CHAP. IV.

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

WE have ſeen above, that, abſtracting from poſitive engagements, the affording relief to a fellow-creature in diſtreſs, is the only caſe that exalts our benevolence to be an indiſpenſable duty. A man however is ſingly the moſt helpleſs of all animals; and unleſs he could rely upon aſſiſtance from others, he would in vain attempt any work that requires more than two hands. To ſecure aid and aſſiſtance in time of need, the moral ſenſe makes the performance of promiſes and covenants a duty; and to theſe accordingly may juſtly be attributed, the progreſs at leaſt, if not the commencement, of every art.

Among the various principles that qualify men for ſociety, that by which one man can

can bind himſelf to another by an act of will, is eminent. By that act, a new relation ariſes between them: the perſon bound is termed *obligor*, the other *obligee*. But a man may exert an act of will in favour of another without binding himſelf, which is the caſe of a teſtament or latter-will: during the teſtator's life, his will expreſſed in his teſtament, differs not from a reſolution, as he is bound by neither; but after death it differs widely, for death puts an end to the power of alteration. A teſtament therefore muſt be effectual by the teſtator's death, or it never can be effectual.

Where two perſons bind themſelves to each other by mutual acts of will, this is termed a *contract* or *covenant*. Where one binds himſelf to another without any reciprocal obligation, that act of will is termed a *promiſe*. I promiſe to pay to John L. 100. An *offer* is a different act of will: it binds not unleſs it be accepted; and acceptance is an act of will of a fourth kind. Where one by an act of will conveys a ſubject to another, that is a fifth kind; and that act expreſſed in writing is termed a *deed*.

Nature, independent of will, bars abſolutely men from harming each other. It binds them poſitively to afford relief to the diſtreſſed as far as they are able. But in no caſe is a man bound to add to the eſtate of another, or to make him *locupletior*, as termed in the Roman law, otherwiſe than by voluntary engagement. This diſtinguiſhes the obligation of a voluntary engagement from the other duties mentioned. The latter cannot be tranſgreſſed without making others ſuffer in perſon, in goods, or in reputation: but in relieving from the obligation of a promiſe or covenant, the perſon in whoſe favour it is made, is indeed deprived of any benefit from it, but ſuffers no poſitive loſs or damage: to him it is *lucrum ceſſans* only, not *damnum datum*. Hence it is, that the moral ſenſe is leſs rigid as to voluntary engagements, than as to duties that ariſe without conſent. To fulfil a rational promiſe or covenant, is a duty no leſs inflexible than to fulfil the duties that ariſe without conſent. But as man is a fallible being, liable to fraud and deceit, and apt to be miſled by ignorance and error, the moral ſenſe would be ill ſuited to his nature,

ture, did it compel him to fulfil every engagement, however irrational, however raſhly or ignorantly made. Deplorable indeed would be our condition, were we ſo ſtrictly bound by the moral ſenſe: the innocent would be a prey to the deſigning, the ignorant would be over-reached by the crafty, and ſociety be an uncomfortable ſtate. But the author of our nature leaves none of his works imperfect: the moral ſenſe, correſponding to the fallibility of our nature, binds us by no engagement but what is fairly entered into with every conſequence in view, and what in particular anſwers the end for which it was made.

Few perſons paſs much of their time without having purpoſes to fulfil, and plans to execute; for accompliſhing which, means are employ'd. Among theſe means, deeds and covenants make a capital figure; no man binds himſelf or others for the ſake merely of binding, but in order to bring about a deſired event. Every deed and covenant may accordingly be conſidered to be a mean employed to bring about ſome end or event.

Sometimes the deſired event is mentioned

ed in the deed or covenant, and expreſſly agreed on to be performed; in which caſe performance concludes the tranſaction, being all that was intended. A bond for borrowed money is a proper example; what is ſtipulated in the bond to be performed, is repayment of the money, beyond which the parties have no view; and that end is accompliſhed when the money is repaid. A legacy bequeathed in a teſtament is another example: payment of the legacy is the only end in view; and that end is accompliſhed when the legatee receives the money. But in many deeds and contracts, the fact appointed to be done, is not ultimate, but intended to bring about a further end. Thus, when I buy a ſtone horſe for propagation, the contract is performed upon delivery of the horſe to me. But this performance does not fulfil my purpoſe: I have a further end in view, which is to breed horſes; and unleſs the horſe be fit for that end, my purpoſe in contracting is fruſtrated. I purchaſe a hogſhead of flax-ſeed for raiſing a crop of flax. It is not enough that the ſeed be delivered to me: if it be rotten,

rotten, the end I have in view is diſappointed.

This ſuggeſts a diviſion of voluntary engagements into two kinds: the firſt, where the performance mentioned is ultimate by fulfilling all that was intended; the other, where the performance mentioned is not ultimate, but intended as a mean to a further end, not mentioned. In this kind, a contract is a mean to bring about the immediate end, namely, the performance of what was mentioned and agreed on; and this immediate end is a mean to bring about the ultimate end.

In contracts of this kind, there is place for judging how far the means are proportioned to the end: they may be inſufficient to bring about the end; they may be more than ſufficient; and they may have no tendency to bring about the end. Here equity may interpoſe, to vary theſe means in ſome caſes, and to proportion them more accurately to the ultimate end: in other caſes, to ſet aſide the contract altogether, as inſufficient to bring about the ultimate end. Hence it is, that ſuch contracts are termed *contracts bonæ fidei*; that is, contracts in which equity may interpoſe

poſe to correct inequalities, and to adjuſt all matters according to the plain intention of the parties. With reſpect to contracts where the performance ſtipulated is the ultimate end, there is evidently no place for the interpoſition of equity; for what defence can a man have, either in law or in equity, againſt performing his engagement, when it fulfils all that he had in view in contracting? Contracts accordingly of that kind, are termed *contracts ſtricti juris*.

To the diſtinction between contracts *bonæ fidei* and *ſtricti juris*, great attention is given in the Roman law. We are told, that equity may interpoſe in the former, and that the latter are left to common law. But as to what contracts are *bonæ fidei*, what *ſtricti juris*, we are left in the dark by Roman writers. Some of their commentators give us liſts or catalogues; but they pretend not to lay down any preciſe rule by which the one kind may be diſtinguiſhed from the other. I have endeavoured to ſupply that defect: whether ſatisfactorily or not, is the province of others to judge.

Have we in Scotland any action ſimilar

to what in the Roman law is termed *Condictio ex pœnitentia?* Voet, upon the title *Condictio cauſa data*, &c. ſays, that the *condictio ex pœnitentia* is not admitted in modern practice, becauſe every paction is now obligatory. I admit, that every paction is obligatory ſo far as to produce an action; but that does not bar an equitable defence. And it appears to me, that there are contracts where repentance may be ſuſtained in equity as a good defence; as where the contract is of a deep concern to one of the parties, and of very little to the other. For example, I bargain with an undertaker to build me a dwelling-houſe for a certain ſum, according to a plan concerted. Before the work is begun, the plan is diſcovered to be faulty in many capital articles. Am I bound notwithſtanding to fulfil my covenant with the undertaker? Will not ignorance here relieve me, as error would do, where it is *lucrum ceſſans* only to the undertaker, and a very deep loſs to me? Suppoſe again, that upon a more narrow inſpection into my finances, the ſum agreed on for building is found to be more than I ought to afford. Or what if, *rebus integris*, I ſuc-

ceed to an eſtate with a good houſe upon it, or am invited by an employment to ſettle elſewhere? If I be relieved, the undertaker is at liberty to accept of employment from others; and perhaps of more beneficial employment than mine: if I be kept bound, a great intereſt on my ſide is ſacrificed to a trifling intereſt on his. Covenants, intended for the ſupport of ſociety, ought not raſhly to be converted to the ruin of an individual. It is a delicate point to determine in what caſes a court of equity ought to interpoſe. All arbitrary queſtions are dangerous, and this is one of them. The court of ſeſſion, however, muſt not decline ſuch queſtions where it is to relieve from deep inequality and diſtreſs. In the caſes above mentioned, they certainly would not refuſe to interpoſe.

Great intereſt on the one ſide, and very little on the other, is not the only inſtance where a court of equity will admit of repentance. Of all articles of commerce, that of land is of the higheſt importance. For that reaſon, repentance is permitted in a verbal bargain of land, however fair and equal the bargain may be. It requires writing

writing to fix the bargain. Marriage is a contract ſtill more important, as the happineſs of one's whole life may depend on it. Hence it is that nothing but a contract *de præſenti* can bind. Repentance is permitted of every agreement that can be made about a future marriage. Thus a bond granted by a woman to marry the obligee under a penalty, will not be effectual even for the penalty *.

This chapter, conſiſting of many parts, requires many diviſions; and in the diviſions that follow a proper arrangement is ſtudied, which ought to be a capital object in every didactic ſubject.

SECT. I.

Where will is imperfectly expreſſed in the writing.

IN applying the rules of equity to deeds and covenants, what comes firſt under conſideration is, whether the will be fully

* 2. Vernon 102.

or fairly taken down in the writing. A man, expreſſing his thoughts to others, is not always accurate in his terms; neither is the writer always accurate in expreſſing the will of his employer: and between the two, errors are often multiplied. Thus, clauſes in writings are ſometimes ambiguous or obſcure, ſometimes too limited, ſometimes too extenſive. As in common law the words are ſtrictly adhered to, ſuch imperfections are remedied by a court of equity. It admits words and writing to be the proper evidence of will; but excludes not other evidence. Senſible that words and writing are not always accurate, it endeavours to reach will, which is the ſubſtantial part; and if, from the end and purpoſe of the engagement, from collateral circumſtances, or from other ſatisfying evidence, will can be aſcertained, it is juſtly made the rule, however it may differ from the words. The ſole purpoſe of the writing is to bear teſtimony of will; and if that teſtimony prove erroneous, it can avail nothing againſt the truth. This branch of equitable juriſdiction, which comprehends both deeds and covenants, is founded on the principle

principle of juſtice, which declares for will againſt every erroneous evidence of it.

This ſection may be divided into three articles. Firſt, Where the words leave us uncertain about will. Second, Where they are ſhort of will. Third, Where they go beyond it.

ART. I. *Where the words leave us uncertain about will.*

THIS imperfection may be occaſioned by the fault of the writer, miſtaking the meaning of his employer; or by the fault of the employer, exerting an act of will imperfectly, or expreſſing his will obſcurely. But I purpoſely neglect theſe diſtinctions; becauſe in moſt of the caſes that occur, it is extremely doubtful upon whom the inaccuracy is to be charged. Nor will this breed any confuſion; for from whatever cauſe the doubt about will ariſes, the method of ſolving it is the ſame, namely, to form the beſt conjecture we can, after conſidering every relative circumſtance.

Contracts

Contracts ſhall furniſh the firſt examples. In a bargain of ſale, the price is referred to a third perſon: the referee dies ſuddenly without naming the price; and there is no performance on either ſide. There being no remedy here at common law, becauſe the price is not aſcertained, can a court of equity ſupply the defect in order to validate the bargain? This queſtion depends on what the parties intended by the reference. If they intended not to be bound but by the opinion of the referee, it is in effect a conditional bargain, never purified, which no court will make effectual. But if it was intended, that the ſale ſhould in all events ſtand good, leaving only the price to be determined by the referee; the unexpected accident of his death cannot reſolve the bargain; upon which account, it belongs to a court of equity, in place of the referee, to name a price *ſecundum arbitrium boni viri*. A man having purchaſed land, obliged himſelf in a backbond to rediſpone, upon receiving back the price from the vender within a time ſpecified. The vender having died within the time, it was queſtioned, Whether his heir was privileged to redeem the land.

land. If it was the meaning of the contract to confine the privilege of redemption to the vender perſonally, his heir could have no right. But if it was underſtood ſufficient that the price ſhould be repaid within the time ſpecified, the heir was intitled to redeem, as the predeceſſor was. This conſtruction, as the more equal and rational, was adopted by the court of ſeſſion. And accordingly, the land was found legally redeemed, upon the heir's offering the price before the term was elapſed *. A gentleman having given a bond of proviſion to his ſiſter for 3000 merks, took from her a backbond, importing, "That the ſum being rather "too great for his circumſtances, ſhe con-"ſented that the ſame ſhould be mitiga-"ted by friends to be mutually choſen, "their mother being one." After the mother's deceaſe without mitigation, the brother's creditors inſiſting for a mitigation *ſecundum arbitrium boni viri*, the defence was, That the condition of the mitigation had failed by the mother's death; and therefore that the bond muſt ſubſiſt

* Stair, 9th January 1662, Earl of Moray contra Grant.

in

in totum. The defence was ſuſtained *. Suppoſing the backbond to be conditional, the judgement is right. But as it ſeems the more natural conſtruction, that there ſhould be a mitigation if the brother's circumſtances required it, the unexpected death of the mother ought not to have prevented the mitigation.

'The next examples ſhall be of deeds. The miniſter of Weem ſettled his funds upon five truſtees, and their ſucceſſors, for the uſe of the ſchoolmaſters of that pariſh, declaring the major part to be a quorum. Two only of the truſtees having accepted and intermeddled with the funds, a proceſs was brought againſt them by the repreſentatives of the miniſter, claiming the funds upon the following ground, That the deed of mortification was conditional, requiring the acceptance of a quorum at leaſt of the truſtees; and therefore void, the condition not having been purified. The defence was, That the deed of mortification was pure, veſting a right in the ſchoolmaſters of Weem; that the nomination of truſtees was only

* 19th February 1734, Corſan contra Maxwell of Barncleuch.

intended, like the nomination of an executor, to make the funds effectual; and that it was not intended to make the deed depend on their acceptance or non-acceptance. The deed was ſuſtained; the court being of opinion, that it would have been effectual though all the truſtees had declined acceptance *. I illuſtrate this by an oppoſite caſe, where it was underſtood that no right was created by the deed. Lady Preſtonfield made a ſettlement of conſiderable funds, to Sir John Cunninghame her eldeſt ſon, and Anne Cunninghame her eldeſt daughter, as truſtees for the ends and purpoſes following. Firſt, the yearly intereſt to be applied for the education and ſupport of ſuch of her deſcendents as ſhould happen to be in want or ſtand in need thereof, and that at the diſcretion of the truſtees. Second, failing deſcendents, the capital to return to her heirs. The truſtees declining to accept this whimſical ſettlement, a proceſs for voiding it was brought by the heir at law, in which were called all the exiſting deſcendents of the

* December 1752, Campbell contra Campbell of Monzie and Campbell of Achallader.

maker. As here it appeared to be the maker's will to leave all to the diſcretion of the truſtees, without the leaſt hint of giving any right to her deſcendents independent of the truſtees, the deed was declared void by their non-acceptance *.

Colonel Campbell being bound in his contract of marriage to ſecure the ſum of 40,000 merks, and the conqueſt during the marriage, to himſelf and ſpouſe in conjunct fee and liferent, and to the children to be procreated of the marriage in fee, did by a deathbed-deed ſettle all upon his eldeſt ſon, burdened with the ſum of 30,000 merks to his younger children, to take place if their mother could be prevailed on to give up her claim to the liferent of the conqueſt, and reſtrict herſelf to a leſs jointure: otherwiſe the proviſion to the younger children to be void; in which event, it was left upon the Duke of Argyle and Earl of Ilay to name ſuch proviſions to the children as they ſhould ſee convenient. The referees having declined to accept, the queſtion occurred between the heir and the younger children, What

* 22d January 1758, Sir Alexander Dick contra Mrs Ferguſſon and her children.

was

was the Colonel's intention, whether to make a proviſion for his younger children, referring the quantum only to the Duke and Earl; or to make the proviſion conditional, that it ſhould not be effectual unleſs the referees named a ſum. The court adopted the latter conſtruction; and refuſed to interpoſe in place of the referees to name a ſum *. The judgement probably would have been different, had no proviſion been made for the children in the contract of marriage.

A married woman gives a ſecurity on her eſtate to her huſband's creditors; but with what intention it is not ſaid. If a donation was intended, ſhe has no claim for relief againſt her huſband: but *in dubio*, a cautionary engagement will be preſumed; which affords her a claim †. A court of common law would hardly be brought to ſuſtain a claim of this nature, where there is no clauſe in the deed on which it can be founded.

* 22d December 1739, Campbell contra Campbells.

† Stair, 11th January 1679, Bowie contra Corbet; Fountainhall, 16th July 1696, Leiſhman contra Nicols; 29th November 1728, Trail of Sabae contra Moodie.

Where a man provides a ſum to his creditor, without declaring it to be in ſatisfaction, it will be ſuſtained as a ſeparate claim at common law. But as the granter probably intended that ſum to be in ſatisfaction, according to the maxim, *Quod debitor non præſumitur donare*, a court of equity, ſupplying a defect in words, decrees the ſum to be in ſatisfaction. Thus, a man being bound for L. 10 yearly to his daughter, gave her at her marriage a portion of L. 200. Decreed, That the annuity was included in the portion *. But where a man leaves a legacy to his creditor, this cannot be conſtructed as ſatisfaction; for in that caſe it would not be a legacy or donation.

