PRINCIPLES OF EQUITY.

THE THIRD EDITION.

IN TWO VOLUMES.

VOL. I.

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LETTER

TO

Lord MANSFIELD.

AN author, not more illuſtrious by birth than by genius, ſays, in a letter concerning enthuſiaſm, " That he had ſo " much need of ſome conſiderable " preſence or company to raiſe " his thoughts on any occaſion, " that when alone he endeavour- " ed to ſupply that want by fan- " cying ſome great man of ſupe- " rior genius, whoſe imagin'd pre- " ſence might inſpire him with " more

" more than what he felt at or-
" dinary hours." To judge from his Lordſhip's writings, this receipt muſt be a good one. It naturally ought to be ſo; and I imagine that I have more than once felt its enlivening influence. With reſpect to the firſt edition of this treatiſe in particular, I can affirm with great truth, that *a great man of ſuperior genius* was never out of my view: Will Lord Mansfield reliſh this paſſage—How would he have expreſſed it—were my conſtant queſtions.

But though by this means I commanded more vigour of mind, and a keener exertion of thought, than I am capable of *at ordinary hours;* yet I had not courage to mention

mention this to his Lordſhip, nor to the world. The ſubject I had undertaken was new: I could not hope to avoid errors, perhaps groſs ones; and the abſurdity appear'd glaring, of acknowledging a ſort of inſpiration in a performance that might not exhibit the leaſt ſpark of it.

No trouble has been declined upon the preſent edition; and yet that the work, even in its improved ſtate, deſerves his Lordſhip's patronage, I am far from being confident. But however that be, it is no longer in my power to conceal, that the ambition of gaining Lord Mansfield's approbation has been my chief ſupport in this work.

work. Never to reveal that ſecret would be to border on ingratitude.

WILL your Lordſhip permit me to ſubſcribe myſelf, with heart-ſatisfaction,

Your zealous friend,

HENRY HOME.

Auguſt 1766.

PREFACE to the Second Edition.

AN author who exerts his talents and induſtry upon a new ſubject, without hope of aſſiſtance from others, is apt to flatter himſelf; becauſe he finds no other work of the kind to humble him by compariſon. The attempt to digeſt equity into a regular ſyſtem, was not only new, but difficult; and for theſe reaſons, the author hopes he may be excuſed for not diſcovering more early ſeveral imperfections in the firſt edition of this book. Theſe imperfections he the more regretted, becauſe they concerned chiefly the arrangement, in which every miſtake muſt be attended with ſome degree of obſcurity. No labour has been ſpared to improve the preſent edition: and yet, after all his endeavours, the author dare not hope that every imperfection is cured: that the arrangement is conſiderably improved, is all that with aſſurance he can take upon him to ſay.

For an interim gratification of the reader's curioſity before entering upon the work, a few

particulars ſhall here be mentioned. The defects of common law ſeemed to the author ſo diſtinct from its exceſſes, that he thought it proper to handle theſe articles ſeparately. But almoſt as ſoon as the printing was finiſhed, the author obſerved that he had been obliged to handle the ſame ſubject in different parts of the book, or at leaſt to refer from one part to another; which he holds to be an infallible mark of an unſkilful diſtribution. This led him to reflect, that theſe defects and exceſſes proceed both of them equally from the very conſtitution of a court of common law, too limited in its power of doing juſtice; whence it appeared evident that they ought to be handled promiſcuouſly as ſo many examples of imperfection in common law, which ought to be ſupplied by a court of equity. This is ſo evident, that even in the ſame caſe we find common law ſometimes defective, ſometimes exceſſive, according to occaſional or accidental circumſtances, without any fundamental difference. For example, many claims, good at common law, are reprobated in equity becauſe of ſome incidental wrong that comes not under the cogniſance of common law. A claim of this kind muſt be ſuſtained by a court of common law, which cannot regard the inci-

dental wrong; and in ſuch inſtances common law is exceſſive, by tranſgreſſing the bounds of juſtice. On the other hand, where a claim for reparation is brought by the perſon who ſuffered the wrong, a court of common law can give no redreſs; and in ſuch inſtances common law is defective. And yet the ratio decidendi *is preciſely the ſame in both caſes, namely, the limited power of a court of common law.*

The tranſgreſſion of a deed or covenant is a wrong that ought to be diſtinguiſhed from a wrong that miſleads a man to make a covenant or to grant a deed. The former only belongs to the chapter Of Covenants; *the latter, to the chapter* Of the powers of a court of equity to protect individuals from injuries. *For example, a man is fraudulently induced to enter into a contract: the reparation of this wrong, which is antecedent to the contract, cannot ariſe from the contract; and for that reaſon it is put under the chapter laſt mentioned.*

PREFACE to the Preſent Edition.

AN uſeful book ought not to be a coſtly book. To bring this edition within a moderate price, not only the ſize is ſmaller, but the preliminary diſcourſe on the principles of morality is left out, being publiſhed more complete in Sketches of the Hiſtory of Man.

