BOOK II.

Powers of a Court of Equity founded on the principle of Utility.

JUſtice is applied to two particulars, equally capital; one to make right effectual, and one to repreſs wrong. With reſpect to the former, utility coincides with juſtice: with reſpect to the latter, utility goes farther than juſtice. Wrong muſt be done before juſtice can interpoſe; but utility lays down meaſures to prevent wrong. With reſpect to meaſures for the poſitive good of ſociety, and for making men ſtill more happy in a ſocial ſtate, theſe are reſerved to the legiſlature (*a*). It is not neceſſary

(*a*) And to interpoſe for advancing the poſitive good of but one or a few individuals is ſtill farther beyond the powers of a court of equity; though the court of chancery has ſometimes ventured to exert itſelf

neceſſary that ſuch extenſive powers be truſted with courts of law: the power of making right effectual, of redreſſing wrong, and of preventing miſchief, are ſufficient.

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

itſelf for this narrow purpoſe, actuated by a laudable zeal to do good, carried indeed beyond proper bounds. I give the following inſtance. Eighteen tenants of a manor have right to a common, and fifteen of them agree to incloſe. The incloſing will be decreed tho' oppoſed by three: for it ſhall not be in the power of a few wilful perſons to oppoſe a public good; *Abridg. caſes in equity, cap. 4. ſect. D.* § 2.

CHAP.

CHAP. I.

Acts in themſelves lawful reprobated in equity as having a tendency to corrupt morals.

SOciety cannot flouriſh by pecuniary commerce merely: without benevolence the ſocial ſtate would neither be commodious nor agreeable. Many connections there are altogether diſintereſted; witneſs the connection between a guardian and his infant, and in general between a truſtee and the perſon for whoſe behoof the truſt is gratuitouſly undertaken. In ſuch a caſe, to take a premium for executing any article of the truſt, being a breach of duty, will be diſcountenanced even at common law. Thus a bond for 500 merks granted to an interdictor by one who purchaſed land from the perſon interdicted was voided *. If the ſale was a rational meaſure,

* Haddington, penult July 1622, Carnouſie contra Achanachie.

it

it was the interdictor's duty to conſent to it without a bribe: if a wrong meaſure, the interdictor's taking a ſum for his conſent, was taking a bribe to betray his truſt.

Equity goes farther: it prohibits a truſtee from making any profit by his management directly or indirectly. An act of this nature may in itſelf be innocent; but is poiſonous with reſpect to conſequences; for if a truſtee be permitted, even in the moſt plauſible circumſtances, to make profit, he will ſoon loſe ſight of his duty, and direct his management chiefly for making profit to himſelf. It is ſolely on this foundation that a tutor is barred from purchaſing a debt due by his pupil, or a right affecting his eſtate. The ſame temptation to fraudulent practice, concludes alſo againſt a truſtee who has a ſalary, or is paid for his labour. A *pactum de quota litis* between an advocate and his client, which tends to corrupt the morals of the former, and to make him ſwerve from his duty, is diſcountenanced by all civilized nations. A bargain betwixt ſuch perſons may be fair, and may even be advantageous to the client: but utility requires

quires that it be prohibited; for if indulged in any circumſtances, it muſt be indulged without reſerve. It is for the ſame reaſon, that a member of the college of juſtice is prohibited by ſtatute * from purchaſing land that is the ſubject of a lawſuit; and that a factor on a bankrupt-eſtate is prohibited by an act of ſederunt † from purchaſing the bankrupt's debts. The ſame rule is extended againſt private factors and agents without an act of ſederunt. Debts due by a conſtituent purchaſed by his factor or agent will be held as purchaſed for behoof of the conſtituent; and no claim be ſuſtained but for the tranſacted ſum. It was decreed in chancery, That a bond for L. 500 for procuring a marriage between two perſons equal in rank and fortune, is good. But on an appeal to the Houſe of Lords, the decree was reverſed ‡. Such a bond to a match-maker, tending to ruin perſons of fortune and quality, ought not to be ſuſ-

* Act 216. parl. 1594; the ſame, 13. Edward I. cap. 49.

† 25th December 1708.

‡ Abridg. caſes in equity, chap. 13. ſect F. § 3.

tained; and the countenancing ſuch bonds would be of evil example to guardians, truſtees, ſervants, who have the care of perſons under age.

CHAP. II.

Acts and covenants in themſelves innocent, prohibited in equity, becauſe of their tendency to diſturb ſociety, and to diſtreſs its members.

THE ſpirit of mutiny ſhewed itſelf ſome time ago among the workmen in the city of London, and roſe to ſuch a height as to require the interpoſition of the legiſlature. The ſame ſpirit broke out afterward among the journeymen-tailors of Edinburgh, who erected themſelves into a club or ſociety, keeping in particular a liſt of the journeymen out of ſervice, under pretext of accommodating the maſters more eaſily with workmen, but in reality to enable themſelves to get new maſters if they differed with thoſe they ſerved. Any

of them that deſerted their ſervice, entered their names in that liſt, and were immediately again employed by other maſters who wanted hands. The maſter-tailors ſuffered many inconveniencies from this combination, which among other hardſhips produced increaſe of wages from time to time. The journeymen, for ſaving time, had always breakfaſted in the houſes of their maſters; but upon a concert among them, they all of them deſerted their work about nine in the morning, declaring their reſolution to have the hour between nine and ten to themſelves in all time coming; a deſertion that was the more diſtreſſing, as it was made when the preparing cloathing for the army required the utmoſt diſpatch. This occaſioned a complaint to the bailies of Edinburgh; who found, " That the defenders, and other " journeymen-tailors of Edinburgh, are " not intitled to an hour of receſs for " breakfaſt; that the wages of a journey- " man-tailor in the ſaid city ought not to " exceed one ſhilling per day; and that if " any journeyman-tailor, not retained or " employed, ſhall refuſe to work when re- " quired by a maſter on the foreſaid terms,

" unleſs

" unleſs for ſome ſufficient cauſe to be allow-
" ed by the magiſtrates, the offender ſhall
" upon conviction be puniſhed in terms of
" law." This cauſe being brought to the court of ſeſſion by advocation, it was thought of ſufficient importance for a hearing in preſence; and the reſult was, to approve of the regulations of the magiſtrates.

