PRINCIPLES OF EQUITY.

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 ariſes from a principle, That where there is a right, it ought to be made effectual; in the latter, from another prin-

ciple, That for every wrong there ought to be a remedy. In both, the object commonly is 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 that view, the preſent book is divided into two parts. In the firſt are treated, the powers of a court of equity to ſupply defects and to correct injuſtice in the common law, with reſpect to pecuniary intereſt; and in the ſecond, 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 remedy the imperfections of common law with reſpect to pecuniary intereſt, by ſupplying what is defective, and correcting what is wrong.

THE imperfections of common law are ſo many and ſo various, that it will be difficult to bring them into any perfect order.

order. The following arrangement, if not the beſt, ſeems at leaſt to be natural and eaſy. 1. Imperfections of common law in protecting men from being harmed by others. 2. In protecting the weak of mind from harming themſelves. 3. Imperfections of common law with reſpect to the natural duty of benevolence. 4. Imperfections with reſpect to deeds and covenants. 5. With reſpect to ſtatutes. 6. With reſpect to tranſactions between debtor and creditor. 7. With reſpect to actions at law. 8. With reſpect to legal execution. 9. Power of a court of equity to inflict puniſhment.

CHAPTER I.

Powers of a court of equity to remedy what is imperfect in common law, with reſpecting to the protecting individuals from harm.

THE ſocial ſtate, however deſirable, could never have taken place among men, were they not reſtrained from injuring

ring thoſe of their own ſpecies. To abſtain from injuring others, is accordingly the primary law of ſociety, enforced by the moſt vigorous ſanctions: every culpable tranſgreſſion of that law, ſubjects the wrong-doer to reparation; and every intentional tranſgreſſion, ſubjects him alſo to puniſhment.

The moral principle of abſtaining from injuring others, naturally takes the lead in every inſtitute of law; and as the enforcing that principle was a capital object in eſtabliſhing courts of juſtice, it is proper to commence a treatiſe of equity with examining in what caſes the interpoſition of a court of equity is required to make it effectual; which can only be where no remedy is provided at common law.

With reſpect to harm done intentionally, there is no imperfection in common law, and conſequently no neceſſity for a court of equity. But that court may be neceſſary in the following caſes. Firſt, Harm done by one in exerciſing a right or privilege. Second, Harm done by one who has it not in view to exerciſe any right or privilege. Third, A man tempted or overawed by undue influence to act knowingly

knowingly againſt his intereſt. Fourth, A man moved to act unknowingly againſt his intereſt, by fraud, deceit, or other artificial means. I cloſe the chapter with the remedies that are applied by a court of equity againſt the wrongs above ſtated. Of theſe in their order.

SECTION I.

Harm done by a man in exerciſing a right or privilege.

THE ſocial ſtate, which on the one hand is highly beneficial by affording mutual aid and ſupport, is on the other attended with ſome inconveniencies, as where a man cannot have the free exerciſe of a right or privilege without harming others. How far ſuch exerciſe is authoriſed by the law of our nature, is a queſtion of nice diſcuſſion. That men are born in a ſtate of freedom and independence, is an eſtabliſhed truth; but whether that freedom and independence may not admit of ſome limitation from the colliſion of oppoſite rights and privileges, deſerves to be examined. If the free exerciſe of my right be

be indulged me without regarding the harm that may enſue to another, that other is ſo far under my power, and his intereſt ſo far ſubjected to mine. On the other ſide, if I be reſtrained from the exerciſe of my right in every caſe where harm may enſue to another, I am ſo far dependent upon that other, and my intereſt ſo far ſubjected to his. Here is a threatening appearance for civil ſociety, that ſeems to admit no reſource but force and violence. Caſes there certainly are that admit no other reſource; as where in a ſhipwreck two perſons lay hold of the ſame plank, one of whom muſt be thruſt off, otherwiſe both will go to the bottom. But upon the preſent ſuppoſition, we are not reduced to that deplorable dilemma; for nature has temper'd theſe oppoſite intereſts by a rule no leſs beautiful than ſalutary. This rule conſiſts of two branches: the firſt is, That the exerciſing my right will not juſtify me in doing any action that directly harms another; and ſo far my intereſt yields to his: the ſecond is, That in exerciſing my right I am not anſwerable for any indirect or conſequential damage that another may ſuffer; and ſo far the intereſt

intereſt of others yields to mine: I am ſorry if my neighbour happen thus to ſuffer; but I feel no check of conſcience on that account. The firſt branch reſolves into a principle of morality, That no intereſt of mine, not even the preſervation of life itſelf, authoriſes me to do any miſchief to an innocent perſon *. The other branch is founded on expediency in oppoſition to juſtice; for if the poſſibility of harming others, whether foreſeen or not foreſeen, were ſufficient to reſtrain me from proſecuting my own rights and privileges, men would be too much cramped in action, or rather would be reduced to a ſtate of abſolute inactivity †.

This rule, which is far from being eaſy in its application, requires much illuſtration. I begin with the firſt branch. However profitable it may be to purge my field of water, yet it is univerſally admitted, that I cannot legally open a new paſſage for it into my neighbour's ground; becauſe this is a direct damage to him: "Sic "enim debere quem meliorem agrum

* Sketches of the Hiſtory of Man, vol. 4. p. 31. 32.

† Eod. p. 64. 65.

"ſuum

" ſuum facere, ne vicini deteriorem fa-
" ciat*." Where a river is interjected between my property and that of my neighbour, it is not lawful for me to alter its natural courſe, whether by throwing it upon my neighbour's ground, or by depriving him of it; becauſe theſe acts, both of them, are direct encroachments upon his property. Neratius puts the caſe of a lake which in a rainy ſeaſon overflows the neighbouring fields, to prevent which on one ſide, a bulwark is erected. He is of opinion, that if this bulwark have the effect, in a rainy ſeaſon, to throw a greater quantity of water than uſual upon the oppoſite fields, it ought to be demoliſhed †. As the damage here is only occaſional or accidental, this opinion is not well founded. It has not even a plauſible appearance. Is it not natural and common for a proprietor to fence his bank, in order to prevent the encroachments of a river or of a lake? The courſe of the river is not altered; and the proprietor on the oppoſite ſide may fence his bank, if he be afraid of encroachments.

* De aqua, et aquæ pluv. l. 1. § 4.

† De aqua, et aquæ pluv. l. 1. § 2.

The foregoing examples, being all of the ſame kind, are governed by a practical rule, That we muſt not throw any thing into our neighbour's ground; *Ne immittas in alienum*, as expreſſed in the Roman law. But the principle of abſtaining to hurt others regards perſons as well as property. "It ſeems the better opinion, that a brew-"houſe, glaſs-houſe, chandler's ſhop, or "ſtie for ſwine, ſet up in ſuch inconve-"nient parts of a town that they cannot "but greatly incommode the neighbour-"hood, are common nuiſances *." Neighbours in a town muſt ſubmit to inconveniences from each other; but they muſt be protected from extraordinary diſturbances that render life uncomfortable. Upon the ſame ground the court of ſeſſion was of opinion, that the working in the upper ſtory of a large tenement with weighty hammers upon an anvil, is a nuiſance; and it was decreed that the blackſmith ſhould remove at the next term †.

As to the ſecond branch of the rule, it

* A new abridgement of the law, vol. 3. p. 686.

† Kinloch of Gilmerton againſt Robertſon, Dec. 9. 1756.

is agreed by all, as above mentioned, that where a river gradually encroaches on my property, I may fence my bank in order to prevent further encroachments; for this work does not tend to produce even indirect or conſequential damage: all the effect it can have is, to prevent my neighbour from gaining ground on his ſide.

In matters of common property, the application of this ſecond branch is ſometimes more intricate. A river or any running ſtream directs its courſe through the land of many proprietors; who are thereby connected by a common intereſt, being equally intitled to the water for uſeful purpoſes. Whence it follows, that the courſe of the river or running ſtream cannot be diverted by any one of the proprietors, ſo as to deprive others of it. Where there is plenty for all, there can be no interference: but many ſtreams are ſo ſcanty, as to be exhauſted by uſing the water too freely, leaving little or none to others. In ſuch a caſe, there ought to be a rule for uſing it with diſcretion; though hitherto no rule has been laid down. To ſupply the defect in ſome meaſure, I venture to ſuggeſt the following particulars, which practice may

may in time ripen to a preciſe rule. It will be granted me, that if there be not a ſufficiency of water for every purpoſe, thoſe purpoſes ought to be preferred that are the moſt eſſential to the well-being of the adjacent proprietors. The moſt eſſential uſe is drink for man and beaſt; becauſe they cannot ſubſiſt without it. What is next eſſential, is water for waſhing; becauſe cleanneſs contributes greatly to health. The third is water for a corn-mill, which ſaves labour, and cheapens bread. The fourth is watering land for enriching it. The fifth is water for a bleachfield. And the loweſt I ſhall mention, is water for machinery, neceſſary for cheapening the productions of ſeveral arts. There may be more diviſions; but theſe are ſufficient in a general view. From this arrangement it follows, that one may uſe the water of a rivulet for drink, and for brewing and baking, however little be left to the inferior heritors. But a proprietor cannot be deprived of that eſſential uſe by one above him, who wants to divert the water for a mill, for a bleachfield, or for watering his land. Nor can a proprietor divert the water for a bleachfield, or for

watering his land, unleſs he leave ſufficient for a mill below. According to this doctrine, I may lawfully dig a pit in my own field for gathering water to my cattle, though it happens to intercept a ſpring that run under ground into my neighbour's field, and furniſhed him with water *.

Under this head comes a queſtion that may be reſolved by the principles above laid down, which is, How far the free uſe of a river in carrying goods can be prevented or impeded by a cruive for catching ſalmon. It is admitted, that a navigable river fit for ſailing, ought to be free to all for the purpoſes of commerce; and that the navigation ought not to be hurt, or rendered difficult, by any work erected in the channel of the river. But ſuppoſing a river that can only admit the floating of timber, is it lawful to erect there a cruive with a dam-dike, ſo as to prevent that operation? A cruive for catching ſalmon is an extraordinary privilege, granted to a ſingle proprietor, prejudicial to all above who have right to fiſh ſalmon. The floating of timber, on the contrary,

* l. 1. § 12. De aqua.

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is profitable to the proprietor, and to every perſon who ſtands in need of that commodity. A cruive, therefore, ought to yield to the floating of timber, as far as theſe rights are incompatible. But will poſitive preſcription give no aid to the proprietor of a cruive in this caſe? This preſcription regulates the competition among thoſe who pretend right to the ſame ſubject; but protects not the poſſeſſor from burdens naturally affecting his property. Now it is a rule, That property, which is a private right, muſt yield to what is eſſential for the good of the nation. In order to defend a town beſieged, a houſe ſtanding in the way ought to be demoliſhed. The right of property will not avail in this caſe, even admitting the proprietor and his predeceſſors to have been in poſſeſſion for a century. Or ſuppoſe, that to repel a foreign enemy, my field is found to be an advantageous ſituation for the national troops, it is lawful to encamp upon it, though the conſequence be to deſtroy the trees, and all it produces. Or, to come nearer the preſent caſe, a manufacturing village is erected on the brink of a rivulet, which is uſed for a mill below that

that has been in conſtant exerciſe forty years and upward. The manufactures ſucceed, and the village becomes ſo populous as nearly to exhauſt the water in drink for man and beaſt, in brewing, and in other purpoſes preferable to that of a mill. Yet I take it for granted, that poſitive preſcription will not protect the proprietor of the mill; becauſe here there is no competition, but only property ſubjected to the burdens that naturally attend it. The tranſition from this example to the caſe in hand is direct. The poſſeſſion of a cruive for a hundred years, will not bar a ſuperior heritor from planting trees, nor conſequently from floating them down the river for ſale; for evidently poſitive preſcription can have no operation in this caſe. It can have no effect but to beſtow upon the poſſeſſor the property of the cruive, which otherwiſe might have been doubtful. But ſuch property muſt, like all other property, be ſubjected to its natural burdens; and cannot ſtand in the way of a right of greater importance to the public.

