CHAP. V.

Powers of a court of equity to remedy what is imperfect in common law with reſpect to ſtatutes.

CONſidering the nature of a court of common law, there is no reaſon that it ſhould have more power over ſtatutes than over private deeds. With reſpect to both it is confined to the words; and muſt not pretend to pronounce any judgement upon the ſpirit and meaning in oppoſition to the words. And yet the words of a ſtatute correſpond not always to the will of the legiſlature; nor are always the things enacted proper means to anſwer the end in view; falling ſometimes ſhort of the end, and ſometimes going beyond it. Hence to make ſtatutes effectual, there is the ſame neceſſity for the interpoſition of a court of equity, that there is with reſpect to deeds and covenants. But in order to

form a juſt notion of the powers of a court of equity with reſpect to ſtatutes, it is neceſſary, as a preliminary point, to aſcertain how far they come under the powers of a court of common law; and with that point I ſhall commence the enquiry.

Submiſſion to government is univerſally acknowledged to be a duty: but the true foundation of that duty ſeems to lie in obſcurity, though ſcarce any other topic has filled more volumes. Many writers derive this duty from an original compact between the ſovereign and his people. Be it ſo. But what is it that binds future generations? for a compact binds thoſe only who are parties to it; not to mention that governments were eſtabliſhed long before contracts were of any conſiderable authority *. Others, diſſatisfied with this narrow foundation, endeavour to aſſign one more extenſive, deriving the foregoing duty from what is termed in the Roman law a *quaſi-contract*. "It is a rule," they ſay, "in law, and in common ſenſe, That a "man who lays hold of a benefit, muſt "take it with its conditions, and ſubmit "to its neceſſary conſequences. Thus one

* See Hiſtorical law-tracts, tract 2.

"who

" who accepts a ſucceſſion, muſt pay the " anceſtor's debts: he is preſumed to a- " gree to this condition, and is not leſs " firmly bound than by an explicit en- " gagement. In point of government, " protection and ſubmiſſion are recipro- " cal; and the taking protection from " a lawful government, infers a conſent to " ſubmit to its laws." This ground of ſubmiſſion is not much more extenſive than the former; for both proceed upon the ſuppoſition, that without conſent expreſſed or imply'd no perſon owes obedience to government. At this rate, the greater part of thoſe who live under government are left in a ſtate of independency; for ſeldom is there occaſion to afford ſuch peculiar protection to private perſons, as neceſſarily to infer their conſent. Conſider farther, that the far greater part of thoſe who live in ſociety, are not capable to underſtand the foregoing reaſoning: many of them have not even the ſlighteſt notion of what is meant by the terms *protection* and *ſubmiſſion*. I am inclined therefore to think, that this important duty has a more ſolid foundation; and, comparing it with other moral duties, I find no reaſon to doubt, that

that like them it is rooted in human nature *. If a man be a ſocial being and government be eſſential to ſociety, it is not conformable to the analogy of nature, that we ſhould be left to an argument for inveſtigating the duty we owe our rulers. If juſtice, veracity, gratitude, and other private duties, be ſupported and enforc'd by the moral ſenſe, it would be ſtrange if nature were deficient with reſpect to the public duty only. But nature is not deficient in any branch of the human conſtitution: government is no leſs neceſſary to ſociety, than ſociety to man; and by the very frame of our nature we are fitted for government as well as for ſociety. To form originally a ſtate or ſociety under government, there can be no means, it is true, other than compact; but the continuance of a ſtate, and of government over multitudes who never have occaſion to promiſe ſubmiſſion, muſt depend on a different principle. The moral ſenſe, which binds individuals to be juſt to each other, binds them equally to ſubmit to the laws of their ſociety; and we have a clear con-

* See Eſſays on the principles of morality and natural religion, part 1. eſſ. 2. chap. 7.

viction

viction that this is our duty. The ſtrength of this conviction is no where more viſible than in a diſciplined army. There, the duty of ſubmiſſion is exerted every moment at the hazard of life; and frequently where the hazard is imminent, and death almoſt certain. In a word, what reaſon ſhows to be neceſſary in ſociety, is, by the moral ſenſe, made an indiſpenſable duty. We have a ſenſe of fitneſs and rectitude in ſubmitting to the laws of our ſociety; and we have a ſenſe of wrong, of guilt, and of meriting puniſhment, when we tranſgreſs them (*a*).

Hence

(*a*) In examining this matter, it would not be fair to take under conſideration ſtatutes relating to juſtice, becauſe juſtice is binding independent of municipal law. Conſider only things left indifferent by the law of nature, which are regulated by ſtatute for the good of ſociety; the laws, for example, againſt uſury, againſt exporting corn in time of dearth, and many that will occur upon the firſt reflection. Every man of virtue will find himſelf bound in conſcience to ſubmit to ſuch laws. Nay, even with reſpect to thoſe who by intereſt are moved to tranſgreſs them, I venture to affirm, that the firſt acts, at leaſt, of tranſgreſſion, are ſeldom perpetrated with a quiet mind. I will not even except what is called *ſmuggling*; though private intereſt authoriſed by example, and

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

Many differences among ſtatutes muſt be kept in view, in order to aſcertain the powers of a court of common law con-

and the trifle that is loſt to the public by any ſingle tranſgreſſion, obſcure commonly the conſciouſneſs of wrong; and perhaps, after repeated acts, which harden individuals in iniquity, make it vaniſh altogether. It muſt however be acknowledged, that the moral ſenſe, uniform as to private virtue, operates with very different degrees of force with relation to municipal law. The laws of a free government, directed for the good of the ſociety, and peculiarly tender of the liberty of the ſubject, have great and univerſal influence: they are obeyed chearfully as a matter of ſtrict duty. The laws of a deſpotic government, on the contrary, contrived chiefly to advance the power or ſecure the perſon of a tyrant, require military force to make them effectual; for conſcience ſcarce interpoſes in their behalf. And hence the great ſuperiority of a free ſtate, with reſpect to the power of the governors as well as the happineſs of the ſubjects, over every kingdom that in any degree is deſpotic or tyrannical.

cerning them. Some ſtatutes are compulſory, others prohibitory; ſome reſpect individuals, others the public; of ſome the tranſgreſſion occaſions damage, of others not; to ſome a penalty is annexed, others reſt upon authority.

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

But from diſobeying a ſtatute, prejudice often enſues, which, not being pecuniary, cannot be repaired by awarding a ſum in name of damages. Statutes relating to the public are for the moſt part of this nature;

and many alſo in which individuals are immediately concerned (*a*). To clear this point, we muſt diſtinguiſh as formerly between compulſory and prohibitory ſtatutes. The tranſgreſſion of a prohibitory ſtatute is a direct contempt of legal authority, and conſequently a moral wrong, which ought to be redreſſed; and where no ſanction is added, it muſt neceſſarily be the purpoſe of the legiſlature to leave the remedy to a court of law. This is a clear inference, unleſs we ſuppoſe the legiſlature guilty of prohibiting a thing to be done, and yet leaving individuals at liberty to diſobey with impunity. To make the will of the legiſlature effectual in this caſe, different means muſt be employ'd according to the nature of the ſubject. If an act done *prohibente lege* can be undone, the moſt effectual method of redreſſing the wrong is to void the act. If the act cannot be undone, the only means left is puniſhment. And accordingly, it is a rule in

(*a*) This branch, by the general diſtribution, ought regularly to be handled afterward, part 2. of this firſt book; but by joining it here to other matters with which it is intimately connected, I thought it would appear in a clearer light.

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the law of England *, that an offender for contempt of the law, may be fined and impriſoned at the King's ſuit (*a*).

On the other hand, the tranſgreſſion of a compulſory ſtatute ordering a thing to be done, infers not neceſſarily a contempt of legal authority. It may be an act of omiſſion only, which is not criminal; and it will be conſtrued to be ſuch, unleſs from collateral circumſtances it be

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

* 2. Inſtit. 163.

made evident, that there was an intention to contemn the law. Suppoſing then the tranſgreſſion to be an act of omiſſion only, and conſequently not an object of puniſhment, the queſtion is, What can be done, in order to fulfil the will of the legiſlature. The court has two methods: one is, to order the ſtatute to be fulfilled; and if this order be alſo diſobey'd, a criminal contempt muſt be the conſtruction of the perſon's behaviour, to be followed, as in the former caſe, with a proper puniſhment. The other is, to order the thing to be done under a penalty. I give an example. The freeholders are by ſtatute bound to convene at Michaelmas, in order to receive upon the roll perſons qualified; but no penalty is added to compel obedience. In *odium* of a freeholder who deſires to be put upon the roll, they forbear to meet. What is the remedy here where there is no pecuniary damage? The court of ſeſſion may appoint them to meet under a penalty. For, in general, if it be the duty of judges to order the end; they muſt uſe ſuch means as are in their power. And if this can be done with reſpect to a private perſon, it follows, that where a thing

thing is ordered to be done for the good of the public, it belongs to the court of ſeſſion, upon application of the King's Advocate, to order the thing to be done under a penalty. In a proceſs at the inſtance of an heritor intitled to a ſalmon-fiſhing in a river, againſt an inferior heritor, for regulating his cruive and cruive-dike, concluding, That he ſhould obſerve the Saturday's ſlap; that the hecks of his cruives ſhould be three inches wide, &c. it was decreed, That the defendant ſhould be obliged to obſerve theſe regulations under the penalty of L. 50 Sterling. It was urged for the defendant, That the purſuer ought to be ſatisfied with damages upon contravention, becauſe the law has impoſed no penalty, and the court can impoſe none. Anſwered, That it is beyond the reach of art to aſcertain damage in this caſe; and therefore that to enforce theſe regulations a penalty is neceſſary. And if this remedy be neglected by the legiſlature, it muſt be ſupplied by a court of equity upon the principle, That if there be a right it ought to be made effectual.

What next come under conſideration are ſtatutes forbidding things to be done under

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

be inflicted; for otherwiſe it will loſe its influence as a prohibitory means.

