Carruthers.

IN applying compenſation both claims muſt be pure; for it is not equitable to delay paying a debt of which the term is paſt, upon pretext of a counter-claim that cannot at preſent be demanded, or that is uncertain as to its extent. But what if in this caſe the purſuer be bankrupt, or *vergens ad inopiam?* The common law authorizes a bankrupt to inſiſt for payment equally with a perſon ſolvent: but it never was the intention of the common law to oblige me to pay what I owe to a bankrupt, and to leave me without remedy as to what he owes me. This therefore is a proper caſe for the interpoſition of equity. It cannot authorize compenſation in circumſtances that afford not place for it; but it can prevent the miſchief in the moſt natural manner, by obliging the bankrupt to find ſecurity to make good the counter-claim when it ſhall become due; and this is the conſtant practice of the court of ſeſſion.

COMPENSATION would be but an imperfect remedy againſt the oppreſſion of the common law, if it could not be applied otherwiſe than by exception. The ſtatute, it is true, extends the remedy no farther; but the court of ſeſſion upon a principle of equity affords a remedy where the ſtatute is ſilent. Let us ſuppoſe two mutual debts, of which the one only bears intereſt, and that the creditor in

the barren debt demands his money. The debtor pays without pleading compenſation, and then demands the debt due to him with the intereſt. Or let it be ſuppoſed that he pleads compenſation upon the intereſt only, reſerving the capital. In theſe caſes there is no opportunity to apply the equitable maxim, That both ſums ſhould bear intereſt or neither. Therefore, to make room for that maxim, a proceſs of mutual extinction of the two debts ought to be ſuſtained to the creditor whoſe ſum is barren; to have effect *retro* from the time of concourſe; and this proceſs acccordingly is always ſuſtained in the court of ſeſſion.

To examine what equity dictates with reſpect to compenſation in all its different branches, we muſt take under conſideration the caſe of an aſſignee. And the firſt queſtion is, Whether the proceſs of mutual extinction juſt now mentioned be competent againſt an aſſignee. To prevent miſtakes in judging of this queſtion, let it be underſtood, that an aſſignment intimated is, by our preſent practice, a proper *ceſſio in jure*, transferring the claim *funditus* from the aſſignor or cedent to the aſſignee. Upon this ſuppoſition, compenſation cannot be pleaded againſt an aſſignee, becauſe there is no mutual concourſe of debts betwixt the parties. For though one of the claims is now transferred to the aſſignee, that circumſtance ſubjects him not to the counter-claim.

LET us ſuppoſe, that the claim bearing intereſt is that which is aſſigned. This claim, principal and intereſt, muſt be paid to the aſſignee, becauſe he is not ſubjected to the counter-claim. Muſt then the aſſignee's debtor, after paying the principle and intereſt, be ſatisfied to demand from the cedent the ſum due to himſelf which bears not intereſt? It is undoubtedly a hardſhip that he ſhould be deprived of the benefit of making both ſums bear intereſt or neither. At this rate, the creditor whoſe claim bears intereſt, will always take care by an aſſignment to prevent compenſation. This hardſhip is a ſufficient ground for the interpoſition of a court of equity. If the cedent hath procured an undue advantage to himſelf, by making a ſum bear intereſt in the name of an aſſignee, which would not bear intereſt in his own name, he ought to be deprived of that undue advantage, to make up what his debtor ſuffers by the aſſignment. And the proper reparation is to oblige him to pay intereſt *ex equitate*, though the claim naturally bears none.

BUT if the debt aſſigned be that which bears not intereſt, a total ſeparation is thereby made betwixt the two debts, ſo as to bar compenſation altogether. And what after this can prevent the counter-claim with its intereſt from being made effectual againſt the cedent? No objection in equity can ariſe to him, ſeeing, with his eyes open, he deprived himſelf of the opportunity of compenſation, the only means he had to avoid paying intereſt upon the counter-claim.

IN handling compenſation as directed by equity, I have hitherto conſidered what the law ought to be, and have carefully avoided the intricacies of our practice, which in ſeveral particulars is groſsly erroneous: to compleat the ſubject, I muſt take a ſurvey of that practice, the errors of which will be the more eaſily apprehended after what is already ſaid. By our old law derived from that of the Romans, and from England, a creditor could not aſſign his claim: all he could do was to grant a procuratory *in rem ſuam*, which did not transfer the *jus crediti* to the aſſignee, but only entitle him *procuratorio nomine* to demand payment. From the nature of this title it was thought, that compenſation might be pleaded againſt the aſſignee as well as againſt the cedent; and indeed, conſidering the title ſingly, the opinion was right, becauſe the pleading compenſation againſt a procurator or aſſignee, is in reality pleading it againſt the cedent or creditor himſelf. The opinion however is erroneous, and the error ariſes from overlooking the capital circumſtance, which duly weighed muſt have led to the oppoſite opinion. This circumſtance is the right that the aſſignee, though conſidered as a procurator only, hath to the claim aſſigned, by having paid a price for it. Equity will never ſubject ſuch a procurator or aſſignee to the cedent's debts, whether in the way of payment or compenſation. And as for the ſtatute, it could never, conſidered in a juſt light, afford any pretext for ſuſtaining compenſation againſt an aſſignee for a valuable conſideration. The ſtatute was made to rectify the common law, by beſtowing the privilege of compenſation ſo far as juſt and equitable, that is betwixt two perſons who are mutually debtors and creditors to each other: but it never could be the intention of the legiſlature, in defiance of juſtice, to make compenſation effectual againſt an aſſignee who pays value. Nor muſt it paſs unobſerved, that as our law ſtands at preſent, this iniquitous effect given to compenſation is ſtill more abſurd, if poſſible, than it was formerly. In our later practice an aſſignment has changed its nature, and is converted into a proper *ceſſio in jure*,

diveſting the cedent *funditus*, and veſting the aſſignee. Whence it follows, that after an aſſignment is intimated, compenſation ought to be barred from the very nature of the aſſignee's title, even laying aſide the objection upon the head of equity. But we begun with ſuſtaining compenſation againſt an aſſignee for a valuable conſideration, in quality of a procurator; not adverting, that though his title did not protect him from compenſation, his right as purchaſer ought to have had that effect. And by the force of cuſtom we have adhered to the ſame erroneous practice, even after our law is changed, when now the title of an aſſignee protects him from compenſation, as well as the nature of his right when he pays value for it.

SECTION II.

Injuſtice of Common Law with reſpect to legal Execution.

EXECUTION for payment of debt, is the operation of the judge or magiſtrate interpoſing in behalf of a creditor to whom the debtor refuſes or neglects to do juſtice. It is the duty of a debtor to convert his effects into money in order to pay his debts; and if he prove refractory or be negligent, it is the duty of the judge to interpoſe, and in his place to do what he himſelf ought to have done *. Hence it clearly appears, that the judge ought not to authorize execution againſt any ſubject which the debtor himſelf is not bound to ſurrender to his creditors, or to ſell for their behoof. But a court of common law confined by general rules, regards no circumſtance but one ſingly, *viz.* whether the ſubject belong to the debtor. If it be his property, execution iſſues; and it is not conſidered whether the debtor can juſtly apply this ſubject for payment of his debts. This in ſome caſes may prove rigorous and unjuſt. A man who by fraud or other illegal means has acquired the property of a ſubject, is not bound to convey that ſubject to his creditors. On the contrary, he is in conſcience bound to reſtore it to the perſon injured, in order to repair the wrong he has done. And in ſuch a caſe the law ought not to interpoſe in behalf of the creditors, but in behalf of the perſon injured. A court of equity accordingly, correcting the injuſtice of common law, will refuſe its aid to the creditors, who ought not to demand from their debtor what in conſcience he ought to reſtore to another; and will give its aid to that other for recovering a ſubject of which he was unjuſtly deprived.

* Hiſtorical Law-Tracts, Tract 12. at the beginning.

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HAVING thus given a general view of the ſubject, I proceed to particulars; and ſhall firſt ſtate a caſe, where a merchant, in immediate proſpect of bankruptcy, purchaſes goods and takes delivery, without any view of paying the price. This is a groſs cheat in the merchant, which binds him in common juſtice to reſtore the goods. A court of common law however, regardleſs of that circumſtance, will authorize the bankrupt's creditors to attach theſe goods for their payment, as being his property. This act of injuſtice ought to be redreſſed by a court of equity. If the goods be claimed by the vender, the court of equity, barring execution by the creditors, will decree the goods to be reſtored to him. The ſame muſt hold with reſpect to land, when thus purchaſed fraudulently. So ſoon as a creditor commences his adjudication, the vender will be admitted for his intereſt, and his objection will be ſuſtained in equity, that the land ought not to be adjudged to the creditor, but to him the vender, in order to repair the wrong done him. I put another caſe. In a proceſs of adjudication, a man who had purchaſed the land by a minute of ſale before the adjudication was commenced, appears for his intereſt. Ought he not to be preferred? His objection againſt the adjudger ſeems to be good in two reſpects: it would, in the firſt place, be unjuſt in the proprietor to grant to his creditor a ſecurity upon that ſubject; and it is therefore unjuſt in the creditor to demand the ſecurity by legal execution: in the next place, it would be unjuſt in the court to authorize execution againſt a ſubject which the debtor is not bound to ſurrender to his creditors, but, on the contrary, is ſtrictly bound to convey it in terms of the minute of ſale.

I illuſtrate this doctrine by applying it to a ſubject of ſome importance, which has been frequently canvaſſed in the court of ſeſſion. A factor having ſold his conſtituent's goods, took the obligation for the price in his own name without mentioning his conſtituent. The factor having died bankrupt, the queſtion aroſe, Whether the ſum in this obligation was to be deemed part of his moveable eſtate affectable by his creditors, or whether he was to be deemed a nominal creditor only and a truſtee for his conſtituent? The common law regarding the words only, conſiders the obligation as belonging to the deceaſed factor. But equity looks farther, and takes under conſideration the circumſtances of the caſe, which prove that the obligation was intended to be taken *factorio nomine*, or ought to have been ſo intended; and that the factor's creditors are in equity barred from attaching a ſubject which he was bound

to convey to his conſtituent; and the conſtituent was accordingly preferred [a]. *A* employs *B* as his factor to ſell cloth. *B* ſells on credit, and before the money is paid dies bankrupt. This money ſhall be paid to *A*, and not to the adminiſtrator of *B*: for a factor is in effect a truſtee only for his principal [b]. Hugh Murray named executor in Sir James Rochead's teſtament, appointed a factor to act for him. At clearing accounts there was a balance of *L.* 268 *Sterling* in the hands of the factor, for which he granted a bill to the executor his conſtituent, and of the ſame date obtained from him a diſcharge of the factory. The executor having died inſolvent, the ſaid bill as belonging to him was confirmed by his creditors. Sir James's next of kin claimed the ſum in the bill as part of his executry, or as the produce of it. They urged, that though the bill was taken payable to Mr. Murray ſingly, yet the circumſtances of the caſe evince, that it was taken payable to him in quality of executor, and that he was bound to account for it to Sir James's next of kin. They accordingly were preferred [c]. For the ſame reaſon, if an executor, inſtead of receiving payment, take a new bond from a debtor of the deceaſed with a cautioner, and diſcharge the original bond, this new bond, being a *ſurrogatum* in place of the former, will be conſidered in equity as part of the effects of the deceaſed. It will not be affectable by the creditors of the executor [d]. And if the debt be loſt by the bankruptcy of the debtor and his cautioner, equity will not charge the executor with it, but will only decree him to aſſign the ſecurity [e]. Boylſtoun having given money to one Makelwood to buy a parcel of linen-cloth for him, ſhe bought the goods but without mentioning her employer. Her creditors having arreſted theſe goods, Boylſtoun appeared for his intereſt. The vender depoſed, that he underſtood Makelwood to be the purchaſer for her own behoof. She depoſed upon the commiſſion from Boylſtoun, and that with his money ſhe bought the cloth for his behoof. The court, in reſpect that the goods being ſold to Makelwood for her own behoof, became her property, therefore preferred her creditors the arreſters [f]. This was acting as a court of common law. The property no doubt veſted in Makelwood, becauſe the goods were ſold and delivered to her for her own behoof: but that circumſtance is far from being deciſive in point of equity. The court ought to have conſidered, that though the transference of property be ruled by the will of the vender, yet that it depends on the will of the purchaſer whether to accept delivery for his own behoof or for behoof of another. Here it clearly appeared that Makelwood bought the goods for behoof of Boylſtoun, and that, in

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

[b] 2. Vernon 638.

[c] Jan. 4. 1744, Sir John Baird *contra* creditors of Murray.

[d] Stair, Book 3. Tit. 8, §. 71.

[e] 1. Chancery Caſes 74.

[f] Stair, Jan. 24. 1672, Boylſtoun *contra* Robertſon.

in effect, ſhe was truſtee only in the ſubject. The legal right was indeed in her, but the equitable right clearly in Boylſtoun. The court ought to have conſidered further, that Makelwood having laid out Boylſtoun's money in purchaſing the cloth, was bound in juſtice to deliver it to Boylſtoun; and therefore that he in equity ought to have been preferred to her creditors, even though ſhe had been guilty of making the purchaſe for her own behoof.

SUCH is the relief that by a court of equity is afforded to the perſon who has the equitable claim, while matters are entire and the ſubject *in medio*. But now, ſuppoſing the execution to be compleated, and the property to be transferred to the creditor ignorant of any claim againſt his debtor, as for example, by a poinding, or by an adjudication with a decree declaring the legal to be expired, What ſhall be the operation of equity in this caſe? This queſtion is already anſwered, Part 2. Chap. 1. Sect. 8. where it is laid down, That a *bona fide* purchaſer lies not open to a challenge in equity more than at common law; becauſe no man can be deprived of his property except by his conſent or his crime.

I proceed to another branch of the ſubject. Execution both perſonal and real for payment of debt is afforded by the law of all countries: but execution intended againſt the refractory only, is ſometimes extended beyond the bounds of humanity; and equity is interpoſed againſt rigorous creditors where it can be done by ſome rule that is applicable to all caſes of the kind. Two rules have been diſcovered, which judges may ſafely apply without hazard of becoming arbitrary. The firſt governs thoſe caſes where there is ſuch a peculiar connection betwixt the debtor and creditor, as to make kindneſs or benevolence their reciprocal duty. In ſuch caſes, if the creditor carry his execution to extremity, and deprive the debtor of bread, he acts in contradiction to his poſitive duty, and a court of equity will interpoſe to prevent the wrong. The rule is, That a competency muſt be left to the debtor to preſerve him from indigence. Thus in the Roman law, parents have *beneficium competentiæ* againſt their children, and a patron againſt his client *. A man againſt his wife †. And the ſame obtains in an *actio pro ſocio* ‡. The rule was applied by the court of ſeſſion to protect a father againſt his children, February 21. 1745, Bontein of Mildovan, where two former deciſions on the other ſide were over-ruled. The common law in affording execution againſt a debtor, intends not to indulge the rigor of creditors acting in

* l. 17. de re judicata.
† §. 37. Inſtit. de actionibus.
‡ l. 16. de re judicata.

direct contradiction to their duty. But as in making laws it is impracticable to foreſee every limitation, the rule muſt be made general, leaving to a court of equity to make exceptions in ſingular caſes.

THE other rule is more general, and ſtill more ſafe in the application. Perſonal execution was contrived to force the debtor, by the terror and hardſhip of perſonal reſtraint, to diſcover his effects and to do juſtice to his creditors. But if the *ſqualor carceris*, a ſpecies of torture, cannot draw a confeſſion of concealed effects, the unhappy priſoner muſt be held innocent; and upon that ſuppoſition, perſonal reſtraint is inconſiſtent with juſtice as well as with humanity. Hence the foundation of the *Ceſſio bonorum*, by which the debtor, after his innocence is proved by the trial of perſonal reſtraint, recovers his liberty upon conveying to his creditors all his effects. And in Scotland this action is known as far back as we have any written law.

SECTION III.

Injuſtice of Common Law with reſpect to voluntary Payment.

THE remaining ſections of the preſent chapter concern the oppreſſion or wrong that may be committted by a debtor under protection of common law. In order to eſtabliſh the *Jus crediti* in an aſſignee, and totally to diveſt the cedent, the law of Scotland requires, that notification of the aſſignment be made to the debtor, verified by an inſtrument under the hand of a notary termed *an Intimation*. Before intimation the legal right is in the cedent, and the aſſignee has a claim in equity only. In this caſe, payment made to the cedent by the debtor ignorant of the aſſignment, is in all reſpects the ſame as if there were no aſſignment. It is a payment made to the creditor, which, in law, muſt extinguiſh the debt. But what if the debtor, when he makes payment to the cedent before intimation, is in the knowledge of the aſſignment? The common law knows no creditor but him who is legally veſted in the right; and therefore, diſregarding the debtor's knowledge of the aſſignment, will ſuſtain the payment made to the cedent as made to the legal creditor. But equity teaches a different doctrine. It is wrong in the cedent to take payment after he has conveyed his right to the aſſignee; and the debtor, knowing the aſſignment, is partaker of the wrong in paying to him. A court of equity, therefore, correcting the injuſtice of common law, will hold

hold as nothing the payment wrongouſly made to the cedent, and will oblige the debtor to make payment to the aſſignee.

WITH reſpect to this matter, there is a wide difference betwixt the ſolemnities that may be requiſite for veſting in an aſſignee a compleat right to the ſubject, and what are ſufficient to bar the debtor from making payment to the cedent. In the former view, a regular intimation is neceſſary, or ſome ſolemn act equivalent to a regular intimation, a proceſs for example. In the latter view, the private knowledge of the debtor is ſufficient. Hence it is, that a promiſe of payment made to the aſſignee, though not equivalent to a regular intimation, is yet ſufficient to bar the debtor from making payment to the cedent. The court went farther; they were of opinion, That the aſſignee having ſhown his aſſignment to the debtor, though without intimating the ſame by a notary, the debtor was thereby put in *mala fide*, and could not thereafter make payment to the cedent *. But hiſtorical knowledge of an aſſignment, where it falls ſhort of ocular evidence, will ſcarce be ſuſtained to put the debtor in *mala fide*. And this rule is founded on utility. A debtor ought not to be furniſhed with pretexts againſt payment; and if private conviction of an aſſignment, without certain knowledge, were ſufficient, private conviction would often be affected, to gain time and to delay payment.

* Fountainhall, February 16. 1703. Leith *contra* Garden.

SECTION IV.

Injuſtice of Common Law with reſpect to indefinite Payment.

EVERY man who has the adminiſtration of his own affairs, may pay his debts in what order he pleaſes, where his creditors interpoſe not by legal execution. Nor will it make a difference, that ſeveral debts are due by him to the ſame creditor; for the rule of law is, That if full payment be offered of any particular debt, which is fulfilling the debtor's obligation, the creditor is bound to accept, and to grant a diſcharge.

BUT now ſuppoſing a ſum to be delivered by the debtor to the creditor indefinitely, without applying it to any one debt in particular, the queſtion is, By what rule ſhall the application be made, when the parties afterward come to ſtate an accompt? If the debts be all of the ſame kind, it is of no importance in what manner the application be made. But when the debts are of different kinds, one

for example bearing intereſt, one barren, the manner of application comes to be a point of importance. The rule in the Roman law is *quod electio eſt debitoris*, a rule founded on the principles of common law. The money delivered to the creditor, as aforeſaid, cannot be recalled, becauſe it was delivered to him in order for payment. It remains however the debtor's money, becauſe there was no agreement about the application; and for that reaſon it could not extinguiſh any debt in particular, nor the whole debts proportionally: and if it remain the debtor's money, he only is entitled to make the application. But though this is agreeable to the rule of common law, it is not agreeable to the rule of juſtice. If the debtor make an undue application, equity will interpoſe to relieve the creditor from the hardſhip. Equity indeed cannot force a man to give his money out of his own hand; and therefore, in giving it away, he may name what terms or conditions he thinks proper. Upon that account, though a debtor acts unjuſtly in applying his money towards extinction of a debt bearing intereſt, when he is due to the ſame creditor a debt bearing none; yet a remedy in this caſe is beyond the reach of equity. But where the money is already given away and in the hands of the creditor, the debtor has no longer the ſame arbitrary power of making the application. Equity will interpoſe, and will direct the application. Thus indefinite payment comes under the power of a court of equity.

IN order to aſcertain the equitable rules for applying an indefinite payment, a few preliminary conſiderations may be proper. A loan of money is a mutual contract equally for the benefit of the lender and borrower. The debtor has the uſe of the money he borrows, and pays to the creditor a yearly premium for it. With reſpect therefore to a ſum bearing intereſt, the debtor is not bound, either in ſtrict law or in equity, to pay the capital until the creditor make a demand. A debt not bearing intereſt is in a very different condition. The debtor has the whole benefit, and the creditor is deprived of the uſe of his money without a valuable conſideration. This inequality merits a remedy in equity. The debtor, in good conſcience, ought either to pay the ſum or pay intereſt for the uſe of it. Though this be a matter of duty, it cannot however be enforced by a court of equity in all caſes. It may be the creditor's intention to aſſiſt the debtor with the uſe of money without intereſt: but upon the firſt legal expreſſion of the creditor's will to have his money, a court of equity ought to decree for intereſt.

ANOTHER

ANOTHER preliminary conſideration is, that where a bond is granted with a cautioner, the debtor is in conſcience bound to pay the ſum at the term covenanted, in order to relieve his cautioner who has no benefit by the tranſaction. With regard to a cautioner, the debtor ſtands in a relation ſimilar to that in which he ſtands with regard to his creditor, where the debt bears not intereſt. The caſe is different where the cautioner ſhows a willingneſs to continue his credit with the principal debtor.

WE are now ripe for entering upon particulars; and the firſt caſe I ſhall mention is, where two debts are due by the ſame debtor to the ſame creditor, one of which only bears intereſt. An indefinite payment here ought undoubtedly to be applied to the debt not bearing intereſt, becauſe this debt ought in common juſtice to be firſt paid; and there is nothing to oblige the debtor to pay the other till it be demanded. A man of candor will make the application in this manner; and were there occaſion for a preſumption, it will be preſumed of every debtor that he intended ſuch application. But the judge has no occaſion to lay hold of a preſumption: his authority for making the application is derived from a principle of juſtice. The ſame rule directs, that where both debts bear intereſt, the indefinite payment ought firſt to be applied for extinguiſhing what is due of intereſt; and thereafter for extinguiſhing one or other capital indifferently, or for extinguiſhing both in proportion [a].

THE ſecond caſe ſhall be of two debts bearing intereſt; the one perſonal, the other ſecured by infeftment or inhibition. It is equal to the debtor which of the debts be firſt paid; and therefore the indefinite payment ought to be applied to the debt for which there is the ſlendereſt ſecurity; becauſe ſuch application is for the intereſt of the creditor. Take another caſe of the ſame kind. An heir of entail owes two debts to the ſame creditor; one of his own contracting, and one as repreſenting the entailer. Every indefinite payment he makes ought to be aſcribed to his proper debt, for payment of which there is no fund but the rents during his life. This, it is true, is againſt the intereſt of the ſubſtitutes. But their intereſt cannot be regarded in the application of rents which belong not to them but to the tenant in tail. And next, as they are *certantes de lucro captando*, their intereſt cannot weigh againſt that of a creditor who is *certans de damno evitando*.

[a] The rule here laid down ſeems to be unknown in England. Sometimes it is found that *electio eſt debitoris* *, and ſometimes that it is *creditoris* †.

* Abridg. caſes in equity, cap. 22. Sect. D. § 1.
† Ibid. § 2.

THIRD caſe. If a debtor obtain an eaſe upon condition of paying at a day certain the tranſacted ſum bearing intereſt, and be alſo bound to the ſame creditor in a ſeparate debt not bearing intereſt, the queſtion is, In what manner ought an indefinite payment to be applied in this caſe? It is the intereſt of the debtor that it be applied to the tranſacted ſum. It is the intereſt of the creditor that it be applied to the ſeparate debt not bearing intereſt. The judge will not prefer the intereſt of either, but make the application in the moſt equitable manner, regarding the intereſt of both. He will therefore, in the firſt place, conſider which of the two has the greateſt intereſt in the application; and he will ſo apply the ſum as to produce the greateſt effect. This conſideration will probably lead him to make the application to the tranſacted ſum; for if the tranſaction be in any degree lucrative, the debtor will loſe more by its becoming ineffectual, than the creditor will by wanting the interim uſe of the money due to him without intereſt. But then the benefit ought not to lie all on one ſide; and therefore equity rules, that the debtor, who gets the whole benefit of the application, ought to pay intereſt for the ſeparate ſum; which brings matters to a perfect equality betwixt them. For the ſame reaſon, if the application be made to the debt not bearing intereſt, the tranſaction ought to be made effectual, notwithſtanding the term appointed for paying the tranſacted ſum be elapſed.

FOURTH caſe. Suppoſe the one debt is ſecured by adjudication the legal of which is near expiring, and the other is a debt not bearing intereſt. And to adjuſt the caſe to the preſent ſubject, we ſhall alſo ſuppoſe that the legal of an adjudication expires *ipſo facto* without neceſſity of a declarator. An indefinite payment here ought to be applied for extinguiſhing the adjudication. And, for the reaſon given in the preceeding caſe, the ſeparate debt ought to bear intereſt from the time of the indefinite payment.

FIFTH caſe. An heir of entail owes two debts to the ſame creditor; the one a debt contracted by the entailer not bearing intereſt, the other a debt bearing intereſt contracted by the heir, which may found a declarator of forfeiture againſt him. An indefinite payment ought to be applied to the firſt mentioned debt, becauſe it bears not intereſt: for with regard to the heir's hazard of forfeiture, the forfeiture, which cannot be made effectual but by a proceſs of declarator, may be prevented by paying the debt. And the

the difficulty of procuring money for that purpoſe, is an event too diſtant and too uncertain to be regarded in forming a rule of equity.

SIXTH caſe. Neither of the debts bear intereſt, and one of them is guarded by a penal irritancy. I give for an example feu-duties owing more than two years. In this caſe the fue-duties ought to be extinguiſhed by the indefinite payment; becauſe ſuch application relieves the debtor from a declarator of irritancy, and is indifferent to the creditor as both debts are barren. Nor will it be regarded that the creditor is cut out of the hope he had of acquiring the ſubject by the declarator of irritancy; becauſe in equity the rule holds without exception, *Quod potior debet eſſe conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro captando.*

SEVENTH caſe. If there be a cautioner in one of the debts, and neither debt bear intereſt, the indefinite payment ought undoubtedly to be applied for relieving the cautioner. Gratitude demands this at the hands of the principal debtor, for whoſe ſervice ſolely the cautioner gave his credit. It may be more the intereſt of the creditor to have the application made to the other debt which is not ſo well ſecured: but the debtor's connection with his cautioner is more intimate than with his creditor; and equity reſpects the more intimate connection as the foundation of a ſtronger duty.

EIGHTH caſe. Of the two debts, the one is barren, the other bears intereſt, and is ſecured by a cautioner. The indefinite payment ought to be applied to the debt which bears not intereſt. Delaying payment of ſuch a debt, where the creditor gets nothing for the uſe of his money, is a poſitive act of injuſtice. On the other hand, there is no poſitive damage to the cautioner by delaying payment of the debt in which he ſtands engaged. There is, 'tis true, a riſk; but ſeeing the cautioner makes no legal demand to be relieved, it may be preſumed that he willingly ſubmits to the riſk.

NINTH caſe. One of the debts is a tranſacted ſum, which muſt be paid at a day certain, otherwiſe the tranſaction to be void: or it is a ſum which muſt be paid without delay, to prevent an irritancy from taking place. The other is a bonded debt with a cautioner bearing intereſt. The indefinite payment muſt be applied to make the tranſaction effectual, or to prevent the irritancy. For, as in the former caſe, the intereſt of the creditor, being the more ſubſtantial,

is preferred before that of the cautioner; ſo, in the preſent caſe, the intereſt of the debtor is for the ſame reaſon preferred alſo before that of the cautioner.

TENTH caſe. An indefinite payment made after inſolvency to a creditor in two debts, the one with, the other without a cautioner, ought to be applied proportionally to both debts, whatever the nature or circumſtances of the debts may be: for here the creditor and cautioner being equally *certantes de damno evitando*, ought to bear the loſs equally. It is true the debtor is more bound to the cautioner who lent his credit for the debtor's benefit, than to the creditor who lent his money for his own benefit. But circumſtances of this nature cannot weigh againſt the more ſubſtantial intereſt of preventing loſs and damage.

SECTION V.

Injuſtice of Common Law with reſpect to Rent levied indefinitely.

BY the common law of this land, a creditor introduced into poſſeſſion upon a wadſet, or upon an aſſignment to rents, muſt apply the rent he levies towards payment of the debt which is the title of his poſſeſſion; becauſe for that very purpoſe is the right granted. Rent again levied by execution, upon an adjudication for example, muſt for the ſame reaſon be applied to the debt upon which the execution proceeds. Rent thus levied, whether by conſent or by execution, cannot be applied by the creditor to any other debt however unexceptionable.

BUT this rule of common law may in ſome caſes be rigorous and materially unjuſt, to the debtor ſometimes and ſometimes to the creditor. If a creditor in poſſeſſion, by virtue of a mortgage or improper wadſet, purchaſe or ſucceed to an adjudication the legal of which is current, it is undoubtedly the debtor's intereſt that the rents be applied to the adjudication, in order to prevent expiry of the legal, rather than to the wadſet which contains no irritancy nor forfeiture upon failure of payment. On the other hand, if the creditor purchaſe or ſucceed to an infeftment of annualrent upon which a great ſum of intereſt happens to be due, it is beneficial to him that the rents be aſcribed for extinction of that intereſt, rather than for extinction of the wadſet ſum which bears intereſt. Theſe applications cannot be made, either of them, upon the principles of common

mon law; and yet material juſtice requires ſuch application, which is fair and equitable betwixt the parties, weighing all circumſtances. No man of candor in poſſeſſion of his debtor's land by a mortgage or improper wadſet, but muſt be aſhamed to apply the rents he levies to the wadſet, when he has an adjudication the legal of which is ready to expire. And no debtor of candor but muſt be aſhamed to extinguiſh a debt bearing intereſt, rather than a debt equally unexceptionable that is barren.

EQUITY therefore is juſtly applied to correct the oppreſſion of the common law in ſuch caſes; and it is lucky that this can be done by general rules, without hazard of making judges arbitrary. Theſe rules are delineated in the ſection immediately foregoing; and they all reſolve into a general principle, which is, That the judge ought to apply the rents ſo as to be moſt equal with reſpect to both parties, and ſo as to prevent rigorous and hard conſequences on either ſide.

BUT this equitable relief againſt the rigor of common law, ought not to be confined to real debts which entitle the creditor to poſſeſs. In particular caſes, it may be more beneficial to the debtor or to the creditor, without hurting either, to apply the rents for payment even of a perſonal debt, than for payment of the debt which is the title of poſſeſſion. What if the perſonal debt be a bulky claim, which is reſtricted to a leſſer ſum upon condition that payment be made at a day certain? It is the debtor's intereſt that the rents be applied to this debt in the firſt place; as on the other hand it is the creditor's intereſt that they be applied to a perſonal debt which is barren. A court of equity, diſregarding the rigid principles of common law, and conſidering matters in the view of material juſtice, reaſons after the following manner. An adjudication is a title of poſſeſſion, which, upon failure of payment, empowers the creditor to levy the debt out of the rents of his debtor's land: but if the creditor be already in poſſeſſion, an adjudication is unneceſſary. Such a title, it is true, is requiſite to compleat the forms of the common law: but equity diſpenſes with theſe forms, when they ſerve no end other than to load the parties concerned with expence. And thus where the queſtion is with the debtor only, equity relieves the creditor in poſſeſſion from the ceremony or ſolemnity of leading an adjudication upon the ſeparate debts to which he has right. And no perſon can heſitate a moment about the equity of a rule that is not leſs beneficial to the debtor, in relieving him from the expence of legal execution, than to the creditor in relieving him from trouble and ad-

vance of money. Thus an executor in poſſeſſion, is by equity relieved from the uſeleſs ceremony of taking a decree againſt himſelf for payment of debt due to him by the deceaſed. And for that reaſon an executor may pay himſelf at ſhort-hand. In the ſame manner a wadſetter in poſſeſſion of his debtor's land, has no occaſion to attach the rents by legal execution for payment of any ſeparate debt due to him by the proprietor. His poſſeſſion, by conſtruction of equity, is held a good title; and by that conſtruction the rents are held to be levied indefinitely; which makes way for the queſtion, To which of the debts they ought to be imputed? The ſame queſtion may occur where poſſeſſion is attained by legal execution, without conſent of the debtor. A creditor, for example, who enters into poſſeſſion by virtue of an adjudication, acquires or ſucceeds to perſonal debts due by the ſame debtor. Theſe, in every queſtion with the debtor himſelf, are juſtly held to be titles of poſſeſſion, to give occaſion for the queſtion, To what particular debt the rent ſhould be imputed?

HAVING ſaid ſo much in general, the interpoſition of equity to regulate the various caſes which belong to the preſent ſubject, cannot be attended with any degree of intricacy. The road is in a good meaſure paved by the labour beſtowed in the preceeding ſection; for the rules there laid down, with regard to debts of all different kinds, may, with very little variation, be readily accommodated to the ſubject we are now handling. For the ſake however of illuſtrating a ſubject that is almoſt totally overlooked by our authors, I ſhall mention a few rules in general, the application of which to particular caſes will be extreme eaſy. Let me only premiſe, what is hinted above, that the creditor in poſſeſſion can ſtate no debts for exhauſting the rents but ſuch as are unexceptionably due by the proprietor. For it would be againſt equity as well as common law, that any man ſhould be protected in the poſſeſſion of another's property during the very time the queſtion is depending, whether he be or be not really a creditor. Let ſuch debts then be the only ſubject of our ſpeculation. And the firſt rule of equity is, That the imputation be ſo made as to prevent on both hands irritancies and forfeitures. A ſecond rule is, That, *in pari caſu*, perſonal debts ought to be paid before thoſe which are ſecured by infeftment. And thirdly, with reſpect to both kinds, That ſums not bearing intereſt be extinguiſhed before ſums bearing intereſt.

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IT is laid down above, that where the legal of an adjudication is in hazard of expiring, equity demands that the rents be wholely aſcribed to the adjudication. But it may happen in ſome inſtances to be more equitable, that the creditor be privileged to apply the rents to the bygone intereſt due upon his ſeperate debts: and this privilege will be indulged him, provided he renounce the benefit of an expired legal.

THE foregoing rules take place betwixt the creditor and debtor. A fourth rule takes place among creditors. The creditor who, by virtue of a preference decreed to him in a competition with co-creditors, attains poſſeſſion, cannot aſcribe the rents to any debt but what is preferable to thoſe debts which by the other creditors were produced in the proceſs of competition: for after uſing his preferable right to exclude others, it would be plainly unjuſt to aſcribe the rents to any debt which is not effectual againſt the creditors who are excluded. This would be taking an undue preference upon debts that have no title to a preference.

IT will be obſerved, that hitherto I have had nothing in view but the poſſeſſion of a ſingle fund, and in what manner the rents of that fund ſhall be applied when the poſſeſſor hath claims of different kinds. But, with very little variation, the foregoing rules may be applied to the more involved caſe of different funds. A creditor, for example, upon an entailed eſtate, has two debts in his perſon, one contracted by the entailer, upon which an adjudication is led againſt the entailed eſtate; another contracted by the tenant in tail, which can only affect the rents during his life. It is the intereſt of the ſubſtitutes that the rents be imputed towards extinction of the entailer's debt, becauſe they are not liable for the other. The intereſt of the creditor in poſſeſſion upon his adjudication is directly oppoſite. It is his intereſt that the perſonal debt be firſt paid, for which he has no other ſecurity but the rents during his debtor's life. Here equity is clearly on the ſide of the creditor. He is *certans de damno evitando*, and the ſubſtitutes *de lucro captando*. And this coincides with the ſecond caſe ſtated in the foregoing ſection of indefinite payment.

APPENDIX to CHAPTER IV.

WHEN a creditor leads an adjudication for a greater ſum than is due, it is held that at common law the adjudication is totally void. The reaſon given is, That an adjudication, being an indiviſible right, cannot ſubſiſt in part and fall in part: but where the *pluris petitio* is occaſioned by an innocent error, without any *mala fides* in the creditor, it has long been the practice of the court of ſeſſion to ſupport the adjudication as a ſecurity for what is juſtly due, not only in accounting with the debtor, but even in a competition with co-creditors. This practice is put upon the *nobile officium* of the court acting as a court of equity; and if this be the true foundation of the practice, it belongs to the preſent chapter, being an example of equity correcting the rigor of common law in making debts effectual.

BUT that this practice cannot be founded on equity, appears to me clear from the following conſiderations. In the firſt place it is made evident above, That one *certans de damno evitando* may take advantage of an error committed by another, and that equity prohibites not ſuch advantage to be taken except where poſitive gain is made by it *. This rule is applicable to the preſent caſe. A creditor demanding his payment in a competition, is *certans de damno evitando*; and for that reaſon, he, in order to obtain preference, may lawfully avail himſelf of any error committed by a co-creditor. He may in particular object to a competing adjudication as being void and null; and to ſupport a void adjudication againſt him, is not agreeable to any rule of equity. In the next place, an adjudication *ex facie* null, as proceeding without citing the debtor, is never ſupported to any effect whatever againſt a competing creditor, nor even againſt the debtor himſelf. Nor is there any ſupport given to an adjudication againſt an apparent heir, when it proceeds without a ſpecial charge, or when the lands are not ſpecified in the ſpecial charge. This leads me to reflect upon the difference betwixt intrinſic objections, which render the adjudication void and null, and extrinſic objections, which only tend to reſtrict it. If the *pluris petitio* be an objection of the former ſort, the adjudication, being void totally at common law, cannot be ſupported in equity, more than an adjudication that proceeds without calling the debtor. If it be an objection of the latter ſort, there may poſſibly be a foundation at common law for ſupporting the adjudication in part, even againſt a competing creditor, though there be no foundation in equity.

* Part 1. Chap. 2. Section 2. Part 2. Chap. 1. Sect. 6.

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

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

BUT too much is ſaid upon an adjudication conſidered as a judicial ſale; for during the legal at leaſt, it is undoubtedly not a judicial ſale, but a *pignus prætorium* only; and this I have had occaſion

* Part 2, Ch. 2. Sect. 2.

to demonſtrate above *. If a man ſhall grant to his creditor real ſecurity for *L.* 1000, when in reality *L.* 900 is only due, will this *pluris petitio* void the infeftment? There is not the leaſt pretext for ſuch a conſequence. The ſum ſecured will indeed be reſtricted, but the ſecurity will ſtand firm and unſhaken. It will be evident at firſt glance, that the ſame muſt be the caſe of an adjudication led innocently for a greater ſum than is due. A *pignus prætorium* muſt, with reſpect to the preſent point, be preciſely of the ſame nature with a voluntary pledge.

HENCE it clearly appears, that the ſuſtaining an adjudication for what is truly due, notwithſtanding a *pluris petitio*, is not an operation of equity to have a place regularly in the preſent treatiſe, but truly an operation of common law, which ſuſtains not a *pluris petitio* to any other effect than to reſtrict the ſum ſecured to what is truly due, without impinging upon the ſecurity. Nor is this a vain diſpute. For beſides reſting the point upon its true foundation, which always tends to inſtruction, it will be found to have conſiderable influence in practice. At preſent an adjudication where there is a *pluris petitio*, is never ſupported againſt competing creditors farther than to be a ſecurity for the ſums due in equity, ſtriking off all penalties. And this practice is right, ſuppoſing ſuch adjudication to be null at common law, and to be ſupported by equity only. But if a *pluris petitio* have not the effect at common law to void the adjudication, but only to reſtrict the ſum ſecured, there is no place for ſtriking off the penalties, more than where there is no *pluris petitio*. Equity indeed interpoſes to reſtrict penalties to the damage which the creditor can juſtly claim by the delay of payment; but this holds in all adjudications equally, not excepting thoſe that are free of all objections.

