This penalty would undoubtedly be mitigated by the court of ſeſſion; and yet the two caſes mentioned are fundamentally the ſame, differing in the form of words only.

PART II.

Powers of a court of equity to remedy the imperfection of common law with reſpect to matters of juſtice that are not pecuniary.

THE goods of fortune, ſuch as admit an eſtimation in money, are the great ſource of controverſy and debate among private perſons. And, for that reaſon, when civil courts were inſtituted, it was not thought neceſſary to extend their juriſdiction beyond pecuniary matters: the improvement was indeed ſo great as to be held complete. But time unfolded many intereſting articles that are not pecuniary.

Some

Some of them, making a figure, are diſtributed among different courts: a claim of peerage, for example, is determined in the Houſe of Lords; of bearing arms, in the Lyon court; and of being put upon the roll of freeholders, in the court of Barons. Even after this diſtribution, there remain many rights eſtabliſhed by law, and wrongs committed againſt law, that are not pecuniary; which being left unappropriated, muſt be determined in a court of equity: for the great principles ſo often above mentioned, That where there is a right it ought to be made effectual, and where there is a wrong it ought to be repreſſed, are equally applicable, whether the intereſt be pecuniary or not pecuniary.

To collect all the rights eſtabliſhed and wrongs committed that are not pecuniary, would be an endleſs labour: it would be uſeleſs as well as endleſs; for the remedy is not at all intricate. The only queſtion of difficulty is, In what courts ſuch matters are to be tried; and to this queſtion no general anſwer can be given, other than that the chancery in England and ſeſſion in Scotland, are the proper courts, where there is no peculiar court eſtabliſhed for

determining the point in controverſy. Take the following example. The qualifications of a man claiming to be a freeholder, muſt be judged by the freeholders of the county, convened at their Michaelmas head-court: but the law has provided no remedy for a wrong that may be committed by the freeholders, namely, their forbearing to meet at the Michaelmas head-court in order to prevent a man from applying to be put upon the roll; and therefore it is incumbent upon the court of ſeſſion to redreſs this wrong, by ordering the freeholders to meet under a penalty.

Two branches of law come under this part of the work, ſo extenſive as to require different chapters. In the firſt is treated, how far a covenant or promiſe in favour of an abſent perſon, is effectual. In the other, immoral acts that are not pecuniary.

CHAP. I.

How far a covenant or promiſe in favour of an abſent perſon, is effectual.

I Am aware that the intereſt which ariſes to the abſent from a promiſe or covenant, being commonly pecuniary, ought in ſtrict form to have been handled above. But the intereſt of the perſon who obtains the obligation for behoof of the abſent, is not pecuniary; and the connection of theſe different intereſts, ariſing from the ſame promiſe or covenant, makes it neceſſary that they ſhould be handled together.

Promiſes and covenants are provided by nature for obliging us to be uſeful to others, beyond the bounds of natural duty. They are perfected by an act of the will, expreſſed externally by words or by ſigns. And they are binding by the very conſtitution of our nature, the moral ſenſe dictating

tating that every rational promiſe ought to be performed.

No circumſtance ſhows more conſpicuouſly our deſtination for ſociety, than the obligation we are laid under by our very nature to perform our promiſes and covenants. And to make our engagements the more extenſively uſeful in the ſocial ſtate, we find ourſelves bound in conſcience, not only to thoſe with whom we contract, but alſo to thoſe for whoſe benefit the contract is made, however ignorant of the favour intended them. If John exact from me a promiſe to pay L. 100 to James, I ſtand bound in conſcience to perform my promiſe. It is true, that the promiſe being made to John, it is in his power to diſcharge the ſame; and therefore, if he be ſilent without requiring me to perform, my obligation is in the mean time ſuſpended, waiting the reſult of his will. But as John's death puts an end to his power of relieving me from my obligation, the ſuſpenſion is thereby removed, and from that moment it becomes my indiſpenſable duty to pay the L. 100 to James.

The binding quality of a promiſe goes ſtill farther. If I promiſe John to educate his children after his death, or to build a monument for him, conſcience binds me alſo in this caſe: which is wiſely ordered by the author of our nature; for a man would leave this world diſcontented, if he could not rely upon the promiſes made to him of fulfilling his will after his death. And though my friend dies without an heir to repreſent him, I find myſelf, however, bound in conſcience to execute his will. Here then comes out a ſingular caſe, an obligor without an obligee. And if it be demanded what compulſion I am under to perform, when a court of law cannot interpoſe unleſs there be an obligee to bring an action; the anſwer is, that I ſtand bound in conſcience, as men were by a covenant before courts of law were inſtituted. Nor is this caſe altogether neglected by law. It is extremely probable, that a court of equity would compel me to execute the will of my deceaſed friend, upon a complaint brought by any of his relations, though they could not ſtate themſelves as obligees.