Anthony Murray, *anno* 1738, made a ſettlement of his eſtate upon John and Thomas Belſcheſes, taking them bound, among other legacies, to pay L. 300 Sterling to their ſiſter Emilia, at her marriage. Anthony altered this ſettlement *anno* 1740, in favour of his heir at law; obliging him, however, to pay the legacies contained in the former ſettlement. In the year 1744, Anthony executed a bond to Emilia upon

* Tothill's Reports, 78.

the

the narrative of love and favour, binding himſelf to pay to her in liferent, and to her children *nati et naſcituri* in fee, at the firſt term after his deceaſe, the ſum of L. 1200 Sterling. The doubt was, whether both ſums were due to Emilia, or only the latter. It was admitted, that both ſums would be due at common law, which looks no farther than the words. But that this was not the intention of the granter, was urged from the following circumſtance, That in the bond for the L. 1200 there is no mention of the former legacy, nor of any legacy; which clearly ſhews, that Anthony had forgot the firſt legacy, and conſequently that he intended no more for Emilia but L. 1200 in whole. Which was accordingly decreed *.

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

BETWEEN this article and a following ſection, intitled *Imply'd will*, there is much affinity; but as the blending together

* 22d December 1752, Emilia Belſches and her huſband contra Sir Patrick Murray.

things

things really distinct, tends to confusion of ideas, I have brought under the present article, acts of will that are indeed expressed, but so imperfectly as to leave room for doubt whether the will does not go farther than is spoken out; leaving to the section *Imply'd will* articles essential to the deed or covenant, that must have made a part of the maker's will, and yet are totally omitted to be expressed.

In England, where estates are settled by will, it is the practice to make up any defect in the words, in order to support the will of the devisor. But here it is essential, that the will be clearly ascertained, in order that the court may run no hazard of overturning the will, instead of supporting it. An executor being named with the usual power of managing the whole money and effects of the deceased, the following clause subjoined "And I hereby "debar and seclude all others from any "right or interest in my said executry," was held by the court to import an universal legacy in favour of the executor *. A man having two nephews who were his

* 1st February 1739, John Beizly contra Gabriel Napier.

heirs

heirs at law, made a ſettlement in their favour, dividing his farms between them, intending probably an equal diviſion. A farm was left out by the omiſſion of the clerk, which the ſcriviner ſwore was intended for the plaintiff. The court refuſed to amend the miſtake, leaving the farm to deſcend as *ab inteſtato* *. For here it was not clear that the maker of the deed intended an equal diviſion.

There being an entail of the eſtate of Cromarty to heirs-male, the Earl, in his contract of marriage, *anno* 1724, became bound, in caſe of children of the marriage who ſhould ſucceed to and enjoy the eſtate, to infeft his lady in a liferent-locality of forty chalders victual; and in caſe of no children to ſucceed to and enjoy the eſtate, he became bound to make the ſaid locality fifty chalders. The following clauſe is added: "That if at the "diſſolution of the marriage there ſhould "be children ſucceeding to and enjoying "the eſtate, but who ſhould afterward de-"ceaſe during the life of his ſaid ſpouſe, "ſhe from that period ſhould be entitled "to fifty chalders, as if the ſaid children

* 1. Vernon 37.

"had

" had not exiſted." The Earl being forfeited in the year 1745, having iſſue both male and female, a claim was entered by his lady for the jointure of fifty chalders, to take effect after her huſband's death. Objected by his Majeſty's Advocate, That ſhe is intitled to forty chalders only, there being ſons of the marriage, who but for the forfeiture would have ſucceeded to the eſtate. Here evidently the words fall ſhort of intention; for as the claimant would have had a jointure of fifty chalders if the Earl's brother or nephew had ſucceeded to the eſtate, there can be no doubt that had the event of forfeiture been foreſeen, the Earl would have given her at leaſt fifty chalders. The claim accordingly was ſuſtained *."

Walter Riddel, in his contract of marriage 1694, became bound to ſettle his whole land-eſtate on the heir-male of the marriage. In the year 1727, purpoſing to fulfil that obligation, he diſponed to his eldeſt ſon the lands therein ſpecified, burdened with his debts, reſerving to himſelf an annuity of 2000 merks only.

* 26th January 1764, Counteſs of Cromarty contra the Crown.

The lands of Stewarton, which came under the ſaid obligation, were left out of the diſpoſition 1727. But that they were omitted by overſight, without intention, was made evident from the following circumſtances: firſt, That the title-deeds of that farm were delivered to the ſon along with the other title-deeds; ſecond, That he took poſſeſſion of the whole; third, That a ſubſequent deed by the father *anno* 1733, proceeds upon this narrative, "That the whole lands belonging to him "were conveyed to his ſon by the diſpoſi-"tion 1727." Many years after, the father, having diſcovered that Stewarton was not mentioned in the ſaid diſpoſition, ventured to convey that farm to his ſecond ſon, who was otherwiſe competently provided. It was not pretended, that Stewarton was actually conveyed to the eldeſt ſon, which could not be but in a formal diſpoſition; but as there was clear evidence of the father's obligation to convey it with the reſt of the eſtate, which obligation he was ſtill bound to fulfil, the court judged this a ſufficient foundation for voiding

the gratuitous diſpoſition to the ſecond ſon *.

In the caſes mentioned, writing is neceſſary as evidence only: it is of no conſequence what words be uſed in the nomination of an heir or of an executor, provided the will of the maker be aſcertained. But in ſeveral tranſactions, writing, beſide the evidence it affords, is an indiſpenſable ſolemnity. Land cannot be convey'd without a procuratory or a precept, which muſt be in a ſet form of words. A man may lend his money upon a verbal paction, but he cannot proceed directly to execution, unleſs he have a formal bond containing a clauſe of regiſtration, authoriſing execution. Neither can ſuch a bond be convey'd to a purchaſer, otherwiſe than by a formal aſſignment in writing. Here a new ſpeculation ariſes, What power a court of equity hath over a writing of this kind. In this writing, no leſs than in others, the words may happen erroneouſly to be more extenſive than the will of the granter; or they may happen to be more limited. Muſt the words in all caſes

* January 4. 1766, Riddel contra Riddel of Glenriddel.

be

be the ſovereign rule? Far from it. Though in certain tranſactions writ is an eſſential ſolemnity, it follows not that the words ſolely muſt be regarded, without relation to will; for to bind a man by words where he hath not interpoſed his will, is contrary to the moſt obvious principles of juſtice. Hence it neceſſarily follows, that a deed of this kind may, by a court of equity, be limited to a narrower effect than the words naturally import; and that this ought to be done, where from the context, from the intendment of the granter, or from other convincing circumſtances, it can be certainly gathered, that the words by miſtake go beyond the will. But though in ordinary caſes, ſuch as thoſe above mentioned, the defect of words may be ſupplied, and force given to will, ſuppoſing it clearly aſcertained; yet this cannot be done in a deed to which writ is eſſential. The reaſon is, that to make writ an eſſential ſolemnity, is in other words to declare, that action muſt not be ſuſtained except as far as authoriſed by writ. However clear therefore will may be, a court of equity hath not authority to ſuſtain action upon it, independent of

the words where theſe are made eſſential; for this, in effect, would be to overturn law, which is beyond the power of equity. A caſe that really happened, is a notable illuſtration of this doctrine. A bond of corroboration granted by the debtor with a cautioner, was of the following tenor. "And ſeeing the foreſaid "principal ſum of 1000 merks, and inte-"reſt ſince Martinmas 1742, are reſting "unpaid; and that *A* the creditor is "willing to ſuperſede payment till the "term after mentioned, upon *B* the debt-"or's granting the preſent corroborative "ſecurity with *C* his cautioner; therefore "*B* and *C* bind and oblige them, con-"junctly and ſeverally, &c. to content "and pay to *A* in liferent, and to her "children in fee, equally among them, "and failing any of them by deceaſe, to "the ſurvivors, their heirs or aſſignees, "in fee, and that at Whitſunday 1744, "with 200 merks of penalty, together "with the due and ordinary annualrent "of the ſaid principal ſum from the ſaid "term of Martinmas 1742," &c. Here the obligatory clauſe is imperfect, as it omits the principal ſum corroborated, namely,

ly, the 1000 merks, a pure overſight of the writer. In a ſuit upon this bond of corroboration againſt the heir of the cautioner, it was objected, That upon this bond no action could lie againſt him for payment of the principal ſum. It was obvious to the court, that the bond, though defective in the moſt eſſential part, afforded clear evidence of C's conſent to be bound as cautioner. But then it occurred, that a cautionary engagement is one of thoſe deeds that require writing in point of ſolemnity. A defective bond, like the preſent, whatever evidence it may afford, is ſtill leſs formal than if it wanted the requiſites of the act 1681. Action accordingly was denied; for action cannot be ſuſtained upon conſent alone where a formal deed is eſſential *. The following caſe concerning a regiſtrable bond, or, as termed in England, *a bond in judgement*, is another inſtance of refuſing to ſupply a defect in words. A bond for a ſum of money bore the following clauſe, *with intereſt and penalty*, without ſpecifying any ſum in name of penalty. The creditor moved

* 2d June 1749, Colt contra Angus.

the

the court to ſupply the omiſſion, by naming the fifth part of the principal ſum, being the conſtant rule as to conſenſual penalties. There could be no doubt of the granter's intention; and yet the court juſtly thought that they had not power to ſupply the defect *.

But though a defect in a writ that is eſſential in point of ſolemnity, cannot be ſupplied ſo as to give it the full effect that law gives to ſuch a deed, it will however be regarded by a court of equity in point of evidence. A bond of borrowed money, for example, null by the act 1681 becauſe the writer's name was neglected, may, in conjunction with other evidence, be produced in an action for payment; in order to prove delivery of the money as a loan, and conſequently to found a decree for repayment.

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

IT is a rule in daily practice, That

* Fountainhall, 6th January 1705, Leſlie contra Ogilvie.

however

however expreſs the words may be, a court of equity gives no force to a deed beyond the will of the granter. This rule is finely illuſtrated in the following caſe. John Campbell, provoſt of Edinburgh, did in July 1734 make a ſettlement of the whole effects that ſhould belong to him at the time of his death, to William his eldeſt ſon, with the burden of proviſions to his other children, Matthew, Daniel, and Margaret. Daniel being at ſea in a voyage from the Eaſt Indies, made his will, May 1739, in which he "gives and bequeaths "all his goods, money, and effects, to "John Campbell his father; and in caſe "of John's deceaſe, to his beloved ſiſter "Margaret." The teſtator died at ſea in the ſame month of May; and in June following John the father alſo died, without hearing of Daniel's death, or of the will made by him. William brought an action againſt his ſiſter Margaret and her huſband, concluding, That Daniel's effects, being veſted in the father, were conveyed to him the purſuer by the father's ſettlement; and that the ſubſtitution in favour of Margaret, contained in Daniel's will, was thereby altered. It was anſwered,

That

That nothing could be intended by the Provoſt, but to ſettle his proper eſtate upon his eldeſt ſon, without any intention to alter the ſubſtitution in his ſon Daniel's teſtament, of which he was ignorant: That words are not alone, without intention, ſufficient to found a claim; and therefore, that the preſent action ought not to be ſuſtained. "The court judged, "That the general diſpoſition 1734, granted by John Campbell to his ſon, the "purſuer, ſeveral years before Daniel's "will had a being, does not evacuate the "ſubſtitution in the ſaid will *." Charles Farquharſon writer, being in a ſickly condition and apprehenſive of death, did, *anno* 1721, ſettle all the effects real and perſonal that ſhould belong to him at his death, upon his eldeſt brother Patrick Farquharſon of Inverey, and his heirs; reſerving a power to alter, and diſpenſing with the delivery. Charles was at that time a bachelor, and died ſo. Being reſtored to health, he not only ſurvived his brother Patrick, but alſo Patrick's two ſons, who ſucceſſively inherited the eſtate

* 13th June 1740, Campbell contra his Siſter.

of Inverey. Patrick left daughters; but as the inveſtitures were to heirs-male, Charles was infeft as heir-male, died in poſſeſſion, and left the eſtate open to the next heir-male. Againſt him a proceſs is raiſed by the daughters of Patrick, claiming the eſtate of Inverey upon the ſettlement 1721 as belonging to Charles at the time of his death, and conſequently now to them as heirs of line to Patrick. The defence was, That here the words of the ſettlement are more extenſive than the will of the granter, which was only to augment the family-eſtate by ſettling his own funds on Patrick the heir of the family; that this purpoſe was fulfilled by the coalition of both eſtates in the defendant, the preſent head of the family; whereas the claim made by the purſuers, the purpoſe of which is to take from the repreſentative of the family the family-eſtate itſelf, is not only deſtitute of any foundation in the maker's will, but is in direct oppoſition to it. The court judged, That the purſuers had no action on the deed 1721 to oblige the defendant to denude of the e-

ſtate of Inverey *. A contract of marriage providing the eſtate to the heirs-male of the marriage, whom failing, to the huſband's other heirs-male, contained the following clauſe, "And ſeeing the earldom "of Perth is tailzied to heirs-male, ſo that "if there be daughters of the marriage "they will be excluded from the ſucceſ-"ſion; therefore the ſaid James Lord "Drummond and his heirs become bound "to pay to the ſaid daughters, at their age "of eighteen or marriage, the ſums fol-"lowing; to an only daughter 40,000 "merks," &c. The eſtate being forfeited for treaſon committed by the eldeſt ſon of the marriage, the only daughter of the marriage claimed the 40,000 merks as being excluded from the ſucceſſion by the exiſtence of an heir-male. Objected by the King's Advocate, That the proviſion not being to younger children in general, but to daughters only, upon conſideration that the eſtate was entailed to heirs-male, was obviouſly intended to be conditional, and only to take effect failing ſons of the mar-

* 10th February 1756, Heirs of line of Patrick Farquharſon contra his Heir-male.

riage;

riage; and that here inadvertently the words are more extenſive than the will. It carried however, by a narrow plurality, to ſuſtain the claim *. But the judgement was reverſed in the Houſe of Lords.

The ſame rule obtains with reſpect to general clauſes in diſcharges, ſubmiſſions, aſſignments, and ſuch like, which are limited by equity where the words are more extenſive than the will. Thus, a general ſubmiſſion of all matters debateable, is not underſtood to comprehend land or other heritable right †. Nor was a general clauſe in a ſubmiſſion extended to matters of greater importance than thoſe expreſſed ‡. *A* had a judgement of L. 6000 againſt *B*. *B* gave *A* a legacy of L. 5, and died. *A*, on receipt of this L. 5, gave the executor of *B* a releaſe in the following words. "I acknowledge to have received "of *C* L. 5, left me as a legacy by *B*, and "do releaſe to him all demands which I

* 10th July 1752, Lady Mary Drummond contra the King's Advocate.

† Hope, (Arbiter), 4th March 1612, Paterſon contra Forret.

‡ Haddington, 4th March 1607, Inchaffray contra Oliphant.

" againſt him, as executor to *B*, can have " for any matter whatever." It was adjudged, That the generality of the words *all demands* ſhould be reſtrained by the particular occaſion mentioned in the former part, namely, the receipt of the L. 5, and ſhould not be a diſcharge of the judgement *.

A variety of irritancies contrived to ſecure an entail againſt acts and deeds of the proprietor, furniſh proper examples of this doctrine. Where ſuch irritancies are ſo expreſſed as to declare the proprietor's right voidable only, not *ipſo facto* void, an act of contravention may be purged before challenge, and even at any time before ſentence in a proceſs of declarator. But what ſhall be ſaid upon clauſes declaring the proprietor to fall from his right *ipſo facto* upon the firſt act of contravention? Suppoſing the entailer by this clauſe to have only intended to keep his heirs of entail to their duty, which *in dubio* will always be preſumed, his purpoſe is fulfilled if the eſtate be relieved from the debts and deeds of the tenant in tail.

* Abridgement Caſes in equity, chap. 25. ſect. C. note at the end.

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The words indeed are clear; but words unſupported by will have no effect in law. The act 1685 concerning tailzies declares, "That if the proviſions and irritant clauſes are not repeated in the rights and conveyances by which the heirs of tailzie bruik or enjoy the eſtate, the omiſſion ſhall import a contravention of the irritant and reſolutive clauſes againſt the perſon and his heirs who ſhall omit to inſert the ſame, whereby the eſtate ſhall *ipſo facto* fall, accreſce, and be devolved upon the next heir of tailzie; but ſhall not militate againſt creditors," &c. Here the words go inadvertently beyond will. It cannot be the will of any entailer, to forfeit his heir for an omiſſion that the heir ſupplies *rebus integris*. Nor could it be the intendment of the legiſlature to be more ſevere than entailers themſelves commonly are. This irritancy, according to order, ought to come in afterward in treating of equity with reſpect to ſtatutes; but by the intimacy of its connection with the irritancies mentioned, it appears in a better light here.

The foregoing irritancies relate to grants and ſingle deeds. The following is an example

ample of a conventional irritancy, an irritancy *ob non ſolutum canonem* in a leaſe or feu-right. Such a clauſe expreſſed ſo as to make the right voidable only upon failure of payment, is juſt and equal; becauſe, by a declarator of irritancy, it ſecures to the ſuperior or landlord payment of what is due to him, and at the ſame time affords to the vaſſal or tenant an opportunity to purge the irritancy by payment. And even ſuppoſing the clauſe ſo expreſſed as to make failure of payment an *ipſo facto* forfeiture, it will be held by a court of equity, that the words go inadvertently beyond the will; and a declarator of irritancy will ſtill be neceſſary, in order to afford an opportunity for purging the irritancy.