THAT it is lawful for one *certans de damno evitando* to take advantage of another's error, is an univerſal law of nature. That it has place in covenants is ſhown in a former chapter: and that it ſhould have place among creditors, is evidently agreeable to the rules of juſtice, which dictates, that if there muſt be a loſs, it ought to reſt upon the creditor who hath been guilty of ſome error, rather than upon the creditor who hath avoided all error. When matters of law are taken in a train, and every caſe is reduced to ſome principle, judges ſeldom err. What occaſions ſo many erroneous deciſions, is judging by the impreſſion made in every particular caſe, without reducing it under any claſs, or recurring to any principle.

By

By this means we are extremely apt to go aſtray, carrying equity ſometimes too far, and ſometimes not far enough. Take the following remarkable inſtance. Among the creditors of the York-building company, a number of annuitants for life, infeft for their ſecurity, occupied the firſt place, and next in order came the Duke of Norfolk infeft for a very large ſum. Theſe annuities were frequently bought and ſold, and the purchaſers in ſome inſtances, inſtead of demanding a conveyance of the original bonds ſecured by infeftment, returned theſe to the company, and took new perſonal bonds in their place, not imagining that by this method the real ſecurity was unhinged. Theſe new bonds being objected to by the Duke of Norfolk as merely perſonal, and incapable to compete with his infeftment, the court pronounced the following interlocutor: "In reſpect that the "Engliſh purchaſers, ignorant of the laws of Scotland, had no in- "tention to paſs from their real ſecurity; and that the Duke of "Norfolk, who had ſuffered no prejudice by the error, ought not "to take advantage of it; therefore find the ſaid annuitants pre- "ferable as if they had taken aſſignments to the original bonds, "inſtead of delivering them up to the company." This was ſtretching equity beyond all bounds; and in effect judging that a creditor is barred by equity from taking advantage of any error committed by a co-creditor. Upon a reclaiming petition accordingly this interlocutor was altered, and the Duke of Norfolk preferred *. And this judgment was affirmed in the houſe of Lords.

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

PART III.

Powers of a Court of Equity to remedy the Imperfection of Common Law with reſpect to Matters of Juſtice that are not pecuniary.

THE goods of fortune, ſuch as can bear an eſtimation in money, are the great ſource of controverſy and debate among private perſons. And, for that reaſon, when civil courts were inſtituted, it was not thought neceſſary to extend their juriſdiction beyond pecuniary matters. The improvement indeed was ſo great as to be held altogether compleat: but time unfolded many intereſting articles that are not pecuniary. Some of them, making a figure, are appropriated to peculiar courts. A claim of peerage, for example, is determined in the houſe of Lords, of bearing arms in the Lyon-court, and of being put upon the roll of freeholders in the court of Barons. There remain many rights eſtabliſhed by law, and wrongs committed againſt law, that are not pecuniary, which therefore muſt be determined in a court of equity, when not appropriated to a peculiar court; for the great principles ſo often above mentioned, that where there is a right it ought to be made effectual, and where there is a wrong it ought to be repreſſed, are equally applicable, whether the intereſt be pecuniary or not pecuniary.

To collect all the rights eſtabliſhed and wrongs committed that are not pecuniary, would be an endleſs labour. It would be uſeleſs as well as endleſs. The remedy to be applied is not at all intricate. The only queſtion of difficulty is, in what courts ſuch matters are to be tried; and to this queſtion no general anſwer can be given, other than that the chancery in England and ſeſſion in Scotland are the proper courts, where there is no peculiar court eſtabliſhed for determining the point in controverſy. I ſhall therefore bring this ſubject within a narrow compaſs, by giving one example of a wrong and one of a right, which, for the reaſon now mentioned, muſt be determined in the court of ſeſſion.

THE qualifications of a man claiming to be a freeholder, muſt be judged by the freeholders of the county, convened at their Michaelmas head-court: but the law has provided no remedy for a wrong

wrong that may be committed by the freeholders, *viz.* their forbearing to meet at the Michaelmas head-court, in order to prevent a man from applying to be put upon the roll; and therefore it is incumbent upon the court of ſeſſion to redreſs this wrong, by ordering the freeholders to meet under a penalty.

THE example I ſhall give of a right not pecuniary, opens an extenſive field; and I have choſen it in order to explain the famous Roman law maxim, *Alii per alium non acquiritur obligatio*, which, ſo far as I can judge, is but obſcurely handled by the writers on that law. A very ſimple caſe ſhall introduce the ſubject. I obtain a gratuitous promiſe from a ſtranger, to pay a ſum to my friend or to build a houſe for him; and the queſtion is, What is the legal effect of this promiſe with reſpect to myſelf and with reſpect to my friend? A promiſe made to me muſt create a right in me: but then, as I cannot qualify any pecuniary intereſt in having a ſum paid to another, I have not an action at common law to enforce performance of this promiſe.

WITH reſpect to my friend again, he, no doubt, hath a pecuniary intereſt to have the ſum or to have the houſe. But as intereſt merely without right will not generate an action either at common law or in equity, the cardinal point is, Whether any right ariſe to my friend by this promiſe. From the very nature of a contract or promiſe, the parties are bound to each other and to none elſe. It is their mutual dependance on performance that conſtitutes the obligation. I pledged my faith to the perſon with whom I contracted; and as he naturally relies on me for performance, my breach of faith to him is evidently a wrong. A perſon with whom I have no connection may have an intereſt that the contract be performed: but I did not pledge my faith to him, and for that reaſon am not bound to him *. Thus it appears, that the Roman maxim above mentioned, *Alii per alium non acquiritur obligatio*, ariſes from the very nature of a covenant.

* See l. 11. de obligat. et action. L. 38. §. 17. de verb. obligat. See alſo Eſſays on the Principles of Morality and Natural Religion, edit. 2. p. 88.

WHAT I have ſaid, is, if I miſtake not, preciſely what is taught in the Roman law. In the caſe ſtated, an action is not given to me who obtained the promiſe, becauſe I have no intereſt; nor is an action given to my friend who hath an intereſt, becauſe he was not a party to the engagement. But by confining an engagement of this nature within ſo narrow bounds, more than one moral duty is left unſupported by municipal law, as will by and by appear. Whether the Roman lawyers ever thought of applying the rules of equity

of equity to this ſubject, appears a little uncertain; and yet many a doubtful queſtion about what is in reality a man's intereſt, ought naturally to have led them to it. If I exact a promiſe in favour of a ſtranger, it is held that I am not intereſted to have it performed. Is the caſe the ſame where the promiſe is in favour of a friend or of a diſtant relation? Perhaps it may. Let us then ſuppoſe the promiſe to be made in favour of my benefactor, or of my child, perhaps my heir. Have not I to whom the promiſe was made an intereſt to exact performance in this caſe? No perſon of feeling can anſwer with confidence in the negative. Intricate queſtions of this ſort lead to a general doctrine founded on human nature, That the accompliſhment of every honeſt purpoſe is a man's intereſt. And accordingly, in the affairs of this world, it is far from being uncommon to prefer the intereſt of ambition, of glory, of learning, of friendſhip, to that of money. This doctrine, by refinement of manners, prevails now univerſally. In the caſe ſtated, that I have an equitable intereſt to exact the promiſe in favour of my friend, is acknowledged; and a court of equity will accordingly afford me an action to compel performance. But has my friend an action in caſe I forbear to interpoſe? He has no action at common law, becauſe the promiſe was not made to him; and as little has he an action in equity, for the following reaſon, that it depends on me to whom the promiſe was made whether it ſhall be performed or not. It is in the power of every obligee to paſs from his claim or diſcharge it; and therefore an obligor is not bound to perform, till a demand be made upon him by the obligee.

BUT now let us vary one circumſtance. The obligee dies without diſcharging or paſſing from the promiſe. Has the perſon to whom it was to be performed an action in that caſe? A promiſe, it is true, ought to be fulfilled: but then, a man is not bound to fulfil his promiſe, unleſs performance be exacted from him by the perſon to whom the promiſe was made. The perſon who was to reap the benefit, not being a party to the promiſe, cannot claim upon it; and I diſcover no other medium for a claim, in equity more than at common law.

THIS leads me to another variation, where the promiſe is connected with a valuable conſideration. I give, for example, to my ſervant, money to be delivered to my friend as a gift, or to my creditor as payment. The money continues mine till delivery; and I have it in my choice to take it back or to compel delivery. The friend,

friend, however, or creditor, has no action. He has not a real action, becauſe the property of the money is not transferred to him. He has not a perſonal action, becauſe my ſervant came under no obligation to him. If delivery be delayed, he will not naturally think of any remedy other than of making his complaint to me. This reaſoning appears ſo clear and ſatisfactory, that I am forced to give up ſome deciſions of the court of ſeſſion, teaching a very different doctrine. In a minute of ſale of land the purchaſer was taken bound to pay the price to a creditor of the vender's. Action was ſuſtained to this creditor for payment to him of the price, though the vender interpoſed, pleading, That the purſuer not being a party to the minute of ſale, no right could ariſe to him from it, and therefore that the mandate or order he the vender gave to the purchaſer about payment of the price, might be recalled by him at his pleaſure *. But the court afterwards determined more juſtly in a caſe founded on the ſame principle. A proprietor having reſigned his eſtate in favour of his ſecond ſon and his heirs-male, with a clauſe of redemption in favour of his eldeſt ſon and the heirs-male of his body, did thereafter limit the power of redemption, that it ſhould not be exerted unleſs with the conſent of certain perſons named, and impowering at the ſame time theſe perſons to diſcharge the reverſion altogether if they thought proper, which accordingly they did after the father's death. In a declarator at the inſtance of the ſecond ſon to aſcertain his right to the eſtate, it was objected by the eldeſt, that by the ſettlement he had a *jus quæſitum* which could not be taken from him. The diſcharge was ſuſtained †.

* Stair, July 7. 1664, Ogilvie *contra* Ker. Durie, Jan. 9. 1627, Supplicants *contra* Nimmo.

† Fountainhall, Jan. 2. 1706, Dundas *contra* Dundas.

BUT in the caſe above figured, if I die ſuddenly before delivery, what will become of the money? Has my heir a claim? has my friend a claim? or, if neither have, will the money be ſuffered to remain with the ſervant if he chuſe not to execute the order given him? My heir evidently has no right to the money, becauſe equity will not permit him to take by ſucceſſion what is deſtined by me for another. Neither has he an action to compel performance, becauſe, with reſpect to a matter not pecuniary, he has only an equitable intereſt to have his own will performed, not mine. My friend again has no action upon the promiſe. Muſt it then be left entirely upon the ſervant's conſcience to perform, or to retain the ſum, if avarice prevail over conſcience? By no means. Here is a ſum of money in the ſervant's hands, to which he has no right, and which therefore he cannot retain without groſs injuſtice. He is bound therefore to make

delivery; and if my heir have no right, which I have endeavoured to ſhow, the money muſt be delivered to my friend according to my deſtination. The ſubject *in medio*, not the promiſe, is here what founds the obligation and the action in equity for making it effectual. My ſervant, on the one hand, cannot hold the money, but ought to deliver it. My friend, on the other hand, has, by my will, an equitable claim to the money; and a court of equity will interpoſe to make his claim effectual. This caſe then of a *rei interventus* muſt be held an exception to the foregoing maxim *Alii per alium non acquiritur obligatio.* The following deciſions reſt evidently upon this foundation, Colvil, December 1591, Wood *contra* Moncur. Durie, 25. Spottſwood (contract) 26. June 1634, Lord Renton *contry* Lady Aiton. Stair, June 8. 1676, Irvine *contra* Forbes.

SUPPOSING me now to die bankrupt, and that the ſum in the ſervants hand is claimed by my friend to whom it was deſtined, and by my creditors. Here equity which declared for my friend againſt my heir, declares for my creditors againſt my friend; according to the well known maxim *Quod nemo debet locupletari aliena jactura.*

THE laſt variation I ſhall ſuggeſt, is, that the money was put by me in the ſervant's hand, to be delivered to one of my creditors for his payment. As it was all along in my power to recal the money before delivery to the creditor, it was undoubtedly mine at my death, and conſequently made a part of my moveable eſtate. The creditor for whoſe payment the ſum was deſtined, hath no doubt an equitable intereſt in it, but ſo have all my creditors; and therefore, in the caſe of my bankruptcy, equity rules, that the money in queſtion with my other effects be equally diſtributed among them. And this preciſely was decreed, Jan. 4. 1744, Sir John Baird *contra* creditors of Murray.

THIS doctrine unfolds the nature of *fidei-commiſſary* ſettlements among the Romans. Of theſe ſettlements Juſtinian * gives a hiſtory which I do not comprehend, that they were a contrivance to elude the law rendering certain perſons incapable of taking benefit by a teſtament; that it being in vain to ſettle upon ſuch a perſon an eſtate by teſtament, another perſon was named heir, to whom it was recommended to ſettle the eſtate as intended; and that Auguſtus Cæſar gave here a civil action to make the ſettlement effectual. But did

* §. 1. Inſtit. de fidei-com. hered.

did Auguſtus make effectual a ſettlement executed in defraud of the law? I can hardly be of that opinion. If the law was inexpedient, why not openly reſcind it? Auguſtus was too wiſe a prince to ſet thus a public example of eluding law. Juſtinian, I ſuſpect, did not underſtand the nature of theſe ſettlements. It was a maxim in the Roman law derived from the nature of property, That a man cannot name an heir to ſucceed to his heir *. Becauſe this could not be done directly, it was attempted indirectly by a *fidei-commiſſary* ſettlement. I name my heir regularly in my teſtament, and I order him to make a teſtament in favour of the perſon I incline ſhould ſucceed him. Such ſettlements did at firſt depend entirely on the faith of the heir in poſſeſſion, who upon that account was termed *Heres fiduciarius*. The perſon appointed to ſucceed him, termed *Heres fidei-commiſſarius*, had not an action at common law to compel performance. The fiduciary heir was not bound to him but to the teſtator ſolely. But here was a *rei interventus*, a ſubject in the hands of the fiduciary heir, which, by accepting the teſtament, he bound himſelf to ſettle upon the *fidei-commiſſary* heir; and he is therefore bound in conſcience to ſettle it accordingly. The *fidei-commiſſary* heir alſo has an equitable claim to the ſubject, founded on the will of the teſtator. Theſe things conſidered, it appears to me plain, that Auguſtus Cæſar, with reſpect to ſuch ſettlements, did no more but ſupply the defect of the common law, by appointing an action to be ſuſtained in equity to the *fidei-commiſſary* heir.

* See as to this point, Hiſtorical Law-tracts, Tract 3.

WHAT is juſt now ſaid ſerves to explain the nature of truſts, where a ſubject is veſted in a truſtee for behoof of a third party, the children *naſcituri* of a marriage for example. A truſt of this nature, analogous to a *fidei-commiſſary* ſettlement among the Romans, comes not under the cognizance of the courts of common law; becauſe the perſon in whoſe favours the truſt is eſtabliſhed, not being a party to the agreement, has not at common law an action to oblige the truſtee to fulfil his engagement: but he hath an action in equity as above mentioned. And hence it is, that in England ſuch truſts muſt be made effectual in the court of chancery.

REVIEWING what is ſaid above, I am in ſome pain about an objection that will readily occur upon it. A legatee, by the common law of the Romans, had an action againſt the heir for performance; and yet a legatee is not made a party in the teſtament; nor is the heir by accepting the teſtament bound to him, but to the

teſtator ſolely. In order to remove this objection, an account muſt be given of the different kinds of legacies, well known in the Roman law; and by putting this ſubject in its true light, the objection will vaniſh. In the firſt place, where a legacy is left of a *corpus*, the property is transferred to the legatee *ipſo facto* upon the teſtator's death, conformable to a general rule in the common law, that ſubjects are transferred from the dead to the living without neceſſity of delivery. After the proprietor's death, there is no perſon who can make delivery; and therefore, if will alone, in this caſe, had not the effect to transfer property, it could never be transferred from the dead to the living. For this reaſon, a legatee of a *corpus* has no occaſion to ſue the heir for delivery: he hath a *rei vindicatio* at common law. The next kind of legacy I ſhall mention, is where a bond for a ſum of money is bequeathed directly to Titius. The ſubject here, as in the former caſe, veſts in the legatee *ipſo facto* upon the teſtator's death. The legatee has no occaſion for an action againſt the heir: in quality of creditor he has at common law an action againſt the debtor for payment. A third ſort of legacy is where the teſtator burdens his heir to pay a certain ſum to Titius. This is the only ſort, reſembling a *fidei-commiſſary* ſettlement, to which the maxim can be applied *quod alii per alium non acquiritur obligatio*. But as an action at common law for making other legacies effectual was familiar, the influence of connection, without making nice diſtinctions, produced an action at common law for this ſort alſo. Therefore all that can be made of this inſtance, is to prove what will appear in many inſtances, that common law and equity are not ſeparated by any accurate boundary.

OUR entails upon the common law are, in ſeveral reſpects, ſimilar to the Roman *fidei-commiſſary* ſettlements; and ſo far are governed by the principles above eſtabliſhed. I give the following inſtances. A man makes an entail in favour of his ſon or other relation, diſponing the eſtate to him, ſubſtituting a certain ſeries of heirs, and reſerving his own liferent. The inſtitute, though fettered with irritant and reſolutive clauſes, is however veſted in the full property of the eſtate *; and the ſubſtitutes, for the reaſon above given, have not an action at common law to oblige the inſtitute to make the entail effectual in their favours. But the inſtitute reſembles preciſely a Roman *heres fiduciarius*, and is bound in equity to fulfil the will of the entailer, by permitting the ſubſtitutes to ſucceed in their order.

* See Hiſtorical Law-tracts, Tract 3. towards the cloſe.

I give

I give a ſecond inſtance, which I chuſe the rather becauſe it relates to a celebrated queſtion often diſputed in the court of ſeſſion, *viz.* Whether an entail, ſuch as that above mentioned, after being compleated by infeftment, can be altered or diſcharged even by the joint deed of the entailer and inſtitute. Our lawyers have generally leaned to the negative. The inſtitute, they urge, fettered by the entail, has not power to alter or diſcharge; and the will of the entailer, who is not now proprietor, cannot avail. This reaſoning is ſlight and unſatisfactory. The full property is veſted in every tenant in tail, not leſs than in him who inherits a fee-ſimple. A tenant in tail is indeed limited as to the exerciſe of his powers of property: he muſt not alien, and he muſt not alter the order of ſucceſſion. But theſe and ſuch like limitations, proceed not from defect of power *qua proprietor*, but from being bound perſonally by acceptance of the entail not to exerciſe theſe powers *. This diſtinction with reſpect to the preſent queſtion is of moment. A man cannot exerciſe any power beyond the nature of his right. Such an act is void; and every perſon is entitled to object to it: but no perſon, other than the obligee, is entitled to object to the tranſgreſſion of a covenant or perſonal obligation. The entailer, in the caſe ſtated, is the obligee. It is he who took the inſtitute bound to limit as above the exerciſe of his property; and he therefore has it in his choice, to keep the heir bound or to releaſe him from his obligation. To be in a condition to grant ſuch releaſe, it is neceſſary indeed that he be obligee but it is not neceſſary that he be proprietor.

* This doctrine is more fully explained in Tract 3. above cited.

HENCE it appears, that the ſubſtitutes have no title while the entailer is alive, to reſtrain the inſtitute from the free uſe of his property. They have no claim perſonally againſt the inſtitute, who ſtands bound to the entailer not to them. Nor have they any other medium for an action, ſeeing the full property of the eſtate is veſted in the inſtitute, and no part in them. In a word, it depends entirely upon the entailer, during his life, whether the entail ſhall be effectual or not; and while that continues to be his privilege, the ſubſtitutes evidently can have no claim. I go farther by aſſerting, that the entailer cannot deprive himſelf of this privilege, even though he ſhould expreſsly renounce it in the deed of entail. The ſubſtitutes are not made parties to the entail, and the renunciation, though in their favours, is not made to them. The renunciation is at beſt but a gratuitous promiſe, which none are entitled to lay hold of but that very perſon to whom it is made.

A great change indeed is produced by the entailer's death. There now exiſts no longer a perſon who can looſe the fetters of the entail. The inſtitute now muſt for ever be bound by his own deed, reſtraining him from the free exerciſe of his property; and as the ſubſtitutes, by the entailer's will, have in their order an equitable claim to the eſtate, a court of equity will make this claim effectual.

BUT here a queſtion may naturally ariſe, Why ought not the privilege which the entailer had to diſcharge the fetters of the entail deſcend to his heirs? The ſolid and ſatisfactory anſwer is what follows: No right or privilege deſcends to heirs but what is pecuniary. But the privilege of diſcharging the fetters of an entail makes not the heir *locupletior*, and therefore deſcends not to heirs.

BOOK II.

BOOK II.

Powers of a Court of EQUITY founded on the Principle of Utility.

JUSTICE is concerned in two things equally capital, one to make right effectual, and one to redreſs wrong. With reſpect to the former, utility coincides with juſtice: with reſpect to the latter, it goes a great way farther. Wrong muſt be done before juſtice can interpoſe. But utility, having a more extenſive view, lays down meaſures that are preventive of wrong. With reſpect to meaſures for the poſitive good of ſociety, and for making men ſtill more happy in a ſocial ſtate, theſe are reſerved to the legiſlature [a]. It is not neceſſary that ſuch extenſive powers be truſted with courts of law. The power of making right effectual, of redreſſing wrong, and of preventing miſchief, are ſufficient.

As the matters contained in this book come within a narrow compaſs, I ſhall not have occaſion for the multiplied ſubdiviſions neceſſary in the former. A few chapters will exhauſt the whole; beginning with thoſe miſchiefs or evils that are the moſt deſtructive, and deſcending gradually to thoſe of leſs conſequence. I reſerve the laſt place for the power of a court of equity to ſupply defects in ſtatutes preventive of harm, whether that harm be of more or leſs importance. It is proper that matters ſo much connected ſhould be handled together.

CHAPTER I.

Acts contra bonos mores *repreſſed.*

INDIVIDUALS in ſociety are linked together by many different relations, that require each of them a ſuitable behaviour or conduct; and that we ſhould act according to the relations in which we are engaged, appears not only proper, but, by the moral

[a] AND ſtill leſs ought a court of equity to interpoſe for advancing the poſitive good of one or a few individuals; though the court of chancery ſometimes ventures to exert its power for this narrow purpoſe, actuated by a laudable zeal to do good, carried indeed beyond proper bounds. I give the following inſtance. Eighteen tenants of a manor have right to a common, and fifteen of them agree to encloſe. The encloſing will be decreed though oppoſed by three. For it ſhall not be in the power of a few wilful perſons to oppoſe a public good *.

* Abridg. Caſes in Equity, cap. 4. Sect. D. §. 2.

ſenſe, is made a matter of ſtrict duty. The relations in particular that imply ſubordination, make the corner-ſtone of government and ripen men gradually for behaving properly in it. The reciprocal duties of parent and child, of preceptor and ſcholar, of maſter and ſervant, of the high and low, of the rich and poor, *&c.* do each of them pave the way to others that follow, and enure us to the duties both of rulers and of ſubjects. It is for this reaſon extremely material, that the reciprocal duties ariſing from ſubordination be preſerved from encroaching upon each other. To reverſe them would reverſe the order of nature, and would tend to the diſſolution of government. To ſuffer, for example, a young man to uſurp upon his father and to aſſume rule over him, has not only the bad tendency now mentioned, but is directly immoral and a breach of duty. A wrong, however, of this nature not being pecuniary, comes not under the juriſdiction of courts of common law, and therefore muſt be repreſſed by a court of equity. It might, as a wrong not pecuniary, have found a place in the foregoing book; but as it makes a greater figure by its poiſonous and undermining conſequences, I choſe it as proper for the front of the preſent book.

A young man in his contract of marriage having conſented to be put under interdiction to his father and father-in-law, and to the eldeſt ſon of the marriage in caſe of their failure; and the two firſt being dead, the court refuſed to ſuſtain an interdiction where the father was interdicted and the ſon interdictor *.

* Durie, Jan. 18. 1622, Silvertonhill *contra* his Father.

A bond was granted by a man to his wife, bearing, "That by "his facility he might be miſled to diſpoſe of a liferent he had by "her, and therefore binding himſelf not to diſpone without her "conſent." The court refuſed to ſuſtain this bond with an inhibition upon it, though equivalent to an interdiction; becauſe the wife being *ſub poteſtate viri*, cannot be curator to any perſon, and leaſt of all to her huſband †.

† Stair, Feb. 27. 1663, Lady Milton *contra* Milton.

OTHER deeds tending to depravation of manners, are alſo rejected by a court of equity. Thus a man who had fallen out with his mother, ſettled his manſion-houſe on his brother, and took a bond from him in his ſiſter's name, that he ſhould not permit his mother to come into the houſe. The bond was decreed to be ſet aſide ‡.

‡ 1. Vernon 413.

A bond which appears from its narrative to be granted as a temptation to commit adultery or any other crime, will be reprobated even

even at common law. And though the cauſe be not mentioned in the bond itſelf, it will be rejected by a court of equity, if it appear from collateral evidence, that ſuch was the cauſe of granting the bond. But as it is a duty, not a wrong, to provide for a baſtard child, or to provide for a woman that the man has robbed of her chaſtity, a bond or ſettlement made for that purpoſe is effectual both in law and equity *.

* Durie, June 25. 1642, Roſs *contra* Robertſon.

THE Marquis of Annandale having for two years had criminal converſation with Harris his houſe-keeper, and having a child by her that afterwards died, gave her a bond of *L.* 4000 penalty, conditioned to pay her *L.* 2000 within three months after his death. The bond being put in ſuit after the death of the Marquis, a bill was brought to be relieved againſt the bond, as being given *pro turpi cauſa*. The bill was diſmiſſed, the bond being *præmium pudoris*. And this decree was affirmed by the houſe of Lords. A caſe was cited, where Mrs. Ord, a young lady of about fourteen years of age and entitled to *L.* 12,000 fortune, was ſeduced by Sir William Blacket, who ſettled on her *L.* 300 yearly for life; and the young lady had a decree for the *L.* 300 as *præmium pudicitiæ*. A like caſe happened in the exchequer, where a man having debauched a young woman, and intending afterwards to trick her, ſettled on her *L.* 30 yearly for life out of an eſtate that was not his; the court decreed him to make the ſettlement good out of his own eſtate †.

† Abridg. Caſes in Equity. Ch. 13. Sect. C. §. 6.

CHAPTER II.

Certain Claims in themſelves juſt, and therefore authorized by Common Law, rendered ineffectual by Equity becauſe of their bad Tendency.

SOCIETY cannot flouriſh by pecuniary commerce merely. Laying aſide benevolence, the ſocial ſtate would neither be commodious nor comfortable. There are ſeveral connections formed chiefly by conſent, that are in their nature and intendment altogether diſintereſted; witneſs the connection betwixt a guardian and his infant, and in general betwixt a truſtee and the perſon for whoſe behoof the truſt is gratuitouſly undertaken. In this caſe, to take a premium for executing any article of the truſt, may ſometimes by circumſtances be extortion, of which in the former book; and being in every caſe inconſiſtent with the truſtee's duty, will be diſcountenanced even at common law. Thus a bond for 500 merks granted

to an interdictor by one who purchaſed land from the perſon interdicted, was voided *. If the ſale was a rational meaſure, it was the interdictor's duty to conſent to it without a bribe: if the ſale was hurtful to the perſon interdicted, the interdictor's taking a ſum for his conſent was taking a bribe to betray his truſt.

* Haddington, penult July 1622, Carnouſie *contra* Achanachie.

BUT equity goes farther, and prohibits a truſtee from making any profit by his management directly or indirectly. For however innocent an act of this nature may be in itſelf, it is poiſonous with regard to its conſequences. If any opportunity be given for making profit in this manner, a truſtee will loſe ſight of his duty, and ſoon learn to direct his management chiefly or ſolely for his own profit. It is ſolely upon this foundation that the tutor is barred from making profit by purchaſing debts due by his pupil, or rights affecting his eſtate. The ſame hazard of miſchief concludes alſo againſt a truſtee, who hath a ſalary or is paid for his labour. A *pactum de quota litis* betwixt an advocate and his client, which tends to corrupt the morals of the former and to make him ſwerve from his duty, is diſcouraged in all civilized countries. A bargain of this kind may be fair, and even beneficial to the client: but if indulged in any inſtance it muſt be indulged without reſerve; and therefore utility requires that it be totally prohibited. It is for the ſame reaſon that a member of the college of juſtice is prohibited by ſtatute † from purchaſing land the property of which is the ſubject of a law-ſuit; and that a factor upon a bankrupt eſtate is prohibited from purchaſing the bankrupt's debts ‡. The ſame rule is extended to private factors and agents without an act of ſederunt. Debts due by their conſtituents purchaſed by theſe gentlemen, will be extinguiſhed as purchaſed for behoof of the conſtituents, and no claim will be ſuſtained but for the tranſacted ſum.

† 13. Edw. 1. cap. 49. act 216. parl. 1594.

‡ Act of ſederunt, Dec. 25. 1708.

A bond given to the defendant to procure in marriage to the plaintiff a young gentlewoman of *L.* 2000 fortune, was decreed to be given up, becauſe the match was unequal the plaintiff being ſixty years of age and having ſeven children ‖. It was decreed in chancery, that a bond of *L.* 500 given for the procuring a marriage between perſons of equal rank and fortune was good: but on an appeal to the houſe of Lords, the decree was reverſed. For ſuch bonds to match-makers, tending to betray and ruin perſons of fortune and quality, ought not to be countenanced in equity; and the countenancing ſuch bonds would be of evil example to guardians, truſtees, ſervants, and others who have the care of perſons under

‖ Abridg. Caſes in Equity, cap. 13. Sect. F. §. 2.

under age *. But if the ſum be paid to the brocker, neither law nor equity furniſhes an action againſt him for reſtitution. For even ſuppoſing this to be a *turpis cauſa*, the rule applies, *quod potior eſt conditio poſſidentis*. And yet action was ſuſtained in the court of chancery for reſtoring the money †.

* Abridg. Caſes in Equity, cap. 1. Sect. F. §. 3.

† Ibid. §. 4.

CHAPTER III.

Forms of the Common Law diſpenſed with in order to abridge Law-ſuits.

RETENTION, which is an equitable exception reſembling compenſation, was introduced by the court of ſeſſion without authority of a ſtatute. The ſtatute 1592, authoriſing compenſation, ſpeaks not of an obligation *ad factum præſtandum*, nor of any obligation other than for payment of money; and yet it may be thought hard, that a man ſhould have the authority of a court to make his claim effectual againſt me, while he refuſes or delays to ſatisfy the claim I have againſt him. So ſtands however the common law, which is corrected by a court of equity for the public good. Suppoſing parties once in court upon any particular affair, the adjuſting, without a new proceſs, all matters betwixt them that can at preſent be adjuſted, is undoubtedly beneficial to the public, becauſe it tends to abridge law-ſuits. This valuable end is attained, by beſtowing on the defendant a privilege to with-hold performance from the purſuer till the purſuer *ſimul et ſemel* perform to him. This privilege is exerciſed by pleading it as an exception to the purſuer's demand; and the exception, from its nature, is termed *Retention*.

COMPENSATION, as we have ſeen, is founded on the principle of equity. And it is alſo ſupported by that of utility; becauſe the finiſhing two counter-claims in the ſame proceſs tends to leſſen the number of law-ſuits. Retention, again, is founded ſolely on utility, being calculated for no other end but to prevent the multiplication of law-ſuits. The expedience of retention in this reſpect, has gained it admittance in all civilized nations. In the Engliſh court of chancery particularly, it is a well known exception, of which I give the following inſtance. "If the plaintiff mortgage his eſtate to the "defendant, and afterwards borrow money from the defendant upon "bond, the redemption ought not to take place unleſs the bonded "debt be paid as well as the mortgage money ‡."

‡ 1. Vernon 244.

FROM what is ſaid, every ſort of obligation affords, as it would appear, a ground for retention, provided the term of performance be come and no juſt cauſe for with-holding performance. It ſhall only be added, that for the reaſons given with reſpect to compenſation *, retention cannot be pleaded againſt an aſſignee for a valuable conſideration.

* Book 1. Part 2. Chap. 3. Sect. 1.

A directed *B* to pay to *C* what ſums *C* ſhould want. *C* accordingly received two ſums (among others) from *B*, for which he gave receipts as by the order of *A*. *A* and *C* came to account, which being ſtated, they gave mutual releaſes. But the two ſums not being entered in the books of *A*, were not accounted for by *C*. *B* not having received any allowance from *A* for the two ſums, prefers his bill againſt *C* to have the money returned to him. *C* confeſſed the receipts, but inſiſted, that the money was delivered to him by the order of *A*, and that *B* being a hand only had no claim. But the court decreed, that the plaintiff had a fair claim againſt the defendant to avoid circuity of ſuits: for otherwiſe it would turn the plaintiff on *A*, and *A* again on the defendant in equity to ſet aſide the releaſe and to have an allowance of theſe ſums. And the decree was affirmed in the houſe of Lords †.

† Shower's Caſes in Parliament, 17.

BY the common law of this land, a creditor introduced into poſſeſſion upon a wadſet, upon an aſſignment to rents, or upon an adjudication, is bound to ſurrender the poſſeſſion ſo ſoon as the debt is extinguiſhed by the rents levied. He obtained poſſeſſion for a certain purpoſe, *viz.* to levy the rents for his payment; and therefore, ſo ſoon as that purpoſe is fulfilled his right is at an end, and he is not any longer entitled to poſſeſs. He perhaps is creditor in other debts that may entitle him to apprehend poſſeſſion *de novo*: but theſe will not, at common law, impower him to detain the poſſeſſion one moment after the debt that was the title of his poſſeſſion is extinguiſhed. He muſt firſt ſurrender poſſeſſion; and, if he think proper, he may thereafter apply for legal authority to enter again into poſſeſſion for payment of theſe ſeparate debts.

A court of equity views matters in a different light. The debtor's claim to have his land reſtored to him is certainly not founded on utility, when ſuch claim can ſerve no other end but to multiply expence by forcing the creditor to take out execution upon the ſeparate debt in order to be repoſſeſſed. A maxim in the Roman law concludes in this caſe with its utmoſt force, *Fruſtra petis quod mox es reſtituturus*; and

and this maxim accordingly furniſheth to the creditor in poſſeſſion, a defence which is a ſpecies of retention. There is indeed the ſame reaſon for ſuſtaining the exception of retention to keep a creditor in poſſeſſion till he be paid of all the real debts burdening the land, that there is to protect from payment of a perſonal debt, a debtor who has a counter-claim againſt the creditor. And the foundation of the exception is in both caſes the ſame, *viz.* the principle of utility, which is interpoſed to prevent the multiplying of law-ſuits, prejudicial to one of the parties at leaſt, and beneficial to neither.

BUT this relief againſt the ſtrictneſs of common law, ought not to be confined to real debts which entitle the creditor to poſſeſs. It may ſometimes happen, as demonſtrated above *, to be more beneficial to the debtor or to the creditor, without hurting either, that the rents be applied for payment even of a perſonal debt than for payment of the debt which is the title of poſſeſſion. And wherever the rents may be applied for payment of a perſonal debt the creditor muſt be privileged to hold the poſſeſſion till that debt be paid.

* Book 1. Part 2. Ch. 4. Sect. 5.

CHAPTER IV.

Bona fide *Payment.*

IN the courſe of money-tranſactions and the payment of debt, it may happen by miſtake that payment is made, not to the perſon who is really creditor, but to one underſtood to be the creditor. However invincible the error may be, payment made to any but to the creditor avails not at common law; becauſe none but the creditor can diſcharge the debt. What remedy can be afforded by a court of equity where a debt is *bona fide* paid to another than the true creditor, is the ſubject of the preſent chapter.

IT is an obſervation verified by long experience, That no circumſtance tends more to the advancement of commerce than a free circulation of the goods of fortune from hand to hand. In this iſland, commercial law is ſo much improved, as that land, moveables, debts, have all of them a free and expedite currency. A bond for borrowed money, in particular, deſcends to heirs, and is readily tranſferrable to aſſignees voluntary or judicial. But that circumſtance, beneficial to commerce, proves in many inſtances hurtful to debtors. Payment made to any other than the creditor, frees not the debtor at common law: and yet circumſtances may be often ſuch, as to

make it impracticable for the debtor to diſcover that the perſon who produceth a title, fair in appearance, is not the creditor. Here is a caſe extremely nice in point of equity. On the one hand, if *bona fide* payment be not ſuſtained, the hardſhip will be great upon the debtor, who muſt pay a ſecond time to the true creditor. On the other hand, if the exception of *bona fide* payment be ſuſtained to protect the debtor from a ſecond payment, the creditor will be often forfeited of his debt without his fault. Here the ſcales hang even, and equity preponderates not on either ſide. But the principle of utility affords relief to the debtor, and exerts all its weight in his ſcale. For if a debtor were not ſecure by voluntary payment, no man would venture to pay a ſhilling by any authority leſs than that of the ſovereign court; and how ruinous to credit this would prove, muſt be obvious without taking a moment for reflection.

To bring this matter nearer the eye, we ſhall firſt ſuppoſe that the putative creditor proceeds to legal execution, and in that manner recovers payment. Payment thus made by authority of law, muſt undoubtedly protect the debtor from a ſecond payment. And this leads to another caſe, that the debtor, to prevent legal execution which threatens him, makes payment voluntarily. The payment here is made indeed without compulſion, becauſe there is no actual execution. But then it is not made without authority; for, by the ſuppoſition, execution is awarded, and nothing prevents it but payment. The third caſe is of a clear bond, upon which execution muſt be obtained ſo ſoon as demanded; and the debtor pays, knowing of no defence. Why ought not he alſo to be ſecure in this caſe? That he be ſecure is beneficial to creditors as well as to debtors, becauſe otherwiſe there can be no free commerce of debts. This exception then of *bona fide* payment, is ſupported by the principle of utility in two different reſpects. It is beneficial to creditors, by encouraging debtors to make prompt payment; and by removing from them the pretext of inſiſting upon anxious and ſcrupulous defences, which, under the colour of paying ſecurely, would often be laid hold of to delay payment. It is beneficial to debtors, who can pay with ſafety without being obliged to ſuffer execution.

An executor under a revoked will, being ignorant of the revocation, pays legacies; and the revocation is afterwards proved; he ſhall be allowed theſe legacies *.

* 1 Chancery Caſes 126.

If

IF in making payment to the putative creditor the debtor obtain an eaſe, the exception of *bona fide* payment will be ſuſtained for that ſum only which was really paid *. This rule is founded on equity; for here the true creditor is *certans de damno evitando*, and the debtor *de lucro captando*.

* Stair, July 19. 1665, Johnſton *contra* M'Gregor.

CHAPTER V.

Interpoſition of a Court of Equity in favour even of a ſingle Perſon to prevent Miſchief.

THIS ſubject is broached in the introduction, and indeed ſo diſtinctly explained as to require very little addition. It ſhows a matter pretty curious and of which hitherto we have had no example, that a court of equity acting upon the principle of utility is not confined to what is properly termed *Juriſdiction*, but, in order to prevent miſchief even to a ſingle perſon, can aſſume magiſterial powers. It is by ſuch power that the court of ſeſſion names factors to manage the eſtates of thoſe who are in foreign parts, and of infants who are deſtitute of tutors. The authority interpoſed for ſelling the land-eſtate of a perſon under age, is properly of the ſame nature. For the enquiry made about the debts, and about the rationality of a ſale, though in the form of a proceſs, is an expiſcation merely.

BY the Roman law, a ſale made by a tutor of his pupil's land-eſtate without authority of a judge, was void *ipſo jure* as *ultra vires*. This ſeems not to have been followed in Scotland. Maitland reports a caſe †, where it was decreed, that ſuch a ſale *ſine decreto* is not void, but that it is good if profitable to the infant. And I muſt approve this deciſion as agreeable to principles and the nature of the thing. The interpoſition of a court before-hand, is not to beſtow new powers upon a tutor, but to certify the neceſſity of a ſale, in order to encourage purchaſers by rendering them ſecure. But if, without authority of a court, a purchaſer be found who pays a full price, and if the ſale be neceſſary, where can the objection lie? So far indeed a court may juſtly go, as to preſume leſion from a ſale *ſine decreto*, until the tutor juſtify that the ſale is rational and profitable to the infant.