Such

Such are the binding qualities of a promiſe, and of a covenant, by the law of our nature. We proceed to ſhow how far theſe qualities are ſupported by municipal law.

For a long period after courts of law were inſtituted, covenants and promiſes were left upon conſcience, and were not inforc'd by any action. This in particular was the caſe among our Saxon anceſtors: they did not give an action even upon buying and ſelling, though the moſt neceſſary of all covenants. The Romans were more liberal; and yet they confined their actions to a few covenants that are neceſſary in commerce. At the ſame time, the action given to inforce theſe covenants was confined within the narroweſt bounds. In the firſt place, as only pecuniary intereſt was regarded, no action was given upon a covenant, unleſs the plaintiff could ſhow that it tended to his pecuniary intereſt *. And accordingly, an action was denied upon a contract to pay a ſum of money to a third perſon. In the next place, though that perſon had a pecuniary intereſt to

* l. 38. § 17. De verborum oblig.

have

What is the legal effect of bribery in the election of a member to ſerve in parliament, or of magiſtrates to ſerve in boroughs? Common law, with reſpect to electors, conſiders only whether the man was intitled to vote, diſregarding the motive that induced him to prefer one candidate before another; and therefore this matter comes under a court of equity. And as good government requires a freedom and independency in voting, a court of equity will ſet aſide every vote obtained by bribery; for the candidate who is guilty of bribery will not be permitted to be-

" tempore fuiſſe geſtum." It is amuſing to obſerve how well an argument paſſes in Latin, that would make but a ſhabby figure in Engliſh. But to judge well, and to give a ſolid reaſon for one's judgement, are very different talents. There is in the mind of man a diſpoſition to let nothing paſs without a reaſon; but that diſpoſition is eaſily gratified, for with the plurality any thing in the form of a reaſon is ſufficient. Maſcardus, *de probationibus*, lays down the following rule: " That a thouſand witneſſes, " without being put upon oath, afford not evidence " in a court of juſtice." What is the reaſon given? It is, that numbers do not ſupply the want of an oath; which is no more but the ſame aſſertion in different words.

nefit

tive. Intricate queſtions of this kind lead to a general doctrine founded on human nature, That the accompliſhment of every honeſt purpoſe is a man's intereſt. And accordingly, in the affairs of this world, it is far from being uncommon to prefer the intereſt of ambition, of glory, of learning, of friendſhip, to that of money. This doctrine, by refinement of manners, prevails now univerſally. In the caſe ſtated, that I have an equitable intereſt to exact the promiſe in favour of my friend, is acknowledged; and a court of equity will accordingly afford me an action to compel performance.

But has my friend an action if I forbear to interpoſe? He has no action at common law, becauſe the promiſe was not made to him. And as little has he an action in equity during my life; for the following reaſon, that it depends on me to whom the promiſe was made, whether it ſhall be performed or not. It is in my power to paſs from or diſcharge the promiſe made to me; and as this power continues for life, the obligor cannot be bound to pay to my friend, while it remains uncertain

certain whether it may not be my will to diſcharge the obligation *.

I illuſtrate this doctrine by the following examples. I give to my ſervant money to be delivered to my friend as a gift, or to my creditor as payment. The money continues mine till delivery; and I have it in my choice to take it back, or to compel delivery. The friend or creditor has no action. He has not a real action, becauſe the property of the money is not transferred to him: he has not a perſonal action, while it continues in my power to recal the money. If delivery be delay'd, he will not naturally think of any remedy other than of making his complaint to me. Yet the court of ſeſſion taught a very different doctrine in the following caſe. In a minute of ſale of land, the purchaſer was taken bound to pay the price to a creditor of the vender's: action was ſuſtained to this creditor for payment to him of the price; though it was pleaded for the vender, That the purſuer not being a party to the minute of ſale, no right could ariſe

* l. 3. De ſervis exportandis. l. 1. C. Si mancipium ita fuerit alienat.