To mould the principles of equity into a regular ſyſtem, was a bold undertaking. The pleaſure of novelty gave it a luſtre, and made every article appear to be in its proper place. The ſubject being more familiar in labouring upon a ſecond edition, the many errors I diſcovered produced an arrangement differing conſiderably from the former. My ſatisfaction however in the new arrangement, was not entire: the errors I had fallen into produced a degree of diffidence and a ſuſpicion of more. And now, after an interval of no fewer than ten years, I find the ſuſpicion but too well founded, chiefly with reſpect to the extenſive chapter of deeds and covenants. The many diviſions and ſubdiviſions of that chapter, I judged

judged at the time to be neceſſary; but after pondering long and frequently upon them, I became ſenſible that they tend to darken rather than to enlighten the ſubject. That chapter is now divided into fewer and more diſtinct heads; which I expect will be found a conſiderable improvement. In an inſtitute of law or of any other ſcience, the analyzing it into its conſtituent parts, and the arranging every article properly, is of ſupreme importance. One would not conceive, without experience, how greatly accurate diſtribution contributes to clear conception. Before I was far advanced in the preſent edition, the many errors I found in the diſtribution ſurpriſed and vexed me. I have beſtowed much pains in correcting theſe errors; and yet I will not anſwer that there are none left. Many eſcaped me before; and ſome may again eſcape me. No work of man is perfect: it is good however to be on the mending hand; and in every new attempt, to approach nearer and nearer to perfection. To compile a body of law, the parts intimately connected and every link hanging on a former, requires the utmoſt effort of the human genius. Have I not reaſon to think ſo, conſidering how imperfect in that reſpect the far greater part

of

of law-books are; witneſs in particular the famous body of Roman law compiled under the auſpices of the Emperor Juſtinian, remarkable even among law-books for defective arrangement? Let the candid reader keep this in view, and he will be indulgent to the errors of arrangement in this edition, if after my utmoſt application any remain.

But imperfect arrangement in the former editions, is not the only thing that requires an apology. Frequent and ſerious reflection on a favourite ſubject, have unfolded to me ſeveral errors, ſtill more material, as they concern the reaſoning branch of my ſubject. Theſe I bluſh for; and yet, to acknowledge an erroneous opinion, ſits lighter on my mind than to perſevere in it.

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EXPLA-

EXPLANATION of ſome SCOTCH law terms uſed in this Work.

Adjudication, is a judicial conveyance of the debtor's land for the creditor's ſecurity and payment. It correſponds to the Engliſh *Elegit*.

Arreſtment, defined, book 3. chap. 4.

Cautioner, a ſurety for a debt.

Cedent, aſſignor.

Contravention. An act of contravention ſignifies the breaking through any reſtraint impoſed by deed, by covenant, or by a court.

Decree of forthcoming, defined, book 3. chap. 4.

Fiar, he that has the fee or feu; and the proprietor is termed *fiar*, in contradiſtinction to the liferenter.

Gratuitous, *ſee* Voluntary.

Heritor, a proprietor of land.

Inhibition, defined, book 3. chap. 4.

Leſion, loſs, damage.

Purſuer, plaintiff.

Propone,

EXPLANATION of SCOTCH law terms.

Propone. To propone a defence is to ſtate or move a defence.

Reduction, is a proceſs for voiding or ſetting aſide any conſenſual or judicial right.

Tercer, a widow that poſſeſſes the third part of her huſband's land as her legal jointure.

Voluntary, in the law of Scotland bears its proper ſenſe as oppoſed to involuntary. A deed in the Engliſh law is ſaid to be voluntary when it is granted without a valuable conſideration. In this ſenſe it is the ſame with *gratuitous* in our law.

Wadſet, anſwers to a mortgage in the Engliſh law. A proper wadſet is where the creditor in poſſeſſion of the land takes the rents in place of the intereſt of the ſum lent. An improper wadſet is where the rents are applied for payment, firſt of the intereſt, and next of the capital.

Writer, ſcrivener.

INTRODUCTION.

EQUITY, ſcarce known to our forefathers, makes at preſent a great figure. It has, like a plant, been tending to maturity, ſlowly indeed, but conſtantly; and at what diſtance of time it ſhall arrive at perfection, is perhaps not eaſy to foretell. Courts of equity have already acquired ſuch an extent of juriſdiction, as to obſcure in a great meaſure courts of law. A revolution ſo ſignal, will move every curious enquirer to attempt, or to wiſh at leaſt, a diſcovery of the cauſe. But vain will be the attempt, till firſt a clear idea be formed of the difference between a court of law and a court of equity. The former we know follows preciſe rules: but does the latter act by conſcience ſolely without any rule? This would be unſafe while men are the judges, liable no leſs to partiality than to error: nor could a court without rules ever have attained that height of favour, and extent

of juriſdiction, which courts of equity enjoy. But if a court of equity be governed by rules, why are not theſe brought to light in a ſyſtem? One would imagine, that ſuch a ſyſtem ſhould not be uſeful only, but neceſſary; and yet writers, far from aiming at a ſyſtem, have not even defined with any accuracy what equity is, nor what are its limits and extent. One operation of equity, univerſally acknowledged, is, to remedy imperfections in the common law, which ſometimes is defective, and ſometimes exceeds juſt bounds; and as equity is conſtantly oppoſed to common law, a juſt idea of the latter may probably lead to the former. In order to aſcertain what is meant by common law, a hiſtorical deduction is neceſſary; which I the more chearfully undertake, becauſe the ſubject ſeems not to be put in a clear light by any writer.

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

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

* Reg. Maj. lib. 3. cap. 10. Fleta, lib. 2. cap. 58. § 3. and 5.

† See Hiſtorical Law-tracts, tract 2.