† Dec. 1. 1565, Douglas *contra* Foreman.

CHAPTER VI.

Statutes preventive of Wrong or Miſchief extended by a Court of Equity.

* Book 1. Part 1. Chap. 4.

STATUTES, as hinted above*, that have utility for their object, are of two kinds: Firſt, Statutes directed for promoting the poſitive good of the whole ſociety, or of ſome part; Second, Statutes directed to prevent miſchief only. Defective ſtatutes of the latter kind may be ſupplied by a court of equity, which, independant of ſtatutes, is impowered to prevent miſchief. But that court has not, more than a court of common law, any power to ſupply defective ſtatutes of the former kind; becauſe it belongs to the legiſlature only to make laws or regulations for promoting good poſitively.

USURY is in itſelf innocent, but to prevent oppreſſion is prohibited by ſtatute. Gaming is prohibited by ſtatute; and the purchaſing law-ſuits is a commerce unlawful for members of the college of juſtice. Theſe in themſelves are not unjuſt; but they tend to corrupt the morals of ſome, and prove often ruinous to others. Such ſtatutes, preventive of wrong and miſchief, may be extended by a court of equity, in order to compleat the remedy intended by the legiſlature. It is chiefly with relation to ſtatutes of this kind that Bacon delivers an opinion with great elegance: "Bonum publicum "inſigne rapit ad ſe caſus omiſſos. Quamobrem, quando lex ali- "qua, reipublicæ commoda notabiliter et majorem in modum in- "tuetur et procurat, interpretatio ejus extenſiva eſto et amplians †."

† De augmentis ſcientiarum, L. 8. cap. 3. aphor. 12.

IN this claſs, as appears to me, our ſtatute 1617 introducing the poſitive preſcription ought to be placed. For it has not, like the Roman *uſucapio*, the penal effect of forfeiting a proprietor upon account of his negligence, and of transferring his property to another. It is calculated, on the contrary, to ſecure every man in his land-property, by denying action upon old obſolete claims, which, by the common law, are perpetual. A claim may be very old and yet very juſt; and it is not therefore wrong in the common law to ſuſtain ſuch a claim. But then the conſequences ought to be conſidered. If a claim be ſuſtained beyond forty or fifty years becauſe it may be juſt, every claim muſt be ſuſtained however old; and experience diſcovered, that this opens a wide door to falſehood. To prevent wrong

wrong and miſchief, it was neceſſary that land-property ſhould by lapſe of time be ſecured againſt all claims; and as with reſpect to antiquated claims there is no infallible criterion to diſtinguiſh good from bad, it was neceſſary to bar them altogether by the lump. The paſſage cited from Bacon applies in the ſtricteſt manner to the ſtatute conſidered in the light now mentioned; and it hath accordingly been extended in order to compleat the remedy afforded by the legiſlature. To ſecure land-property againſt obſolete claims, it muſt be qualified, that the proprietor has poſſeſſed peaceably forty years by virtue of a charter and ſaſine. So ſays the ſtatute; and if the ſtatute be taken ſtrictly, no property is protected from obſolete claims but where infeftment is the title of poſſeſſion. But the court of ſeſſion, preferring the end to the means, and conſulting its own powers as a court of equity to prevent miſchief, ſecures by preſcription every ſubject poſſeſſed upon a good title, a right to tithes for example, a long leaſe of land, or of tithes, which are titles that admit not of infeftment.

As the foregoing ſtatute was made to ſecure land from obſolete and unjuſt claims, ſo the ſtatutes 1469 and 1474, introducing the negative preſcription of obligations, were made to ſecure individuals perſonally from claims of the ſame ſort. As theſe ſtatutes all of them are preventive of miſchief, they may all of them be extended by a court of equity to compleat the remedy. The ſtatutes accordingly now mentioned have been extended to mutual contracts, to decrees *in foro contradictorio*, and to reductions of deeds granted on deathbed [a].

CONSIDERING the inſtances above mentioned, it muſt, I imagine, occaſion ſome ſurpriſe, to find a propoſition cheriſhed by our lawyers, That correctory ſtatutes, as they are termed, ought never to be extended. We have already ſeen this propoſition contradicted not only by ſolid principles, but even by the court of ſeſſion in many inſtances. With relation to ſtatutes, in particular, correctory of injuſtice or of wrong, no man can ſeriouſly doubt that a court of equity is impowered to extend ſuch ſtatutes, in order to compleat the re-

a I am aware, that the ſtatutes introducing the negative preſcription have, by the court of ſeſſion, been conſidered in a different light. They have been held as a forfeiture even of a juſt debt. For it was once judged, that after the forty years the defendant was not bound to give his oath upon the verity of the debt; and that though he ſhould acknowledge the debt to be juſt, yet he was not liable *in foro humano*, however he might be liable *in foro poli & conſcientiæ* ‡. That this is a wrong conſtruction of theſe ſtatutes I have endeavoured to ſhow above ||.

‡ Fountainhall, Dec. 7. 1703, Napier *contra* Campbell.

|| Book 1. Part 2. Ch. 2. Sect. 2.

medy preſcribed by the legiſlature. And the ſame is equally clear with relation to ſtatutes ſupplying defects in the common law. As to the ſtatutes under conſideration, calculated to prevent miſchief, it might, I own, have once been more doubtful whether theſe could be extended; for of all the powers aſſumed by a court of equity it is probable, that the power of preventing miſchief was the lateſt. But in England this power has been long eſtabliſhed in the court of chancery, and experience has proved it to be a ſalutary power. Why then ſhould we ſtop ſhort in the middle of our progreſs? No other excuſe can be given for ſuch heſitation, but that our law, conſidered as a regular ſyſtem, is of a much later date than that of England.

THE foregoing are inſtances where the court of ſeſſion, without heſitation, have ſupplied defects in ſtatutes made to prevent miſchief. But to ſhow how deſultory and fluctuating the practice of the court is in that particular, I ſhall confine myſelf to a ſingle caſe on the other ſide, which makes a figure in our law. In the tranſmiſſion of land-property, by ſucceſſion as well as by ſale, we require infeftment. An heir however, without compleating his right by infeftment, is entitled to continue the poſſeſſion of his anceſtor *. In this ſituation, behaving as proprietor, he contracts debts, and unleſs he be reduced to the neceſſity of borrowing large ſums, thoſe he deals with are ſeldom ſo ſcrupulous as to enquire into his title. By the common law however, the debtor's death before infeftment is, as to the real eſtate, a forfeiture of all his perſonal creditors. This is a miſchief which well deſerved the interpoſition of the legiſlature; and a remedy was provided by act 24. p. 1695, enacting, "That if an apparent heir "have been in poſſeſſion for three years, the next heir, who by "ſervice or adjudication connects with the predeceſſor laſt infeft, "ſhall be liable to the apparent heir's debts *in valorem* of the heri-"tage." It cannot be doubted, that a compleat remedy was here intended, to give a reaſonable ſecurity that thoſe who deal with heirs apparent ſhall obtain payment of their debts. And yet if we regard the words only, the remedy is imperfect; for what if the next heir apparent, purpoſely to evade the ſtatute, ſhall content himſelf with the poſſeſſion and enjoyment of the heritage, without making up titles by ſervice or adjudication? Upon this ſtrict conſtruction of the ſtatute, the creditors, in whoſe favour it is introduced, will reap little benefit. For if the debts be conſiderable, no heir will ſubject himſelf by compleating his titles, when he is admitted to the poſſeſſion,

* See Hiſtorical Law-tracts, Tract 5.

ſion, and has the full enjoyment of the rents without any titles. Formerly the heir-apparent in poſſeſſion had no intereſt to forbear making up titles: his neglect muſt have been aſcribed to indolence, or to inattention. But if the remedy intended by the ſtatute reach not the heir-apparent in poſſeſſion, a ſtrong motive of intereſt ariſes to avoid making up titles. In this view the ſtatute, if confined to the words, muſt appear extremely abſurd. Here is indeed a remedy provided for a legal wrong: but what ſort of remedy? A remedy ſo ſtrangely contrived as to depend entirely upon that very perſon againſt whom it is directed. For is it not always in the power of the heir, by ſatisfying himſelf with a poſſeſſory title, to diſappoint the creditors of their remedy? And as by this poſſeſſory title he has the full enjoyment of the eſtate, he will always diſappoint them if he regard his own intereſt. The legiſlature in this caſe undoubtedly intended a compleat remedy; and the conſideration now mentioned, peculiar to this caſe, is a ſtrong additional motive for the interpoſition of a court of equity to fulfil the intendment of the legiſlature. And yet miſled by the notion that correctory laws ought not to be extended, the court of ſeſſion hath conſtantly denied action to the creditors of an heir who dies in apparency, againſt the next heir in poſſeſſion who has not compleated his title to the eſtate by ſervice or adjudication.

A word or two upon ſtatutes to which the power of a court of equity reacheth not in any degree. Monopolies or perſonal privileges cannot be extended by a court of equity *; becauſe that court may prevent miſchief, but has no power to do any act to the purpoſe of enriching any perſon, or making him *locupletior*, as termed in the Roman law. As to penal ſtatutes again, it is clear in the firſt place, that to augment a penalty beyond that directed by a ſtatute is acting in contradiction to the ſtatute, which enacts that preciſe penalty and not a greater. In the next place, to extend the penalty in a ſtatute to a caſe not mentioned, is a power not truſted with any court, becauſe the truſt is not neceſſary. A penalty is generally added to a ſtatutory prohibition. A court of equity may extend the prohibition to ſimilar caſes, and even puniſh the tranſgreſſion of their own prohibition †; but it is a prerogative peculiar to the legiſlature to annex before-hand a penal ſanction to a prohibition.

* L. 1. §. 2. de conſtitut. princ.

† Book 1. Part 1. Ch. 4.

CONCLUSION of BOOK II.

THE principle of juſtice, though more extenſive in its influence than that of utility, is in its nature more ſimple. It never looks beyond the parties engaged in the ſuit. The principle of utility, on the contrary, not only regards the parties engaged in the ſuit, but alſo the ſociety in general; and comprehends many circumſtances concerning both. Being thus in its nature and application more intricate than juſtice, I thought it not amiſs to cloſe this book with a few thoughts upon it. In the introduction there was occaſion to hint, that utility co-operates ſometimes with juſtice, and in oppoſition prevails over it. This propoſition is verified in the firſt book by ſeveral inſtances, which I propoſe to bring under one view, in order to give a diſtinct notion of the co-operation and oppoſition of theſe principles.

IT is ſcarce neceſſary to be premiſed, that in oppoſing private utility to juſtice, the latter ought always to prevail. A man is not bound to proſecute what is beneficial to him: he is not even bound to demand reparation for wrong done him. But he is ſtrictly bound to do his duty; and for that reaſon he himſelf muſt be conſcious, that in oppoſition to duty intereſt ought to have no weight. It is beſides of great importance to ſociety that juſtice have a free courſe; and accordingly public utility unites with juſtice to enforce right againſt intereſt. Private intereſt therefore or private utility, may, in the preſent ſpeculation, be laid entirely aſide; and it is barely mentioned to prevent miſtakes.

ANOTHER limitation is neceſſary. It is not every ſort of public utility that can outbalance juſtice: it is that ſort only which is preventive of miſchief affecting the whole or bulk of the ſociety. To prevent miſchief to an individual coincides with private intereſt; and as to public utility ſo far as it concerns a poſitive additional good to the ſociety, it is a ſubject that comes not within the ſphere of a court of equity.

CONFINING our view then to public utility directed to prevent miſchief, I venture to lay down the following propoſition, That wherever it is at variance with juſtice, a court of equity ought not to enforce the latter, nor ſuffer it to be inforced by a court of common law. In order to evince this propoſition, which I ſhall endeavour

deavour to do by induction, the proper method will be to give a table of caſes, beginning with caſes where the two principles are in ſtrict union, and proceeding orderly to thoſe where they are in declared oppoſition.

In general, theſe principles for the moſt part are good friends. The great end of eſtabliſhing a court of equity is to have juſtice accurately diſtributed, even in the moſt delicate circumſtances; and nothing contributes more to peace and union in ſociety than that this great end be ſteadily proſecuted and compleatly fulfilled. As this branch therefore of utility is inſeparable from juſtice, it will not be neceſſary hereafter to make any expreſs mention of it. It muſt be always underſtood when we talk of juſtice.

We proceed to other branches of utility not ſo ſtrictly attached to juſtice, but which ſometimes coincide with it, and ſometimes riſe in oppoſition. One of theſe is the benefit accruing to the ſociety by abridging law-ſuits. In the caſe of compenſation, utility unites with juſtice to make compenſation a ſtrong plea in every court of equity. Retention again depends entirely upon the utility of abridging law-ſuits. But if it have no ſupport from juſtice, neither is it oppoſed by juſtice.

In the caſe of *bona fide* payment the utility is different. It is the benefit accruing to a mercantile ſociety by giving a free courſe to money-tranſactions, joined with the hurt that muſt follow if debtors, by running any riſk in making payment, were encouraged to ſtate anxious or frivolous defences. The exception of *bona fide* payment is ſuſtained upon no other principle than to prevent the miſchief here deſcribed. Juſtice weighs equally on both ſides; for if the exception be not ſuſtained, the honeſt debtor bears the hazard of loſing his money: if it be ſuſtained, the hazard is tranſferred upon the creditor.

But there are caſes where juſtice and utility take oppoſite ſides. This in particular is the caſe, where a tranſaction extremely unequal is occaſioned by error. Here the juſtice of affording relief is obvious. But then a tranſaction by putting an end to ſtrife is a favourite of law; and it is againſt the intereſt of the public to weigh a tranſaction in the nice balance of grains and ſcruples. A man by care and attention in making a tranſaction may avoid error; but the bad conſequences of opening tranſactions upon every ground of

equity cannot be avoided. Juſtice therefore muſt in this caſe yield to utility; and a tranſaction will be ſupported againſt errors that may be ſufficient to overturn other agreements. I give another example. In the Roman law *læſio ultra duplum* was ſuſtained to void a bargain: but in Britain we refuſe to liſten to equity in this caſe. For if complaints of inequality were indulged, law-ſuits would be multiplied, to the great detriment of commerce.

If the diſcouraging law-ſuits be ſufficient to with-hold relief in equity, the hazard of making judges arbitrary is a much ſtronger motive for with-holding that relief. However clear a juſt claim or defence may be, a court of equity ought not to interpoſe, unleſs the caſe can be brought under a general rule. No ſort of oppreſſion is more intolerable than what is done under the colour of law: and for that reaſon, judges ought to be confined to general rules, the only method invented to prevent legal oppreſſion. Here the refuſing to do juſtice to a ſingle perſon makes no figure, when ſet in oppoſition to an important intereſt that concerns deeply the whole ſociety. And indeed it ſeems to follow from the very nature of a court of equity, that it ought to adhere to general rules, even at the expence of forbearing to do juſtice. It is the declared purpoſe of a court of equity, to promote the good of ſociety by an accurate diſtribution of juſtice. But the means ought to be ſubordinate to the end; and therefore, if in any caſe juſtice cannot be done but by uſing means that tend to the hurt of ſociety, a court of equity ought not to interpoſe. To be active in ſuch a caſe, involves the abſurdity of preferring the means to the end.

Thus we may gather by induction, that in every caſe where it is the intereſt of the public to with-hold juſtice from an individual, it becomes the duty of a court of equity in that circumſtance, not only to abſtain from enforcing the juſt claim or defence, but alſo to prevent its being enforced at common law. But the influence of public utility ſtops here, and never authorizes a court of equity to enforce any poſitive act of injuſtice *. For firſt, I cannot diſcover that it ever can be the intereſt of the public to require the doing an unjuſt action. And next, if even ſelf-preſervation will not juſtify any wrong done by a private perſon †, much leſs will public utility, ſuppoſing it intereſted, be able to juſtify any wrong done or enforced by a court of equity. It is inconſiſtent with the very conſtitution of this court to do injuſtice, or to enforce it.

* See this doctrine illuſtrated Hiſtorical Law-tracts, Tract 2.

† Eſſays on Morality and Natural Religion, page 95. ſecond edit.

Book III.

HITHERTO our plan has been to ſet forth the different powers of a court of equity; and to illuſtrate theſe powers by apt examples drawn from various ſubjects where they could be beſt found. In the preſent book an unity in the ſubjects handled is the plan; and the ſubjects choſen are thoſe which figure beſt as a whole, and cannot eaſily be ſplit into parts to be diſtributed under the different heads formerly explained. Beſides, as the various powers of a court of equity have been ſufficiently illuſtrated, as well as the principles on which they are founded, I thought it would be pleaſant as well as inſtructive to vary the method, by connecting together theſe powers and principles in their co-operation upon particular ſubjects. Thus the diſtribution of the whole appears in the following light. The firſt and ſecond books may be conſidered as theoretical, containing the powers of a court of equity, and the principles on which theſe powers are founded. The preſent book is practical, containing the application of theſe powers and principles to ſeveral important ſubjects.

Chapter I.

What Equity rules with reſpect to Rents levied upon an erroneous Title of Property.

WITH reſpect to land poſſeſſed upon an erroneous title of property, it is a rule eſtabliſhed in the Roman law and among modern nations, that the true proprietor aſſerting his right to the land, has not a claim for the rents levied by the *bona fide* poſſeſſor and conſumed. But though this ſubject is handled at large both by the Roman lawyers and by their commentators, we are left in the dark as to the reaſon of the rule, and upon what principle it is founded. Perhaps it was thought, that the proprietor has not an action at common law for the value of the product conſumed by the *bona fide* poſſeſſor; or perhaps, that though ſuch action may be competent, yet being rigorous and in ſome meaſure unjuſt, it is rendered ineffectual by equity. And indeed as no title of property can abſolutely be relied on, ſad would be the condition of land-holders, could they be made liable forty years back, for rents which they had reaſon to believe their own, and which

without ſcruple they laid out upon procuring the neceſſaries and conveniencies of life.

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

THE poſſeſſor, as obſerved, muſt, for his ſecurity, be indebted either to the common law or to equity. If the common law afford to the proprietor a claim for the value of his rents conſumed, it muſt be equity correcting the rigor of the common law that protects the poſſeſſor from this claim. But if the proprietor have not a claim at common law, the poſſeſſor has no occaſion for equity; he is ſafe by the common law. The matter then is reſolvable into the following queſtion, Whether there be or be not a claim at common law? And to this queſtion, which is ſubtile, we muſt lend our attention.

SEARCHING for materials to reaſon upon, what firſt occurs is the difference betwixt natural and induſtrial fruits. The former owing their exiſtence, not to man, but to the land ſolely, will readily be thought an acceſſory that muſt follow the property of the land: the latter will be viewed in a different light. Induſtrial fruits owe their exiſtence to labour and induſtry more than to the land. Upon this very circumſtance does Juſtinian found the right of the *bona fide* poſſeſſor. "Si quis a non domino quem dominum eſſe "crediderit, bona fide fundum emerit, vel ex donatione, aliave qua- "libet juſta cauſa æque bona fide acceperit: naturali rationi placuit, "fructus, quos percepit, ejus eſſe pro cultura et cura. Et ideo ſi "poſtea dominus ſupervenerit, et fundum vindicet, de fructibus "ab eo conſumptis agere non poteſt *." And upon this foundation Pomponius pronounces, that the *bona fide* poſſeſſor acquires right to the induſtrial fruits only. "Fructus percipiendo uxor vel vir, "ex re donata, ſuos facit: illos tamen, quos ſuis operis adquiſierit, "veluti ſerendo. Nam ſi pomum decerpſerit, vel ex ſylva cedit, "non fit ejus: ſicuti nec cujuſlibet bonæ fidei poſſeſſoris, quia non "ex facto ejus fructus naſcitur †." Paulus goes farther. He admits not of any diſtinction betwixt natural and induſtrial fruits, but is poſitive, that both kinds equally, ſo ſoon as ſeparated from the ground, belong to the *bona fide* poſſeſſor. "Bonæ fidei emptor "non dubie percipiendo fructus etiam ex aliena re, ſuos interim "facit,

* §. 35. Inſtit. de rer. diviſione.

† l. 45. de uſuris.

" facit, non tantum eos, qui diligentia et opera ejus pervenerunt,
" ſed omnes; quia quod ad fructus attinet, loco domini pene eſt.
" Denique etiam priuſquam percipiat, ſtatim ubi a ſolo ſeparati ſunt,
" bonæ fidei emptoris fiunt *."

* l. 48. pr. de acquir. rer. dom.

BUT now after drawing ſo nigh in appearance to a concluſion, we ſtumble upon an unexpected obſtruction. Is the foregoing doctrine conſiſtent with the principle, *Quod ſatum ſolo cedit ſolo?* If corns while growing make part of the ground, and conſequently belong to the proprietor of the ground, the act of ſeparation, merely, cannot have the effect to transfer the property from him to another. And if this hold as to fruits that are induſtrial, the argument concludes with greater force if poſſible as to natural fruits. What then ſhall be thought of the opinions delivered above by the Roman lawyers? Their authority is great I confeſs, and yet no authority will juſtify us in deviating from clear principles. The fruits, induſtrial as well as natural, after being ſeparated as well as before, belong to the proprietor of the land. He has undoubtedly an action at common law to vindicate the fruits while extant; and if ſo, has he not alſo a claim for the value after conſumption?

HOWEVER prone we may be to anſwer the foregoing queſtion in the affirmative, let us however ſuſpend our judgment till the queſtion be fairly canvaſſed. It is indeed clear, that the fruits while extant, the *percepti* as well as *pendentes*, belong to the proprietor of the land, and can be claimed by a *rei vindicatio* [a] But is it equally clear, that the *bona fide* poſſeſſor who conſumes the fruits is liable for their value? Upon what medium is this claim founded? The fruits are indeed conſumed by the poſſeſſor, and the proprietor is thereby deprived of his property: but it cannot be ſubſumed that he is deprived of it by the fault of the poſſeſſor; for, by the ſuppoſition, the poſſeſſor was in *bona fide* to conſume, and was not guilty of the ſlighteſt fault. Let us endeavour to gather light from a ſimilar caſe. A man buys a horſe *bona fide* from one who is not proprietor. Upon urgent buſineſs he makes a very ſevere journey, and the horſe, unable to ſupport the fatigue, dies. Is the purchaſer anſwerable for the value of the horſe? There is no principle of law upon which this claim can be founded. In general, when a proprietor is deprived of his goods by the fact of another, reparation is the only medium upon which he can found a claim for the value; and it is a

[a] WHETHER he may not in equity be liable in ſome recompence to the perſon by whoſe labour the induſtrial fruits were raiſed, is a different queſtion.

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

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

As the common law affords not an action in this caſe, equity is ſtill more averſe to ſuch action. The proprietor no doubt is a loſer, and, which is a more material circumſtance, what he loſes is converted to the uſe of the *bona fide* poſſeſſor. But then, though the proprietor be a loſer, the *bona fide* poſſeſſor is not a gainer. The fruits or rents are conſumed upon living and not a veſtige of them remains [a]. Thus equity rules even where the claim is brought recently. But where it is brought at a diſtance of time, for the rents of many years, againſt a poſſeſſor who regularly conſumed his annual income and had no reaſon to dread or ſuſpect a claim, the hardſhip is ſo great and the claim itſelf in theſe circumſtances ſo unjuſt, that were it founded on common law the *bona fide* poſſeſſor would undoubtedly be relieved againſt it by equity.

WHAT is now ſaid ſuggeſts another caſe. Suppoſe the *bona fide* poſſeſſor to be *locupletior* by the rents he has levied. It is in moſt circumſtances pretty difficult to aſcertain this point: but circumſtances may be ſuppoſed where it is clear. The rents, for example, are aſſigned by the *bona fide* poſſeſſor for payment of his proper debts. The creditors continue in poſſeſſion till their claims be wholely extinguiſhed, and then the true proprietor diſcovering his right enters upon the ſtage. Here it can be qualified, that the *bona fide* poſſeſſor is *locupletior*, and that he has gained preciſely the amount of the debts now ſatisfied and paid. Admitting now the fact, that the *bona*

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

bona fide poſſeſſor is enriched by his poſſeſſion, the queſtion is, Whether this circumſtance will ſupport any action againſt him? None at common law, for the reaſon above given, that there is nothing to found an action of reparation or damages in this caſe more than where the rents are conſumed upon living. But that equity affords an action is clear; for the maxim *Quod nemo debet locupletari aliena jactura* applies to this caſe in the ſtricteſt ſenſe. The effects of the proprietor are converted to the uſe of the *bona fide* poſſeſſor: what is loſt by the one is gained by the other; and therefore equity lays hold of that gain to make up the loſs. This point is ſo evidently founded on equity, that even after repeated inſtances of wandering from juſtice in other points, I cannot help teſtifying ſome ſurpriſe at the ſtupidity of Vinnius, Voet, and other commentators, who reject the proprietor's claim even in this caſe. And I am the more ſurpriſed, that in this opinion they make a ſtep not leſs bold than uncommon, which is, to deſert their guides who paſs for being infallible I mean the Roman writers, who juſtly maintain; that the *bona fide* poſſeſſor is liable *quatenus locupletior*. "Conſuluit ſenatus "bonæ fidei poſſeſſoribus, ne in totum damno adficiantur, ſed in "id duntaxat teneantur, in quo locupletiores facti ſunt. Quem-"cunque igitur ſumptum fecerint ex hereditate, ſi quid dilapidave-"runt, perdiderunt, dum re ſua ſe abuti putant, non præſtabunt: "nec ſi donaverint, locupletiores facti videbuntur, quamvis ad re-"munerandum ſibi aliquem naturaliter obligaverunt *." * L. 25. §. 11. de hered. pet.

WHEN the *bona fide* poſſeſſor becomes *locupletior* by extreme frugality and parſimony, it may be more doubtful whether a claim can lie againſt him. It muſt appear hard that his ſtarving himſelf and his family, or his extraordinary anxiety to lay up a ſtock for his children, ſhould ſubject him to a claim which his prodigality would free him from. And yet I cannot ſee that this conſideration will prevent the operation of the maxim *Quod nemo debet locupletari aliena jactura.*

THE foregoing diſquiſition, is matter not only of curioſity but of uſe. Among other things it ſerves to determine an important queſtion, *viz.* Whether the *bona fides*, which relieves the poſſeſſor from accounting for the rents, will at the ſame time prevent the imputation of theſe rents towards extinction of a real debt belonging to him. A man, for example, who has claims upon an eſtate by infeftments of annualrent, adjudications, or ſuch like, enters into poſſeſſion upon a title of property which he conceives to

be unexceptionable. When the lameneſs of his title is diſcovered, his *bona fides* will ſecure him from any demand at the inſtance of the true proprietor; but will it alſo preſerve his debts alive and ſave them from being extinguiſhed by his poſſeſſion of the rents? The anſwer to this queſtion depends evidently upon the point diſcuſſed above. If the proprietor have a legal claim for the value of the rents conſumed by the *bona fide* poſſeſſor, this value, as appears to me, muſt go in extinction of the debts affecting the ſubject. But if there be no legal claim, there will be no extinction. My reaſons are theſe. Suppoſing firſt a legal claim, the caſe muſt be conſidered in the following light. In the hands of the *bona fide* poſſeſſor is a ſum claimable in ſtrict law by the proprietor of the land, being the value of his rents conſumed. This indeed comes to be a rigorous claim upon the *bona fide* poſſeſſor, who, conſidering theſe rents to be his own, applied them without ſcruple for maintaining himſelf and family. Equity therefore, correcting the rigor of common law, refuſes to ſuſtain this claim. But when the proprietor, inſtead of demanding the money to be paid to himſelf, inſiſts only, that it ſhall operate ſo far as to extinguiſh the real incumbrances. Equity interpoſeth not againſt this demand, becauſe the claim ſo reſtricted is not rigorous and unjuſt; and if equity interpoſe not the extinction muſt take place.

IF on the other hand there be no claim at common law for the value of the rents conſumed, I cannot perceive any foundation for extinguiſhing the real debts belonging to the poſſeſſor. The man who levies and conſumes the rents *bona fide*, is not liable to the proprietor more than if had not intermedled. He has nothing in his hands that belongs to the proprietor; he is not in any reſpect debtor to the proprietor; and therefore the proprietor has no medium upon which to plead an extinction of the debts. Upon the former ſuppoſition, there is a fund in the hands of the *bona fide* poſſeſſor, which the judge can apply for payment of the debts: upon the preſent ſuppoſition there is no fund. But as it is made out above, that the *bona fide* poſſeſſor is not liable even at common law for the value of the rents he conſumes, it is clear that his poſſeſſion cannot have the effect to extinguiſh any real debts belonging to him, unleſs the following propoſition can be maintained, That the very act of levying the rents extinguiſhes *ipſo facto* theſe debts, without neceſſity of applying to a judge for his interpoſition. This propoſition holds indeed where a real debt is the title for levying the rents, as, for example, where they are levied upon a poinding

of

of the ground, or upon an adjudication compleated by a decree of mails and duties. But it cannot hold in the caſe under conſideration; becauſe, by the very ſuppoſition, the rents are levied upon a title of property, and not by virtue of the real debts.

I illuſtrate this point by ſtating the following caſe. An adjudger infeft enters into poſſeſſion of the land adjudged after the legal is expired, conſidering his adjudication to be a right of property. After many years poſſeſſion, the perſon againſt whom the adjudication was led, or his heir, claims the property, urging a defect in the adjudication which prevented expiration of the legal. It is decreed accordingly, that the adjudication never became a right of property, but that the legal is ſtill current. Here it comes out in fact, that the land has all along been poſſeſſed upon the title of a real debt, extinguiſhable by levying the rents, though by the poſſeſſor underſtood to be a title of property. I hold, that even in this caſe the levying the rents will not extinguiſh the debt. I give my reaſon. Voluntary payment, to give it its full operation, ſuppoſes two acts, *viz.* delivery by the debtor in order to extinguiſh the debt, and acceptance by the creditor as payment. In legal payment again by execution there are alſo two acts, firſt, levying the rent in order to be applied for payment of the debt; and next, the creditor's receiving the ſame as payment. Now, neither of theſe acts are found in the caſe under conſideration. The rent is levied not by virtue of execution in order to extinguiſh a debt, but upon a title of property: neither is the rent received by a creditor as payment, but by a man who conceives himſelf to be proprietor.

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

IN theſe concluſions I have been forced to deſert the eſtabliſhed practice of the court of ſeſſion, which indeed admits not the claim for payment, but always holds the *bona fide* poſſeſſion as ſufficient to extinguiſh the real debts belonging to the poſſeſſor. But I have had the leſs reluctance in differing from the eſtabliſhed practice, being ſenſible that this matter has not been examined with all the accuracy of which it is ſuſceptible. In particular, we are not told upon what medium the practice is founded: and if it be founded on the ſuppoſition that the proprietor has a legal claim for his rents levied by the *bona fide* poſſeſſor, which indeed appears to be the only foundation, I have clearly proved this to be a mere ſuppoſition without any reality.

ANOTHER important queſtion comes in here, which has a near analogy to that now diſcuſſed. If the *bona fide* poſſeſſor have made conſiderable improvements upon the ſubject by which its value is increaſed, will he have a claim in equity againſt the proprietor ſo far as he profits by theſe improvements; or will this claim of the *bona fide* poſſeſſor be compenſated by the rents which he has levied? Keeping in view what is ſaid upon the foregoing queſtion, one will readily anſwer, that the proprietor, having no claim for the rents levied and conſumed by the *bona fide* poſſeſſor, has no ground upon which to plead compenſation But upon a more narrow inſpection, we perceive, that this queſtion depends upon a different principle. In point of œconomy and management, there will be obſerved a natural propenſity to make every ſubject contribute to its own ſupport, and to uphold every ſubject by the profits made of it. Hence the preſumption, that reparations and meliorations beſtowed upon a houſe or upon land are defrayed out of the rents. Governed by this preſumption, we ſuſtain no claim againſt the proprietor for meliorations, if the expence exceed not the rents levied by the *bona fide* poſſeſſor. It is not properly compenſation; for the proprietor has no claim to found a compenſation upon. The claim is rejected upon a different medium. The rents while extant belong to the proprietor of the ground: theſe rents are not conſumed, but are beſtowed upon meliorations. The meliorations are thus defrayed out of the proprietor's rents and by his own money, and the *bona fide* poſſeſſor who employs the proprietor's money, and not a farthing of his own, can have no claim upon this account either in law or equity. Such accordingly is the determination of Papinian, the moſt ſolid of all the Roman lawyers. "Sumptus in prædium, quod "alienum eſſe apparuit, a bona fide poſſeſſore facti, neque ab eo

"qui

" qui prædium donavit, neque a domino peti poſſunt; verum ex-
" ceptione doli poſita per officium judicis æquitatis ratione ſervantur:
" ſcilicet ſi fructuum ante litem conteſtatam perceptorum ſummam
" excedunt. Etenim, admiſſa compenſatione, ſuperfluum ſumptum,
" meliore prædio facto, dominus reſtituere cogitur *."

* l. 48. de rei vindicatione.

CHAPTER II.

Powers of a Court of Equity with reſpect to a conventional Penalty.

CONVENTIONAL penalties are of two kinds. A ſum of money ſubſtituted in place of an obligation to perform a fact, is an example of the one kind; and a penal ſum added to enforce the performance of any obligation, is an example of the other kind.

THE firſt kind is explained by Juſtinian in the following words. " Non ſolum res in ſtipulatum deduci poſſunt, ſed etiam facta: ut " ſi ſtipulemur aliquid fieri vel non fieri. Et in hujuſmodi ſtipu-
" lationibus optimum erit pœnam ſubjicere, ne quantitas ſtipula-
" tionis in incerto ſit, ac neceſſe ſit actori probare quod ejus inter-
" ſit. Itaque ſi quis, ut fiat aliquid, ſtipuletur: ita adjici pœna
" debet, *Si ita factum non erit, tunc pœnæ nomine decem aureos dare*
" *ſpondes* †? A ſtipulation of this kind conſtitutes properly an al-
ternative obligation, putting it in the option of the obligor to perform the fact or in place of it to pay the penal ſum. And it muſt be obſerved, that this ſum is improperly termed *a Penalty*; for it is in reality a liquidation of the damages that the obligee ſuffers by want of performance, or a lump ſum agreed on in place of proving the extent of the damages. A ſum thus ſtipulated, having nothing penal in its nature, is due in equity as well as at common law. Thus land being verbally ſet to a tenant, under the following condition that if he entered not he ſhould pay a year's rent, the whole penalty was decreed becauſe the tenant entered not ‡.

† §. 7. Inſtit. de verb. oblig.

‡ Durie, July 15. 1637. Skene

A ſum pactioned in caſe of failure, as where a man obliges himſelf to pay the ſum borrowed with a certain ſum over and above if he fail to pay at the term covenanted, is more properly a penalty, becauſe it makes not an alternative obligation as a penalty of the other ſort does. Both articles muſt be fulfilled, the penal article as well as that which is principal.

WITH reſpect to a penalty of this kind, it is clear, that a good defence againſt performance of what is principal will relieve alſo from the penalty: but if there be no good defence, the penalty is due by agreement ſo ſoon as any failure in the performance can be qualified, and may be demanded at common law by an action *ex contractu*. Voet accordingly ſays, "Committitur hæc pœnæ ſtipulatio, ſi principalis obligatio, quæ ſtipulatione penali firmata erat, "impleta non ſit, cum de jure implenda fuiſſet *." And to prove this poſition he gives the authority of Paulus in the following words: "Ad diem ſub pœna pecunia promiſſa, et ante diem mortuo promiſſore, committetur pœna, licet non ſit hereditas ejus "adita †." For here the death of the debtor before the term of payment afforded no legal defence to his heir; nor ought the creditor to ſuffer by that accident, *cui de jure implenda erat obligatio*, in the foregoing words of Voet.

* §. 13. de verb. oblig.

† l. 77. Ibid.

WHETHER and how far equity will mitigate a penalty of this kind comes next to be conſidered. What will at firſt occur is, to diſtinguiſh culpable failure from what is innocent, and to afford relief in the latter caſe only. But a more accurate view will ſhow this to be an utopian thought unſuited to practice. The extreme difficulty of making good this diſtinction by evidence, would render judges arbitrary without attaining that refinement of juſtice which is intended by the diſtinction. That the innocent, at whatever time they perform, ought to be relieved, is clear: it is not ſuppoſable that a penal paction is intended againſt them; and ſuppoſing it ſo intended, they would ſtill be relieved againſt a paction that is rigorous and oppreſſive. And if the innocent be relieved, ſo muſt the culpable; for the difficulty of carrying the diſtinction into practice makes it neceſſary, with very few exceptions, to give relief to all or to none.

THE next point is, How far equity will relieve. When an obligor who performs late demands to be relieved from the penal ſum, juſtice requires that the obligee be indemnified of what damage he has ſuſtained by the delay; according to an obvious rule in equity formerly handled ‡, which the Engliſh lawyers expreſs thus, "He that demands equity muſt give equity." And hence in this iſland it is the conſtant practice to entitle the obligee to draw by virtue of the penal paction whatever damage he has ſuſtained, however innocent or unvoluntary the delay may have been. A debtor, for example, diſappointed of money, fails to make payment

‡ Page 104, 105.

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at the term covenanted, which draws upon him a ſtorm of execution. However innocent, he muſt pay the penalty reſtricted to the expence of execution; becauſe the conventional penalty ſo reſtricted is exacted, not as a puniſhment upon the debtor, but to repair the creditor's loſs; and ſo far it is due in equity as well as at common law. Take another example. A debtor ſuſpends his bond *bona fide*, and the creditor, after diſcuſſing the ſuſpenſion, is ſatisfied to reſtrict his penalty to the coſts of ſuit. The penalty thus reſtricted is not a penal claim, and therefore is due in equity as well as at common law. This example may be viewed in a different light. There muſt be error at leaſt, in every caſe where the obligor refuſes to fulfil a juſt claim however innocent he may be; and equity relieves from the effect of error, ſo far only as the perſon who takes advantage of the error is *in lucro captando*, not where he is *in damno evitando* *.

* See Book 1. Part 1. Ch. 2. Sect. 2. Art. 1.

AN Engliſh double bond is an example of the ſecond kind of conventional penalties. It was introduced originally to evade the common law of England which prohibits the taking intereſt for money. And though that prohibition be no longer in force, the double bond however continues in practice, being made uſe of to compel punctual payment of the money lent. The penalty accordingly is due at common law if the covenanted term be allowed to elapſe without payment. And this penal ſtipulation is in the practice of England governed by the rule of equity above laid down. "After "the day of payment the double ſum becomes the legal debt; and "there is no remedy againſt ſuch penalty but by application to a "court of equity, which relieves on payment of principal, intereſt "and coſts †."

† New Abridg. of the Law, vol. III. page 691.

IN our bonds for payment of ſums of money, a clauſe generally is added binding the debtor "to pay a fifth part more of liquidate "expences in caſe of failzie." This clauſe is commonly treated as intending a penalty of the kind laſt mentioned, contrived to enforce performance: but I think improperly; for the words plainly import a liquidation of that damage which the creditor may ſuſtain by the debtor's failing to pay at the term covenanted. It is of the nature of a tranſaction *de re futura*, being a lump ſum in place of all that can be demanded in caſe of future damage by the ſaid failure. Lord Stair talking of the court of ſeſſion as a court of equity, conſiders the clauſe in the foregoing light. "The court of ſeſſion (ſays our "author) modifies exorbitant penalties in bonds and contracts, even

" though they bear the name of liquidate expences with conſent " of parties, which neceſſitous debtors yield to. Theſe the Lords " retrench to the real expence and damage of the parties. Yet " theſe clauſes have this effect, that the Lords take ſlender proba- " tion of the true expence, and do not conſider whether it be ne- " ceſſary or not, provided it exceed not the ſum agreed on; where- " as in other caſes they allow no expence but what is neceſſary or " profitable *."

* Lib. 4. Tit. 3. §. 1.