Conditional bonds and grants afford proper examples of the ſame kind. Theſe are of two ſorts. One is where the condition is ultimate; as for example, a bond for money granted to a young woman upon condition of her being married to a man named, or a bond for money to a young man upon condition of his entering into holy orders. The other is where the condition is a means to a certain end;

as

as for example, a bond for a ſum of money to a young woman upon condition of her marrying with conſent of certain friends named, the intendment of which is to prevent an unſuitable match. Conditions of the firſt ſort are taken ſtrictly, and the ſum is not due unleſs the condition be purified. This is requiſite at common law; and no leſs ſo in equity, becauſe juſtice requires that a man's will be obey'd. To judge aright of the other ſort, we ought to lay the chief weight upon the ultimate purpoſe of the granter; which, in the caſe laſt mentioned, is to confine the young woman to a ſuitable match. If ſhe therefore marry ſuitably, though without conſulting the friends named, I pronounce that the bond ought to be effectual in equity, though not at common law. The reaſon is given above, that the ultimate will or purpoſe ought to prevail in oppoſition to the words. I am aware, that in Scotland we are taught a different leſſon. In bonds of the ſort under conſideration, a diſtinction is made between a ſuſpenſive condition, and one that is reſolutive. If the bond to the young woman contain a reſolutive condition only, namely, *if ſhe marry*

marry without consent she shall forfeit the bond, it is admitted, that the forfeiture will not take effect unless she marry unsuitably. But it is held by every one, that if the condition be suspensive, as where a bond for money is granted to a young woman, *on condition that if she marry it be with consent of certain friends named*, it must be performed in the precise terms of the clause; because, say they, the will of the granter must be the rule; and no court has power to vary a conditional grant, or to transform it into one that is pure and simple. This argument is conclusive where a condition is ultimate, whether suspensive or resolutive; but not where the condition is a means to an end. The granter's will, it is true, ought to be obey'd; but whether his will with regard to the means, or his will with regard to the end? The means are of no significancy but as productive of the end; and if the end be accomplished without them, they can have no weight in equity or in common sense. Let us try the force of this reasoning by bringing it down to common apprehension. Why is a resolutive condition disregarded, where the obligee

ligee marries ſuitably? For what reaſon but that it is conſidered as a mean to an end; and that if the end be accompliſhed, the granter's purpoſe is fulfilled? Is not this reaſoning applicable equally to a ſuſpenſive condition? No man of plain underſtanding, unacquainted with law, will diſcover any difference. And accordingly, in the later practice of the Engliſh court of chancery, this difference ſeems to be diſregarded. A portion of L. 8000 is given to a woman provided ſhe marry with conſent of *A*; and if ſhe marry without his conſent, ſhe ſhall have but L. 100 yearly. She was relieved, though ſhe married without conſent; for the proviſo is *in terrorem* only *.

One having three daughters, deviſes lands to his eldeſt, upon condition that within ſix months after his death ſhe pay certain ſums to her two ſiſters; and if ſhe fail, he deviſes the land to his ſecond daughter on the like condition. The court may enlarge the time for payment, though the premiſes are deviſed over. And in all caſes where compenſation can be made for

* Abridg. Caſes in equity, chap 17. ſect. C. § 1.

the delay, the court may diſpenſe with the time, though even in the caſe of a condition precedent *. This practical rule is evidently derived from the reaſoning above ſtated.

Take another example that comes under the ſame rule of equity. A claim is tranſacted, and a leſs ſum accepted, upon condition that the ſame be paid at a day certain, otherwiſe the tranſaction to be void. It is the general opinion, that where the clauſe is reſolutive, equity will relieve againſt it after the ſtipulated term is elapſed, provided the tranſacted ſum be paid before proceſs be raiſed; but that this will not hold where the clauſe is ſuſpenſive. In my apprehenſion, there is an equitable ground for relief in both equally. The form may be different, but the intention is the ſame in both, namely, to compel payment of the tranſacted ſum; and therefore if payment be offered at any time before a declarator of irritancy, with damages for the delay, the conditional irritancy has had the full effect that was intended. Equity therefore requires a decla-

* Abridg. Caſes in equity, chap. 17. ſect. B. § 5.

rator

rator of irritancy, whether the clauſe be ſuſpenſive or reſolutive; and the defendant ought to be admitted to purge the failure by offering payment of the tranſacted ſum. The caſe, I acknowledge, is different where the tranſacted ſum is to be paid in parcels, and at different periods; as for example, where an annuity is tranſacted for a leſs yearly ſum. A court of equity will ſcarce interpoſe in this caſe, but leave the irritancy to take place *ipſo facto*, by the rules of common law; for if the irritant clauſe be not in this caſe permitted to operate *ipſo facto*, it will be altogether ineffectual, and be no compulſion to make payment. If a declarator be neceſſary, the defendant muſt be admitted to purge before ſentence; and if it be at all neceſſary, it muſt be renewed every term where there is a failure of payment. This would be unjuſt, becauſe it reduces the creditor to the ſame difficulty of recovering the tranſacted ſum, that he had with reſpect to his original ſum; which, in effect, is to forfeit the creditor for his moderation, inſtead of forfeiting the debtor for his ingratitude.

The examples above given coincide in the following particular, that the acts of

contravention can be purged, ſo as to reſtore matters to the ſame ſtate as if there had been no contravention. But there are acts incapable of being purged, ſuch as the cutting down trees by a tenant. Now, ſuppoſe a leaſe be granted with a clauſe of forfeiture in caſe of felling trees, will equity relieve againſt this forfeiture in any caſe? If the act of contravention was done knowingly, and conſequently criminally, there can be no equity in giving relief; but if it was done ignorantly and innocently, a court of equity ought to interpoſe againſt the forfeiture, upon making up full damages to the landlord. Take the following inſtance. The plaintiff, tenant for life of a copyhold-eſtate, felled trees, which, at a court-baron, was found a waſte, and conſequently a forfeiture. The bill was to be relieved againſt the forfeiture, offering ſatisfaction if it appeared to be a waſte. The court decreed an iſſue, to try whether the primary intention in felling the trees was to do waſte; declaring, That in caſe of a wilful forfeiture it would not relieve *.

* 1. Chancery caſes 95.

A power granted to diſtribute a ſum or a ſubject among children, or others, is limited in equity to be exerciſed *ſecundum arbitrium boni viri*, unleſs an abſolute power be clearly expreſſed. A man deviſed to his wife his perſonal eſtate, upon truſt and confidence, " That ſhe ſhould not diſpoſe " thereof but for the benefit of her chil- " dren." She by will gave to one but five ſhillings, and all the reſt to another. The court ſet aſide ſo unequal a diſtribution *. A man by will directed that his land ſhould deſcend to his daughters, " in ſuch " ſhares as his wife by a deed in writing " ſhould appoint." The wife makes an unequal diſtribution. The court at firſt declared, the circumſtances muſt be very ſtrong, as bribery, for inſtance, or corruption, that could take from the wife a power given her by the will: but afterward declared the caſe was proper for equity, and that the plaintiff might be relieved. Here the plaintiff was allowed but a ſmall proportion; and for any cauſeleſs diſpleaſure ſhe might have been put off with a ſingle barren acre; that the court in the latter caſe would have a juriſdiction; and

* 1. Vernon 66.

therefore

therefore in the caſe that really happened *.

SECT. II.

Implied Will.

IN framing a deed it belongs to the granter to declare his will and purpoſe: the proper clauſes for expreſſing theſe are left to the writer. But ſeldom it happens that every particular is expreſſed: nor is it neceſſary; for where a man declares his will with reſpect to a certain event, he undoubtedly wills every neceſſary mean; which is only ſaying, that he is not a changeling. I grant, for example, to a neighbour, liberty of my coal-pit for the uſe of his family. It follows neceſſarily, that he have a coal-road through my land, if he have not otherwiſe acceſs to the pit. The ſame holds in covenants. A clauſe in a leaſe entitling the leſſee to take poſſeſſion at a time ſpecified, implies ne-

* 1. Vernon 355. 414.

ceſſarily

ceſſarily authority from the landlord to remove the tenant in poſſeſſion.

Tacit will, where made clear from circumſtances, ought to have the ſame authority with expreſſed will: the only uſe of words is to ſignify will or intention; and from the very nature of the thing, will or intention cannot have greater authority when expreſſed in words, than when aſcertained with equal clearneſs by any other ſigns or means. A court of common law rarely ventures to dive into tacit will. But it is one of the valuable powers of a court of equity, to imply will where it is not expreſſed; without which deeds and covenants would often fall ſhort of their purpoſed end. But a judge ought to be extremely cautious in the exerciſe of this power, to avoid counteracting will, inſtead of ſupporting it; an error that ſeems to have been committed in the following caſe. The ſum of L. 120 was given with an apprentice; and as the maſter was ſick when the articles were drawn, it was provided, that if he died within a year L. 60 ſhould be returned. He having died within three weeks, a bill was brought in chancery to have a greater ſum returned. And not-

notwithſtanding the expreſs proviſion, it was decreed that a hundred guineas ſhould be returned *.

As tacit will is to be gathered from various circumſtances, particularly from the nature and intendment of the deed or covenant, general rules are not to be expected. All I can venture on, is to give examples of various kinds, which may enure the ſtudent of law to judge, in what caſes will ought to be imply'd, in what not. For the ſake of perſpicuity, theſe examples ſhall be put in different claſſes. And firſt, of *acceſſories*. Where a ſubject is conveyed, every one of its acceſſories are underſtood to be conveyed with it, unleſs the contrary be expreſſed. An aſſignment, for example, of a bond of borrowed money, implies a conveyance of what executions have paſſed upon it: theſe may be of uſe to the aſſignee; but can avail nothing to the cedent after he is denuded. Thus, an aſſignment to a bond was underſtood to comprehend an inhibition that followed upon it; though there was no general clauſe that could compre-

* Vernon 460.

hend the inhibition *. In an infeftment of annualrent a perſonal obligation for payment is now common. In the conveyance of an infeftment containing that obligation, no mention was made of it. It was however imply'd by the court of ſeſſion; as there appeared no intention to relieve the debtor †. Tenants, taken bound by leaſe to carry their cornrent to the place of ſale, were decerned to perform that ſervice to the proprietor's widow, infeft in a liferent-locality ‡. Such implication is not made with reſpect to penal acceſſories: theſe will not go to the aſſignee, unleſs expreſsly convey'd. The ſuperior of a feu-right diſpones the ſame for a valuable conſideration; but antecedently the feuer had incurred an irritancy upon failing to pay his feu-duty. Is the purchaſer entitled to reduce the feu upon that head? The irritancy is indeed an acceſſory to the ſuperiority; but looſely con-

* Harcarſe, (Aſſignation), January 1682, Williamſon contra Threapland.

† Dury, 23d November 1627, Dunbar contra Williamſon.

‡ Fountainhall, 29th July 1680, Counteſs-dowager of Errol contra the Earl.

nected and eaſily ſeparated. The puniſhment is what few ſuperiors are ſo hard-hearted as to inflict; and a ſuperior who declines the taking advantage of it for himſelf, will not readily beſtow the power on another. If intended therefore to be convey'd, it muſt be expreſſed; for it will not be imply'd by a court of equity.

A diſcharge of the principal debt includes acceſſories by imply'd will. An agent, for example, employ'd to carry on a proceſs, ſtates an account without any article for pains. He receives payment of the ſum in the account, and gives a diſcharge. The article for pains is underſtood to be alſo diſcharged. Imply'd will is extended ſtill farther. The extract of a decree implies the paſſing from any claim for coſts of ſuit; becauſe no rational perſon who purpoſes to claim ſuch coſts will reſerve them for a new proceſs, when by delaying extract it is ſo much more eaſy to claim them in the ſame proceſs.

So much for acceſſories. Next, of *conſequents*. A commiſſion being given to execute any work, every power neceſſary to carry it on is implied. Example: A man commiſſioned to navigate a ſhip,

termed

termed the *maſter*, can bind his owners to pay what money he has borrowed in a foreign country for repairing the ſhip.

I ſhall add but one claſs more, which is, where in a ſettlement upon one perſon a benefit is underſtood to be conferred on another. Thus, where a man deviſes land to his heir after the death of his wife, this by neceſſary implication is a good device to the wife for life: by the words of the will, the heir is not to have it during her life; and none elſe can have it, as the executors cannot intermeddle *. But if a man deviſes land to a ſtranger after the death of his wife, this does not neceſſarily infer, that the wife ſhould have the eſtate for her life: it is but declaring at what time the ſtranger's eſtate ſhall commence; and in the mean time the heir ſhall have the land † (*a*).

I cloſe this head with the following reflection, That the power of implying will

* New abridgement of the law, vol. 2. p. 66.

† Ibid.

(*a*) This is a proper example of a maxim in the Roman law, *Poſitus in conditione non cenſetur poſitus in inſtitutione.*

can only be of uſe where tacit will is authoritative: it can avail nothing where writing, and conſequently words, are eſſential. To make a valid entail, for example, words are eſſential: tacit will avails nothing.

SECT. III.

Whether an omiſſion in a deed or covenant can be ſupplied.

With regard to the former ſection, a court has no occaſion to extend its equitable power farther than to dive into tacit will and to bring it into day-light. With reſpect to the preſent ſection, the court is called on to extend its power a great way farther, in order to do juſtice. In framing a deed or covenant, every neceſſary circumſtance is not always in view: articles are ſometimes omitted eſſential to the deed or covenant; which therefore ought to be ſupplied, in order to do juſtice to the parties concerned. It is a bold ſtep in a court to ſupply will in any particular,

lar, which ſo far is making a will for a man who omitted to make one for himſelf; but where will is declared with reſpect to capital articles, ſo as to create a right to one or to both of the parties, it is the duty of a court of equity to ſupply omiſſions, in order to make the rights created effectual: a right is created by what is actually agreed on; the court is bound to give force to that right, according to the maxim, That right ought never to be left without remedy.

This extraordinary power ought never to be exerciſed but where it clearly follows from the nature of the writing, from the intendment of parties, or from other pregnant circumſtances, that there really is an omiſſion of ſome clauſe that would have been expreſſed had it occurred to the parties. If a court ſhould venture to interpoſe without being certain that the clauſe was not purpoſely left out, they would be in hazard of making a will for a man, and overturning that which he himſelf made. But where they are ſatisfied that there is really an omiſſion, their ſupplying the omiſſion is not making a will for a man, but,

but, on the contrary, is completing his will.

This doctrine will be illuſtrated by the following examples. In a wadſet the naming a conſignator is omitted; which could not be done purpoſely, a conſignator being an eſſential perſon in following out an order of redemption. From the nature of the contract, the granter is intitled to redeem; and to make his right effectual, the court will name a conſignator. Upon a wadſet granted to be held of the ſuperior, an infeftment paſſed; but it was omitted to provide, that the wadſetter, on redemption, ſhould ſurrender the ſubject to the ſuperior for new infeftment to the reverſer. The court of ſeſſion, conſidering that this is a proper clauſe, and that the wadſetter could not have objected to it had it occurred in framing the wadſet, decreed him to grant a procuratory of reſignation *.

A man lent a ſum on bond, payable to to himſelf and to his children *nominatim* in fee, with the following proviſion,

* Dury, 9th February 1628, Simſon contra Boſwell; Gosford, 25th June 1625, Duke Lauderdale contra Lord and Lady Yeſter.

" That

" That in caſe of the deceaſe of any of " the ſaid children, the ſhare of that child " ſhall be equally divided among the ſur- " vivors." One of the children, a ſon, having predeceaſed his father, leaving iſſue, it was queſtioned, whether his ſhare of the bond deſcended to his iſſue, or accreſced to the ſurvivors. Here was evidently an omiſſion; as the granter could not intend to exheredate the iſſue of any of his children. And accordingly the iſſue of the ſon were preferred *. Papinian, the greateſt of the Roman lawyers, delivers the ſame opinion in a ſimilar caſe: " Cum avus filium ac nepotem ex altero " filio heredes inſtituiſſet, a nepote petiit, " ut *ſi intra annum trigeſimum moriretur,* " *hereditatem patruo ſuo reſtitueret:* nepos, " liberis relictis, intra ætatem ſupraſcrip- " tam vita deceſſit: fideicommiſſi condi- " tionem, conjectura pietatis, reſpondi de- " feciſſe, quod minus ſcriptum quam di- " ctum fuerat inveniretur †." Our author ſuppoſes, that the teſtator had provided for the iſſue of his grandchildren, but

* 21ſt November 1738, Magiſtrates of Montroſe contra Robertſon.

† l. 102. De cond. demonſt. et cauſis.

that

that the proviſion had been caſually omitted by the writer. This is cutting the Gordian knot, inſtead of untying it; for what if the writer had not received any ſuch inſtruction? There is no occaſion for Papinian's conjecture: it was obviouſly an omiſſion, which a court of equity ought to ſupply, in order to do juſtice, and to fulfil the intendment of the creditor.