Prohibitory ſtatutes are often ſo inaccurately expreſſed, as to leave it doubtful whether the penalty be intended as one of the means for repreſſing the evil, or the only means. This defect occaſions in courts of law much conjectural reaſoning, and many arbitrary judgements. The capital circumſtance for clearing the doubt, is the nature of the evil prohibited. With reſpect to every evil of a general bad tendency, it ought to be held the will of the legiſlature, to give no quarter: and conſequently, beſide inflicting the penalty, it is the duty of courts of law to uſe every other mean to make this will effectual. With reſpect to evils leſs pernicious, it ought to be held the intention of the legiſlature, to leave no power with judges beyond inflicting the penalty. This doctrine will be illuſtrated by the following examples. By the act 52. parl. 1587. "He "who bargains for greater profit than 10 "*per cent.* ſhall be puniſhed as an uſurer." Here is a penalty without declaring ſuch bargains null: and yet it has ever been held the intendment of this act to diſcharge

charge uſury totally; and the penalty is deemed as one mean only of making the prohibition effectual. There was accordingly never any heſitation to ſuſtain action for voiding uſurious bargains, nor even to make the lender liable for the ſums received by him above the legal intereſt. This then is held to be a ſtatute of the firſt claſs. The following ſtatutes belong to the ſecond claſs. An excluſive privilege of printing books, is given to authors and their aſſigns for the term of fourteen years. Any perſon who within the time limited prints or imports any ſuch book, ſhall forfeit the ſame to the proprietor, and one penny for every ſheet found in his cuſtody; the half to the King, and the other half to whoever ſhall ſue for the ſame *. With reſpect to the monopoly granted by this ſtatute, it has been juſtly eſtabliſhed, that a court of law is confined to the penalty, and cannot apply other means for making it effectual, not even an action of damages againſt an interloper †. "Members of the college of juſtice are

* 8. Ann. 18.

† June 7. 1748, Bookſellers of London contra Bookſellers of Edinburgh and Glaſgow.

" diſcharged to buy any lands, teinds, &c. " the property of which is controverted in " a proceſs, under the certification of lo- " ſing their office *." It has been always held the ſenſe of this ſtatute, to be ſatisfied with the penalty, without giving authority to reduce or void ſuch bargains.

But though contracts or deeds contrary to ſtatutory prohibitions of the kind laſt mentioned are not ſubject to reduction, it is a very different point, Whether it be the duty of courts of law to ſuſtain action upon ſuch a contract or deed. And yet this diſtinction ſeems to have been overlooked in the court of ſeſſion: for it is the practice of that court, while they inflict the penalty, to ſupport with their authority that very thing which is prohibited under a penalty. Thus, a member of the college of juſtice, buying land while the property is controverted in a proceſs, is deprived of his office; and yet, with the ſame breath, action is given him to make the minute of ſale

* Act 216. parl. 1594.

effectual *. This, in effect, is conſidering the ſtatute, not as prohibitory of ſuch purchaſes, but merely as laying a tax upon them, ſimilar to what at preſent is laid upon plate, coaches, &c. I take liberty to ſay, that this is a groſs miſapprehenſion of the ſpirit and intendment of the ſtatute. Comparing together the ſtatutes contained in both claſſes, both equally are prohibited: the difference concerns only the means employ'd for making the prohibition effectual. To repreſs the leſs noxious evils, the ſtatutory penalty is thought ſufficient: to repreſs the more noxious evils, beſide inflicting the ſtatutory penalty, a court may employ every lawful mean in its power. But evidently both are intended to be repreſſed; and juſtly, becauſe both in different degrees are hurtful to the ſociety in general, or to part of it. This article is of no ſlight importance. If I have ſet in a juſt light the ſpirit and intendment of the foregoing ſtatutes, it follows of conſe-

* Haddington, June 5. 1611, Cunninghame contra Maxwell; Durie, July 30. 1635, Richardſon contra Sinclair; Fountainhall, December 20. 1683, Purves contra Keith.

quence,

quence, that an act prohibited in a ſtatute of the ſecond claſs ought not to be countenanced with an action, more than an act prohibited in a ſtatute of the firſt claſs. Courts of law were inſtituted to enforce the will of the national legiſlator, as well as of the Great Legiſlator of the univerſe, and to put in execution municipal laws as well as thoſe of nature. What ſhall we ſay then of a court that ſupports an act prohibited by a ſtatute, or authoriſes any thing contradictory to the will of the legiſlature? It is a tranſgreſſion of the ſame nature, though not the ſame in degree, with that of ſuſtaining action for a bribe promiſed to commit murder or robbery. With regard then to ſtatutes of this kind, though a court is confined to the penalty, and cannot inflict any other puniſhment, it doth by no means follow, that action ought to be ſuſtained for making the act prohibited effectual: on the contrary, to ſuſtain action would be flying in the face of the legiſlature. The ſtatute, for example, concerning members of the college of juſtice, is ſatisfied with the penalty of deprivation, without declaring the bargain

null; and therefore to ſuſtain a reduction of the bargain would be to puniſh beyond the words, and perhaps beyond the intention, of the ſtatute. But whether action ſhould be ſuſtained to make the bargain effectual, is a conſideration of a very different nature: the refuſing action is made neceſſary by the very conſtitution of a court of law; it being inconſiſtent with the deſign of its inſtitution, to enforce any contract or any deed prohibited by ſtatute. It follows indeed from theſe premiſes, that it is left optional to the vender to fulfil the contract or no at his pleaſure; for if a court of law cannot interpoſe, he is under no legal compulſion. Nor is this a novelty. In many caſes beſide the preſent, the rule is applicable, *Quod potior eſt conditio poſſidentis*, where an action will not be given to compel performance, and yet if performance be made, an action will as little be given to recall it.

Pondering this ſubject ſedately, I can never ceaſe wondering to find the practice I have been condemning extended to a much ſtronger caſe, where the purpoſe of the legiſlature to make an abſolute prohibition is clearly expreſſed. The caſe I have

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in view relates to the revenue-laws, prohibiting certain goods to be imported into this iſland, or prohibiting them to be imported from certain places named. To import ſuch goods, or to bargain about their importation, is clearly a contempt of legal authority; and conſequently a moral wrong, which the ſmuggler's conſcience ought to check him for, and which it will check him for, if he be not already a hardened ſinner. And yet, by miſtaking the nature of prohibitory laws, actions in the court of ſeſſion have been ſuſtained for making ſuch ſmuggling-contracts effectual. They are not ſuſtained at preſent; nor I hope will be. " Non dubium eſt, in le-
" gem committere eum, qui verba legis
" amplexus, contra legis nititur voluntatem. Nec pœnas inſertas legibus evita-
" bit, qui ſe contra juris ſententiam ſæva
" prærogativa verborum fraudulenter ex-
" cuſat. Nullum enim pactum, nullam
" conventionem, nullum contractum in-
" ter eos videri volumus ſubſecutum, qui
" contrahunt lege contrahere prohibente.
" Quod ad omnes etiam legum interpre-
" tationes, tam veteres quam novellas,
" trahi generaliter imperamus; ut legiſ-
" latori quod fieri non vult, tantum pro-
" hibuiſſe

" hibuiſſe ſufficiat : cæteraque, quaſi ex-
" preſſa, ex legis liceat voluntate colli-
" gere : hoc eſt, ut ea, quæ lege fieri pro-
" hibentur, ſi fuerint facta, non ſolum in-
" utilia, ſed pro infectis etiam habeantur :
" licet legiſlator fieri prohibuerit tantum,
" nec ſpecialiter dixerit *inutile eſſe debere*
" *quod factum eſt* *."

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

* l. 5. C. De legibus.

may

may be divided into two claſſes. Firſt, Thoſe which have juſtice for their object, by ſupplying the defects, or correcting the injuſtice, of common law. Second, Thoſe which have utility for their ſole object. Statutes of the firſt claſs are intended for no other purpoſe but to enlarge the juriſdiction of courts of common law, by impowering them to diſtribute juſtice where their ordinary powers reach not: ſuch ſtatutes are not neceſſary to a court of equity, which, by its original conſtitution, can ſupply the defects and correct the injuſtice of law: but they have the effect to limit the juriſdiction of a court of equity; for the remedies afforded by them muſt be put in execution by courts of common law, and no longer by a court of equity. All that is left to a court of equity concerning a ſtatute of this kind, is to ſupply the defects and correct the injuſtice of common law, as far as the ſtatute is incomplete or imperfect; which, in effect, is ſupplying the defects of the ſtatute. But it is not a new power beſtowed upon a court of equity as to ſtatutes that are imperfect: the court only goes on to exerciſe its wonted powers with reſpect to matters of juſtice

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that are left with it by the ſtatute, and not beſtowed upon courts of common law. I explain myſelf by an example. When goods were wrongouſly taken away, the common law of England gave an action for reſtitution to none but to the proprietor; and therefore when the goods of a monaſtery were pillaged during a vacancy, the ſucceeding abbot had no action. This defect in law with reſpect to material juſtice, would probably have been left to the court of chancery, had its powers been unfolded when the ſtatute of Marlebirge ſupplying the defect was made *; but no other remedy occurring, that ſtatute impowers the judges of common law to ſuſtain action. Had the ſtatute never exiſted, action would undoubtedly have been ſuſtained in the court of chancery: all the power that now remains with that court, is to ſuſtain action where the ſtatute is defective. The ſtatute enacts, "That the "ſucceſſor ſhall have an action againſt "ſuch tranſgreſſor, for reſtoring the goods "of the monaſtery." Attending to the words ſingly, which a court of common law muſt do, the remedy is incomplete;

* 52. Henry III. cap. 29.

for trees cut down and carried off are not mentioned. This defect in the ſtatute, is ſupplied by the court of chancery. And Coke obſerves, that a ſtatute which gives remedy for a wrong done, ſhall be taken by equity. After all, it makes no material difference, whether ſuch interpoſition of a court of equity, be conſidered as ſupplying defects in common law, or as ſupplying defects in ſtatutes. It is ſtill enforcing juſtice in matters which come not under the powers of a court of common law.