CONSIDERING the foregoing clauſe as a tranſaction *de re futura*, it may be doubted, whether in any caſe it ought to be mitigated. On the one hand, whatever be the extent of the damage, the creditor by agreement can demand no more but the liquidated ſum; and therefore on the other, it may be thought that he is entitled to this ſum even where it exceeds his damage. *Cujus incommodum ejus debet eſſe commodum.* This argument is concluſive, ſuppoſing the tranſaction fair and equal, ſtipulating no greater ſum than the damages ordinarily amount to. But it ought to be conſidered, that in Scotland formerly money-lenders were in condition to give law to thoſe who borrow. Hence exorbitant ſums as liquidate expences, which, being rigorous and oppreſſive, ought to be mitigated in equity. Upon this account, the lump ſum for damages has been generally conſidered and handled as a penalty, which in effect it is when exorbitant, and as ſuch it ſhall hereafter be treated of.

THE only doubtful point touching this penalty, is to determine at what time and by what means it is incurred. If we adhere to the words of the clauſe, it is incurred by *failzie* in general, and conſequently by every ſort of failzie. But many good lawyers, moved with the hardſhip of ſubjecting an innocent perſon to a penalty, hold, that the penalty is not incurred except in the caſe of culpable failzie, and that this muſt be underſtood the meaning of the clauſe. They maintain accordingly, that when a debtor in place of payment enters into a law-ſuit, he is not liable for any part of the penalty, though reſtricted to the coſts of ſuit, if he have *probabilis cauſa litigandi.* They do not advert, as above laid down, that a conventional penalty reſtricted to the expence of execution or coſts of ſuit, ceaſes in that caſe to be penal; and that the creditor, when ſuch claim is made effectual to him, draws nothing but what he hath actually expended. But as this is a point of great importance in practice, it merits a deliberate diſcuſſion, to which accordingly I proceed.

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IN order to give ſatisfaction upon this ſubject, I muſt ſtate a preliminary point, *viz.* what claim there is for coſts of ſuit abſtracting from a conventional penalty. A man who oppoſes a juſt claim, acts againſt law. But is he thereby bound to repair the damage he occaſions to the purſuer? If he be litigious in any degree he is undoubtedly bound; for though it may require a crime to ſubject a man to puniſhment, the ſlighteſt voluntary wrong or fault is a ſufficient foundation for damages, even at common law. But it is a rule derived from the law of nature to municipal law, "That a "man free from fault or blame is not liable to repair any hurt he is "the occaſion of *;" and therefore there is no foundation even at common law for ſubjecting to the coſts of ſuit, or to any damage, a defendant who is in *bona fide*. Equity is ſtill more averſe from making an innocent perſon in any caſe liable to damages. For, conſidering that man is a fallible being, his caſe would be deplorable were he bound to repair all the loſs he may occaſion by an involuntary wrong. What then ſhall we ſay of the act 144. p. 1592, appointing, "That damage, intereſt, and expences of plea, be ad-"mitted by all judges, and liquidated in the decree whether con-"demnator or abſolvitor?" If this regulation could ever be juſt, it muſt have been among a plain people, governed by a few ſimple rules of law, ſuppoſed to be univerſally known. Law, in its preſent ſtate, is too intricate, to admit a preſumption that every perſon who goes againſt law is *in mala fide;* and yet unleſs a *mala fides* be preſumed in every caſe, the regulation cannot be juſtified.

* See the chapter immediately foregoing.

TAKING it now for granted, that, abſtracting from a paction, coſts of ſuit cannot be claimed otherwiſe than upon the medium of litigioſity, I proceed in my inquiry. And I begin with examining, whether in an obligation *ad factum præſtandum*, or to pay a ſum of money, it be lawful to ſtipulate damages upon the obligor's failure to perform, not even excepting an innocent failure. To bring this queſtion near the eye, I put a plain caſe. A man is willing to lend his money at the common intereſt; but inſiſts, that if he be put to any expence in recovering payment, the borrower, who occaſions this expence, ſhall be liable for it. The borrower agrees to take the money in theſe terms. Is this paction in itſelf unlawful? or is it one of theſe oppreſſive proviſions againſt which the debtor will be relieved in equity? I cannot diſcover any injuſtice in this paction, nor any oppreſſion. A paction of this nature, ſo far from being unjuſt or oppreſſive, ſeems naturally to be the reſult of the law againſt

uſury. Where a man is permitted to take what intereſt he can get for his money, a high intereſt may be held ſufficient to counterbalance what may be expended in recovering payment: but where the creditor is limited to a certain rate of intereſt, it ſeems intended by the legiſlature, that he ſhould be in all events ſecure of that intereſt, without laying it out, and perhaps more, upon recovering the very ſum he lent. Wherever this happens, the creditor, inſtead of the common rate of intereſt, receives no intereſt at all; and muſt be ſatisfied to receive back a ſum, that, in effect, has all along been barren.

AN inquiry into what is lawful in this caſe, ſmooths the road greatly in our preſent progreſs. If the paction above mentioned be lawful, we cannot heſitate in preſuming that every creditor will take the advantage of it, and conſequently that this paction is meant and intended in the penal clauſe contained in our bonds of borrowed money. To confine this penal clauſe to a culpable failure, is truly to deſtroy the effect of it altogether; for a culpable failure ſubjects the debtor to damages at common law, independant of the clauſe. Nor can we doubt that the meaning of the clauſe is what is above ſet forth, when we ſee the ſame meaning given to a penal clauſe in England and in old Rome.

BUT I am not ſatisfied to aſcertain the ſenſe of the clauſe from the preſumed will of the parties. I am able to ſhow, that the ſenſe I eſpouſe is eſtabliſhed by inveterate practice. I urge in the firſt place, that if culpable failzie be the meaning of the clauſe, the conſtant practice of the court of ſeſſion, which mitigates a conventional penalty in certain circumſtances, is deſtitute of all foundation in law. It is made out above, that a conventional penalty is not mitigated but under the colour of being innocent. A conventional penalty conſidered as culpable, cannot be mitigated in equity. Here then is an evident dilemma. If it be maintained, that a conventional penalty is not incurred unleſs the failure be culpable, it follows neceſſarily, that it never can in any caſe be mitigated. On the other hand, if it be admitted, as it muſt be, that the court of ſeſſion can in ſome caſes afford relief againſt a conventional penalty, it follows not leſs neceſſarily, that it is incurred by every ſort of failure, innocent as well as culpable. I urge in the next place, that the failure of a debtor to pay at the term covenanted, muſt *in dubio* be held innocent till the contrary be proved. This is a legal privilege,

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common to a debtor with the reſt of mankind. Hence it neceſſarily follows, that if the clauſe under conſideration be confined to culpable failure, a charge of horning cannot paſs for the penalty, till firſt it be proved in a proceſs, that the failure is culpable. Here is another dilemma not leſs pinching than the former. If culpable failure be the meaning of the clauſe, the practice of charging for the penalty ſo ſoon as the term of payment is paſt, muſt be given up as irregular and illegal, though acquieſced in for centuries without the leaſt oppoſition. On the other hand, if it be admitted, as it muſt be, that this practice is agreeable to law, it follows neceſſarily, that a conventional penalty is incurred by innocent as well as by culpable failure.

I add the following obſervation. Where a bond ſtipulating intereſt after the term of payment, is ſuſpended and the letters are found orderly proceeded after an intricate and doubtful litigation of many years, no lawyer ever dreamed that the ſuſpender's *bona fides* will relieve him from intereſt. Now, in this caſe, let any man ſay, where lies the difference betwixt intereſt and coſts of ſuit. A plauſible defence, if it prevent the ſtipulated penalty from being incurred, ought alſo to prevent the ſtipulated intereſt from being incurred. Both are due *ex contractu* upon the failure of payment; and if there be any reaſon for barring innocent failure in the paction for the penalty, there is the ſame reaſon for barring it in the paction for intereſt. If there be a difference, the penalty reſtricted to coſts of ſuit is the more favourable claim. It is money out of the creditor's pocket, it is *damnum datum;* whereas the claim for intereſt is only *lucrum ceſſans*. With reſpect to the Engliſh double bond, this argument concludes beyond the poſſibility of cavil; the penal ſtipulation being the only foundation for claiming intereſt as well as for claiming coſts.

UPON the whole, it ſhall now be taken for granted, that in a bond of borrowed money the penal ſum is incurred by innocent as well as by culpable failure. In the latter caſe, ſuppoſing the *culpa* clearly proved, equity pleads not for a mitigation: in the former, equity requires a mitigation, ſo far as the ſtipulation is truly penal; that is, ſo far as the penal ſum exceeds the damage occaſioned to the creditor by the delay of payment. This mitigation ariſes neceſſarily from the rule above mentioned, "He that demands equity "muſt give equity." And hence, in innocent failure, the practice is to mitigate the penalty to the coſts of ſuit and to what other

damage is clearly aſcertained. This, at the ſame time, by putting the creditor in the ſame condition as if punctual payment had been made, fulfils all the intention he could fairly have in ſtipulating a penalty.

Chapter III.

What Effect, with reſpect to Heirs, has the Death of the Obligee or Legatee before or after the Term of Payment?

If the obligee's heirs be named in the obligation, they will ſucceed whether he die before or after the term of payment, becauſe ſuch is the will of parties. The preſent queſtion relates to obligations where the obligee's heirs are are not named. Such obligations by the common law tranſmit not to heirs, becauſe the common law regards what is ſaid to be the only proof of will; and if heirs be not expreſsly called to the ſucceſſion, they are, by conſtruction of common law, purpoſely omitted. But the concluſions of equity are not ſo peremptory or ſuperficial. It conſiders, that in human affairs errors and omiſſions are frequent, and that words are not always to be abſolutely relied on. It holds indeed words to be the beſt evidence of will, but it holds them not to be the only evidence. If therefore any ſuſpicion lie that the will is not preciſely what is expreſſed, every rational circumſtance is laid hold of to aſcertain, with all the accuracy poſſible, what really was the will of the granter, or of the contracters *.

* See Book I. Part I. Ch. 3. Sect. I.

With reſpect to this point, the cauſe of the obligation is one capital circumſtance. A gratuitous obligation has no cauſe but the will merely of the granter; and therefore an heir cannot claim upon ſuch obligation, unleſs he can ſhow the will of the granter to be in his favours, which will be no eaſy taſk if he be not named in the deed. It will not even be ſufficient that he was omitted by overſight; becauſe in a deed which has no other foundation but will merely, a poſitive act of will is neceſſary to create a right †. Thus a gratuitous promiſe to give a ſum to Titius at a day certain, without mentioning heirs, will be ineffectual if Titius die before the term of payment. The heir of Titius has no claim either at common law or in equity.

† Ibid. Sect. 2.

But what if Titius, ſurviving the term, die without obtaining payment? His heir has no claim at common law, becauſe he is not mentioned

mentioned in the obligation: but he has a good claim in equity. It was the duty of the obligor to make payment at the term ſtipulated, and juſtice will not ſuffer him to make profit by his obſtinacy or neglect. The obligee on the other hand was entitled to have the ſum at the term ſtipulated; and he muſt not be forfeited by the failure of the obligor. Equity therefore affords an action to his heir for payment, which relieves from the loſs ſuſtained at common law by the failure of payment.

ON the other hand, an obligation for which an equivalent is given, is in its nature perpetual and ought in all events to be fulfilled. Such muſt be preſumed the intention of parties, in every engagement that has for its object the exchange of one thing for another, and is not purely an exerciſe of benevolence. An obligor accordingly who has received a valuable conſideration, muſt, in all events, perform his part of the engagement, unleſs the contrary be ſtipulated. The obligee's death, in particular, before the term of payment, will not relieve him, though heirs be not named in the deed. The common law, it is true, affords not to the heir an action in this caſe more than where the obligation is gratuitous: but equity, ſupplying the defects of common law, affords an action in order to fulfil the rules of juſtice, which will not ſuffer the valuable conſideration to remain with the obligor without performing the equivalent pactioned. Hence, with reſpect to the point under conſideration, an obligation for a valuable conſideration is directly oppoſite to that which is gratuitous. In the former, the heir takes unleſs he be expreſsly excluded: in the latter, the heir takes not unleſs he be expreſsly included. Thus a bond for borrowed money, though taken in the creditor's name ſolely, will go to his heir, even where he dies before the term of payment.

A bond of proviſion to children is deemed a gratuitous deed; and, for that reaſon, if the children die before the term of payment, equity gives no aid to their heirs. If heirs be named in the bond, they have right at common law: if not named, neither equity nor common law gives them right. Parents are bound to educate their children till they be able to gain a livelihood for themſelves, and if they make any further proviſion it is underſtood to be gratuitous. Thus, in a contract of marriage certain proviſions being alloted to the children, the portions of the males payable at their age of twenty-one years, and of the females at eighteen, without mentioning heirs or aſſignees, the aſſignees and creditors of ſome of the

children who died before the term of payment were judged to have no right *. I cannot ſo readily acquieſce in the following deciſion, where a bond of proviſion payable to a daughter at her age of fourteen, and to her heirs executors and aſſignees, was voided by her death before the term of payment †. The addition of *heirs executors and aſſignees*, was thought to regard the child's death after the term of payment, and not to be an indication of the granter's will that the bond ſhould be effectual though the child died before the term of payment. The clauſe, I admit, is capable of that reſtricted meaning: but I can find no cauſe for this reſtriction; and in all caſes it is ſafeſt to give words their natural import, unleſs it be made extremely clear that the granter's meaning was different.

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

† Stair, Feb. 22. 1677, Belſches *contra* Belſches.

With reſpect to a bond of proviſion, or any gratuitous deed that hath no cauſe other than the will of the granter, though the ſtrongeſt preſumptive evidence of what would have been the granter's will in a certain event, had it been foreſeen, is not ſufficient to extend the effect of ſuch a deed ‡, yet evidence brought, from the nature of the deed and from collateral circumſtances, that the granter actually interpoſed his will, is ſufficient in a court of equity, though the will be not expreſſed in words ‖. And therefore, upon ſuch evidence brought, the claim of the heir will be ſuſtained, though he be not expreſsly mentioned in the deed.

‡ Book I. Part I. Ch. 3. Sect. 2.

‖ Ibid. Sect. I.

What is ſaid above ſeems a more clear and concluſive reaſon for excluding heirs where the creditor in a bond of proviſion dies before the term of payment, than what is commonly aſſigned, *viz.* that the ſum in the bond, being deſtined as a ſtock for the child, ceaſes to be due, ſince it cannot anſwer the purpoſe for which it was intended. Were this reaſon good, it would hold equally whether the child die before or after the term of payment; and therefore in proving too much it proves nothing.

In what caſes a legatee tranſmits a legacy to his heirs, is a queſtion that takes in a greater variety of matter. To have a diſtinct notion of this queſtion, legacies muſt be divided into their different kinds. I begin with a legacy of a *Corpus*. The property here is transferred to the legatee *ipſo jure* upon the teſtator's death. Will ſolely muſt in this caſe have the effect to transfer property, becauſe otherwiſe it could never be transferred from the dead to the living. A proprietor after his death cannot make delivery; and no other perſon but the proprietor can make a legal delivery. This circumſtance

ſtance removes all ambiguity. If the legatee be veſted in the property as he is *ipſo jure* by the teſtator's death, the ſubject legated as his property muſt upon his death deſcend to his heirs even by the common law.

BUT what if the legatee die before the teſtator? In this caſe the legacy is undoubtedly void. The teſtator remains proprietor till his death, and the ſubject legated cannot by his death be transferred to a perſon who is no longer in exiſtence. Nor can it be transferred to that perſon's heirs, becauſe the teſtator did not exert any act of will in their favours.

THE next caſe I put is of a ſum of money legated to Titius. A legacy of this ſort, giving the legatee an intereſt in the teſtator's perſonal eſtate and entitling him to a proportion, veſts in the legatee *ipſo jure* upon the teſtator's death. And for the ſame reaſon that is given above, the legacy will tranſmit to heirs if the legatee ſurvive the teſtator; if not, it will be void. But now, what if the legacy be ordered to be paid at a certain term? It muſt be conſidered, whether the term be added for the benefit of the teſtator's heir, in order to give him time for preparing the money; or whether it be added as a limitation upon the legacy. A term for payment given to the teſtator's heir, will not alter the nature of the legacy nor prevent its veſting in the legatee upon the teſtator's death; and conſequently ſuch a legacy will tranſmit to heirs even where the legatee dies before the term of payment, provided he ſurvive the teſtator. *Dies cedit etſi non venerit.* But where the term of payment is calculated to limit the legacy, the legatee's death before that term will bar his heirs, becauſe he himſelf had never any right which could deſcend to them. Here *dies nec cedit nec venit.* In order to aſcertain the intention of the teſtator in adding a day for payment, the rule laid down by Papinian is judicious. *Dies incertus conditionem in teſtamento facit* *. A day certain for performance is commonly added in favour of the teſtator's heir, in order to give him time for providing the money. An uncertain term reſpects generally the condition of the legatee, as where a legacy is in favour of a boy to be claimed when he arrives at eighteen years of age, or of a girl to be claimed at her marriage. In ſuch inſtances, it appears to be the will of the teſtator, that the legacy ſhall not veſt before the term of payment. The *dies incertus* is ſaid to make the legacy conditional; not properly ſpeaking; for the naming a day of payment, certain or uncertain, is not a condition.

* l. 75. de condition. & demonſt.

The legacy is only imagined conditional *fictione juris*, in order to explain the nature of ſuch a legacy, which, by the legatee's predeceaſing the term of payment, is vacated in the ſame manner as if it were a conditional legacy never purified.

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

Chapter IV.

Arreſtment and Proceſs of Furthcoming.

CURRENT ſpecie is the proper means for extinguiſhing debt, but not the only means. The creditor, it is true, is not bound to accept any ſubject for his payment other than current ſpecie: but ſometimes he agrees to take ſatisfaction in goods, and ſometimes, for want of ready money, he is put off with a ſecurity, an aſſignment to rents, for example, or to debts, which impowers him to draw his payment out of theſe funds belonging to his debtor. Legal execution, copying the private acts of the debtor, is clearly diſtinguiſhable into three kinds. The firſt reſembles voluntary payment, becauſe it concludes with payment and extinction of the debt upon which the execution proceeds. This was the caſe of poinding as framed originally *; and is the caſe at preſent of a furthcoming of moveables. A debtor's moveables in his own poſſeſſion are attached by poinding, correſponding to the *Levari Facies* in England: but where theſe moveables are in cuſtody of any other, and the particulars unknown, there is no opportunity for poinding. They are made effectual to the creditor by a proceſs of furthcoming againſt the cuſtodier or poſſeſſor. In this proceſs, the moveables belonging to the debtor are ſold by authority of the court, the price is delivered to the creditor for his payment, and the debt is thereby extinguiſhed in whole or in part.

* Hiſtorical Law-tracts, Tract 10.

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THE ſecond reſembles voluntary delivery of fungibles for ſatisfying the debt. This is the caſe of poinding as modeled in our later practice. The goods are not ſold as originally, but only valued and delivered *ipſa corpora* to the creditor for ſatisfying the debt upon which the execution proceeds.

THE third reſembles a voluntary ſecurity; for it proceeds no farther than to give a ſecurity upon the debtor's funds, leaving the creditor to operate his payment by virtue of the ſecurity. This is the caſe of an adjudication during the legal, which impowers the creditor to draw his payment out of the debtor's rents, provided the tenants be willing to pay: if refractory, they may be compelled by a decree againſt them perſonally for their rents. This decree, termed *a Decreet of Mails and Duties*, compleats the ſecurity, by giving direct acceſs to the debtor's tenants. A decree for making furthcoming ſums of money due to the debtor is of the ſame nature. It is a ſecurity only, not payment; and ſuch a decree may be juſtly defined a power given to the creditor to draw payment from the debtors of his debtor. What follows to compleat the proceſs may be done by private conſent. The perſon againſt whom the decree of forthcoming is obtained ought to pay without further compulſion; and payment thus obtained voluntarily, extinguiſhes the debt upon which the furthcoming is founded. In a word, a decree of furthcoming obtained by my creditor againſt my debtor, reſembles in every circumſtance an order by me upon my debtor, to deliver the ſum he owes me to my creditor for ſatisfying the debt I owe him. A decree of furthcoming is a judicial order, having the ſame effect with a voluntary order. Hence it clearly follows, that if my debtor, againſt whom the decree of furthcoming is obtained, prove inſolvent, the ſum is loſt to me, not to my creditor. His ſecurity indeed is gone, but the debt which was ſecured remains entire.

A judicial order to ſecure a moveable ſubject, whether a perſon or or goods, till it be diſpoſed of by legal authority, is ſtiled, *an Arreſtment*. Perſons accuſed of crimes are arreſted to prevent their flying or abſconding. When the property of moveables is diſputed, they are arreſted in the hands of the poſſeſſor till the property be aſcertained. This arreſtment, termed *Rei ſervandæ cauſa*, is a ſpecies of ſequeſtration: it is a ſequeſtration in the hands of the poſſeſſor, in place of being *in manibus curiæ*. It hath its full effect, by ſecuring the controverted ſubject till the property be aſcertained; and ſo ſoon as the property is aſcertained, the proprietor takes poſſeſſion *via facti*,

without neceſſity of a proceſs of furthcoming. A third ſort of arreſtment is preparatory to a proceſs of furthcoming raiſed by a creditor for drawing his payment out of his debtor's moveable funds; and this ſort only, is propoſed to be handled in the preſent chapter.

When a creditor ſuſpects that his debtor has goods not in his own poſſeſſion, he obtains a warrant or order from a proper court to arreſt them in the hands of the cuſtodier; and this order ſerved upon the cuſtodier, ſecures theſe goods till a proceſs of furthcoming be raiſed. The ſervice of this order is termed *an Arreſtment*, and the perſon upon whom it is ſerved is termed *the Arreſtee*. An arreſtment of ſums due to the debtor, is of the ſame nature and has the ſame effect. An arreſtment of this kind is not, properly ſpeaking, a ſtep of execution, but only a cautious ſtep preparatory to execution: for goods or debts may be made furthcoming for ſatisfying the creditor without uſing an arreſtment. In this reſpect, an arreſtment is preciſely ſimilar to an inhibition, which, properly ſpeaking, is not a ſtep of execution: its ſole purpoſe is to pave the way to an adjudication, by prohibiting the debtor to alien his land, or to contract debt; and the effect of this prohibition is to preſerve the fund entire to the creditor when he proceeds to adjudge. Adjudications are carried on every day without a preparatory inhibition; and in the ſame manner may a proceſs of furthcoming be carried on without a preparatory arreſtment.

These things ſhortly premiſed, I come to what is chiefly intended in this chapter, which is to explain the operations of common law and of equity with reſpect to an arreſtment, when it is brought in competition with other rights voluntary or legal. All writers are agreed about the effect given by common law to an arreſtment of moveable goods. This arreſtment being, as above obſerved, a ſequeſtration in the hands of the poſſeſſor, transfers not the property to the creditor. The goods ſecured by the arreſtment are, in the proceſs of furthcoming, ſold as the property of the debtor, and the price is applied for payment of the debt due by him to his creditor the arreſter. For this reaſon, an arreſtment cannot bar a poinding carried on by another creditor. The common law, authorizing execution, conſiders only whether the ſubject propoſed to be attached belong to the debtor; and if it be his property, execution proceeds of courſe.

THE effect of an arreſtment attaching ſums of money due to the debtor againſt whom the execution proceeds, has been much controverted; and in order to clear this point it becomes neceſſary to take an accurate ſurvey of ſuch arreſtment in all its parts. The letter or warrant for arreſtment, to which the arreſtment itſelf is entirely conformable, is in the following words: "To fence and arreſt all "and ſundry the ſaid *A. B.* his readieſt goods, gear, debts, *&c.* in "whoſoever hands the ſame can be apprehended, to remain under "ſure fence and arreſtment, at the inſtance of the ſaid complainer "ay and while payment be made to him." Upon this warrant and arreſtment following upon it, it will be obſerved, firſt, That no perſon is named but the arreſter and his debtor. It is not a limited warrant to arreſt in the hands of any particular perſon; but in general authorizes the creditor to arreſt in the hands of any perſon that he ſuſpects may be due money to his debtor. Secondly, The arreſtee is not ordered or authorized to make payment to the arreſter. The order he receives, is to keep the money in his hand till the arreſter be ſatisfied. Theſe particulars make it plain, that an arreſtment, like an inhibition, is merely prohibitory; and that it transfers not any right to the arreſter; which would be a poſitive effect. And this point is put out of doubt by the ſummons of furthcoming, concluding, "That the defender ſhould be decerned and ordained to "make furthcoming to the complainer the ſum of "reſting and owing by him to *A. B.* (the complainer's debtor "againſt whom the execution paſſes) and arreſted in the defender's "hands at the complainer's inſtance." A decree of furthcoming therefore, as above obſerved, is a ſpecies of execution, entitling the creditor to draw his payment out of ſums due to his debtor. It is the decree of furthcoming which gives a ſecurity to the creditor upon the ſum arreſted due to his debtor; and the preparatory arreſtment has no other effect, than to afford an interim ſecurity to prevent dilapidation before the proceſs of furthcoming be raiſed.

IF it hold true that arreſtment is prohibitory only, and that my creditor arreſting in the hands of my debtor hath no right to the ſum arreſted till he obtain a decree of furthcoming; it follows upon the principles of common law, that this ſum belonging to me, after arreſtment as well as before, lies open to be attached by my other creditors; and that in a competition among theſe creditors, all of them arreſters, the firſt decree of furthcoming muſt give preference. For the firſt order ſerved upon my debtor binds him to the creditor who obtained the order; after which he cannot legally pay

to any other. Thus ſtands the common law, which is followed out in a courſe of deciſions, moſtly of an old date, giving preference, not to the firſt arreſtment, but to the firſt decree of furthcoming.

Whether equity make any variation ſhall be our next enquiry. It is the privilege of the debtor, with reſpect to his own funds, to chuſe what of them he will apply for payment of his debts. Upon the debtor's failure, this choice is transferred to the creditor, who may attach any particular ſubject for his payment. In that caſe, the debtor is in duty bound to ſurrender to his creditor the ſubject attached, by conveying it to him for his ſecurity. It is undoubtedly the duty of the debtor in general to relieve his creditor from the trouble and expence of execution; and, in particular, to relieve him from execution againſt any particular ſubject, by ſurrendering it voluntarily, unleſs he find other means of making payment. The creditor's privilege to attach any particular ſubject for his payment, and the debtor's relative obligation to ſave execution by ſurrendering that ſubject to his creditor, are indeed the foundation of all execution. A judge authorizing execution, ſupplies only the place of the debtor; and conſequently cannot authorize execution againſt any particular ſubject, unleſs upon ſuppoſition that the debtor is antecedently bound to ſurrender the ſame to his creditor *. This branch of the debtor's duty explains clearly a rule in law, "That inchoated "execution makes the ſubject litigious, and ties up the debtor's hands "from aliening." If it be his duty to prevent execution by ſurrendering this ſubject to his creditor, it is inconſiſtent with his duty to diſpoſe of it for any other purpoſe.

* Book I. Part 2. Ch. 3. Sect. 2.

In applying the rules of equity to an arreſtment, the duty now evolved will be found of great importance. If it be the duty of the debtor to convey to his creditor the ſubject arreſted by him, it is wrong for any other creditor in the knowledge of the arreſtment, to attach this ſubject by legal execution: for it is unjuſt to demand from a debtor privately, or even by legal execution, any ſubject which is pre-occupied, and which the debtor is bound to convey to another †. And if a creditor ſhall act thus unjuſtly, by arreſting a ſubject which he knows to be already arreſted by another creditor, a court of equity will diſappoint the effect of the ſecond arreſtment, by giving preference to the firſt.

† Ibid.

Our writers, though they have not evolved clearly the foregoing obligation which the debtor is under to the firſt arreſter, have how-

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

* Book 1. Part 4. Ch. 3. Sect. 2.

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

So much about arreſters competing for the ſame debt. Next about an arreſter competing with an aſſignee for a valuable conſideration. Touching this competition one preliminary point muſt be accurately adjuſted, *viz.* How far an arreſtment makes the ſubject arreſted litigious; or, in other words, how far it bars voluntary deeds. It is obvious in the firſt place, that an arreſtment makes the ſubject litigious with reſpect to the arreſtee, becauſe it is ſerved upon him. The very purpoſe of the arreſtment is to prohibit him from making payment. In the next place, as a creditor may proceed to arreſtment without intimating his purpoſe to his debtor,

an arreſtment cannot bar the debtor's voluntary deeds, till it be notified to him. The arreſtment deprives him not of his *jus crediti;* and while he continues ignorant of the arreſtment, nothing bars him either in law or equity, from conveying his right to a third party. Upon this account, intimation to him is an eſtabliſhed practice in the country from whence we borrowed an arreſtment. "Quamvis "debitor debitoris mei a me arreſtari nequeat, cum mihi nulla ex "cauſa obligatus ſit, tamen quod Titius debitori meo debet, per "judicem inhibere poſſum, ne debitori meo ſolvatur, ſine mea "vel judicis voluntate. De quo arreſto debitorem meum certiorem "facere debeo, eique diem dicere, quo ſi compareat, nec juſtam "cauſam alleget, ob quam arreſtum relaxari debeat, vel ſi non com- "pareat, judex ex pecunia arreſtata mihi ſolvendum decernet *." The ſame doctrine is laid down by Balfour †; "That an arreſtment "of corns, goods or gear ought to be intimated to the owner there- "of, and that if no intimation be made, it is lawful for the owner "to diſpoſe of the ſame at his pleaſure." Thirdly, With reſpect to others, an arreſtment, though notified to the arreſter's debtor, makes not the ſubject litigious. Any perſon ignorant of the arreſtment, is at liberty to take from the arreſter's debtor a conveyance to the ſubject arreſted. The cedent aliens indeed *mala fide* after the arreſtment is notified to him; but the purchaſer is ſecure if he be in *bona fide.* The property is legally transferred to him; and there is nothing in law or equity to deprive a man of a ſubject honeſtly acquired. That an arreſtment makes not the ſubject litigious with regard to third parties, will be clear from conſidering, that an effect ſo ſtrong is never given to any act, unleſs there be a public notification. A proceſs in the court of ſeſſion is ſuppoſed to be known to all; and, as it is a rule *Quod nihil innovandum pendente lite,* any perſon who tranſacts either with the plaintiff or defendant ſo as to hurt the other, does knowingly an unlawful act, which, for that reaſon, will be voided. An inhibition and interdiction are publiſhed to all the lieges, who are thereby put *in mala fide* to purchaſe from the perſon inhibited or interdicted. An appriſing again renders the ſubject litigious as to all, becauſe the letters are publicly proclaimed or denounced, not only upon the land, but alſo at the market-croſs of the head burgh of the jurisdiction where the land lies ‡; and an adjudication has the ſame effect, becauſe it is a proceſs in the court of ſeſſion. A charge of horning bars not the debtor from aliening: he is not barred till he be publicly proclaimed or denounced rebel. And it muſt be evident, that an arreſtment ſerved againſt my debtor cannot hurt third parties dealing with me, more than a horning againſt myſelf.

* Sande Decis. Friſ. L. 1. Tit. 17. Def. 1.

† Title, Arreſtment, cap. 3.

‡ Stair, L. 3. Tit. 2. §. 14.

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In a word, litigioſity, ſo as to affect third parties, never takes place without public notification.

WHEN one conſiders an inhibition, it will naturally occur that the argument here may be carried a great way farther; even ſo far, as that the actual knowledge of an arreſtment ſhould not bar any perſon from purchaſing the ſubject arreſted. But the argument from an inhibition concludes not with reſpect to an arreſtment; and in order to ſhow the difference, it will be neceſſary to ſtate the nature of an inhibition in a hiſtorical view.

THIS writ prohibits the alienation of moveable as well as immoveable ſubjects; and to ſecure againſt ſuch alienation, the writ is publiſhed to the lieges to put every man upon his guard againſt dealing with the perſon inhibited. This writ muſt have been the invention of a frugal age before the commerce of money was far extended, and before inhibitions were frequent. While inhibitions were rare, their publication could be kept in remembrance: a debtor inhibited would be a remarkable perſon, and every one would avoid dealing with him; but when the commerce of money was farther extended and debts were multiplied, an inhibition was no longer a mark of diſtinction. And as they could no longer be kept in memory, they became a load upon the commerce of moveables paſt all enduring; for no man was in ſafety to purchaſe from his neighbour a horſe, or a buſhel of corn, till firſt the records of inhibitions were conſulted. A Lycurgus intending to bar commerce in order to preſerve his nation in poverty, could not poſſibly have invented a more effectual ſcheme. But this execution, inconſiſtent with commerce ſo far as it affects moveables, is alſo inconſiſtent in itſelf, tending in a moſt direct manner to diſappoint its own end. The purpoſe of an inhibition is to force payment; and the effect of it is to prevent payment, by locking up the debtor's moveables, which commonly are the only ready fund for procuring money.

THESE reaſons have prevailed upon the court of ſeſſion to deny any effect to an inhibition, ſo far as it regards moveables. An inhibition indeed, with reſpect to its form and tenor, continues the ſame that it was originally; and accordingly every debtor inhibited is to this hour diſcharged to alien his moveables, not leſs peremptorily than to alien his land. This is an inconſiſtency that cannot be remedied but by the legiſlature; for the court of ſeſſion cannot

alter a writ of the common law, more than it can alter any other branch of the common law. But the court of ſeſſion as a court of equity can redreſs the rigor, injuſtice, or oppreſſion, of the common law: and though it hath no power to alter the ſtile of an inhibition, it acts juſtly in denying any force to an inhibition ſo far as it affects moveables, becauſe ſo far it is an oppreſſive and inconſiſtent execution. This argument, as above hinted, may ſeem to apply to an arreſtment, that even the knowledge of this execution ought not to bar any perſon from purchaſing the ſubject arreſted, whether it be a debt or a moveable properly ſo called. But this holds not in practice; and there is good reaſon for diſtinguiſhing, in this particular, an arreſtment from an inhibition. The latter prohibits in general the debtor to alien any of his moveables, and for that reaſon is highly rigorous and oppreſſive. The former is of particular ſubjects only; nor doth it affect any moveables in the debtor's own poſſeſſion. Againſt an execution ſo limited, equity makes no objection. An arreſtment therefore has the full effect that is given it by the common law. A man who *bona fide* purchaſes a ſubject arreſted, is ſecure in equity as well as at common law: but a *mala fide* purchaſe will undoubtedly be voided in a court of equity.

Having diſcuſſed preliminary points, we proceed to the ſubject propoſed, *viz.* the competition betwixt an arreſter and an aſſignee. I begin with the aſſignment of a moveable bond, which is afterwards arreſted, and after the arreſtment the aſſignment is intimated. The intimation by our law makes a compleat conveyance of the bond into the perſon of the aſſignee, after which it is in vain to think of making the debt furthcoming to the arreſter for his payment. The very foundation of his claim is gone; for neither law nor equity will permit any ſubject to be taken in execution that belongs not to the debtor. The bulk of our deciſions, it is true, prefer the arreſter, upon what medium I cannot comprehend. Our deciſions, however, are far from being uniform upon this point. I give the following example. *A* aſſigns the rent of his land for ſecurity and payment of a debt due by him. *A* hath another creditor who afterwards raiſes a proceſs of adjudication againſt the ſame land. The aſſignee intimating his right after the citation, but before the decree of adjudication, is preferred to the adjudger *. An arreſtment ſurely makes not a ſtronger *nexus* upon the ſubject than is made by a citation upon a ſummons of adjudication; and if an aſſignment be preferred to the latter, it muſt alſo be preferred to the former. But I

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

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ſay more. Let it be ſuppoſed, that after the citation upon the ſummons of adjudication, but before intimation of the aſſignment, the mails and duties are arreſted by a third creditor. The decree of adjudication is preferred before the arreſtment *. If ſo, here is a circle abſolutely inextricable, an adjudication preferred before an arreſtment, that arreſtment before an aſſignment, and that aſſignment again before the adjudication. This proves demonſtrably that the aſſignee ought to be preferred before the arreſter as well as before the adjudger. The court went ſtill farther in preferring an aſſignee before an arreſter. An Engliſh aſſignment to this day is a procuratory *in rem ſuam* only, carrying the equitable right indeed, but not the legal right. And yet with reſpect to a bond due to Wilſon reſiding in England by the Earl of Rothes in Scotland, an Engliſh aſſignment by Wilſon of the ſaid bond was of itſelf, without any intimation, preferred before an arreſtment ſerved afterwards upon the Earl. The preference thus given was clearly founded on equity; becauſe the court of ſeſſion as a court of equity could not juſtly make furthcoming to a creditor of Wilſon for his payment a ſubject that Wilſon had aliened for a valuable conſideration, and to which the purchaſer had the equitable though not the legal right. But if this be a juſt deciſion, which it undoubtedly is, nothing can be more unjuſt than to prefer an arreſtment before a Scotch aſſignment of a prior date, even after it is compleated by intimation. For here the aſſignee has both the equitable and legal right.

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

THE next caſe I put, is where in a proceſs of furthcoming upon an arreſtment, an aſſignee appears with an aſſignment prior to the arreſtment, but not intimated. I have already given my reaſon for preferring the aſſignee, as the court did with reſpect to an Engliſh aſſignment; and yet the ordinary practice is to prefer the arreſtment; which one will have no heſitation to believe, when an arreſtment is preferred even where the aſſignment is intimated.

THE preference due to the aſſignee is in this caſe ſo clear, that I am encouraged to carry the doctrine farther, by preferring an aſſignee even before a poinder, provided the aſſignee appear for his intereſt before the poinding be compleated. The poinder no doubt is preferable at common law, becauſe the aſſignment not being compleated by intimation, the debtor continues ſtill proprietor. The aſſignee however has the equitable right, and juſtice will not permit goods that the debtor has aliened for a valuable conſideration to be after-

wards attached by any of his creditors. The reſult will be different, when the poinding is compleated and the property of the goods transferred to the creditor before the aſſignee appear. In this caſe the poinder is ſecure, becauſe no man can be forfeited of his property who has committed no fault.

I proceed to an aſſignment of a debt made after the arreſtment, and intimated before the competition. Suppoſing the aſſignee to be *in bona fide*, he is clearly preferable. The intimation, which compleats the conveyance, veſts in the aſſignee the legal as well as equitable right; and if the ſubject be attachable by execution, it muſt be for payment of his debt, and no longer for payment of debt due by the cedent. This reaſon is good at common law to prefer the aſſignee, even ſuppoſing he had notice of the arreſtment before he took the aſſignment: but in equity the arreſter is clearly preferable where the aſſignee is *in mala fide*. The debtor, after his ſubject is affected by an arreſtment, is bound in duty to make over the ſubject to his creditor the arreſter. In theſe circumſtances he is guilty of a moral wrong if he convey the ſubject to another. The aſſignee is acceſſory to the wrong, and equity will redreſs this wrong by preferring the arreſter.

Let us drop now the intimation, by putting the caſe that in a proceſs of furthcoming at the inſtance of an arreſter, an aſſignee appears for his intereſt craving preference upon an aſſignment bearing date after the arreſtment but before the citation in the proceſs of furthcoming. Suppoſing the aſſignee *in mala fide*, he will in equity be poſtponed to the arreſter for the reaſon immediately above given. But what ſhall be the rule of preference where the aſſignee purchaſes *bona fide?* The arreſter and he have each of them an equitable right to the ſubject; neither of them has the legal right. This caſe reſembles that of ſtellionate, where a proprietor of land ſells to two different purchaſers ignorant of each other. Neither of them has the legal right, becauſe there is no infeftment; but each of them has an equitable right. In neither of theſe caſes can I diſcover a rule for preference; nor can I extricate the matter otherwiſe than by dividing the ſubject betwixt them. And after all, whether this may not be to cut the Gordian knot in place of untying it, I pretend not to be certain.

UPON the whole, an arreſtment appears a very precarious ſecurity till a proceſs of furthcoming be commenced. This proceſs indeed is a notification to the debtor not to alien in prejudice of the arreſter, and at the ſame time a public notification to the lieges not to purchaſe the ſubject arreſted. And by this proceſs the ſubject is rendered litigious, though the ſame privilege is not indulged to an inhibition ſo far as moveables are concerned.

CHAPTER V.

Powers of a Court of Equity with relation to Bankrupts.