A man believing his wife to be pregnant, left a legacy to a friend in the following terms, "That if a male child was "brought forth, the ſum ſhould be 4000 "merks; if a female, 5000 merks." The wife produced no child. As a legacy was intended even in caſe of a child, it cannot be thought that the friend ſhould have no legacy if no children were born. The clauſe therefore is evidently imperfect, a member being wanting, that of the teſtator's dying without children. The want of that member was a pure omiſſion, which the teſtator would have ſupplied had the event occurred to him; and which a court of equity may ſupply, in order fully to accompliſh the intendment of thoſe who are

no longer in being to ſpeak for themſelves. The court of ſeſſion accordingly found the higheſt ſum due *ex præſumpta voluntate teſtatoris* *. They could go no further without exerting an act of power altogether arbitrary; as they had no *data* for determining what greater length the teſtator himſelf would have gone. Here it is proper to be obſerved, that in the former caſes mentioned, a right was created, to make which effectual a court of equity ought to lend their aid. In the preſent caſe, there was no right created; and a court of equity had no call to interpoſe, but in order to give the moſt liberal effect to deeds made by perſons deceaſed. The preſent caſe then is much more delicate than any formerly mentioned.

But now, what if the wife had brought forth twins? Though the teſtator gave a legacy in the event of a ſingle child, it follows not neceſſarily, that he would have given a legacy had he foreſeen the birth of two children. Therefore, as it is not certain that in the caſe here figured there is

* Dirleton, 18th July 1666, Wedderburn contra Scrimzeor.

any omiſſion, a court cannot interpoſe, without hazarding the making a will for a man that he himſelf would not have made. I venture this opinion even againſt the authority of Julianus, the moſt acute of all the writers on the Roman law. 'Si 'ita ſcriptum ſit, "Si filius mihi natus "fuerit, ex beſſe heres eſto, ex reliqua "parte uxor mea heres eſto; ſi vero filia "mihi nata fuerit, ex triente heres eſto, "ex reliqua parte uxor heres eſto:" et fi- 'lius et filia nati eſſent: dicendum eſt, aſ- 'ſem diſtribuendum eſſe in ſeptem partes, 'ut ex his filius quatuor, uxor duas, filia 'unam partem habeat: ita enim ſecun- 'dum voluntatem teſtantis, filius altero 'tanto amplius habebit quam uxor, item 'uxor altero tanto amplius quam filia. 'Licet enim ſubtili juris regulæ conveniebat, ruptum fieri teſtamentum, attamen, 'quum ex utroque nato teſtator voluerit 'uxorem aliquid habere, ideo ad hujuſmodi ſententiam humanitate ſuggerente 'decurſum eſt; quod etiam Juventio Celſo 'apertiſſime placuit *.'

* l. 13. pr. De liberis et poſthumis heredibus inſtituendis.

In

In a contract of marriage there was the following clauſe: "And in caſe there ſhall "happen to be only one daughter, he ob- "liges him to pay the ſum of 18,000 "merks; if there be two daughters, the "ſum of 20,000 merks, 11,000 to the eld- "eſt, and 9000 to the other; and if there "be three daughters, the ſum of 30,000 "merks, 12,000 to the eldeſt, 10,000 to "the ſecond, and 8000 to the youngeſt." There the contract ſtops, becauſe probably a greater number was not expected. The exiſtence of a fourth daughter brought on the queſtion, Whether ſhe could have any ſhare of the 30,000 merks, or be left to inſiſt for her legal proviſion *ab inteſtato*. As it appeared to be the father's intention to provide for all the children of the marriage, and as he certainly would have provided for the fourth daughter, it belonged to a court of equity to ſupply the omiſſion, by naming to her ſuch a ſum as he himſelf would have done. The court decreed 4500 merks to the fourth daughter, as her proportion of the 30,000 merks; and reſtricted the eldeſt daughter to 10,500, the ſecond to 8500, and the

third to 6500 *. The following caſe ſtands on the ſame foundation. 'Clemens Patro-'nus teſtamento caverat, "Ut ſi ſibi filius "natus fuiſſet, heres eſſet: ſi duo filii, ex "æquis partibus heredes eſſent: ſi duæ "filiæ, ſimiliter: ſi filius et filia, filio duas "partes, filiæ tertiam dederat." Duobus 'filiis et filia natis, quærebatur quemad-'modem in propoſita ſpecie partes facie-'mus: cum filii debeant pares, vel etiam 'ſinguli duplo plus quam ſoror accipere. 'Quinque igitur partes fieri oportet, ut 'ex his binas maſculi, unam fœmina ac-'cipiat †.'

No article concerning law ought to be more reliſhed, than the authority a court of equity is endued with to make effectual deeds and covenants, not only according to the actual will of the parties, but according to their honeſt wiſhes. With reſpect to family-ſettlements in particular, a man in his laſt moments has entire ſatisfaction in reflecting, that his ſettlement will be made effectual after his death, candidly and fairly, as if he himſelf were at hand to explain his views. So great ſtreſs is laid up-

* 18th July 1729, Anderſon contra Anderſon.

† l. 81. pr. De heredibus inſtituendis.

on

on will as the fundamental part of every engagement, that where it is clear, defects in form are little regarded by a court of equity. Take the following inſtances. A man ſettles his eſtate on his eldeſt ſon in tail, with a power, by deed or will under ſeal, to charge the land with any ſum not exceeding L. 500. A deed is prepared and ingroſſed, by which he appoints the L. 500 to his younger children; but dies without its being ſigned and ſealed. Yet this in equity ſhall amount to a good execution of his power, the ſubſtance being performed *. Here there could be no doubt about the man's will creating a right to his younger children. The power he reſerved of charging the eſtate by deed or will under ſeal, was not intended to make their right conditional, but to give them the higheſt ſecurity that is known in law. This ſecurity was indeed diſappointed by the man's ſudden death; but he had ſufficiently declared his purpoſe to give them L. 500, which afforded them a good claim in equity for that ſum. Provoſt Aberdeen wiſhing to have a country-ſeat

* Abridg. Caſes in equity, ch. 44. ſect. B. § 14.

near

near the town of Aberdeen, purchaſed the lands of Crabſtone from Farquharſon of Invercauld for L. 3900 Sterling; and miſſive letters were exchanged, agreeing that the lands ſhould be diſponed to the Provoſt in liferent, and in fee to any of his children he ſhould name. The title-deeds were delivered to a writer, who, by the Provoſt's order, made out a ſcroll of the diſpoſition, to the Provoſt in liferent, and to Alexander the only ſon of his ſecond marriage in fee. A diſpoſition was extended 12th June 1756, and diſpatched to Invercauld, incloſed in the following letter, ſubſcribed by the Provoſt: "This will "come along with the amended diſpoſi- "tion; and upon its being delivered to "me duly ſigned, I am to put the bond "for the price in the hands of your doer." Invercauld not being at home, the packet was delivered to his lady. As ſoon as he came home, which was on the 21ſt of the ſaid month, he ſubſcribed the diſpoſition, and ſent it with a truſty hand to be delivered to the Provoſt at Aberdeen. But he, having been taken ſuddenly ill, died on the 24th of June, a few hours before the expreſs arrived; whereby it happened, that the

the diſpoſition was not delivered to him, nor the bond for the price ſubſcribed by him. This unforeſeen accident gave riſe to a queſtion between Robert, the Provoſt's eldeſt ſon and heir, and the ſaid Alexander, ſon of the ſecond marriage. For Robert it was pleaded, That the diſpoſition remained an undelivered evident under the power of the granter; nor could it bind the Provoſt, ſince it was not accepted by him; and laying aſide that incompleted deed, nothing remained binding but the mutual miſſives; the benefit of which muſt deſcend to the Provoſt's heir at law, ſeeing none of his children is named in theſe miſſives. It was anſwered for Alexander, That his father's will being clearly for him, it is the duty of the court of ſeſſion to make it effectual. And he accordingly was preferred *. A ſettlement being made on a young woman, proviſo that ſhe marry with conſent of certain perſons named, the conſent to be declared in writing; a conſent by parole was deemed ſufficient †. For it was not underſtood to be the will of

* 13th December 1757, Alexander Aberdeen contra Robert Aberdeen.

† 1. Modern Reports, 310.

the

the maker to forfeit the young woman merely for the want of form, when the ſubſtance was preſerved. Land cannot be charged but by a formal deed; for ſuch is the common law. But a court of equity may ſupply a defective deed, conſidered as a ſatisfactory evidence of will, by ſubjecting the heir perſonally. In one caſe, the court of ſeſſion made a wide ſtep. In a diſpoſition the granter reſerved power to burden the land with a ſum to particular perſons named. The diſponee was made liable for the ſum, though the diſponer had made no ſtep toward exerciſing the power *. This indeed was a favourable caſe, the power reſerved being to provide younger children. And yet, were this extenſion of equity to be juſtified, I cannot diſcover any bounds to equitable powers. What better evidence can be required of the diſponer's reſolution not to exert his reſerved power, than his forbearing to exert it?

I muſt obſerve upon this ſection in general, that to aſcertain what was a man's will, to make it effectual, and to ſupply omiſſions, afford a ſpacious field in equity

* Gosford, 15th February 1673, Graham contra Morphey.

for ſupporting deeds and covenants, upon which the proſperity of ſociety and many of its comforts greatly depend. But as far as I diſcover, equity, which has a free courſe in ſupporting will, never is exerted againſt it. It ventures not to alter a man's will, far leſs to void it: it cannot even ſupply will where totally wanting. Where a deed or covenant is fairly made without any reſerved power to alter, what before was voluntary, becomes now obligatory; and it muſt have its courſe, whatever be the conſequence. However clear it may be, that it would not have been made had the event been foreſeen, yet no court of law is impowered to void the writing or to alter it; for this would be to make a ſettlement for a man who himſelf made none. Power ſo extenſive would be dangerous in the hands of even the moſt upright judges. I dare not except a Britiſh parliament.

Were a court of law endued with a power to alter will, or to ſupply its total abſence, the following caſes would be a ſtrong temptation to exerciſe the power. A gratuitous bond by a minor being voided at the inſtance of his heir, becauſe a

minor cannot bind himſelf without a valuable conſideration; the obligee inſiſted for an equivalent out of the moveables left by the minor, on the following ground, That he could have left the ſame ſum to his friend by way of legacy. It was admitted, that if the heir's challenge had been foreſeen, the minor probably would have given a legacy inſtead of a bond: but that in fact the minor gave no legacy; and no court can make a teſtament for a man, who himſelf made none: which accordingly was found *. The bond here was complete in all its parts, and no article omitted that a court of equity could ſupply. There was indeed a defect of foreſight with reſpect to what might happen; but a court of equity does not aſſume a power to ſupply defects of that kind. The like was found with reſpect to a gratuitous diſpoſition of an heritable ſubject, which was voided as being granted on deathbed. The diſponee claimed the value from the executor, preſuming that the deceaſed, had the event been foreſeen, would have given an equivalent out of his moveables. But as in fact the deceaſed ſignified no will nor

* Fountainhall, 15th December 1698, Straiton contra Wight.

intention

intention to burden his executor, the judges refuſed to make him liable *. The Roman law concerning a *legatum rei alienæ* adheres to the ſame principle. Where a teſtator legates a ſubject as his property, which after his death is diſcovered to be the property of another, the heir is not bound to give an equivalent, becauſe *deficit voluntas teſtatoris*. But if the teſtator knew that the ſubject was not his, it muſt have been his will, if he did not mean to be jocular, that it ſhould be purchaſed by his heir for the legatee; and this implied will was accordingly made effectual by the Pretor as a judge of equity.

SECT. IV.

A deed or covenant that tends not to bring about the end for which it was made.

WHere a man exerts an external act, however inconſiderately, he cannot be relieved, *quia factum infectum fieri ne-*

* Dirleton, 12th November, Stair, 26th November, 1674, Paton contra Stirling; Fountainhall, 22d November 1698, Cumming contra Cumming.

quit. But a man making a deed or covenant may be relieved by a ſentence of the judge; and will be relieved if a good cauſe be ſhown. With reſpect particularly to the ſubject of the preſent ſection, a deed or covenant, as laid down in the beginning of this chapter, is a mean employed to bring about a certain end or event: whence it follows, that it ought to be voided where it fails to be a mean, or, in other words, where it tends not to bring about the end or event deſired. To think otherwiſe, is to convert a mean into an end, or to adhere to the mean without regard to the end. Common law, regarding the words only, may give force to ſuch a deed or covenant; but equity pierces deeper into the nature of things. Adverting to the fallibility of our nature, it will not ſuffer one to be bound by ſuch an engagement; and conſiders, that when he is freed from it, it is only *lucrum ceſſans* to the party who inſiſts on its performance, not *damnum datum*.

To prevent miſtakes in the application of the foregoing doctrine, it is neceſſary to be obſerved, that the end here underſtood is not that which may be ſecretly in view

view of the one or the other party, but that which is ſpoken out, or underſtood by both; for a thought retained within the mind, cannot have the effect to qualify an obligation more than to create it. The overlooking this diſtinction has led Puffendorff into a groſs error: who puts the caſe *, That a man, upon a falſe report of all his horſes being deſtroy'd, makes a contract for a new ſet; and his opinion is, that in equity the purchaſer is not bound. This opinion is of a man unacquainted with the world and its commerce. Were miſtakes of that kind indulged with a remedy, there would be no end of law-ſuits. At this rate, if I purchaſe a quantity of body or table linen, ignorant at the time of a legacy left me of a large quantity, I ought to be relieved in equity, having now no occaſion for the goods purchaſed. And for the ſame reaſon, if I purchaſe a horſe by commiſſion for a friend, who happens to be dead at the time of the purchaſe; there muſt be a relief in equity, though I made the purchaſe in my own name. But there is no foundation for this opinion in equity,

* lib. 3. cap. 6. § 7.

more

more than at common law. If a ſubject anſwer the purpoſe for which it is purchaſed, the vender has no farther concern: he is entitled upon delivery to demand the price, without regarding any private or extrinſic motive that might have led his party to make the purchaſe. In general, a man who expoſes his goods to ſale muſt anſwer for their ſufficiency; becauſe there is no obligation in equity to pay a price for goods that anſwer not the purpoſe for which they are ſold by the one, and bought by the other: but if a purchaſer be led into an error or miſtake that regards not the ſubject nor the vender, the conſequences muſt reſt upon himſelf.

I ſhall only add upon this general head, that the end purpoſed to be brought about by a deed or covenant ought to be lawful; for to make effectual an unlawful act is inconſiſtent with the very nature of a court of law. Thus a bond granted by a woman, binding her to pay a ſum if ſhe ſhould marry, is unlawful, as tending to bar population; and therefore will be rejected even by a court of common law. And the ſame fate will attend every obligation granted *ob turpem cauſam*; a bond, for

for example, granted to a woman as a bribe to commit adultery or fornication. So far there is no occaſion for a court of equity.

The firſt example ſhall be from deeds. Upon a young man living abroad under ſentence of forfeiture, his father ſettled an annuity for life, ignorant that it would fall to the crown. This deed will not bind the granter; for it does not produce the end or effect intended. To ſuſtain it, would be to give force to the mean without regarding the end.

Here a ſubtile queſtion caſts up, What in the view of law is to be held the end upon which the fate of the deed or covenant depends: is a court of equity confined to the immediate end, or may it look forward to conſequences. An example will explain the queſtion. In a contract of marriage, the eſtate is ſettled on heirs-male of the marriage. The eldeſt ſon, being forfeited for high treaſon, is forced to abandon his native country. The father makes a ſettlement, excluding him from the ſucceſſion, in order to prevent his eſtate from falling to the crown. Can this

ſettlement

ſettlement be ſupported by a court of equity? I doubt. The contract of marriage was a proper mean for the end in view, namely, that the eſtate ſhould deſcend to the heirs-male of the marriage. The contractors had no farther view; and if a court were to be ſway'd by unforeſeen conſequences, deeds and covenants could not be much relied on. Suppoſe that after the father's death a pardon is procured for the ſon, muſt not this have the effect to void the laſt ſettlement, and to reſtore the ſon to his right as heir of the marriage? Yet in a caſe ſtill more delicate, the court of ſeſſion gave judgement for the father, influenced probably by an overflow of compaſſion and humanity. James Thomſon, in his marriage-contract, provided his eſtate and conqueſt to the heirs of the marriage. The heir, a ſon idle and profligate, became a notour bankrupt; which induced the old man to ſettle his eſtate on his grandchildren by that ſon, burdened with the liferent of the whole to him. A reduction being brought of this ſettlement as in defraud of the marriage-contract, the court of ſeſſion repelled the reaſon of

reduction, and ſuſtained the ſettlement *. Beſide ſetting the father free from a rational and ſolemn contract, there was a very material point in equity againſt ſuſtaining the ſettlement, which ſeems to have been overlooked. What if the whole debts, or the bulk of them, were contracted by the ſon for neceſſaries before his bankruptcy? On that ſuppoſition, the creditors were *certantes de damno vitando:* the children, on the other hand, were *certantes de lucro acquirendo.* Take a different view of the caſe: What if the bankrupt, by ſome fortunate adventure, a lottery-ticket for example, had been enabled to pay all his debts: would he not have been entitled as a free man to claim the benefit of the contract of marriage, ſeeing the only cauſe for diſinheriting him was now removed? If ſo, a contract of marriage is but an unſtable ſecurity, as it may depend on future contingencies whether it will be effectual or no.