to him from it, and that the vender's mandate or order might be recalled by him at his pleaſure *. But the court afterward determined more juſtly in the following caſes, founded on the ſame principle. A proprietor having reſigned his eſtate in favour of his ſecond ſon and his heirs-male, with power to his eldeſt ſon and the heirs-male of his body to redeem; did afterward limit the power of redemption, that it ſhould not be exerciſed unleſs with the conſent of certain perſons named; and impowering thoſe perſons to diſcharge the reverſion altogether if they thought proper, which accordingly they did after the father's death. In a declarator at the inſtance of the ſecond ſon to aſcertain his right to the eſtate, it was objected by the eldeſt, That, by the ſettlement, he had a *jus quæſitum*, which could not be taken from him. The diſcharge was ſuſtained †. Sir Donald Baine of Tulloch diſ-

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

† Fountainhall, January 2. 1706, Dundas contra Dundas.

poned his eſtate to his eldeſt ſon John; and took from him bonds of proviſion in name of his younger children. It was found, that as theſe bonds were never delivered, it was in Sir Donald's power to diſcharge or cancel them at pleaſure *. The like was found 2d July 1755, Hill contra Hill.

To return to the caſe figured of a promiſe exacted by me in favour of an abſent perſon. My death makes a total change, by giving him an action which he had not during my life: for if the obligor, who formerly was bound at my inſtance, remain ſtill bound in conſcience, as is made evident above, it follows, that the perſon in whoſe favour the promiſe was made, muſt be intitled to demand performance. This will readily be yielded where the paction is for a valuable conſideration: if John give a ſum to James, for which James promiſes to John that he will build a houſe to William, James cannot both retain the money and refuſe performance. The ſame muſt follow though the paction be gratuitous; for James is in

* July 6. 1717, Roſe contra Baine of Tulloch.

conſcience

conſcience bound to perform his promiſe; and William of courſe muſt be intitled to demand performance.

From theſe premiſes it follows, that the man who thus makes a contract for the benefit of an abſent perſon, may renounce his power of diſcharging the contract; which renunciation delivered, will inſtantly intitle that perſon to demand performance. Such renunciation may alſo be inferred *rebus et factis*. As for example, where a man diſpones his eſtate to his eldeſt ſon, and takes from him a bond of proviſion to his younger children by name: while the bond is in the father's cuſtody, it continues under his power; but if he deliver the bond to his children, he is underſtood to renounce his power, which will intitle them to demand payment *.

In the Roman law, a ſtipulation in favour of the heir was early made effectual, by ſuſtaining an action to the heir †. By that law, a ſon might ſtipulate in favour

* Dirleton, November 20. 1667, Trotters, contra Lundy.

† l. 38. § 12. & 14. De verborum oblig.

of his father, and a ſlave in favour of his maſter. In the progreſs of equity this privilege was further extended. Where a man ſtipulated in favour of his daughter, an *utilis actio* was given to the daughter, which is an action in equity *. Yet a daughter's paction in favour of her mother did not avail the mother †. A man's ſtipulation in favour of his grandchildren profited them ‡. Where there was a *rei interventus*, an *utilis actio* was given to the abſent perſon whoever he was ‖. But among the Romans a gratuitous ſtipulation in favour of a ſtranger never produced an action to the ſtranger **.

The foregoing doctrine unfolds the nature of *fideicommiſſary* ſettlements among the Romans. Of theſe ſettlements Juſtinian †† gives the following hiſtory, That they were a contrivance to elude a regulation that rendered certain perſons incapable of taking benefit by a teſtament; that

* l. 45. § 2. De verborum oblig.
† l. 26. § 4. De pactis dotal.
‡ l. 7. C. De pactis conven.
‖ l. 3. C. De donat. quæ ſub modo.
** § 4. Inſtit. de inutil. ſtipul.
†† § 1 Inſt. de fideicommiſſ. hered.

it

it being in vain to ſettle upon ſuch a perſon an eſtate by teſtament, another perſon was named heir, to whom it was recommended to ſettle the eſtate as intended; and that Auguſtus Cæſar gave here a civil action to make the ſettlement effectual. But did Auguſtus make effectual a ſettlement executed in defraud of the law? I can hardly be of that opinion. If the law was inexpedient, why not openly reſcind it? Auguſtus was too wiſe a prince to ſet thus a public example of eluding law. Juſtinian, I ſuſpect, did not underſtand the nature of theſe ſettlements. It was a maxim in the Roman law, derived from the nature of property, That a man cannot name an heir to ſucceed to his heir *. Becauſe this could not be done directly, it was attempted indirectly by a *fideicommiſſary* ſettlement: I name my heir regularly in my teſtament, and I order him to make a teſtament in favour of the perſon I incline ſhould ſucceed him. Such ſettlements did at firſt depend entirely on the faith of the heir in poſſeſſion, who upon that account was termed *Heres fiducia-*