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

THIS branch of law is of great importance in every commercial country; and in order to ſet it in a clear light, I cannot think of a better arrangement than what follows. Firſt, To ſtate the rules of common law. Secondly, To examine what equity dictates. Thirdly, To ſtate the regulations of different countries. And to conclude with the proceedings of the court of ſeſſion.

THE rules of common law are very ſhort, and indeed extremely imperfect. Any deed done by a bankrupt is effectual at common law, not leſs than if he were ſolvent. Nor is legal execution obſtructed by bankruptcy; for a creditor, after his debtor's bankruptcy, has the ſame remedy for recovering payment that he had while his debtor was in intire credit. With reſpect to deeds done by a bankrupt and execution by his creditors, the common law regards one circumſtance only, *viz.* whether the ſubject conveyed by the bankrupt, or attached by his creditors, was the bankrupt's property. If it was, a court of common law ſupports both. Hence it follows, that no fraud committed by a bankrupt againſt his creditors can be regarded at common law. Let us ſuppoſe the groſſeſt of all, that he ſecrets his moveables and makes feigned alienations of his lands, in order to diſappoint his creditors: yet ſuch acts, with reſpect to the debtor, are conſidered as ſo many exertions of property,

and conſequently lawful. With reſpect again to the creditors, the damage or loſs they ſuffer by ſuch acts is conſequential only; and the common law affords not redreſs but where the damage is direct, where a man by fraud or otherwiſe is deprived of his own property *.

* Book I. Part I. Ch. I.

IN order to determine with perſpicuity, what juſtice or equity dictates in this caſe, we muſt firſt aſcertain the circumſtances that in the common ſenſe of mankind infer bankruptcy. A man while he carries on trade, or hath any buſineſs that affords him a proſpect of gain, is not bankrupt though his effects may not be ſufficient to pay his debts. It is not unjuſt to pay one creditor before another, while there is a proſpect of making money to pay them all. But a man whoſe effects are not ſufficient for his debts and who hath no proſpect of bettering his circumſtances, is in the common ſenſe of mankind inſolvent or bankrupt. His creditors muſt loſe by him.

THIS condition, though not uncommon, is yet ſingular in the eye of juſtice. *Property* and *intereſt*, for the moſt part ſtrictly united, are here disjoined: the bankrupt continues proprietor of his eſtate, but his creditors are the only perſons intereſted in it: they have the equitable right, and nothing remains with him but the legal right. Conſidering the matter in this view, a bankrupt may not improperly be held as a truſtee, bound to manage his effects for behoof of his creditors. The duty of a bankrupt is in effect the ſame with that of a truſtee: both ought to make a faithful account of the ſubjects under their management. It is the duty of every debtor to turn his effects into money for payment of his creditors. While he continues ſolvent, he may pay his creditors in what order he pleaſes, becauſe no creditor ſuffers by the preference given to another: but ſo ſoon as he becomes inſolvent or bankrupt, this privilege vaniſhes; he is bound to all his creditors equally, and juſtice dictates that he ought to diſtribute his effects among them equally. No other diſtinction ought to be made but betwixt real and perſonal creditors. A real ſecurity fairly obtained from a debtor in good circumſtances, is not prejudicial to the other creditors; and therefore ſuch a right, unexceptionable originally, cannot be voided by any accident that may afterward happen to the debtor.

THUS ſtands the duty of a bankrupt with reſpect to his creditors, founded on the rules of common juſtice. The duty of the creditors

creditors with reſpect to each other, may ſeem not ſo evident. It is the privilege of a creditor who obtains not ſatisfaction, to draw his payment out of the debtor's effects; and it will not readily occur, that the debtor's inſolvency, the very circumſtance which enhances the value of the privilege, ſhould be a bar to it. This way of thinking is extremely natural, and hence the following maxims that have obtained an univerſal currency: *Prior tempore potior jure. Vigilantibus non dormientibus jura ſubveniunt.* In rude times, before the connections produced by ſociety have taken deep root, ſelfiſh principles prevail over thoſe that are ſocial. Thus in the preſent caſe, a creditor, partial to his own intereſt, is apt to confine his thoughts to the power he hath over his debtor; overlooking or ſeeing but obſcurely, that where the debtor is bankrupt, all the creditors are connected with each other by a common fund, the only ſubject of their payment. But by refinement of manners, the ſocial connections gain the aſcendant: man becomes more a ſocial than a ſelfiſh being; and by the improvement of his rational as well as ſenſitive faculties, he diſcovers the lawful authority of ſocial duties, as what he is bound to fulfil even in oppoſition to his own intereſt. By ſuch refinement it is at laſt perceived, that upon the debtor's inſolvency his perſonal creditors have all of them an equal claim upon his effects: that a creditor taking meaſures to operate his payment, ought to conſider the connection he has with his fellow-creditors engaged equally with him upon the ſame fund; and therefore that juſtice requires an equal diſtribution. This rule of juſtice is fortified by every view we take of the ſubject. To make the diſtribution of the common fund depend on priority of execution, exhibites the appearance of a race, where the ſwifteſt obtains the prize. A race is a more manly competition, becauſe there is merit in ſwiftneſs, whereas priority in execution depends upon accident more frequently than upon expedition. It is natural for ſavage animals to fall out about their prey, and to rob each other; but ſocial beings ought to be governed by the principle of benevolence: creditors in particular, being connected by a common fund and equally intereſted, ſhould not like enemies ſtrive to prevent each other, but like near relations join in common meaſures for the common benefit.

BUT to put this matter paſt doubt, I urge the following argument. A debtor, after his inſolvency, is bound to diſtribute his effects equally among his creditors; and it would be an act of injuſtice in him to prefer any of them before the reſt. It neceſſa-

rily follows, that a creditor cannot be innocent, who, knowing the bankruptcy, takes more than his proportion of the effects: if he take more by voluntary payment, he is acceſſary to an unjuſt act done by the bankrupt; and it will not be thought that he can juſtly take more by execution than by voluntary payment. If he ſhould attempt ſuch wrong, it is the duty of the judge to refuſe execution *.

* See Book 1. Part 2. Ch. 3. Sect. 2.

THAT creditors having notice of their debtor's bankruptcy are barred from taking advantage of each other, ſeems now ſufficiently evident. It is a matter of greater intricacy, what effect bankruptcy ought to have againſt creditors who are ignorant of it. I begin with the caſe of payment made by a bankrupt in money or effects, which transfers the property to his creditor. It is demonſtrated above †, that even in the caſe of ſtellionate, the ſecond purchaſer, ſuppoſing him *in bona fide* and not partaker of his author's fraud, is ſecure by getting the firſt infeftment, and that his purchaſe cannot be cut down in equity more than at common law. The reaſoning there concludes with equal if not ſuperior force in the caſe of bankruptcy. It is unjuſt in a bankrupt to prefer one creditor before another; but if he offer payment, the creditor who accepts, ſuppoſing him ignorant of the bankruptcy, is innocent and therefore ſecure. The property of the money or effects being transferred to him in lieu of his debt, there is no rule in equity more than at common law to forfeit him of his property. The ſame reaſoning concludes in favour of a creditor, who, ignorant of the bankruptcy, recovers payment by a poinding, or by a furthcoming upon an arreſtment.

† Ib. Ch. 2 Sect. 8.

NEXT comes the caſe of a real ſecurity, which transfers not the property of the ſubject. The creditor who, ignorant of his debtor's bankruptcy, obtains ſuch ſecurity, whether by legal execution or by the bankrupt's voluntary deed, is not culpable in any degree: but then, before this ſecurity exiſted, the equitable right to the bankrupt's effects was transferred to his creditors, who were entitled each of them to draw a ſhare in proportion to his juſt claim, ſuppoſing all of them at that period to have been perſonal creditors. This right eſtabliſhed in equity, cannot in equity be voided by legal execution, which is calculated to force payment of what is juſtly due, and not to create a debt or to enlarge it. Far leſs can it be voided by the voluntary deed of the bankrupt, which as to him is an unjuſt act. Where a debt is actually extinguiſhed by payment and the property of the money transferred, the court cannot

not interpoſe; for equity never deprives an innocent man of his property. But where the creditor is ſtill *in petitorio*, the court juſtly refuſes to interpoſe in behalf of the real ſecurity, becauſe it cannot be ſupported without forfeiting the other creditors of their equitable rights.

IF in a bankrupt it be unjuſt to divide his effects unequally among his creditors, it is ſtill more unjuſt to hurt his whole creditors by gratuitous alienations or gratuitous bonds. A gratuitous alienation transferring the property, cannot, it is true, be voided if the donee be not in the knowledge of the bankruptcy. But then, upon the rule of equity *quod nemo debet locupletari aliena jactura*, the donee is liable to make good the value to the bankrupt's creditors. A gratuitous bond is in a different condition; for it will be voided whether granted before or after bankruptcy. A man in good circumſtances may juſtly alien gratuitouſly, provided the fund he reſerves be ſufficient for his debts. The property is fairly transferred, and the creditors are not hurt. Nor in caſe of an eventual bankruptcy have they any claim upon the diſponee. The right itſelf cannot be voided, becauſe property once fairly transferred cannot be recalled where the acquirer has been guilty of no wrong. Nor upon the foregoing rule of equity *quod nemo debet locupletari aliena jactura*, have the creditors any perſonal claim againſt the diſponee, becauſe they were not hurt by the alienation: but againſt a gratuitous bond claimed after bankruptcy, though executed and delivered while the granter was in good circumſtances, the rule *quod nemo debet locupletari aliena jactura* is applicable, becauſe the taking payment is a direct prejudice to the creditors who have given a valuable conſideration, by leſſening their fund. And it deſerves attention, that this principle operates in favour of a creditor who lent his money even after the date of the gratuitous bond *.

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

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

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

BUT if the ſpecifying a legal mark of bankruptcy be of great importance, the choice of a proper act for ſuch a mark is not leſs nice than important. Whether in any country a choice altogether unexceptionable has been made, ſeems doubtful. It ought, in the firſt place, to be ſome act that cannot readily happen except in bankruptcy: for to eſtabliſh as a mark of bankruptcy any act that may happen where there is no bankruptcy, may have pernicious conſequences and be upon occaſion a heavy puniſhment without any guilt. Secondly, It muſt be ſuch an act as will readily happen in bankruptcy, and which a bankrupt cannot prevent: for if it be in his power to ſuppreſs it altogether or for any time, he may in the interim do much wrong for which there can be no remedy.

HAVING thus gone through the rules of the common law and the rules of equity concerning bankruptcy, we are, I preſume, ſufficiently prepared for the third article propoſed, *viz.* to ſtate the regulations of different countries upon this ſubject. And to bring the preſent article within reaſonable compaſs, I ſhall confine myſelf to the Roman law, the Engliſh law, and that of Scotland, which may be thought ſufficient for a ſpecimen. I begin with the Roman law. A debtor's abſconding entitled his creditors to apply to the court for a *curator bonis;* and after the creditors were put in poſſeſſion by their *curator*, no creditor could take payment from the bankrupt *. But this *miſſio in poſſeſſionem* ſeems not to have been

* l. 6. §. 7. Quæ in fraud. Cred. l. 10. §. 16. eod.

been deemed a public notification of bankruptcy, with reſpect to ſtrangers at leaſt. For even after that period, a purchaſer from the bankrupt was ſecure, if it could not be proved that he was *particeps fraudis* *. But every gratuitous deed was reſcinded, whether the acquirer was acceſſory to the wrong or not †; and in particular a gratuitous diſcharge of a debt ‡.

* l. 9. Quæ in fraud. Cred.
† l. 6. §. 11. eod.
‡ l. 1. §. 2. eod.

AGAIN, before the *miſſio in poſſeſſionem* the debtor continued to have the management as while he was ſolvent, and particularly was impowered to pay his creditors in what order he thought proper. It is accordingly laid down, That a creditor, who before the *miſſio in poſſeſſionem* receives payment, is ſecure, though he be in the knowledge of his debtor's inſolvency. *Sibi enim vigilavit* ſays the author ‖; a doctrine very juſt with reſpect to a court of common law, but very averſe to prætorian law or principles of equity.

‖ l. 6. §. 7. eod.

THE defects of the foregoing ſyſtem are many, but ſo obvious as to make a liſt unneceſſary. I ſhall mention two particulars only, being of great importance. The firſt is, that the neceſſity of eſtabliſhing a public mark of bankruptcy ſeems to have been altogether overlooked by the Romans. Even the *miſſio in poſſeſſionem* was not held a notification of bankruptcy; for in order to void a ſale made by a bankrupt in that ſituation, it was neceſſary to prove the purchaſer's knowledge of the bankruptcy, which ſeems extreme difficult to be proved, if poſſeſſion by his creditors be not held ſufficient evidence. It is true, that after ſuch poſſeſſion no creditor could take payment from the bankrupt. But why? not becauſe of the creditor's *mala fides*, but becauſe the creditors in general, being put in poſſeſſion of the bankrupt's funds, acquired thereby a *jus pignoris*, and in the diviſion of the price were accordingly entitled each of them to a rateable proportion. I obſerve next, that it is a great overſight in the Roman law, to neglect that remarkable period which runs betwixt the firſt act of bankruptcy and the *miſſio in poſſeſſionem*. In that period generally all contrivances are ſet on foot to cover the effects of the bankrupt, or to prefer the favourite creditors.

IN England the regulations concerning bankrupts are extended farther than in the Roman law, and are brought much nearer the rules of equity above laid down. The nomination of commiſſioners by the chancellor upon application of the creditors, is, in effect, the ſame with the nomination of a *curator bonis* in the Roman law. But then the foregoing defects of the Roman law are ſupplied, by

declaring a debtor's abſconding or keeping out of the way, termed *The firſt Act of Bankruptcy*, to be a public mark or notification of bankruptcy, of which no perſon is ſuffered to plead ignorance. From that moment the hands both of the bankrupt and of his creditors are tied up. He can do no deed that is prejudicial to his creditors in general, or to any one in particular. They on the other hand are not permitted to receive a voluntary payment, or to operate their payment by legal execution.

IT is perhaps not eaſy to invent a regulation better calculated for fulfilling the rules of equity than that now mentioned. It may be thought indeed, that abſconding or keeping out of the way, ſuppoſing it momentary only, is a circumſtance too ſlight and too private to be impoſed upon all the world as notorious. But then it ought to be conſidered, that the Engliſh bankrupt ſtatutes are confined to mercantile people who live by buying and ſelling: and with reſpect to a merchant, his abſconding or keeping out of the way is a mark of bankruptcy neither ſlight nor obſcure. Merchants convene regularly in the exchange; a retailer ought to be found in his ſhop or warehouſe; and their abſconding or abſence without a juſt cauſe is conſpicuous. One or other individual may happen, for ſome time, to be ignorant of the firſt act of bankruptcy, but a ſingular caſe muſt not be made an exception to a general rule. Juſtice muſt be diſtributed by general rules; and it is better for ſociety that ſome individuals ſuffer than that judges become arbitrary and law-ſuits endleſs. There is indeed a hardſhip in this regulation with reſpect to commerce, which is ſoftened by a late ſtatute *, enacting, That money received from a bankrupt in the courſe of trade and dealing before the commiſſion of bankruptcy ſued furth, whether in payment of goods ſold to the bankrupt, or of a bill of exchange accepted by him, ſhall not be claimed by the aſſignees to the bankruptcy, unleſs it be made appear, that the perſon ſo receiving payment was in the knowledge of the debtor's bankruptcy. This is in effect declaring with reſpect to payment received in the courſe of trade, that the iſſuing the commiſſion of bankruptcy is to be deemed the firſt public mark or notification of bankruptcy, and not what is called the firſt act of bankruptcy.

* 19. Geo. II. cap. 32.

THE firſt bankrupt act we have in Scotland is an act of ſederunt ratified by ſtatute 1621, cap. 18. intituled, "A ratification of the "act of the Lords of council and ſeſſion againſt unlawful diſpoſitions "and alienations made by dyvours and bankrupts." In this act of

of ſederunt two articles only are brought under conſideration. Firſt, Fraudulent contrivances to withdraw a bankrupt's effects from his creditors by making ſimulate and feigned conveyances. Second, The partiality of bankrupt's making payment to favourite creditors neglecting others. With reſpect to the firſt, it is ſet forth in the preamble, "That the fraud, malice, and falſehood of dyvours and "bankrupts was become ſo frequent as to be in hazard of diſſolving "all truſt and commerce among the ſubjects of this kingdom; that "many, by their apparent wealth in land and goods, and by their "ſhow of conſcience and honeſty, having obtained credit, intend "not to pay their debts, but either live riotouſly or withdraw themſelves or their goods furth of this realm to elude all execution "of juſtice: and to that effect, and in manifeſt defraud of their "creditors, make ſimulate and fraudful alienations, diſpoſitions, "and other ſecurities of their lands, reverſions, tiends, goods, actions, debts, and other ſubjects belonging to them, to their wives, "children, kinſmen, allies, and other confident and interpoſed perſons, without any true, lawful, or neceſſary cauſe, and without "any juſt or true price; whereby the creditors and cautioners are "falſely and godleſsly defrauded of their juſt debts, and many honeſt families are ruined." For remedying this evil, it is ordained and declared, Firſt, "That all alienations, diſpoſitions, aſſignations, "made by the debtor, of any of his lands, tiends, reverſions, actions, debts, or goods, to any conjunct or confident perſon, without true, juſt and neceſſary cauſes, and without a juſt price really "paid, ſhall be of no force or effect againſt prior creditors. Second, Whoever purchaſes from the ſaid interpoſed perſons any of "the bankrupt's lands or goods, at a juſt price, or in ſatisfaction "of debt, *bona fide*, without being partaker of the fraud, ſhall be "ſecure. Third, The receiver of the price ſhall make the ſame "furthcoming to the bankrupt's creditors. Fourth, It ſhall be ſufficient evidence of the fraud intended againſt the creditors, if they "verify by writ or by oath of the party receiver of any right "from the dyvour or bankrupt, that the ſame was made without "any true juſt and neceſſary cauſe, or without any true price; or "that the lands or goods of the bankrupt being ſold by the interpoſed perſon, the price is to be converted to the bankrupt's profit "and uſe. Fifth, All ſuch bankrupts, and interpoſed perſons for "covering or executing their frauds, and all others who ſhall give "counſel and aſſiſtance to the ſaid bankrupts in deviſing and practiſing their frauds and godleſs deceits to the prejudice of their "true creditors, ſhall be reputed and holden diſhoneſt, falſe, and

" infamous perſons, incapable of all honours, dignities, beneſices " and offices, or to paſs upon an inqueſt or aſſize, or to bear wit- " neſs in judgment or outwith, in any time coming."

The clauſe reſtraining a bankrupt's partiality in making payment to favourite creditors and neglecting others, is conceived in the following terms: " If any bankrupt, or interpoſed perſon partaker of " his fraud, ſhall make any voluntary payment or right to any per- " ſon, in defraud of the more timely diligence of another creditor, " having ſerved inhibition, or uſed horning, arreſtment, compriſing, " or other lawful mean to affect the bankrupt's lands, goods, or " price thereof; in that caſe the bankrupt, or interpoſed perſon, " ſhall be bound to make the ſame forthcoming to the creditor hav- " ing uſed the more timely diligence. And this creditor ſhall like- " wiſe have good action to recover from the co-creditor poſterior " in diligence what was voluntarily paid to him in defraud of the " purſuer."

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

This act, framed as we ought to ſuppoſe by the wiſeſt heads in the nation, is however not only ſhamefully imperfect, but in ſeveral particulars groſsly unjuſt. No general meaſures are preſcribed regulating what ought to be done by the bankrupt, by his creditors, or by the judges. No ouvert act is fixed as a public notification of bankruptcy: nor is there any regulation barring the creditors from taking advantage of each other by precipitancy of execution. Such blindneſs

blindneſs is the leſs excuſable in judges to whom the Roman law was no ſtranger, and who, in an Engliſh bankrupt ſtatute paſt a few years before, had a good model to copy after and to improve. But this act, which has occaſioned many irregular and even unjuſt deciſions, muſt be examined more particularly.

IN the firſt place, there cannot be a ſtronger inſtance of unſkilfulneſs in making laws, than the clauſe in the ſtatute confining the evidence of fraud to the writ or oath of the perſon who receives any ſubject from the bankrupt. A very little inſight into human nature would have taught our judges, that it is in vain to think of detecting fraud by the evidence of thoſe who deal in it whether as principals or acceſſories. Covered crimes muſt be detected by circumſtances, or not at all; and matters of this kind, being beyond the reach of a general rule, muſt be left with judges without any rule other than to determine every caſe according to its own peculiar circumſtances. And accordingly we ſhall have occaſion to ſee afterwards, that the court of ſeſſion were forced to abandon the evidence eſtabliſhed by themſelves, and in every inſtance to indulge ſuch proof as the nature of the caſe would admit. In the ſecond place, with reſpect to deeds done againſt creditors in general, it may at firſt view appear ſtrange, that the act of ſederunt ſhould be confined to actual fraud, a crime that merits puniſhment, and to which accordingly a puniſhment is annexed in the act itſelf. It plainly reacheth not gratuitous deeds in favour of children or others, however prejudicial to creditors, if not granted fraudulently in order to hurt them, but in order to benefit the donees. This palpable defect in the act will be accounted for by an obſervation one has occaſion to make daily, that in reforming abuſes there is generally a degree of diffidence which prevents the innovation from being carried its due length. The repreſſing actual fraud was a great improvement, which filled the mind, and ſcarce left room for a thought that the improvement could be carried farther. And, in all probability, it appeared a bolder ſtep to ſupply the defect of common law by voiding frauds committed by bankrupts, than to ſupply the defect of the ſtatute by voiding alſo gratuitous deeds.

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

to be the public notification of bankruptcy ſo often mentioned. But I am obliged to relinquiſh that thought, when I conſider, that our ſtatute 1621 is not confined to merchants but comprehends the whole body of the people, and that an inchoated act of horning or arreſtment is ſcarce a mark of bankruptcy at preſent, far leſs at the period of the act, with reſpect eſpecially to landed men. And that in fact it was not intended a mark or notification of bankruptcy is clear from the following conſiderations, that creditors are not barred by it from forcing payment by legal execution, nor even the bankrupt from acting partially among his creditors; for excepting that creditor only who hath commenced execution, it continues in the bankrupt's power as much as ever to diſtribute his effects among his favourite creditors, leaving the reſt without a remedy. But it is fruitleſs to diſguiſe a truth which muſt be diſcovered by every perſon of reflection, that this clauſe in the ſtatute betrays groſs ignorance of juſtice. There ought, no doubt, to be a remedy againſt the creditor who obtains payment by the bankrupt's partiality: but to make him ſurrender the money received by him to the creditor who has got the ſtart in execution is an unjuſt remedy. No more can be done in common juſtice, but to make the creditor who has received payment communicate part to the creditor who has commenced execution, that both may be upon a level. To make him ſurrender the whole is indeed an effectual cure to the bankrupt's partiality, but a cure that is worſe than the diſeaſe; worſe, I ſay, becauſe partiality among individuals is a ſpectacle much leſs diſguſting than is partiality in law. This regulation then is unjuſt, even upon ſuppoſition that the bankruptcy is known to the creditor who receives payment. But how much more glaring the injuſtice where he happens to be ignorant of that fact? The money he receives becomes undoubtedly his property, and juſtice in no caſe forfeits a man of his property unleſs as a penalty for committing ſome wrong: and therefore to wreſt from a creditor a ſum he has received *bona fide* in payment of a juſt debt, is in reality to inflict a puniſhment without a fault. Nor is this all. The regulation in itſelf unjuſt, is not leſs ſo with reſpect to conſequences; for by it a creditor is put in a worſe condition than if payment had not been offered him. Had he not depended on the payment, he might have made his debt effectual by legal execution. But before it can be aſcertained in a proceſs that he ought to ſurrender to another creditor the money he has received as payment, the bankrupt's funds are generally carried off by other creditors. Viewing again this regulation with reſpect to utility, it appears not leſs inexpedient

expedient than unjuſt. To thoſe who take the ſtart in execution, it holds out a premium to which they are not entitled by the rules of juſtice; and which therefore tends to a very unhappy conſequence, *viz.* to overwhelm with precipitant execution honeſt dealers, who, treated with humanity, might have emerged out of their difficulties, and have become bold and proſperous traders.

THE next bankrupt ſtatute in order of time is the act 62, p. 1661, ranking *pari paſſu* with the firſt effectual appriſing all appriſings of a prior date, and all led within year and day of it; for I ſhall have occaſion to ſhow afterward, that this ſtatute ought to be claſſed with thoſe concerning bankruptcy, though not commonly conſidered in that light. But the connection of matter, more intimate than that of time, leads me firſt to handle the act 5. p. 1696, intended evidently to ſupply the defects of theact 1621. Experience diſcovered in the act 1621 one defect mentioned above, that no ouvert act is aſcertained to be held the firſt act of bankruptcy as well as a public notification of it. This defect is ſupplied by the act 1696, in the following manner. An inſolvent debtor under execution by horning and caption, is declared a notour bankrupt, provided he be impriſoned, or retire to a ſanctuary, or fly, or abſcond, or defend his perſon by force. This is one term, and counting ſixty days backward, another term is fixed; after which all partial deeds by a bankrupt among his creditors are prohibited. The words are: "All "diſpoſitions, aſſignations, or other deeds, granted by the bankrupt "at any time within ſixty days before his notour bankruptcy, in fa- "vour of a creditor, directly or indirectly, for his ſatisfaction or "further ſecurity, preferring him to other creditors, ſhall be null "and void."

IT will be obſerved, that this ſtatute, with reſpect to the legal commencement of bankruptcy, differs widely from thoſe made in England. And indeed, to have copied theſe ſtatutes by making abſconding or keeping out of the way the firſt act of bankruptcy, would in this country have been improper. In England, arreſtment of the debtor's perſon till he find bail being generally the firſt act of execution, a debtor, to avoid impriſonment, muſt abſcond or keep out of the way the moment his credit is ſuſpected; and therefore in England, abſconding or keeping out of the way is a mark of bankruptcy not at all ambiguous. But in Scotland this mark of bankruptcy would always be too late. For with us there muſt be ſeveral ſteps

of execution before a bankrupt be forced to abſcond, letters of horning, a charge, a denunciation, a caption. In this country therefore it was neceſſary to ſpecify ſome mark of bankruptcy antecedent to abſconding. The mark that would correſpond the neareſt to abſconding in England, is a denunciation upon a horning. For after receiving a charge, the debtor, if he have any credit, will be upon his guard againſt a denunciation, ſuppoſing it to be eſtabliſhed as a public notification of bankruptcy. But our legiſlature perhaps ſhowed greater penetration, in commencing bankruptcy from a term of which even the bankrupt muſt be ignorant. Sudden bankruptcy is ſo rare as ſcarce to deſerve the attention of the legiſlature. A man commonly becomes bankrupt long before he is publicly known to be ſo by ultimate execution; and conſidering that the ſuſpicious period during which a debtor is tempted to act fraudulently commences the moment he foreſees the ruin of his credit, which is generally more than two months before his notour bankruptcy, it appears the ſafeſt courſe to tie up a bankrupt's hands during that period. Such retroſpect from notour bankruptcy cannot be productive of any wrong, if no effect be given to it other than to void ſecurities, which creditors obtain by force of execution, or by the voluntary deed of their debtor. And therefore, ſo far as concerns the term for the commencement of bankruptcy aſcertained by our act 1696, the regulation ſeems wiſe and political, and perhaps the beſt of the kind that is to be found in any country.

The ſtatute adheres ſtrictly to the principles of equity above laid down, by voiding every ſecurity granted to one creditor, in prejudice of the reſt, by their debtor within ſixty days of his notour bankruptcy, or, in other words, after the commencement of his bankruptcy aſcertained as above. But I muſt add with regret, that the regulation goes too far, when it voids alſo without diſtinction conveyances made in ſatisfaction or payment of debt. To deprive a man of a ſubject the property of which he has obtained *bona fide* in lieu of a debt, is, as obſerved above, inconſiſtent with an inviolable rule of juſtice, That an innocent man ought never to be forfeited of his property. A conveyance therefore of this nature ought not to be voided, unleſs where the creditor receiving ſatisfaction is in the knowledge of his debtor's bankruptcy.

But this is an error of ſmall importance in reſpect of what follows. After the commencement of bankruptcy, aſcertained as above, a bankrupt

a bankrupt is prohibited to act partially among his creditors, and yet creditors are permitted, as in the act 1621, to act partially among themſelves, and to prevent each other by legal execution. To permit a creditor to take by legal execution what he cannot receive voluntarily, is a glaring abſurdity. Payment or ſatisfaction obtained *bona fide*, whether from the bankrupt himſelf, or by force of execution, ought to be ſuſtained; but after the commencement of bankruptcy, there is the ſame foundation in juſtice for voiding a ſecurity obtained by execution that there is for voiding a ſecurity obtained voluntarily from the bankrupt. And yet our legiſlature has deviated ſo widely from the rules of juſtice, as to give full ſcope to execution even after notour bankruptcy. Nothing can be conceived more groſs. It had been a wiſe regulation, that upon notour bankruptcy a factor ſhould be appointed, to convert the bankrupt's effects into money, and to diſtribute the ſame among the creditors at the ſight of the court of ſeſſion. This regulation, the practice of Rome, and of England, ought not to have been overlooked. But if it was not palatable, our legiſlature ought at leaſt to have prohibited more to be taken by any execution than a rateable proportion; for after notour bankruptcy no creditor can be in *bona fide* to take payment of his whole debt.

THE injuſtice and abſurdity of permitting a creditor to take by execution what he is diſcharged to receive from his debtor voluntarily, though left without remedy by our two capital bankrupt ſtatutes, have not however been altogether overlooked. And I now proceed to the regulations made to correct that evil, which, for the ſake of connection, I have reſerved to the laſt place, though one of theſe regulations comes in point of time before the act 1696. The great load of debt contracted during our civil wars in the reign of Charles I. and the decay of credit occaſioned thereby, produced the act 62. p. 1661, laying down regulations ſuited to the times, for eaſing debtors and reſtoring credit. Among other articles, "All "appriſings deduced ſince the firſt of January 1652, before the "firſt effectual appriſing, or after, but within year and day of the "ſame, are appointed to come in *pari paſſu*, as if one appriſing had "been deduced for the whole." This regulation is general without reſpect to bankruptcy. But whatever ſtretches may be neceſſary to anſwer a particular exigency, it is evident, that the regulation cannot be juſtified as a perpetual law, except upon ſuppoſition that all the appriſings are deduced after the debtor is inſolvent. A debtor

while he is in good circumſtances, may pay his debts or grant real ſecurities in what order he pleaſes. By uſing this privilege he harms none of his creditors. They have no ground for challenging ſuch a deed at the time when it is granted; and the ſupervening bankruptcy of the debtor cannot afford them a ground of challenge which they had not at firſt. A ſecurity obtained by an appriſing or adjudication is preciſely ſimilar. If the debtor be ſolvent when ſuch judicial ſecurity is obtained by his creditor, the other creditors ſuffer not by it; and the adjudger who has thus fairly obtained a ſecurity, muſt be entitled to make the beſt of his right, whether the debtor afterwards become inſolvent or not. I have reaſon therefore to place the foregoing ſtatute, conſidered as perpetual, among thoſe which have been enacted in the caſe of bankruptcy: and in order to fulfil the rules of juſtice, it is the duty of the court of ſeſſion, as a court of equity, to conſider it in that light. The involved circumſtances of debtors and creditors at the time of the ſtatute, made it a ſalutary regulation to bring in appriſers *pari paſſu*, even where the debtor was ſolvent, though evidently a ſtretch againſt juſtice: but to adhere ſtrictly to the regulation at preſent when there is not the ſame neceſſity, is to adhere rigidly to the words againſt the mind and intendment of the legiſlature; for ſurely it could not be intended, that a creditor ſhould for ever be deprived of the preference he obtains by being the firſt adjudger, even though the other creditors are not hurt by that preference. That after the debtor's bankruptcy a creditor ſhould not be permitted to take more than his proportion of the common fund, is extremely juſt; and ſo far the ſtatute ought to be held perpetual. What farther is enacted to anſwer a particular purpoſe ought to be conſidered as temporary, becauſe the legiſlature could not mean it to be perpetual.

CONSIDERING then the foregoing ſtatute as perpetual, it muſt be confined to the caſe of bankruptcy, and in that view it deſerves to be immortal. The firſt adjudication may be juſtly held a public mark or notification of the debtor's bankruptcy, warning the other creditors to beſtir themſelves. And a year commonly is ſufficient for the other creditors to lead adjudications, which, by authority of the ſtatute, will entitle each creditor to a proportion of the debtor's real eſtate. This was a happy commencement to a much wanted reformation. The court of ſeſſion, taking example, ventured to declare by an act of ſederunt *, That the priority of a creditor's confirmation ſhall afford no preference in competition with other

* 28. Feb. 1662.

other creditors confirming within ſix months of the death of their debtor. By another act of ſederunt *, All arreſtments within ſixty days preceeding the notour bankruptcy, or within four months thereafter, are ranked *pari paſſu;* and every creditor who poinds within ſixty days preceeding the notour bankruptcy, or within four months thereafter, is obliged to communicate a proportion to the other creditors ſuing him within a limited time †. In the heat of reformation, the laſt mentioned regulation is carried too far. Poinding operates at once a transference of the property and a diſcharge of the debt; and ſuppoſing a poinder to be ignorant of his debtor's inſolvency, which is frequently the caſe where the execution precedes the notour bankruptcy, there is no rule in equity more than at common law to oblige the poinder to communicate any proportion to the other creditors. Nay, it is poſſible that a debtor may be ſolvent within ſixty days of his notour bankruptcy. A poinding againſt him in ſuch caſe, which wounds not the other creditors, ought not to afford them the ſhadow of a claim.

* Auguſt 9. 1754.

† Act of ſederunt, Ibid.

THE principles of equity ripening gradually, our zeal for the act 1661 has increaſed; and there is a viſible tendency in our judges to make the remedy ſtill more complete. In order to that end, the court of ſeſſion as a court of equity might have enlarged the time given by the ſtatute for leading adjudications. The principles of juſtice authorize a ſtill bolder ſtep, which is to put upon an equal footing all adjudications that are led upon debts exiſting before the firſt adjudication. But the court of ſeſſion, wavering always as to their equitable powers, have not hitherto ventured ſo far. Not adverting to an obvious doctrine, that in order to fulfil juſtice it is lawful to enlarge or improve means laid down in a ſtatute, the court of ſeſſion hath not attempted directly to enlarge the time for bringing in adjudgers *pari paſſu:* but they do the ſame thing every day indirectly; for upon the application of any creditor, ſetting furth, "That if the common *inducie* required in the proceſſes of conſti-"tution and adjudication be not abridged in his favours, he can-"not hope to complete his adjudication within year and day of the "adjudication firſt effectual," the court, without requiring any cauſe to be aſſigned for the delay, give authority for adjudging ſummarly. This, in effect, is declaring, that all adjudgers ſhall have the benefit of the ſtatute, provided the ſummons of adjudication be within year and day of the firſt effectual adjudication. It is curious at the ſame time to obſerve, in what manner a court, like an individual, afraid of a bold ſtep, will, to ſhun it, venture upon one

not leſs bold. To abridge or diſpenſe with forms, ſalutary in themſelves, and ſanctified by inveterate practice, is an act of authority not leſs extraordinary than to enlarge the time afforded in a ſtatute for ranking adjudgers *pari paſſu*.

BUT after all, the foregoing regulations, calculated to put creditors upon a level in the caſe of bankruptcy, are mere palliatives. They ſoften the diſeaſe but ſtrike not at the root. The court of ſeſſion tried once a bolder and more effectual remedy, borrowed from the law of Rome and of England, *viz.* to name a factor for managing and diſpoſing of the bankrupt's moveable funds, in order that the price may be equally diſtributed among the creditors. And why that regulation was not made perpetual I cannot explain.

ACCORDING to the method propoſed in the beginning, nothing now remains but to take under conſideration the proceedings of the court of ſeſſion with relation to the preſent ſubject, beginning with deciſions relative to the ſtatutes, and concluding with deciſions founded on principles of equity independent of the ſtatutes. And firſt, the ſtatute 1621 has been extended to a leaſe of land ſet to a truſtee at an undervalue, in order that the bankrupt himſelf might enjoy the profits. A leaſe of this nature, though not comprehended under the words of the act, comes plainly under its ſpirit and intention; and therefore it is the duty of a court of equity to extend the act to this caſe. A fraudulent bond granted by a bankrupt in order to withdraw from the true creditors a part of the fund for the bankrupt's own behoof, is another example of the ſame kind. For, as Sir George Mackenzie obſerves in his explication of this act, "Though neither tacks nor bonds be comprehended under the letter of the law, yet the reaſon of the law extends to them; and in laws founded on the principles of reaſon, extenſions from the ſame principles are natural. And in laws introduced for obviating of cheats, extenſions are moſt neceſſary, becauſe the ſame ſubtile and fraudulent inclination that tempted the debtor to cheat his creditors, will tempt him likewiſe to cheat the law, if the wiſdom and prudence of the judge do not interpoſe." A diſcharge granted by the bankrupt in order to cover a debt from his creditors for his own behoof, will alſo come under the act by an equitable interpretation.

UPON what principle ſhall we reſt the famous caſe of Street and Maſon, which is as follows? "A diſpoſition by a merchant to his

" his infant ſon of his whole eſtate, without reſerving his liferent " or a power to burden, was deemed fraudulent in order to cheat " his correſpondents, being foreign merchants, who had been in a " courſe of dealing with him before the alienation, and continued " to deal with him after it upon the faith that he was ſtill proprietor. " And their debts, though poſterior to the diſpoſition, were ſuſtained " to affect the ſaid eſtate. Nor was it reſpected that the infant's " ſeiſine was on record, which ſtrangers are not bound to know *." This caſe comes not under the words of the ſtatute 1621, which are in favour of prior creditors only. It may be thought however a rational extenſion of the ſtatute, to fulfil the purpoſe of the legiſlator againſt fraud. A man who accepts a deed, fraudulently contrived againſt others, is evidently acceſſory to the fraud of his author: and equity will not indulge an infant with a gain of which a perſon at full age would be deprived. Suppoſing only a few years to paſs, the infant himſelf, underſtanding the vicious motive that procured him the eſtate, would be acceſſory to the fraud if he ſhould pretend to take benefit by it.

* Stair, July 2. 1673, Street and Jackſon *contra* Maſon. Stair Dec. 4. 1673, Reid *contra* Reid.

WITH reſpect to the evidence required in the firſt article of the ſtatute 1621 for detecting fraudulent deeds, the court of ſeſſion hath aſſumed a power proper and peculiar to a court of equity. It has been forced to abandon the oath or writ of the partaker of the fraud, being a means altogether inſufficient to anſwer the end propoſed by the ſtatute, and in place of it to lay hold of ſuch evidence as can be had, according to the nature of the caſe. It is accordingly the practice of the court, after weighing circumſtances, to preſume ſometimes in favour of the deed till the fraud be proved, and ſometimes againſt the deed till a proof be brought of its being fair and honeſt. Thus a bond bearing borrowed money, granted by a bankrupt to a conjunct and confident perſon, was preſumed to be fairly granted for the cauſe expreſſed; and the burden of proving it to have been granted without any juſt cauſe, was, in terms of the act, laid upon the purſuer of the reduction †. Again, a diſpoſition by a bankrupt of his whole heritage to his ſon-in-law, upon the narrative of a price paid, was found probative, unleſs redargued by the diſponee's oath ‡. A diſpoſition by a bankrupt to his brother, bearing to be for ſecurity of a ſum inſtantly borrowed, was ſuſtained; but admitting the cauſe expreſſed to be redargued by the diſponee's oath. And the judges diſtinguiſhed this caſe from that of a diſpoſition bearing a valuable conſideration in general, which muſt be otherwiſe verified than by the diſpoſition ‖.

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

‡ Durie, Jan. 17. 1632, Skene *contra* Beatſon.

‖ Gosford, Nov. 28. 1673, Campbell *contra* Campbell.