In queſtions between huſband and wife, a contract of marriage is a contract in the

* 11th February 1762, Thomſon and his Creditors contra his Children.

ſtricteſt ſenſe; but in queſtions with the heirs, it is rather to be conſidered as a deed; in which light it is viewed above. I proceed now to give examples relative to what are properly contracts. In a contract of ſale, the circumſtance regarded at common law, is the agreement of the parties, the one to ſell the other to purchaſe the ſame ſubject. What are its qualities, whether the price be adequate, and whether it will anſwer the end for which it is purchaſed, are left to the regulation of equity. The laſt belongs to the preſent ſection; one inſtance of which makes a figure in practice, to wit, where goods ſold are by ſome latent inſufficiency unfit for the purchaſer's uſe. A horſe is bought for a ſtallion that happens to be gelt, or a hogſhead of wine for drinking that happens to be ſour. If the purchaſer be notwithſtanding bound, he is compelled to accept goods that are of no uſe to him, and over and above to pay a full price for what is of little or no value. It would, on the other hand, be to act againſt conſcience, for the vender to take a full price in ſuch a caſe. Suppoſing the goods to be ſufficient at the time of the bargain, but in-

ſufficient at the time of delivery, the loſs naturally falls on the vender, who continues proprietor till the ſubject be delivered. If inſufficient at the time of the bargain, there is an additional reaſon for ſetting it aſide, namely error; for error relieves the perſon who is *certans de damno vitando* againſt the perſon who is *certans de damno captando*, which will be more fully explained afterward (*a*).

A large cargo of ſtrong ale was purchaſed from a brewer in Glaſgow, in order to be exported to New York. In a ſuit for the price, the following defence was ſuſtained, That having been not properly prepared for the heat of that climate, it had burſted the bottles, and was loſt. It was not ſuppoſed, that the brewer had been guilty of any wilful wrong; but the defence was ſuſtained upon the following rule of equity, That a man who purchaſes

(*a*) The laws of Hindoſtan go a great way farther againſt the vender of inſufficient goods, farther indeed than either equity or utility will juſtify. "If "a man have ſold rice or wheat for ſowing, and "they do not ſpring up, the vender ſhall make "good the crop."

goods for a certain purpoſe, is not bound to receive them unleſs they anſwer that purpoſe; which holds *a fortiori* where the vender is himſelf the manufacturer. And where the inſufficiency cannot be known to the purchaſer but upon trial, the rule holds even where the goods are delivered to him. It was alſo in view, that if the brewer be not anſwerable for the ſufficiency of ale ſold by him for the American market, that branch of commerce cannot be carried on *.

An inſolvent debtor makes a truſt-right in favour of his creditors; and, among his other ſubjects, diſpones to the truſtees his intereſt in a company-ſtock. A creditor of the company, who was clearly preferable upon the company-ſtock before the bankrupt's private creditors, being ignorant of his preference, accedes to the truſt-right, and conſents to an equal diſtribution of the bankrupt's effects. Being afterward informed of his preference, he retracts while matters are yet entire. *Quær.* Is he bound by his agreement. He undoubtedly draws by it all the benefit he

* 13th December 1765, Baird contra Pagan.

had

had a proſpect of; and conſidering the agreement ſingly, without relation to the end, he is bound; and ſo ſays common law. But equity conſiders the end and purpoſe of the agreement; which is, that this man ſhall draw ſuch proportion of the bankrupt's effects as he is intitled to by law. The means concerted, that he ſhall draw an equal proportion, contribute not to this end, but to one very different, namely, that he ſhall draw leſs than what is juſt, and the other creditors more. Equity relieves from an engagement where ſuch is the unexpected reſult; there being no authority from the intendment of parties to make it obligatory where it anſwers not the purpoſed end.

Having laid open the foundation in equity for giving relief againſt a covenant where performance anſwers not the end purpoſed by it, I proceed to examine whether there be any relief in equity after the covenant is fulfilled. I buy, for example, a lame horſe unfit for work; but this defect is not diſcovered till the horſe is delivered, and the price paid. If the vender hath engaged to warrant the horſe as ſufficient, he is liable at common law to ful-

fil

fil his covenant. But ſuppoſing this paction not to have been interpoſed, it appears to me not at all clear, that there is any foundation in equity for voiding the ſale thus completed. The horſe is now my property by the purchaſe, and the price is equally the vender's property. If he knew that the horſe was lame, he is guilty of a wrong that ought to ſubject him to the higheſt damages * : but ſuppoſing him *in bona fide*, I ſee no ground for any claim againſt him. The ground of equity that relieves me from paying for a horſe that can be of no uſe, turns now againſt me in favour of the vender; for why ſhould he be bound to take my horſe, of no uſe to him? The Roman law indeed gave an *actio redhibitoria* in this caſe, obliging the vender to take back the horſe, and to return the price. But I diſcover a reaſon for this practice in a principle of the Roman law, that ſquares not with our practice, nor with that of any other commercial nation. The principle is, That ſuch contracts as are intended to be equal, ought to anſwer the intention: and therefore in ſuch contracts the Roman Pretor never permitted any

* l. 13. pr. Actionibus empt.

con-

conſiderable inequality. Hence the *actio quanti minoris*, which was given to a purchaſer who by ignorance or error paid more for a ſubject than it is intrinſically worth: and it follows upon the ſame plan of equity, that if a ſubject be purchaſed which is good for nothing, the *actio quanti minoris* muſt reſolve into an *actio redhibitoria*. But equity may be carried ſo far as to be prejudicial to commerce by encouraging law-ſuits; and for that reaſon we admit not the *actio quanti minoris*: the principle of utility rejects it, experience having demonſtrated that it is a great interruption to the free courſe of commerce. The ſame principle of utility rejects the *actio redhibitoria* as far as founded on inequality; and after a ſale is completed by delivery, I have endeavoured to ſhow, that if inequality be laid aſide, there is no foundation for the the *actio redhibitoria*. In Scotland, however, though the *actio quanti minoris* is rejected, the *actio redhibitoria* is admitted where a latent inſufficiency unqualifies the ſubject for the end with a view to which it was purchaſed. This practice, as appears to me, is out of all rule. If we adhere ſtrictly to equity without regarding utili-

ty,

ty, we ought to ſuſtain the *actio quanti minoris*, as well as the *actio redhibitoria*. But if we adhere to utility, the great law in commercial dealings, we ought to ſuſtain neither. To indulge debate about the true value of every commercial ſubject, would deſtroy commerce: and for that reaſon, equity, which has nothing in view but the intereſt of a ſingle perſon, muſt yield to utility, which regards the whole ſociety.

SECT. V.

Equity with reſpect to a deed providing for an event that now can never happen.

THis ſection chiefly concerns ſettlements *intra familiam*, and ſuch like, which on the part of the maker are gratuitous. I cannot eaſily figure a caſe relative to a covenant where it can obtain.

A bachelor in a deadly diſeaſe, daily expecting death, ſettles his eſtate on a near relation, without reſerving a power to alter, which he had no proſpect of needing. He recovers as by a miracle, and lives

many years. The deed, being in its tenor pure, is effectual at common law. But as death was the event provided for, which did not happen, and as he had no intention to give away his eſtate from himſelf, it will not be ſuſtained in equity. And indeed it would be hard to forfeit the poor man for a miſtake in thinking himſelf paſt recovery. In this example, the failure of the event is accidental, independent of the granter's will. But equity affords relief, even where the failure is owing to the granter himſelf. An old man, on a preamble that he was reſolved to die a bachelor, ſettles his eſtate on a near relation, reſerving his liferent and power to alter. In dotage, he takes a conceit for a young woman, marries her, but dies ſuddenly without altering his ſettlement. Seven or eight months after, a male child is born, who claims the eſtate. The deed cannot ſtand in equity, being made for an event that has not fallen out, to wit, the granter's dying without children. Take another example which depends on the ſame principle. In the year 1688, the Ducheſs of Buccleugh obtained from the crown a gift of her huſband the Duke of Mon-

mouth's perſonal eſtate, which fell under his forfeiture. As by this means their younger ſon the Earl of Deloraine was left unprovided, ſhe gave him a bond for L. 20,000. The Duke's forfeiture being afterward reſcinded, the Earl of Deloraine, executor decerned to him, claimed from his mother the Duke's perſonal eſtate. The Ducheſs was willing to account; but inſiſted that payment of the bond ſhould be held as part payment of the perſonal eſtate. Which was accordingly found *. Here the event provided for, which was the Earl's being deprived of his legal right by his father's forfeiture, had failed; and conſequently the bond could not be effectual in equity. There was beſide a ſtill ſtronger objection againſt it, namely, that the purſuer had now right to the very ſubject out of which the bond was intended to be paid.

Caſes of this nature are reſolved by lawyers into a conditional grant, imply'd, they ſay, though not expreſſed. A condition may be imply'd in the caſe laſt mentioned; but the circumſtances of the two

* 7th December 1723, Earl Deloraine contra Ducheſs of Buccleugh.

former

former will not admit ſuch implication. In the firſt, the granter is deſcribed as having loſt all hope of recovery; in which he would not readily think of making his death a condition of the grant. Neither in the other is there any foundation for implying a condition *ſi ſine liberis*, as the granter declared his firm intention to die a bachelor. In caſes of this nature, there is no neceſſity of cutting the Gordian knot by a ſuppoſed condition. It is looſed with great facility, by applying to it a maxim, That a deed providing for an event that has failed, cannot in equity be effectual.

SECT. VI.

Errors in deeds and covenants.

IN the beginning of this chapter it is laid down, that the moral ſenſe, reſpecting the fallibility of our nature, binds us by no engagement but what is fairly done with every circumſtance in view; and conſequently, that equity will afford relief

againſt raſhneſs, ignorance, and error. In handling the circumſtance laſt mentioned, it will contribute to perſpicuity, that we diſtinguiſh errors that move a perſon to enter into a deed or covenant, from errors that are found in the deed or covenant itſelf. Errors of the former kind happen more frequently with reſpect to deeds: of the latter kind, ſeldom but in contracts. I begin with the firſt kind, of which the following is an example. My brother having died in the Eaſt Indies, leaving children, a boy is preſented to me as my nephew, with credentials in appearance ſufficient. After executing a bond in his favour for a moderate ſum, the cheat is diſcovered. The moral ſenſe would be little concordant with the fallibility of our nature, did it leave me bound in this caſe. And ſuppoſing the cheat not to be diſcovered till after my death, a court of equity, directed by the moral ſenſe, will relieve my heir. Here the relief is founded on error ſolely; for the boy is not ſaid to have been privy to the cheat, or to have underſtood what was tranſacting for his behoof. To the ſame purpoſe Papinian, "Falſam cauſam legato non obeſſe, verius

"eſt;

" eſt: quia ratio legandi legato non co-
" hæret. Sed plerumque doli exceptio lo-
" cum habebit, ſi probetur alias legaturus
" non fuiſſe *." The circumſtances of the following caſe make it evident, that the error was the ſole motive, bringing it under the exception mentioned by Papinian. ' Pactumeius Androſthenes Pactumeiam ' Magnam filiam Pactumeii Magni ex aſſe ' heredem inſtituerat; eique patrem ejus ' ſubſtituerat. Pactumeio Magno occiſo, ' et rumore perlato quaſi filia quoque e- ' jus mortua, mutavit teſtamentum, Novi- ' umque Rufum heredem inſtituit, hac ' præfatione: ' Quia heredes quos volui " habere mihi, continere non potui, No- " vius Rufus heres eſto.' Pactumeia Ma- ' gna ſupplicavit Imperatores noſtros; et, ' cognitione ſuſcepta, licet modus inſtitu- ' tione contineretur, quia falſus non ſolet ' obeſſe, tamen ex voluntate teſtantis pu- ' tavit Imperator ei ſubveniendum: igi- ' tur pronunciavit, ' Hereditatem ad Ma- " gnam pertinere, ſed legata ex poſteriore " teſtamento eam præſtare debere, proinde " atque ſi in poſterioribus tabulis ipſa

* l. 72. § 6. De condition. et demonſtr.

" fuiſſet

" fuiſſet heres ſcripta *." The teſtament could not ſtand in equity, proceeding from an erroneous motive. To ſuſtain ſuch a teſtament, would be to diſinherit the favourite heir, contrary to the will of the maker. As to the legacies contained in the latter teſtament, they were juſtly ſuſtained, as there appeared no evidence nor preſumption that the teſtator was moved by an error to grant them.

In many caſes it may be doubted, whether error was the ſole motive, or one of them only. To ſolve that doubt, the nature of the deed will have great influence. A rich man executes a bond for a ſmall ſum in favour of an indigent relation, upon the narrative, that he had behaved gallantly in a battle, where he was not even preſent. Equity will not relieve the granter againſt this bond, becauſe charity of itſelf was a good cauſe for granting. The following texts of the *Corpus Juris* belong to the ſame head. 'Longe magis legato 'falſa cauſa adjecta, non nocet: veluti 'cum quis ita dixerit, 'Titio, quia me " abſente negotia mea curavit, ſtichum " do, lego.' Vel ita: 'Titio, quia patro-

* l. ult. De hered. inſtit.

" cinio

" cinio ejus capitali crimine liberatus ſum,
" ſtichum do, lego.' Licet enim neque
' negotia teſtatoris unquam geſſerit Titius,
' neque patrocinio ejus liberatus ſit, lega-
' tum tamen valet. Sed ſi conditionaliter
' enunciata fuerit cauſa, aliud juris eſt:
' veluti hoc modo, ' Titio, ſi negotia mea
" curaverit, fundum meum do, lego *."
Again: ' Quod autem juris eſt in falſa de-
' monſtratione, hoc vel magis eſt in falſa
' cauſa: veluti ita, ' Titio fundum do,
" quia negotia mea curavit.' Item, ' Fun-
" dum Titius filius meus præcipito, quia
" frater ejus ex arca tot aureos ſumpſit:'
' licet enim frater hujus pecuniam ex arca
' non ſumpſit, utile legatum eſt †.'

With reſpect to a deed entirely gratuitous to a perſon unconnected with the granter, and above taking charity, an error like what is mentioned above, will be held more readily the ſole motive; and conſequently a ground in equity for voiding the deed.

Where there is any foundation of controverſy, a tranſaction putting an end to it muſt be effectual; for where there is a

* § 31. Inſtit. de legatis.

† l. 17. § 2. De condit. et demonſt.

rational

rational motive for making a deed, the making of it will never be held to proceed from error. But where a man is moved to make a tranſaction on ſuppoſition of a claim that has no foundation, as in the caſe of a forged deed, he will be relieved from the tranſaction in equity, the motive being erroneous *. An unequal tranſaction may be occaſioned by error; but here utility forbids relief; for to extinguiſh lawſuits, the great ſource of idleneſs and diſcord, is beneficial to every member of ſociety.

We proceed now to errors found in a deed or covenant after it is made. Theſe are of two kinds: one prevents conſent altogether; as where the purchaſer has one ſubject in view, the vender another. And as no obligation can ariſe where there is no agreement, ſuch a covenant, if it can bear that name, is void at common law, and there is no occaſion for equity. The other kind is where the error is in the qualities of a ſubject, not in the ſubject itſelf; a purchaſe, for example, of a horſe underſtood to be an Arabian of true blood, but diſcovered after to be a mere Ple-

* l. 42. Cod. De tranſact.

beian. The bargain is effectual at common law; and the queſtion is, Whether or how far there ought to be a relief in equity.

We begin with errors that regard the ſubject itſelf. If in the ſale of a horſe, the vender intended to ſell the horſe *A*, the purchaſer to buy the horſe *B*, there is no agreement: the one did not agree to ſell the horſe *B*, nor the other to buy the horſe *A*. The ſame muſt hold in every bargain of ſale, whatever the ſubject be.

Next, where an error reſpects not the ſubject, but its qualities. I purchaſe, for example, a teleſcope, believing it to be mounted with ſilver, though the mounting is only a mixed metal. Or, I purchaſe a watch, the caſe of which I take to be gold, though only ſilver gilt. Equity will not relieve me from the bargain, as the inſtrument equally anſwers its end, whether more or leſs ornamented. The moſt that can reſult from ſuch an error, is to abate the price, in order to make the bargain equal; and this was done in the Roman law. But a claim of that nature, impeding the free courſe of commerce, is rejected by commercial nations.

It is a very different caſe, where the error is ſuch as would have prevented the purchaſe had it been diſcovered in time, termed in the Roman law *Error in ſubſtantialibus*. Example: A horſe is purchaſed as a ſtallion for breed; but unknown to both, he happened to be gelt before the bargain. It may be doubted, whether ſuch a bargain be not effectual at common law, as the error is only in the quality of the horſe; but undoubtedly it may be ſet aſide in equity, upon a principle mentioned more than once above, That the vender *certans de lucro captando*, ought not to take advantage of the purchaſer's error, who is *certans de damno vitando*. Another principle concurs, handled ſect. 4. of the preſent chapter, that one is not bound to fulfil a contract which anſwers not the purpoſed end.