Statutes that have utility for their object, are of two kinds. Firſt, Thoſe which are made for promoting the poſitive good and happineſs of the ſociety in general, or of ſome of its members in particular. Second, Thoſe which are made to prevent miſchief. Defective ſtatutes of the latter kind may be ſupplied by a court of equity; becauſe, even independent of a ſtatute, that court hath power to make regulations for preventing miſchief. But that court hath not, more than a court of common law, any power to ſupply defective ſtatutes of the former kind; becauſe it is not impowered originally to interpoſe in any matter that hath no other tendency but merely to promote the poſi-

tive good of the ſociety. But this is only mentioned here to give a general view of the ſubject: for the powers of a court of equity as directed by utility are the ſubject of the next book.

Having ſaid ſo much in general, we are prepared for particulars; which may commodiouſly be diſtributed into three ſections. Firſt, Where the will of the legiſlature is not juſtly expreſſed in the ſtatute. Second, Where the means enacted fall ſhort of the end purpoſed by the legiſlature. Third, Where the means enacted reach unwarily beyond the end purpoſed by the legiſlature.

SECT. I.

Where the will of the legiſlature is not juſtly expreſſed in the ſtatute.

THis ſection, for the ſake of perſpicuity, ſhall be divided into three articles. Firſt, Where the words are ambiguous. Second, Where they fall ſhort of will. Third, Where they go beyond will.

ART. I.

ART. I. *Where the words are ambiguous.*

THE following is a proper inſtance. By the act 250. parliament 1597, " Vaſſals " failing to pay their feu-duties for the " ſpace of two years, ſhall forfeit their " feu-rights, in the ſame manner as if a " clauſe irritant were ingroſſed in the in- " feftment." The forfeiting clauſe here is ambiguous: it may mean an *ipſo facto* forfeiture upon elapſing of the two years; or it may mean a forfeiture if the feu-duty be not paid after a regular demand in a proceſs. Every ambiguous clauſe ought to be ſo interpreted as to ſupport the rules of juſtice, becauſe ſuch muſt be conſtructed the intendment of the legiſlature: and that by this rule the latter ſenſe muſt be choſen, will appear upon the ſlighteſt reflection. The remedy here provided againſt the obſtinacy or negligence of an undutiful vaſſal, could never be intended a trap for the innocent, by forfeiting thoſe who have failed in payment through ignorance or inability. The conſtruction choſen making the right voidable only, not void *ipſo*

facto, obliges the ſuperior to inſiſt in a declarator of irritancy or forfeiture, in order to void the right; which gives the vaſſal an opportunity to prevent the forfeiture, by paying up all arrears. By this method, it is true, the guilty may eſcape: but this is far more eligible in common juſtice, than that the innocent be puniſhed with the guilty.

ART. II. *Where the words fall ſhort of will.*

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

ART. III. *Where the words go beyond will.*

BY the act 5. parl. 1695, it is enacted, "That hereafter no man binding for and

"with

" with another conjunctly and ſeveral-
" ly, in any bond or contract for ſums
" of money, ſhall be bound longer than
" ſeven years after the date of the bond."
It appearing to the court, from the nature of the thing, and from other clauſes in the ſtatute, that the words are too extenſive, and that the privilege was intended for none but for cautioners upon whoſe faith money is lent, they have for that reaſon been always in uſe to reſtrict the words, and to deny the privilege to other cautioners.

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

The regulations 1695, admitting no objection againſt a decreet-arbitral but bribery and corruption only, reach unwarily beyond

beyond the meaning of the legiſlature. A decreet-arbitral derives its force from the ſubmiſſion; and for that reaſon every good objection againſt a ſubmiſſion muſt operate againſt the decreet-arbitral.

By the ſtatute 9° *Annæ*, *cap.* 13. "The "perſon who at one time loſes the ſum or "value of L. 10 Sterling at game, and "pays the ſame, ſhall be at liberty with- "in three months to ſue for and recover "the money or goods ſo loſt, with coſts "of ſuit. And in caſe the loſer ſhall not "within the time foreſaid really and *bona* "*fide* bring his action, it ſhall be lawful "for any one to ſue for the ſame, and "triple value thereof, with coſts of ſuit." Here there is no limitation mentioned with reſpect to the popular action: nor, as far as concerns England, is it neceſſary; becauſe, by the Engliſh ſtatute 31ſt Eliz. cap. 5. "No action ſhall be ſuſtained upon "any penal ſtatute made or to be made, "unleſs within one year of the offence." A limiting clauſe was neceſſary with regard to Scotland only, to which the ſaid ſtatute of Elizabeth reacheth not; and therefore, as there is no limitation expreſſed in the act, a court of common law in Scotland

Scotland muſt ſuſtain the popular action for forty years, contrary evidently to the will of the legiſlature, which never intended a penal ſtatute to be perpetual in Scotland, that in England is temporary. As here, therefore, the words go beyond will, it belongs to the court of ſeſſion to limit this ſtatute, by denying action if not brought within one year after the offence. Hence, in the deciſion January 19. 1737, Murray *contra* Cowan, where an action was ſuſtained even after the year, for recovering money loſt at play with the triple value, the court of ſeſſion acted as a court of common law, and not as a court of equity.

The following is an inſtance from the Roman law with reſpect to the *hereditatis petitio*, of words reaching inadvertently beyond the will of the legiſlator. " Illud " quoque quod in oratione Divi Hadriani " eſt, *Ut poſt acceptum judicium id actori* " *præſtetur, quod habiturus eſſet, ſi eo tempore,* " *quo petit, reſtituta eſſet hereditas*, interdum durum eſt: quid enim, ſi poſt litem conteſtatam mancipia, aut jumenta, " aut pecora deperierint? Damnari debebit ſecundum verba orationis: quia po-

" tuit

" tuit petitor, reſtituta hereditate, diſtra-
" xiſſe ea. Et hoc juſtum eſſe in ſpeciali-
" bus petitionibus Proculo placet: Caſſius
" contra ſenſit. In prædonis perſona Pro-
" culus recte exiſtimat: in bonæ fidei
" poſſeſſoribus Caſſius. Nec enim debet
" poſſeſſor aut mortalitatem præſtare, aut
" propter metum hujus periculi temere in-
" defenſum jus ſuum relinquere *."

SECT. II.

Where the means enacted fall ſhort of the end purpoſed by the legiſlature.

THE firſt inſtance ſhall be given of means that afford a complete remedy in ſome caſes, and fall ſhort in others *ubi par eſt ratio*. In order to fulfil juſtice, the will of the legiſlature may be made effectual by a court of equity, whatever defect there may be in the words. Take the following examples. In the Roman law, Ulpian mentions the following edict. " Si
" quis id quod, juriſdictionis perpetuæ

* l. 40. De hereditatis petitione.

" cauſa, in albo, vel in charta, vel in alia " materia propoſitum erit, dolo malo cor- " ruperit; datur in eum quingentorum " aureorum judicium, quod populare eſt." Upon this edict Ulpian gives the following opinion. " Quod ſi, dum proponitur, " vel ante propoſitionem, quis corruperit; " edicti quidem verba ceſſabunt; Pompo- " nius autem ait ſententiam edicti porri- " gendam eſſe ad hæc *."

" Oratio Imperatorum Antonini et Com- " modi, quæ quaſdam nuptias in perſonam " ſenatorum inhibuit, de ſponſalibus nihil " locuta eſt: recte tamen dicitur, etiam " ſponſalia in his caſibus ipſo jure nullius " eſſe momenti; ut ſuppleatur, quod ora- " tioni deeſt †."

" Lex Julia, quæ de dotali prædio pro- " ſpexit, Ne id marito liceat obligare, aut " alienare, plenius interpretanda eſt: ut " etiam de ſponſo idem juris ſit, quod de " marito ‡."

By the ſtatute of Gloceſter, " A man " ſhall have a writ of waſte againſt him

* l. 7. § 2. De juriſdic.
† l. 16. De ſponſalibus.
‡ l. 4. De fundo dotali.

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

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

* 6. Edward I. cap 5.

† 1. Inſtit. 54 b.

cum

cum beneficio, for ſelling his predeceſſor's eſtate *.

By the common law of Scotland, a man's creditors after his death had no preference upon his eſtate: the property was tranſferred to his heir, and the heir's creditors came in for their ſhare. This was groſs injuſtice; for the anceſtor's creditors, who lent their money upon the faith of the eſtate, ought in all views to have been preferred. The act 24. parl. 1661, declares, "That the creditors of the predeceſſor do-"ing diligence againſt the apparent heir, "and againſt the real eſtate which belong-"ed to the defunct, within the ſpace of "three years after his death, ſhall be pre-"ferred to the creditors of the apparent "heir." The remedy here reaching the real eſtate only, the court of ſeſſion completed the remedy, by extending it to the perſonal eſtate †, and alſo to a perſonal bond limited to a ſubſtitute named ‡. And, as being a court of equity, it was well authoriſed to make this extenſion; for to

* Feb. 27. 1751, Patrick Blair.

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

‡ Forbes, Feb. 9. 1711, Graham contra Macqueen.

withdraw from the predeceſſor's creditors part of his perſonal eſtate, is no leſs unjuſt than to withdraw from them part of his real eſtate.