ON the other hand, in a reduction upon the act 1621 of a bond bearing borrowed money granted by a bankrupt to his brother, the judges thought, that though bonds *inter conjunctas* may prove where commercial dealings appear, yet, as in the preſent caſe no ſuch dealings were alledged, and as the creditor's circumſtances made it improbable that he could have advanced ſuch a ſum, the bond was not ſuſtained as probative of its cauſe [a]. A diſpoſition of land by a bankrupt to his brother, bearing a valuable conſideration in general, was not ſuſtained as probative of its narrative in prejudice of prior creditors, but it was laid on the diſponee to aſtruct the ſame [b]. And he having ſpecified, that it was for a ſum of money advanced in ſpecie to his brother, which he offered to depone upon, the Lords found this not relevant [c]. In the like caſe, the diſponee having produced two bonds due to him by the diſponer, and offering to give his oath that theſe were the cauſe of the diſpoſition, the judges thought this ſufficient [d].

[a] Fountainhall, Forbes, Decem. 5. 1707, M'Learie *contra* Glen.

[b] Stair, Novem. 29. 1671, Whitehead *contra* Lidderdale.

[c] Stair, Dec. 14. 1671, Inter eoſdem.

[d] Stair, Dec. 15. 1671, Duff *contra* Forbes of Culloden.

A diſpoſition by a bankrupt to a conjunct or confident perſon, referring to a prior engagement as its cauſe, is not ſuſtained unleſs the prior engagement be inſtructed. Thus an aſſignment made by a bankrupt to a conjunct and confident perſon, bearing to be a ſecurity for ſums due to the aſſignee, was preſumed to be *in fraudem creditorum*, unleſs the aſſignee would bring evidence of the debts referred to in the deed [e]. And the aſſignee ſpecifying, that he took the aſſignment for behoof of a third party, one of the bankrupt's creditors, the aſſignment was ſuſtained [f]. An aſſignment by a bankrupt to his brother, bearing to be a ſecurity for debts owing to him, was preſumed gratuitous, unleſs the aſſignee would inſtruct otherwiſe than by his own oath that he was creditor [g]. To ſupport the narrative of a diſpoſition by a bankrupt to his ſon, bearing for its cauſe certain debts ſpecified undertaken by the ſon, it was judged ſufficient that the ſon offered to prove by the creditors mentioned in the diſpoſition, that he had made payment to them in terms of the diſpoſition [h]. A diſpoſition by a bankrupt to his brother, bearing to be a ſecurity for certain ſums due by bond, was thought ſufficiently ſupported by production of the bonds, unleſs the purſuer would offer to prove that the bonds were granted after inſolvency. Here no ſuſpicious circumſtances occurred other than the conjunction itſelf; and if ſuch a proof of a valuable conſideration be not held ſufficient, all commerce among relations will be at an end. It might upon the ſame footing be doubted, whether even a proof by witneſſes of the actual delivery of the money would be ſufficient, which

[e] Durie, Haddington, Feb. 12. 1622, Denniſon *contra* Young.

[f] Hope, (de creditoribus) Feb. 27. 1622, Inter eoſdem.

[g] Durie, Jan. 29. 1629, Auld *contra* Smith. Stair, July 15. 1670, Hamilton *contra* Boyd.

[h] Stair, Jan. 9. 1672, Robertſon *contra* Robertſon.

which might be done ſimulately in order to ſupport a bond, as well as a bond be granted ſimulately in order to ſupport a diſpoſition *. It will be obſerved, that ſome of the foregoing caſes are of bonds granted after bankruptcy, as for borrowed money, which ought not to be ſuſtained in equity. But the court of ſeſſion, as will be ſeen afterwards, is in the practice of ſuſtaining ſuch bonds, for no better reaſon than that they are not prohibited by the bankrupt ſtatutes.

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

WITH reſpect to the ſecond article of the act 1621, prohibiting payment to be made in prejudice of a creditor who is *in curſu diligentiæ*, the court of ſeſſion conſidering the injuſtice of wreſting from a creditor ignorant of his debtor's bankruptcy, a ſum delivered to him in payment, ventured ſo far to correct this injuſtice, that a proceſs having been raiſed againſt a creditor who had obtained payment, for delivering the money to the creditor firſt in execution, they refuſed to ſuſtain the action, unleſs it could be verified, that at the time of the ſaid payment the debtor was commonly reputed a bankrupt †. A debtor commonly reputed a bankrupt will always be held ſuch by his creditors; and a creditor knowing of his debtor's bankruptcy cannot juſtly take more than his proportion. It muſt be obſerved, however, that the remedy here afforded is not complete; for ſuppoſing the creditor's knowledge, equity does not oblige him to part with that proportion of the debtor's effects which he is entitled to upon an equal diſtribution. Where payment is made before inchoated execution, and yet within threeſcore days of notour bankruptcy, the court of ſeſſion hath no occaſion to extend its equitable powers to ſupport ſuch payment, which ſtands free of both ſtatutes. The ſtatute 1621 challenges no payments but what are made after inchoated execution, and payments are not at all mentioned in the ſtatute 1696. Payments after notour bankruptcy are in a different caſe: they are barred in equity though not by the ſtatute 1696.

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

THE ſecond branch of the act 1621 ſecuring a creditor, who has commenced execution, againſt the partiality of his debtor, is ſo ſtrictly applied by the court of ſeſſion, that where a ſecurity is voided by a creditor prior in execution, the whole benefit is given to him, and the defendant who obtained the ſecurity is forfeited of it altogether. And the act 1696 is ſo ſtrictly applied, that moveables being delivered to a creditor forhis debt, the tranſaction was voided becauſe delivery was made within ſixty days of notour bankruptcy;

ruptcy *; though abſtracting from the injuſtice of depriving an innocent man of his property, the court, in interpreting a rigorous ſtatute, ought to have limited the words within their narroweſt meaning, by finding that moveables, the commerce of which ought to be free, are not comprehended in the ſtatute.

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

By the act 1696, as above obſerved, "All diſpoſitions, &c. "granted by a debtor within ſixty days before his notour bank- "ruptcy, in favour of a creditor for his ſatisfaction or ſecurity, "preferring him before other creditors, are declared null and void." This clauſe admits of a double meaning. It may import a total nullity, or itmay import a nullity ſo far only as the creditor is preferred before others. The latter meaning ought evidently to be choſen, as what anſwers the purpoſe of the legiſlature, and fulfils the rules of juſtice. And yet, I know not by what miſapprehenſion, the former is adopted by the court of ſeſſion. A diſpoſition accordingly of this kind was voided totally, and other creditors, who had attached the ſubject by legal execution, were preferred, without giving the diſponee ſo much benefit by his diſpoſition as even to bring him in *pari paſſu* with the other creditors †. This is laying hold of the words of a ſtatute, without regarding its ſpirit and intendment. It is worſe. It is giving a wrong ſenſe to an ambiguous clauſe, in oppoſition to the ſpirit and intendment. The obvious purpoſe of the act 1696 is not to deprive a bankrupt altogether of the management of his affairs, for in that caſe a *curator bonis* muſt have been appointed, but only to bar him from acting partially. It clearly follows, that a court of equity, ſupporting the ſpirit of the law, ought not in the caſe mentioned to have carried the reduction farther than to redreſs the inequality intended by the diſpoſition. The court followed an oppoſite courſe, not leſs partial to the purſuers of the reduction than the diſpoſition was to the defendant; and their decree accordingly exceeded the bounds of juſtice on the one ſide as much as the bankrupt's diſpoſition did on the other. The ſolidity of this reaſoning will be clearly apprehended, in applying it to a ſecurity granted by a debtor in good credit, but who within ſixty days thereafter is a notour bankrupt. A creditor being *in optima fide* to take a ſecurity in theſe circumſtances, merits no puniſhment. Another creditor however, anxious about his debt, attaches the ſubject by legal execution; and thus gets the ſtart of the diſponee, whoſe hands by the diſpoſition are tied up from execution. Is it juſt or equitable to void the diſpoſition altogether, and to prefer the other creditor?

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

With

WITH reſpect to particulars that come not under either of the bankrupt ſtatutes, and which therefore are left to be regulated by equity, it is ſurpriſing to obſerve the fluctuation of the court of ſeſſion betwixt common law and equity. In many inſtances, the court hath given way to the injuſtice of common law without affording a remedy, for a very odd reaſon indeed, that no remedy is provided by ſtatute. In other inſtances again, the court, exerting its equitable powers, has boldly applied the remedy. I proceed to examples of both.

A ſale by a notour bankrupt after the act 1696, was ſupported upon the following medium that it is not prohibited by the act 1696*. Very true. But then, as above demonſtrated, it is prohibited by juſtice and by utility; and upon theſe *media* it ought to have been voided. The court went ſtill farther, by ſuſtaining a bond for money lent to a known bankrupt †. Upon the ſtatute 1696 it has been diſputed, whether an act be challengeable where no ſubject is aliened and yet a partial preference is given. The caſe was as follows. An heir-apparent having given infeftments of annualrent, did thereafter grant a procuratory to ſerve himſelf heir, that his infeftment might accreſce to the annualrent-rights. In a competition betwixt theſe annualrenters and poſterior adjudgers, it was objected againſt the procuratory, That it was granted by a notour bankrupt, and therefore null by the ſtatute 1696; the purpoſe of which is to annul every partial preference by a bankrupt, direct or indirect. It was anſwered, That the ſtatute mentions only alienations made by the bankrupt, and reaches not every act that may be attended with a conſequential damage or benefit to ſome of the creditors. The court preferred the annualrenters ‡. Had the ſervice been before the bankruptcy, there would have occurred no reaſon in equity againſt it. But a man, who, conſcious of his own bankruptcy, performs any act in order to prefer one creditor before another, is unjuſt; and the creditor who takes advantage of this act, knowing his debtor to be bankrupt, is partaker of the wrong. The court therefore denying a remedy in this caſe, acted as a court of common law, overlooking its equitable powers.

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

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

‡ February 1728, creditors of Graitney competing.

OPPOSITE to the foregoing inſtances, I ſhall mention firſt a donation, the motive of which is love and favour to the donee, without any formed intention to wrong the creditors, though in effect they are wronged by it. That the ſtatute 1621 reaches

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

NEXT comes a ſecurity given by a bankrupt in ſuch circumſtances as not to be challengeable upon either of the ſtatutes, being given, for inſtance, before execution is commenced againſt the bankrupt, and more than ſixty days before his bankruptcy becomes notorious. It is made out above, that a court of equity ought to void ſuch a ſecurity, even though the creditor, ignorant of his debtor's bankruptcy, obtained the ſame *bona fide*. The court of ſeſſion, it is true, hath not hitherto ventured to adopt this equitable regulation in its full extent; but the court hath made vigorous approaches to it, by voiding ſuch ſecurity whereever any collateral circumſtance could be found that appeared to weigh in any degree againſt the creditor. Thus, a ſecurity given by a bankrupt to one of his creditors, who was his near relation, was voided, though the diſpoſition came not under either of the bankrupt ſtatutes *. In the ſame manner, a diſpoſition *omnium bonorum*, as a ſecurity to a ſingle creditor, is always voided. And here it merits obſervation, that the court of ſeſſion acting upon principles of equity, is more correct in its decrees, than when it acts by authority of the ſtatutes; witneſs the following caſe. " A debtor againſt whom no execution was commenced, having " granted a diſpoſition *omnium bonorum* as a ſecurity to one of " his creditors, another creditor arreſted in the diſponee's hands, " and

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

" and in the furthcoming inſiſted, that the diſpoſition was null, " and that the ſubject ought to be made furthcoming to him " upon his arreſtment. The court reduced to the effect of bring- " ing in the arreſter *pari paſſu* *." The following caſe, though varying in circumſtances, is built upon the preciſe ſame foundation. Robert Grant, conſcious of his inſolvency and reſolving to prefer his favourite creditors, executed privately in their favours a ſecurity upon his land-eſtate, which in the ſame private manner he compleated by infeftment. This ſecurity being kept latent, even from thoſe for whom it was intended, gave no alarm, and Robert Grant did not become a notour bankrupt for many months thereafter. But the peculiar circumſtances of this caſe, a real ſecurity beſtowed on creditors who were not making any demand, ſeiſin given clandeſtinely, *&c.* were clear evidence of the granter's conſciouſneſs of his bankruptcy, as well as of his intention to act partially and unjuſtly among his creditors; and the court accordingly voided the ſecurity ſo far as it gave preference to the creditors therein named. November 10. 1748, Sir Archibald Grant *contra* Grant of Lurg.

* Feb. 25. 1737. Cramond *contra* Bruce.

AFTER finiſhing the inſtances promiſed, another point demands our attention. With reſpect to an alienation bearing to be granted for love and favour, or made to a near relation, and therefore in caſe of bankruptcy preſumed gratuitous, a doctrine eſtabliſhed in the court of ſeſſion by a train of deciſions, appears ſingular. It is held, that the purchaſer from ſuch diſponee, though he pay a full price, is in no better condition than his author, and that a reduction at the inſtance of the bankrupt's creditors will reach both equally. This doctrine ought not to paſs current without examination, for its conſequences are terrible. At this rate, every ſubject acquired upon a lucrative title is withdrawn from commerce for the ſpace at leaſt of forty years. What ſhall become of thoſe who purchaſe from heirs if this doctrine hold? And if a purchaſer from an heir of proviſion, for example, be ſecure, why not a purchaſer from a gratuitous diſponee? What objection ſhould lie againſt the purchaſer is not obvious, conſidering that a purchaſer even from a notour bankrupt is, in the practice of the court of ſeſſion, held to be ſecure. This is at leaſt a good *argumentum ad hominem*. The only reaſon urged in ſupport of this doctrine is, That a purchaſer cannot pretend to be *in bona fide* when his author's right appears to be gratuitous, or is preſumed gratuitous. I cannot for my part perceive the weight of this reaſon. It is obvious to anſwer in the firſt place, That if we

adhere to the act 1621, there can be no foundation for ſuch reduction. For if even in the caſe of a fraudulent conveyance to an interpoſed perſon a purchaſer *bona fide* from that perſon be ſecure, what doubt can there be that a purchaſer from a gratuitous diſponee is alſo ſecure, where the gratuitous diſponee is innocent of any fraud? In the next place, conſidering this matter upon the principles of equity, a gratuitous deed is not ſubject to reduction, unleſs granted by a bankrupt; and to put a purchaſer from a gratuitous diſponee *in mala fide*, the bankruptcy ought to be known to him as well as that his author's title is gratuitous. And yet, one caſe excepted, I find not that the purchaſer's knowledge of the bankruptcy has ever been held a neceſſary circumſtance. The caſe is reported by Fountainhall * as follows: "It is not ſufficient to reduce the purchaſer's "right that he knew his author's relation to the bankrupt, unleſs "he was alſo in the knowledge of the bankruptcy; becauſe there "is no law to bar a man in good circumſtances from making a do-"nation to a near relation. And knowledge, an internal act, muſt "be gathered from circumſtances, the moſt pregnant of which is, "that the granter of the gratuitous deed was at the time held "and reputed a bankrupt." But, in the third place, ſuppoſing the bankruptcy known to the purchaſer, I deny that this circumſtance can ſupport the reduction either at common law or in equity. It is made evident above, that a gratuitous diſponee ignorant of his author's bankruptcy, is not bound to yield the ſubject to the bankrupt's creditors, but only to account to them for the value. Now, when the gratuitous diſponee diſpoſes of the ſubject for a full price, this ſale, ſo far from diſappointing the obligation he is under to the bankrupt's creditors, enables him to perform it. In one caſe only will the purchaſer's right be voided in equity, and that is where the gratuitous diſponee and the purchaſer from him are both of them *in mala fide*. A man who takes a gratuitous diſpoſition knowing his author to be bankrupt, is guilty of a wrong which binds him in conſcience to reſtore the ſubject itſelf to the bankrupt's creditors; and the perſon who purchaſes from him knowing that he is ſo bound, being alſo guilty, is for that reaſon bound equally to reſtore.

* Nov. 28. 1693. Spence *contra* creditors of Dick.

THE ſtatute 1696 voiding all diſpoſitions aſſignments or other deeds granted by a bankrupt to a favourite creditor, ſeems to have no ſubjects in view but what are locally in Scotland within the juriſdiction of the court of ſeſſion. And indeed it would be to no purpoſe to void a diſpoſition granted by a Scotch bankrupt of his foreign effects, becauſe ſuch effects will be regulated by the law of the place

and

and not by a decree pronounced in Scotland. Suppoſing then ſuch a diſpoſition to be granted, is there no remedy? It is certainly a moral wrong for a bankrupt to convey to one of his creditors what ought to be diſtributed among all; and the creditor who accepts ſuch ſecurity, knowing his debtor to be inſolvent, is acceſſory to the wrong. Upon this ground, the court of ſeſſion, though they cannot void the ſecurity, may, as a court of equity, ordain the favourite creditor to repair the loſs that the other creditors have ſuſtained by it; which will oblige the favourite creditor either to ſurrender the effects, or to be accountable for the value. And this was decreed in the court of ſeſſion, July 18. 1758, Robert Syme clerk to the ſignet *contra* George Thomſon tenant in Dalhouſie.

OF late years it has been much controverted, whether a diſpoſition *omnium bonorum* by a notour bankrupt to truſtees for behoof of his whole creditors, is voidable upon the bankrupt ſtatutes. Formerly ſuch diſpoſitions were ſuſtained, as not being prohibited by any clauſe in either of the ſtatutes. But the court at laſt ſettled in the following opinion, "That no diſpoſition by a bankrupt can "diſable his creditors from doing diligence *." This opinion, founded on juſtice and expediency, though not at all upon the bankrupt ſtatutes, ought to govern the court of ſeſſion as a court of equity. It belongs not to the bankrupt, though proprietor, to direct the management of his funds, but to his creditors, who are more intereſted in that management than he is. It belongs therefore to the creditors to direct the method by which the funds ſhall be turned into money for their payment; and if they chuſe to have the effects managed by truſtees, it is their privilege, not the bankrupt's, to name the truſtees. It follows however from this conſideration, that thoſe truſt-rights only which are impoſed by bankrupts upon their creditors, ought to be voided. There lies evidently no objection either at common law or in equity againſt a diſpoſition *omnium bonorum* ſolicited by the creditors, and granted by the bankrupt to truſtees of their naming. On the contrary, a truſt-right of this nature, which ſaves the nomination of a *curator bonis* as in Rome or of commiſſioners as in England, merits the greateſt favour, being an expeditious and frugal method of managing the bankrupt's funds for behoof of his creditors. And ſuppoſing ſuch a meaſure to be concerted among the bulk of the creditors, a court of equity ought not to regard a few diſſenting creditors who incline to follow ſeparate meaſures. The truſt-right is good at common law being an alienation by a proprietor, and it is good in equity as being a juſt act.

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

It muſt accordingly afford a preference to the creditors who lay hold of it. A diſſenting creditor may if he pleaſes proceed to execution againſt his debtor, and he may attach the imaginary reverſion implied in the truſt-diſpoſition. But ſuch peeviſh meaſures cannot hurt the other creditors who are ſecured by the truſt-right; for if that right be not voidable, it muſt be preferred before an adjudication or any other execution at the inſtance of a diſſenting creditor.

Chapter VI.

Powers and Faculties.

Every right real or perſonal is a legal power to perform certain acts. In this extenſive ſenſe there are numberleſs powers. Every individual hath power over his own property, and over his own perſon; ſome over another's property or perſon. To trace all theſe powers would be the ſame with writing a body of law. The powers under conſideration are of a ſingular kind. They are not rights properly ſpeaking, but they are means by which rights can be created, a power, for example, to make a man debtor for a ſum, a power to charge his land with debt, a power to redeem land from the purchaſer.

These powers are of two kinds; powers founded on conſent merely, and powers which make a branch of property. Where a man diſpones his eſtate to his heir abſolutely and irredeemably, impowering a third perſon to charge the heir or the land with a ſum, this is an example of the firſt kind. A power thus created is founded on the conſent of the heir, ſignified by his acceptance of the diſpoſition. A power reſerved in a ſettlement of a land-eſtate, to alter the ſettlement or to burden the land with debt, is an example of the other kind. By ſuch ſettlement the property is underſtood to be reſerved to the maker, ſo far as to impower him to alter or to burden.

To explain a power of the firſt kind, which is properly termed *a Faculty* in contradiſtinction to a power founded on property, it muſt be conſidered, 1*mo*, That with regard to pecuniary intereſt, a man may ſubject himſelf to the power of another. He may gratuitouſly bind himſelf to pay a ſum of money; or he may impower any perſon to burden him with a ſum. 2*do*, He may alſo ſubject his property to the power of another. A proprietor can impower any perſon

perſon to charge his land with an infeſtment of annualrent; and a real right thus eſtabliſhed is good even at common law. Thus it is laid down by our writers, that the proprietor's conſent will validate a reſignation made by one who hath no right *, and will validate alſo an annualrent-right granted by one who is not proprietor †. 3*tio*, Though an annualrent-right thus granted by a perſon having a faculty to burden the land is a real right not leſs compleat than if granted by the proprietor, yet the faculty itſelf is not a real right. It may indeed be exerted while the granter continues proprietor; his conſent makes it effectual: but his conſent cannot operate after he is diveſted of his property more than if he never had been proprietor. In that caſe it is a conſent by one to burden the property of another, an act that can have no effect in law. Thus a power granted by a proprietor to charge his land with a certain ſum, ceaſes by his ſelling the land before the faculty is exerted. Nor in ſtrict law can ſuch faculty be exerted after the proprietor's death when the land is veſted in the heir by ſucceſſion. Whether equity may not in this caſe interpoſe, is more doubtful. Let us ſuppoſe that a man makes a deed, impowering certain perſons to name proviſions to his younger children after his death, and to burden his heir and land-eſtate with the payment; leaving at the ſame time his eſtate to deſcend to his heir at law by the courſe of ſucceſſion. This deed cannot be effectual at common law; becauſe it is inconſiſtent with the nature of property, that, without conſent of the proprietor, any one ſhould have power over a ſubject which belongs not to him. It ſeems however juſt, that a court of equity ſhould interpoſe to make ſo rational a faculty effectual againſt the heir, though not to charge the eſtate. The faculty, it is true, cannot be conſidered as a debt due by the anceſtor to ſubject the heir by repreſentation: but it is the will of the anceſtor to burden the heir with proviſions to his younger children; and in equity the will of the anceſtor ought to be a law to the heir who ſucceeds by that very will implied though not expreſſed. In the law of England accordingly, where lands are deviſed to be ſold for younger children's portions, and the executor dies without ſelling, the heir is compelled to ſell. And where lands were ordered to be ſold for payment of debts without impowering any perſon to ſell, it was decreed that the heir ſhould ſell ‡. But a ſettlement of an eſtate made by the proprietor upon any of his blood-relations that his wife ſhould think proper to nominate after his death, is effectual at common law: for there is nothing in reaſon or in law to bar a proprietor from making a ſettlement upon any perſon he

* Stair, Tit. Extinction of Infeftments, §. 7.

† Durie, Dec. 15, 1630, Stirling *contra* tenants.

‡ 1. Chancery Caſes 176.

has amind, whether named by himſelf or by another having his authority. The ſettlement excludes the heir at law, and the perſon named has a good title by his deed *.

* Nov. 28. 1729, Murray *contra* Fleeming.

That ſort of power which is a branch of property, is in a very different condition. It is in its nature effectual againſt all ſingular ſucceſſors, even *bona fide* purchaſers. For a diſponee to whom the property is conveyed to a limited effect only, cannot beſtow upon another a more extenſive right than he himſelf has.

It may be laid down as a general rule, that powers reſerved in a diſpoſition of land, the moſt limited as well as the moſt extenſive, are all of them branches of the property. To verify this rule, it muſt be premiſed, that all the powers a man hath over his own ſubject, are involved in his right of property; and that the meaning of a reſervation, is not to create a new right but only to preſerve entire what formerly was in the diſponer. From theſe premiſes it clearly follows, that the reſervation of any power over the land muſt ſo far imply a reſervation of the property: and this muſt hold, however limited the reſerved power be or however extenſive, unleſs it be expreſſed in clear terms that a faculty only is intended. A ſeparate argument concurs for this rule. Human nature, which, in matters of intereſt, makes a man generally prefer himſelf before others, founds a natural and therefore a legal preſumption, that when a diſponer reſerves to himſelf any power over the ſubject diſponed, his intention is to reſerve it in the ampleſt and moſt effectual manner. And hence, *in dubio*, the preſumption will lie for a power properly ſo called, in oppoſition to a faculty. Thus, a reſerved power to charge the eſtate diſponed with a ſum, though the moſt limited power that can be reſerved, is held to be a reſervation of the property, ſo as to make the reſerved power good even againſt a purchaſer from the diſponee. A man diſponed his eſtate to his eldeſt ſon, reſerving a power "to affect "or burden the ſame with a ſum named for proviſions to his "children." The ſon's creditors appriſed the eſtate, and were infeft. Thereafter the diſponer exerted his reſerved power, by granting to his children heretable bonds, upon which they alſo were infeft; and in a competition they were preferred †: the reſerved power was juſtly deemed a branch of property, which made every deed done in purſuance of it a preferable right upon the land.

† Stair, Dirleton, Jan. 6. 1677, creditors of Mouſwell *contra* children. Stair, Dec. 16. 1679, inter eoſdem.

But

BUT though a faculty regularly exerted while the granter continues proprietor, will lay a burden on the land effectual againſt purchaſers, and though a power will have the ſame effect at whatever time exerted; it follows not that every exertion of a power or faculty will be ſo effectual: this leads us to examine in what manner they muſt be exerted in order to be effectual againſt purchaſers. That land may be charged with debt without infeftment, or without giving a title in the feudal form, is evident from a rent-charge, and from a clauſe in a conveyance of land burdening the land with a certain ſum *. That without infeftment ſuch a burden may be laid on land by means of a power or faculty to burden, ſeems equally conſiſtent; and were there a record of bonds granted in purſuance of ſuch powers, there would be nothing repugnant to utility more than to law in ſuſtaining them as real rights. But as no record is appointed for bonds of this kind, it is a wiſe and ſalutary regulation to ſuſtain none of them as real rights, unleſs where created in the feudal form to produce infeftment, which brings them under the ſtatute 1617 requiring all ſeiſines to be recorded. Where land ſtands charged with a ſum by virtue of a clauſe contained in the diſpoſition, no inconvenience ariſes from ſupporting this right, according to its nature, againſt all ſingular ſucceſſors. A purchaſer from the diſponee is put upon his guard by the diſpoſition containing the burden, which diſpoſition makes part of his title deeds: but a power or faculty, could it be exerted without infeftment, might occaſion great embaraſſment. The power or faculty, it is true, appears on the face of the diſpoſition, which is a title deed that muſt be delivered to a purchaſer: but then a purchaſer has no means to diſcover whether the power or faculty be exerted, or to what extent. Nay further, if a ſimple bond be held an exertion, there can be no limitation. Bonds referring to the faculty may be granted for *L.* 10,000, though the faculty be limited to the twentieth part of that ſum. And ſuch uncertainty behoved to put the land *extra commercium* during the ſpace of the long preſcription, commencing at the death of the diſponer who reſerved to himſelf the power of burdening the land. The foregoing regulation is accordingly in ſtrict obſervance. By the deciſion mentioned above, creditors of Mouſwell *contra* children, it appears, that when a reſerved power to burden land is regularly exerted by granting an infeftment of annualrent, ſuch annualrent-right is preferred even before a prior infeftment derived from the diſponee. But a ſimple bond is never ſo preferred.

* See Hiſtorical Law-tracts, Tract 4. pag. 244.

Thus a man having diſponed his eſtate to his eldeſt ſon, reſerving to himſelf a power to burden the ſame with 5000 merks, granted thereafter ſimple bonds for that ſum to his wife and children, proceeding upon the narrative of the reſerved power. After the date of theſe bonds, the diſponee contracted debts which were eſtabliſhed upon the eſtate by infeftments. A competition ariſing betwixt theſe two ſets of creditors after the diſponer's deceaſe, the diſponee's creditors were preferred upon their infeftments *. In a diſpoſition to the eldeſt ſon, the father having reſerved power to charge the eſtate with wadſets or infeftment of annualrent to the extent of a ſum certain, a ſimple bond referring to the faculty was not deemed a real burden; and for that reaſon it was not held to be effectual againſt a donator of the ſon's forfeiture †. But where the diſponer reſerves a power to burden the land with a ſum to one perſon named, the heir-male of a ſecond marriage for example, and thereafter grants a ſimple bond to that perſon referring to the reſerved power, it ſeems not unreaſonable that this bond ſhould be deemed a real burden effectual againſt purchaſers. For here there is no uncertainty to put the land *extra commercium*. The burden can never exceed the ſum ſpecified in the diſpoſition; and after the diſponer's death, a purchaſer, by enquiring at the perſon named, has acceſs to know whether and to what extent the power has been exerted.

* June 26. 1735, Ogilvies *contra* Turnbull.

† Stair, July 12. 1671, Lermont *contra* Earl of Lauderdale.

If the foregoing regulation hold in reſerved powers, there can be no doubt of it with reſpect to faculties properly ſo called. The following deciſions I think belong to this claſs. A purchaſer of land took the diſpoſition to himſelf in liferent and to his ſon *nominatim* in fee, with power to himſelf to diſpone, wadſet, *&c.* He thereafter granted a ſimple bond upon which the creditor adjudged the eſtate after the ſon was diveſted, and a purchaſer infeft. The adjudication was evidently void, and the bond was decreed not to be a proper exertion of the faculty to burden the eſtate, or be effectual againſt ſingular ſucceſſors ‡. This is properly an inſtance of a faculty, becauſe the power which the father provided to himſelf could not be founded on the property which was never in him. Again, a purchaſer of land having taken the diſpoſition to himſelf in liferent, and to his ſon *nominatim* in fee, with a faculty "to bur-"den, contract debt, and to ſell or otherways diſpoſe at his plea-"ſure," did firſt grant a ſimple bond, declaring it a burden on the land, and thereafter ſold the land. The purchaſer was preferred, the bond not being a real burden on the land ‖.

‡ Home, February 1719, Rome *contra* Creditors of Graham. November 1725, Sinclair *contra* Sinclair of Barrack.

‖ Forbes, December 16. 1708. Davidſon *contra* Town of Aberdeen.

The

THE caſes above mentioned are governed by the rules of the common law; and as a *bona fide* purchaſe for a valuable conſideration is the higheſt title of property, this title, if good at common law, will never be impugned in equity. For that reaſon, a power to burden, when it enters the liſts againſt ſuch a purchaſe, is confined within the ſtricteſt rules of law. A faculty to impoſe a perſonal burden, ſtands upon more advantageous ground: where a valuable conſideration has been given, it is ſupported in equity beyond the bounds of common law. In particular, where the will of the perſon who reſerves the faculty appears to be more extenſive than the creative words, equity interpoſes to give the faculty its intended effect. Nay, even a defect in will is ſupplied, if from the circumſtances it appear, that the maker would have interpoſed his will had his foreſight reached ſo far. Thus in a gratuitous diſpoſition of a land-eſtate, a power reſerved to burden the ſame with ſums to a certain extent has evidently a valuable conſideration; and yet this power will not at common law entitle the diſponer to ſubject the diſponee perſonally: but the diſponee will be liable in equity, becauſe it could not have been the intention of the diſponer, reſerving power over the land, to exclude himſelf from a power of burdening alſo the diſponee; and therefore it muſt have been an overſight merely that power was not reſerved to burden the diſponee as well as the land. And hence in the deciſions above mentioned, Rome *contra* creditors of Graham, Sinclair *contra* Sinclair of Barrack, and Ogilvies *contra* Turnbull, though a ſimple bond granted in purſuance of a power to burden the land was held not to be a real right, it was held however from the implied will of the deceaſed to be a burden upon the diſponee perſonally. And in like manner, a ſimple bond granted in purſuance of a reſerved power to burden the land diſponed, was found effectual againſt the diſponee perſonally, ſo as to ſupport an adjudication of the land againſt the diſponee after the diſponer's death *. But a faculty granted to a third perſon for his own behoof without any valuable conſideration, is in a different condition. He is *in pari caſu* with the diſponee, the rights of both being by ſuppoſition gratuitous. In this caſe it appears doubtful, whether in equity the faculty ought to be extended beyond the actual will of the granter, or even beyond the words.

* Jan. 17. 1723, Creditors of Ruſco *contra* Blair of Senwick.

SUPPOSING now a ſimple bond to be granted without referring to the reſerved faculty, will this bond be in equity deemed an exertion of the faculty yea or not? If the granter have no other fund

of payment, this circumſtance infers a rational preſumption that he intended an exertion of the faculty. If he have a ſeparate fund the preſumption ceaſes, and that fund only muſt be attached for payment. But again, what if the ſeparate fund be not altogether ſufficient? In this caſe a court of equity may juſtly interpoſe to make what is deficient effectual by means of the reſerved faculty, in order to fulfil the will of the perſon who granted the bond. Thus a man, upon the narrative of love and favour, having diſponed his eſtate to his eldeſt ſon reſerving a power to burden the eſtate to the extent of a ſum named, granted thereafter a perſonal bond of proviſion to his children without any relation to the reſerved power. In a ſuit for payment againſt the diſponee's repreſentatives it was objected, That the diſponer at the date of the bond had an opulent fund of moveables, and that there is no preſumption he intended to charge with this debt either his ſon or the eſtate diſponed. The diſponer's will was preſumed to be, that the bond ſhould burden his executors in the firſt place, and the diſponee in the ſecond place *. By marriage-articles the eſtate was provided to heirs-male, with power to burden the eſtate with a ſum named for the heirs of a ſecond marriage. The proprietor contracting a ſecond marriage made a proviſion for the children of that marriage, burdening his heir with the ſame, but not charging his eſtate in terms of the reſerved power. At common law the eſtate was not ſubjected, becauſe the proviſion was not made a burden upon it; nor was the heir ſubjected, becauſe the reſerved power entitled the granter to burden the eſtate only. The court ſteered a right courſe in equity. The heir was made liable *ultimo loco* after his father's other eſtate ſhould be diſcuſſed †.

* Stair, Dirleton, June 21. 1677, Hope-Pringle *contra* Hope-Pringle.

† Fountainhall, Dalrymple, Jun. 23. 1698, Carnegie *contra* Laird Kinſauns.

It has been queſtioned, whether a reſerved power to charge with a ſum the land diſponed, can benefit a creditor whoſe debt was contracted before the reſerved power was created. The court thought it reaſonable that this power ſhould be ſubjected to the diſponer's debts whether prior or poſterior ‡. But it is certainly a miſtake in principles to ſubject a power or faculty, like a *corpus*, to the payment of debt. A power to charge an eſtate with debt is a perſonal privilege merely, incommunicable to a creditor or to any other, even during the life of the perſon priviledged; not to talk of his or her death. It ſeems equitable however, that a power or faculty ſhould be available to prior creditors, and the only doubt is upon what medium. With reſpect to reſerved powers, we have had occaſion to ſee, that equity interpoſes to ſupply any defect in will.

‡ Fountainhall, Dalrymple, Dec. 16. 1698, Eliot of Swinſide *contra* Eliot of Meikle-dean,

Now

Now, in reſerving a power to burden, it muſt certainly be the mind of the diſponer to make the reſervation the moſt ample and extenſive. In the preſent caſe, had prior debts been in view, the diſponer would in all probability not have confined himſelf to future contractions, but have declared theſe prior debts effectual againſt the eſtate to the extent of the ſum mentioned in the reſerved power. And the court of ſeſſion, in making the reſerved power available to the prior creditor, did no more than what the diſponer would have done had he foreſeen the event. A man diſponed to his ſons of the ſecond marriage ſeveral parcels of land, "reſerving to himſelf full "power and faculty to alter and innovate, and to contract debt as "fully and freely as if the entire fee were in him," the queſtion occurred, Whether theſe diſponees were liable to their father's perſonal debts contracted before the exiſtence of the ſaid power? and the affirmative was decreed *. But in caſes of this nature, the diſponee, even where he is heir-apparent, is liable *in valorem* only †. For the diſponee is not liable at common law; and equity ſubjects no man farther than *in valorem* of the ſubject he receives.

* July 21. 1724. Creditors of Ruſco *contra* Blair of Senwick.

† Dalrymple, Jan. 18. 1717, Abercrombie *contra* Graham.

THE exertion of a reſerved power to charge land with a ſum, requires a formal deed; becauſe every act of will concerning land, conveying the property or burdening it, muſt be declared by a formal writing: but the exertion of a faculty to charge a man perſonally with a ſum, ſeems not to require writing. It is ſufficient that the act of will be proved by witneſſes or other ſatisfactory evidence. Thus a man ſettled his eſtate on his eldeſt ſon, reſerving a power, by deed or will under ſeal, to charge the land with any ſum not exceeding *L.* 500. He prepares a deed appointing the *L.* 500 to his younger children, and gets it ingroſſed, but dies before it is ſigned or ſealed. This in equity ſhall amount to a good execution of his power, the ſubſtance being performed ‡. Land cannot be charged but by a formal deed; becauſe what is required by common law, cannot be overturned by a court of equity: but this court may ſupply a defect in common law, by ſubjecting the heir perſonally upon an incompleated deed, which, though not regarded at common law, is ſatisfactory evidence of will. In one caſe the court of ſeſſion made a much wider ſtep, which was to find the diſponee liable for the ſum in a reſerved power, though the diſponer had not uſed his power by granting a bond, nor ſo much as ſhowed any will to exert it ‖. Though this was a moſt favourable caſe, the power reſerved being to provide younger children, it was a ſtretch however that even equity cannot juſtify. For what better evidence need a man

‡ Abridg. Caſes in Equity, Ch. 44. Sect. B. §. 14.

‖ Gosford, Feb. 15. 1673, Graham *contra* Lord Morphey.

give of his reſolution not to exert a power or faculty, than his forbearing to exert it? If ſo, here is a deciſion that directly contradicts will in place of ſupporting it.

A power granted to diſtribute a ſum or a ſubject among children, or others, is limited in equity, to be exerciſed *ſecundum arbitrium boni viri*, unleſs an abſolute power be expreſſed in the cleareſt terms. Thus a man deviſed to his wife his perſonal eſtate upon truſt and confidence, "That ſhe ſhould not diſpoſe thereof but for the benefit "of her children." She by will gave one but five ſhillings, and all the reſt to another. The court ſet aſide ſo unequal a diſtribu-
* 1. Vernon 66. tion *. A man by his will directed that his land ſhould deſcend to his daughters, "in ſuch ſhares and proportions as his wife by "deed in writing ſhould direct and appoint." The wife makes an unequal diſtribution. The court at firſt declared the circumſtances muſt be very ſtrong, as ſomething of bribery and corruption, that would take from the wife a power given her by the will; but afterwards declared the caſe was proper for equity, and that the plaintiff might be relieved. For as the plaintiff was allowed but a ſmall proportion, ſhe might for any cauſeleſs diſpleaſure have been put off with one barren acre only; that the court in ſuch a caſe would
† 1. Vernon 955, 414. have had a juriſdiction, and therefore here alſo †.

I ſhall cloſe this chapter with a ſeparate point concerning powers given to a plurality, whether in exerciſing ſuch powers the whole muſt concur, or what number leſs than the whole may be ſufficient. If the perſons be named jointly, the will of the granter is clear, that the whole muſt concur, becauſe ſuch is the import of the word *jointly*. To ſay that any number leſs than the whole may be ſufficient, is in other words to ſay, That a nomination to act jointly is the ſame with a nomination to act ſeparately.

But though all muſt concur, it follows not that they muſt all agree. If they be all preſent, the will of the maker naming them jointly is fulfilled; and what remains is, that the opinion of the majority muſt govern the whole body. "Celſius, lib. 2. Digeſto-"rum, ſcribit, Si in tres fuerit compromiſſum, ſufficere duorum "conſenſum, ſi præſens fuerit et tertius: alioquin, abſente eo, licet "duo conſentiant, arbitrium non valere; quia in plures fuit com-"promiſſum, et potuit præſentia ejus trahere eos in ejus ſenten-"tiam. Sicuti tribus judicibus datis, quod duo ex conſenſu, abſente "tertio, judicaverunt, nihil valet: quia id demum, quod major

"pars

" pars omnium judicavit, ratum eſt, cum et omnes judicaſſe pa-
" lam eſt *."