But when the great advantages of a court of law were experienced, its juriſdiction was gradually extended, with univerſal approbation: it was extended, with very few exceptions, to every covenant and every promiſe: it was extended alſo to other matters, till it embraced every obvious duty ariſing in ordinary dealings between man and man. But it was extended no farther; experience having diſcovered limits, beyond which it was deemed hazardous to ſtretch this juriſdiction. Cauſes of an extraordinary nature, requiring ſome ſingular remedy, could not be ſafely truſted with the ordinary courts, becauſe no rules were eſtabliſhed to direct their proceedings in ſuch matters; and upon that account, ſuch cauſes were appropriated to the king and council, being the paramount court (*a*). Of this nature

(*a*) We find the ſame regulation among the Jews: "And Moſes choſe able men out of all Iſ-"rael, and made them heads over the people, ru-"lers of thouſands, rulers of hundreds, rulers of "fifties, and rulers of tens. And they judged the "people at all ſeaſons: the hard cauſes they brought "unto Moſes, but every ſmall matter they judged "themſelves." *Exodus*, xviii. 25. 26.

were

were actions for proving the tenor or contents of a loſt writ; extraordinary removings againſt tenants poſſeſſing by leaſe; the cauſes of pupils, orphans, and foreigners; complaints againſt judges and officers of law *, and the more atrocious crimes, termed, *Pleas of the crown.* Such extraordinary cauſes, multiplying greatly by complex and intricate connections among individuals, became a burden too great for the king and council. In order therefore to relieve this court, extraordinary cauſes of a civil nature, were in England devolved upon the court of chancery; a meaſure the more neceſſary, that the king, occupied with the momentous affairs of government, and with foreign as well as domeſtic tranſactions, had not leiſure for private cauſes. In Scotland, more remote, and therefore leſs intereſted in foreign affairs, there was not the ſame neceſſity for this innovation: our kings, however, addicted to action more than to contemplation, neglected in a great meaſure their privilege of being judges, and ſuffered cauſes peculiar to the king and

* See act 105. parl. 1487.

council

council to be gradually aſſumed by other ſovereign courts. The eſtabliſhment of the court of chancery in England, made it neceſſary to give a name to the more ordinary branch of law that is the province of the common or ordinary courts: it is termed, *the Common Law:* and in oppoſition to it, the extraordinary branch devolved on the court of chancery is termed *Equity*; the name being derived from the nature of the juriſdiction, directed leſs by preciſe rules, than *ſecundum æquum et bonum*, or according to what the judge in conſcience thinks right (*a*). Thus equity, in its proper ſenſe, comprehends every matter of law that by the common law is left without remedy; and ſuppoſing the boundaries of the common law to be aſcertained, there can no longer remain any difficulty about the powers of a court of equity. But as theſe boundaries are

(*a*) At curiæ ſunto et juriſdictiones, quæ ſtatuant ex arbitrio boni viri et diſcretione ſana, ubi legis norma deficit. Lex enim non ſufficit caſibus, ſed ad ea quæ plerumque accidunt aptatur: ſapientiſſima autem res tempus, (ut ab antiquis dictum eſt), et novorum caſuum quotidie author et inventor. *Bacon de Aug. Scien. lib.* 8. *cap.* 3. *aphor.* 32.

not

not aſcertained by any natural rule, the juriſdiction of common law muſt depend in a great meaſure upon accident and arbitrary practice; and accordingly the boundaries of common law and equity, vary in different countries, and at different times in the ſame country. We have ſeen, that the common law of Britain was originally not ſo extenſive as at preſent; and inſtances will be mentioned afterward, which evince, that the common law is in Scotland farther extended than in England. Its limits are perhaps not accurately aſcertained in any country; which is to be regretted, becauſe of the uncertainty that muſt follow in the practice of law. It is lucky, however, that the diſeaſe is not incurable: a good underſtanding between the judges of the different courts, with juſt notions of law, may, in time, aſcertain theſe limits with ſufficient accuracy.

Among a plain people, ſtrangers to refinement and ſubtilties, law-ſuits may be frequent, but never are intricate. Regulations to reſtrain individuals from doing miſchief, and to enforce performance of covenants, compoſed originally the bulk of

of the common law; and theſe two branches, among our rude anceſtors, ſeemed to comprehend every ſubject of law. The more refined duties of morality were, in that early period, little felt, and leſs regarded. But law, in this ſimple form, cannot long continue ſtationary: for in the ſocial ſtate under regular diſcipline, law ripens gradually with the human faculties; and by ripeneſs of diſcernment and delicacy of ſentiment, many duties, formerly neglected, are found to be binding in conſcience. Such duties can no longer be neglected by courts of juſtice; and as they made no part of the common law, they come naturally under the juriſdiction of a court of equity.

The chief objects of benevolence conſidered as a duty, are our relations, our benefactors, our maſters, our ſervants, &c.; and theſe duties, or the moſt obvious of them, come under the cogniſance of common law. But there are other connections, which, though more tranſitory, produce a ſenſe of duty. Two perſons ſhut up in the ſame priſon, though no way connected but by contiguity and reſemblance of condition, are ſenſible, however,

that to aid and comfort each other is a duty incumbent on them. Two perſons, ſhipwrecked upon the ſame deſert iſland, are ſenſible of the like mutual duty. And there is even ſome ſenſe of this kind, among a number of perſons in the ſame ſhip, or under the ſame military command.