It is lawful for me to build a houſe upon my march, though it intercept the light from

from a neighbouring houſe; for this is conſequential damage only: beſide, that if my neighbour chuſe to build on his march, he muſt ſee that I am equally intitled.

With regard to this ſection in general, there is a limitation founded entirely upon equity; which is, That though a man may lawfully exerciſe his right for his own benefit where the harm that enſues is only conſequential; yet that the exerciſe is unlawful if done intentionally to diſtreſs others, without any view of benefiting himſelf. Rights and privileges are beſtowed on us for our own good, not for hurting others. Malevolence is condemned by all laws, natural and municipal: a malevolent act of the kind mentioned is condemned by the actor himſelf in his ſedate moments; and he finds himſelf in conſcience bound to repair the miſchief he has thus done. The common law, it is true, overlooks intention, conſidering the act in no other view but as legal exerciſe of a right. But equity holds intention to be the capital part, being that which determines an action to be right or wrong; and affords reparation accordingly. Hence a general rule in equity,

quity, That juſtice will not permit a man to exerciſe his right where his intention is ſolely to hurt another; which in law-language is termed the acting *in æmulationem vicini*. In all caſes of this nature, a court of equity will give redreſs by voiding the act, if that can be done; otherwiſe by awarding a ſum in name of damages. We proceed to examples.

A man may lawfully dig a pit in his own field in order to intercept a vein of water that runs below the ſurface into his neighbour's property, provided his purpoſe be to have water for his own uſe; but if his purpoſe be to hurt his neighbour without any view to benefit himſelf, the act is unlawful, as proceeding from a malevolent intention; and a court of equity will reſtrain him from this operation *.

Upon the ſame principle is founded the noted practice in a court of equity, of refuſing to ſuſtain an action at law unleſs the plaintiff can ſhow an intereſt; for if he can take no benefit by the action, the preſumption muſt be, that it is calculated

* De aqua, et aquæ pluv. l. 1. § 12.

to diſtreſs the defendant, and done *in æmulationem vicini.*

In order to eſtabliſh the *jus crediti* in an aſſignee, and totally to diveſt the cedent or aſſignor, 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 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, be 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, it will ſuſtain the payment made to the cedent as made to the legal creditor. But equity teaches a different doctrine. It was wrong in the cedent to take payment after he convey'd his right to the aſſignee: and

though the debtor was only exerciſing his own right in making payment to the cedent, who is ſtill the creditor; yet being in the knowledge of the aſſignment, the payment muſt have been made intentionally to diſtreſs the aſſignee, without benefiting himſelf. A court of equity, therefore, correcting what is imperfect in common law, will oblige the debtor to make payment over again to the aſſignee, as reparation of the wrong done him.

With reſpect to this matter, there is a wide difference between the ſolemnities that may be requiſite for veſting in an aſſignee a complete 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; and hence it is, that a promiſe of payment made to the aſſignee, though not equivalent to a regular intimation, is however ſufficient to bar the debtor from making payment to the cedent. The court went farther: they were of opinion, that the aſſignee having

having ſhown his aſſignment to the debtor, though without intimating the ſame by a notary, the debtor could not 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.

SECT. II.

Harm done by one who has it not in view to exerciſe any right or privilege.

IN tracing the hiſtory of courts of law with reſpect to this branch, one beforehand would conjecture, that common law ſhould regard no acts injuring others in

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

their rights and privileges, but where miſchief is intended; neglecting acts that are culpable only, as having a foundation too ſlight for that law. But upon examination we diſcover a very different plan; ſo different as that damage occaſioned even by the ſlighteſt fault is, and always was, repaired in courts of common law. In the criminal law, very little diſtinction was originally made between a criminal and a culpable act, even with reſpect to puniſhment *, not to talk of reparation: the paſſion of reſentment, in a fierce and lawleſs people, is rouſed by the ſlighteſt harm; and is too violent for any deliberate diſtinction between intentional and culpable wrong. In fact, both were equally ſubjected to puniſhment, even after the power of puniſhment was transferred to the magiſtrate. Of this we have a notable example in the *lex Aquilia* among the Romans: "Qui ſervum alienum, qua-" drupedem vel pecudem, injuria occide-" rit; quanti id in eo anno plurimi fuit, " tantum æs dare domino damnas eſto †." Here the word *injuria* is interpreted, "quod

* Hiſtorical law-tracts, tract 1.

† l. 2. p. ad leg. Aquil.

" non

" non jure factum eſt; i. e. ſi culpa quis " occiderit *." The retroſpect here may happen to be a great puniſhment; for the obliging a man who kills a lame horſe not worth fifty ſhillings, to pay fifty pounds becauſe the horſe was of that value ſome months before, is evidently a puniſhment. And as even a *culpa leviſſima* ſubjects a man to the *lex Aquilia* †, it is clear, that the ſlighteſt fault by which damage enſues is puniſhable by that law. The *lex Aquilia* was accordingly held by all to be penal; and for that reaſon no action upon it was ſuſtained againſt the heir ‡. The only thing ſurpriſing is, to find this law continuing in force, without alteration or improvement, down to the reign of the Emperor Juſtinian. The Roman law was cultivated by men of great talents, and was celebrated all the world over for its equitable deciſions: is it not amazing, that in an enlightened age ſuch groſs injuſtice ſhould prevail, as to make even the ſlighteſt fault a ground for puniſhment?

When ſuch was the common law of the Romans with regard to puniſhment, there

* l. 5. § 1. ad leg. Aquil. † l. 44. eod.
‡ l. 23. § 8. ad leg. Aquil.

can

can be no difficulty to aſſign a reaſon, why that law was extended to reparation even for the ſlighteſt fault; and as little, to aſſign a reaſon why the ſame obtains in the common law of moſt European nations, the principles of which are borrowed from the Roman law. The penal branch, it is true, of wrongs that are culpable only, not criminal, has been long aboliſhed; having given way to the gradual improvement of the moral ſenſe, which dictates, that where there is no intention to do miſchief, there ought to be no puniſhment; and that the perſon who is hurt by a fault only, not by a crime, cannot juſtly demand more than reparation. And as this is the preſent practice of all civilized nations, it is clear, that the reparation of damage occaſioned by acts of violence comes under courts of common law, which conſequently is ſo far a bar to a court of equity.

And conſidering, that regulations reſtraining individuals from injuring others and compelling them to perform their engagements, compoſed originally the bulk of common law *, it will not be ſurpriſing,

* See Introduction.

that

that courts of common law took early under their cogniſance every culpable act that occaſions miſchief; which was the more neceſſary, in reſpect that, puniſhment being laid aſide, reparation is the only mean left for repreſſing a culpable act. Thus we find ample proviſion made by common law, not only againſt intentional miſchief, but alſo againſt miſchief that is only foreſeen, not intended. And ſo far there is no occaſion for a court of equity.

But for the ſecurity of individuals in ſociety, it is not ſufficient that a man himſelf be prohibited from doing miſchief: he ought over and above to be careful and vigilant, that perſons, animals, and things, under his power, do no miſchief; and if he neglect this branch of his duty, he is liable to repair the miſchief that enſues, equally as if it had proceeded from his own act. With reſpect to ſervants, it is the maſter's buſineſs to make a right choice, and to keep them under proper diſcipline; and therefore, if they do any miſchief that might have been foreſeen and prevented, he is liable. Thus, if a paſſenger be hurt by my ſervant's throwing a ſtone out of a window

window in my houſe, or have his cloaths ſullied by dirty water poured down upon him, the damage muſt be repaired by me at the firſt inſtance; reſerving to me relief againſt my ſervant. But if a man be killed or wounded by my ſervant in a ſcuffle, I am not liable; unleſs it can be ſpecified, that I knew him to be quarrelſome, and conſequently might have foreſeen the miſchief. With reſpect to animals, it is the proprietor's duty to keep them from doing harm; and if harm enſue that might have been foreſeen, he is bound to repair it; as, for example, where he ſuffers his cattle to paſture in his neighbour's field; or where the miſchief is done by a beaſt of a vicious kind; or even by an ox or a horſe, which, contrary to its nature, he knows to be miſchievous *. As to things, it is alſo the duty of the proprietor to keep them from doing harm. Thus both ſiar and liferenter were made liable to repair the hurt occaſioned to a neighbouring tenement by the fall of their houſe †. It is the duty of a man who carries ſtones in a waggon a-

* Exodus, chap. xxi. 29. 36.

† Stair, 16th February 1666, Kay contra Littlejohn.

long the highway, to pack them ſo as to prevent harm; and if by careleſs package a ſtone drop out and bruiſe a paſſenger, the man is liable. But as to caſes of this kind, it is a good defence againſt a claim of reparation, that the claimant ſuffered by his own fault: "Si quis aliquem evi- "tans, magiſtratum forte, in taberna pro- "xima ſe immiſiſſet, ibique a cane feroce "læſus eſſet, non poſſe agi canis nomine "quidam putant: at ſi ſolutus fuiſſet, "contra *." If a fierce bull of mine get looſe, and wound a perſon, I am liable; but if a man break down my fence, and is hurt by the bull in my incloſure, I am not liable; for by an unlawful act he himſelf was the occaſion of the hurt he ſuffered.

Thus, with reſpect to matters falling under the preſent ſection, it appears, that faults come under common law as well as crimes, and omiſſions as well as commiſſions; and therefore ſo far the common law appears complete, leaving no gleanings to a court of equity.

* l. 2. § 1. Si quadrupes pauperiem feciſſe dicatur.

SECT. III.

A man tempted or overawed by undue influence to act knowingly againſt his intereſt.

THE imperfections of man are not confined to his corporeal part: he has weakneſſes of mind as well as of body; and if the taking advantage of the latter to diſtreſs a perſon by acts of violence be a moral wrong, intitling the ſufferer to reparation, it is no leſs ſo to take advantage of the former. Society could not ſubſiſt without ſuch prohibition; and happy it is for man as a ſocial being, that the prohibition with reſpect to both articles makes a branch of his nature.

For the ſake of perſpicuity, this ſection ſhall be ſplit into two parts: the firſt, where a man, yielding to a temptation, acts knowingly againſt his intereſt: the next, where he is overawed to act knowingly againſt his intereſt.

ARTICLE

ARTICLE I. *Where a man, yielding to a temptation, acts knowingly againſt his intereſt.*

JEAN MACKIE, heireſs of Maidland, having diſponed ſeveral parcels of land, lying about the town of Wigton, to perſons who were moſtly innkeepers 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 tempting 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 theſe diſpoſitions *. Upon this caſe it ought to be obſerved, that though fraud and circumvention were

* November 24. 1752, Mackie contra Maxwell, &c.

ſpecified as the foundation of this reduction, which is a common but ſlovenly practice in proceſſes of that ſort; yet 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 give away 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 is of no avail, more than the conſent of a child. With reſpect to the end, it is no leſs pernicious than theft or robbery.

ART. II.

ART. II. *Where a man is overawed to act knowingly againſt his intereſt.*

IF it be a moral wrong to tempt a weak man to act againſt his intereſt, extortion is a wrong ſtill more flagrant, by its nearer approach to open violence. What therefore only remains upon this article, is to illuſtrate it by examples.

Every benefit taken indirectly by a creditor, for the granting of which no impulſive cauſe appears but the money lent, will be voided as extorted. 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 heritable bond of corroboration, the debtor engaged 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 extortion †.

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

† November 30. 1736, Brown contra Muir.

Upon

Upon the ſame ground, a bond for a ſum taken from the principal debtor by his cautioner as a reward for lending his credit, was voided *.

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 ſtipulation of that ſort which makes a great 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. This paction is in the Roman law named *lex commiſſoria in pignoribus*, and in that law ſeems to be abſolutely reprobated †. With us it muſt be effectual at common law, becauſe there is no ſtatute againſt it. But then, as it is a hard and rigorous condition, extorted from a neceſſitous debtor, a court of equity will interpoſe to give relief. And this can be done by following

* Forbes 24. Fountainhall 27. January 1711, King contra Ker.