The only difficulty was, whether the foreſaid regulations did not incroach upon the liberty of the ſubject. It was admitted that they did in ſome meaſure; but the court was ſatisfied of their neceſſity from the following conſiderations. Arts and manufactures are of two kinds. Thoſe for luxury and for amuſement are ſubjected to no rules, becauſe a ſociety may ſubſiſt comfortably without them. But thoſe which are neceſſary to the well-being of ſociety muſt be ſubjected to rules; otherwiſe it may be in the power of a few individuals to do much miſchief. If the bakers ſhould refuſe to make bread, or the brewers to make ale, or the colliers to dig coal, without being ſubjected to any controul, they would be maſters of the lives of the inhabitants. To remedy ſuch an evil,

which is of the firſt magnitude, there muſt be a power placed ſomewhere; and this power has been long exerciſed by magiſtrates of boroughs and juſtices of peace, under review of the ſovereign court. The tailors, by forbearing to work, cannot do miſchief ſo ſuddenly: but people muſt be clad; and if there be no remedy againſt the obſtinacy of the tailors, they may compel people to ſubmit to the moſt exorbitant terms.

Another point debated was the propriety of the foregoing regulations. Upon which it was obſerved, that the regulation of the wages is even admitted by the defenders themſelves to be proper, becauſe they have acquieſced in it without complaint. And yet if this article be admitted, the other regulations follow of neceſſary conſequence; for it is to no purpoſe to fix wages without alſo fixing the number of working hours; and it is to no purpoſe to fix either, if the defenders have the privilege to work or not at their pleaſure. Their demand of a receſs between nine and ten, which they chiefly inſiſt for, is extremely inconvenient, becauſe of the time it conſumes, eſpecially in a wet day, when they

they muſt ſhift and dry themſelves to avoid ſullying the new work they have on hand. And as for health, they will never be denied, either by their maſters or by the judge, a whole day at times for exerciſe *.

When the malt-tax was ordered to be levied in Scotland, the Edinburgh brewers, diſſatisfied with the ſame, entered into a combination to forbear brewing. The court of ſeſſion, upon the principle above mentioned, ordered them to continue their brewing as formerly under a ſevere penalty.

The journeymen-woolcombers in Aberdeen did in the year 1755 form themſelves into a ſociety, exacting entry-money, inflicting penalties, &c. to be under the management of ſtewards, choſen every month: and though their ſeeming pretext was to provide for their poor, yet under that pretext ſeveral regulations were made, cramping trade, and tending to make them independent of their employers. A complaint againſt the ſociety, by the procurator-fiſcal of the bailie-court of Aberdeen,

* Tailors of Edinburgh contra their Journeymen, December 10. 1762.

being

being removed to the court of ſeſſion by advocation, the following interlocutor was pronounced: " The Lords, having conſi-
" dered the plan upon which the ſociety
" of woolcombers is erected, the regula-
" tions at firſt enacted, though afterward
" abrogated, and the rules ſtill ſubſiſting,
" find, That ſuch combinations of artifi-
" cers, whereby they collect money for a
" common box, inflict penalties, impoſe
" oaths, and make other by-laws, are of
" dangerous tendency, ſubverſive of peace
" and order, and againſt law: therefore
" they prohibit and diſcharge the defen-
" ders, the woolcombers, to continue to
" act under ſuch combination or ſociety
" for the future, or to enter into any ſuch-
" like new ſociety or combination, as they
" ſhall be anſwerable: but allow them, at
" the ſight of the magiſtrates of Aberdeen,
" to apply the money already collected,
" for diſcharging the debts of the ſociety;
" the remainder to be diſtributed among
" the contributors, in proportion to their
" reſpective contributions."

Upon a reclaiming petition, anſwers, replies, and duplies, the court adhered to the foregoing interlocutor, as far as it finds the ſociety complained of to be of danger-

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ous tendency, and conſequently *contra bonos mores*; but they remitted to the Ordinary to hear the parties, Whether the woolcombers may not be permitted, under proper regulations, to contribute ſums for maintaining their poor *.

The journeymen-weavers in the town of Paiſley, emboldened by numbers, began with mobs and riotous proceedings, in order to obtain higher wages. But theſe ouvert acts having been ſuppreſſed by authority of the court of ſeſſion, they went more cunningly to work, by contriving a kind of ſociety termed the *defence-box*; and a written contract was ſubſcribed by more than ſix hundred of them, containing many innocent and plauſible articles, in order to cover their views, but chiefly contrived to bind them not to work under a certain rate, and to ſupport out of their periodical contributions thoſe who by inſiſting on high wages, might not find employment. Seven of the ſubſcribers being charged upon the contract for payment of their ſtipulated contributions, brought a ſuſpenſion, in which it was decreed, That

* Procurator-fiſcal contra Woolcombers in Aberdeen, December 15. 1762.

this

this ſociety was an unlawful combination, under the falſe colour of carrying on trade; and that the contract was void, as *contra utilitatem publicam* *.

CHAP. III.

Regulations of commerce, and of other public concerns, rectified where wrong.

IT belongs to a court of police to regulate commerce and other public matters. The court of ſeſſion is not a court of police; but it is a court of review, to take under conſideration the proceedings of courts of police, and to rectify ſuch as are againſt the public intereſt. This juriſdiction is inherent in the court of ſeſſion as the ſupreme court in civil matters, founded on the great principle, That every wrong muſt have a remedy.