One ſtatute there is, or rather clauſe in a ſtatute, which affords a plentiful harveſt of inſtances. By the principles of common law an heir is intitled to continue the poſſeſſion of his anceſtor; and formerly, if he could colour his poſſeſſion with any ſort of title, however obſolete or defective, he not only enjoy'd the rents, but was enabled by that means to defend his poſſeſſion againſt the creditors *. Among many remedies for this flagrant injuſtice, there is a clauſe in the act 62. parl. 1661, enacting, "That in caſe the apparent heir of "any debtor ſhall acquire right to an ex- "pired appriſing, the ſame ſhall be re- "deemable from him, his heirs and ſuc- "ceſſors, within ten years after acquiring "of the ſame, by the poſterior appriſers, "upon payment of the purchaſe-money." This remedy has been extended in many particulars, in order to fulfil the end intended by the legiſlature. For, 1*mo*, Tho'

* See Hiſtorical law-tracts, tract 12. toward the cloſe.

the

the remedy is afforded to appriſers only, it is extended to perſonal creditors. 2*do*, It has been extended even to an heir of entail, impowering him to redeem an appriſing of the entailed lands, after it was purchaſed by the heir of line. 3*tio*, Though no purchaſe is mentioned in this clauſe but what is made by the heir-apparent, the remedy however is extended againſt a preſumptive heir, who cannot be heir-apparent while his anceſtor is alive. 4*to*, It was judged, That an appriſing led both againſt principal and cautioner, and purchaſed by the heir-apparent of the principal, might be redeemed by the creditors of the cautioner. This was a ſtretch, but not beyond the bounds of equity: the cautioner himſelf, as creditor for relief, could have redeemed this appriſing in terms of the ſtatute; and it was thought, that every privilege competent to a debtor ought to be extended to his creditors, in order to make their claims effectual. 5*to*, The privilege is extended to redeem an appriſing during the legal, though the ſtatute mentions only an expired appriſing. And, *laſtly*, Though the privilege of redemption is limited to ten years after the purchaſe made

made by the heir-apparent, it was judged, that the ten years begin not to run but from the time that the purchaſe is known to the creditors. Theſe deciſions all of them are to be found in the Dictionary, vol. 1. p. 359.

It is chiefly to ſtatutes of this kind that the following doctrine is applicable. "Non "poſſunt omnes articuli ſingillatim aut "legibus aut ſenatuſconſultis comprehen- "di: ſed cum in aliqua cauſa ſententia "eorum manifeſta eſt, is, qui juriſdictio- "ni præeſt, ad ſimilia procedere, atque ita "jus dicere debet. Nam, ut ait Pedius, "quoties lege aliquid, unum vel alterum "introductum eſt, bona occaſio eſt, cætera, "quæ tendunt ad eandem utilitatem, vel "interpretatione vel certe *juriſdictione*, ſup- "pleri *."

The next branch is of means that are incomplete in every reſpect, where the very thing in view of the legiſlature is but imperfectly remedied. Of this take the following illuſtrious example, which at the ſame time furniſhes an opportunity to explain the nature and effect of an adjudication after its legal is expired.

* l. 12. & 13. De legibus.

An

An adjudication during the legal is a *pignus prætorium:* and expiry of the legal is held to transfer the property from the debtor to the creditor; preciſely as in a wadſet or mortgage, where the redemption is limited within a day certain. Yet the rule which, with relation to a wadſet, affords an equity of redemption after the ſtipulated term of redemption is paſt *, has never been extended, directly at leaſt, to relieve againſt an expired legal. This ſubject therefore is curious, and merits attention.

In a poinding of moveables, the debtor has not an equity of redemption, becauſe the moveables are transferred to the creditor at a juſt value. The ſame being originally the caſe of an appriſing of land, the legal reverſion of ſeven years introduced by the act 36. parl. 1469, was in reality a privilege beſtowed upon the debtor, without any foundation in equity; and therefore equity could not ſupport an extenſion of the reverſion one hour beyond the time granted by the ſtatute. But the nature of an appriſing was totally reverſed, by an oppreſſive and diſhoneſt practice of

* Pag. 70.

attaching

attaching land for payment of debt, without preſerving any equality between the debt and the land; great portions of land being frequently carried off for payment of inconſiderable ſums. An appriſing, as originally conſtituted, was a judicial ſale for a juſt price: but an execution, by which land at random is attached for payment of debt without any eſtimation of value, ought to have been reprobated as flying in the face of law. By what means it happened that creditors were indulged to act ſo unjuſtly, I cannot ſay; but ſo it is, that ſuch appriſings were ſupported even againſt the cleareſt principles of common law. An appriſing ſo irregular cannot indeed be held as a judicial ſale for a juſt price: the utmoſt indulgence that could be given it, was to hold it to be a ſecurity for payment of debt. Accordingly the act 6. parl. 1621, conſiders it in that light, enacting, "That appriſers ſhall be "accountable for their intromiſſions with-"in the legal, firſt in extinction of the in-"tereſt, and thereafter of the capital;" which, in effect, is declaring the property to remain with the debtor, as no man is bound to account for rents that are his

own. And it is conſidered in the ſame light by the act 62. parl. 1661, "ranking "*pari paſſu* with the firſt effectual appri- "ſing, all other appriſings led within "year and day of it:" creditors real or perſonal may be ranked upon a common ſubject *pari paſſu*, or in what order the legiſlature thinks proper; but ſuch ranking evidently implies that the property belongs to the debtor (*a*).

An appriſing then, or, inſtead of it, an adjudication, has, during the legal, ſunk down to be a *pignus prætorium*, or a judicial ſecurity for debt; and the remaining queſtion is, Whether it be converted into a title of property upon expiry of the legal. The act 1621 above mentioned makes appriſers accountable for their in-

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

tromiſſion within the legal; and if they be not accountable after, ought it not to be inferred, that they muſt be held to be proprietors? It may indeed be clearly inferred from the act, that they are not accountable after the legal is expired; but it follows not that the property muſt be held to be in them: I inſtance a proper wadſetter, who is not proprietor of the ſubject, and yet is not liable to account. I ſay farther, that a court of equity, though it has no power to overturn expreſs law, is not bound by any inference drawn from a ſtatute, however clear, except as far as that inference is ſupported by the rules of juſtice. And in that view we proceed to inquire, what are the rules of juſtice with reſpect to an appriſing or an adjudication after expiration of the legal.

According to the original form of an appriſing, requiring a ſtrict equality between the debt and the value of the land, it was rational and juſt, that the property of the land ſhould inſtantly be transferred to the creditor in ſatisfaction of the debt; but it could no longer be rational or juſt to transfer the property, after it became cuſtomary

ſtomary to attach land at random without regarding its extent. The debtor's whole land-eſtate was appriſed, and is now adjudged by every ſingle creditor, however ſmall his debt may be; and therefore to transfer to an appriſer or adjudger the property of the land *ipſo facto*, upon the debtor's failure to make payment within the legal, would be a penal irritancy of the ſevereſt kind. On the other hand, this ſuppoſed *ipſo facto* transference of the property is penal upon the creditor where the land adjudged by him happens to be leſs in value than his debt: in that caſe, it would be glaring injuſtice to force the land upon him in payment of his debt. Nay more, it is repugnant to firſt principles, that a man ſhould be compelled to take land for his debt, however valuable the land may be: it may be his choice to continue poſſeſſion as creditor, after the legal as well as before; and this muſt be underſtood his choice, if he do not ſignify the contrary. To relieve the creditor as well as the debtor from the foregoing hardſhips, equity ſteers a middle courſe. It admits not an *ipſo facto* transference of the property, upon expiry of the legal; but

only gives the creditor an option, either to continue in his former ſituation, or to take the land for his debt; which laſt muſt be declared in a proceſs, intitled *a declarator of expiry of the legal.* This removes all hardſhip: land is not impoſed upon the creditor againſt his will: the debtor, on the other hand, has an opportunity to purge his failure, by making payment: and if he ſuffer a decree to paſs without offering payment, it is juſt that the property be transferred to the creditor in ſatisfaction of the debt; for judicial proceedings ought not for ever to be kept in ſuſpenſe. Thus, the law is ſo conſtructed as to make the property transferable only, and not to be transferred but by the intervention of a declarator. The declarator here, ſerves the ſame double purpoſe that it ſerves in the *lex commiſſoria in pignoribus:* it is a declaration of the creditor's will to accept the land for his money; and it relieves the debtor from a penal irritancy, by admitting him to purge at any time before the declaratory decree paſs.

We proceed to examine how far the practice of the court of ſeſſion concerning appriſings and adjudications, is conform-

able

able to the principles above laid down. And I muſt prepare my reader beforehand to expect here the ſame wavering and fluctuation between common law and equity, that in the courſe of this work is diſcovered in many other inſtances. I obſerve, in the firſt place, That though the court, adhering to common law, has not hitherto ſuſtained to the debtor an equity of redemption after expiry of the legal, yet that the ſame thing in effect is done indirectly, through the influence of equity. Some pretext or other of informality is always embraced to open an expired legal, in order to afford the debtor an opportunity to redeem his land by payment of the debt. And this has been carried ſo far, as to open the legal to the effect ſolely of intitling the debtor to make payment, holding the legal as expired with reſpect to other effects, ſuch as that of relieving the creditor from accounting for the rents levied by him, unleſs during the ten years that the legal is current by ſtatute *.

In another particular, our practice appears to deviate far from juſt principles.

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

With

With reſpect to the adjudger, it is juſtly held, that the debt due to him cannot be extinguiſhed without his conſent; whence it neceſſarily follows, that, even after the legal is expired, he muſt have an option, to adhere to his debt, or to take the land inſtead of it. This is eſtabliſhed in our preſent practice: and what man is ſo blind as not to perceive what neceſſarily follows? An adjudger, upon whoſe will it depends to continue creditor, or to take himſelf to the land, cannot be proprietor of that land: before the property can be transferred to him, he muſt interpoſe his will, which is done by a declarator; and ſo far our practice proceeds upon juſt principles. But whether what is held with reſpect to the debtor be conſiſtent with that practice, we next inquire. It is held, that the debtor's power of redemption is confined within the legal; that, by expiry of the legal, he is forfeited *ipſo facto* of his property; and conſequently that he has no power to redeem, nor to purge his failure of payment. Here we find a direct inconſiſtency in our practice: with reſpect to the creditor, the property is not his, till he obtain a declarator of expiry of the legal: with reſpect

to

to the debtor, the property without a declarator is loſt to him *ipſo facto*, by expiry of the legal. Can any man ſay who is proprietor in the interim? Theſe notions cannot be reconciled; but the cauſe of them may be accounted for. In our practice, there is a ſtrong bias to creditors in oppoſition to their debtors. This bias hath beſtow'd on an appriſer the equitable privilege of an option between the debt and the land upon which he is ſecured: the rigor, on the other hand, with which debtors are treated, has denied them the equitable privilege of purging an irritant clauſe at any time before the door be ſhut againſt them by a declaratory decree.