† l. ult. C. De pactis pignorum.

lowing a general rule applicable to all caſes of the kind; which is, to admit the debtor to redeem his pledge by payment, at any time, till the creditor in a declaratory proceſs ſignify his will to hold the pledge in place of his money. This proceſs affords the debtor an opportunity to purge his failure by payment; which is all that in fair dealing can be demanded by the creditor. And thus, the declarator ſerves a double purpoſe: it relieves the debtor from the hardſhip of a penal irritancy, by furniſhing him an opportunity to pay the debt; and if he be ſilent, the extracted decree operates a transference of the property to the creditor, which extinguiſhes the debt.

Hence it follows, that the debtor can redeem the wadſet or pledge, whether the bargain be lucrative or no. A declarator being neceſſary, the property is not tranſferred to the creditor, if the debtor be willing to redeem his pledge: and this option he muſt have, whether the creditor have made profit or no by 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

have an option 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 his option, even where the creditor has drawn leſs than his intereſt.

In equity, however, there is a material difference between 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 inſtead of intereſt: the debtor, on the other hand, may redeem his land when he pleaſes, upon repayment of the ſum borrowed. 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 tho' the rents have fallen ſhort of the intereſt. But if the debtor inſiſt upon the equity of redemption after the term to which the re-

demption is limited; he muſt, beſide repaying the ſum borrowed, make good the intereſt, as far as the rent of the land has proved deficient. For impartiality is eſſential to a court of equity: if the one party be relieved againſt the rigour 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 intitled to by law upon an ordinary loan *.

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. 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.

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

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. parl. 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 was competent except in a court of equity.

It was perhaps the ſtatute now mentioned that 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 ir- "ritant contained in contracts, tacks, in- "feftments, bonds, and obligations, pre- "ciſely according to the words and mean- "ing 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

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.

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 inſtead of intereſt, takes upon himſelf the inſolvency of the tenants; and the hazard of this inſolvency, however ſmall, ſaves from uſury; which conſiſts in ſtipulating a yearly ſum certain above the legal intereſt. But tho' 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 which account, it might be thought a proper ſubject for 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 he to follow 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 againſt utility, regarding the whole ſociety. The latter being by far the more weighty conſideration, muſt preponderate: and for that reaſon only are wadſets tolerated, even the moſt lucrative; for it is not ſafe to give any redreſs in equity.

This doctrine may be illuſtrated by 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 creditor, if he levy the rents for his payment, ſhall not be ſubjected to an account, but ſhall hold the rents in lieu of his intereſt." 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

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, affording a remedy equally complete in every caſe; which is, to oblige the creditor to account for what 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 between 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 runs no chance of getting leſs than the legal intereſt.

Pacta contra fidem tabularum nuptialium belong to this article. Such private pactions

tions between the bridegroom and his father, contrary to the marriage-articles openly agreed on, are hurtful to the wife and children; who will therefore be relieved upon the head of fraud. But the huſband cannot be ſo relieved, 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; for the fear of loſing his bride, leaves him not at liberty to refuſe any hard terms that may be impoſed by his father, who ſettles the eſtate upon him. The relief granted to the wife and children upon the head of fraud, comes properly under the following ſection; but for the ſake of connection is introduced here. In a contract of marriage the eſtate was ſettled upon the bridegroom by his father; and the bride's portion 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 afterward having privately before the marriage granted bond for a certain ſum to his father, it was voided at the wife's inſtance,

ſtance, 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 Sterling 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 favour the faculty was exerciſed, the defendants were aſſoilzied, the deed granting the faculty being *in fraudem pactorum nuptialium* †. The following caſes relate to the other branch, namely oppreſſion, intitling the huſband to reduce deeds granted by him-

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

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

ſelf.

ſelf. 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 warrandice. 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 portion before ſolemnization of the marriage, 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. 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 ‡. Thus the bridegroom's

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

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

‡ Abridg. caſes in equity, chap. 13. ſect. E. § 1.

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 *. 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 †.

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 recalling the money, if paid. The latter action is, in the Roman law, ſtyled,

* Abridg. caſes in equity, chap. 13. ſect. E. § 2.
† Ibid. § 3.

Condictio ob injustam causam. To take money for doing what I am bound to do without it, must be extortion: I hold the money *sine justa causa*, and 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 *. 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 †.

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 at that rate it would be difficult to deal with an heir during the life of his ancestor. But if such bargain appear very unequal, it is set aside, upon payment of what was really lent, with interest ‡. One intitled to an estate after the death of two tenants for life, takes L. 350 to pay L. 700 when the lives should fall, and

* Durie, penult. Feb. 1639, Mushet contra Dog.

† Nicolson, *(turpis causa)*, July 24. 1634, Roffie contra her curators.

‡ Abridg. cases in equity, ch. 13. sect. G. § 1. note.

mortgages

mortgages the eſtate as a ſecurity. Tho' both the tenants for life died within two years, yet the bargain being equal, no relief was given againſt it *. 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 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; but that,

* Abridg. caſes in equity, chap. 32. ſect. I. § 2.
† Ibid, § 1.

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 Jeffreys, it was inſiſted, That the clauſe freeing the plaintiff from the debt if he died before his father, made no difference; 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 unconſcionable, was in reality a circumſtance againſt him. Though in this caſe there was no proof of fraud, nor of any practice uſed to draw the plaintiff into the bargain; yet, becauſe of the unconſcionableneſs of the bargain, the plaintiff was relieved againſt it *. In the year 1730, the Earl of Peterborough, then Lord

* 2. Vernon 14. Berny contra Pitt.

Mordaunt,

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 *.

* July 13. 1745, Dr William Abercromby contra Earl of Peterborough.

SECT.

SECT. IV.

A man moved to act unknowingly againſt his intereſt, by fraud, deceit, or other artificial means.

IT is thought, that a court of common law ſeldom interpoſes in any of the caſes that come under the ſection immediately foregoing; and the reaſon is, that whether a man be led againſt his own intereſt by a violent temptation or by extortion, there is ſtill left to him in appearance a free choice. But with reſpect to the matters that belong to the preſent ſection, a man is led blindly againſt his own intereſt, and has no choice. This ſpecies of wrong, therefore, being more flagrant, is not neglected by courts of common law. It is accordingly laid down as a general rule in the Engliſh law, "That without "the expreſs proviſion of an act of parlia- "ment, all deceitful practices in defraud- "ing another of his known right, by "means of ſome artful device, contrary "to

" to the plain rules of common honeſty, " are condemned by the common law, " and puniſhed according to the heinouſ- " neſs of the offence *." Thus the cauſing an illiterate perſon to execute a deed to his prejudice, by reading it to him in words different from thoſe in the deed, is a fraud, which a court of common law will redreſs, by ſetting the deed aſide. The ſame where a woman is deceived to ſubſcribe a warrant of attorney for confeſſing a judgement, underſtanding the writing to be of a different import †. In ſelling a houſe, it being a lie to affirm that the rent is L. 30 inſtead of L. 20, by which the purchaſer is moved to give a greater price than the houſe is worth; this loſs will be repaired by a court of common law, though the purchaſer, by being more circumſpect, might have prevented the loſs.

In general, every covenant procured by fraud will be ſet aſide in a court of common law. But with regard to covenants or agreements diſregarded at common law, there can be no relief but in a court of e-

* New abridgement of the law, vol. 2. p. 594.

† 1. Sid. 431,

quity.

quity. Thus a policy of inſurance was ſet aſide upon fraud by a bill in chancery *.

We next proceed to enquire, whether every deceitful practice to impoſe upon others comes under common law. Fraud conſiſts in my perſuading a man who has confidence in me, to do an act as for his own intereſt, which I know will have the contrary effect. But in whatever manner a man be deceived or miſled, yet if he was not deceived by relying upon the friendſhip and integrity of another, it is not a fraud. Fraud therefore implies treachery, without which no artifice nor double dealing can be termed *fraud* in a proper ſenſe. But there are double-fac'd circumſtances without number, and other artful means, calculated to deceive, which do not involve any degree of treachery. Where a man is deceived by ſuch artifice, it muſt in ſome meaſure be his own fault; and byſtanders are more apt to make him the object of their ridicule than of their ſorrow: for which reaſon, frauds of this inferior nature have been overlooked by common law. But as every attempt to

* 2. Vernon 206.

deceive another to his prejudice is criminal in conſcience, it is the duty of a court of equity to repreſs ſuch deceit, by awarding reparation to the perſon who ſuffers. Utility pleads for reparation as well as equity; for if law were not attentive to repreſs deceit in its bud, corruption would gain ground, and even the groſſeſt frauds would become too ſtubborn for law. It is this ſpecies of deceit, excluding treachery, that Lord Coke probably had in his eye *, when he lays down the following doctrine, That all covins, frauds, and deceits, for which there is no remedy at common law, are and were always redreſſed in the court of chancery.

It is mentioned above, that a covenant procured by fraud will be ſet aſide in a court of common law; and I now give inſtances where a covenant procured by deceit that amounts not to fraud, is ſet aſide in a court of equity. A man 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 fulfil the agreement, a bill

* 4 Inſt. 84.

was brought by the bankrupt to compel a ſpecific performance. But it appearing that he had underhand agreed with ſome of his creditors to pay their whole debts, in order that they might draw in the reſt to a compoſition, the court would not decree the agreement, but diſmiſſed the bill *. A purchaſe made by a merchant in the courſe of commerce will be effectual, however ſoon his bankruptcy follow, provided it was his intention by continuing in trade to pay the price. But if he had bankruptcy in view, and no proſpect to pay the price, the bargain, brought about by a palpable cheat, will be reduced in a court of equity, and the ſubject be reſtored to the vender. The only thorny point is, to detect the *animus* of the purchaſer to defraud the vender. In the caſe of Joſeph Cave †, the preſumptive fraud was confined to three days before the *ceſſio bonorum*; but in that caſe Cave the purchaſer was in good credit, till he demanded a meeting of his creditors in order to ſurrender his effects to them. Other circumſtances may concur with in-

* 2. Vernon 71. Child contra Danbridge.

† Dict. tit. Fraud.

ſolvency

ſolvency to enlarge that period. Gilbert Barclay merchant in Cromarty was in labouring circumſtances, and owed much more than he was worth, when he made a purchaſe of ſalmon from Mackay of Bighouſe; and before delivery ſeveral of his creditors proceeded to execution againſt him. A few days after delivery, he made over the ſalmon to William Forſyth, another merchant of the ſame town, in part payment of a debt due to Forſyth; who was in the knowledge that Barclay was in labouring circumſtances, and that the price of the ſalmon was not paid. Execution thickened more and more upon him, and he broke in ten days or a fortnight after the ſalmon were delivered to Forſyth. From theſe circumſtances the court preſumed an intention in Barclay to defraud Bighouſe: and conſidering that Forſyth's purchaſe was not made *bona fide*, they found him liable to pay to Bighouſe the value of the ſalmon *.

Next of other tranſactions brought about by deceitful means. By a marriage-

* Mackay of Bighouſe contra William Forſyth merchant in Cromarty, January 20. 1758.

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 a conſiderable ſum in new buildings, and other improvements, intending to take the benefit after his father's death. This is a deceit which juſtice diſcountenances; and therefore it was decreed, that the leſſee ſhould enjoy for the reſidue of the term that was current at the father's death *. The defendant on a treaty of marriage for his daughter with the plaintiff, ſigned a writing compriſing the terms of the agreement. Deſigning afterward to get looſe from the agreement, he ordered his daughter to entice the plaintiff to deliver up the writing, and then to marry him. She obey'd; and the defendant ſtood at the corner of the ſtreet to ſee them go along to be married. The plaintiff was relieved on the point of deceit. A man having agreed to be bound for certain proviſions in his ſon's contract of marriage, upon a promiſe from the ſon to diſcharge the

* Abridgement caſes in equity, cap. 47. ſect. B. par. 10.