Thus mutual duties among individuals multiply by variety of connections; and in the progreſs of ſociety, benevolence becomes a matter of conſcience in a thouſand inſtances, formerly diſregarded. The duties that ariſe from connections ſo ſlender, are taken under the juriſdiction of a court of equity; which at firſt exerciſes its juriſdiction with great reſerve, interpoſing in remarkable caſes only, where the duty is palpable. But, gathering courage from ſucceſs, it ventures to enforce this duty in more delicate circumſtances: one caſe throws light upon another; men, by the reaſoning of the judges, become gradually more acute in diſcerning their duty: the judges become more and more acute in diſtinguiſhing caſes; and this branch of law is imperceptibly moulded into a ſy-

ſtem (*a*). In rude ages, acts of benevolence, however peculiar the connection may be, are but faintly perceived to be our duty: ſuch perceptions become gradually more firm and clear by cuſtom and reflection; and when men are ſo far enlightened, it is the duty as well as honour of judges to interpoſe *.

This branch of equitable juriſdiction ſhall be illuſtrated by various examples. When goods by labour, and perhaps with danger, are recovered from the ſea after a ſhipwreck, every one perceives it to be the duty of the proprietor to pay ſalvage. A man ventures his life to ſave a houſe from fire, and is ſucceſsful; no mortal can doubt that he is intitled to a recompence from the proprietor, who is benefited. If a man's affairs by his abſence be in diſor-

(*a*) At curiæ illæ uni viro ne committantur, ſed ex pluribus conſtent. Nec decreta exeant cum ſilentio: ſed judices ſententiæ ſuæ rationes adducant, idque palam, atque adſtante corona; ut quod ipſa poteſtate ſit liberum, fama tamen et exiſtimatione ſit circumſcriptum.

Bacon de Aug. Scient. lib. 8. *cap.* 3 *aphor.* 38.

* See Eſſays on morality and natural religion, ſecond edition, p. 108.

der,

der, ought not the friend who undertakes the management to be kept *indemnis*, tho' the ſubject upon which his money was uſefully beſtowed may have afterward periſhed caſually? Who can doubt of the following propoſition, That I am in the wrong to demand money from my debtor, while I with-hold the ſum I owe him, which perhaps may be his only reſource for doing me juſtice? Such a proceeding muſt, in the common ſenſe of mankind, appear partial and oppreſſive. By the common law, however, no remedy is afforded in this caſe, nor in the others mentioned. But equity affords a remedy, by enforcing what in ſuch circumſtances every man perceives to be his duty. I ſhall add but one example more: In a violent ſtorm, the heavieſt goods are thrown overboard, in order to diſburden the ſhip: the proprietors of the goods preſerved by this means from the ſea, muſt be ſenſible that it is their duty to repair the loſs; for the man who has thus abandoned his goods for the common ſafety, ought to be in no worſe condition than themſelves. Equity dictates this to be their duty; and

if they be refractory, a court of equity will interpoſe in behalf of the ſufferer.

It appears now clearly, that a court of equity commences at the limits of the common law, and enforces benevolence where the law of nature makes it our duty. And thus a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is not provided for at common law.

The duties hitherto mentioned ariſe from connections independent altogether of conſent. Covenants and promiſes alſo, are the ſource of various duties. The moſt obvious of theſe duties, being commonly declared in words, belong to common law. But every incident that can poſſibly occur in fulfilling a covenant, is ſeldom foreſeen; and yet a court of common law, in giving judgement upon covenants, conſiders nothing but declared will, neglecting incidents that would have been provided for had they been foreſeen. Further, the inductive motive for making a covenant, and its ultimate purpoſe and intendment, are circumſtances diſregarded at common law: theſe, however, are capital circumſtances; and juſtice, where they are neglected,

glected, cannot be fulfilled. Hence the powers of a court of equity with reſpect to engagements. It ſupplies imperfections in common law, by taking under conſideration every material circumſtance, in order that juſtice may be diſtributed in the moſt perfect manner. It ſupplies a defect in words, where will is evidently more extenſive: it rejects words that unwarily go beyond will; and it gives aid to will where it happens to be obſcurely or imperfectly expreſſed. By taking ſuch liberty, a covenant is made effectual according to the aim and purpoſe of the contractors; and without ſuch liberty, ſeldom it happens that juſtice can be accurately diſtributed.

In handling this branch of the ſubject, it is not eaſy to ſuppreſs a thought that comes croſs the mind. The juriſdiction of a court of common law, with reſpect to covenants, appears to me odd and unaccountable. To find the juriſdiction of this court limited, as above mentioned, to certain duties of the law of nature, without comprehending the whole, is not ſingular nor anomalous. But with reſpect to the circumſtances that occur in the ſame cauſe,

cauſe, it cannot fail to appear ſingular, that a court ſhould be confined to a few of theſe circumſtances, neglecting others no leſs material in point of juſtice. This reflection will be ſet in a clear light by a ſingle example. Every one knows, that an Engliſh double bond was a contrivance to evade the old law of this iſland, which prohibited the taking intereſt for money: the profeſſed purpoſe of this bond is, to provide for intereſt and coſts, beyond which the penal part ought not to be exacted; and yet a court of common law, confined ſtrictly to the words or declared will, is neceſſitated knowingly to commit injuſtice. The moment the term of payment is paſt, when there cannot be either coſts or intereſt, this court, inſtead of pronouncing ſentence for what is really due, namely, the ſum borrowed, muſt follow the words of the bond, and give judgement for the double. This defect in the conſtitution of a court, is too remarkable to have been overlooked: a remedy accordingly is provided, though far from being of the moſt perfect kind; and that is, a privilege to apply to the court of equity for redreſs. Far better had it been, either to withdraw covenants

nants altogether from the common law, or to impower the judges of that law to determine according to the principles of juſtice (*a*). I need ſcarce obſerve, that the preſent reflection regards England only, where equity and common law are appropriated to different courts. In Scotland, and other countries where both belong to the ſame court, the inconvenience mentioned cannot happen.——But to return to the gradual extenſion of equity, which is our preſent theme:

A court of equity, by long and various practice, finding its own ſtrength and utility, and impelled by the principle of juſtice, boldly undertakes a matter ſtill more arduous; and that is, to correct or mitigate the rigour, and what even in a proper ſenſe may be termed the *injuſtice* of common law. It is not in human foreſight to eſtabliſh any general rule, that, however ſalutary in the main, may not be oppreſſive and unjuſt in its application to ſome ſingular caſes. Every work of man

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

muſt partake of the imperfection of its author; ſometimes falling ſhort of its purpoſe, and ſometimes going beyond it. If with reſpect to the former a court of equity be uſeful, it may be pronounced neceſſary with reſpect to the latter; for, in ſociety, it is certainly a greater object to prevent legal oppreſſion, which alarms every individual, than to ſupply legal defects, ſcarce regarded but by thoſe immediately concerned. The illuſtrious Bacon, upon this ſubject, expreſſes himſelf with great propriety: "Habeant curiæ prætoriæ poteſtatem tam ſubveniendi contra "rigorem legis, quam ſupplendi defectum "legis. Si enim porrigi debet remedium ei "quem lex præteriit, multo magis ei quem "vulneravit *."

All the variety of matter hitherto mentioned, is regulated by the principle of juſtice ſolely. It may, at firſt view, be thought, that this takes in the whole compaſs of law, and that there is no remaining field to be occupied by a court of equity. But, upon more narrow inſpection, we find a number of law-caſes into

* De Aug. Scient. lib. 8. cap. 3. aphor. 35.

which juſtice enters not, but only utility. Expediency requires that theſe be brought under the cogniſance of a court; and the court of equity, gaining daily more weight and authority, takes naturally ſuch matters under its juriſdiction. I ſhall give a few examples. A laviſh man ſubmits to have his ſon made his interdictor: this agreement is not unjuſt; but, tending to the corruption of manners, by reverſing the order of nature, it is reprobated by a court of equity, as *contra bonos mores*. This court goes farther: it diſcountenances many things in themſelves indifferent, merely becauſe of their bad tendency. A *pactum de quota litis* is in itſelf innocent, and may be beneficial to the client as well as to the advocate: but to remove the temptation that advocates are under to take advantage of their clients inſtead of ſerving them faithfully, this court declares againſt ſuch pactions. A court of equity goes ſtill farther, by conſulting the public intereſt with relation to matters not otherwiſe bad but by occaſioning unneceſſary trouble and vexation to individuals. Hence the origin of regulations tending to abridge law-ſuits.

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

perfection

perfection in law, to abandon an innocent perſon to ruin, when the remedy is ſo eaſy. In the caſes governed by the motive of public utility, a court of equity interpoſes as a court properly, giving or denying action, in order to anſwer the end purpoſed: but in the caſes now mentioned, and in others ſimilar, there is ſeldom occaſion for a proceſs; the court acts by magiſterial powers.

The powers above ſet forth aſſumed by our courts of equity, are, in effect, the ſame that were aſſumed by the Roman Prætor, from neceſſity, without any expreſs authority. "Jus prætorium eſt "quod prætores introduxerunt, adjuvandi vel ſupplendi vel corrigendi juris Civilis gratia, propter utilitatem publicam *."

Having given a hiſtorical view of a court of equity, from its origin to its preſent extent of power and juriſdiction, I proceed to ſome other matters, which muſt be premiſed before entering into particulars. The firſt I ſhall inſiſt on is of the greateſt moment, namely, Whether a court of

* l. 7. § 1. De juſtitia et jure.

equity be, or ought to be, governed by any general rules? To determine every particular caſe according to what is juſt, equal, and ſalutary, taking in all circumſtances, is undoubtedly the idea of a court of equity in its perfection; and had we angels for judges, ſuch would be their method of proceeding, without regarding any rules: but men are liable to prejudice and error, and for that reaſon cannot ſafely be truſted with unlimited powers. Hence the neceſſity of eſtabliſhing rules, to preſerve uniformity of judgement in matters of equity as well as of common law: the neceſſity is perhaps greater in the former, becauſe of the variety and intricacy of equitable circumſtances. Thus, though a particular caſe may require the interpoſition of equity to correct a wrong or ſupply a defect; yet the judge ought not to interpoſe, unleſs he can found his decree upon ſome rule that is equally applicable to all caſes of the kind. If he be under no limitation, his decrees will appear arbitrary, though ſubſtantially juſt: and, which is worſe, will often be arbitrary, and ſubſtantially unjuſt; for ſuch too frequently are human proceedings when

when ſubjected to no control. General rules, it is true, muſt often produce decrees that are materially unjuſt; for no rule can be equally juſt in its application to a whole claſs of caſes that are far from being the ſame in every circumſtance: but this inconvenience muſt be tolerated, to avoid a greater, that of making judges arbitrary. A court of equity is a happy invention to remedy the errors of common law: but this remedy muſt ſtop ſomewhere; for courts cannot be eſtabliſhed without end, to be checks one upon another. And hence it is, that, in the nature of things, there cannot be any other check upon a court of equity but general rules. Bacon expreſſes himſelf upon this ſubject with his uſual elegance and perſpicuity: "Non "ſine cauſa in uſum venerat apud Roma- "nos album prætoris, in quo præſcripſit "et publicavit quomodo ipſe jus dicturus "eſſet. Quo exemplo judices in curiis "prætoriis, regulas ſibi certas (quantum "fieri poteſt) proponere, eaſque publice "affigere, debent. Etenim optima eſt "lex, quæ minimum relinquit arbitrio "judicis,

" judicis, optimus judex qui minimum " ſibi *."