In the year 1703 the magiſtrates and

* January 21. 1766, Barr contra Curr, &c.

town-council of Stirling made an act confirming a former act of council in favour of the town weavers, and prohibiting all country weavers from buying woollen or linen yarn brought to the town for ſale, except in public market after eleven forenoon, under the pain of confiſcation. This act of council was not a little partial: the weavers in the neighbourhood were confined to the market, while the town weavers were left at liberty to make their purchaſes at large. The former brought a proceſs before the court of ſeſſion, inſiſting to have the market at an earlier hour, in order that they might not be prevented by the latter from purchaſing; and alſo, that the prohibition of purchaſing yarn privately ſhould be made general to comprehend the town weavers as well as thoſe of the country. The court not only appointed an earlier hour for the market; but put both parties upon an equal footing, by prohibiting yarn to be purchaſed before the opening of the market *.

Regulations that encroach on freedom

* 14th November 1777, Paterſon and others contra Rattray and others.

of commerce, by favouring ſome to the prejudice of others, is what renders a monopoly odious in the ſight of law. However beneficial a monopoly may be to the privileged, it is a wrong done to the reſt of the people, by prohibiting them arbitrarily from the exerciſe of a lawful employment. Monopolies therefore ought to be diſcountenanced by courts of juſtice, not excepting thoſe granted by the crown. And I am perſuaded, that the monopolies granted by the crown laſt century, which were not few in number, would have been rejected by our judges, had their ſalaries been for life, as they now happily are. I venture a bolder ſtep, which is to maintain, that even the parliament itſelf cannot legally make ſuch a partial diſtinction among the ſubjects. My reaſon is, that admitting the Houſe of Commons to have the powers of a Roman dictator *ne quid reſpublica detrimenti capiat*, it follows not that ſuch a truſt will include a power to do injuſtice, or to oppreſs the many for the benefit of a few. How crude muſt have been our notions of government in the laſt century, when monopolies granted by the King's ſole authority, were generally

nerally thought effectual to bind the whole nation! I am acquainted with no monopolies that may be lawfully granted but what are for the public good, ſuch as, to the authors of new books and new machines, limited to a time certain. The profit made in that period is a ſpur to invention: people are not hurt by ſuch a monopoly, being deprived of no privilege enjoyed by them before the monopoly took place; and after expiry of the time limited, all are benefited without diſtinction.

In the year 1722 certain regulations were made in the bailie-court of Leith, concerning the forms of procedure in the adminiſtration of juſtice, and the qualification of practitioners before that court; among other articles providing, "That "when the procurators are not under "three in number, none ſhall be allowed "to enter, except ſuch as have ſerved the "clerk or a procurator for the ſpace of "three years as an apprentice, and one "year at leaſt after; beſide undergoing a "trial by the procurators of court, named "by the magiſtrates for that effect." John Young, craving to be entered procurator, as having ſerved an apprenticeſhip to an

agent of character before the court of ſeſſion, this regulation of the bailie-court of Leith was objected. The bailies having found the petitioner not qualified in terms of the regulations, the cauſe was advocated; and the court found the ſaid article void, as *contra utilitatem publicam*, by eſtabliſhing a monopoly *.

CHAP. IV.

Forms of the common law diſpenſed with in order to abridge law-ſuits.

RETention, which is an equitable exception reſembling compenſation, was introduced by the court of ſeſſion without authority of a ſtatute. The ſtatute 1592, authoriſing compenſation, ſpeaks not of an obligation *ad factum præſtandum*, nor of any obligation but for payment of money; and yet it would be hard, that a man ſhould have the authority of a

* 21ſt December 1765, John Young contra Procurators of the bailie-court of Leith.

court

court to make his claim effectual againſt me, while he refuſes or delays to ſatisfy the claim I have againſt him. So ſtands, however, the common law, which is corrected by a court of equity for the public good. Suppoſing parties once in court upon any controverſy, the adjuſting, without a new proceſs, all matters between them that can at preſent be adjuſted, is undoubtedly beneficial, becauſe it tends to abridge law-ſuits. This good end is attained, by beſtowing on the defendant a privilege to with-hold performance from the purſuer, till the purſuer *ſimul et ſemel* perform to him. This privilege is exerciſed by pleading it as an exception to the purſuer's demand; and the exception, from its nature, is termed *Retention.*

Compenſation, as we have ſeen, is founded on the principle of equity. And it is alſo ſupported by that of utility; becauſe the finiſhing two counter-claims in the ſame proceſs tends to leſſen the number of law-ſuits. Retention is founded ſolely on utility, being calculated for no other end but to prevent the multiplication of law-ſuits. The utility of retention has gained it admittance in all civilized nations. In the

the Engliſh court of chancery particularly, it is a well-known exception, of which I give the following inſtance. " If the " plaintiff mortgage his eſtate to the de- " fendant, and afterward borrow money " from the defendant upon bond, the re- " demption ought not to take place unleſs " the bonded debt be paid as well as the " mortgage-money *."

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

A directed B to pay to C what ſums C ſhould want. C accordingly received two ſums (among others) from B, for which he gave receipts as by the order of A. A and C came to account, which being ſtated, they gave mutual releaſes. But the two ſums not being entered in the books of A, were not accounted for by C. B not ha-

* 1. Vernon 244. † Vol. 1. p. 395.

ving

ving received any allowance from A for the two ſums, prefers his bill againſt C to have the money returned to him. C confeſſed the receipts, but inſiſted, that the money was delivered to him by the order of A, and that B being a hand only had no claim. But the court decreed, That the plaintiff had a fair claim againſt the defendant to avoid circuity of ſuits: for otherwiſe it would turn the plaintiff on A, and A again on the defendant in equity to ſet aſide the releaſe, and to have an allowance of theſe ſums. And the decree was affirmed in the Houſe of Lords *.