* l. 17. §. 7. l. 18. de receptis qui arbitr:

THE next queſtion is, when a plurality are named without adding the term *jointly*, What is the legal import of ſuch nomination? Whether is it underſtood the will of the maker that they muſt act jointly, or may act ſeparately? Stair † reſolves this queſtion by an argument not leſs plain than perſuaſive: " A mandate (ſays he) given to
" ten cannot be underſtood as given to a leſſer number. To give a
" mandate to Titius, Seius and Mævius cannot be the ſame with
" giving it to any two of them." Hence it may be aſſumed as a rule at common law, that a number of perſons named in one deed to act in the ſame affair, are underſtood to be named jointly where the contrary is not expreſſed.

† Book 1. Tit. 12. §. 13.

How far in this matter the common law is ſubjected to the correction of equity we ſhall next proceed to enquire, after paving the way by ſettling ſome preliminary points. One point ſeems clear, that here, as well as in every other branch of law, it is the duty of a court of equity to make the will of the granter effectual, without regarding the words where they happen to differ from the will ‡. But is a court of equity alſo authorized to ſupply a defect in will, by ſuſtaining the exerciſe of powers in caſes not provided for, which it is probable the granter would have provided for had his foreſight reached ſo far? With reſpect to covenants, eſpecially where there is a *rei interventus*, ſuch defects muſt be ſupplied by a court of equity in order to fulfil the rules of juſtice. But with reſpect to deeds deriving their obligatory force from the will ſolely of the granter, this extraordinary power can never be neceſſary, becauſe upon ſuch a deed no right can be founded except ſo far as will is actually interpoſed ‖. This doctrine being applicable to the preſent ſubject, it follows clearly, that a court of equity cannot ſupply any defect in will, and that its province is to make effectual what was truly the will of the maker. To aſcertain that will, it is not indeed confined to the words of the deed; but may lay hold of other circumſtances to ſupply what is defective in the words, or to clear what is dark or intricate.

‡ See Book 1. Part 1. Ch. 3. Sect. 1.

‖ Ibid. Sect. 2.

FROM theſe preliminary propoſitions it follows, that when a number of perſons are named *jointly* to perform any work, the whole muſt concur in equity as well as at common law. For here the will is clearly expreſſed, and a court of equity hath no power to

vary from will. Thus two tutors being named *jointly* by a man to his heir, it was decreed that the office was evacuated by the death of one of them *.

* Stair, Jan. 17. 1671, Drummond *contra* Feuers of Bothkennar.

A plurality named for carrying on any particular affair without the addition of *jointly*, affords a large field for equitable conſiderations. We have ſeen that at common law the term *jointly* is always implied or preſumed. But in particular caſes there are many circumſtances which a court of equity will lay hold of to overbalance this preſumption. To reduce theſe circumſtances under any general rule is ſcarce practicable. Circumſtances are ſeldom preciſely the ſame in any two caſes, and for that reaſon each caſe muſt be ruled by its own circumſtances. All that can be ſaid in general is, that the common law ought to take place, unleſs it can be clearly ſhown that the maker did not intend to confine his nominees to act jointly.

Since general rules cannot be expected, what remains is to ſtate caſes the moſt oppoſed to each other, and which therefore admit of different conſiderations. And, in the firſt place, If I name a plurality to perform any act that is to bind or affect me, equity as well as common law requires that the nominees act jointly. In caſes of this nature, there cannot readily occur any circumſtance to infer it to be my will that they may act ſeparately. For if any one of the nominees refuſe to accept, or die after acceptance, it is my privilege to make a ſecond nomination, or to forbear altogether; and it is not readily ſuppoſeable that any man will give away his privilege unleſs it be ſo declared. Thus an award pronounced by two arbiters and an overſman named by them, was declared void; becauſe it proceeded upon a ſubmiſſion to four arbiters who were impowered to name an overſman †. And when a plurality are conſtituted ſheriffs in that part by the court of ſeſſion, no ſentence can be pronounced by any of them without the reſt; becauſe (as the author expreſſes it) he being but one collegue joined to others, hath no power to pronounce ſentence without their conſent ‡. This holds in curators, becauſe they are elected by the minor himſelf. If any of them refuſe to accept, or die after acceptance, it is no hardſhip that the nomination ſhould be void, becauſe it is in the minor's own power to renew the commiſſion. But where the curators named are many in number, it will ſcarce be held the minor's intention to adhere to the common law by confining them to act jointly. In this caſe it appears a more natural preſumption, that the purpoſe of naming ſo great a number was to provide againſt death or non-acceptance.

† Fountainhall, Nov. 18. 1696, Watſon *contra* Mill.

‡ Balfour, (Of Judges) cap. 26.

acceptance. And accordingly an act of curatory was ſuſtained, though ſeven only accepted of the eight that were named [a]. Where in an act of curatory a *quorum* is named, there can be no doubt that the act is void where a ſufficient number do not accept to make the *quorum* [b]. For here the will of the minor is expreſſed in clear terms.

[a] Hope, (Minor) March 11. 1612, Airth.

[b] Stair, Jan. 25. 1672, Ramſay *contra* Maxwell.

THERE is much greater latitude for interpretation of will with reſpect to powers intended to be exerciſed after the granter's death. Stair explains this matter extremely well in the following words: "A mandate *inter vivos* giving power is ſtrictly to be interpreted, "becauſe the nominees failing, the power returns to the mandant. "But power given by a man in contemplation of death cannot "return, and therefore he is preſumed to prefer all the perſons no- "minate to any other that may fall by courſe of law [c]." This doctrine is finely illuſtrated by a nomination of tutors. Where they are named jointly, each muſt concur in every act, and conſequently the death or non-acceptance of any one voids the nomination; for ſuch is the meaning of a joint commiſſion to a plurality: but where a number of tutors are named without adding the term *jointly*, the tutory is ſupported by an equitable interpretation while any one remains alive. The preference given to them ſhows it to be the will of the deceaſed, that the adminiſtration ſhould be carried on by any one of the nominees rather than by the tutor-in-law. "For "were it otherways, the more guardians are appointed for the ſe- "curity of the infant the leſs ſecure he would be, becauſe upon the "death of any one of them the guardianſhip would be at an end [d]." Thus three tutors being named without ſpecifying *conjunctly* or *ſeverally*, and one only having accepted, it was decreed, that the whole office was devolved on him [e]. And five tutors being named as above, without ſpecifying *conjunctly* or *ſeverally*, the nomination was ſuſtained though two only accepted [f].

[c] Book 1. Tit. 12. §. 13.

[d] New Abridg. of the Law, vol. II. pag. 677.

[e] Haddington, Dec. 12. 1609, Fawſide *contra* Adamſon.

[f] Stair, Feb. 14. 1672, Elies *contra* Scot.

IT is a very different caſe, where it is declared that a certain number of the tutors named, termed a *quorum*, muſt concur in every act: for if by death or non-acceptance the number be brought ſo low as not to make a *quorum*, it follows from the declared will of the maker that the tutors exiſting cannot act; and therefore that the nomination is void. It is poſſible indeed, that the death or non-acceptance of ſo many as not to leave a *quorum*, may have been a *caſus incogitatus* which the maker would have provided for had he forſeen the event. But, in the firſt place, this is altogether conjec-

tural; and, in the next place, ſuppoſing it certain, yet here *deſit voluntas;* and in a deed which derives its obligatory force from will ſolely without any other cauſe, it is beyond the reach of equity to ſupply the defect of will, which would land in making a will for a man who made none for himſelf. The ſame reaſoning is applicable to a nomination of tutors requiring expreſsly to every act the concurrence of one of them, termed a *ſine quo non.* And yet in ſeveral inſtances, ſo much has the court of ſeſſion been inflamed with what have been reckoned equitable conſiderations, that neither the failing of a *quorum*, nor even of the *ſine quo non*, were deemed ſufficient to void the nomination; for the court conjectured it to be the will of the deceaſed, to truſt any of the perſons named rather than the tutor-in-law *. But this ſtretch of equity was afterwards corrected in the following caſe. In a nomination of tutors by a man to his children, his wife was named for one, and was ſo much diſtinguiſhed as to be declared *ſine qua non.* But ſhe by a ſecond marriage having rendered herſelf incapable of the office, the queſtion occurred, Whether this incident did not void the nomination altogether? And the court declared the nomination void †.

* Fountainhall, Dec. 22. 1692, Watt *contra* Scrimzeour. Fountainhall, Feb. 22. 1693, Counteſs of Callander *contra* Earl of Linlithgow.

† Fountainhall, June 24. 1703, Aikenhead *contra* Durham.

But though with reſpect to a *quorum*, or a *ſine quo non*, the defect of will cannot be ſupplied, it is undoubtedly the privilege of a court of equity to ſupply any defect in words, in order to make the will effectual. Of this take the following curious inſtance. A gentleman having named his ſpouſe, his brother, and ſeveral others, to be tutors and curators to his only child, "appointed that, of thoſe "who ſhould accept and ſurvive, the major part ſhould be a *quorum*; "that his ſpouſe ſhould be *ſine qua non*, and in caſe of her death "or incapacity, his brother; but that by the death or incapacity "of either, the tutory and curatory ſhould not be diſſolved, but "be continued with the other perſons named, ſo long as any one of "them remained alive." The only event omitted to be provided for was that which happened, *viz.* the widow's refuſal to undertake the office, which brought on the queſtion before the court of ſeſſion, Whether the nomination could notwithſtanding ſubſiſt? or, If it was void to make way for the tutor-in-law. The court unanimouſly held it undoubted law, the above mentioned deciſions notwithſtanding, that the failure of any one of a plurality of tutors named jointly unhinges the nomination, and ſtill more the failure of that perſon who is named *ſine quo non*, or the failure of a *quorum;* but in the preſent caſe, that it appeared the intention of the father to continue his nomination as long as any of the perſons named ſhould exiſt; that

that this is expreſſed in clear terms with reſpect to the death or incapacity of the *ſine quibus non*; and that the ſame muſt be underſtood his will in the caſe of their non-acceptance, becauſe the caſes are ſo parallel, as that no man could think of making a difference; and conſequently that here there is no defect of will, but of words only, occaſioned by the careleſſneſs or inaccuracy of the writer. The nomination accordingly was decreed to ſubſiſt *.

* June 16. 1742. Dalrymple of Drummore *contra* Mrs Iſobel Somervell.

I proceed to examples of a different kind. A man having left 2500 merks to his children, impowered four friends named to divide the ſame among the children. After the death of one of the four, a diviſion made by the three ſurvivors was not ſuſtained, and the children accordingly were decreed to have each of them an equal ſhare †. Here the four being named in the ſame deed, and to concur in the ſame act, were underſtood to be named jointly; and as there was no circumſtance to infer that the granter intended to impower any number leſs than the whole to make the diviſion, there could be no reaſon for varying from the rule of the common law.

† Fountainhall, Feb. 10. 1693, Moir *contra* Grier.

HELEN CUNINGHAME left 4000 merks to her grandchildren, to be employed for their behoof at the ſight of five perſons named, of which number their father and mother were two. This ſum was lent out with the approbation of all including the father and mother, one of the nominees excepted, who was abroad at the time. The ultimate purpoſe of this ſettlement was evidently to ſecure the grandchildren in the ſum ſettled upon them, and if this was done by lending the money to a perſon of unexceptionable credit at the time, the granter's will and purpoſe was fulfilled. By naming ſo many perſons he made it eaſy for the executor to get the approbation of a ſufficient number, and it could not be his intention to require rigidly the concurrence of every perſon named. And yet the court, adhering to the words like a court of common law, found that the money was not employed as it ought to have been, and therefore decreed the executor to be liable ‡.

‡ Spotſwood (Legacy) Feb. 13. 1624. Hunters *contra* Executors of Macmichael.

A reference being made by a man and his ſon to three friends, impowering them to name a ſum to the father when he ſhould be in want, which the ſon ſhould be obliged to pay; and two having concurred in abſence of the third to name the ſum, it was objected by the ſon, that the clauſe importing a joint nomination required the concurrence of the whole. The objection was over-ruled, and

* Fountainhall, July 27. 1694, Riddle *contra* Riddle.

the determination of the two referees ſuſtained *. The reference to the three friends was the means choſen for aſcertaining the father's claim, but it was certainly not intended to make that claim depend on their life or acceptance. The father had a juſt claim whenever he came to be in want; and ſuppoſing none of the referees had interpoſed, it was the duty of the court of ſeſſion to make the claim effectual.

Chapter VII.

Of the Power which Officers of the Law have to act extra territorium.

HITHERTO of the powers of a court of equity, varying from common law in order to fulfil the great principles of juſtice and utility. But the influence of a court of equity extends beyond its own peculiar province. Acts promoting the ſame great ends, done by individuals againſt the ſtrict rules of common law, are countenanced and made effectual. The preſent chapter is intended as an illuſtration of this doctrine; for ſeveral examples will be given, of ſupporting poſitive infringements of common law done even by its own officers.

The legal authority of magiſtrates and officers of the law being territorial, is confined within preciſe limits. In ſtrict reaſoning, nothing can be pronounced with greater certainty, than that an officer of the law acting beyond the bounds of his commiſſion acts without authority: and yet in practice we admit of ſeveral exceptions from this rule. If goods once apprehended in order to be pointed be drove out of the ſheriffdom, purpoſely to diſappoint the pointing, it is lawful for the officer to follow and compleat his pointing, in the ſame manner as if the goods had not been drove away †. By the ſtatute 52. Henry III. cap. 15. "No man for any "manner of cauſe can take a diſtreſs out of his fee, or in the king's "high-way:" but if the Lord coming to diſtrain have the view of the beaſts within his fee, and before he can diſtrain them the tenant chaces them into the high-way, it hath been found, that the Lord, notwithſtanding the ſtatute, may diſtrain them there ‡. With regard to the power of apprehending delinquents, one inſtruction is, That if a delinquent fly without the bounds of a conſtables charge, the conſtable, being in hot purſuit, may follow and apprehend him ‖. And, by the ſame rule, a ſtranger committing a riot within a barony,

† Balfour, (Pointing) March 22. 1560, Home *contra* Sheill.

‡ Abridg. of the Law, vol. II. pag. 111.

‖ Act 8. p. 1617. Act 38. p. 1661.

rony, may, by the officers of the barony, be purſued and apprehended out of the barony *.

* Nicolſon, (Forum competens) Jan. 8. 1661, Baillie *contra* Lord Torphichen.

SIR MATTHEW HALE, in his hiſtory of the pleas of the crown †, handles this matter with a good deal of care, and traces it through various caſes. "If a warrant or precept to arreſt a felon come to "an officer or other, if the felon be arreſted, and after arreſt eſcape "into another county, yet he may be purſued and taken upon "freſh purſuit, and brought before the juſtice of the county where "the warrant iſſued; for the law adjudged him always in the offi- "cer's cuſtody by virtue of the firſt arreſt. But if he eſcape before "arreſt into another county, if it be a warrant barely for a miſde- "meanour, it ſeems the officer cannot purſue him into another "county; becauſe out of the juriſdiction of the juſtice who granted "the warrant. But in caſe of felony, affray, or dangerous wound- "ing, the officer may purſue him, and uſe hue and cry upon him "into any county. But if he take him in a foreign county, he is "to bring him to the goal or juſtice of that county where he is "taken. For he doth not take him purely by the warrant of the "juſtice, but by the authority that the law gives him; and the "juſtice's warrant is a ſufficient cauſe of ſuſpicion and purſuit." Here ſeveral caſes are diſtinguiſhed, and different degrees of power indulged to the officer, all of them flatly contradictory to the ſtrict rules of common law: and yet we chearfully acquieſce in the doctrine, becauſe our hearts dictate to us that it is juſt and ſalutary.

† Vol. II. p. 115.

LET us examine what will the moſt readily occur in reflecting upon this ſubject. If a felon be once arreſted and the hands of the officer, a notion of property ariſes, and ſuggeſts a right ſimilar to that of the firſt occupant of land. Though the felon eſcape, the officer, in freſh purſuit, is underſtood to retain a ſort of poſſeſſion *animo*. The mind is carried on after the felon, without any obſtruction, till it compaſs its aim, *viz.* a ſecond arreſt. We naturally conclude, that the felon, being in ſome ſenſe the property of the officer, may be ſeized wherever he can be found; and, by virtue of that *quaſi*-property, may be carried before the judge who granted the warrant. This reaſoning will appear ſtill more ſatisfactory when it is applied to the caſe cited above from Balfour, where a poinding is inchoated by apprehenſion of the goods; a circumſtance which undoubtedly produces ſome faint notion of property in the goods, and juſtifies the poinder in ſeizing them wherever found.

Again, "where a felon eſcapes without being arreſted, if the "warrant be barely for a miſdemeanour, it ſeems the officer cannot "purſue him into another county. But in caſe of felony, affray, "or dangerous wounding, the officer may purſue him into another "county." Here is a diſtinction made which appears to have a foundation in human nature. The diſtinction cannot ariſe from the nature of the warrant, which is not more extenſive in the one caſe than in the other. We muſt cling then to the delinquency. Felony, or any capital crime, enflames the mind, and creates a ſtrong deſire of puniſhment. The heated imagination is hurried along, and cannot be reſtrained by the ſlight fetters of ſtrict form. And accordingly, in weighing an abſtract principle againſt the impulſe of an honeſt paſſion, the mind, which feels the preponderancy of the latter, naturally embraces the following ſentiment, that the officer in this caſe ought not to be confined within the limits of his commiſſion. In the caſe of a ſlight miſdemeanour, the reſult is different. Strict principles have a ſtronger effect upon the mind than any impulſe that can ariſe from a venial tranſgreſſion; and therefore, in judging of this caſe, the mind naturally reſts upon the limitation of the warrant.

And what is further mentioned in the foregoing citation, will ſupport theſe reflections. "A delinquent once arreſted, may, upon "a ſecond arreſt, be brought from another county to the judge "who gave the warrant. But if arreſted for the firſt time in a fo-"reign county, the criminal muſt be carried before the judge of "the county where he is taken." The diſtinction here made ariſes from the ſame principles that are above explained. It has already been obſerved, that the notion of a *quaſi*-property ſupplies the want of a ſecond warrant. But an arreſt for the firſt time in a foreign county muſt be governed by a different rule: the mind figuring a hot purſuit of the criminal, eaſily ſurmounts any obſtruction that may ariſe from mere form; but ſo ſoon as the end is gained by having the felon in ſafe cuſtody, the impulſe of paſſion being over, the mind ſubſides in its wonted calm ſtate. In this condition we perceive the want of power, which leads us to take the firſt opportunity of ſupplying the defect, by making application to the judge of the place.

And with reſpect to the two caſes now mentioned, a remarkable difference is obſervable in the operations of the mind. However ſtrong the impulſe of a paſſion may be when it agitates the mind, yet

yet ſo ſoon as it ſubſides by gratification, the mind is left free to the government of reaſon. Thus when a felon who was never arreſted is purſued into a foreign county, the defect of power is ſcarce perceived during the heat of purſuit: but immediately upon the arreſt, the defect of power makes an impreſſion; and reaſon demands that the defect be furthwith ſupplied. The mind is differently influenced in the caſe of an eſcape after arreſt. If once a reſemblance be unexpectedly diſcovered betwixt two objects, there is a natural propenſity in the mind to make the reſemblance as compleat as poſſible. Hence in reaſoning it is an error extremely common, from any unexpected reſemblance betwixt two objects, to draw the ſame inferences from both as if the reſemblance were altogether compleat. Thus by getting poſſeſſion of the body of a felon, a faint notion of property being ſuggeſted, the mind proceeds, without heſitation, to form all its concluſions as if the felon were truly the property of the officer.

IT is extremely curious to obſerve, how men ſometimes are influenced by principles and emotions which they themſelves at the ſame time ſcarce attend to. This is remarkable in writers upon law, who little apt to regard the ſilent operations of the mind, are not ſatisfied, unleſs for every regulation they can aſſign a reaſon in ſtrict law. This proceeds from ſtudying law too much as an abſtract ſcience, without conſidering, that all its juſt regulations muſt be founded upon human nature and be adapted to the various operations of the mind. If one of the greateſt lawyers in modern times furniſh this cenſure, few can hope to eſcape. And that the cenſure is juſt, will appear from conſidering the reaſoning of our author, which is by no means ſatisfactory. With regard to the felon who has been once arreſted, he aſſigns the following reaſon for the regulation, "That the law adjudgeth him always in the officer's "cuſtody by virtue of the firſt arreſt." But why does the law give this judgment, when it is contrary to the fact? This queſtion ought to have been prevented in accurate reaſoning; inſtead of which we are left in the dark, preciſely where light is moſt wanted. The true anſwer to this queſtion is given above, *viz.* that the right of poſſeſſion once fairly acquired, cannot be loſt by ſtealth or force, and therefore is retained *animo.*

UPON the other branch, the reaſoning appears ſtill more lame. The caſe is of a felon apprehended for the firſt time out of the juriſdiction, upon which our author's reaſoning is, "That the officer

" doth not act purely by the warrant of the juſtice, but by the " authority which the law gives him; and that the juſtice's warrant " is a ſufficient cauſe of ſuſpicion and purſuit." This is extremely obſcure, and unſatisfactory ſo far as intelligible. In the firſt place, it is obvious, that the reaſoning if juſt is equally applicable whatever be the nature of the crime. The juſtice's warrant is not more a ſufficient cauſe of ſuſpicion and purſuit where the crime is atrocious than where it is of the ſlighteſt kind. In the next place, ſuppoſing the juſtice's warrant to be a ſufficient cauſe of ſuſpicion and conſequently of purſuit, the perſon upon whoſe information the warrant was iſſued has a better cauſe of ſuſpicion, and yet the law impowers not that perſon to apprehend or to purſue. Neither doth a ſufficient cauſe of ſuſpicion give authority to an officer of the law out of the juriſdiction, more than to a private perſon. But let a man having authority to apprehend be figured in hot purſuit of a noted criminal, the mind furthwith interpoſes, and hurries him on till he reach his quarry wherever found. No ſuch impreſſion is made by the ſlighter tranſgreſſions. And this difference of feeling, is the foundation of our author's doctrine; a difference that undoubtedly he was ſenſible of, though he has not been ſo lucky as to put it in a clear light.

Thus we have endeavoured to trace out the foundation of ſeveral nice concluſions in law, that depend not on abſtract reaſoning, but on mental operations. In one of the caſes, an imagined right over the perſon of a felon arreſted, ſuggeſted by a ſlight reſemblance it hath to property founded on occupation, is in reality the only reaſon of our concluſion. In the other, what in reality determines us, is the anxiety we have to prevent the felon's eſcape. And whoever ſets himſelf to examine laws and deciſions with due attention, will find many of them founded on impreſſions or emotions, ſtill more ſlight than thoſe above mentioned.

To compleat the ſubject, nothing further ſeems neceſſary but to obſerve, that the foregoing principles and operations of the mind are countenanced by courts of juſtice, even ſo far as upon their account to diſpenſe with the cleareſt rules of law. Theſe principles and operations merit regard as virtuous and laudable; but their merit chiefly depends on their utility. By overcoming that ſcrupulous nicety of law, which often is an impediment to the adminiſtration of juſtice, they tend in an eminent degree to the good of ſociety.

CHAPTER VIII.

Juriſdiction of the Court of Seſſion with reſpect to foreign Matters.

THE various ſubjects hitherto treated, falling within the bounds of common law, come of courſe under the equitable juriſdiction of the court of ſeſſion, ſupplying defects or correcting injuſtice in common law. Foreign matters, as will by and by be explained, fall not within the bounds of common law, and for that reaſon cannot come under the juriſdiction of the ſeſſion either as a court of common law or as a court of equity. Why then ſhould the preſent ſubject be brought into a treatiſe of equity? Not neceſſarily, I acknowledge. It is however ſo intimately connected with matters of equity, that the ſeſſion, acting whether as a court for foreign affairs or as a court of equity, is governed by the ſame principles, *viz.* theſe above laid down. Of theſe accordingly we ſhall ſee many beautiful illuſtrations in handling the preſent ſubject, which, in that view, will make a proper appendix to a treatiſe on equity, if not a neceſſary part.

MEN allured by huſbandry, having relinquiſhed the wandering ſtate for a ſettled habitation, were by this revolution brought under new rules of law. The laws of the tribe or clan, governed originally each individual belonging to it, without relation to place *. But after nations became ſtationary, place became the capital circumſtance. Laws were made to regulate all matters at home, that is, within the territory of the ſtate; and legiſlators extended not their view to what was done or ſuffered in a foreign country, whether by their own people or by ſtrangers. Thus laws, originally *perſonal*, became ſtrictly *territorial;* and hence the eſtabliſhed maxim, That law hath no authority *extra territorium*. This confined notion of law, correſponded perfectly well to the manners of early times: mutual fear and diffidence in days of barbarity prevented all intercourſe among nations; and individuals, having no temptation to go abroad, ſeldom ventured beyond their own territory; but regular government introduced more ſocial manners, the appetite for riches unfolded itſelf, and individuals were put in motion to ſeek gain where the proſpect was faireſt. In moſt countries accordingly, there are found many foreigners, who have an occaſional reſidence there for the ſake of commerce. This change of manners, diſ-

* See Hiſtorical Law-tracts, Tract 6.

covered the imperfection of territorial laws. A man by retiring abroad, is ſecure againſt a proſecution civil or criminal for what he has done at home; and by returning home, he is ſecure againſt a proſecution for what he has done abroad. Common law reacheth no perſon but who is actually within the territory of the ſtate; and reacheth no cauſe of action but what happens within the ſame territory *.

* Hiſtorical Law-tracts, Tract 7.

THE common law of England is ſtrictly territorial in the ſenſe above deſcribed †: nor have we reaſon to believe that the common law of Scotland was more extenſive. When therefore the foregoing defect came to be diſcovered, it was neceſſary to provide a remedy; and the remedy was, to bring foreign matters under juriſdiction of the king and council, to which originally, as a paramount court, all extraordinary matters were appropriated. In Scotland particularly, the act 105, p. 1487, declares the king and council to be the only court for *the actions of ſtrangers of other realms*.

† See Statute-law of Scotland abridged, Note 7.

WITH reſpect to foreign matters, the juriſdiction of the king and council in both kingdoms, was diſtinguiſhed from that of the ordinary courts of law in two particulars. Firſt, The juriſdiction of the latter was territorial with reſpect to cauſes as well as with reſpect to perſons: the juriſdiction of the former was indeed territorial with reſpect to perſons, no perſon in foreign parts being ſubjected to the juriſdiction; but with reſpect to cauſes, it was the oppoſite to territorial, no cauſe but what happened in foreign parts being ſubjected. Next, the ordinary courts are confined to common law: but with reſpect to foreign matters this law can be no rule, for the reaſon above given that it regulates nothing *extra territorium*. The king and council accordingly judging of foreign matters, could not be governed by the common law of any country. The common law of *Britain* regulates not foreign matters; and the law of a foreign country hath no authority here. Whence it follows, that foreign matters muſt be governed by the rules of common juſtice to which all men are ſubjected, or *jure gentium* as generally expreſſed.

THIS extraordinary juriſdiction concerning foreign matters, confined originally in both kingdoms to the ſame court, is now exerciſed very differently in the two kingdoms, In Scotland, it was

derived

derived by intermediate ſteps from the king and council to the court of ſeſſion: and accordingly by the regulations laid down ſoon after the inſtitution of this court, a juriſdiction is beſtowed upon it as to foreign matters, and the actions of foreigners are privileged *. In England, this extraordinary juriſdiction made a different progreſs. The extenſive territories poſſeſſed by the Engliſh kings in France and the great reſort of Engliſhmen there, occaſioned numberleſs law-ſuits before the king and council. To relieve that court from an oppreſſive load of buſineſs, the conſtable and mariſhal court was inſtituted, and to this new court were appropriated foreign matters to be tried *jure gentium* †. After the Engliſh conqueſts in France were wreſted from them, this court had very little buſineſs. We find ſcattered inſtances of its acting as a criminal court, down to the reign of Charles II. but none for centuries before of its acting as a civil court. The court of chancery, with reſpect to its power of ſupplying the defects and mitigating the rigor of common law, had ſucceeded to the king and council; and it would have been a natural meaſure to transfer to the ſame court the extraordinary juriſdiction under conſideration, the rule of judging being the ſame in both. But the court of chancery being at that time in its infancy, and its privilege as to all extraordinary matters not being clearly evolved, the courts of common law, by an artifice or fiction, aſſumed foreign matters to themſelves. The cauſe of action is feigned to have exiſted in England ‡, and the defendant is not ſuffered to traverſe this allegation. This then may be juſtly conſidered as an uſurpation of the courts of common law upon the court of chancery, which, like moſt uſurpations, has occaſioned very irregular conſequences. I ſhall not inſiſt upon the ſtrange irregularity of aſſuming a juriſdiction upon no better foundation than an abſolute falſehood. It is more material to obſerve, that foreign matters ought to be tried *jure gentium;* and yet that the judges who uſurp this juriſdiction have no power to try any cauſe otherways than by the common law of England. What can be expected from ſuch inconſiſtency but injuſtice in every inſtance? Lucky it is for Scotland, that chance perhaps more than good policy hath appropriated foreign matters to the court of ſeſſion, where they can be decided on rational principles, without being abſurdly fettered as in England by common law.

* Act 45. p. 1537.

† See Duck de Authoritate Juris Civilis, L. 2. cap. 8. pars 3. §. 15. &c.

‡ Ibid. §. 18.

To form a diſtinct notion of the foregoing extraordinary juriſdiction of the court of ſeſſion with reſpect to foreign matters, it may be proper to ſtate ſuccinctly its different juriſdictions, and to

aſcertain the bounds of each. Conſidered as a court of common law, thoſe actions only belong to it where the cauſe of action did ariſe within Scotland. With regard to perſons, this court was originally limited like the courts of common law in England: it had no authority over any man but during the time he was locally in Scotland. But in this reſpect, the court hath in later times acquired by preſcription an enlargement of juriſdiction. Every Scotchman, even in foreign parts, is ſubjected to the juriſdiction of the court; and, by a citation at the market-croſs of Edinburgh pier and ſhore of Leith, may be called to defend in any action before the court *. In the next place, conſidering this court as a court of equity, impowered to ſupply the defects and mitigate the rigor of common law, its juriſdiction is and muſt be the ſame with what it enjoys as a court of common law. To give it a more extenſive juriſdiction would be uſeleſs; and to confine it within narrower bounds would not fully anſwer the end of its inſtitution, which is to redreſs common law when juſtice demands redreſs. In the laſt place, this court, with relation to foreign matters, has a juriſdiction over perſons not ſo extenſive as it has with relation to common law or equity. When it judges of foreign matters, the man who is to be made defendant, muſt, I incline to think, be perſonally in Scotland; becauſe I do not find that the extraordinary citation of abſents at the market-croſs of Edinburgh pier and ſhore of Leith, has been extended to foreign matters. Nor doth analogy juſtify the extention. One extraordinary ſtep to compleat an ordinary juriſdiction is natural; but it is harſh and unnatural to accumulate extraordinary remedies one upon another. Our propenſion is to enlarge an ordinary and accuſtomed juriſdiction, but to confine what is extraordinary within ſtrict bounds. Thus if I bring an action againſt my countryman and fellow-traveller for payment of a ſum I lent him at Rome, and even produce the bond in court, the action will not be ſuſtained againſt him while he remains abroad. The juriſdiction of the court as to foreign matters ought to reach none but who are in Scotland at the time.

* See Statute-law of Scotland abridged, Note 7.

Whatever difference there may be as to extent, betwixt the juriſdiction of the court of ſeſſion conſidered as a court of equity and its juriſdiction conſidered as a court for foreign matters, there is little or no difference with reſpect to the rules that govern the court in theſe two capacities; for theſe rules are derived from the principles of juſtice. But it muſt not be held that theſe rules are applied preciſely in the ſame manner. As a court of equity, the ſeſſion will not venture to interpoſe againſt common law, unleſs authorized

authorized by ſome general rule of equity that is applicable to all caſes of the kind. But as to foreign matters which belong not to common law, every caſe muſt be judged upon its own merits. And therefore the court here is leſs under reſtraint, than in ſupplying the defects of common law, or in correcting its rigor.

THOUGH with reſpect to foreign matters, there is, ſtrictly ſpeaking, but one rule of judging, *viz.* equity or natural juſtice, yet this rule, in its application to different matters, brings out very different concluſions. And ſhould one undertake to evolve all the various caſes to which the rule may be applied, the work would be endleſs. Avoiding therefore this laborious taſk, I propoſe to confine my ſpeculations to ſome few leading caſes that have been diſputed in the court of ſeſſion; and theſe for the ſake of perſpicuity ſhall be diſtributed into ſeveral claſſes.

SECTION I.

Actions ſtrictly perſonal founded on foreign Covenants, Deeds, or Facts.

UPON the principles above laid down, there can be no doubt, that a foreign covenant will produce an action here, provided the party bound by the covenant, whether a native or a foreigner, be found in Scotland. It would be a great defect in law, if it could not give redreſs againſt a foreigner who retires with his effects to this country, in order to ſcreen himſelf from debts contracted at home. And yet an action being brought by one foreigner againſt another for payment of debt contracted abroad, the court of ſeſſion refuſed to ſuſtain action; giving for a reaſon, that the parties were here occaſionally only, and that the debtor having no domicil in Scotland was not ſubjected to the juriſdiction of this court *. This was in effect declaring, that the court of ſeſſion is a court of common law only, having no privilege to cognoſce of foreign tranſactions; a ſtrange miſtake, conſidering the regulation above mentioned, expreſsly acknowledging a juriſdiction in this court as to foreign matters.

* Haddington, Nov. 23. 1610, Vernor *contra* Elvies.

WHEN a foreign bond, ſtipulating the intereſt of the country where granted, is made the foundation of a proceſs here, it has been doubted whether that intereſt or the legal intereſt of this country ought to be decreed. This doubt is eaſily ſolved. An agreement to pay the intereſt of the country where the money is borrowed,

is undoubtedly binding in conſcience, and therefore ought to be made effectual in every country. The Scotch ſtatutes regulating the intereſt of money are not intended to reach foreign borrowings, which, for that reaſon, ought to be regulated by common juſtice. And this accordingly is the rule in the law of England *. Hence it appears, that the court of ſeſſion erred in refuſing the intereſt of 10 *per cent.* upon a double bond executed in Ireland, and in reſtricting the penal part of the bond to 6 *per cent.* the legal intereſt here †. There is another error in this decree. The penalty of a double bond put in ſuit here, ought to be ſuſtained to the extent of damage and coſts of ſuit. But the damage is plainly the intereſt of the country where the money is lent; becauſe had payment been duly made, the money again lent out would have produced that intereſt. For the ſame reaſon, ſuppoſing the rate of intereſt to be lower in England than here, our judges, in relieving from the penalty in a double bond, will make the Engliſh intereſt the rule. For the lender could not have a view to greater intereſt than that of his own country.

* Abridg. Caſes in Equity, Ch. 36. Sect. E. §. 1.

† Fountainhall, Jan. 27. 1710, Savage *contra* Craig.

THE caſe is different where intereſt is ſtipulated greater than is allowed in the *locus contractus*. Such ſtipulation is uſury in that country, and a moral wrong everywhere. I ſay a moral wrong, becauſe, as every man is bound to give obedience to the laws of his own country, it is a moral wrong to tranſgreſs theſe laws ‡. When action then is brought in a foreign country for payment of the ſtipulated intereſt, it would be contrary to the rules of juſtice to ſuſtain a claim that is founded on an immoral paction; and the judge who ſhould ſuſtain action in this caſe would be acceſſory to the wrong. But now, admitting that the intereſt ſtipulated cannot be made effectual, it comes next to be conſidered, whether the intereſt of the *locus contractus* ſhould be the rule, or that of the country where the action is brought; or laſtly, whether intereſt ſhould be rejected altogether? This is a puzzling queſtion. One at firſt view will naturally reject intereſt altogether, as a juſt puniſhment of the wrong done. But it is not clear that a judge can puniſh for a wrong committed in a foreign country. One thing indeed is clear, that action cannot be ſuſtained upon the immoral ſtipulation; and therefore if there be any claim for intereſt it muſt be *nomine damni* only. This leads the mind to the intereſt of the *locus contractus;* and I incline to be of opinion that that intereſt is due.

‡ See Book I. Part I. Ch. 4.

UNDER the head of covenants comes properly marriage celebrated abroad. The municipal law of Scotland regulating the ſolemnities of marriage reſpects no marriage but what is made in Scotland. And as foreign laws have no coercive authority here, nothing is left for determining the validity of ſuch a marriage but the law of nature; according to this law the matrimonial connection is founded upon conſent ſolely; and the various ſolemnities required by the laws of different nations have all of them the ſame aim, *viz.* to teſtify conſent in the moſt compleat manner. In this view, the ſolemnities of the country where a marriage is celebrated, ought with us to have the greateſt weight, becauſe they evidently ſhow the deliberate will and purpoſe of the parties. On the other hand, juſtice requires that a marriage be held good here though not formal according to the law of the country where it was made, provided the will and purpoſe of the parties to unite in marriage clearly appear.

ACCORDING to the doctrine here laid down, a child ought with us to be held legitimate by a ſubſequent marriage, provided the marriage-ceremony was performed in a country where ſuch is the law; becauſe marriage in ſuch a country muſt import the will of the father to legitimate his baſtard-children. But we cannot juſtly give the ſame effect to marriage celebrated in a country where the marriage, as in England, hath not the effect of legitimation. The reaſon is, that marriage in ſuch a caſe is no proof of the father's will to legitimate.

A minor in the choice he makes of curators is not confined to the inhabitants of his own country; and therefore a foreigner choſen curator has the ſame authority here with a native. Neither is it of importance in what place curators be choſen; and accordingly a choice made in England of curators, whether Engliſh or Scotch, will be effectual here. The powers of a guardian to a lunatic in England are more limited. The cuſtody of the perſon of an Engliſh lunatic and the management of his land-eſtate in England belong to the court of chancery; and the chancellor names one guardian to the perſon and another to the eſtate. But the chancellor having no power over a lunatic's land in Scotland, cannot appoint a guardian to manage ſuch land.

HAVING diſcuſſed civil matters, I proceed to criminal. A crime committed at ſea, may be tried by the court of admiralty: but

this caſe excepted, no crime committed in a foreign country can be tried in Scotland. The juriſdiction of the juſticiary-court is ſtrictly territorial, being confined within the limits of Scotland; and the extraordinary juriſdiction of the court of ſeſſion with reſpect to foreign matters, reaches civil cauſes only. Nor is it neceſſary that it ſhould be extended to crimes. It is of great importance to every nation that juſtice have a free courſe everywhere; and to this end it is neceſſary that in every country there be an extraordinary juriſdiction for foreign matters ſo far as juſtice is concerned. But there is not the ſame neceſſity for an extraordinary juriſdiction to puniſh foreign delinquencies. The proper place for puniſhment is where the crime is committed; and no ſociety takes concern in any crime but what is hurtful to itſelf. A claim for reparation ariſing from a foreign delinquency, ſtands upon a different footing. Being founded on the rules of common juſtice, it is a claim that undoubtedly belongs to the juriſdiction under conſideration. No man who injures another ought to reckon himſelf ſecure anywhere till he make reparation; and if he be obſtinate or refractory, juſtice requires that he be compelled, wherever found, to make reparation.

To ſecure the effects of the deceaſed from embezzlement, every perſon who intermeddles irregularly is, in Scotland, ſubjected to the whole debts of the deceaſed, without limitation. This penal paſſive title, termed *Vicious intromiſſion*, is confined to irregular intermeddling within Scotland. The intermeddling in England with the moveable effects of a Scotchman who dies there, muſt be judged by the rules of natural juſtice; and therefore in this country cannot infer any concluſion beyond reſtitution or damages.

Section II.

Foreign Covenants and Deeds reſpecting Land.