In perufing the following treatiſe, it will be diſcovered, that the connections regarded by a court of equity ſeldom ariſe from perſonal circumſtances, ſuch as birth, reſemblance of condition, or even blood, but generally from ſubjects that in common language are denominated *goods*. Why ſhould a court, actuated by the ſpirit of refined juſtice, overlook more ſubſtantial ties, to apply itſelf ſolely to the groſſer connections of intereſt? doth any connection founded on property make an impreſſion equally ſtrong with that of friendſhip, or blood-relation, or of country? doth not the law of nature form duties on the latter, more binding in conſcience than on the former? Yet the more conſcientious duties are left commonly to ſhift for themſelves, while the duties founded on intereſt are ſupported and enforced by courts of equity. This, at firſt view, looks like a prevailing attachment to riches; but it is not ſo in reality. The duties ariſing from the connection laſt

* De aug. ſcient. l. 8. cap. 3. aph. 46.

mentioned,

mentioned, are commonly aſcertained and circumſcribed, ſo as to be ſuſceptible of a general rule to govern all caſes of the kind. This is ſeldom the caſe of the other natural duties; which, for that reaſon, muſt be left upon conſcience, without receiving any aid from a court of equity. There are, for example, not many duties more firmly rooted in our nature than that of charity; and, upon that account, a court of equity will naturally be tempted to interpoſe in its behalf. But the extent of this duty depends on ſuch a variety of circumſtances, that the wiſeſt heads would in vain labour to bring it under general rules: to truſt, therefore, with any court, a power to direct the charity of individuals, is a remedy which to ſociety would be more hurtful than the diſeaſe; for inſtead of enforcing this duty in any regular manner, it would open a wide door to legal tyranny and oppreſſion. Viewing the matter in this light, it will appear, that ſuch duties are left upon conſcience, not from neglect or inſenſibility, but from the difficulty of a proper remedy. And when ſuch duties can be brought under a general rule, I except not even gratitude,

titude, though in the main little ſuſceptible of circumſcription, we ſhall ſee afterward, that a court of equity declines not to interpoſe.

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

It is commonly obſerved, that equitable rights are leſs ſteady and permanent than thoſe of common law: the reaſon will appear from what follows. A right is permanent or fluctuating according to the circumſtances upon which it is founded. The circumſtances that found a right at common law, being always few and weighty, are not variable: a bond of borrowed money, for example, muſt ſubſiſt till it be paid. A claim in equity, on the contrary, ſeldom ariſes without a multipli-

city of circumſtances; which make it leſs permanent, for if but a ſingle circumſtance be withdrawn, the claim is gone. Suppoſe, for example, that an infeftment of annualrent is aſſigned to a creditor for his ſecurity: the creditor ought to draw his payment out of the intereſt before touching the capital; which is an equitable rule, becauſe it is favourable to the aſſignor or cedent, without hurting the aſſignee. But if the cedent have another creditor who arreſts the intereſt, the equitable rule now mentioned ceaſes, and gives place to another; which is, that the aſſignee ought to draw his payment out of the capital, leaving the intereſt to be drawn by the arreſter. Let us next ſuppoſe, that the cedent hath a third creditor, who after the arreſtment adjudges the capital. This new circumſtance varies again the rule of equity: for though the cedent's intereſt weighs not in oppoſition to that of his creditor arreſting, the adjudging creditor and the arreſter are upon a level as to every equitable conſideration; and upon that account, the aſſignee, who is the preferable creditor, ought to deal impartially between them: if he be not willing to take pay-

ment out of both ſubjects proportionally, but only out of the capital, or out of the intereſt; he ought to make an aſſignment to the poſtponed creditor, in order to redreſs the inequality; and if he refuſe to do this act of juſtice, a court of equity will interpoſe.

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

In England, where the courts of equity and common law are different, the boundary between equity and common law, where the legiſlature doth not interpoſe,

poſe, will remain always the ſame. But in Scotland, and other countries where equity and common law are united in one court, the boundary varies imperceptibly; for what originally is a rule in equity, loſes its character when it is fully eſtabliſhed in practice; and then it is conſidered as common law: thus the *actio negotiorum geſtorum*, retention, ſalvage, &c. are in Scotland ſcarce now conſidered as depending on principles of equity. But by cultivation of ſociety, and practice of law, nicer and nicer caſes in equity being daily unfolded, our notions of equity are preſerved alive; and the additions made to that fund, ſupply what is withdrawn from it by common law.

What is now ſaid ſuggeſts a queſtion, no leſs intricate than important, Whether common law and equity ought to be committed to the ſame or to different courts. The profound Bacon gives his opinion in the following words: "Apud nonnullos "receptum eſt, ut juriſdictio, quæ decer- "nit ſecundum æquum et bonum, atque "illa altera, quæ procedit ſecundum jus "ſtrictum, iiſdem curiis deputentur: a- "pud alios autem, ut diverſis: omnino

" placet curiarum ſeparatio. Neque enim " ſervabitur diſtinctio caſuum, ſi fiat com- " mixtio juriſdictionum: ſed arbitrium " legem tandem trahet *." Of all queſtions thoſe which concern the conſtitution of a ſtate, and its political intereſt, being the moſt involved in circumſtances, are the moſt difficult to be brought under preciſe rules. I pretend not to deliver any opinion; and feeling in myſelf a bias againſt the great authority mentioned, I ſcarce venture to form an opinion. It may be not improper, however, to hazard a few obſervations, preparatory to a more accurate diſcuſſion. I feel the weight of the argument urged in the paſſage above quoted. In the ſcience of juriſprudence, it is undoubtedly of great importance, that the boundary between equity and common law be clearly aſcertained; without which we ſhall in vain hope for juſt deciſions: a judge, who is uncertain whether the caſe belong to equity or to common law, cannot have a clear conception what judgement ought to be pronounced. But a court that judges of both, being relie-

* De aug. ſcient. l. 8. cap. 3. aph. 45.