ſame,

ſame, which accordingly was done before the marriage: and after the marriage, money having been lent to the ſon upon the faith of the ſaid proviſions in his contract; the diſcharge was ſet aſide at the inſtance of the creditors, as being a deceitful contrivance between father and ſon to entrap them *. In a ſuit by the indorſee of a note or ticket, the debtor pleaded compenſation upon a note for the equivalent ſum, granted him by the indorſer, bearing the ſame date with that upon which the proceſs was founded. The court deemed this a deceitful contrivance to furniſh the indorſer credit; and therefore refuſed to ſuſtain the compenſation †.

A having an incumbrance upon an eſtate, is witneſs to a ſubſequent mortgage, but conceals his own incumbrance. For this wrong his incumbrance ſhall be poſtponed ‡. To mortgage land as free when there is an incumbrance upon it, is a cheat in the borrower; to which cheat the in-

* Stair, January 21. 1680, Caddel contra Raith.

† Fountainhall, Forbes, June 11. 1708, Bundy contra Kennedy.

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

cumbrancer

cumbrancer is acceſſory by countenancing the mortgage, and ſubſcribing it as a witneſs. The hurt thus done to the lender by putting him off with a lame ſecurity, was properly repaired by preferring him before the incumbrancer. The following caſes are of the ſame kind. A man lends his mortgage-deed to the mortgager, to enable him to borrow more money. The mortgagee being thus in combination with the mortgager to deceive the lender, is acceſſory to the fraud. And the hurt thereby done was properly repaired by poſtponing his mortgage to the incumbrance which the lender got for his money *. 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 incumbrances. The ſtatute was poſtponed to the mortgage †. *A* being about to lend money to *B* on a mortgage, ſends to inquire 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,

* 2 Vern. 726. Peter contra Ruſſel.

† New abridgement of the law, vol. 2. p. 598. Draper contra Borlace.

his

his mortgage will be poſtponed *. 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 becauſe ſhe was alſo one of the inſtrumentary witneſſes †.

SECT. V.

What remedy is applied by a court of equity againſt the wrongs above ſtated.

IT is proper to be premiſed, that regulations for preventing harm cannot be other but prohibitory; and conſequently cannot afford opportunity for the interpoſition of any court of law till the wrong be committed. To reſtore the party injured to his former ſituation, where that method is practicable, will be preferred

* 2 Vern. 554. Ibbotſon contra Rhodes.
† 2 Vern. 150. Hunſdens contra Cheiney.

as

as the moſt complete remedy. Thus goods ſtolen are reſtored to the owner; and a diſpoſition of land procured by fear, or undue influence, is voided, in order that the diſponer may be reſtored to his property. But it ſeldom happens that there is place for a remedy ſo complete: it holds commonly, as expreſſed in the Roman law, that *factum infectum fieri nequit*; and when that is the caſe, the perſon injured, who cannot be reſtored to his former ſituation, muſt be contented with reparation in money.

The firſt queſtion that occurs here is, Whether in money-reparation, conſequential damage can be ſtated. Conſequential damage is ſometimes certain, ſometimes uncertain. A houſe of mine rented by a tenant, is unlawfully demoliſhed: the direct damage is the loſs of the houſe: the conſequential damage is the loſs of the rent; which in this caſe is certain, becauſe the unlawful act neceſſarily relieves the tenant from paying rent. Again, a man robs me of my horſe: the direct damage is the horſe loſt to me: the conſequential damage is the being prevented from making profit by him; which is not

certain, becauſe the opportunity of making profit might have failed me, and poſſibly might have been neglected though it had offered. In the caſe firſt mentioned, the loſs of the rent, being certain, comes properly under the eſtimation of actual damage; and conſequently will not be excluded by a court of common law. But conſequential damage that is uncertain, is not always taken into the account. And the reaſon follows. It is regularly incumbent on the man who claims reparation, to prove the extent of the damage he has ſuſtained; which cannot be done with reſpect to conſequential damage, as far as uncertain. But as it is undoubtedly a prejudice to be deprived of profit that probably might have been made; the claimant is in equity relieved from this proof, where the direct damage is the effect of a criminal act: every preſumption is turned againſt the delinquent; and he is charged with every probable article of profit, unleſs he can give convincing evidence that the profit claimed could not have been made. And this is conformable to the rules of equity; for as the profits are rendered uncertain by a

criminal act, the conſequences of this uncertainty ought to affect the delinquent, not his party who is innocent. Here is a fair opportunity for the interpoſition of equity. A court of common law cannot liſten to any proof but what is complete; and cannot award damages except as far as rendered certain by evidence. A court of equity, with reſpect to criminal acts, turns the uncertainty againſt the delinquent; and by that means affords complete reparation to the perſon injured. Thus, in a ſpuilzie, which is a claim for damages in a civil court founded on the violent abſtraction of moveable goods, the profit that might have been made by the horſes carried off, termed *violent profits*, makes always an article in the eſtimation of damage. The rule is different, where the damage is occaſioned by a culpable act only; for as there is nothing here to vary the rule of law, *Quod affirmanti incumbit probatio*, no article of profit will be ſuſtained but what can be rendered certain by evidence. This, it is true, may poſſibly be prejudicial to the perſon who is hurt by the culpable act: but *humanum eſt errare*; and it is more expedient that he ſuffer

ſuffer ſome prejudice, than that men ſhould be terrified from induſtry and activity, by a rigorous and vague claim (*a*). This doctrine is eſpouſed by Ulpian *: " Item Labeo ſcribit, ſi cum vi ventorum " navis impulſa eſſet in funes anchorarum " alterius, et nautæ funes præcidiſſent, ſi " nullo alio modo, niſi præciſis funibus " explicare ſe potuit, nullam actionem " dandam. Idemque Labeo, et Proculus, " et circa retia piſcatorum, in quæ navis " inciderat, æſtimarunt. Plane, ſi culpa " nautarum id factum eſſet, lege Aquilia " agendum. Sed ubi damni injuria agi- " tur, ob retia, non piſcium, qui capti " non ſunt, fieri æſtimationem; cum in- " certum fuerit, an caperentur. Idemque " et in venatoribus, et in aucupibus pro- " bandum." The following inſtance is an apt illuſtration of this doctrine. The Duke of Argyle's right of admiralty reach-

(*a*) In the Engliſh courts of common law there is no accurate diſtinction made between damage certain and uncertain. Damages are taxed by the jury, who give ſuch damages as in conſcience they think ſufficient to make up the loſs, without having any preciſe rule.

* l. 29 § 3. ad leg. Aquil.

es over the weſtern iſlands; on the coaſt of which a wrecked ſhip, floating without a living creature in it, was laid hold of and ſold by authority of the Duke's depute to one Robertſon, who refitted the ſhip at a conſiderable charge, and provided a crew to carry her to Clyde. Sir Ludovick Grant, who had a deputation from the Admiral of Scotland, miſapprehending the bounds of his juriſdiction, gave orders for ſeizing the ſhip as his property; and theſe orders were put in execution after the ſhip was refitted by Robertſon. As ſoon as the miſtake was diſcovered, the ſhip was redelivered. But Robertſon, who loſt conſiderably by the delay, brought a proceſs againſt Sir Ludovick for damages, and obtained a decree * for a large ſum, to which the direct damage amounted. It was conſidered, that the defendant's error was culpable in acting raſhly without duly examining the limits of his juriſdiction, which might have been aſcertained by inſpecting the Duke's title on record. But as to the conſequential damage, namely, the profits Robertſon could have made by the ſhip

* December 21. 1756.

had

had he not been unjuſtly deprived of the poſſeſſion, which muſt be uncertain, the court unanimouſly rejected that branch of the claim.

The next queſtion is, Whether in eſtimating damage there be ground in any caſe for admitting the *pretium affectionis*. Paulus anſwers, That there is not: "Si "ſervum meum occidiſti, non affectiones "æſtimandas eſſe puto, (veluti ſi filium "tuum naturalem quis occiderit, quem "tu magno emptum velles), ſed quanti "omnibus valeret. Sextus quoque Pedius "ait, pretia rerum, non ex affectione, nec "utilitate ſingulorum, ſed communiter "fungi. Itaque eum, qui filium natura-"lem poſſidet, non eo locupletiorem eſſe, "quod eum plurimo, ſi alius poſſideret, "redempturus fuit: nec illum, qui fi-"lium alienum poſſideat, tantum habere, "quanti eum patri vendere poſſet: in le-"ge enim Aquilia (damnum) conſequi-"mur, et amiſiſſe dicemur, quod aut con-"ſequi potuimus, aut erogare cogimur *." As this reſponſe is given in general terms, without diſtinction of caſes, it muſt be conſidered as declaratory of the common

* l. 33. ad legem Aquiliam.

law.

law. The ſame rule muſt obtain in equity where the wrong is culpable only. But in repairing miſchief done intentionally, the *pretium affectionis* ought in equity to be admitted; becauſe otherwiſe the perſon who ſuffers obtains no adequate reparation; and alſo becauſe that otherwiſe there is no proper diſtinction made between a crime and a fault.

CHAP. II.

Powers of a Court of Equity to remedy what is imperfect in common law, with reſpect to protecting the weak of mind from harming themſelves by unequal bargains and irrational deeds.

THE weakneſs and imbecillity of ſome men make them a fit prey for the crafty and deſigning. But as every deed, covenant, or tranſaction, procured by undue influence, comes under the foregoing chapter, the preſent chapter is confined to caſes where equity protects individuals who

who are not miſled by undue influence, from hurting themſelves by their own weakneſs and imbecillity. And here, though for the ſake of commerce utility will not liſten to a complaint of inequality among *majores, ſcientes, et prudentes*; yet the weak of mind ought to be excepted; becauſe ſuch perſons ought to be removed from commerce, and their tranſactions be confined to what is ſtrictly neceſſary for their ſubſiſtence and well-being. And this is juſtly confining to the weak of mind a rule againſt inequality in bargains, which the Romans, ignorant of commerce, made general with reſpect to every perſon.

I begin with deeds granted by perſons under age, who cannot be ſuppoſed mature in judgement. A reduction upon the head of minority and leſion, unknown in the common law, is an action ſuſtained by a court of equity for ſetting aſide any unequal tranſaction done during nonage. But inequality ought not to be regarded in a deed that proceeds from a virtuous and rational motive, which would be a laudable deed in one of full age. I give the following examples. A young man under age, having no means of his own,

is

is alimented and educated by a near relation, till he happens to ſucceed to an opulent fortune. Full of gratitude, he grants to his benefactor a remuneratory bond for a moderate ſum, and dies without arriving to full age. A court of equity will never give countenance to the heir attempting to reduce this bond; for gratitude is a moral duty, and the young man was in conſcience bound to make a grateful return. A court of equity, it is true, has not many opportunities to enforce the duty of gratitude, becauſe it can ſeldom be brought under a general rule; but here the court may ſafely interpoſe to ſupport a grateful return, the extent of which is aſcertained by the young man himſelf. I put another caſe. 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 ſuitable proviſions, and dies under age. I put a third caſe. A man of an opulent fortune dies ſuddenly, leaving a numerous family of children, all of the female ſex, without making proviſions for them. A collateral heir-male ſucceeds, who ſupplies this

omiſſion by giving ſuitable proviſions, but dies under age. A court of equity would deviate from the ſpirit of its inſtitution, if it ſhould authoriſe a reduction of ſuch proviſions by the granter's heir, upon the head of minority and leſion. For a rational and laudable deed never can be leſion in any proper ſenſe.

The ſame doctrine is applicable to thoſe who have a natural imbecillity which continues for life. A tranſaction made 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 the court interpoſe, though there can be no general rule for direction.