SECT. III.

Where the means enacted reach unwarily beyond the end purpoſed by the legiſlature.

BY the common law of England, eccleſiaſtics were at liberty to grant leaſes without limitation of time. As this liberty might be exerciſed greatly to the hurt of

of their ſucceſſors in office, the ſtatute 13° Eliz. cap. 10. was made, prohibiting eccleſiaſtics from granting a leaſe for a longer time than twenty-one years, or three lives. In the conſtruction of this ſtatute, it is held, that a leaſe during the life of the granter is good were he to live a century; for not being within the miſchief, it is not within the remedy.

The act 6. parl. 1672, requires, "That "all executions of ſummons ſhall bear ex- "preſsly the names and deſignations of "the purſuers and defenders." This regulation was neceſſary in order to connect the execution with the ſummons. For as at that period it was common to write an execution upon a paper apart, bearing a reference in general to the ſummons, in the following manner, "That the parties "within expreſſed were lawfully cited," &c. the execution of one ſummons might be applied to any other, ſo as to become legal evidence of a citation that was never given. But as there can be no opportunity for this abuſe where an execution is written upon the back of the ſummons, it belongs to a court of equity, with reſpect to a caſe where the ſtatutory remedy is unneceſſary,

neceſſary, to relieve ſo far from the enacting clauſe; which is done by declaring, that it is not neceſſary to name the purſuers and defenders where the execution is written on the back of the ſummons *.

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

The ſtatutes introducing the poſitive and negative preſcriptions, have for their object public utility; and the ſupplying defects in theſe ſtatutes reſts upon the ſame principle; a ſubject that belongs to the next book, which contains the proceedings of a court of equity acting upon the principle of utility. But to mitigate theſe ſtatutes with reſpect to articles that happen to be oppreſſive and unjuſt, is a branch of

* Feb. 20. 1755, Sir William Dunbar contra John Macleod younger of Macleod.

† 2 Vernon 104.

the preſent ſubject; and to examples of that kind I proceed. Common law, which limits not actions within any time, affords great opportunity for unjuſt claims, which, however ill founded originally, are brought ſo late as to be ſecure againſt all detection. It is not wrong in common law to ſuſtain an old claim, for a claim may be very old and yet very juſt: but to ſuſtain claims without any limitation of time, gives great ſcope to fraud and forgery; and for that reaſon public utility required a limitation. Upon that principle the ſtatutes 1469 and 1474 were made, denying action upon debts and other claims beyond forty years. A court of common law proceeding upon theſe ſtatutes, cannot ſuſtain action after forty years, even where a claim is evidently well founded, as where it is proved to be ſo by referring it to the oath of the defendant. In this caſe, the means enacted go evidently beyond the end purpoſed by the legiſlature; which intended only to ſecure againſt ſuſpicious and ill-founded claims, not to cut off any juſt debt; and in this view nothing farther could be intended than to introduce a preſumption againſt every claim brought after forty years;

years; reſerving to the purſuer to bring poſitive evidence of its being a ſubſiſting claim, and juſtly due. Yet the court of ſeſſion, acting as a court of common law, did in one inſtance refuſe to ſuſtain action after the forty years, though the debt was offered to be proved by the oath of the defendant *. In another point they act properly as a court of equity. Perſons under age are relieved from the effect of theſe ſtatutes, for an extreme good reaſon, That no preſumption can lie againſt a creditor while under age, for delaying to bring his action.

The ſame conſtruction in equity is given to the Engliſh act of limitation concerning perſonal actions: it is held, That a bare acknowledgement of the debt is ſufficient to bar the limitation †; importing, that the legiſlature intended not to extinguiſh a juſt debt, but only to introduce a preſumption of payment. But with this doctrine I cannot reconcile what ſeems to be eſtabliſhed in the Engliſh courts of e-

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

† Abridg. of the law, vol. 3. p. 517.

quity, "That if a man by will or deed "ſubject his land to the payment of his "debts, debts barred by the ſtatute of li- "mitations ſhall be paid; for they are "debts in equity, and the ſtatute hath "not extinguiſhed the obligation, though "it hath taken away the remedy *." This differs widely from the equitable conſtruction of the ſtatute; for if its intendment be to preſume ſuch debts paid, they cannot even in equity be conſidered as debts, unleſs the ſtatutory preſumption be removed by contrary evidence. The following caſe proceeds upon the ſame miſapprehenſion of the ſtatute: "It hath alſo been "ruled in equity, that if a man has a debt "due to him by note, or a book-debt, "and has made no demand of it for ſix "years, ſo that he is barred by the ſtatute "of limitations; yet if the debtor or his "executor, after the ſix years, puts out an "advertiſement in the Gazette, or any o- "ther news-paper, that all perſons who "have any debts owing to them may ap- "ply to ſuch a place, and that they ſhall "be paid; this, though general, (and

* Abridg. of the law, vol. 3. p. 518.

"therefore

" therefore might be intended of legal " ſubſiſting debts only), yet amounts to " ſuch an acknowledgement of that debt " which was barred, as will revive the " right, and bring it out of the ſtatute a- " gain *."

To the caſe firſt mentioned of referring a debt to the defendant's oath, a maxim in the law of England is obviouſly applicable, " That a caſe out of the miſchief, is out " of the meaning of the law, though it be " within the letter." A claim, of whatever age, referred to the defendant's oath, is plainly out of the miſchief intended to be remedied by the foregoing ſtatutes; and therefore ought not to be regulated by the words, which in this caſe go beyond the end purpoſed. Coke † illuſtrates this maxim by the following example. The common law of England ſuffered goods taken by diſtreſs to be driven where the creditor pleaſed; which was miſchievous, becauſe the tenant, who muſt give his cattle ſuſtenance, could have no knowledge where they were. This miſchief was remedied by ſtatute 3. Edward I. cap 16.

* Abridg. of the law, vol. 3. p. 518.

† 2 Inſtit. 106.

enacting,

enacting, " That goods taken by diſtreſs " ſhall not be carried out of the ſhire " where they are taken." Yet, ſays our author, if the tenancy be in one county and the manor in another, the lord may drive the diſtreſs to his manor, contrary to the words of the ſtatute; for the tenant, by doing of ſuit and ſervice to the manor, is preſumed to know what is done there.

The act 83. parl. 1579, introducing a triennial preſcription of ſhop-accounts, &c. is directed to the judges, enacting, " That they ſhall not ſuſtain action after " three years," without making any diſtinction between natives and foreigners. Nor is there reaſon for making a diſtinction; becauſe every claimant, native or foreigner, muſt bring his action for payment in the country where the debtor reſides; and for that reaſon both equally ought to guard againſt the preſcription of that country. When ſuch is the law of preſcription in general, and of the act 1579 in particular, I cannot avoid condemning the following deciſion. " In a purſuit for an " account of drugs, furniſhed from time " to time by a London druggiſt to an E-

" dinburgh

" dinburgh apothecary, the court repelled " the defence of the triennial preſcription, " and decreed, That the act of limitation " in England, being the *locus contractus*, " muſt be the rule *." There is here another error beſide that above mentioned. The Engliſh ſtatute of limitation has no authority with us, otherwiſe than as inferring a preſumption of payment from the delay of bringing an action within ſix years; and this preſumption cannot ariſe where the debtor is abroad, either in Scotland or beyond ſeas.

If the preſcription of the country where the debtor dwells be the rule which every creditor foreign or domeſtic ought to have in view, it follows neceſſarily, that a defendant, to take advantage of that preſcription, muſt be able to ſpecify his reſidence there, during the whole courſe of the preſcription. While the debtor reſides in England, for example, or in Holland, the creditor has no reaſon to be upon his guard againſt the Scotch triennial preſcription: and ſuppoſing the action to be brought the next day after the debtor ſettles

* November 1731, Fulks contra Aikenhead.

in

in Scotland, it would be abſurd that the creditor ſhould be cut out by the triennial preſcription. I illuſtrate this doctrine by a plain caſe. A ſhop-keeper in London furniſhes goods to a man who has his reſidence there. The creditor, truſting to the Engliſh ſtatute of limitation, reckons himſelf ſecure if he bring his action within ſix years; but is forc'd to bring his action in Scotland, to which the debtor retires after three years. It would in this caſe be unjuſt, to ſuſtain the Scotch triennial preſcription as a bar to the action; in which view, the means enacted in the ſtatute 1579 are unwarily too extenſive, forbidding action after three years, without limiting the defence to the caſe where the defendant has been all that time in Scotland.

Equity is alſo applied to mitigate the rigor of ſtatute-law with reſpect to evidence. By the Engliſh ſtatute of frauds and perjuries *, it is enacted, "That all leaſes, eſtates, intereſts of freehold or terms of years, made or created by parole and not put in writing, ſhall have the force and effect of leaſes or eſtates at will only." In the conſtruction of this ſtatute the following point was reſolved, That if there

* 29. Charles II. cap. 3.

be a parole-agreement for the purchaſe of land, and that in a bill brought for a ſpecific performance, the ſubſtance of the agreement be ſet forth in the bill, and confeſſed in the anſwer, the court will decree a ſpecific performance; becauſe in this caſe there is no danger of perjury, which was the only thing the ſtatute intended to prevent *. Again, whatever evidence may be required by law, yet it would be unjuſt to ſuffer any man to take advantage of the defect of evidence, when the defect is occaſioned by his own fraud. There are accordingly many inſtances in the Engliſh law-books, where a parole-agreement intended to be put into writing, but prevented by fraud, has been decreed in equity, notwithſtanding the ſtatute of frauds and perjuries. Thus upon a marriage-treaty, inſtructions given by the huſband to draw a ſettlement, are by him privately countermanded: after which he draws in the woman, upon the faith of the ſettlement, to marry him. The parole-agreement will be decreed in equity †.