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ved from determining this preliminary point, will be apt to loſe ſight altogether of the diſtinction between common law and equity. On the other hand, may it not be urged, that the dividing among different courts things intimately connected, bears hard upon every one who has a claim to proſecute? Before bringing his action, he muſt at his peril determine an extreme nice point, Whether the caſe be governed by common law, or by equity. An error in that preliminary point, though not fatal to the cauſe becauſe a remedy is provided, is, however, productive of much trouble and expence. Nor is the moſt profound knowledge of law ſufficient always to prevent this evil; becauſe it cannot always be foreſeen what plea will be put in for the defendant, whether a plea in equity or at common law. In the next place, to us in Scotland it appears extremely uncouth, that a court ſhould be ſo conſtituted, as to be tied down in many inſtances to pronounce an iniquitous judgement. This not only happens frequently with reſpect to covenants, as above mentioned, but will always happen where a claim founded on common law, which muſt

muſt be brought before a court of common law, is oppoſed by an equitable defence, which cannot be regarded by ſuch a court. Weighing theſe different arguments with ſome attention, the preponderancy ſeems to be on the ſide of an united juriſdiction; ſo far at leaſt, as that the court before which a claim is regularly brought, ſhould be impowered to judge of every defence that is laid againſt it. The ſole inconvenience of an united juriſdiction, that it tends to blend common law with equity, may admit a remedy, by an inſtitute diſtinguiſhing with accuracy their boundaries: but the inconvenience of a divided juriſdiction admits not any effectual remedy. Theſe hints are ſuggeſted with the greateſt diffidence; for I cannot be ignorant of the bias that naturally is produced by cuſtom and eſtabliſhed practice.

In Scotland, as well as in other civilized countries, the King's council was originally the only court that had power to remedy defects or redreſs injuſtice in common law. To this extraordinary power the court of ſeſſion naturally ſucceeded, as being

ing the ſupreme court in civil matters; for in every well-regulated ſociety, ſome one court muſt be truſted with this power, and no court more properly than that which is ſupreme. It may at firſt ſight appear ſurpriſing, that no mention is made of this extraordinary power in any of the regulations concerning the court of ſeſſion. It is probable, that this power was not intended, nor early thought of; and that it was introduced by neceſſity. That the court itſelf had at firſt no notion of being poſſeſſed of this power, is evident from the act of ſederunt November 27. 1592, declaring, " That in time coming they will " judge and decide upon clauſes irritant " contained in contracts, tacks, infeft- " ments, bonds, and obligations, preciſe- " ly according to the words and meaning " of the ſame;" which in effect was declaring themſelves a court of common law, not of equity. But the miſtake was diſcovered: the act of ſederunt wore out of uſe; and now for more than a century, the court of ſeſſion hath acted as a court of equity, as well as of common law. Nor is it rare to find powers unfolded in practice, that were not in view at the inſtitution

tion of a court. When the Roman Pretor was created to be the ſupreme judge, in place of the conſuls, there is no appearance that any inſtructions were given him concerning matters of equity. And even as to the Engliſh court of chancery, though originally a court of equity, there was not at firſt the leaſt notion entertained of that extenſive juriſdiction to which in later times it hath juſtly arrived.

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

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

Our courts of equity have advanced far in ſeconding the laws of nature, but have not perfected their courſe. Every clear and palpable duty is countenanced with an action; but many of the more refined duties, as will be ſeen afterward, are left ſtill without remedy. Until men, thoroughly humanized, be generally agreed about theſe more refined duties, it is perhaps the more prudent meaſure for a court of equity to leave them upon conſcience. Neither doth this court profeſs to take under its protection every covenant and agreement. Many engagements of various ſorts, the fruits of idleneſs, are too trifling, or too ludicrous, to merit the countenance of

law: a court, whether of common law or of equity, cannot preſerve its dignity if it deſcend to ſuch matters. Wagers of all ſorts, whether upon horſes, cocks, or accidental events, are of this ſort. People may amuſe themſelves, and men of eaſy fortunes may paſs their whole time in that manner, becauſe there is no law againſt it; but paſtime, contrary to its nature, ought not to be converted into a ſerious matter, by bringing the fruits of it into a court of juſtice. This doctrine ſeems not to have been thoroughly underſtood, when the court of ſeſſion, in a caſe reported by Dirleton, ſuſtained action upon what is called there a *ſponſio ludicra*. A man having taken a piece of gold, under condition to pay back a greater ſum in caſe he ſhould be ever married, was after his marriage ſued for performance. The court ſuſtained proceſs; though ſeveral of the judges were of opinion, that *ſponſiones ludicræ* ought not to be authoriſed *. But in the following remarkable caſe, the court judged better. In the year 1698, a bond was executed of the follow-

* February 9. 1676.