The protection afforded by equity to the weak in mind, is extended to ſave them from hurting themſelves by irrational ſettlements. The opinions of men with reſpect to the management of affairs and the exerciſing acts of property, are no leſs various than their faces: and as the world is ſeldom agreed about what is rational and irrational in ſuch matters, there can be no rule for reſtraining the ſettlements of thoſe who are not remarkably weak,

unleſs ſuch ſettlements be not only irrational but abſurd. But as the weak and facile are protected againſt unequal bargains, there is the ſame reaſon for their being protected againſt abſurd ſettlements. Take the following example. 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, ſome time 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 inſtances 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

the teſtament was made, who had ready acceſs to her at all times, while her brother lived at a diſtance. In reaſoning 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 health. Weight alſo was laid upon the following circumſtance, That the teſtament was made *remotis arbitris*, and kept ſecret; which ſhowed the defendant's conſciouſneſs, that the teſtatrix would have been eaſily diverted by her friends from making ſo irrational a ſettlement. In this view, it was conſidered as a wrong in him to take from her, in theſe circumſtances, an irrational

deed; and conſequently, that he ought to be reſtrained in equity from taking any benefit by it. The teſtament was voided *.

A temporary weakneſs ought, for the time of its endurance, to have the ſame effect in law with one that is perpetual: for which reaſon a diſcharge obtained from a woman during the pains of childbirth was reduced; *Fountainhall, 7th December* 1686.

CHAP. III.

Powers of a court of equity to remedy what is imperfect in common law, with reſpect to the natural duty of benevolence.

IN the Introduction there was occaſion to obſerve, that the virtue of benevolence is by various connections converted

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

into

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 in 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, with reſpect to pecuniary intereſt, confined to the latter. No connection, no ſituation, nor circumſtance, makes it my duty to enlarge the eſtate of any perſon who has already a ſufficiency, 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 make my children independent, ſo as to preſerve them from want (*a*): all

(*a*) This propoſition is illuſtrated in the following caſe. Mary Scot, daughter of Scot of Highcheſter, having,

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.

Here

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, but the 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. 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 it was ſtated, that the purſuer, being very young when her father died, was educated by her mother to no 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 ſettling him in buſineſs with a competent ſtock, is relieved from all further aliment; yet if a ſon be bred

Here is a clear circumſcription of equity, as 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 makes this a duty. What then is 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

bred as a gentleman, without being inſtructed in any art that can gain him a farthing, he is intitled to be alimented for life; for otherwiſe 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 otherwiſe provided; 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 intitled to an aliment of L. 12 Sterling yearly, and decerned againſt the defendant for the ſame. — 8*th March* 1759, *Mary Scot contra Mary Sharp*.

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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 doing good, it is wiſely directed where it is the moſt uſeful, namely, to relieve others from diſtreſs.

It appears then, that equity, with reſpect to the duty of ſerving others, is not extended beyond pity or compaſſion. But it is circumſcribed within ſtill narrower bounds; for 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; and 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 pre-

* See the Introduction.

ciſe 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 elucidation. 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 more intimate 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.

SECT. 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 between a creditor and a cautioner. The nature of this engagement demands benevolence on the part of the creditor. The cautioner, when he pays the debt, ſuffers loſs by the act of the creditor, though not by his fault; and the creditor will find himſelf bound in humanity, as far as conſiſtent with his own intereſt, to aſſiſt the cautioner in operating his relief againſt the principal debtor. He ought in particular to convey to the cautioner, the bond with the execution done upon it, in order that the cautioner may the more ſpeedily obtain

obtain relief from the principal. 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 on the Roman law: "Cum poſſeſſor unus, expediendi "negotii cauſa, tributorum jure conveni-"retur; adverſus cæteros, quorum æque "prædia tenentur, ei, qui conventus eſt, "actiones a fiſco præſtantur: ſcilicet ut "omnes pro modo prædiorum pecuniam "tributi conferant: nec inutiliter actio-"nes præſtantur tametſi fiſcus pecuniam "ſuam reciperaverit, quia nominum ven-"ditorum pretium acceptum videtur *." From which conſideration it follows, that this aſſignment may be demanded and granted *ex poſt facto*, if the precaution be omitted when the money is paid.

From this connection 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 cre-

* l. 5. De cenſibus.

ditor diſcharge or paſs from his ſeparate ſecurity, the cautioner, as 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, remote in point of time, will not be much regarded; becauſe the rules of equity lay formerly 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, 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 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 intitled 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

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 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 between the creditor and cautioner, becauſe upon it depends, in my apprehenſion, the mutual relief between 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 that intitles 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: nay, ſuppoſing them bound in the ſame deed, we are not from that ſingle circumſtance to imply a mutual conſent 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

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 with reſpect to equity, the connection of being bound for payment of the ſame debt, is too ſlight to intitle 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 ſuch aſſignment may be granted *ex poſt facto*: hence it is the duty of the creditor to grant the 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

plied legal aſſignment, is the true foundation of the mutual relief among co-cautioners, which obtains both in Scotland and England.

Utility concurs to ſupport this equitable claim: no ſituation with regard to law would be attended with more pernicious conſequences, than to permit a creditor to oppreſs one cautioner and relieve others: judges ought to be jealous of ſuch arbitrary 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.

The creditor, as has been ſaid, being bound to all the cautioners equally, cannot legally give an aſſignment to one of them in ſuch terms as to intitle him to claim the whole from the other cautioners. 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 cautioner,

tioner, deducting only his own part of the debt, is unequal; becauſe it evidently gives the aſſignee an advantage over his co-cautioners. On the other hand, the aſſignee is in a worſe ſituation than any other of them, if he muſt ſubmit to take from each of them ſeparately his proportion of the debt: upon this plan, the cautioner who pays the debt, is forc'd 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. To explain this rule, I ſuppoſe ſix cautioners bound in a bond for ſix hundred pounds. The firſt paying the debt, is intitled to claim the half from the ſecond, who ought to be equally burdened 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 that caſe, the aſſignment is a legal title to lead an adjudication for the whole debt. Equity is ſatisfied, if no more be actually drawn out of the eſtate of any of the co-cautioners, than what 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 cautioners that the ſecurity be as extenſive as poſſible; for it intitles the adjudger to a greater proportion of the ſubject or price, in competition with extraneous creditors.

The ſame principles and concluſions are equally applicable to *correi debendi*, where a number of debtors are bound conjunctly and ſeverally to one creditor. Equity requires the utmoſt impartiality in him to his debtors: if for his own eaſe he take the whole from one, he is bound to grant an aſſignment preciſely as in the caſe of co-cautioners. Utility joins with equity

to enforce this impartiality. And it makes no difference whether the *correi debendi* be bound for a civil debt, or be bound *ex delicto*; for in both caſes equally it is the duty of the creditor to act impartially, and in both caſes equally utility requires impartiality.

Another connection, of the ſame nature with the former, is that between one 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 it be the will of the preferable creditor to draw his whole payment out of that ſubject in which the other creditor is infeft, the latter for his relief is intitled to have the preferable ſecurity aſſigned to him: which can be done upon the conſtruction above mentioned; for the ſum recovered by the preferable creditor out of the ſubject on which the other creditor is alſo infeft, is juſtly underſtood to be advanced by the latter, being a ſum which he was intitled to, and

muſt have drawn had not the preferable creditor intervened; and this ſum is held to be the purchaſe-money of the conveyance. This conſtruction, preſerving the preferable debt entire in the perſon of the ſecond creditor, intitles him to draw payment of that debt out of the other tenement. By this equitable conſtruction, matters are reſtored to the ſame ſtate 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.

It is ſcarce neceſſary here to obſerve, that a ſuppoſed conveyance, 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 aſſign, the queſtion is, To what extent. Whether ought the aſſignment to have a total effect, or only to put the diſappointed creditor in the ſame ſituation as if the preferable creditor had 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 in 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.

We proceed to another connection, which

* 2 Chancery Caſes 4.

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is that between the preferable creditor infeft in both tenements, and two ſecondary creditors, one infeft in one of the tenements, and one in the other. 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 between them. The equitable meaſure is, to 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 intitled to an aſſignment; not indeed total, which would be an arbitrary act, but proportional, ſo as to intitle him to draw out of the other ſubject, what he would have drawn out of his own, had the preferable creditor drawn proportionally 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

infeftment of annualrent. A man grants a rent-charge out of all his lands, and afterward 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 *.

A caſe connected with that laſt handled, 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 between the creditors is by no means ſo intimate, as to oblige any one of them, at the expence of his own intereſt, to ſerve the others. There is no rule in equity to bar the catholic creditor 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

* Abridg. caſes in equity, cap. 18. ſect. A. § 1.

is

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 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 *.

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 afterward 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: the bill was diſmiſſed, becauſe the grantee of the rent-charge may diſtrain in all or any part of the lands for her rent; and there is no equity to abridge her remedy †.

* Immediately below, ſect. 2. art. 1.

† 1 Vern. 347.

If

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 renunciation 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 mentioned, the catholic creditor is equally connected with each of the ſecondary creditors, and upon that account is bound to act impartially between 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 intitled 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 afterward 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 ſecond creditor is in this caſe not intitled 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 lays 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 by being both of them creditors to the ſame perſon, and both of them infeft on the ſame ſubject for ſecurity.

A queſtion of great importance that has frequently been debated in the court of ſeſſion, appears to depend upon the principles above ſet forth. The queſtion is, Whether a 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. With reſpect to feu-duties, ceſs, and teind, theſe 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. But this is not the caſe of the entailer's perſonal debts, which burden the heirs

heirs of entail perſonally, but not the fruits. Let us conſider what that difference will produce. An heir in a fee-ſimple is 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 theſe rents are his property, juſt as much as if the eſtate were a fee-ſimple; and the conſuming rents belonging to himſelf, cannot ſubject him as tenant in tail more than if his eſtate were 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, finds this caſe reſolvable into one above determined, namely, that of *correi debendi*, where ſeveral debtors are conjunctly bound for payment of one debt. There is no difference between *correi debendi* and heirs of entail, but that the former are all of them liable at

the ſame time, the latter only ſucceſſively; which makes no difference either in equity or in expediency, the ſame impartiality being required of the creditor with reſpect to both. While the debt ſubſiſts, the creditor is bound to lay the burden of his intereſt upon each heir equally; conſequently each heir is bound to pay the intereſt that ariſes during his time. And if the principal be demanded, the heir who pays is only intitled to an aſſignment of the principal ſum, and of the intereſt that ſhall ariſe after his own death. 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 *.

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 intitled to ſupply any defect in law, whether written or cuſtomary, in order to make the law rational. The law, autho-

* 1. Chancery caſes 223.

riſing

riſing the huſband to poſſeſs 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* *.

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 ſpecified, without power of revocation, reſerving only his own liferent. Many years after, forgetting the aſſignment, he makes a 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

* Home, Jan. 3. 1717, Anna Monteith.

the

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, as 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 that are conterminous, form ſuch a connection between 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 intitle me to repair a bulwark within that field, provided the reparation do not hurt 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

* l. 2. § 5. in fine, De aqua, et aquæ pluviæ arcen.

order

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.

But in order to procure any actual profit, or to make myſelf *locupletior*, equity will not interpoſe or intitle me to make any alteration in my neighbour's property, even where he cannot ſpecify any prejudice by the alteration. The reaſon is given above, That equity never obliges any man, whether by acting or ſuffering, to encreaſe the eſtate 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 propoſed to raiſe the purſuer's mill-wheel ten inches, which would make the mill go as well as formerly; offering ſecurity againſt all future

ture damage: and urged, that to refuſe ſubmitting to this alteration would be acting *in æmulationem vicini*, which the law doth not indulge. The court judged the defendant's dam-dike to be an encroachment on the purſuer's property, and ordained the ſame to be removed or taken down as far as it occaſioned the reſtagnation *.

SECT. II.

Connections that make benevolence a duty even againſt our intereſt.

THeſe connections muſt be very intimate; for, as obſerved in the beginning of the preſent chapter, it requires a much ſtronger connection to oblige me to beſtow upon another any portion of my ſubſtance, than merely to do a good office which takes nothing from me. The bulk of theſe connections, though extremely various, may be brought under the fol-

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

lowing heads. 1ſt, Connections that intitle a man to have his loſs made up out of my gain. 2d, Connections that intitle a man who is not, properly ſpeaking, a loſer, to partake of my gain. 3d, Connections that intitle one who is a loſer to a recompence from one who is not a gainer.