* Abridg. caſes in equity, ch. 4. ſect. B. § 3.
† Ibid. § 4.

Statutory irritancies in an entail are handled book 1. part 1. chap. 4. ſect. 1. art. 3.

Whether can a ſtatutory penalty be mitigated by a court of equity. See below, chap. 8.

CHAP. VI.

Powers of a court of equity to remedy what is imperfect in common law with reſpect to matters between debtor and creditor.

With reſpect to this ſubject, we find daily inſtances of oppreſſion, ſometimes by the creditor, ſometimes by the debtor, authoriſed by one or other general rule of common law, which happens to be unjuſt when applied to ſome ſingular caſe out of the reaſon of the rule. In ſuch caſes, it is the duty of a court of equity, to interpoſe and to relieve from the oppreſſion. To truſt this power with ſome court,

court, is evidently a matter of neceſſity; for otherwiſe wrong would be authoriſed without remedy. Such oppreſſion appears in different ſhapes and in different circumſtances, which I ſhall endeavour to arrange properly; beginning with the oppreſſion a creditor may commit under protection of common law, and then proceeding to what may be committed by a debtor.

SECT. I.

Injuſtice of common law with reſpect to compenſation.

BY the common law of this land, when a debtor is ſued for payment, it will afford no defence that the plaintiff owes him an equivalent ſum. This ſum he may demand in a ſeparate action; but in the mean time, if he make not payment of the ſum demanded, a decree iſſues againſt him, to be followed with execution. Now this is rigorous, or rather unjuſt. For, with reſpect to the plaintiff, unleſs he mean to oppreſs, he cannot wiſh better payment

than to be diſcharged of the debt he owes the defendant. And, with reſpect to the defendant, it is groſs injuſtice to ſubject him to execution for failing to pay a debt, when poſſibly the only means he has for payment is that very ſum the plaintiff detains from him. To that act of injuſtice, however, the common law lends its authority, by a general rule, impowering every creditor to proceed to execution when his debtor fails to make payment. But that rule, however juſt in the main was never intended to take place in the preſent caſe; and therefore a court of equity remedies an act of injuſtice occaſioned by a too extenſive application of the rule beyond the reaſon and intention of the law. The remedy is, to order an account in place of payment, and the one debt to be hit off againſt the other. This is termed the *privilege of compenſation*, which furniſhes a good defence againſt payment. Compenſation accordingly was in old Rome ſuſtained before the Prætor; and in England has long been received in courts of equity. In Scotland indeed it has the authority of a ſtatute *; which it ſeems was

* Act 143. parl. 1592.

thought

thought neceſſary, becauſe at that period the court of ſeſſion was probably not underſtood to be a court of equity *. But perhaps there was a further view, namely, to introduce compenſation as a defence into courts of common law; and with that preciſe view did compenſation lately obtain the authority of a ſtatute in England †: the defence of compenſation was always admitted in the court of chancery; but by authority of the ſtatute, it is now alſo admitted in courts of common law.

In applying, however, the foregoing ſtatute, the powers of a court of equity are more extenſive, than of a court of common law. A court of common law is tied to the letter of the ſtatute, and has no privilege to inquire into its motive. But the court of ſeſſion, as a court of equity, may ſupply its defects and correct its exceſſes. Yet I know not by what miſapprehenſion, the court of ſeſſion, with regard to this ſtatute, hath always been conſidered as a court of common law, and not as a court of equity; a miſapprehenſion the leſs excuſable, conſidering the ſubject of

* See the Introduction.

† 2. Geo. II. cap. 22. § 11.

the

the ſtatute, a matter of equity, which the court itſelf could have introduced had the ſtatute never been made. I ſhall make this reflection plain, by entering into particulars. The ſtatute authoriſes compenſation to be pleaded in the original proceſs only, by way of exception, and gives no authority to plead it whether in the reduction or ſuſpenſion of a decree. The words are, "That a liquid debt be admitted by "way of exception before decreet by all "judges, but not in a ſuſpenſion nor re-"duction of the decreet." This limitation is proper in two views. The firſt is, that the omitting or forbearing to plead compenſation in the original proceſs is not a good objection againſt the decree. The other view is, that it would afford too great ſcope for litigioſity, were defendants indulged to reſerve their articles of compenſation as a ground for ſuſpenſion or reduction. Attending to theſe views, a decree purely in abſence ought not to bar compenſation; becauſe it is often pronounced when the party hath not an opportunity to appear. For that reaſon, a party who is reſtored to his defences in a ſuſpenſion, upon ſhewing that his abſence was

was not contumacious, ought to be at liberty to plead every defence, whether in equity or at common law. And yet our judges conſtantly reject compenſation when pleaded in a ſuſpenſion of a decree in abſence, though that caſe comes not under the reaſon and motive of the ſtatute. The ſtatute, in my apprehenſion, admits of ſtill greater latitude; which is, that after a decree *in foro* is ſuſpended for any good reaſon, compenſation may be received in diſcuſſing the ſuſpenſion; for the ſtatute goes no farther but to prohibit a decree to be ſuſpended merely upon compenſation. Nor can it have any bad effect to admit compenſation when a cauſe is brought under review by ſuſpenſion becauſe of error committed in the original proceſs: on the contrary, it is beneficial to both by preventing a new law-ſuit.

If the deciſions of the court of ſeſſion upon the different articles of this ſtatute ſhow a ſlaviſh dependence on the common law; the deciſions which regulate caſes of compenſation not provided for by the ſtatute breathe a freer ſpirit, being governed by true principles of equity. The firſt caſe that preſents itſelf, is, where one only

of

of the two concurring debts bears intereſt. What ſhall be the effect of compenſation in that caſe? Shall the principal and intereſt be brought down to the time of pleading compenſation, and be ſet off at that period againſt the other debt which bears not intereſt? Or ſhall the account be inſtituted as at the time of the concourſe, as if from that period intereſt were no longer due? Equity evidently concludes for the latter; for it conſiders, that each had the uſe of the other's money; and that it is not juſt the one ſhould have a claim for intereſt while the other has none: intereſt is a premium for the uſe of money, and my creditor in effect gets that premium by having from me the uſe of an equivalent ſum. And accordingly, it is the conſtant practice of the court, to ſtay the courſe of intereſt from the time the two debts concurred. But as it would be unjuſt to make a debtor pay intereſt for money he muſt retain in his hand ready to anſwer a demand, therefore in ſuch a caſe compenſation is excluded. Example. A tackſman lends a conſiderable ſum to his landlord, agreeing in the bond to ſuſpend the payment during the currency of the tack, but

ſtipulating to himſelf a power to retain the intereſt annually out of the tack-duty. The tackſman makes punctual payment of the ſurplus tack-duties, as often as demanded: but, by ſome diſorder in the landlord's affairs, a conſiderable arrear is allowed to remain in the hands of the tackſman. The landlord pleading to make the tack-duties in arrear operate *retro* againſt the bonded debt, ſo as to extinguiſh ſome part of the principal annually, the *retro* operation was not admitted: becauſe, in terms of the contract, the tackſman was bound to keep in his hand the ſurplus tack-duties ready to be paid on demand; and for that reaſon it would be unjuſt to make him pay intereſt for this ſum; or, which comes to the ſame, it would be unjuſt to make it operate *retro*, by applying it annually in extinction of the bonded debt bearing intereſt *.

In applying compenſation, both claims muſt be pure; for it is not equitable to delay paying a debt of which the term is paſt, upon pretext of a counter-claim that cannot at preſent be demanded, or that

* July 21. 1756, Campbell contra Carruthers.

is uncertain as to its extent. But what if the purſuer be bankrupt, or be *vergens ad inopiam?* The common law authoriſes a bankrupt to inſiſt for payment equally with a perſon ſolvent: but it is not juſt to oblige me to pay what I owe to a bankrupt, and to leave me without remedy as to what he owes me. This therefore is a proper caſe for the interpoſition of equity. It cannot authoriſe compenſation in circumſtances that afford not place for it; but it can prevent the miſchief in the moſt natural manner, by obliging the bankrupt to find ſecurity to make good the counterclaim when it ſhall become due; and this is the conſtant practice of the court of ſeſſion.

Compenſation would be but an imperfect remedy againſt the oppreſſion of the common law, if it could not be applied otherwiſe than by exception. The ſtatute, it is true, extends the remedy no farther; but the court of ſeſſion, upon a principle of equity, affords a remedy where the ſtatute is ſilent. Suppoſing two mutual debts, of which the one only bears intereſt, the creditor in the barren debt demands his money; which the debtor pays without pleading

pleading compenſation, and then demands the debt due to himſelf with the intereſt. Or let it be ſuppoſed, that payment of the barren debt is offered, which the creditor muſt accept, however ſenſible of the hardſhip. In theſe caſes there is no opportunity to apply the equitable rule, That both ſums ſhould bear intereſt, or neither. Therefore, to give opportunity for applying that rule, a proceſs of mutual extinction of the two debts ought to be ſuſtained to the creditor whoſe ſum is barren; to have effect *retro* from the time of concourſe: and this proceſs accordingly is always ſuſtained in the court of ſeſſion.

We next take under conſideration the caſe of an aſſignee. And the firſt queſtion is, Whether the proceſs of mutual extinction now mentioned be competent againſt an aſſignee. To prevent miſtakes, let it be underſtood, that an aſſignment intimated is, in our preſent practice, a proper *ceſſio in jure*, transferring the claim *funditus* from the aſſignor or cedent to the aſſignee. This being taken for granted, it follows, that compenſation cannot be pleaded againſt an aſſignee: for though one of the claims is now transferred to him, that cir-

cumſtance ſubjects him not to the counter-claim; and therefore there is no mutual concourſe of debts between the parties, upon which to found a compenſation.