By the common law of this land, a creditor introduced into poſſeſſion upon a wadſet, upon an aſſignment to rents, or upon an adjudication, is bound to ſurrender the poſſeſſion as ſoon as the debt is paid by the rents levied. He obtained poſſeſſion in order to levy the rents for his payment; and when payment is obtained, he is no longer intitled to poſſeſs. He perhaps is creditor in other debts that may intitle him to apprehend poſſeſſion *de novo*: but theſe will not, at common law, im-

* Shower's caſes in parliament, 17.

power

power him to detain poſſeſſion one moment after the debt that was the title of his poſſeſſion is paid. He muſt firſt ſurrender poſſeſſion; and he may afterward apply for legal authority to be repoſſeſſed for payment of theſe ſeparate debts. A court of equity views matters in a different light. The debtor's claim to have his land reſtored to him is certainly not founded on utility, when ſuch claim can ſerve no other end but to multiply expence, by forcing the creditor to take out execution upon the ſeparate debt, in order to be repoſſeſſed. A maxim in the Roman law concludes in this caſe with force, *Fruſtra petis quod mox es reſtituturus*; and this maxim accordingly furniſheth to the creditor in poſſeſſion a defence that is a ſpecies of retention. There is, indeed, the ſame reaſon for ſuſtaining the exception of retention in this caſe, that there is in perſonal debts, namely, utility, which is interpoſed to prevent the multiplying of law-ſuits, prejudicial to one of the parties at leaſt, and beneficial to neither.

But this relief againſt the ſtrictneſs of common law, ought not to be confined to real debts which intitle the creditor to poſ-

ſeſs. It may ſometimes happen, as demonſtrated above *, to be more beneficial to the debtor or to the creditor, without hurting either, that the rents be applied for payment even of a perſonal debt, than for payment of the debt which is the title of poſſeſſion. And where-ever the rents may be applied for payment of a perſonal debt, the creditor muſt be privileged to hold poſſeſſion till that debt be paid.

CHAP. V.

Bona fides as far as regulated by utility.

MY firſt head ſhall be *bona fide* payment. It may happen by miſtake that payment is made, not to the perſon who is really the creditor, but to one underſtood to be the creditor. However invincible the error may be, payment made to any but to the creditor avails not at common law; becauſe none but the cre-

* Vol. 1. p. 420.

ditor can diſcharge the debt. What remedy can be afforded by a court of equity where a debt is *bona fide* paid to another than the true creditor, I proceed to explain.

It is an obſervation verified by long experience, That no circumſtance tends more to the advancement of commerce, than a free circulation of the goods of fortune from hand to hand. In this iſland, commercial law is ſo much improved, as that land, moveables, debts, have all of them a free and expedite currency. A bond for borrowed money, in particular, deſcends to heirs, and is readily transferable to aſſignees voluntary or judicial. But that circumſtance, beneficial to commerce, proves in many inſtances hurtful to debtors. Payment made to any but the creditor, frees not the debtor at common law: and yet circumſtances may be often ſuch, as to make it impracticable for the debtor to diſcover that the perſon who produceth a title, fair in appearance, is not the creditor. Here is a caſe extremely nice in point of equity. On the one hand, if *bona fide* payment be not ſuſtained, the hardſhip will be great upon the debtor, who muſt

pay

pay a ſecond time to the true creditor. On the other hand, if the exception of *bona fide* payment be ſuſtained to protect the debtor from a ſecond payment, the creditor will be often forfeited of his debt without his fault. Here the ſcales hang even, and equity preponderates not on either ſide. But the principle of utility affords relief to the debtor, and exerts all its weight in his ſcale: for if a debtor were not ſecure by voluntary payment, no man would venture to pay a ſhilling by any authority leſs than that of the ſovereign court; and how ruinous to credit this would prove, muſt be obvious without taking a moment for reflection.

To bring this matter nearer the eye, we ſhall firſt ſuppoſe that the putative creditor proceeds to legal execution, and in that manner recovers payment. Payment thus made by authority of law, muſt undoubtedly protect the debtor from a ſecond payment. And this leads to another caſe, That the debtor, to prevent legal execution which threatens him, makes payment voluntarily. The payment here is made indeed without compulſion, becauſe there is no actual execution: but then it is not made without authority; for, by the ſup-

poſition, execution is awarded, and nothing prevents it but payment. The third caſe is of a clear bond, upon which execution muſt be obtained as ſoon as demanded; and the debtor pays, knowing of no defence. Why ought not he alſo to be ſecure in this caſe? That he be ſecure, is beneficial to creditors as well as to debtors, becauſe otherwiſe there can be no free commerce of debts. This exception then of *bona fide* payment, is ſupported by the principle of utility in two different reſpects: it is beneficial to creditors, by encouraging debtors to make prompt payment; and by removing from them the pretext of inſiſting upon anxious and ſcrupulous defences, which, under the colour of paying ſecurely, would often be laid hold of to delay payment: it is beneficial to debtors, who can pay with ſafety without being obliged to ſuffer execution.

But here the true creditor is not left without a remedy. The ſum received by the putative creditor is in his hand *ſine juſta cauſa*, and he is anſwerable for it to the true creditor. In this view, the operation of *bona fide* payment is only to ſubſtitute one debtor for another, which may as often

often be beneficial to the true creditor, as detrimental.

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

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

My next head ſhall be a *bona fide* tranſaction with a putative proprietor. Such tranſactions are void at common law as *ultra vires*; and were there no remedy in equity, the paying debt to a putative creditor would not be more hazardous, than tranſactions with a putative proprietor. The remedy with reſpect to the former is ſtated above; and the remedy with reſpect to the latter, far from oppreſſion on either ſide, muſt give ſatisfaction to every rational enquirer. Where a perſon in poſſeſ-

* 1. Chancery caſes 126.

† Stair, July 19. 1665, Johnſton contra Macgregor.