ART. I. *Connections that intitle a man to have his loſs made up out of my gain.*

No perſonal connection, ſuppoſing the moſt intimate, that of parent and child, can make it an act of juſtice, that one who is a gainer, ſhould repair the loſs ſuſtained by another, unleſs there be alſo ſome connection between the loſs and gain; and that connection is a capital circumſtance in the preſent ſpeculation. The connections hitherto mentioned relate to perſons; this relates to things. If, for example, I lay out my money for meliorating a ſubject that I conſider to be my own, but which is afterward diſcovered to be the property of another; my loſs in this caſe is

intimately connected with his gain, becauſe in effect my money goes into his pocket.

The connection between the loſs and gain may be more or leſs intimate: and its different degrees of intimacy ought to be carefully noted. When this connection is found in the higheſt degree, there is ſcarce requiſite any other circumſtance to oblige one to apply his gain for making up another's loſs: in its lower degrees no duty ariſes, unleſs the perſons be otherwiſe ſtrongly connected. Proceeding then to trace theſe degrees, the loweſt I 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 upward, 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

large cargo from abroad, retailing it 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 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 completeſt, is where that which is loſt by the one is gained by the other; or, in other words, where the money of which the one is deprived benefits the other. This is the caſe firſt mentioned, of money laid out by a *bona fide poſſeſſor*, in meliorating a ſubject that is afterward claimed by the proprietor.

The money that the former loſes is gained by the latter.

A famous maxim of the Roman law, *Nemo debet locupletari aliena jactura*, is applicable to this article: and in order to aſcertain, if it can be done, what are the connections that make it the duty of one man to part with his gain for repairing another's loſs, I ſhall begin with a commentary upon that maxim. I obſerve firſt, That it is expreſſed abſtractly, as holding true in general, without diſtinction of perſons; and therefore that the duty it eſtabliſhes muſt be founded upon a real connection, independent altogether of perſonal connections: which leads us to examine what that real connection muſt be. *Nemo debet locupletari aliena jactura*, or, No perſon ought to profit *by* another's loſs, implies a connection between the loſs and the gain: it implies that the gain ariſes *by* the loſs, or *by means* of the loſs. Taking therefore the maxim literally, it ought to take place where-ever the gain is occaſioned by the loſs, or perhaps occaſions the loſs; which certainly is not good law. In the ſecond and third caſes above mentioned, the ſame cauſe that deſtroys the

the one merchant is profitable to the other: yet no man who in ſuch circumſtances makes profit, finds himſelf bound in conſcience to make up the other's loſs. It appears then, that this maxim, like moſt general maxims, is apt to miſlead by being too comprehenſive. Upon ſerious reflection, we find, that what a man acquires by his own induſtry, or by accident, however connected with the loſs ſuſtained by another, will not be taken from him to make up that loſs, if there be no perſonal connection. The only real connection that of itſelf binds him, is where another's money is converted to his uſe. This circumſtance, though without any intention to benefit him, will bind him in conſcience to make up the other's loſs as far as he himſelf is a gainer. Here the maxim, *Nemo debet locupletari aliena jactura*, taken in its moſt extenſive ſenſe, is applicable; and the ſingle caſe, as far as I underſtand, where it is applicable. The moſt noted caſe of this kind is, where the poſſeſſor of a ſubject which he *bona fide* conſiders to be his own, beſtows his money on reparations and meliorations, intending nothing but his own benefit: the proprietor

proprietor claims the ſubject in a proceſs, and prevails: he profits by the meliorations; and the money beſtow'd on theſe meliorations is converted to his uſe. Every one muſt be ſenſible 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 the 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 ſeparate exiſtence upon which to found a *rei vindicatio:* the proprietor, in claiming the ſubject, does no more but exerciſe his own right; which cannot ſubject him perſonally to any demand. 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 uncomfortable were individuals diſpoſed in every caſe 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 make it a law in our nature, never to take advantage of error

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 theſe extremes. No man is conſcious of wrong when, to ſave himſelf from loſs, he takes advantage of an error committed by another: if there muſt be a loſs, the moral ſenſe 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,

ſtice. 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 between 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 internally by the delight it affords the human mind. No ſcene is more diſguſtful than that of things depending on 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 clearly applicable to the caſe above mentioned. The titles of land-property being 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 beſtow'd without heſitation on repairing and meliorating the ſubject. Equity will not permit the owner to profit by ſuch miſtake, and in effect to pocket the money of the innocent poſſeſſor: he will be compelled by a court of equity to make up the loſs, as far as he is *locupletior*. Thus the poſſeſſor of a tenement, having, on the faith and belief of its being his own, made conſiderable meliorations, was found intitled 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, what is loſt to the one accrues to the other. The maxim then muſt be underſtood in this limited ſenſe; for no connection between 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 per-

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

ſon who gains, to make up the other's loſs.

But ſuppoſing the ſubject meliorated to have periſhed before bringing the action, is the proprietor notwithſtanding liable? I anſwer, That where equity makes benevolence a duty to thoſe who benefit us without intending it, it is not ſufficient that there has been gain one time or other: it is implied in the 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 out of which the loſs can be made up.

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 authoriſe 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 intitle the *bona fide poſſeſſor* to retain the ſubject, till he got payment of his expence; and this ex-

* See Hiſtorical law tracts, tract 8.

ception

ception the judges could have no difficulty to ſuſtain, becauſe exceptions were not ſubjected to any *formula*. The inconvenient reſtraint of theſe *formulæ* was in time broken through, and *actiones in factum*, or *upon the caſe*, were introduced, which are 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, namely, by an exception while he remained in poſſeſſion, and by an action if he happened to loſe the poſſeſſion.

Another caſe, differing nothing from the former in effect, though conſiderably in its circumſtances, is where, upon a fictitious mandate, one purchaſes my goods, or borrows my money, for the uſe of another. That other is not liable *ex mandato*, becauſe he gave no mandate: but if I can prove that the money or goods were actually applied for his uſe, equity affords me a claim againſt him, as far as he is a gainer. Thus, in an action for payment of merchant-goods purchaſed in name of the defendant, and applied to his uſe, the defendant inſiſted, that he gave no com-

miſſion; 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 be-"ſpoke the goods *." This caſe, like the former, reſts entirely upon the real connection between the loſs and gain, independent of which there was no connection between the parties. And in it, perhaps more clearly than in the former, every one muſt be ſenſible, that the man who reaps the benefit is in duty bound to make up the other's loſs. 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 †. Upon the ſuppoſition of a gift, it could not well

* Stair, February 20. 1669, Bruce contra Stanhope.

† July 1726, Hawthorn contra Urquhart.

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be ſpecified that the defendant was *locupletior*: a man will ſpend liberally what he conſiders as a preſent, though he would not lay out his money upon the purchaſe.

Having endeavoured to aſcertain, with all poſſible accuracy, that degree of connection between 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 aſcertain the preciſe meaning of loſs and gain as underſtood in the maxim. And the firſt doubt that occurs is, Whether the term *locupletior* comprehends every real benefit, prevention of loſs as well as a 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 land, this is a poſitive acceſſion to the ſubject, which makes the proprietor *locupletior* in the ſtricteſt ſenſe of the word. But it may happen that the money laid out by the *bona fide poſſeſſor* is directed to prevent loſs; as where he fortifies the bank of a river againſt its incroachments, where he ſupports a tottering edifice, or where he tranſacts a claim that threatened to carry off the

the property. Is the maxim applicable to caſes of this kind, 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 incroachments 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. Here equity ſupports the claim of him who is

certans

certans de damno evitando; for, as obſerved above, there is in human nature a perception 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; which is the ſame whether it has been applied to prevent loſs, or to make a real acceſſion to a man's fortune. In the caſes accordingly that have occurred, I find no diſtinction made; and in thoſe which follow, there was no benefit 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.

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From what is ſaid, it may poſſibly be thought, that the foregoing rule of equity is applicable where-ever it can be ſubſumed, that the loſs ſuſtained by one proves beneficial to another. But this will be found a raſh thought, 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 borough, 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 their work and furniſhings; and the adjudgers are in one ſenſe *locupletiores*, as by means of the tenement 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 between property and obligation. 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 though 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;

* Dec. 4. 1735, Burns contra creditors of Maclellan.

for otherwiſe a court of equity muſt not undertake to make up 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 heritors 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 mode of fiſhing. What the one loſes by the interruption, is probably gained by the other, at leaſt in ſome meaſure. But as what is here transferred from the one to the other cannot 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

leaving an infant heir: the land by this means comes into the ſuperior's hand, and the leaſe is ſuperſeded 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. The following caſe 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, namely, 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 at leſs expence *. The loſs here was not aſcertained, and was ſcarce capable 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 levied her ſhare, or have got a friend to ſerve her *gratis*.

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

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 encourage any wrong. Whence it follows, that no man is intitled to the aid of a court of equity, where he ſuffers by his own fault. For this reaſon the proprietor is not made liable for the expence of profitable meliorations, but where the meliorations were made *bona fide* by a perſon 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 plough and

* l. 5. C. De rei vindic.

ſow,

ſow, he ought to have no claim for his ſeed nor his labour. The claim in theſe circumſtances hath no foundation either in juſtice or utility: yet the claim was ſuſtained *.

But there are many perſonal connections joined with a much ſlighter real connection than that above mentioned, which intitle a man to have his loſs made up out of my gain. Of which take the following examples.

There are three creditors connected by their relation to the ſame debtor who is a bankrupt, and by their relation to two land-eſtates *A* and *B* belonging to the debtor, the firſt creditor being preferably ſecured on both eſtates, one of the ſecondary creditors being ſecured upon *A*, the other upon *B*. The catholic creditor purchaſes one of the ſecondary debts under its value, by which he is a gainer; for by his preferable debt he cuts out the other ſecondary creditor, and by that means draws the whole price of the two ſubjects. The queſtion is, Whether equity will ſuffer him to retain his gain againſt the other

* Stair, February 22. 1671, Gordon contra Macculloch.

ſecondary

ſecondary creditor, who is thus cut out of his ſecurity. It cannot indeed be ſpecified here, as in the caſe of the *bonæ fidei poſſeſſor rei alienæ*, that money given out by the one is converted to the uſe of the other: but then the loſs and gain are neceſſarily connected by having a common cauſe, namely, the purchaſe made by the catholic creditor. This connection between 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 make up the loſs that the other creditor ſuſtains. And one with confidence may deliver this opinion, when the following circumſtance is added, that the loſs was occaſioned by the catholic creditor, in making a purchaſe that he was ſenſible would ruin his fellow-creditor.

The next caſe in order is of two aſſignees to the ſame bond, ignorant of each other. The cedent or aſſignor contrives 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 it be preferred for the whole ſum

ſum in the bond, or only for the price paid for it? The circumſtances here favour the poſtponed aſſignee, though they have not the ſame weight with thoſe in the former: the material difference is, that the aſſignee preferred made his purchaſe without knowing of his competitor, and conſequently without any thought of diſtreſſing him. The perſonal connection however, joined with the neceſſary connection between the loſs and gain, appears ſufficient to deprive the laſt aſſignee of his gain, in order to make up the loſs ſuſtained by the firſt. The caſe would be more doubtful, had the firſt aſſignment been firſt completed; becauſe it may appear hard, that the intervention of a ſecond purchaſer ſhould deprive the firſt of a profitable bargain. I leave this point to be ripened by time and mature deliberation. The progreſs of equity is ſlow, though conſtant, toward the more delicate articles of natural juſtice. If there appear any difficulty about extending equity to this caſe, the difficulty probably will vaniſh in courſe of time.