Let us ſuppoſe, that the claim bearing intereſt is that which is aſſigned. This claim, principal and intereſt, muſt be paid to the aſſignee, becauſe he is not ſubjected to the counter-claim. Muſt then the aſſignee's debtor, after paying the principal and intereſt, be ſatisfied to demand from the cedent the ſum due to himſelf which bears not intereſt? At that rate, the creditor whoſe claim bears intereſt, will always take care by an aſſignment to prevent compenſation. This hardſhip is a ſufficient ground for the interpoſition of equity. If the cedent hath procured an undue advantage to himſelf, by making a ſum bear intereſt in the name of an aſſignee, which would not bear intereſt in his own name; the debtor ought not to ſuffer; and the proper reparation is to oblige him to pay intereſt *ex æquitate*, though the claim at common law bears none.

But if the debt aſſigned be that which bears not intereſt, a total ſeparation is thereby

thereby made between the two debts. And what after this can prevent the counter-claim with its intereſt from being made effectual againſt the cedent? No objection in equity can ariſe to him, ſeeing, with his eyes open, he deprived himſelf of the opportunity of compenſation, the only mean he had to avoid paying intereſt upon the counter-claim.

In handling compenſation as directed by equity, I have hitherto conſidered what the law ought to be, and have carefully avoided the intricacies of our practice, which in ſeveral particulars appears erroneous. To complete the ſubject, I muſt take a ſurvey of that practice. By our old law, derived from that of the Romans, and from England, a creditor could not aſſign his claim; all he could do was to grant a procuratory *in rem ſuam*; which did not transfer the *jus crediti* to the aſſignee, but only intitled him *procuratorio nomine* to demand payment. From the nature of this title it was thought, that compenſation might be pleaded againſt the aſſignee as well as againſt the cedent: and indeed, conſidering the title ſingly, the opinion is right; becauſe the pleading compenſation againſt

a procurator, is in effect pleading it againſt the cedent or creditor himſelf. The opinion however is erroneous; and the error ariſes from overlooking the capital circumſtance, which is the equitable right that the aſſignee, though conſidered as a procurator only, hath to the claim aſſigned, by having paid a price for it. Equity will never ſubject ſuch a procurator or aſſignee to the cedent's debts, whether in the way of payment or compenſation. And as for the ſtatute, it affords not any pretext for ſuſtaining compenſation againſt ſuch an aſſignee; being made to ſupport compenſation againſt the rigor of common law; but to ſupport it only as far as juſt. It could not therefore be the intention of the legiſlature, in defiance of juſtice, to make compenſation effectual againſt an aſſignee who pays value. Nor muſt it paſs unobſerved, that, as our law ſtands at preſent, this iniquitous effect given to compenſation is ſtill more abſurd, if poſſible, than it was formerly. In our later practice an aſſignment has changed its nature, and is converted into a proper *ceſſio in jure*, diveſting the cedent *funditus*, and veſting the aſſignee. Whence it follows, that, after

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

SECT. II.

Injuſtice of common law with reſpect to indefinite payment.

NExt of oppreſſion or wrong that may be committed by a debtor, under protection of common law.

Every man who has the adminiſtration of his own affairs, may pay his debts in what

what order he pleaſes, where his creditors interpoſe not by legal execution. Nor will it make a difference, that ſeveral debts are due by him to the ſame creditor; for the rule of law is, That if full payment be offered of any particular debt, the creditor is bound to accept, and to give a diſcharge.

But now ſuppoſing a ſum to be delivered by the debtor to the creditor as payment, but without applying it to any one debt in particular, termed *indefinite payment*, the queſtion is, By what rule ſhall the application be made when the parties afterward come to ſtate an account. If the debts be all of the ſame kind, it is of no importance to which of them the ſum be applied: otherwiſe, if the debts be of different kinds, one for example bearing intereſt, one barren. The rule in the Roman law is, *Quod electio eſt debitoris*; a rule founded on the principles of common law. The ſum delivered to the creditor is in his hand for behoof of the debtor, and therefore it belongs to the debtor to make the application. But though this is the rule of common law, it is not the rule of juſtice: if the debtor make an undue

application, equity will interpoſe to relieve the creditor from the hardſhip. A debtor, it is true, delivering a ſum to his creditor, may direct the application of it as he thinks proper: he may deliver it as payment of a debt bearing intereſt, when he is due to the ſame creditor a debt bearing none; yet a remedy in this caſe is beyond the reach of equity. But where the money is already in the hand of the creditor indefinitely, the debtor has no longer the ſame arbitrary power of making the application: equity interpoſing, will direct the application. Thus, indefinite payment comes under the power of a court of equity.

In order to aſcertain the equitable rules for applying an indefinite payment, a few preliminary conſiderations may be of uſe. A loan of money is a mutual contract equally for the benefit of the lender and borrower: the debtor has the uſe of the money he borrows, and for it pays to the creditor a yearly premium. With reſpect therefore to a ſum bearing intereſt, the debtor is not bound, either in ſtrict law or in equity, to pay the capital until the creditor make a demand. A debt

not bearing intereſt is in a very different condition: the debtor has the whole benefit, and the creditor is deprived of the uſe of his money without a valuable conſideration; which binds the debtor, in good conſcience, either to pay the ſum, or to pay intereſt. Though this be a matter of duty, it cannot however be enforced by a court of equity in all caſes; for it may be the creditor's intention to aſſiſt the debtor with the uſe of money without intereſt: but upon the firſt legal expreſſion of the creditor's will to have his money, a court of equity ought to decree intereſt.

Another preliminary is, that where a cautioner accedes to a bond of borrowed money, the debtor is in conſcience bound to pay the ſum at the term covenanted, in order to relieve his cautioner, who has no benefit by the tranſaction. The caſe is different where the cautioner ſhews a willingneſs to continue his credit.

Entering now into particulars, the firſt caſe I ſhall mention is, where two debts are due by the ſame debtor to the ſame creditor, one of which only bears intereſt. An indefinite payment ought undoubtedly

to

to be applied to the debt not bearing intereſt; becauſe this debt ought in common juſtice to be firſt paid, and there is nothing to oblige the debtor to pay the other till it be demanded. A man of candor will make the application in this manner; and were there occaſion for a preſumption, it will be preſumed of every debtor that he intended ſuch application. But the judge has no occaſion for a preſumption: his authority for making the application is derived from a principle of juſtice. The ſame principle directs, that where both debts bear intereſt, the indefinite payment ought firſt to be applied for extinguiſhing what is due of intereſt; and next for extinguiſhing one or other capital indifferently, or for extinguiſhing both in proportion (*a*).

The ſecond caſe ſhall be of two debts bearing intereſt; one of which is ſecured by infeftment or inhibition. It is equal to the debtor which of the debts he firſt paid:

(*a*) The rule here laid down ſeems to be unknown in England. Sometimes it is found that *electio eſt debitoris*, and ſometimes that it is *creditoris*. *Abridg. caſes in equity*, *cap.* 22. *ſect. D.* § 1. & 2.

and therefore, the indefinite payment ought to be applied to the debt for which there is the ſlendereſt ſecurity; becauſe ſuch application is for the intereſt of the creditor. Take another caſe of the ſame kind. A tenant in tail owes two debts to the ſame creditor; one of his own contracting, and one as repreſenting the entailer. Every indefinite payment he makes ought to be aſcribed to his proper debt, for payment of which there is no fund but the rents during his life. This, it is true, is againſt the intereſt of the ſubſtitutes: but their intereſt cannot be regarded in the application of rents which belong not to them but to the tenant in tail: and next, as they are *certantes de lucro captando*, their intereſt cannot weigh againſt that of a creditor who is *certans de damno evitando*.

Third caſe. A debtor obtains an eaſe, upon condition of paying at a day certain the tranſacted ſum bearing intereſt: he is alſo bound to the ſame creditor in a ſeparate debt not bearing intereſt. The queſtion is, To which of theſe debts ought an indefinite payment to be applied? It is the intereſt of the debtor that it be applied

plied to the tranſacted ſum: it is the intereſt of the creditor that it be applied to the ſeparate debt not bearing intereſt. The judge will not prefer the intereſt of either, but make the application in the moſt equitable manner, regarding the intereſt of both: he will therefore, in the firſt place, conſider which of the two has the greateſt intereſt in the application; and he will ſo apply the ſum as to produce the greateſt effect. This conſideration will lead him to make the application to the tranſacted ſum; for if the tranſaction be in any degree lucrative, the debtor will loſe more by its becoming ineffectual, than the creditor will by wanting the interim uſe of the money due to him without intereſt. But then, the benefit ought not to lie all on one ſide; and therefore equity rules, that the debtor, who gets the whole benefit of the application, ought to pay intereſt for the ſeparate ſum; which brings matters to a perfect equality between them. For the ſame reaſon, if the application be made to the debt not bearing intereſt, the tranſaction ought to be made effectual, notwithſtanding the term appointed for paying the tranſacted ſum be elapſed.

Fourth

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

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

too

too distant and too uncertain to be regarded in forming a rule of equity.

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

Seventh case. If there be a cautioner in one of the debts, and neither debt bear interest, the indefinite payment ought undoubtedly to be applied for relieving the cautioner. Gratitude demands this from the principal debtor, for whose service solely the cautioner gave his credit. It may be more the interest of the creditor to have the application made to the other debt, which is not so well secured: but the debtor's

debtor's connection with his cautioner is more intimate than with his creditor; and equity reſpects the more intimate connection as the foundation of a ſtronger duty.

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

Ninth caſe. One of the debts is a tranſacted ſum that muſt be paid at a day certain, otherwiſe the tranſaction to be void: or it is a ſum which muſt be paid without delay, to prevent an irritancy from taking place. The other is a bonded debt with a cautioner, bearing intereſt. The indefinite payment muſt be applied to

make the tranſaction effectual, or to prevent the irritancy. For, as in the former caſe, the intereſt of the creditor, being the more ſubſtantial, is preferred before that of the cautioner; ſo, in the preſent caſe, the intereſt of the debtor is for the ſame reaſon preferred before that of the cautioner.

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

SECT. III.

Injuſtice of common law with reſpect to rent levied indefinitely.