ſion

ſion of land performs acts of property in the ordinary way of management, levying rents, granting leaſes, ſelling corns, cattle, or what elſe the land produces, no perſon thinks of enquiring about his title. It would be an unſufferable hardſhip on thoſe who deal with him, and a great obſtruction to commerce, were ſuch acts void as *ultra vires*. But with reſpect to acts of extraordinary adminiſtration, ſuch as ſelling land, or borrowing money upon real ſecurity, it is expected that the poſſeſſor ſhould make good his title; without which no prudent perſon will deal with him. If the title be found infirm, a court of equity can afford no remedy: it cannot interpoſe on the footing of juſtice between the proprietor on the one hand and the purchaſer on the other, who are equally *certantes de damno vitando*; nor on the footing of utility, which pleads not for the one more than for the other. The parties muſt be left to common law, which intitles the proprietor to vindicate his ſubject, or to be relieved from debt he did not contract. This latter branch is ſo clearly founded on principles, that probably it has never been drawn into controverſy. With reſpect to the

the former, leſs clear, take the following examples. Count Antonius Leſly, an alien, was ſerved and infeft in the eſtate of Balquhain as heir of entail; it being at that time underſtood, that alienage deprives not a man of his birthright in Scotland. But his title being afterward called in queſtion by Peter Leſly-Grant, the next ſubſtitute, inſiſting that an alien cannot acquire land in Scotland either by purchaſe or ſucceſſion, the reaſon of reduction was ſuſtained, firſt in the court of ſeſſion, and next in the Houſe of Lords; which rendered the Count's right void from the beginning. Before his right was challenged, he had ſold many trees come to maturity, and received the price. The court, in reſpect of his *bona fides*, relieved him from accounting for the price. This at firſt ſeemed to be a queſtion of ſome intricacy; but it was ſoon found to reſolve into an eſtabliſhed maxim, *Quod bona fide poſſeſſor rei alienæ facit fructus conſumptos ſuos.* Trees are the product of land as well as corn or cattle; and it would be no leſs ſevere to oblige a putative proprietor to account for the price of full-grown trees than to account for the price of ripe corn.

The

The following caſe is far more delicate. The brother of the deceaſed Miſſiniſh, being the neareſt heir in exiſtence, was admitted to ſerve heir to the eſtate. The right of the brother thus ſerved was but conditional, as there was a poſſibility of a nearer heir; and the widow of the deceaſed brought forth a ſon, which voided the ſervice from the beginning. But the brother ſerved and infeft having ſold land for payment of the family-debts, while there was yet little proſpect of a nearer heir, the ſale was ſupported by the court of ſeſſion, upon evidence brought that it was *in rem verſum* of the infant-heir. The favourableneſs of this caſe had, I conjecture, no ſlight influence in procuring the judgement. It lies open to objections that ſeem not eaſily ſolved. Firſt, What room was there for *bona fides* while it remained uncertain whether the widow might not be pregnant? and ſurely the debts could not be ſo preſſing as not to bear the delay of a few months. Next, Had the intereſt of the debts exceeded the rents of the eſtate, to make it neceſſary to diſpoſe of the whole, a ſale upon that ſuppoſition might be held to be *in rem verſum* of the in-

ſant-heir: but it does not appear ſo clearly that the ſale of a part could be *in rem verſum*; becauſe, by exact and frugal management during the minority of the heir, the debts might have been ſo much reduced as to make it proper to preſerve the eſtate entire.

I cloſe this chapter with the acts and deeds of a putative judge; of which the caſe of Barbarius Philippus is an illuſtrious inſtance *. Having been elected a Roman Prætor, he determined many cauſes, and tranſacted every ſort of buſineſs that belonged to the office. He was diſcovered to be a ſlave, which rendered all his acts and deeds void at common law; becauſe none but a freeman was capable to be a Roman Prætor. With reſpect to third parties, however, their *bona fides* ſupported all his acts and deeds as if he really had been a Prætor.

* l. 3. De officio Præt.

CHAP. VI.

Interpoſition of a court of equity in favour even of a ſingle perſon to prevent miſchief.

THis ſubject is ſo fully explained in the introduction as to require very little addition. It exhibits a court of equity in a new light; ſhowing that this court, acting upon the principle of utility, is not confined to what is properly termed *juriſdiction*; but, in order to prevent miſchief even to a ſingle perſon, may aſſume magiſterial powers. It is by ſuch power that the court of ſeſſion names factors to manage the eſtates of thoſe who are in foreign parts, and of infants who are deſtitute of tutors. The authority interpoſed for ſelling the land-eſtate of a perſon under age, is properly of the ſame nature: for the inquiry made about the debts, and about the rationality of a ſale, though in the form

form of a proceſs, is an expiſcation merely.

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

* Dec. 1. 1565, Douglas contra Foreman.

CHAP. VII.

Statutes preventive of wrong or miſchief extended by a court of equity.

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

Uſury is in itſelf innocent, but to prevent oppreſſion it is prohibited by ſtatute. Gaming is prohibited by ſtatute; as alſo

* Vol. 1. p. 339. 340.

the

the purchaſing law-ſuits by members of the college of juſtice. Theſe in themſelves are not unjuſt; but they tend to corrupt the morals, and prove often ruinous to individuals. Such ſtatutes, preventive of wrong and miſchief, may be extended by a court of equity, in order to complete the remedy intended by the legiſlature. It is chiefly with relation to ſtatutes of this kind that Bacon delivers an opinion with great elegance: "Bonum publicum in-"ſigne rapit ad ſe caſus omiſſos. Quam-"obrem, quando lex aliqua reipublicæ "commoda notabiliter et majorem in mo-"dum intuetur et procurat, interpretatio "ejus extenſiva eſto et amplians *."