* See Hiſtorical law-tracts, tract 3.

rius:

rius: the perſon appointed to ſucceed him, termed *Heres fideicommiſſarius*, had not an action at common law to compel performance; for the fiduciary heir was not bound to him, but to the teſtator ſolely. But here was a *rei interventus*, a ſubject in the hands of the fiduciary heir, which, by accepting the teſtament, he bound himſelf to ſettle upon the *fideicommiſſary* heir; and he is therefore bound in conſcience to ſettle it accordingly. The *fideicommiſſary* heir has beſide an equitable claim to the ſubject founded on the will of the teſtator. Theſe things conſidered, it appears to me plain, that Auguſtus Cæſar, with reſpect to ſuch ſettlements, did no more but ſupply a defect in common law, by appointing an action to be ſuſtained to the *fideicommiſſary* heir.

What is juſt now ſaid ſerves to explain the nature of truſts, where a ſubject is veſted in a truſtee for behoof of a third party, the children *naſcituri* of a marriage, for example. A truſt of this nature, analogous to a *fideicommiſſary* ſettlement among the Romans, comes not under the cogniſance of a court of common law; becauſe the perſon in whoſe favour the truſt is eſtabliſhed,

ſtabliſhed, not being a party to the agreement, has not at common law an action to oblige the truſtee to fulfil his engagement: but he hath an action in equity as above mentioned. And hence it is, that in England ſuch truſts muſt be made effectual in the court of chancery.

Reviewing what is ſaid above, I am in ſome pain about an objection that will readily occur againſt it. A legatee, by the common law of the Romans, had an action againſt the heir for performance; and yet a legatee is not made a party in the teſtament; nor is the heir, by accepting the teſtament, bound to him, but to the teſtator ſolely. To remove this objection, it will be neceſſary to give an account of the different kinds of legacies well known in the Roman law; and upon ſetting this ſubject in its true light, the objection will vaniſh. In the firſt place, where a legacy is left of a *corpus*, the property is tranſferred to the legatee *ipſo facto* upon the teſtator's death, conformable to a general rule in law, That ſubjects are transferred from the dead to the living without neceſſity of delivery: for after the proprietor's death, there is no perſon who can make delivery;

delivery; and if will alone, in this caſe, have not the effect to transfer property, it never can be transferred from the dead to the living. Upon that account, a legatee of a *corpus* has no occaſion to ſue the heir for delivery: he hath a *rei vindicatio* at common law. The next kind of legacy I ſhall mention, is where a bond for a ſum of money is bequeathed directly to Titius. The ſubject here, as in the former caſe, veſts in the legatee *ipſo facto* upon the teſtator's death. The legatee has no occaſion for an action againſt the heir; for in quality of creditor he has at common law an action againſt the debtor for payment. A third ſort of legacy is, where the teſtator burdens his heir to pay a certain ſum to Titius. This is the only ſort, reſembling a *fideicommiſſary* ſettlement, to which the maxim can be applied *Quod alii per alium non acquiritur obligatio.* But as an action at common law for making other legacies effectual was familiar, the influence of connection, without making nice diſtinctions, produced an action at common law for this ſort alſo. Therefore all that can be made of this inſtance, is to prove what will appear in many inſtances, that

common law and equity are not ſeparated by any accurate boundary.

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

I give a ſecond inſtance, in order to clear up a celebrated queſtion often debated in the court of ſeſſion, namely, Whether an entail, ſuch as that above men-

* See Hiſtorical law tracts, tract 3. toward the cloſe.