We proceed to errors that reſpect the property of the ſubject ſold. As here the Roman law affords not much light, we have the greater need to proceed warily. I ſell to John a horſe underſtood by both of us to be my property. After all is agreed on, it is diſcovered to be his property. The bargain is void even at common law,

law, as it is incapable of being fulfilled on either ſide. I cannot convey the property to him, nor can he receive the property from me. It was not my intention to ſell a horſe that did not belong to me; nor was it his intention to pay for his own horſe. The caſe where the horſe belongs to a third perſon, is in effect the ſame. I did not intend to ſell a horſe that belongs not to me; nor did John intend to purchaſe a horſe from me that belongs to a third perſon. If the miſtake be diſcovered before delivery to John, I am bound in juſtice to deliver the horſe to the proprietor, not to John; and John is under no obligation to pay the price. If the diſcovery be not made till after John has received the horſe and paid the price, there is no obligation on either ſide, but that I reſtore the price, as the bargain was void from the beginning.

That the ſame doctrine ought to obtain in the ſale of land, is extremely evident. And as in a ſale of land writing is eſſential, the warrandice contained in the diſpoſition, or in the minute of ſale, ought not to go farther than to oblige the vender to repeat the price in caſe of eviction; un-

leſs the circumſtances of the bargain be ſuch as to juſtify a more extenſive warrandice. Hence it follows, that the clauſe of warrandice in a diſpoſition or minute of ſale of land, even what is termed abſolute warrandice, ought to be confined to a repetition of the price upon eviction, unleſs the vender be further bound in expreſs terms. Yet abſolute warrandice here is by the generality of lawyers underſtood as binding the vender to make up to the purchaſer all the loſs he ſuſtains by eviction, which in effect is the value of the ſubject at that time. Whether this be a juſt conception, deſerves the moſt ſerious conſideration, being of capital importance in the commerce of land.

That the eviction of land ought not to ſubject the vender to harder terms than the eviction of a moveable, is a doctrine that at leaſt has a plauſible appearance. A plauſible appearance however is not ſufficient: let us enter into particulars, in order to try whether ſome lurking objection may not be detected that will overturn it. If none can be detected, we may reſt ſecure that the doctrine is ſolidly founded in principles. In communing about a ſale of

of land, the title-deeds are produced for the inſpection of the purchaſer: there is a ſearch of the records; and the bargain is not concluded till the purchaſer have full ſatisfaction that the vender is proprietor. If there happen, after the ſtricteſt examination, to be a latent defect in the progreſs, it is not to be charged on the vender more than on the purchaſer. For what good reaſon then ought he to be made liable for the value of the land as at the time of eviction? The land was underſtood by both parties to belong to the vender: he wanted to have money for his land; the purchaſer to have the land for his money; neither of which purpoſes can be fulfilled. The purchaſer is not bound, becauſe he cannot have the land he bargained for: the vender is not bound, becauſe he agreed to ſell his own land, not that of another. Suppoſe the eviction has taken place while the ſubject remains with the vender, the minute of ſale is void, no leſs than in the caſe firſt mentioned, where the one has it in view to purchaſe the horſe *A*, the other to ſell the horſe *B*. Nor can it make any difference that the purchaſer is infeft before eviction. The infeft-

infeftment is void, as taken without conſent of the proprietor: and after reſtoring the price, both parties are free as before they entered into the contract. Upon the whole, the vender muſt reſtore the price, becauſe he cannot perform the mutual cauſe. And as for the purchaſer, he can have no claim for the value of the ſubject evicted; becauſe there can be no claim, either for a ſubject or its value, at the inſtance of a perſon who has no right to the ſubject. Add another argument no leſs concluſive. From a contract binding on no perſon, no claim can ariſe to any perſon; not even the claim againſt the vender for reſtoring the price, which ariſes not from the contract, but from being in his hand *ſine cauſa*. Hitherto every particular is the ſame as in the ſale of a moveable. The only difference that can found an argument of favour, is on the ſide of a vender of land. As in the ſale of a moveable all reſts on the information of the vender; it might be thought, that more is incumbent on him than on a vender of land, whoſe affirmation is not relied on, but the progreſs.

So much for common law. Let us now examine,

examine, whether there be any ground in equity for ſubjecting the vender of land to all the loſs that the purchaſer may ſuffer by eviction. A bargain of ſale is intended to be fair and equal. The purchaſer gets the land, the vender the price, and both are equally accommodated. By eviction, the vender is the only ſufferer. Land is ſeldom aliened but to pay debt. The vender is deprived of the price: his debts remain unpaid; and he is reduced to poverty. But what does the purchaſer ſuffer? He is indeed deprived of what he probably reckons a good bargain; but the price, which is reſtored to him, will give him the choice of as good a bargain in any corner of Scotland. This is a juſt ſtate of the caſe; upon which I put the following queſtion, Is there any equity for ſubjecting the vender, after reſtoring the price, to pay what more the land may be worth at the time of eviction? Before anſwering this queſtion, let the following caſe be conſidered. Soon after the purchaſer's entry to the land, a valuable lead or coal mine is accidentally diſcovered, for which the purchaſer paid nothing, the parties having had no view to it. This mine belongs

belongs to the evicter, and to neither of the contractors. Suppoſe now the purchaſe to have been only of a few acres, the mine may intrinſically be worth a hundred times the price. Not ſatisfied with ſaying, that I ſee no equity for obliging the vender to pay this immenſe ſum; I have no heſitation to affirm poſitively, that it would be highly unjuſt. This example deſerves attention. Would it not require the moſt expreſs terms in a clauſe of warrandice to oblige the vender to pay ſuch a ſum? One thing will certainly be granted me, that ſuch a contract entered into by a facile perſon, or by a minor even with conſent of curators, would be voided without heſitation. There may indeed be good ground to demand caution from the vender to reſtore the price in caſe of eviction; conſidering that venders of land are ſeldom in opulent circumſtances. More cannot juſtly be demanded.

The hardſhip is here intolerable, which no man with his eyes open will ſubmit to. But now, ſuppoſing, for argument's ſake, the purchaſer's claim, however much above the price, to be well founded; is there nothing to be ſaid for the vender,

where the land happens to fall in value below the price? If the purchaſer, upon a riſe of the market, be intitled to draw from the vender more than the price, ought not the vender to have the benefit of a falling market to pay leſs than the price? I cannot invent a caſe where the maxim, *Cujus commodum, ejus debet eſſe incommodum*, is more directly applicable. It is evident, however, that the vender muſt reſtore the price wholly, as the bargain was from the beginning void; and for the ſame reaſon, the purchaſer can have no claim for more than the price.

Viewing this caſe with regard to expediency, it is of importance to the public, that the commerce of land, the moſt uſeful of all, be free, eaſy, and equal. If a vender muſt be ſo deeply burdened as above, and laid open to ſuch conſequences, no man will ſell land but in the moſt pinching neceſſity. Men at any rate are abundantly averſe to ſell land, which reduces many to low circumſtances; and if this law ſhould obtain, there would be few ſales but by public authority. Nor is this all. This law, as to meliorations, would be of no uſe to the purchaſer, who

is ſecured abſolutely without need of oppreſſing the vender: he is intitled to retain poſſeſſion, till the evicter make good to him all the expence profitably laid out upon the ſubject.

Hitherto of a complete progreſs. Very different is the caſe where the progreſs is acknowledged to be incomplete. If in this caſe the vender be unwilling to ſell under the market-price, he muſt ſubmit to the hazard of eviction, and give warrandice to make up to the purchaſer what he loſes by eviction, being the value of the ſubject at the time of eviction. It is a chance-bargain, importing, that if the land ſink in value below the price, the purchaſer is intitled to that value only; and is intitled to double or triple the price, if the land riſe ſo high in value.

What then is the true import of a clauſe of abſolute warrandice in a ſale of land? In the ſale of a moveable, there is no warrandice. The vender is held to be proprietor, of which the purchaſer is ſatisfied without requiring warrandice. Neither is there uſe for warrandice againſt incumbrances; becauſe a moveable paſſes from hand to hand, without being ſubjected to any

any incumbrance. But in a ſale of land warrandice is neceſſary; for though there may be no doubt of the vender's right, yet it is proper that the purchaſer be ſecured againſt incumbrances, to many of which that appear not on record land is ſubjected. Clauſes of warrandice are different, according to the nature of the bargain. In ſome contracts of ſale, the vender gives warrandice againſt his own facts and deeds only; in ſome, againſt the facts and deeds of his predeceſſors and authors; in ſome, againſt all incumbrances whatever; and this laſt is termed *abſolute warrandice*. But of whatever tenor the warrandice be, it will not be underſtood to guard againſt a preferable title of property, unleſs expreſſed in the cleareſt terms. The reaſon is given above, that to extend warrandice ſo far, where the progreſs is good and the price adequate, is repugnant to common law, to equity, and to expedience.

The authors of our ſtyles have had a juſt conception of this matter. Every clauſe of warrandice I have ſeen ingroſſed in a diſpoſition of land for a juſt price, and where the progreſs was held ſufficient, is

confined to incumbrances, without any mention of eviction on a preferable right of property. The ſtyle follows: "warranting the land from all wards, reliefs, nonentries, marriages of heirs, liferent eſcheats, recognitions, liferent infeftments, annualrents, and from all and ſundry other burdens and incumbrances whatever, whereby the land may be evicted, or poſſeſſion impeded, at all hands, and againſt all deadly, as law will." Not a ſyllable of eviction upon a preferable title of property; which, as it cuts deeper than any incumbrance, would be placed in the front were it intended. Nor let the concluding words, *at all hands and againſt all deadly*, create any doubt; it being an infallible rule in the conſtruction of writs, Never to extend a general clauſe beyond the particulars to which it is added. This rule holds, even where the general clauſe is expreſſed abſolutely, without reference to any of the antecedent articles in particular. In the preſent caſe, we have ſcarce occaſion for that rule, as the general clauſe has an immediate reference to incumbrances, and to nothing elſe.

It

It is admitted by all lawyers, that in the conveyance of claims or debts, abſolute warrandice does not ſecure the purchaſer againſt eviction upon a preferable title; and I am utterly at a loſs to ſee, that the ſame preciſe words ſhould have a different meaning in a conveyance of land. Lord Stair indeed endeavours to account for this difference; but without ſucceſs, as far as I can comprehend. His words are, "Warrandice has no further effect "than what the party warranted truly "paid for the right whereby he was or "might be diſtreſſed, though leſs than "the value of the right warranted. This "will not hold in warrandice of land; as "to which land of equal value, or the "whole worth of what is evicted as it is "at the time of the eviction, is inferred; "becauſe the buyer had the land with the "hazard of becoming better or worſe, or "the riſing or falling of rates, and there-"fore is not obliged to take the price he "gave *." I cannot avoid obſerving, that two very different ſubjects are jumbled together in this paſſage; namely, the purchaſing a competing right in order to pre-

* Inſtitut. book 2. title 3. ſect. 46.

vent

vent eviction, and the effect of warrandice where land is actually evicted. Theſe are different propoſitions depending on different principles, and entirely unconnected; yet are oppoſed to each other as if they were parts of the ſame propoſition. Can any accuracy be expected in ſuch a manner of handling a queſtion? His Lordſhip beſide ſtops ſhort in the middle. In the caſe of riſing of rates, the purchaſer, ſays he, is not obliged to take the price he gave. Not a word upon the caſe of falling of rates. His Lordſhip upon maturer thinking would have ſeen, that as the ſubject never belonged to the purchaſer, he could have no claim for it or its value againſt the vender; and he alſo would have ſeen, that from a contract binding neither party, no claim can ariſe to either party. But this is not all. I am at a loſs to conceive that the hazard of becoming better or worſe, can be of any weight in this caſe. One thing I clearly conceive, that if this circumſtance have any weight, it will make abſolute warrandice to have the ſame effect in the conveyance of debts, that it is ſaid to have in the conveyance of land. Real debts produced in a ranking

ing are commonly at firſt of uncertain value. An adjudication is purchaſed for a trifle, which, by objections ſuſtained againſt competing creditors, draws at the concluſion a large ſum. There is here perhaps more hazard of becoming better or worſe, than in the purchaſe of land: yet, after the purchaſer of the adjudication has laid out a conſiderable ſum in obtaining a high place in the ranking, he has upon eviction no claim againſt the vender but for the price he paid: he muſt rely on the evicter for recovering the expence of proceſs. Senſible I am from my own experience, how difficult it is to guard againſt errors in the hurry of compoſition. Lord Stair was an able lawyer; and, not to mention the caſe of a mine diſcovered after the purchaſe, had he but thought on uſeful improvements laid out by the purchaſer, he certainly would not have thought it reaſonable that the vender ſhould be liable for the value of theſe, conſidering that the evicter is bound for it. The following ſcene might have occurred to his Lordſhip. After adjuſting the progreſs and the price, "Nothing remains," ſays the intended purchaſer, "but that you

"warrant

" warrant the expence I intend to lay out " upon incloſing, planting, and other im- " provements. Are you not ſecured by " law?" anſwers the vender: " you are in- " titled to retain poſſeſſion till you obtain " full ſatisfaction from the evicter. You " have thus real warrandice, and need " not the addition of perſonal." " I inſiſt " however for your warrandice," replies the other: " one cannot be made too ſe- " cure." " After being abſolutely ſecure," rejoins the vender, " beyond the poſſibi- " lity of a diſappointment, your demand " for my warrandice has no meaning but " to have it in your power to oppreſs me. " A demand ſo irrational proves you ei- " ther to be a fool or a knave: I reject all " dealing with you." As no man of ſenſe would adviſe the vender to ſubmit to that demand, I hold it as demonſtration, that the expence of profitable improvements cannot be underſtood to be comprehended in a clauſe of abſolute warrandice. As to voluptuary expences, termed ſo by Roman writers, the law, it is true, gives no ſecurity in caſe of eviction; nor is there reaſon for it. A man embelliſhes his perſon, his houſe, his fields, in order to make

a figure. In caſe of a voluntary ſale, he reckons not upon any additional price for a fine garden, and as little in caſe of eviction. And were the vender to be made liable, it would oblige venders to be extremely cautious about the perſon they ſell to; no man could ſell an acre or two without the hazard of abſolute ruin. Upon theſe acres the purchaſer erects a palace, adorns his gardens with temples, triumphal arches, caſcades, &c. &c. ſufficient to exhauſt the riches of a nabob. The poor vender all this while ſits trembling at every joint for fear of eviction.

I put a caſe the moſt favourable that can be for the purchaſer, to which the argument urged by Lord Stair is directly applicable. By a gradual riſe of the market without a farthing laid out on it, the land purchaſed thirty years ago has riſen in value a third or fourth part above the price paid for it. There lies no claim againſt the evicter for this additional value; and it is ſo much loſt to the purchaſer if the vender be not liable. This probably is the caſe his Lordſhip had in view. If the vender, *major*, *ſciens*, *et prudens*, bound himſelf to make up that loſs, he muſt ſub-

mit. But I ſtate a plain queſtion, Is there any thing in juſtice, or in the nature of a contract of ſale, to lay this riſk on the vender? In making the bargain, both parties are equally *in bona fide*, the progreſs is held to be good by both; and both are loſers; not equally indeed, for the vender, who muſt reſtore the whole price, is the greateſt loſer. Say, what is it that intitles the purchaſer to draw from the vender the preſent value of the land? Not the contract, for a contract that does not bind can produce no action: not the property of the land, which did not paſs to the purchaſer. The only remaining foundation I can think of, is to claim that loſs on the footing of damage. Neither can this hold, as there can be no claim for damage, except from expreſs paction or from a delict; and the caſe ſuppoſed admits of neither. Nor could Lord Stair have a view to either, when the opinion he gives is founded ſolely on the riſing or falling of rates.

This intereſting point of law was judicially handled in a late proceſs, Lord Napier *contra* the Repreſentatives of Mr William Drummond, who ſold the eſtate of Edinbelly

Edinbelly to his Lordſhip. The progreſs had been held ſufficient by the purchaſer; and the warrandice was in the ordinary ſtyle, the ſame that is above mentioned. It was found however by decree of the court of ſeſſion, "That the repreſentatives "of Mr William Drummond are liable to "Lord Napier for the value of the eſtate "of Edinbelly, evicted from him, as the "ſame was at the time of eviction *." This judgement has a formidable appearance againſt the doctrine above inculcated. Yet as far as could be gathered from the reaſoning of the judges, what moved them was not the terms of the abſolute warrandice, but the two following arguments: Firſt, That poſſeſſors of land ought not to be diſcouraged from making ornamental improvements; and, next, That though many evictions muſt have happened, there is not on record a ſingle inſtance of a proceſs for eviction: whence it was preſumed, that the preſent value muſt have been ſubmitted to by the vender, otherwiſe that it would have been demanded from him in a proceſs. And the inference was, that

* 6th Auguſt 1776.

it is now too late to alter a practice ſo long eſtabliſhed. To the firſt anſwered, That the poſſeſſor has abſolute ſecurity for profitable improvements, which, as beneficial to the public, deſerve every encouragement; but that ornamental improvements, being a ſpecies of luxury, are entitled to no favour; and were they intitled, that the evicter only ought to be ſubjected, as they were occaſioned by his delay or negligence; eſpecially as he now has the pleaſure of them. Anſwered to the ſecond, The preſumption lies clearly on the other ſide. No man who has produced a progreſs to the ſatisfaction of the purchaſer, will upon eviction find himſelf bound in conſcience to pay the preſent value of the land, including all the improvements, voluptuary as well as profitable. And as there is no inſtance of a decree againſt the vender for that value, there is the higheſt probability that the demand has never exceeded the price, which will always be admitted without a proceſs. As for embelliſhments in particular, the taſte for them is but creeping in; and they are ſo rare in Scotland, as to afford no probability

lity that they ever were claimed upon eviction.