One thing is certain, that in the Engliſh court of chancery there would be no heſitation

heſitation to apply equity to this caſe. That court extends its power a great way farther; farther indeed than ſeems juſt. A ſtranger, for example, who purchaſes a prior incumbrance, can draw no more from the other incumbrancers than the ſum 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, being applicable 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 ſuch a demand: 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 be occaſioned by 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 this purchaſe does not harm the other incumbrancers; for when the

* 1. Vernon 476.

purchaſer claims the debt in its utmoſt extent, it is no more than what his author could do. The rule of chancery, in this view, appears a little whimſical: it deprives me of a lucrative bargain, the fruit of my own induſtry, to beſtow it, not upon any perſon who is hurt by the bargain, but upon thoſe who are in no worſe condition than 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 on ſuch a condition, it is in effect a prohibition of ſuch purchaſes, which would prove a great inconveniency to many whoſe funds are locked up by the bankruptcy of their debtors.

That an heir acquiring an incumbrance ſhould be allowed no more but 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 Scot-

* 1. Salkeld 155.

land with regard to heirs who take the benefit of inventory. But the caſe of an heir is very different from that of a ſtranger. He hath in his hand the fund for payment of the creditors, which he ought faithfully to account for; and therefore he is not permitted to ſtate any article for exhauſting that fund beyond what he hath actually expended: if a creditor accept leſs than his proportion, the fund for the other creditors is ſo much the larger.

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 has no claim but to be kept *indemnis*. But ſuppoſing the principal debtor bankrupt, I diſcover no ground other than paction, that can bind one cautioner to communicate eaſes to another: and yet it is the prevailing, I may ſay the eſtabliſhed, opinion, That a cautioner who obtains an eaſe muſt communicate the benefit to his co-cautioner. 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

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 ought to 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 the connection between two cautioners can never be ſo intimate, as to oblige the one who is not a gainer to make up the other's loſs; which is the caſe of the cautioner who obtains an eaſe, ſuppoſing that eaſe to be leſs than that proportion of the debt which he ſtands bound to pay. Upon the whole, my notion is, that if a cautioner, upon account of objections againſt the debt, or upon account of any circumſtance that regards the principal

debtor, obtain an eaſe, he is bound to communicate that eaſe to his fellow-cautioner, upon the following rational principle, That both cautioners ought equally to partake of an eaſe, the motive to which reſpects them equally. This 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 Leſlie.

There is one circumſtance that, without much connection real or perſonal, extends to many caſes the maxim, *Nemo debet locupletari aliena jactura*; and that is fraud, deceit, or any ſort of wrong. If by means of a third perſon's fraud one gains and another loſes, a court of equity will interpoſe to make up the loſs out of the gain. And this reſolves into a general rule, "That no "man, however innocent, ought to take "advantage of a tortious act by which "another

"another is hurt." Take the following example. A ſecond diſpoſition of land, though gratuitous, with the firſt infeftment, is preferred at common law before the firſt diſpoſition without infeftment, though for a valuable conſideration. But as the gratuitous diſponee is thus benefited by a moral wrong done by his author, he ought not, however innocent, to take advantage of that moral wrong to hurt the firſt diſponee. This circumſtance makes the rule applicable, *Non debet locupletari aliena jactura*; and therefore a court of equity will compel him, either to give up his right to the land, or to repair the loſs the firſt diſponee has ſuffered by being deprived of his purchaſe.

The following caſes reſt upon the ſame principle. A diſpoſition by a merchant of his whole eſtate to his infant-ſon, without a reſerved liferent or power to burden, was deemed fraudulent, in order to cheat his correſpondents, foreign merchants, who had traded with him before the alienation, and continued their dealings with him upon the belief that he was ſtill proprietor; and their claims, though poſterior

to

to the diſpoſition, were admitted to affect the eſtate *.

Where a tutor acting to the beſt of his ſkill for the good of his pupil, happens, in the ordinary courſe of adminiſtration, to convert a moveable debt into one that is heritable, or an heritable debt into one that is moveable; ſuch an act, after the pupil's death, will have its effect with reſpect to the pupil's ſucceſſion, by preferring his heir or executor, as if the act had been done by a proprietor of full age. But where the tutor acts in this manner unneceſſarily, with the ſole intention to prefer the heir or the executor, this is a tortious act, contrary to the duty he owes his pupil, which will affect the heir or executor, though they had no acceſſion to the wrong. In common law the ſucceſſion will take place according to the tutor's act, whether done with a right or a wrong intention; but this will be corrected in equity, upon the principle, That no perſon ought to take advantage of a tortious act that harms another.

A donation *inter virum et uxorem* is re-

* Stair, July 2. 1673, Street contra Maſon.

vocable;

vocable; but not a donation to the huſband or wife's children, or to any other relation. A wife makes a donation of her land-eſtate to her huſband; who afterward, in order to bar revocation, gives up the diſpoſition granted to him, and inſtead of it takes a diſpoſition to his eldeſt ſon. Will this diſpoſition be revocable? Where a wife out of affection to her huſband's eldeſt ſon makes a deed in his favour, it is not revocable, becauſe it is not a *donatio inter virum et uxorem*. But in this caſe it is clear, that the donation was intended for the huſband, and that the ſole purpoſe of the diſpoſition to the ſon was to bar revocation; which was an unlawful contrivance to elude the law. It would be wrong therefore in the ſon, however innocent, to take advantage of his father's tortious act, calculated to deprive the woman of her privilege; and therefore the diſpoſition to him will be revocable in equity, as that to the father was at common law.

ART. II.

ART. II. *Connections that intitle a man who is not a loſer, to partake of my gain.*

FOR the ſake of perſpicuity, this article ſhall be divided into two branches: 1ſt, Where the gain is the operation of the man who claims to partake of it. 2d, Where he has not contributed to the gain.

I introduce the firſt branch with a caſe which will be a key to the ſeveral matters that come under it. Two heirs-portioners, or in general two proprietors of a land-eſtate *pro indiviſo*, get for a farm a rent of eighty pounds yearly; and an offer of ten pounds additional rent if they will drain a lake in it. John is willing; but James refuſes, judging it impracticable, or at leaſt too expenſive. John proceeds at his own riſk; and for the ſum of L. 100 drains the lake. He cannot ſpecify any loſs by this undertaking; becauſe the ſum he laid out is fully compenſated by the five pound additional rent accruing to him: and therefore the maxim, *Nemo debet locupletari aliena jactura*, is not applicable to

his caſe. But James is a profiter, not only by John's advancing the money, but at his riſk; for if the undertaking had proved abortive, John would have loſt both his labour and money. Is it juſt that James ſhould be permitted to lay hold of an additional rent of L. 5, without defraying any part of the expence? He cannot juſtify this to his own conſcience, nor to the world. The moral ſenſe dictates, that where expence is laid out in improving or repairing a common ſubject, no one ought to take the benefit, without refunding a part of the expence in proportion to the benefit received.

This leads to a general rule, That expence laid out upon a common ſubject, ought to be a burden upon the benefit procured. And this rule will hold even againſt the diſſent of any of the parties concerned; for they cannot in conſcience take the benefit without the burden. A diſſent cannot have any effect in equity, but only to free the perſon diſſenting from any riſk.

The following caſes come clearly under the ſame general rule. One of three joint proprietors of a mill, having raiſed a decla-

rator of thirlage, and, notwithſtanding a diſclamation by the others, having 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 judgement 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 deſtroy'd by fire was rebuilt by a liferenter, the proprietor, after the liferenter's death, was made liable for the expence of rebuilding, as far as he was *lucratus* thereby ‡. And if rebuilt by the proprietor, the liferenter will be liable for the intereſt of the ſum expended as far as he is *lucratus* ‖. 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 re-

* Stair, January 6. 1676, Forbes contra Roſs.

† Bruce, July 30. 1715, Creditors of Calderwood contra Borthwick.

‡ Forbes, Feb. 20. 1706, Halliday contra Garden.

‖ Stair, Jan. 24. 1672, Haket contra Watt.

verſer;

verſer; and that the reverſer, upon redemption, ſhould be bound to repay the expence thereof *. 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 conſent, is underſtood to lay out his money in order to fulfil his obligation, without any proſpect of retribution †. The preſent miniſter was found not liable for the meliorations of the glebe made by his predeceſſor ‡. 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,

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

† Gilmour, Feb. 1664, Hodge contra Brown.

‡ Nicolſon, (Kirkmen), June 14. 1623, Dunbar contra Hay.

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.

The following caſe belongs undoubtedly to the maxim of equity under conſideration; and yet was judged by common law, neglecting the equitable remedy. In a ſhipwreck, part of the cargo being 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 contribute a ſhare. His anſwer was ſuſtained to free him from any part, That the expence was wholly laid out on recovering the freighter's goods; and therefore that they only

only ought to be liable *. The anſwer here ſuſtained reſolves into the following propoſition, That he only is liable whoſe benefit is intended: which holds not in equity; for at that 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; to the freighters, becauſe it put them again in poſſeſſion of their 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 both; and for that reaſon ought to be paid by both in proportion to the benefit received. This caſe may be conſidered in a different light that will ſcarce admit a diſpute. Suppoſe that the owners of the cargo, in recovering their goods to the extent of L. 1000, have laid out L. 100 upon ſalvage: they have in effect ſaved or recovered but L. 900; and beyond that ſum they cannot be liable for the freight: which in numbers

* January 18. 1735, Lutwich contra Gray.

will

will bring out a greater ſum than what reſults from the rule above mentioned.

It will not eſcape the reader, that equity is further extended in this branch than in the former; and he will alſo diſcover a ſolid reaſon for the difference. With reſpect to matters contained in the former branch, the real connection is only, that what is loſt by the one is gained by the other; as in the caſe of a *bona fide poſſeſſor rei alienæ*. But the real connection in the preſent branch is ſo far more intimate, that every acquiſition muſt benefit all equally, and every loſs burden all equally.

It appears, that a benefit accruing to another by my labour, occaſionally only, not neceſſarily, will not intitle me to a claim where I am not a loſer. To make the truth of this obſervation evident, a few examples will be ſufficient. A drain made by me in my own ground for my own behoof, happens to diſcharge a quantity of water that ſtagnated in a ſuperior field belonging to a neighbour. Juſtice does not intitle me to claim from this neighbour any ſhare of the expence laid out upon the drain. The drain has anſwered my intention, and overpays the ſum beſtowed

ſtowed upon it: therefore my caſe comes not under the maxim, *Nemo debet locupletari aliena jactura.* Neither can I have any claim upon the rule, That expence laid out upon a common ſubject ought to be a burden upon the benefit procured; for here there is no common ſubject, but only another perſon accidentally or occaſionally benefited by an operation intended ſolely for my own benefit. And Providence has wiſely ordered that ſuch a claim ſhould have no ſupport from the moral ſenſe; for as there can be no preciſe rule for eſtimating the benefit that each of us receives from the drain, the ſubjecting my neighbour to a claim would tend to create endleſs diſputes between us. For the ſame reaſon, if my neighbour in making an incloſure take advantage of a march-fence built by me, he will not be liable to any part of the expence beſtow'd by me upon it; becauſe the benefit, as in the former caſe, is occaſional only or conſequential.

From the nature of the claim handled in the preſent branch, it follows, that if the party againſt whom the claim is laid,

renounce

renounce the benefit, he cannot be ſubjected to the burden.

With reſpect to the branch now handled, the circumſtance that the benefit accruing to another was occaſioned by my means, is the connection that intitles me to a proportion of the ſum I laid out in procuring that benefit. But with reſpect to the ſecond branch, which we are next to enter upon, it muſt require ſome perſonal relation extremely intimate to intitle me to partake of another man's profit when I have not contributed to it. And this will be made evident by the following examples.

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 alſo had the benefit thereof upon paying his proportion of the compoſition *. Againſt this opinion it was urged, That a vaſſal muſt reckon upon being liable to all the caſualties ariſing from the nature of

* Dirleton, December 1. 1676, Grierſon contra Ragg.

his right; and that there is no reaſon for limiting the ſuperior's claim, more than that of any other donatar. But it was anſwered, That the relation between 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 †.