IN order to have a diſtinct conception of this branch, the extent of our own municipal law with reſpect to land in Scotland muſt be firſt aſcertained; for we are not at liberty to apply the *jus gentium*, or the principles of natural juſtice, to any caſe which comes under our own law. As to this preliminary point, things it is certain as well as perſons are governed by municipal law, and ſubjected to the juriſdiction of courts of law. Land in particular, next to perſons, is the greateſt object of law; and in every country the acquiſition and tranſmiſſion of land are regulated by municipal law. Our law, for example, with reſpect to the tranſmiſſion of land-property,

perty, requires writings in a peculiar form. Such writings are held a good title of property, whether executed at home or abroad. Writings on the other hand, in a form different from that preſcribed by our law, will be diſregarded wherever executed; for our law regards the ſolemnities only, not the place. Thus a teſtament made in England, bequeathing land in Scotland, will not be ſuſtained by the court of ſeſſion; becauſe, by our law, no man can diſpoſe of his land by teſtament. Nor will it be regarded that land is teſtable in England; becauſe every thing concerning land here is regulated by the law of Scotland. In general, the connection of a land-eſtate with the territory where ſituated, is of the moſt intimate kind: it bears the relation of a part to the whole. Thus every legal act concerning land, the conveying it *inter vivos*, the tranſmitting it from the dead to the living, the ſecurity granted on it for debt, are aſcertained in the ſtricteſt manner by the municipal law of every country; and with reſpect to every particular of this kind, our courts are tied down to their own law.

ARE we then to hold, that a conveyance of land in a form different from what is required by us can have no effect? Suppoſe a man ſells in England his land-eſtate in Scotland, executes a deed of conveyance in the Engliſh form, and perhaps receives payment of the price; ſuch conveyance, not being in the form required by the law of Scotland, will not have the effect to transfer the property. But has the purchaſer in Scotland any claim perſonally againſt the vender? None at common law; becauſe a court of common law hath not authority to transform an actual diſpoſition into an obligation to diſpone. But ſuch claim is ſupported in equity; becauſe where a man, in order to transfer his land to a purchaſer, executes a diſpoſition which is afterwards diſcovered to be imperfect, it is his duty to execute one more formal; and if he be refractory, it is the duty of a court of equity to compel him, or to ſupply his place. If the action be laid within the territory where the land is ſituated, the judge, in default of the diſponer, may adjudge the land to the plaintiff: if in any other territory, all that can enſue is damage for not performance. I illuſtrate this doctrine by a ſimilar caſe. A diſpoſition of land within Scotland without procuratory or precept, will not be regarded at common law: but a court of equity, attentive to juſtice, will interpoſe in behalf of the purchaſer, by adjudging the land to him. Thus with reſpect to an informal conveyance of land within Scotland, the ſeſſion acts as a court of equity; and it acts as an extraordinary court for foreign matters

where a conveyance is executed abroad according to the law of the place.

A covenant was executed in England betwixt two brothers, agreeing, that failing children the eſtate of the deceaſed ſhould go to the ſurviver. The brother who firſt deceaſed had a land-eſtate in Scotland, a part of which he had gratuitouſly aliened in defraud of the covenant. A reduction was brought of this gratuitous deed by the ſurviving brother, and the covenant was ſuſtained as a good title in the reduction. The covenant, though it had not the formalities of the law of Scotland, was however good evidence of the agreement betwixt the brothers; and as the deceaſed brother had done a moral wrong in tranſgreſſing the agreement, juſtice required that the wrong ſhould be redreſſed, which was done by voiding the gratuitous deed *. But in a later caſe, the court erred widely from the foregoing principle of juſtice. A diſpoſition of an heretable juriſdiction in Scotland, executed in England according to the Engliſh form, was not ſuſtained even againſt the granter, to compel him to execute a more formal diſpoſition †. This was acting as a court of common law. And it muſt not paſs unobſerved, that the accumulating different juriſdictions in the ſame court, occaſions frequently miſtakes of this nature, which are avoided in countries where different juriſdictions are preſerved diſtinct in different courts.

* Forbes, July 5. 1706, Cuninghame *contra* LadySemple.

† February 1729, Earl Dalkeith *contra* Book.

Section III.

Foreign Covenants and Deeds reſpecting Moveables.

MOVEABLES as well as immoveables have a local ſituation; and it is a propoſition acknowledged by all our lawyers, that Scotch moveables as well as Scotch land are regulated by our municipal law. Thus though an executor may be named by a nuncupative will in England, yet ſuch will is never ſuſtained to carry moveables in Scotland, becauſe writ with us is an eſſential ſolemnity in the nomination of an executor ‡. In England again, a baſtard enjoys the privilege of making a teſtament, which privilege is denied to a baſtard here. And therefore, notwithſtanding a teſtament made by a baſtard in England, his effects here were eſcheated to the crown ‖.

‡ Stair, Gilmour, Newbyth, Jan. 19. 1665, Shaw *contra* Lewis.

‖ Haddington, Feb. 1. 1611, Purves *contra* Chiſholm.

THE application of the foregoing rule to land is abundantly eaſy, in Europe at leaſt where the marches of different kingdoms and territories are aſcertained with preciſion. But the ſlight connection that

that moveables have with the place where they are found, makes it often a difficult problem to aſcertain the country they belong to. And yet the ſolution of this problem is neceſſary with reſpect to many queſtions concerning them, ſuch as the right of ſucceſſion, the manner of tranſmiſſion *inter vivos*, and from the dead to the living. All queſtions of this kind are regulated by the law of the country to which theſe moveables properly belong. For it will be evidently too precarious a rule, to conſider them as belonging to the country where they happen to be, occaſionally or accidentally. If a foreigner, for example, happen to die here with valuable moveables about him, it will not be thought reaſonable that theſe moveables ſhould be given to his next of kin according to the law of Scotland, when his next of kin according to the law of his own country are different, and when theſe next of kin will take the effects he left at home. The local ſituation of moveables is attended with ſuch variety of circumſtances that it is difficult to bring all of them under general rules, leading to correct and juſt deciſions. It is neceſſary however to make an attempt; and the following rules may, I preſume, exhauſt the bulk of theſe circumſtances.

IN the firſt place, moveables belonging to a Scotchman and locally in Scotland, are deemed Scotch effects, to be regulated by the law of Scotland. Nor will it vary the caſe that the proprietor happens to be occaſionally abroad *non animo remanendi*. An aſſignment made by him there according to the *lex loci*, will not transfer theſe moveables to the aſſignee. But according to what is ſaid above with reſpect to land, it will entitle the aſſignee to demand from the court of ſeſſion that the moveables be adjudged to him; or to demand damages, unleſs the cedent be willing to grant a more formal aſſignment. Next, if the proprietor happen to die abroad, his ſucceſſion will be regulated by the law of Scotland, as alſo the form of making up titles. The connection with his own country continues entire in the mind of every perſon, and all matters are determined in the ſame manner as if he had died at home. That this is the common ſenſe of mankind is teſtified by good authority, *viz.* act 88. p. 1426, enjoining, "That where a Scotchman dies abroad "occaſionally, *non animo remanendi*, his Scotch effects muſt be con- "firmed in Scotland."

MOVEABLES on the other hand occaſionally in Scotland belonging to a foreigner, are held to be foreign effects, not regulated by the law

of this country. The occaſional connection with this country, yields to the more intimate connection with the proprietor who is a foreigner. For this reaſon, a foreign aſſignment of ſuch moveables, formal according to the *lex loci*, will be ſuſtained by the court of ſeſſion acting as judges in foreign matters. And, for the ſame reaſon, an executor named by the proprietor will have a good claim to ſuch moveables, provided he compleat his title *ſecundum conſuetudinem loci*. And even though the proprietor here occaſionally fall ſick and die, the court of ſeſſion will prefer thoſe who are next of kin according to the law of his country; and if he be an Engliſhman, for example, will ſuſtain letters of adminiſtration from the prerogative court as the proper title. In like manner, if a Scotchman occaſionally in England die there, the moveables he carried with him ought to be held Scotch moveables to be regulated by the law of Scotland. And the Engliſh judges, were they allowed to judge *ſecundum bonum & æquum*, without being fettered by their own municipal law, would certainly be of the ſame opinion. This article demands peculiar attention. Here is a ſituation of things not a little ſingular, a ſituation that obliges our judges to follow, not their own law, not the *jus gentium*, but the municipal law of another country.

In the third place, moveables locally in Scotland and originally belonging to a Scotchman, do not change their legal country, if I may uſe the expreſſion, by being ſold to a foreigner, or by being conveyed to him in the courſe of ſucceſſion. A foreign aſſignment will not be a good title of property, nor will the foreign method of conveying effects from the dead to the living be held ſufficient. The nomination of an executor by will is, it is true, an univerſal title effectual *jure gentium*, which therefore ought to be ſuſtained everywhere: but letters of adminiſtration from the prerogative court of Canterbury, for example, will not be ſuſtained here, even though granted to the next of kin. The powers of that court are confined within its own territory, and therefore the next of kin muſt be confirmed here.

In the fourth place, as to moveables connected with an immoveable ſubject, ſuch as the furniture of a houſe, the goods in a ſhop, or the ſtocking of a farm, the country of the principal determines that of the acceſſory, without regard to the proprietor, of whatever country he be. The connection here betwixt the moveables and the immoveable ſubject, prevails over their connection with the proprietor.

proprietor. And accordingly where the principal ſubject is in Scotland, theſe acceſſory moveables will, to all intents and purpoſes, be governed by the municipal law of Scotland. To illuſtrate this branch I put the following caſe. A family has been long in poſſeſſion of two land-eſtates, one in England, one in Scotland, with two manſion-houſes compleatly furniſhed, which are inhabited by turns. The proprietor dies without children, leaving a brother, and children of a deceaſed brother. This makes it a queſtion of importance in the ſucceſſion to his moveables, whether the law of England or of Scotland be the rule. In England, there is a repreſentation in moveables as well as in land; and when a man dies, the children of a deceaſed brother or ſiſter take a ſhare of the moveables with the brothers and ſiſters alive. In Scotland, there is no repreſentation in moveables. Will this queſtion then depend on the accident of the proprietor's dying in England or in Scotland? This will hardly be admitted; for the mind is averſe to make right depend on chance. And yet, abſtracting from this accident, there is no reaſon to prefer the law of either country to that of the other. The reſult then muſt be, that the houſhold-furniture in England, as Engliſh effects, be diſtributed among the next of kin according to the Engliſh law; and that the Scotch law be the rule with reſpect to the effects in Scotland.

IN the laſt place, with reſpect to a proceſs as well as with reſpect to legal execution, no circumſtance is regarded but loco-poſition merely, however occaſional or accidental. A judge has authority over every perſon and every legal ſubject within his territory; and to whatever country goods may belong, the proprietor or a creditor muſt claim them from the court to which they are ſubjected for the time. No other judge can give authority to apprehend the poſſeſſion, or to ſeize them by execution for payment of debt.

SECTION IV.

Foreign Covenants and Deeds reſpecting Debts.

DEBTS due by inhabitants in this country to foreigners, make another branch of the extraordinary juriſdiction of the court of ſeſſion concerning foreign matters. The form of conveying ſuch debts *inter vivos*, of tranſmitting them from the dead to the living, of attaching them by execution, *&c.* have not hitherto been brought under general rules; and our judges are ever at a loſs by what law theſe ought to be governed, whether by our law, by that of the

country where the creditor reſides, or by the *jus gentium*. To get free of this doubt, authors and lawyers are ſtrongly diſpoſed to aſſimilate debts to land, by beſtowing upon them a local ſituation. And yet this fiction, bold as it is, removes not the doubt; for ſtill the queſtion recurs, Where is the debt ſuppoſed to exiſt? whether in the territory of the creditor or in that of the debtor? Conſidering a debt as a *ſubject* belonging to the creditor, it ſeems the more natural fiction to place it with the creditor as in his poſſeſſion; and hence the maxim, *Mobilia non habent ſequelam*. Others are more diſpoſed to place it with the debtor, a thought ſuggeſted by the following conſideration, that the money muſt be demanded from the debtor, and that upon his failure the ſuit for payment muſt be in his *forum*.

¶ It is unneceſſary to beſtow words upon proving, that a debt is not a *corpus* to be capable of loco-poſition, but purely a *jus incorporale*. Rejecting then fictions, which never tend to ſound knowledge, let us take things as they are, and endeavour to draw light from the nature of the ſubject. Here are two perſons connected, a debtor and a creditor, living in different countries, and ſubjected to different laws. In this caſe it muſt even at firſt ſight appear, that there can be no reaſon for holding by the one law in every particular, rejecting the other; for whether is it the law of the debtor or of the creditor that muſt be preferred? Deliberating upon this matter, it appears evident, that as payment muſt be demanded in the *forum* of the debtor, the form of the action that is brought againſt him, the method of procedure, the execution that paſſes upon the decree, and what perſon is liable as heir in place of the debtor dying before payment, muſt all be regulated by the law of the debtor's country. On the other hand, with reſpect to titles derived from the creditor, whether *inter vivos* or by ſucceſſion, theſe naturally are regulated by the law of the creditor's country. Thus, an aſſignment made in Scotland, according to our form, of a debt due by a perſon in a foreign country, ought to be ſuſtained in that country as a good title for demanding payment. And a foreign aſſignment of a debt due here, regular according to the law of the country, ought to be ſuſtained by our judges. A foreign aſſignment cannot at any rate be ſubjected to the regulations of our act 1681 for preventing forgery, or to any other of our regulations; becauſe theſe regard no deeds but what are executed in Scotland. The ſame of ſucceſſion. If a man make a ſettlement of his effects according to the forms of his own country, that ſettlement ought to be

be ſuſtained everywhere. And if he die inteſtate, the heir that is called to ſucceed him by the law of his own country, ought to be entitled to his moveable effects wherever ſituated, and to demand payment from his debtor's wherever found. The reaſon is, that when a man forbears to make a deed regulating his ſucceſſion, it is underſtood to be his will that the law of his own country take place: if he be ſatisfied with the heir whom the law calls to his ſucceſſion, he has no occaſion to make a ſettlement. Thus in a competition betwixt the brother and the nephew of Captain William Brown who died in Scotland his native country inteſtate and without children, concerning moveable debts due to the Captain in Ireland, the brother was preferred as next in kin by the law of Scotland; though by the laws of England and Ireland, which admit the *jus repreſentationis* in the ſucceſſion of moveables, a nephew and niece have the ſame right with a brother and ſiſter *.

* Nov. 28. 1744, Brown of Braid *contra* John Brown Merchant in Edinburgh.

FROM what is ſaid it will appear, that, with reſpect to the matter in hand, debts differ widely from land and from moveables. It is in vain to claim the property of any ſubject, unleſs the title of property be compleat and ſtrictly formal. An equitable title in oppoſition to one that is legal, can never found a real action: it cannot have a ſtronger effect than to found an action againſt the proprietor to grant a more formal right, or in his default that the court ſhould grant it. But in the caſe of a debt, where the queſtion is not about property but about payment, an equitable title coincides in a good meaſure with a legal title. An aſſignment made by a foreign creditor according to the formalities of his country, will be ſuſtained here as a good title for demanding payment from the debtor: and it will be ſuſtained even though informal, provided it be good *jure gentium;* that is, provided it appear that the original creditor really granted the aſſignment. Such effect hath an equitable title; and a legal title can have no ſtronger effect.

IT muſt however be admitted, that an equitable title hath not ſo compleat an effect in a competition. Suppoſe an Engliſh creditor grants an aſſignment, in the Engliſh form, of a debt due to him in Scotland: this aſſignment, though it transfer not the *jus crediti* to the aſſignee, is however an order upon the debtor to pay to the aſſignee. But ſuch aſſignment, even though the firſt in order of time, will not avail againſt a more formal aſſignment taken *bona fide* and regularly intimated to the debtor †. An equitable title

† See Book 1. Part 2. Chapter 1. Sect. 8.

may be good againſt the granter; but can never be ſuſtained in a competition with a legal title, where both parties are *in pari caſu*.

With reſpect to debts due here to foreigners, it is a queſtion not leſs intricate than important, In what manner they are to be attached by execution, and from what court the execution muſt iſſue, whether from the court to which the creditor is ſubjected or from that of the debtor. In England, debts like other moveables are attached by the legal execution of *Fieri Facies*, ſimilar to our poinding; and by this execution the *jus crediti* is transferred *fundituſ* from the original creditor to his creditor. At this rate it would ſeem that a *Fieri Facies* executed againſt the creditor in England, ſhould, like an intimated aſſignment, be effectual againſt the debtor here, ſo as to make execution in this country unneceſſary. This inference appears extremely plauſible, but we muſt enquire whether it be ſolidly founded. Judicial powers, which are confined within a certain territory, reſemble not will or conſent which operate everywhere with equal authority. A voluntary conveyance by a proprietor, or by a creditor, is an univerſal title that ought to be made effectual by judges in every country. And could law compel any man to make a conveyance, ſuch conveyance would in juſtice be equivalent to a voluntary conveyance, to be effectual everywhere; becauſe, ſuppoſing will to be interpoſed, it cannot hurt the deed that it proceeded from legal compulſion more than if it had been voluntary in the ſtricteſt ſenſe. But it is not in the power of law to force the will; and therefore a conveyance by legal execution cannot be held a conveyance from the debtor. In order to ſupply the want of a voluntary conveyance to the creditor for payment of the debt due him, all that can be done is for the judge to be the diſponer; and this diſpoſition he can make where the ſubject to be conveyed is under his power and authority. In our poinding, for example, the property of the goods is transferred to the poinder, not by the will of the debtor, but by the will and authority of the ſheriff within whoſe territory the effects lie. But the ſheriff cannot adjudge to the poinder the debtor's effects in any other territory, becauſe theſe are not ſubjected to his juriſdiction. The matter is clear as to moveable goods, and the ſame rule muſt hold as to debts. For if the judge cannot force the creditor to make a conveyance, all he can do by way of authority is to award execution againſt his debtor for payment of the debt upon which the execution proceeds. But this execution muſt be awarded by the

the judge within whoſe territory the debtor reſides, for no other judge hath authority over him. Thus it is evident, that an Engliſh *Fieri Facies* is not a good title for demanding payment of a debt due in Scotland. And therefore, with reſpect to legal execution, it holds in general, that the judge of the territory within which the ſubjects are, or the debtor lives, muſt be applied to.

I conclude this ſection with applying to debts what is obſerved with reſpect to moveables in the ſection immediately foregoing. The nomination of an executor in a teſtament, is an univerſal title which ought to be ſuſtained everywhere; and is always ſuſtained in the court of ſeſſion to oblige debtors in this country to make payment [a]. But an executor dative with letters of adminiſtration hath not a title to ſue for payment *extra territorium*. And the ſame is the caſe of a guardian to a lunatic's eſtate named in England by the chancellor: he has no title to ſue for payment of the lunatic's debts in Scotland [b].

[a] Durie, Feb. 16. 1627, Lawſon *contra* Kello.

[b] June 21. 1749. Moriſon, &c. *contra* Earl of Sutherland.

SECTION V.

Foreign Evidence.

UNDER this head come properly foreign writs; becauſe no writ where there is wanting any ſolemnity of the law of Scotland, can be effectual here to any other purpoſe than as evidence merely. And as among civilized nations, the ſolemnities required to make a writ effectual, are ſuch as give ſufficient evidence of will; it is eſtabliſhed as a rule with us, That contracts, bonds, diſpoſitions, and other writs, executed according to the law of the place, are probative in this country. Thus, action is always ſuſtained upon a foreign bond having the formalities of the place where it was granted [c]: and an extract of a bond from Bourdeaux ſubſcribed by the tabellion only, and bearing that the bond itſelf ſubſcribed by the granter was inſert in his regiſter, was ſuſtained, being *ſecundum conſuetudinem loci* [d]. Depoſitions of witneſſes taken abroad, upon a commiſſion from the court of ſeſſion, were ſuſtained here, though ſubſcribed by the commiſſioners and clerk only, not by the witneſſes, ſuch being the form in the country where the depoſitions were taken [e].

[c] Haddington, Jan. 19. 1610, Fortune *contra* Shewan

[d] Home, February 1682, Davidſon *contra* Town of Edinburgh.

[e] Fountainhall, March 19. 1707. Cummin *contra* Kennedy.

NOR does it vary the foregoing rule, though a foreign bond bear a clauſe for regiſtring in Scotland: this circumſtance ſhows indeed,

indeed, that the creditor had it in view to make his claim effectual in Scotland; but it weakens not the evidence of the bond, which therefore will be a good inſtruction of the claim [a].

[a] Home, Feb. 14. 1721, Junquet la Pine *contra* Creditors of Ld. Semple.

By the law of England, payment of money may be proved by witneſſes. The ſame proof of payment ſaid to be made in England, ought to be admitted here. For our act of ſederunt confining the evidence to writ [b], regards no payment but what is made in Scotland; and it would be unjuſt to deprive a man of that evidence which the law of his own country made him rely on. Accordingly, in every ſuit here upon an Engliſh bond, the defence of payment alledged made in England, is admitted to be proved by witneſſes [c]. Yet where a bond granted in England contained a clauſe for regiſtring in Scotland, the defence of payment made in England, was not permitted to be proved by witneſſes [d]. This appears to me an erroneous deciſion. For, as obſerved above, the clauſe of regiſtration imported only, that the creditor had it in view to make his debt effectual in Scotland. It certainly did not bar the debtor from making payment in England, nor of proving this payment by witneſſes, had the ſuit been brought againſt him there. And it follows, that the ſame proof ought to be admitted when the ſuit is brought here.

[b] Hiſtorical Law-tracts. Tract 2.

[c] Durie, Nov. 16. 1626, Galbraith *contra* Cuninghame.

[d] Stair, Dec. 8. 1664, Scot *contra* Henderſon.

Though in the practice of Scotland, the cedent's oath is not ſuſtained as good evidence againſt the aſſignee, it is however good evidence *jure gentium*; and is accordingly ſuſtained in England. For this reaſon, an Engliſh bond being aſſigned in England, and a ſuit for payment being raiſed here by the aſſignee, a relevant defence againſt payment was admitted to be proved by the oath of the cedent [e].

[e] Stair, June 28. 1666, MacMorland *contra* Melvine.

Section VI.

What Effect is given to foreign Statutes and Decrees.

Though a ſtatute, as obſerved above, hath no authority as ſuch *extra territorium*, it becomes however neceſſary, upon many occaſions, to lay weight upon foreign ſtatutes, in order to fulfil the rules of juſtice. Many examples occur of indirect effects given thus to foreign ſtatutes. One of theſe effects I ſhall mention at preſent for the ſake of illuſtration; reſerving others to be handled where particular ſtatutes are taken under conſideration.

Obedience

Obedience is due to the laws of our country, and to tranſgreſs any of them is a moral wrong *. This moral wrong ought to weigh with judges in every country; becauſe it is an act of injuſtice to ſupport any moral wrong, by making it the foundation either of an action or of an exception. I give for an example the ſtatute prohibiting any member of a court of law to buy land about which there is a proceſs depending †. Such a purchaſe being made notwithſtanding, the purchaſer follows the vender into a foreign country, in order to compel him by a proceſs to make the bargain effectual. A bargain unlawful where made, becomes not lawful by change of place; and therefore the foreign judge ought not to ſupport ſuch unlawful bargain by ſuſtaining action upon it. Courts were inſtituted to repreſs not to enforce wrong; and the judge who enforces any unlawful paction becomes acceſſory to the wrong.

* See Book 1. Part 1. Chap. 4.

† 13. Edward I. cap. 49. Act 2d. p. 1594.

SEVERAL intricate queſtions ariſe from the different preſcriptions that are eſtabliſhed in different countries. In our deciſions upon this head it is commonly the point diſputed, whether a foreign preſcription or that of our own country ought to be the rule. This never ought to be diſputed; for every caſe that comes under our own law, muſt be decided by that law and not by the law of any other country. When the matter is accurately conſidered, the debate will be found to turn upon a different point, *viz.* whether the caſe in queſtion come under our preſcription. This may often be a doubtful point; becauſe many caſes come under the words of a ſtatute, that are not comprehended under its ſpirit and intendment. Caſes of this nature belong to the juriſdiction of the ſeſſion, impowered as a court of equity to mitigate the rigor of ſtatute-law, by denying force to the words when unwarily more extenſive than the will of the legiſlature ‡. What only belongs to the preſent ſubject, is the effect that ought to be given to foreign preſcriptions where our own are not applicable; and the ſubject thus circumſcribed will be found abundantly ſimple and plain. By the Engliſh act of limitations ||, "All actions of account and upon the caſe, all actions of "debt grounded upon any lending or contract without ſpeciality, "all actions of debt for arrearages of rent, *&c.* ſhall be ſued "within ſix years after the cauſe of action." The purpoſe of this ſtatute is to guard againſt a ſecond demand for payment of temporary debts, ſuch as generally are paid regularly. And to make this purpoſe effectual, action is denied upon ſuch debts after ſix years. As ſtatutes have no coercive authority *extra territorium*, this ſtatute can have no effect with us other than to infer a preſumption

‡ See Book 1. Part 2. Chapter 2. Sect. 1.

|| 21. James I. cap. 16. §. 3.

of payment from the ſix years delay of bringing an action. And accordingly when a proceſs is brought in Scotland for payment of an Engliſh debt after the Engliſh preſcription has taken place, it cannot be pleaded here that the action is cut off by the ſtatute of limitations. But it can be pleaded here, and will be ſuſtained, that the debt is preſumed to have been paid. Conſidering the matter in this light, and that the ſtatute cannot be otherways regarded than as inferring a preſumption merely, it follows, that the plaintiff muſt be permitted to remove the preſumption by poſitive evidence, or to overbalance it by contrary preſumptions, or to ſhow from the circumſtances of his caſe that payment cannot be preſumed. In order to remove the preſumption by poſitive evidence, the purſuer has acceſs to the oath of the defendant; and an acknowledgement that the debt is ſtill exiſting removes the preſumption of payment *. The preſumptive payment may alſo be counterbalanced by contrary preſumptions. A caſe of this nature is reported by Gilmour †, to the following purpoſe: "A bond preſcribed by the Engliſh law while "the parties reſided there, was afterwards made the foundation of "a proceſs in Scotland. The court refuſed to ſuſtain the Engliſh "preſcription, becauſe the bond was drawn in the Scotch form be-"twixt Scotchmen, and bore a clauſe of regiſtration for execution in "Scotland." The circumſtances of this caſe ſhowed, that the creditor laid his account to receive payment in Scotland or to raiſe his action there; and as a bond bearing a clauſe of regiſtration preſcribes not in Scotland till forty years elapſe, the court juſtly thought, that to preſerve the claim alive the creditor had no occaſion to guard againſt any preſcription but that of Scotland. Further, there are circumſtances where the ſtatute of limitation cannot infer any preſumption of payment. What if the debtor within the ſix years did retire beyond ſeas? The forbearance in that caſe to bring an action againſt a man who cannot eaſily be reached, and whoſe reſidence perhaps is not known, cannot infer the ſlighteſt preſumption againſt the creditor. The ſtatute however, which makes no exception, muſt in England have been obeyed, till the defect was ſupplied by another ſtatute. But the court of ſeſſion is under no ſuch dilemma. A preſumption of payment will not be ſuſtained when the circumſtances of the caſe admit not ſuch preſumption.

* Feb. 9. 1738, Rutherfoord *contra* Sir James Campbell.

† Novem. 1664, Garden *contra* Ramſay.

The foregoing defect of the ſtatute of limitation is ſupplied by the Engliſh ſtatute 4th Annæ, cap. 16. declaring, "That where the "perſon againſt whom a claim lies is beyond ſeas, the ſtatute of "limitation ſhall not run againſt the creditor." This ſtatute is alſo

alſo defective, becauſe it includes not Scotland; for a preſumption of payment cannot juſtly be urged againſt an Engliſh creditor, who forbears to ſue while his debtor is out of England though not beyond ſeas. Action however muſt be denied in England by force of the ſtatute, though the debtor has been all along in Scotland. But this is no rule to us. We are at liberty to judge of the weight of the preſumption from circumſtances. And accordingly the court of ſeſſion ſuſtained action after the ſix years againſt a man who reſided moſt of the time in Scotland *.

* March 4. 1755. Truſtees for the creditors of Renton *contra* Baillie.

THOUGH the act of limitation of James I. makes no proviſion for the caſe where the debtor happens to be in a different country, it is more circumſpect as to the creditor's reſidence. For in the 7th ſection it is provided, "That the preſcription ſhall not run againſt "the creditor while he is beyond ſeas;" and juſtly, becauſe in that ſituation his delaying to bring an action infers not againſt him any preſumption of payment. The caſe is parallel where the creditor happens to reſide in Scotland, and therefore his reſidence there muſt alſo bar a preſumption of payment. Hence it appears that the deciſion, July 1717, Rae *contra* Wright is erroneous. And indeed it is ſo in more reſpects than one. James Rae a Scotch pedler having died in England, his brother Richard intermeddled with his effects there at ſhort hand without any warrant. Richard during the running of the ſix years returned to Dumfries and died there. After the ſix years were elapſed, a proceſs was brought againſt his executor by William Rae a third brother, to account to him for the half of the effects thus irregularly intermeddled with. The court ſuſtained the defence that the action was cut off by the Engliſh ſtatute of limitations. This was extremely groſs. While Richard remained in England, the circumſtance that William living in Scotland forbore to raiſe a ſuit in England, afforded not the ſlighteſt ſuſpicion that he had received payment from Richard. And ſuppoſe he had lived in England, payment could not be preſumed againſt him, when his debtor left England before the lapſe of the ſix years.

BY eſtabliſhed practice in England, action is not ſuſtained upon a double bond after twenty years. The intereſt at the rate of *5 per cent.* equals the principal in twenty years, which therefore exhauſts the whole penal part of the bond, and makes the double ſum due in equity as well as at common law. After this period, the ſum muſt remain barren, becauſe intereſt is not ſtipulated in the bond: and in this view, it is juſtly inferred from the delay

of demanding payment after the twenty years, that payment muſt already have been made. This in effect is an Engliſh preſcription, inferring from ſo long delay a preſumption of payment. It follows therefore, if the debtor have lived all along in England, and the creditors have ſuffered the preſcription to run againſt him, that the preſumptive payment ought to be ſuſtained here as it is in England.

In the Engliſh bankrupt ſtatute 13th Elizabeth, cap. 7. §. 2. it is enacted, "That the commiſſioners ſhall have power to ſell "all the goods of the bankrupt, real and perſonal, which he "had before his bankruptcy, and to divide the produce among "the creditors in proportion to the extent of their debts;" and §. 12. it is declared, "That this act ſhall not extend to land "aliened *bona fide* before the bankruptcy." Hence it appears to be the intention and effect of the ſtatute, to bar all deeds by the bankrupt, and all execution by the creditors, after the firſt act of bankruptcy; and the Engliſh writers accordingly invent a cauſe ſufficient to ſupport theſe ſtatutory effects. They hold, That the effects are veſted in the commiſſioners *retro* from the firſt act of bankruptcy: "Creditors upon whatſoever ſecurity they be, "come in all equal, unleſs ſuch as have obtained actual execution "before the bankruptcy, or had taken pledges for their juſt "debts; and the reaſon is, becauſe from the act of bankruptcy, "all the bankrupt's eſtate is veſted in the commiſſioners*." A ſtrange fiction, to ſuppoſe the bankrupt's eſtate veſted in the commiſſioners, before theſe commiſſioners be named or have a being! The ſtatute has a better foundation than a fiction. It is founded on juſt principles of equity, as is demonſtrated above†. But to confine our obſervations upon the ſtatute, to what more peculiarly concerns this country, I muſt obſerve, that the great circulation of trade through the two kingdoms ſince the union, makes it frequently neceſſary for the court of ſeſſion to take the Engliſh bankrupt ſtatutes under conſideration; and it has puzzled the court mightily, what effect ſhould be given to them here. That a foreign ſtatute cannot have any coercive authority *extra territorium*, is clear: but at firſt view it is not ſo clear, that the ſtatutory transference of property above mentioned, from the bankrupt to the commiſſioners, may not comprehend effects real or perſonal in Scotland, or in any other foreign country. For why may not a legal conveyance be equivalent to a voluntary conveyance by the proprietor himſelf? I have had occaſion to obſerve

* New Abridgement of the Law, vol. I. p. 258.

† Chap. 5. of this book.

ſerve above *, that law cannot force the will nor compel any man to make a conveyance. In place of a voluntary conveyance, when juſtice requires it to be granted, all that a court can do, or the legiſlature can do, is to be themſelves the diſponer's; and it is evident that their deed of conveyance cannot reach any ſubject real or perſonal but what is within their territory. This makes a ſolid difference betwixt a voluntary and a legal conveyance. The former has no relation to place. A deed of alienation, whether of land or of moveables, is good wherever granted. An Engliſhman, for example, has in China the ſame power to alien his land in England that he had before he left his native country; and the power he has to diſpoſe of his moveables will reach them in the moſt diſtant corner of the earth. The latter, on the contrary, has the ſtricteſt relation to place. The power of a court, and even of the legiſlature, being merely territorial, reacheth not land nor moveables *extra territorium*. We may then ſafely conclude, that the ſtatutory transference of property from the bankrupt to the commiſſioners, cannot carry any effects in Scotland: theſe are ſubjected to our own laws and our own judges, and cannot be conveyed from one perſon to another by the authority of any foreign court, or of any foreign ſtatute. The Engliſh bankrupt ſtatutes however muſt not be totally diſregarded by us. One effect may and ought to be given them according to the rules of juſtice and equity. It is the duty of the debtor to ſell his effects for ſatisfying his creditors if he cannot otherwiſe procure money; and it is in particular the duty of an Engliſh bankrupt, to convey all his effects to the commiſſioners named by the chancellor or to the aſſignees named by the creditors, in order to be ſold for payment of his debts. The Engliſh ſtatute, by conveying to the commiſſioners all the Engliſh funds, ſupplies the failure of the bankrupt, and does for him what he himſelf ought to do. But as the Engliſh ſtatute has no authority over funds belonging to the bankrupt in Scotland, it becomes neceſſary for the commiſſioners or aſſignees to apply to the court of ſeſſion, "ſpecifying the "debtor's bankruptcy and his failure to make a conveyance, and "therefore praying that the court will adjudge to the plaintiffs the "debtor's effects in Scotland; or rather that they will order the "ſame to be ſold, and the price to be paid to the plaintiffs." And to this purpoſe, the proper action, in my apprehenſion, is a proceſs of ſale of the debtor's moveables as well as of his land. Debts due here to the bankrupt may alſo be ſold; but as againſt ſolvent debtors a proceſs for payment is better management, it appears to me, that, in the caſe of bankruptcy, this proceſs is competent to

* Section 4. of the preſent chap.

the aſſignees without neceſſity of an arreſtment *. The aſſignees being truſtees for behoof of the whole creditors, have a claim in equity to the bankrupt's whole effects, to be converted into money for payment of the creditors; and in the forms of the law of Scotland there appears nothing to bar the aſſignees from bringing a direct action for payment againſt the bankrupt's debtors here, as he himſelf could have done before his bankruptcy. In thus appointing the bankrupt's debtors to make payment to the aſſignees, the court of ſeſſion goes no farther than to ſuſtain the ſaid equitable claim, and exerts no power but what is the foundation of all legal execution, *viz.* making that conveyance for the bankrupt which he himſelf ought to have made. By this expeditious method, juſtice is ſatisfied and no perſon is hurt.

* See chapter 4. of this book.

Whether the price of the bankrupt's moveable funds and the ſum ariſing from the debts due to him, ought to be diſtributed here among his creditors or be remitted to England for that purpoſe, is a matter purely of expediency. The rule of diſtribution ſo far as I can diſcover, is the ſame in both countries; and the creditors therefore have no intereſt in the queſtion, except what may ariſe from the convenience of receiving payment in one place rather than another. But if the bankrupt's land in Scotland have been attached by execution, which is almoſt always the caſe, the price of it upon a ſale muſt be diſtributed here; for the purchaſer is not bound to pay the price till the real debts be conveyed to him, and the real creditors are not bound to convey till they get payment.

In the laſt place come foreign decrees, which are of two kinds, one ſuſtaining the claim, and one diſmiſſing it. A foreign decree ſuſtaining the claim, is not one of thoſe univerſal titles which ought to be made effectual every where. It is a title that depends on the power of the court whence it iſſued, and therefore has no coercive authority *extra territorium*. And yet as it would be hard to oblige the perſon who claims on a decreee, to bring a new action againſt his party in every country to which he may retire, therefore common utility as well as regard to a ſiſter court have eſtabliſhed a rule among all civilized nations, that a foreign decree ſhall be put in execution, unleſs ſome exception be oppoſed to it in law or equity. This, in effect, is making no wider ſtep in favour of the decree, than to preſume it juſt till the contrary be proved. But this includes not a decree decerning for a penalty; becauſe no court reckons itſelf bound

bound to puniſh or to concur in puniſhing any delict committed *extra territorium*.

A foreign decree, which, by diſmiſſing the claim, affords an *exceptio rei judicatæ* againſt it, enjoys a more extenſive privilege. We not only preſume it to be juſt, but will not admit any evidence of its being unjuſt. The reaſon follows. Public utility, regarding the ſafety and quiet of individuals, requires that there be ſome means for putting a final iſſue to every controverſy that can be brought before a court; for otherwiſe law ſuits would be perpetual. When a decree for a ſum of money is put in execution, payment recovered is one of theſe means. The property of the ſum levied is transferred to the creditor by legal authority; and juſtice will not permit, that, without any fault on his part, he be forfeited of his property. A decree diſmiſſing a claim, is in its nature not leſs ultimate than payment recovered upon a decree ſuſtaining a claim; and ſuch decree therefore muſt put an end to the controverſy, if ever it be to have an end. The effect then given to an *exceptio rei judicatæ*, is derived from the common intereſt of mankind. A decree diſmiſſing a claim, may it is true be unjuſt, as well as a decree ſuſtaining it. But they differ widely in one capital point. In declining to give redreſs againſt a decree diſmiſſing a claim, the court is not guilty of authoriſing injuſtice, even ſuppoſing the decree to be unjuſt. The utmoſt that can be ſaid againſt the court is, that it forbears to interpoſe in behalf of juſtice: but ſuch forbearance, inſtead of being faulty, is highly meritorious in every caſe where private juſtice claſhes with public utility *. The caſe is very different with reſpect to a decree of the other kind. To award execution upon a foreign decree without admitting any objection againſt it, would be, for ought the court can know, to ſupport and promote injuſtice. A court, as well as an individual, may in certain circumſtances have reaſon to forbear acting, or executing their office. But the doing injuſtice, or the ſupporting it, cannot be juſtified in any circumſtances †.

* See concluſion of book 2.

† Ibid.

FINIS.

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N. B. *The Roman characters refer to the Introduction, the common or Arabic to the body of the work.*

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Explanation

Explanation of Scotch Law-terms.

ADjudication is an execution for drawing payment out of the debtor's land, and correſponds to the Engliſh *Elegit*.

Arreſtment defined, Book III. Chap. IV.

Cautioner) A ſurety for a debt.

Cedent) Aſſignor.

Contravention) An act of contravention ſignifies the breaking through any reſtraint impoſed by deed, by covenant, or by a court.

Decree of furthcoming defined, Book III. Chap. IV.

Fiar) He that has the fee or feu; and the proprietor is termed *Fiar*, in contradiſtinction to the liferenter.

Gratuitous, ſee Voluntary.

Heretor) A proprietor of land.

Inhibition defined, Book III. Chap. IV.

Leſion) Loſs, damage.

Purſuer) Plaintiff.

Propone) To propone a defence is to ſtate or move a defence.

Reduction is a proceſs for voiding or ſetting aſide any conſenſual or judicial right.

Tercer) A widow that poſſeſſes the third part of her huſband's land as her legal jointure.

Voluntary) In the law of Scotland bears its proper ſenſe as oppoſed to involuntary. A deed in the Engliſh law is ſaid to be voluntary when it is granted without a valuable conſideration. In this ſenſe it is the ſame with *gratuitous* in our law.

Wadſet anſwers to a mortgage in the Engliſh law. A proper wadſet is where the creditor in poſſeſſion of the land takes the rents in place of the intereſt of the ſum lent. An improper wadſet is where the rents are imputed in payment, firſt of the intereſt and then of the capital.

Writer) Scrivener.

ERRATUM.

Margin, page 129, in place of Article II. read Article III.