The arguments I have endeavoured to obviate, were ſpoken out; but what I conjecture chiefly influenced the judges, was the authority of Lord Stair; which could not fail to have great weight, conſidering that for a courſe of years it had been inculcated into every ſtudent as a rule of law, and adopted by every member of the court. Men, who in early youth have ſucked in a maxim whether of law or of religion, are impregnable by argument. Much ſuperior to that of reaſon muſt the authority be, which can operate a converſion. In matters arbitrary and doubtful, I chearfully ſubmit to the authority of eminent writers, to that eſpecially of Lord Stair, who is our capital writer on law. But neither reaſon nor common ſenſe will juſtify ſuch deference, with regard to points that are reſolvable into principles.

But now, waving that ſubject, I have another attack to make on his Lordſhip, and on its offspring the late judgement of the court, which will open the eyes of our men of law, if any thing can. Though his Lordſhip's opinion reſpects voluntary

ſales

ſales only, yet it muſt equally hold in judicial ſales, as the fluctuating value of land is the ſame whether ſold publicly or privately. Yet this opinion is not made the rule in judicial ſales. The practice is, that each creditor gives warrandice againſt eviction to the extent of what he draws of the price; juſtly, becauſe the creditors cannot retain the price, if the purchaſer be deprived of the land. But warrandice is never exacted from them for the value of the land in caſe of eviction. This has not only been the uniform practice from the commencement of judicial ſales, but is a practice authoriſed by an expreſs act of ſederunt *, declaring, "That the credi-
"tors preferred to the price, ſhall, upon
"payment, diſpone to the purchaſer their
"rights and diligences, with warrandice
"*quoad* the ſums received by them; ſo
"that in caſe of eviction of the lands diſ-
"poned, they ſhall be liable to refund
"theſe ſums in whole or in part effeiring
"to the eviction. And this is declared
"to be the import of any former oblige-
"ments of warrandice given by creditors
"in the caſe foreſaid." Here we have

* laſt of March 1685.

conſtant

conſtant and uniform practice for a long courſe of time, authoriſed by the ſupreme court of the nation; which equals in authority an act of parliament. Now as, with reſpect to the preſent point, no difference can be figured between a public and a private ſale, the rule laid down for the former muſt equally obtain with regard to the latter, were the caſe of the latter otherwiſe doubtful. Had the practice in public ſales been ſuggeſted to the court, or had it occurred to any of the judges, we may reſt with aſſurance, that a different judgement would have been given in the caſe of Lord Napier.

I have inſenſibly been led, from the cloſe and conciſe manner of a didactic work, into a ſort of diſſertation. But the importance of the ſubject will I hope plead for me.

Hitherto of errors diſcovered in the contract itſelf. We proceed to errors ariſing in the performance of a contract. Under this head comes erroneous payment, or *ſolutio indebiti*, as termed in the Roman law. Of this there are two kinds; one where payment is erroneouſly made of an extinguiſhed debt, ſuppoſed to be ſubſiſting; and

and one where a debt really ſubſiſting is paid by a man who miſtakes himſelf to be the debtor. To judge rightly of the former, the following preliminaries will pave the way. The ſale of a ſubject as exiſting which does not exiſt, is void: the vender cannot deliver a *non ens*; and the purchaſer is not bound to pay the price unleſs he get what he bargained for. In like manner, where an extinguiſhed debt is aſſigned, underſtood to be ſubſiſting, the aſſignment is void; and if the price have been paid, it muſt be reſtored on diſcovery of the error. This doctrine is applicable to the caſe in hand. As it is unjuſt in a creditor to take twice payment, he can have no pretext for detaining the ſecond payment made erroneouſly by the debtor. The ſame muſt follow, where the ſecond payment has been made to the creditor's heir, who, though *in bona fide*, can have no better right than his predeceſſor had. The ſame will alſo follow in the caſe of an executor-creditor *. An aſſignee to a debt extinguiſhed by payment obtains payment from

* Stair, Gosford, 10th January 1673, Ramſay contra Robertſon.

the debtor's heir; both of them being ignorant of the former payment. The error is diſcovered *rebus integris*. The heir muſt have back the money he paid, being in the hands of the aſſignee *ſine cauſa*; and the aſſignee is intitled to draw from the cedent the price he paid for a *non ens*. So far clear. But what if the error be diſcovered ſeveral years after, when the cedent happens to be inſolvent. This intricate caſe is handled above, where it comes in more properly. There it is laid down, that the aſſignee having been deprived of his recourſe againſt the cedent by the debtor's raſhly paying the debt a ſecond time, neglecting to look into his affairs, the loſs ought to reſt on him. The argument is ſtill ſtronger for the aſſignee, where a debt is purchaſed on condition that the debtor's heir grant a bond of corroboration. This bond indeed corroborating a *non ens* cannot be effectual; but as the purchaſe was made on the faith of it, the loſs occaſioned by the cedent's bankruptcy, ought to fall on the heir, who was at leaſt raſh or incautious, not on the purchaſer, who acted prudently. And when

the price he paid to the cedent is made up to him by the heir, matters are reſtored to their original ſtate, as if the bargain had not been made. There may be bargains againſt which there can be no reſtitution; as where a bond is aſſigned to a huſband in name of tocher with his wife, which happens to be corroborated by the debtor's heir before it was aſſigned to the huſband. As the marriage was made on the faith of the bond of corrobation, the granter of the bond can have no relief, but muſt pay the whole to the huſband. And ſo ſays Paulus: "Si quis indebitam pecu-" niam, per errorem, juſſu mulieris, ſpon-" ſo ejus promiſiſſet, et nuptiæ ſecutæ fu-" iſſent, exceptione doli mali uti non po-" teſt. Maritus enim ſuum negotium ge-" rit; et nihil dolo facit, nec decipiendus " eſt: quod fit, ſi cogatur indotatam u-" xorem habere. Itaque adverſus mulie-" rem condictio ei competit; ut aut repe-" tat ab ea quod marito dedit, aut ut libe-" retur, ſi nondum ſolverit *."

We proceed to the caſe where a debt really ſubſiſting is paid by a man who er-

* l. 9. § 1. De condict. cauſa data.

roneouſly

roneouſly underſtands himſelf to be the debtor. This caſe has divided the Roman writers. To the perſon who thus pays erroneouſly, Pomponius gives a *condictio indebiti* *. Paulus is of the ſame opinion †. Yet this ſame Paulus, in another treatiſe, refuſes action ‡. The ſolution of this queſtion ſeems not to be difficult. Were it the effect of the erroneous payment to extinguiſh the debt, a *condictio* could not be ſuſtained againſt the creditor: a man who does no more but receive payment of a juſt debt, cannot be bound to repeat. But the following reaſons evince, that a debt is not extinguiſhed by erroneous payment. Firſt, There is nothing that can hinder the creditor, upon diſcovery of the miſtake, to reſtore the money, and to hold by the true debtor. Second, The true debtor, notwithſtanding the erroneous payment, is intitled to force a diſcharge from the creditor, upon offering him payment; which he could not do were the debt already extinguiſhed. Hence it follows, that the creditor holds the putative debt-

* l. 19. § 3. De condict. indeb.
† l. 65. § ult. eod.
‡ l. 44. eod.

or's money *ſine juſta cauſa*; and conſequently, that a *condictio indebiti* againſt him is well founded. But the circumſtance that operates in the caſe firſt mentioned, where there exiſts no debt, operates equally here. Upon receiving payment *bona fide* from the putative debtor, the creditor thinks no more of a debt he conſiders to be extinguiſhed; and therefore, if the real debtor become inſolvent after the payment, the inconſiderateneſs of the putative debtor will ſubject him to the loſs; which may inſtruct him to be more circumſpect in time coming.

With reſpect to payment erroneouſly made by the debtor to one who is not the creditor, ſee book 2. chap. 5.

The legal conſequences of the payment of a debt by a man who knows himſelf not to be the debtor, are handled book 1. part 2. at the end.

SECT.

SECT. VII.

A deed or covenant being void at common law as ultra vires, *can a court of equity afford any relief?*

A Principle in logics, That will without power cannot produce any effect, is applicable to matters of law; and is thus expreſſed, That a deed *ultra vires* is null and void. Common law adheres rigidly to this principle, without diſtinguiſhing whether the deed be wholly beyond the power of the maker, or in part only. If it be one deed, it admits of no diviſion at common law, but muſt be totally effectual or totally void. The diſtinction is reſerved to a court of equity, which gives force to every rational deed as far as the maker's power extends. Take the following illuſtrations.

If one having power to grant a leaſe for ten years grants it for twenty, the leaſe is in equity good for ten years *. For here

* 1, Chancery caſes 23.

there

there can be no doubt about will; and juſtice requires, that the leaſe ſtand good as far as will is ſupported by power. A tack ſet by a parſon for more than three years without conſent of the patron, is at common law void totally, but in equity is ſuſtained for the three years *. But a college having ſet a perpetual leaſe of their teinds for 50 merks yearly, which teinds were yearly worth 200 merks; and the leaſe being challenged for want of power in the makers, who could not give ſuch a leaſe without an adequate conſideration, it was found totally null, and not ſuſtained for any limited time or higher duty †. For a court of equity, as well as a court of common law, muſt act by general rules; and here there was no rule for aſcertaining either the endurance of the leaſe, or the extent of the duty. Further, a court of equity may ſeparate a deed into its conſtituent parts, and ſupport the maker's will as far as he had power: but here the li-

* Stair, 18th July 1668, Johnſton contra Pariſhioners of Hoddam.

† Stair, 13th July 1669, Old College of Aberdeen contra the Town.

miting

miting the endurance and augmenting the duty ſo as to correſpond to the power of the makers, would be to frame a new leaſe, varying in every article from the leaſe challenged.

By the act 80. parl. 1579, "All deeds "of great importance muſt be ſubſcribed "and ſealed by the parties, if they can "write; otherwiſe by two notaries before "four witneſſes, preſent at the time, and "deſigned by their dwelling-places; and "the deeds wanting theſe formalities ſhall "make no faith." With reſpect to this ſtatute, a deed is held by the court of ſeſſion to be of great importance when what is claimed upon it exceeds in value L. 100. And upon the ſtatute thus conſtructed, it has often been debated, Whether a bond for a greater ſum than L. 100 ſubſcribed by one notary only and four witneſſes, or two notaries and three witneſſes, be void; or whether it ought to be ſuſtained to the extent of L. 100. A court of common law, adhering to the words of the ſtatute, will refuſe action upon it. And ſuch was the practice originally of the court of ſeſ-

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ſion *. But a court of equity, regarding the purpoſe of the legiſlature, which is to make additional checks againſt falſehood in matters of importance, will ſupport ſuch deeds to the extent of L. 100: for a deed becomes of ſmall importance when reduced to that ſum, and ought to be ſupported upon the ordinary checks. And accordingly the court of ſeſſion, acting in later times as a court of equity, ſupports ſuch bonds to the extent of L. 100 †. But in applying the rules of equity to this caſe, the bond ought to be for a valuable conſideration, or at leaſt be rational: if irrational, it is not intitled to any ſupport from equity.

Oral evidence is not ſuſtained in Scotland to prove a verbal legacy exceeding L. 100, but if it be reſtricted to that ſum, witneſſes are admitted ‡.

When arbiters take upon them to determine articles not ſubmitted, the award or

* Hope, (Obligation), November 29. 1616, Gibſon contra Executors of Edgar; Durie, 13th November 1623, Marſhall contra Marſhall.

† Dictionary of Deciſions, (Indiviſible).

‡ Durie, 7th July 1629, Wallace contra Muir; Durie, 1ſt December 1629, Executrix of Scot contra Raes.

decreet-arbitral is at common law void even as to the articles ſubmitted. A decreet-arbitral is conſidered as one entire act, which muſt ſtand or fall *in totum*. Equity, prone to ſupport things as far as rational, ſeparates the articles ſubmitted from thoſe not ſubmitted, and ſuſtains the proceedings of the arbiters as far as they had power. Thus, if two ſubmit all actions ſubſiſting at the date of the ſubmiſſion, and the arbitrators releaſe all actions to the time of the award, the award ſhall be good for what is in the ſubmiſſion, and void for the reſidue only *. A decreet-arbitral being challenged, as *ultra vires compromiſſi* with reſpect to mutual general diſcharges which were ordered to be granted, though ſome particular claims only were ſubmitted; the decreet-arbitral was ſuſtained as far as relative to the articles ſubmitted, and found void as to the general diſcharges only †. Arbiters having decreed a ſum to themſelves and their clerk, for which the ſubmiſſion gave no

* New abridgement of the law, vol. 1. p. 139. 140.

† Fountainhall, 25th December 1702, Crawford contra Hamilton.

authority; yet the decreet-arbitral, as far as ſupported by the ſubmiſſion, was found good even at common law, ſo as to have the privilege of the regulations 1695, not to be liable to any objection but falſehood, bribery, and corruption. Upon this ground, an objection of iniquity was repelled as incompetent *. Here the objection of iniquity had but an indifferent look: an objection carrying a ſtrong appearance of juſtice, would probably have been better received.

Family-ſettlements are commonly more complex than any of the caſes mentioned above, conſiſting of many parts interwoven ſo intimately, that if one be withdrawn as *ultra vires*, the reſt muſt tumble. There is no remedy but to adjuſt the will to the preſent circumſtances, in ſuch a manner as the maker himſelf would have done had he foreſeen the event. Take the following examples. A man having two ſons, John and James, makes a deed, ſettling upon them his eſtate, conſiſting of two baronies, to John one of the baronies, the other to James. John's part is evicted by one having a preferable right. The deed, as far

* March 1777, Jack contra Cramond.

as

as in favour of James, will be ſupported at common law, which regards the words only without piercing deeper. But a court of equity conſiders, that to give to one of the brothers the whole that remains of the eſtate, and nothing to the other, is inconſiſtent with the will of the maker, who proportioned his eſtate between them in the ſame deed by a ſingle act of will. Therefore to ſupport that will as far as the preſent circumſtances can admit, the court will divide the remaining eſtate between the brothers, in the ſame proportion that the whole was divided by the maker. And this may be done boldly; as being what the granter himſelf would have done, had he foreſeen the event. The following example is of the ſame kind. A man ſettles his eſtate of L. 1000 yearly rent on his eldeſt ſon, burdened with L. 8000 to his eight other children. A farm making half of the eſtate is evicted. The children notwithſtanding claim their whole proviſion; which perhaps would be ſuſtained at common law, as there is no condition expreſſed. But aſſuredly, the proviſion was not intended to be made effectual, even though there ſhould not remain a ſhilling

to the heir. In order to fulfil the maker's will as far as the preſent circumſtances admit, a court of equity will reſtrict the proviſion to L. 4000, which is giving to the younger children the ſame proportion of their father's effects that was originally intended. But let it be remarked, that the reſult will be different where there is a bond of proviſion for L. 8000, and the eſtate ſettled on the heir by a different deed, or left to be taken up *ab inteſtato*. He will be ſubjected to all the debts, and to the bond of proviſion among the reſt. Take a third example. A man having three daughters, ſettles his land-eſtate on the eldeſt, with competent proviſions to the other two. As this ſettlement happened to be made on deathbed, it was reduced by the younger ſiſters, who by that means came to be heirs-portioners with the eldeſt. Can they claim their proviſions over and above? Here the whole was done in the ſame deed, and by a ſingle act of will. It was not the intention of the father, that the eldeſt ſhould have the eſtate independent of her ſiſter's proviſions; and as little that they ſhould have their proviſions independent of their eldeſt ſiſter's right to the

the eſtate. A court of equity, therefore, to ſupport the father's deed as far as poſſible, will reject the claim for the proviſions. The younger ſiſters diſobeying their father's will, are not permitted to take any benefit from it. Equity ſuffers no perſon to approbate and reprobate the ſame deed. The younger ſiſters, therefore, if they adhere to their reduction, muſt give up their proviſions. The following is a ſimilar example. John Earl of Dundonald, by a deed of entail, ſettled his landeſtate on his heirs-male; with the ſame breath ſettled his moveables by a teſtament; and executed bonds of proviſion to his daughters. Theſe ſeveral writings, done *unico contextu* in purſuance of one act of will, and making a complete ſettlement of his eſtate real and perſonal, remained with him undelivered. After the Earl's death, certain lands contained in the entail being found to be ſtill remaining *in hereditate jacente* of a remote predeceſſor, they were claimed by the daughters as heirs of line. It was objected, That the whole ſettlement was one act of will, and one deed, though in different writings; that the purſuers could not approbate and reprobate;

and

and that therefore, if they claimed the lands contrary to their father's will, they could take no benefit by that will. It was accordingly found, That the purſuers might chuſe either, but could not have both *.