tioned, after being completed with infeftment, can be altered or diſcharged even by the joint deed of the entailer and inſtitute. Our lawyers have generally leaned to the negative. The inſtitute, they urge, fettered by the entail, has not power to alter or diſcharge; and the will of the entailer, who is not now proprietor, cannot avail. This reaſoning is a mere ſophiſm. The full property is veſted in every tenant in tail, no leſs than in him who inherits a fee-ſimple. A tenant in tail is indeed limited as to the exerciſe of his powers of property: he muſt not alien, and he muſt not alter the order of ſucceſſion. But theſe, and ſuch like limitations, proceed not from defect of power *qua proprietor*, but from being bound perſonally, by acceptance of the entail, not to exerciſe theſe powers *. This diſtinction with reſpect to the preſent queſtion is of moment. A man cannot exerciſe any power beyond the nature of his right: ſuch an act is void; and every perſon is intitled to object to it. But no perſon, other than the obligee, is intitled to object to the tranſ-

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

greſſion

greſſion of a covenant or perſonal obligation. The entailer, in the caſe ſtated, is the obligee: it is he who took the inſtitute bound to limit as above the exerciſe of his property; and he therefore has it in his choice, to keep the heir bound, or to releaſe him from his obligation. To be in a condition to grant ſuch releaſe, it is neceſſary indeed that he be obligee, but it is not neceſſary that he be proprietor.

Hence it appears, that the ſubſtitutes have no title while the entailer is alive, to reſtrain the inſtitute from the free uſe of his property. They have no claim perſonally againſt the inſtitute; who ſtands bound to the entailer, not to them: nor have they any other ground for an action, ſeeing the full property of the eſtate is veſted in the inſtitute, and no part in them. In a word, it depends entirely upon the entailer, during his life, whether the entail ſhall be effectual or no; and while that continues to be his privilege, the ſubſtitutes evidently can have no claim. Nay more, I affirm, that the entailer cannot deprive himſelf of this privilege, even though he ſhould expreſsly renounce it in the deed of entail. The ſubſtitutes are

not made parties to the entail, and the renunciation, though in their favour, is not made to them. The renunciation is at beſt but a gratuitous promiſe, which none are intitled to lay hold of but that very perſon to whom it is made.

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

But here a queſtion naturally ariſes, Why ought not the entailer's privilege to diſcharge the fetters of the entail, deſcend to his heirs. The ſolid and ſatisfactory anſwer is what follows. No right or privilege deſcends to an heir, but what is pecuniary and tends to make him *locupletior*: but the privilege of diſcharging the fetters of an entail makes not the heir *locupletior*, and therefore deſcends not to him.

Similar to the rule above explained, *Alii per alium non acquiritur obligatio*, is the following

lowing rule, *Alii per alium non acquiritur exceptio.* Theſe rules, governed by the ſame principle, throw light upon each other; and ought therefore to be handled together. I obtain from a man a promiſe to diſcharge his debtor, the queſtion is, What ſhall be the effect of that promiſe. The Roman lawyers anſwer, that I cannot have an action to compel performance, becauſe I have no intereſt that performance ſhould be made; and that the debtor cannot have an action to compel performance, becauſe he was not a party to the agreement *.

But the Roman writers were certainly guilty of an overſight in not diſtinguiſhing here a *pactum liberatorium* from a *pactum obligatorium.* Admitting the latter to be limited as above by the common law of the Romans; it can be made evident from the principles of that very law, that the former cannot be ſo limited, but muſt be effectual to him for whoſe behoof it is made, whether the perſon who obtained it be connected with him or no. The difference indeed with reſpect to the preſent

* l. 17. § 4. De pactis.

point

point between theſe pactions, ariſes not from any difference in their nature, but from the nature of a court of law. Courts of law, as above mentioned, were originally circumſcribed within narrow bounds; and with reſpect to the Roman courts in particular, many *pacta obligatoria* were left upon conſcience unſupported by theſe courts. Such a conſtitution indeed confines courts within too narrow limits with reſpect to their power of doing good; but then it does not lead them to do any wrong. The caſe is very different with reſpect to *pacta liberatoria*: it is unjuſt in the creditor to demand payment, after he has promiſed, even gratuitouſly, to diſcharge the debt; and a court of law would be acceſſory to that act of injuſtice, if it ſuſtained action after ſuch a promiſe. The court therefore muſt refuſe to ſuſtain action; or rather muſt ſuſtain the *pactum liberatorium* as a good exception to the action *. And it makes no difference, whether the perſon who obtained the promiſe be dead or alive. For while the promiſe ſubſiſts, it muſt bar the creditor from

* See Hiſtorical law-tracts, tract 2.

claiming

claiming payment; and muſt bar every court from ſupporting ſuch a claim. It is true indeed, that while the perſon who obtained the promiſe is alive, it is in his power to diſcharge the promiſe; and conſequently to intitle the creditor to an action: but till that diſcharge be obtained, it would be unjuſt in any court to ſuſtain action.