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ing tenor. " I Mr William Cochran of " Kilmaronock, for a certain ſum of mo- " ney delivered to me by Mr John " Stewart younger of Blackhall, bind and " oblige me, my heirs and ſucceſſors, to " deliver to the ſaid Mr John Stewart, his " heirs, executors, and aſſignees, the ſum " of one hundred guineas in gold, and " that ſo ſoon as I, or the heirs deſcend- " ing of my body, ſhall ſucceed to the " dignity and eſtate of Dundonald." This ſum being claimed from the heir of the obligor, now Earl of Dundonald, it was objected, That this being a *ſponſio ludicra* ought not to be countenanced with an action. It was anſwered, That bargains like the preſent are not againſt law; for if purchaſing the hope of ſucceſſion from a remote heir be lawful *, it cannot be unlawful to give him a ſum on condition of receiving a greater when he ſhall ſucceed. If an heir pinched for money procure it upon diſadvantageous terms, equity will relieve him: but in the preſent caſe there is no evidence, nor indeed ſuſpicion, of inequality. It was replied, That it tends

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

not to the good of ſociety to ſuſtain action upon ſuch bargains: they do not advance commerce, nor contribute in any degree to the comforts of life; why then ſhould a court be bound to ſupport them? It is ſufficient that they are not reprobated, but left upon conſcience and private faith. The court refuſed to ſuſtain action; reſerving it to be conſidered, whether the purſuer, upon proving the extent of the ſum given by him, be not intitled to demand it back *.

The multiplied combinations of individuals in ſociety, ſuggeſt rules of equity ſo numerous and various, that in vain would any writer think of collecting all of them. From an undertaking which is in a good meaſure new, all that can be expected is a collection of ſome of the capital caſes that occur the moſt frequently in law-proceedings. This collection will comprehend many rules of equity, ſome of them probably of the moſt extenſive application. Nor will it be without profit, even as to ſubjects omitted; for by diligently obſerving the application of e-

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

quitable

quitable principles to a number of leading caſes, a habit is gradually formed of reaſoning correctly upon matters of equity, which will enable us to apply the ſame principles to new caſes as they occur.

Having thus given a general view of my ſubject, I ſhall finiſh with explaining my motive for appearing in print. Practiſing lawyers, to whom the ſubject muſt already be familiar, require no inſtruction. This treatiſe is dedicated to the ſtudious in general, ſuch as are fond to improve their minds by every exerciſe of the rational faculties. Writers upon law are too much confined in their views: their works, calculated for lawyers only, are involved in a cloud of obſcure words and terms of art, a language perfectly unknown except to thoſe of the profeſſion. Thus it happens, that the knowledge of law, like the hidden myſteries of ſome Pagan deity, is confined to its votaries; as if others were in duty bound to blind and implicit ſubmiſſion. But ſuch ſuperſtition, whatever unhappy progreſs it may have made in religion, never can prevail in law: men who have life or fortune at ſtake, take the liberty to think for themſelves;

ſelves; and are no leſs ready to accuſe judges for legal oppreſſion, than others for private violence or wrong. Ignorance of law hath in this reſpect a moſt unhappy effect: we all regard with partiality our own intereſt; and it requires knowledge no leſs than candour, to reſiſt the thought of being treated unjuſtly when a court pronounceth againſt us. Thus peeviſhneſs and diſcontent ariſe, and are vented againſt the judges of the land. This, in a free government, is a dangerous and infectious ſpirit, to remedy which we cannot be too ſolicitous. Knowledge of thoſe rational principles upon which law is founded I venture to ſuggeſt, as a remedy no leſs efficacious than palatable. Were ſuch knowledge univerſally ſpread, judges who adhere to rational principles, and who with ſuperior underſtanding can reconcile law to common ſenſe, would be revered by the whole ſociety. The fame of their integrity, ſupported by men of parts and reading, would deſcend to the loweſt of the people; a thing devoutly to be wiſhed! Nothing tends more to ſweeten the temper, than a conviction of impartiality in judges; by which we hold ourſelves ſecure

cure againſt every inſult or wrong. By that means, peace and concord in ſociety are promoted; and individuals are finely diſciplined to ſubmit with the like deference to all other acts of legal authority. Integrity is not the only duty required in a judge: to behave ſo as to make every one rely upon his integrity, is a duty no leſs eſſential. Deeply impreſſed with theſe notions, I dedicate my work to every lover of ſcience; having endeavoured to explain the ſubject in a manner that requires in the reader no particular knowledge of municipal law. In that view I have avoided terms of art; not indeed with a ſcrupulous nicety, which might look like affectation; but ſo as that with the help of a law-dictionary, what I ſay may eaſily be apprehended.

ORDER, a beauty in every compoſition, is eſſential in a treatiſe of equity, which comprehends an endleſs variety of matter. To avoid obſcurity and confuſion, we muſt, with the ſtricteſt accuracy, bring under one view things intimately connected, and handle ſeparately things unconnected, or but ſlightly connected. Two

great principles, juſtice and utility, govern the proceedings of a court of equity; and every matter that belongs to that court, is regulated by one or other of theſe principles. Hence a diviſion of the preſent work into two books, the firſt appropriated to juſtice, the ſecond to utility; in which I have endeavoured to aſcertain all the principles of equity that occurred to me. I thought it would benefit the reader to have theſe principles illuſtrated in a third book, where certain important ſubjects are ſelected to be regularly diſcuſſed from beginning to end; ſuch as furniſh the moſt frequent opportunities for applying the principles aſcertained in the former part of the work.

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