If a purchaſer of land, diſcovering a defect in the progreſs, ſecure himſelf by acquiring the preferable title; common law will not permit him to uſe this title as a ground of eviction, and to make his author, bound in abſolute warrandice, liable for the value of the ſubject: for the purchaſer is not intitled to the value unleſs the land be evicted from him; and therefore he cannot have any claim upon the

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

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 between a purchaſer, and a vender bound in abſolute warrandice, that every tranſaction made by either, 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 the purchaſer, diſcovering the 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, as 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 between 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 benefit to the whole. One caſe of

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 reſtricted the claim to 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.

ART. III. *Connections that intitle one who is a loſer to be indemnified by one who is not a gainer.*

CASES daily occur, where, by abſence, infancy, inadvertence, or other circum-

* February 21. 1741, James Drummond contra Brown and Miln.

ſtances, effects real or perſonal are left without proper management, and where ruin muſt enſue, if no perſon of benevolence be moved to interpoſe. Here friendſhip and good-will have a favourable opportunity to exert themſelves, and to do much good, perhaps without any extraordinary labour or great expence; and when a proprietor is benefited by ſuch acts of friendſhip or benevolence, juſtice and gratitude claim from him a retribution, to the extent at leaſt of the benefit received. Here the maxim, *Nemo debet locupletari aliena jactura*, is applicable in the ſtricteſt ſenſe. Hence the *actio negotiorum geſtorum* in the Roman law, which for the reaſon given is adopted by all civilized nations.

But what if this friendly man, after beſtowing his money and labour with the utmoſt precaution, happen to be unſucceſsful? What if, after laying out his money profitably upon repairing houſes or purchaſing cattle for my uſe, the benefit be loſt to me by the caſual deſtruction of the ſubject; would it be juſt that this friend, who had no view but for my intereſt, ſhould run the riſk? As there was

no

no contract between us, a claim will not be ſuſtained at common law for the money expended. But equity pierces deeper, in order to fulfil the rules of juſtice. Service undertaken by a friend upon an urgent occaſion, advances gratitude from a virtue to be a duty; and binds me to *recompenſe* my friend as far as he has laid out his own money in order to do me ſervice. The moral ſenſe teaches this leſſon; and no perſon, however partial in his own concern, but muſt perceive this to be the duty of others. Utility alſo joins with juſtice to ſupport this claim of recompence. Men ought to be invited to ſerve a friend in time of need: but inſtead of invitation, it would be a great diſcouragement, if the money advanced upon ſuch ſervice were upon their own riſk, even when laid out with the greateſt prudence (*a*). This doctrine

(*a*) The Roman writers found this duty upon their *quaſi*-contracts, of which *negotiorum geſtio* is ſaid to be one. And to underſtand this foundation, the nature of *quaſi*-contracts muſt be explained. In human affairs certain circumſtances and ſituations frequently happen that require a covenant, which nothing can prevent but want of opportunity. The preſent caſe affords a good illuſtration. A ſudden call

trine is laid down by Ulpian in clear terms: "Is autem, qui negotiorum geſto-
"rum agit, non ſolum ſi effectum habuit
"negotium quod geſſit, actione ita ute-
"tur: ſed ſufficit, ſi utiliter geſſit, etſi ef-
"fectum non habuit negotium. Et ideo,
"ſi inſulam fulſit, vel ſervum ægrum cu-
"ravit, etiamſi inſula exuſta eſt, vel ſer-
"vus obiit, aget negotiorum geſtorum.
"Idque et Labeo probat *."

From what is ſaid above it is evident,

call forces me abroad, without having time to regulate my affairs: diſorder enſues, and a friend undertakes the management. Here nothing prevents a mandate but want of opportunity; and it is preſumed that the mandate would not have been wanting, had I known the good intentions of my friend. Equity accordingly holds the mandate as granted, and gives the ſame actions to both that the common law gives in purſuance of a mandate. Though this ſerves to explain the Roman *quaſi*-contracts, yet it ſeems a wide ſtretch in equity to give to a ſuppoſition the effects of a real contract; eſpecially without any evidence that the perſon who undertakes the management would have been my choice. But I have endeavoured to make out in the text, that this claim for recompence has a ſolid foundation in juſtice, and in human nature, without neceſſity of recurring to the ſtrained ſuppoſition of a contract.

* l. 10. § 1. Negot. geſt.

that

that the man who undertakes my affairs, not to ſerve me, but to ſerve himſelf, is not intitled to the *actio negotiorum geſtorum*. Nor, even ſuppoſing me to be benefited by his management, is he intitled to have his loſs repaired out of my gain: for wrong can never found any claim in equity. Yet Julianus, the moſt acute of the Roman writers, anſwers the queſtion in the affirmative. Treating of one who *mala fide* meddles in my affairs, he gives the following opinion: "Ipſe tamen, ſi circa res "meas aliquid impenderit, non in id quod "ei abeſt, quia improbe ad negotia mea "acceſſit, ſed in quod ego locupletior fa-"ctus 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 was 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 begun that management, not to ſerve me, but with a view to his own intereſt. A

* l. 6. § 3. De negot. geſt.

prohibition

prohibition involved in the nature of the thing, is equivalent to an expreſs prohibition.

The maſter of a ſhip, or any other, who ranſoms the cargo from a privateer, is, according to the doctrine above laid down, intitled to claim from the owners of the cargo the ſum laid out upon their account: they profit by the tranſaction, and they ought to indemnify him. But what if the cargo be afterward loſt in a ſtorm at ſea, or by robbery at land? The owners are not now profiters by the ranſom, and therefore they cannot be made liable upon the maxim, *Nemo debet locupletari aliena jactura.* They are however liable upon the principle here explained. The moment the tranſaction was finiſhed they became debtors to the ranſomer for the ſum he laid out profitably upon their account. He did not undertake the riſk of the cargo ranſomed; and therefore the caſual loſs of the cargo cannot have the effect to deprive him of his claim.

The *lex Rhodia de jactu*, a celebrated maritime regulation, has prevailed among all civilized nations ancient and modern. Where 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 principle. The throwing overboard weighty goods of little value, is 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 afterward loſt, by which eventually there is no benefit? If loſt at ſea in the ſame voyage, the owner of the goods thrown overboard has certainly no claim; becauſe at any rate he would have loſt his goods along with the reſt of the cargo. But as ſoon as the cargo is laid upon land, the obligation for retribution is purified; the value of the goods abandoned to the ſea, is or ought to be in the pocket of the owner; and the delay of payment will not afford a defence againſt him,

whatever becomes of the cargo after it is landed.

It is a queſtion of greater intricacy, 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 ge- "nera complures mercatores coegiſſent, "prætereaque multi vectores, ſervi, liberi- "que in ea navigarent, tempeſtate gravi "orta, neceſſario jactura facta erat. Quæ- "ſita deinde ſunt hæc: An omnes jactu- "ram preſtare oporteat, et ſi qui tales "merces impoſuiſſent, quibus navis non "oneraretur, velut gemmas, margaritas? "et quæ portio præſtanda eſt? Et an "etiam pro liberis capitibus dari opor- "teat? Et qua actione ea res expediri "poſſit? Placuit, omnes, quorum inter- "fuiſſet jacturam fieri, conferre oportere, "quia id tributum obſervatæ res debe- "rent: itaque dominum etiam navis pro "portione obligatum eſſe. Jacturæ ſum- "mam pro rerum pretio diſtribui oportet. "Corporum liberorum æſtimationem nul- "lam fieri poſſe *." This rule is adopted

* l. 2. § 2. De lege Rhodia de jactu.

by

by all the commercial nations in Europe, without a ſingle exception, as far as I can learn. And in purſuance of the rule, it is alſo adopted, That the owner of the ſhip ought to contribute, becauſe the ſhipwreck being prevented by throwing overboard part of the cargo, his claim for freight is preſerved to him. "Thus, if, in ſtreſs of weather, or in "danger and juſt fear of an enemy, goods "be thrown overboard, in order to ſave "the ſhip and the reſt of the cargo, that "which is ſaved ſhall contribute to re-"pair that which is loſt, and the owners "of the ſhip ſhall contribute in propor-"tion *."

Theſe authorities notwithſtanding, to which great regard is juſtly due, it is not in my power to baniſh an impreſſion, That the rule of contribution ought to be weight, not value. 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;

* Shower's Caſes in parliament 19.

and next, That each individual is liable to make up the loſs of that part which was given away on his account. When a ranſom is paid to a privateer for the ſhip and cargo, a ſhare of the money is underſtood to be advanced for each proprietor, in proportion to the value of his goods; and that ſhare each muſt contribute, being laid out on 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 proceed warily, 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, ought to throw the half into the ſea; for 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

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 their weight. This, as being done for the common intereſt, intitles the proprietors of theſe goods to a recompence from thoſe for whoſe ſervice the goods were abandoned. Now the ſervice done to each proprietor is, inſtead of his valuable goods, to have others thrown overboard of a meaner quality; and for ſuch ſervice all the recompence that can be juſtly claimed is the value of the goods thrown overboard. Let us ſuppoſe with reſpect to any owner in particular, that regularly he was bound to throw overboard twenty ounces of his goods: all that 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 ſhorthand 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

goods to be thrown into the ſea inſtead of their own.

I muſt obſerve at the ſame time, 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 frequently 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 thrown into the ſea upon their account?

Under this article comes a caſe that appears to be *in apicibus juris*. A bond extinguiſhed by payment is aſſigned for a valuable conſideration, and the aſſignee, ignorant

ignorant of the payment, obtains payment a ſecond time from the debtor's heir. After ſeveral years the error is diſcovered, but the cedent by this time has become bankrupt. The heir is at common law entitled to demand from the aſſignee the ſum he paid; as twice payment can have no ſupport in law. The aſſignee paying this ſum is barred by the inſolvency of the cedent from any relief againſt him. What does equity rule in this intricate caſe, where there is a real connection between the parties by their concern in the ſame ſubject? A ſtrong circumſtance for the aſſignee is, that the payment he received from the heir *bona fide*, was to him invincible evidence, that he could have no claim againſt the cedent. He was led into that miſtake by the heir's remiſſneſs or rather raſhneſs in paying without examining his father's writings. They are equally *certantes de damno vitando*; and yet the heir's claim at common law muſt be ſuſtained, if there be nothing in equity to balance it. The balance in equity is, that the loſs ought to reſt on the heir, by whoſe remiſſneſs it was occaſioned, and not on the aſſignee, who had it not in his power to

to prevent it. But as the aſſignee's loſs is only the price he paid to the cedent, his equitable defence againſt the heir can go no further. This principle of equity is acknowledged by the court of ſeſſion, and has been frequently applied. Thus an heir having ignorantly paid a debt to an aſſignee, and ſeveral years after having diſcovered that his anceſtor had paid the debt to the cedent, he inſiſted in a *condictio indebiti*. The defendant was aſſoilzied, becauſe the cedent had become inſolvent after the erroneous payment*. In this caſe it ſeems to have been overlooked, that the aſſignee was not intitled to withhold from the heir more than what he himſelf had paid to the cedent. So far he was *certans de damno vitando*: to demand more was *captare lucrum ex aliena jactura*. A creditor, after receiving a partial payment, aſſigned the whole ſum for ſecurity of a debt due by him to the aſſignee; who having got payment of the whole ſum from the debtor, ignorant of the partial payment, was on diſcovery of the fact ſued for reſtitution *condictione in-*

* 24th July 1723, Duke of Argyle contra Repreſentatives of Lord Halcraig.

debiti. His defence was ſuſtained, That he was not bound to reſtore what he received in payment of a juſt debt *. This judgement is founded on a miſtake in fact. The debt due to the aſſignee by the cedent was a juſt debt; but the ſum paid by the debtor to the aſſignee was not in payment of that debt, but of the debt due by him to the cedent, which was not wholly juſt, as part had been formerly paid. The debtor therefore was well intitled to demand the overplus from the aſſignee, becauſe a ſecond payment can have no ſupport from law. But probably the cedent had become inſolvent after the erroneous payment, which brings this caſe under the rule of equity handled above.

* Stair, 23d February 1681, Earl Mar contra Earl Callender.