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

But this rule of common law may in ſome caſes be rigorous and materially unjuſt; to the debtor ſometimes, and ſometimes to the creditor. If a creditor in poſſeſſion by virtue of a mortgage or improper wadſet, purchaſe or ſucceed to an adjudication of the ſame land, it is undoubtedly

edly the debtor's intereſt that the rents be applied to the adjudication, in order to prevent expiry of the legal, not to the wadſet which contains no irritancy nor forfeiture upon failure of payment. But if the creditor purchaſe or ſucceed to an infeftment of annualrent, upon which a great ſum of intereſt happens to be due, it is beneficial to him that the rents be aſcribed for extinction of that intereſt, rather than for extinction of the wadſet-ſum which bears intereſt. Theſe applications cannot be made, either of them, upon the principles of common law; and yet material juſtice requires ſuch application, which is fair and equitable weighing all circumſtances. No man of candour in poſſeſſion of his debtor's land by a mortgage or improper wadſet, but muſt be aſhamed to apply the rents he levies to the wadſet, when he has an adjudication, the legal of which is ready to expire. And no debtor of candour but muſt be aſhamed to extinguiſh a debt bearing intereſt, rather than a debt equally unexceptionable that is barren.

Equity therefore ſteps in to correct the oppreſſion of common law in ſuch caſes;

and it is lucky that this can be done by rules, without hazard of making judges arbitrary. Theſe rules are delineated in the ſection immediately foregoing; and they all reſolve into a general principle, which is, "That the judge ought to apply "the rents ſo as to be moſt equal with re- "ſpect to both parties, and ſo as to pre- "vent rigorous and hard conſequences on "either ſide."

But this remedy againſt the rigour of common law, ought not to be confined to real debts that intitle the creditor to poſ- ſeſs. In particular caſes, it may be more beneficial to the debtor or to the creditor, without hurting either, to apply the rents for payment even of a perſonal debt, than for payment of the debt that is the title of poſſeſſion. What if the perſonal debt be a bulky ſum, reſtricted to a leſſer ſum up- on condition of payment being made at a day certain? It is the debtor's intereſt that the rents be applied to this debt in the firſt place; as, on the other hand, it is the creditor's intereſt that they be ap- plied to a perſonal debt which is barren. A court of equity, diſregarding the rigid principles of common law, and conſider-

ing

ing matters in the view of material juſtice, reaſons after the following manner. A perſonal creditor has not acceſs to the rents of his debtor's land till he lead an adjudication. But if the creditor be already in poſſeſſion, an adjudication is unneceſſary: ſuch a title, it is true, is requiſite to complete the forms of the common law; but equity diſpenſes with theſe forms, when they ſerve no end but to load the parties with expence. And thus where the queſtion is with the debtor only, equity relieves the creditor in poſſeſſion from the ceremony of leading an adjudication upon his ſeparate debt: and no perſon can heſitate about the equity of a rule, that is no leſs beneficial to the debtor by relieving him from the expence of legal execution, than to the creditor by relieving him from trouble and advance of money. Thus an executor in poſſeſſion, is by equity relieved from the uſeleſs ceremony of taking a decree againſt himſelf for payment of debt due to him by the deceaſed: and for that reaſon, an executor may pay himſelf at ſhort-hand. In the ſame manner, a wadſetter in poſſeſſion of his debtor's land, has no occaſion to attach

attach the rents by legal execution for payment of any ſeparate debt due to him by the proprietor: his poſſeſſion, by conſtruction of equity, is held a good title; and by that conſtruction the rents are held to be levied indefinitely; which makes way for the queſtion, To which of the debts they ought to be imputed. The ſame queſtion may occur where poſſeſſion is attained by legal execution, without conſent of the debtor. A creditor, for example, who enters into poſſeſſion by virtue of an adjudication, acquires or ſucceeds to perſonal debts due by the ſame debtor: theſe, in every queſtion with the debtor himſelf, are juſtly held to be titles of poſſeſſion, to give occaſion for the queſtion, To what particular debt the rent ſhould be imputed.

Having ſaid ſo much in general, the interpoſition of equity to regulate the various caſes that belong to the preſent ſubject, cannot be attended with any degree of intricacy. The road is in a good meaſure paved in the preceding ſection; for the rules there laid down with regard to debts of all different kinds, may, with very little variation, be readily accommodated

ted to the ſubject we are now handling. For the ſake, however, of illuſtrating a ſubject that is almoſt totally overlooked by our authors, I ſhall mention a few rules in general, the application of which to particular caſes will be extremely eaſy. Let me only premiſe what is hinted above, that the creditor in poſſeſſion can ſtate no debts for exhauſting the rents, but ſuch as are unexceptionably due by the proprietor: for it would be againſt equity as well as againſt common law, that any man ſhould be protected in the poſſeſſion of another's property, during the very time the queſtion is depending, whether he be or be not a creditor. Let ſuch debts then be the only ſubject of our ſpeculation. And the firſt rule of equity is, That the imputation be ſo made, as to prevent on both hands irritancies and forfeitures. A ſecond rule is, That, *in pari caſu*, perſonal debts ought to be paid before thoſe which are ſecured by infeftment. And thirdly, with reſpect to both kinds, That ſums not bearing intereſt be extinguiſhed before ſums bearing intereſt.

It is laid down above, that where the legal of an adjudication is in hazard of expiring,

piring, equity demands, that the rents be wholly aſcribed to the adjudication. But it may happen in ſome inſtances to be more equitable, that the creditor be privileged to apply the rents to the bygone intereſt due upon his ſeparate debts: and this privilege will be indulged him, provided he renounce the benefit of an expired legal.

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

Hitherto I have had nothing in view but the poſſeſſion of a ſingle fund, and the rules for applying the rent of that fund

where the poſſeſſor hath claims of different kinds. But, with very little variation, the foregoing rules may be applied to the more involved caſe of different funds. A creditor, for example, upon an entailed eſtate, has two debts in his perſon; one contracted by the entailer, upon which an adjudication is led againſt the entailed eſtate; another contracted by the tenant in tail, which can only affect the rents during his life. It is the intereſt of the ſubſtitutes, that the rents be imputed toward extinction of the entailer's debt, becauſe they are not liable for the other. The intereſt of the creditor in poſſeſſion upon his adjudication is directly oppoſite: it is his intereſt that the perſonal debt be firſt paid, for which he has no ſecurity but the rents during his debtor's life. Here equity is clearly on the ſide of the creditor: he is *certans de damno evitando*, and the ſubſtitutes *de lucro captando*. And this coincides with the ſecond caſe ſtated in the foregoing ſection of indefinite payment.

CHAP. VII.

Powers of a court of equity to remedy what is imperfect in common law with reſpect to a proceſs.

UNder the ſhelter of common law, many act imprudently, many indecently, and not a few act againſt conſcience and moral honeſty. The two firſt are repreſſed by cenſure, public and private: the laſt, a more ſerious matter, is repreſſed by a court of equity; which will not ſuſtain either a claim or a defence againſt conſcience, however well founded it may be at common law. The party will be repelled *perſonali objectione* from inſiſting on his claim or defence. This perſonal objection is with reſpect to the purſuer the ſame with what is termed *exceptio doli* in the Roman law. I proceed to examples; and firſt of the perſonal objection againſt a claimant. An informal relaxation of a

debtor denounced rebel on a horning, is no relaxation; and therefore will not prevent ſingle eſcheat. But the creditor on whoſe horning the eſcheat had fallen, craving preference on the eſcheated goods; it was objected, That he had conſented to the relaxation, which removed the informality as to him; and that equity will not ſuffer him to act againſt his own deed. The court accordingly excluded him *perſonali objectione* from quarrelling the relaxation *. In a competition between two annualrenters, the firſt of whom was bound to the other as cautioner; it was objected to the firſt claiming preference, That it was againſt conſcience for him to uſe his preferable infeftment againſt a creditor whoſe debt he was bound to pay. The court refuſed to ſuſtain this perſonal objection; leaving the ſecond annualrenter to inſiſt perſonally againſt the firſt as cautioner †. This was acting as a court of common law, not as a court of equity. The preferable

* Forbes, 10th February 1710, Wallace contra Creditors of Spot.

† Forbes, 28th June 1711, Baird contra Mortimer.

annualrenter ought to have been barred *perſonali objectione* from obſtructing execution for payment of a debt, which he himſelf was bound to pay as cautioner. In the Roman law, he would have been barred by the *exceptio doli*.

Next as to perſonal objections of this kind againſt defendants. A cautioner for a curator being ſued for a ſum levied by the curator, the cautioner objected, That the perſon for whom he ſtands bound as cautioner could not be curator, as there is a prior act of curatory ſtanding unreduced. An endeavour to break looſe from a fair engagement being againſt conſcience, the cautioner was repelled *perſonali objectione* from inſiſting in his objection *. A verbal promiſe to diſpone land is not made effectual in equity; becauſe a court of equity has no power to overturn common law, which indulges repentance till writ be interpoſed. But a diſponee to land inſiſting upon performance, the diſponer objected a nullity in the diſpoſition. He was barred *perſonali objectione* from

* Durie, 5th December 1627, Rollock contra Croſbies.

pleading

pleading the objection, becauſe he had verbally agreed to ratify the diſpoſition *.

There is one caſe in which the perſonal objection cannot be liſtened to, and that is, where an objection is made to the purſuer's title. The reaſon is, that it is *pars judicis* to advert to the purſuer's title, and never to ſuſtain proceſs upon an inſufficient title, whether objected to or not. Thus, againſt a poinding of the ground, which requires an infeftment, it being objected, That the purſuer was not infeft, it was anſwered, That the defendant, who is ſuperior, has been charged by the purſuer to infeft him; and that the defendant ought to be barred *perſonali objectione* from pleading an objection ariſing from his own fault. The court judged, That it is their duty to refuſe action, unleſs upon a good title; and that no perſonal objection againſt a defendant can ſupply the want of a title †.

* 22d February 1745, Chriſties contra Chriſtie.

† Durie, 20th June 1627, Laird Touch contra Laird Hardieſmill; Stair, Gosford, 25th June 1668, Heriot contra Town of Edinburgh.

END of the FIRST VOLUME.