Some of the Roman writers, ſenſible that an action for payment ought not to be ſuſtained to a creditor who has paſſed from his debt, endeavour to make this opinion conſiſtent with the rule *Alii per alium non acquiritur exceptio*, by a ſubtilty that goes out of ſight. They inſiſt, that the debtor cannot found a defence upon a paction to which he was not a party: but they yield, that the paction, though not effectual to the debtor, is effectual againſt the creditor; and they make it effectual againſt him, by ſuſtaining to the debtor an *exceptio doli* *.

Upon the ſame principle, if a third perſon pay a debt knowingly and take a diſcharge in name of the debtor, the

* l. 25. § 2. l. 26. De pactis; l. 26. § 4. De pactis dotalibus.

debtor,

debtor, though the diſcharge be not delivered to him, can defend himſelf by an *exceptio doli* againſt the creditor demanding payment from him: for the creditor who has received payment from the third perſon, cannot in conſcience demand a ſecond payment from the debtor. But tho' he be barred from demanding a ſecond payment, it does not follow that the debt is extinguiſhed. That it remains a ſubſiſting debt will appear from conſidering, 1*mo*, That the tranſaction between the creditor and the third perſon may be diſſolved as it was eſtabliſhed, namely, by mutual conſent, and by cancelling the diſcharge. 2*do*, The debtor, notwithſtanding the erroneous payment, has it in his power to force a diſcharge from the creditor upon offering him payment: neither of which could happen, were the debt extinguiſhed. It only remains to be obſerved, that, when a debt is thus paid by a third perſon, it is in the debtor's choice to refund the money to the third perſon, or to pay it to the creditor. But if he defend himſelf againſt the creditor by an *exceptio doli*, which imports his ratification of the payment, the ſuſtaining this exception hath

two effects: 1ſt, It operates to him a legal extinction of the debt; and, next, It intitles the third perſon to demand the ſum from him.

CHAP. II.

Powers of a court of equity to repreſs immoral acts that are not pecuniary.

I Have had occaſion to mention above, that an attempt to correct all the wrongs that are not pecuniary, would be endleſs; and in a meaſure uſeleſs, as the method of repreſſing them all is the ſame, which is to declare them void. One ſpecies of immoral acts deſerve peculiar notice, not only as a tranſgreſſion of duty, but as tending to corrupt our morals.

Individuals in ſociety are linked together by various relations that require a ſuitable conduct. The relations in particular that imply ſubordination, make the corner-ſtone of government, and ripen men

gradually for behaving in it with propriety. The reciprocal duties that ariſe from the relation of parent and child, of preceptor and ſcholar, of maſter and ſervant, of the high and low, of the rich and poor, and ſuch like, accuſtom men both to rule and to be ruled. It is for that reaſon extremely material, that the duties ariſing from ſubordination be preſerved from encroaching on each other: to reverſe them, would reverſe the order of nature, and tend to unhinge government. To ſuffer, for example, a young man to aſſume rule over his father, is to countenance an immoral act and a breach of duty; having at the ſame time a tendency to deſtroy ſubordination.

A young man, in his contract of marriage, conſented to be put under interdiction to his father and father-in-law; and in caſe of their failure, to the eldeſt ſon of the marriage. They having failed, the court refuſed to ſuſtain an interdiction where the father is interdicted and the ſon interdictor *. A bond was granted by a man to his wife, bearing, "That by his "facility he might be miſled to diſpoſe of

* Durie, 18th January 1622, Silvertonhill contra his Father.

"a

" a liferent he had by her, and therefore " binding himſelf not to diſpone without " her conſent." Upon this bond followed an inhibition; which was in effect putting the huſband under interdiction to his wife. The court refuſed to ſuſtain this act; becauſe a married woman, being *ſub poteſtate viri*, cannot be a curator to any perſon; and to make her a curator to her huſband would be to overturn the order of nature *.

Other acts tending to or ariſing from depravation of manners, are alſo rejected by a court of equity. Thus, a man who had fallen out with his mother, ſettled his manſion-houſe on his brother; and took from him a bond in his ſiſter's name, that he ſhould not permit his mother to ſet foot in the houſe. The bond was ſet aſide †.

* Stair, 27th February 1663, Lady Milton contra Milton.

† 1 Vernon 413.