In this claſs, as appears to me, our ſtatute 1617 introducing the poſitive preſcription ought to be placed. For it has not, like the Roman *uſucapio*, the penal effect of forfeiting a proprietor for his negligence, and of transferring his property to another: it is contrived, on the contrary, to ſecure every man in his land-property, by denying action upon old obſolete claims, which by common law are perpetual. A

* De augmentis ſcientiarum, l. 8. cap. 3. aphor. 12.

claim

claim may be very old and yet very juſt; and it is not therefore wrong in the common law to ſuſtain ſuch a claim. But the conſequences ought to be conſidered: if a claim be ſuſtained beyond forty or fifty years becauſe it may be juſt, every claim muſt be ſuſtained however old; and experience diſcovered, that this opens a wide door to falſehood. To prevent wrong and miſchief, it was neceſſary that land-property ſhould by lapſe of time be ſecured againſt all claims; and as with reſpect to antiquated claims there is no infallible criterion to diſtinguiſh good from bad, it was neceſſary to bar them altogether by the lump. The paſſage quoted from Bacon is applicable in the ſtricteſt manner to this ſtatute, conſidered in the light now mentioned; and it hath accordingly been extended in order to complete the remedy afforded by the legiſlature. To ſecure land-property againſt obſolete claims, it muſt be qualified, that the proprietor has poſſeſſed peaceably forty years by virtue of a charter and ſeiſin. So ſays the ſtatute; and if the ſtatute be taken ſtrictly, no property is protected from obſolete claims, but where infeftment is the title

of

of poſſeſſion. But the court of ſeſſion, preferring the end to the means, and conſulting its own powers as a court of equity to prevent miſchief, ſecures by preſcription every ſubject poſſeſſed upon a good title, a right to tithes for example, a long leaſe of land, or of tithes, which are titles that admit not infeftment.

As the foregoing ſtatute was made to ſecure land from obſolete and unjuſt claims, the ſtatute 1469 introducing the negative preſcription of obligations, was made to ſecure individuals perſonally from claims of the ſame kind. As this ſtatute is preventive of miſchief, it may be extended by a court of equity to complete the remedy. It has accordingly been extended to mutual contracts, to decrees *in foro contradictorio*, and to reductions of deeds granted on deathbed (*a*).

Conſidering

(*a*) I am aware, that the ſtatutes introducing the negative preſcription have, by the court of ſeſſion, been conſidered in a different light. They have been held as a forfeiture even of a juſt debt: for it was once judged, that after the forty years the defendant was not bound to give his oath upon the verity of the debt; and that though he ſhould acknowledge

Conſidering the inſtances above mentioned, it muſt, I imagine, occaſion ſome ſurpriſe, to find a propoſition cheriſhed by our lawyers, That correctory ſtatutes, as they are termed, ought never to be extended. We have already ſeen this propoſition contradicted, not only by ſolid principles, but even by the court of ſeſſion in many inſtances. With relation to ſtatutes in particular correctory of injuſtice or of wrong, no man can ſeriouſly doubt that a court of equity is impowered to extend ſuch ſtatutes, in order to complete the remedy preſcribed by the legiſlature: and the ſame is equally clear with relation to ſtatutes ſupplying defects in common law. As to the ſtatutes under conſideration, intended to prevent miſchief, it might, I own, have once been more doubtful whether theſe could be extended; for of all the powers aſſumed by a court of equity, it is probable that the power of preventing miſchief

knowledge the debt to be juſt, yet he was not liable *in foro humano*, however he might be liable *in foro poli et conſcientiæ*; *Fountainhall*, *December* 7. 1703, *Napier contra Campbell*. That this is a wrong conſtruction of theſe ſtatutes I have endeavoured to ſhow above, p. 385. 386.

was the lateſt. But in England this power has been long eſtabliſhed in the court of chancery; and experience has proved it to be a ſalutary power. Why then ſhould we ſtop ſhort in the middle of our progreſs? No other excuſe can be given for ſuch heſitation, but that our law, conſidered as a regular ſyſtem, is of a much later date than that of England.

The foregoing are inſtances where the court of ſeſſion, without heſitation, have ſupplied defects in ſtatutes made to prevent miſchief. But to ſhow how deſultory and fluctuating the practice of the court is in that particular, I ſhall confine myſelf to a ſingle caſe on the other ſide, which makes a figure in our law. In the tranſmiſſion of land-property, by ſucceſſion as well as by ſale, we require infeftment. An heir however, without completing his right by infeftment, is intitled to continue the poſſeſſion of his anceſtor *. In this ſituation, behaving as proprietor, he contracts debts, and unleſs he be reduced to the neceſſity of borrowing large ſums, thoſe he deals with are ſeldom ſo ſcrupu-

* See Hiſtorical Law-tracts, tract 5.

lous as to inquire into his title. By the common law however, the debtor's death before infeftment is, as to the real eſtate, a forfeiture of all his perſonal creditors. This is a miſchief which well deſerved the interpoſition of the legiſlature; and a remedy was provided by act 24. parl. 1695, enacting, "That if an apparent heir have "been in poſſeſſion for three years, the "next heir, who by ſervice or adjudica-"tion connects with the predeceſſor laſt "infeft, ſhall be liable to the apparent "heir's debts *in valorem* of the heritage." There can be no doubt, that this ſtatute was intended to procure payment to thoſe who deal *bona fide* with an heir-apparent. And yet, if we regard the words only, the remedy is imperfect; for what if the next heir-apparent, purpoſely to evade the ſtatute, ſhall content himſelf with the poſſeſſion and enjoyment of the heritage, without making up titles by ſervice or adjudication? Taking the ſtatute ſtrictly according to the words, the creditors will reap little benefit: if the debts be conſiderable, no heir will ſubject himſelf by completing his titles, when he has full enjoyment of the rents, without that ſolemnity. For-

merly,

merly, the heir-apparent in poſſeſſion had no intereſt to forbear the completing his titles: his forbearing muſt have proceeded from indolence or inattention. But if the remedy intended by the ſtatute reach not an heir-apparent though in poſſeſſion, a ſtrong motive of intereſt will make him forbear to complete his titles. In this view, the ſtatute, if confined to the words, is perfectly abſurd; for what can be more abſurd than to leave it in the power of the heir-apparent to diſappoint the creditors of the remedy intended them? It is always in his power, by ſatisfying himſelf with a poſſeſſory title, to diſappoint them: and as by a poſſeſſory title he has the full enjoyment of the eſtate, he will always diſappoint them, if he regard his own intereſt. The legiſlature in this caſe undoubtedly intended a complete remedy; and the conſideration now mentioned, peculiar to this caſe, is a ſtrong additional motive for the interpoſition of a court of equity to fulfil the intendment of the legiſlature. And yet, miſled by the notion that correctory laws ought not to be extended, the court of ſeſſion hath conſtantly denied action to the creditors of an

heir who dies in apparency, againſt the next heir in poſſeſſion, unleſs he has completed his title to the eſtate by ſervice or adjudication.

There is another palpable defect in this ſtatute which ought alſo to be ſupplied. A predeceſſor may have a good title to his eſtate without being infeft; and yet, regarding the words only, the heir-apparent is not liable upon this ſtatute, unleſs where he connects with a predeceſſor infeft. I put the following caſe. John purchaſes an eſtate, takes a diſpoſition with procuratory and precept, but dies without being ſeiſed. James, his heir-apparent, enters into poſſeſſion without making up titles, and contracts debt after being in poſſeſſion three years. After his death, William, the next heir-apparent, makes up his titles by a general ſervice. This caſe comes not under the words of the ſtatute; but as it undoubtedly comes under the miſchief which the legiſlature intended to remedy, it is the duty of a court of equity to complete the remedy.

In one caſe the court, from a due ſenſe of their equitable powers, ventured upon a remedy where this ſtatute was defective.

Some

Some acres and houſes having been diſponed for a valuable conſideration by an heir-apparent three years in poſſeſſion, the next heir-apparent foreſeeing that he would be barred by the act 1695 from objecting to this alienation if he ſhould enter heir, bethought himſelf of a different method. He ſold the ſubject for twenty guineas, and granted bond to the purchaſer, who led an adjudication againſt the eſtate, and upon that title brought a reduction of the diſpoſition in his own name. But the court decreed, that this caſe fell under the meaning of the ſtatute, though not under the words; and therefore that the purſuer was barred from challenging the diſpoſition *.

What if the heir forbearing to enter in order to evade the act 1695, ſhall contract debt to the value of the ſubject, upon which adjudications are led *contra hereditatem jacentem?* Here the eſtate is applied for payment of the heir's debts, and conſequently converted to his uſe as much as if he were entered. Would the court of ſeſſion give no relief in this caſe to the creditors

* Burns of Dorater contra Pickens, July 11. 1758.

ditors of the interjected heir-apparent? Would they ſuffer the purpoſe of the ſtatute to be ſo groſsly eluded?

A word or two upon ſtatutes contrived to advance the poſitive good of the ſociety in general, or of individuals in particular, making them *locupletiores*, as termed in the Roman law. To ſupply defects in ſuch a ſtatute is beyond the power even of a court of equity. The ſtatute 1661, act 41. obliging me to concur with my neighbour in erecting a march-dike, is of that nature. There is no proviſion in the act for upholding the march-dike after it is made; and the defect cannot be ſupplied by any court. Upon my neighbour's requiſition I muſt join with him to build a march-dike; but I am bound no further; and therefore the burden of upholding muſt reſt upon himſelf. Monopolies or perſonal privileges cannot be extended by a court of equity *; becauſe that court may prevent miſchief, but has no power to advance the poſitive good of any perſon. As to penal ſtatutes, it is clear, in the firſt place, that to augment a penalty beyond

* l. 1. § 2. De conſtitut. princ.

that

that directed by a ſtatute is acting in contradiction to the ſtatute, which enacts that preciſe penalty, and not a greater. In the next place, to extend the penalty in a ſtatute to a caſe not mentioned, is a power not truſted with any court, becauſe the truſt is not neceſſary. A penalty is commonly added to a ſtatutory prohibition, for preventing wrong or miſchief. A court of equity may extend the prohibition to ſimilar caſes, and even puniſh the tranſgreſſion of their own prohibition *. But with reſpect to a prohibition that regards utility only not juſtice, it is a prerogative peculiar to the legiſlature to annex beforehand a penal ſanction.

CONCLUSION of Book II.

Juſtice and Utility compared.

THE principle of juſtice, though more extenſive in its influence than that of utility, is in its nature more ſimple: it never looks beyond the litigants. The principle of utility, on the contrary, not

* Book 1. part 1. chap. 5.

only

only regards theſe, but alſo the ſociety in general; and comprehends many circumſtances concerning both. Being thus in its nature and application more intricate than juſtice, I thought it not amiſs to cloſe this book with a few thoughts upon it. In the introduction there was occaſion to hint, that utility co-operates ſometimes with juſtice, and ſometimes is in oppoſition to it. There are ſeveral inſtances of both in the firſt book, which I propoſe to bring under one view, in order to give a diſtinct notion of the co-operation and oppoſition of theſe principles.

It is ſcarce neceſſary to be premiſed, that in oppoſing private utility to juſtice, the latter ought always to prevail. A man is not bound to proſecute what is beneficial to him: he is not even bound to demand reparation for wrong done him. But he is ſtrictly bound to do his duty; and for that reaſon he himſelf muſt be conſcious, that in oppoſition to duty intereſt ought to have no weight. It is beſide of great importance to ſociety that juſtice have a free courſe; and accordingly public utility unites with juſtice to inforce right againſt intereſt. Private intereſt therefore,

or private utility, may, in the preſent ſpeculation, be laid entirely aſide; and it is barely mentioned to prevent miſtakes.

Another limitation is neceſſary. It is not every ſort of public utility that can outweigh juſtice: it is that ſort only which is preventive of miſchief affecting the whole or bulk of the ſociety: public utility, as far as it concerns poſitive additional good to the ſociety, is a ſubject that comes not within the ſphere of a court of equity.

Confining our view then to public utility, that which is preventive of miſchief to the whole or great part of the ſociety, I venture to lay down the following propoſition, That where-ever it is at variance with juſtice, a court of equity ought not to enforce the latter, nor ſuffer it to be enforced by a court of common law. In order to evince this propoſition, which I ſhall endeavour to do by induction, the proper method will be, to give a table of caſes, beginning with thoſe where the two principles are in ſtrict union, and proceeding orderly to thoſe where they are in declared oppoſition.

Theſe principles for the moſt part are good friends. The great end of eſtabliſh-

ing a court of equity is, to have juſtice accurately diſtributed, even in the moſt delicate circumſtances; than which nothing contributes more to peace and union in ſociety. As this branch therefore of utility is inſeparable from juſtice, it will not be neceſſary hereafter to make any expreſs mention of it. It muſt be always underſtood when we talk of juſtice.

We proceed to other branches of utility, which are not ſo ſtrictly attached to juſtice, but ſometimes coincide with it, and ſometimes riſe in oppoſition. One of theſe is the benefit accruing to the ſociety by abridging law-ſuits. In the caſe of compenſation, utility unites with juſtice to make compenſation a ſtrong plea in every court of equity. Retention depends entirely upon the utility of abridging law-ſuits. But if it have no ſupport from juſtice, it meets on the other hand with no oppoſition from it.

In the caſe of *bona fide* payment the utility is different. It is the benefit that ariſes from a free courſe to money-tranſactions, which would be obſtructed if debtors, by running any riſk in making payment, were encouraged to ſtate anxious or frivolous

frivolous defences. The exception of *bona fide* payment is ſuſtained upon no ground but that of preventing the miſchief here deſcribed. Juſtice weighs equally on both ſides: for if the exception be not ſuſtained, the honeſt debtor bears the hazard of loſing his money; if it be ſuſtained, the hazard is transferred upon the creditor.

But there are caſes where juſtice and utility take oppoſite ſides: which, in particular, is the caſe where a tranſaction extremely unequal is occaſioned by error. Here the juſtice of affording relief is obvious: but then a tranſaction by putting an end to ſtrife is a favourite of law; and it is againſt the intereſt of the public to weigh a tranſaction in the nice balance of grains and ſcruples. A man, by care and attention in making a tranſaction, may avoid error; but the bad conſequences of opening tranſactions upon every ground of equity cannot be avoided. Juſtice therefore muſt in this caſe yield to utility; and a tranſaction will be ſupported againſt errors ſufficient to overturn other agreements. I give another example. In the Roman law, *læſio ultra duplum* was ſuſtained to void a bargain: but in Britain we re-

fuſe to liſten to equity in this caſe; for if complaints of inequality were indulged, law-ſuits would be multiplied, to the great detriment of commerce.

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

dinate to the end; and therefore, if in any caſe juſtice cannot be done but by uſing means that tend to the hurt of ſociety, a court of equity ought not to interpoſe. To be active in ſuch a caſe, involves the abſurdity of preferring the means to the end.

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

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

† Sketches of the Hiſtory of Man, vol. 4. p. 31.

by

by a court of equity. It is inconſiſtent with the very conſtitution of this court, to do injuſtice, or to enforce it (*a*).

(*a*) The following caſe is an illuſtrious inſtance of this doctrine. A ſhip-cargo of negroes, young and old, being imported into Jamaica for ſale, Mr Wedderburn purchaſed a boy not above twelve years of age, educated him for a houſe-ſervant, and employ'd him as his ſlave while he continued in Jamaica. The negro being now fully grown, was brought to Scotland by his maſter, where he got a wife and had children. Never having received any wages, he became uneaſy for want of means to maintain his family. He abſented, and endeavoured to procure money by a lawful employment. Mr Wedderburn applied to the ſheriff of Perth to oblige his ſlave to return to him. The ſheriff found, "That ſlavery "is not recogniſed by the law of this kingdom, and "is inconſiſtent with the principles thereof; that "the regulations in Jamaica concerning ſlaves ex-"tend not to this kingdom; and therefore repelled "Mr Wedderburn's claim to perpetual ſervice from "the negro." The cauſe being advocated to the court of ſeſſion, was held to be of ſuch importance as to demand a hearing in preſence. The ſum of the argument for the negro was what follows. It was premiſed, that not one of the cauſes aſſigned by writers for juſtifying ſlavery is applicable to the negro in queſtion. It is not alledged that he was taken captive in war; and he was too young for committing any crime that deſerved ſo ſevere a puniſhment. As to conſent, it is not ſaid that he ever

conſented or ſhowed any willingneſs to be a ſlave. He could expect no redreſs in Jamaica; but when he came to a land of liberty, where he could hope for protection, he left his maſter, and aſſerted his claim to be free. Now as all men are born free, and in a ſtate of independence, except upon their parents, and as the negro in queſtion has done no act to deprive him of that valuable right, he is protected by the law of nature, and by every principle of juſtice, from being made a ſlave. Slavery, it is true, is ſupported by the practice of Jamaica. But even ſuppoſing it to be authoriſed by the municipal law of that country, yet the judges in Scotland do not give blind obedience to any foreign law. If a foreign decree or a foreign ſtatute be brought here for execution, our judges liſten cordially to any objection in equity that may lie againſt it; and never interpoſe their authority for execution unleſs where it is founded on material juſtice. Mr Wedderburn can have no pretext other than the law of Jamaica for claiming this man as a ſlave. And as this claim is repugnant to the law of nature and to every juſt principle, the court of ſeſſion would be acceſſory to a groſs wrong if they ſhould enforce that claim. Courts were inſtituted to make juſtice effectual, and never to tranſgreſs it. The court accordingly remitted the cauſe to the ſheriff; which in effect was refuſing to interpoſe their authority in behalf of Mr Wedderburn's claim. But they avoided the giving any opinion with reſpect to the law or practice of Jamaica, how far effectual by long cuſtom for the ſake of commerce. (15th January 1778, John Wedderburn contra Joſeph Knight a negro.)