The ſettlement of an eſtate by marriage-articles upon the heirs of the marriage, is not intended to bar the huſband from a ſecond marriage, or from making rational proviſions to the iſſue of that marriage. A man thus bound makes exorbitant proviſions to the iſſue of a ſecond marriage, ſuch as his whole eſtate, or the greater part. This ſettlement, as a breach of engagement, is wholly void at common law; and it is a matter of delicacy for a court of equity to interpoſe where there is no rule for direction. It would, however, be inconſiſtent with common ſenſe, that children ſhould ſuffer as much by exceſs of affection in their father, as by his utter neglect. As it would be a reproach on law, that the children ſhould be left without remedy, the court of ſeſſion ventures

* 20th February 1729, Counteſs of Strathmore and Lady Catharine Cochrane contra Marquis of Clydeſdale and Earl of Dundonald.

to

to interpoſe, by ſuſtaining the proviſions to ſuch an extent as to be conſiſtent with the engagement the father came under in his firſt contract of marriage. The court, however, never interpoſes without neceſſity; and if common law afford any means for providing the children, the matter is left to common law. The following caſe will illuſtrate this obſervation. Colonel Campbell, being bound by marriage-articles to provide to the iſſue the ſum of 40,000 merks, with the conqueſt, did, by a deathbed-ſettlement, appoint his eldeſt ſon to be heir and executor; leaving it upon the Duke of Argyle and the Earl of Ilay to name rational proviſions to his younger children. The referees having declined to act, the younger children inſiſted to have the ſettlement voided, as contradictory to the marriage-articles. It was urged for the heir, That the Colonel had power to divide the ſpecial ſum and conqueſt, by giving more to one child and leſs to another; and that though the whole happens to be ſettled on the eldeſt ſon, by accident not by intention, it belongs to the court of ſeſſion to remedy the inequality, by doing what was expected from the referees,

namely,

namely, to appoint rational provisions to the younger children. The court voided the settlement totally; which intitled the children *per capita* to an equal division of the subjects provided to them in the marriage-contract *.

SECT. VIII.

Where there is a failure in performance.

IN order to distinguish equity from common law upon this subject, we begin with examining what power a court of common law has to compel persons to fulfil their engagements. That this court has not power to decree specific performance, is an established maxim in England, founded upon the following reason, That in every engagement there is a term for performance; before which term there can be no demand; and after the term is past, performance at the term is imprestable †.

* 22d December 1739, Campbell contra Campbells.

† See Vinnius's commentary upon § 2. De verborum obligationibus. Institutes.

A court of common law, confined to the words of a writing, hath not power to ſubſtitute equivalents; and therefore all that can be done by ſuch a court, is to award damages againſt the party who has failed. Even a bond of borrowed money is not an exception; for after the term of payment, the ſum is ordered to be paid by a court of common law, not as performance of the obligation, but as damage for not performance. This, it muſt be acknowledged, is a great defect; for the obvious intention of the parties in making a covenant, is not to have damages, but performance. The defect ought to be ſupplied; and it is ſupplied by a court of equity upon a principle often mentioned, That where there is a right it ought to be made effectual. By every covenant that is not conditional, there is a right acquired to each party: a term ſpecified for performance is a mean to aſcertain performance, not a condition; and when that mean fails, it is the duty of a court of equity to ſupply another mean, that is, to name another day.

To illuſtrate this doctrine, ſeveral caſes ſhall be ſtated. In a minute of ſale of land,

a term is ſpecified for entering the purchaſer into poſſeſſion, and for paying the price. The matter lies over till the term is paſt, without a demand on either ſide. At common law, the minute of ſale is rendered ineffectual; becauſe poſſeſſion cannot be delivered, nor the price be paid, at a term that is now paſt: neither can damage be awarded for non-performance, as neither of the contractors has been *in mora*. But the remedy is eaſy in a court of equity; namely, to aſſign a new term for ſpecific performance; which fulfils the purpoſe of the covenant, and makes the rights therefrom ariſing effectual. But the naming a new term for performance, muſt vary the original agreement. The price cannot bear intereſt from the term named in the minute, becauſe the purchaſer got not poſſeſſion at that term: nor is the vender liable from that term to account for the rents, becauſe he was not bound to yield poſſeſſion till the price ſhould be offered. Theſe ſeveral preſtations muſt take place from the new term named by the court of equity.

Suppoſing now a *mora* on one ſide. The purchaſer,

purchaſer, for example, demands performance at the term ſtipulated; and years paſs in diſcuſſing the vender's defences. Theſe being over-ruled, the purchaſer inſiſts for ſpecific performance. What doth equity ſuggeſt in this caſe? for now, the term of performance being paſt, performance cannot be made in terms of the original articles. One thing is evident, that the purchaſer muſt not ſuffer by the vender's failure; and therefore, a court of equity, though it muſt name a new term for performance, may, at the inſtance of the purchaſer, appoint an account to be made on the footing of the original articles. If the rent exceed the intereſt of the price, the balance may be juſtly claimed by the purchaſer. But what if the intereſt of the price, as uſual, exceed the rent? The vender will not be intitled to the difference; becauſe no man is intitled to gain by his failure. In a word, the purchaſer can claim damage in the former caſe, ſo far as he loſes by the vender's failure. But in the latter caſe, he gains by the failure, and has no damage to claim. This, at firſt view, may ſeem to claſh with the maxim, *Cujus commodum, ejus*

debet eſſe incommodum. There is no claſhing in reality: the vender ſuffers juſtly for his failure; but the purchaſer cannot ſuffer, who was always ready to perform. This gives the true ſenſe of the maxim, That it holds only between perſons who are upon an equal footing; not between perſons where the one is guilty the other innocent. I need ſcarce add, that the option given to the purchaſer upon the vender's *mora*, is given to the vender upon the purchaſer's *mora*.

It frequently happens that ſpecific performance is impreſtable; as where I ſell the ſame horſe firſt to John, and then to James. The performance to John becomes impreſtable after the horſe is delivered to James; and therefore, inſtead of ſpecific performance, a court of equity muſt be ſatisfied, like a court of common law, to decree damages to John; according to the maxim, *Loco facti impræſtabilis ſuccedit damnum et intereſſe.*

This ſuggeſts an inquiry, whether in awarding damages there be any difference between common law and equity. An obligor, bound to perform what he undertakes, ought to make up the loſs occaſioned

ſioned by his failure; and ſuch failure accordingly affords a good claim for damages at common law as well as in equity. Thus, the purchaſer of an eſtate from an apparent heir, having, along with the diſpoſition, received a procuratory to ſerve and infeft the apparent heir, employs his own doer to perform that work. By the doer's remiſſneſs, the heir-apparent dies without being infeft, which renders the diſpoſition ineffectual. The doer is bound at common law to make up the purchaſer's loſs, though it be *lucrum ceſſans* only; and a court of equity can go no further. In caſes of that nature, if ſkill be profeſſed, unſkilfulneſs will not afford a defence. "Proculus ait, ſi medicus ſervum imperite ſecuerit, vel locato vel ex lege Aquilia competere actionem *. Celſus etiam imperitiam culpæ adnumerandum ſcripſit. Si quis vitulos paſcendos vel ſarciendum quid poliendumve conduxit, culpam eum præſtare debere; et quod imperitia peccavit, culpam eſſe; quippe ut artifex conduxit †." Upon this rule the following

* l. 7. § 8. Ad legem Aquil.

† l. 9. § 5. Locati conducti.

lowing caſe was determined. An advocate being debtor to his client, wrote and delivered him a bill of exchange for the ſum. Being ſued for payment, he objected, That the bill was null, containing a penalty. The advocate probably was ignorant that this was a nullity; but he undertook the truſt of drawing the bill, and therefore was bound for its ſufficiency *. Where a priſoner for debt makes his eſcape, it muſt be admitted, that the creditor is hurt in his intereſt; but he cannot prove any damage; for it is not certain that he would have recovered payment by detaining the debtor in priſon, and it is poſſible he may yet recover it. But to be deprived of the ſecurity he has by his debtor's impriſonment, is undoubtedly a hurt or prejudice; and the common law gives reparation by making the negligent jailor liable for the debt, as equity doth in ſimilar caſes. A meſſenger who neglects to put a caption in execution, affords another inſtance of the ſame kind. By his negligence he is ſubjected to the debt, which is ſaid to be *litem ſuam facere*.

* 26th November 1743, Garden contra Thomas Rigg Advocate.

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The undertaking an office implies an agreement to fulfil the duty of the office: negligence accordingly is a breach of agreement, which ſubjects the officer to all conſequences, whether actual damage or other prejudice. At the ſame time, it ought not to eſcape obſervation, that as neglect ſingly without intention of miſchief is no ground for puniſhment, damages are the only means within the compaſs of law for compelling a man to be diligent in his duty. So far the remedy afforded by a court of common law is complete, without neceſſity of recurring to a court of equity.

Certain covenants unknown to common law, belong to a court of equity. This was the caſe of a bill of exchange, before it was brought under common law by act of parliament; and while it continued in its original ſtate, damages from failure of performance could not be claimed but in a court of equity. A policy of inſurance is to this day unknown at common law; and conſequently every wrong relative to it muſt be redreſſed in a court of equity.

And now as to the rules for eſtimating actual damage upon failure to perform a covenant.

covenant. A failure of duty, whether the duty ariſe from a covenant, or from any other cauſe, is a fault only, not a crime; and upon ſuch failure no conſequential damage that is uncertain ought to be claimed *. There is the greateſt reaſon for this moderation with reſpect to covenants, where the failure is often occaſioned by a very ſlight fault, and ſometimes by inability without any fault. This rule is adopted by writers on the Roman law: "Cum per venditorem ſteterit quo minus "rem tradat, omnis utilitas emptoris in "æſtimationem venit: quæ modo circa "ipſam rem conſiſtit. Neque enim, ſi "potuit ex vino puta negotiari, et lucrum "facere, id æſtimandum eſt, non magis "quam ſi triticum emerit, et ob eam rem "quod non ſit traditum, familia ejus fa-"me laboraverit: nam pretium tritici, "non ſervorum fame necatorum, conſe-"quitur †." "Venditori ſi emptor in "pretio ſolvendo moram fecerit, uſuras "duntaxat præſtabit, non omne omnino "quod venditor, mora non facta, conſe-"qui potuit; veluti ſi negotiator fuit, et,

* See above, p. 98.

† l. 21. § 3. Empti et venditi.

" pretio ſoluto, ex mercibus plus quam ex " uſuris quærere potuit *."

At a ſlight view it might be thought, that to reject uncertain damage here is inconſiſtent with what is laid down above concerning a jailor or a meſſenger. But upon a more accurate view it will appear, that uncertain damage is not admitted in either caſe. The creditor's riſk upon eſcape of his priſoner is certain, however uncertain the conſequences may be. It is this riſk only that is eſtimated; and it is eſtimated in the moſt accurate manner, by relieving the creditor, and laying it on the jailor or meſſenger. Upon the whole, with reſpect to eſtimating actual damage from breach of covenant, there appears no defect in common law more than in eſtimating riſk, to make the interpoſition of equity neceſſary.

Hitherto of a total failure. Next where the failure is partial only. Many obligations are of ſuch a nature as to admit no medium between complete performance and total failure. Other obligations admit a partial performance, and conſe-

* l. 19. De peric. et commod. rei vend.

quently a failure that is but partial. A bargain and ſale of a horſe furniſhes examples of both. The vender's performance is indiviſible: if he deliver not the horſe, his failure is total. The obligation on the purchaſer to pay the price, admits a performance by parts: if he have paid any part of the price, his performance is partial, and his failure partial.

Many obligations *ad facta præſtanda* are of the laſt kind. A waggoner who engages to carry goods from London to Edinburgh, and yet ſtops ſhort at Newcaſtle, has performed his bargain in part, and conſequently has failed only in part. The like, where a ſhip freighted for a voyage, is forced, by ſtreſs of weather, to land the cargo before arriving at the deſtined port. In caſes of that kind the queſtion is, What is the legal effect of a partial failure. The anſwer is eaſy at common law, which takes the bargain ſtrictly according to the ſtrict meaning of the words. I am not bound to pay the price or wages till the whole goods be delivered as agreed on. But in order to anſwer the queſtion in equity, a culpable failure muſt be diſtinguiſhed from a failure occaſioned by accident

dent or misfortune: a culpable failure can expect no relief from equity; the rule being general, That equity never interposes in favour of a wrong-doer: but where the failure is occasioned by accident or misfortune, the price or wages will be due in proportion to what part of the work has been done; and the claim rests on the following maxim, *Nemo debet locupletari aliena jactura.* Thus, where a man undertakes to build me a house for a certain sum, and dies before finishing, his representatives will be entitled to a part of the sum, proportioned to the work done; for in that proportion I am *locupletior alienâ jacturâ.* And in the case above mentioned, if the waggoner die at Newcastle, or be prevented by other accident from completing his journey, he or his executors will have a good claim *pro rata itineris.* By the same rule, the freight is due *pro rata itineris*, as was decreed Lutwidge *contra* Gray *.

A process was lately brought before the court of session upon the following fact. Mariners were hired at Glasgow to per-

* See the Dictionary, title (*Periculum*).

form a trading voyage, firſt to Newfoundland, next to Liſbon, and laſt to the Clyde. A certain ſum per month was agreed on for wages, to be paid when the voyage ſhould be completed. The Glaſgow cargo was ſafely landed in Newfoundland; and a cargo of fiſh, received there, was delivered at Liſbon. In the homeward paſſage, the ſhip with the Liſbon cargo being taken by a French privateer, the mariners, when liberated from priſon, claimed their wages *pro rata itineris*. This cauſe was compromiſed. It can ſcarce however admit of a doubt, but that the rule, *Pro rata itineris*, muſt hold with reſpect to mariners, as well as with reſpect to the freighter of a ſhip. And accordingly it is a common ſaying, That the freight is the mother of the ſeamens wages; meaning, that where the former is due, the latter muſt alſo be due.

What is ſaid above is applicable to a leaſe. A leaſe, in its very nature ſuppoſes a ſubject poſſeſſed by one, for the uſe of which he pays a yearly ſum to another: the poſſeſſion and rent are mutual cauſes of each other, and cannot ſubſiſt ſeparately. Land ſet in leaſe happens to be ſwallowed

lowed up by the ſea: this puts an end to the leaſe. Here the failure is total. A total ſterility is in effect the ſame. Let us now ſuppoſe the ſterility to be partial only. What ſays common law? It ſays, that ſuch ſterility will not intitle the leſſee to any deduction of rent; that he muſt abandon the farm altogether, or pay the whole rent. In the following caſe, ſeveral rules of equity concerning ſterility are opened. In January 1755, Foſter and Duncan ſet to Adamſon and Williamſon a ſalmon-fiſhing in the river Tay, oppoſite to Errol, on the north ſide of a ſhallow, named the *Guinea-bank*, to endure for five years. The river there is broad; but the current, being narrow, paſſed at that time along the north ſide of the ſaid bank, the reſt of the river being dead water. As one cannot fiſh with profit but in the current, the leſſees made large profits the firſt two years, and were not loſers the third; but the fourth year the current changed, which frequently happens in that river, and inſtead of paſſing as formerly along the north ſide of the bank, paſſed along the ſouth ſide, which was a part of the river let to others; by which means the fiſhing let to Adamſon

ſon and Williamſon became entirely unprofitable during the remainder of their leaſe. The granters of the leaſe having brought a proceſs againſt the leſſees for L. 36 Sterling, being the rent for the two laſt years, the defence was, a total ſterility by the change of the current as aforeſaid; and a proof being taken, the facts appeared to be what are above ſtated. It was pleaded for the purſuers, That whatever may be thought with reſpect to a total ſterility during the whole years of the leaſe, or during the remaining years after the leaſe is offered to be given up, the ſterility here was temporary only: for as the ſtream of the river Tay is extremely changeable, it might have returned to its former place in a month, or in a week; and as the leſſees adhered to the leaſe, and did not offer to ſurrender the poſſeſſion, they certainly were in daily expectation that the current would take its former courſe. A tenant cannot pick out one or other ſteril year to get free of that year's rent: if equity afford him any deduction, it muſt be upon computing the whole years of the leaſe; for if he be a gainer upon the whole, which is the preſent caſe, he has no claim

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in equity for any deduction. It was carried, however, by a plurality, to ſuſtain the defence of ſterility, and to aſſoilzie the defenders from the rent due for the laſt two years. This judgement ſeems no better founded in equity than at common law. And it is eaſy to diſcover what moved the plurality: In a queſtion between a rich landlord and a poor tenant, the natural bias is for the latter: the ſubject in controverſy may be a trifle to the landlord, and yet be the tenant's all. Let us put an oppoſite caſe. A widow with a numerous family of children has nothing to ſubſiſt on but her liferent of a dwelling-houſe, and of an extenſive orchard. Theſe ſhe leaſes to a gentleman in opulent circumſtances, for a rent of L. 15 for the houſe, and L. 25 for the orchard. He poſſeſſes for ſeveral years with profit. The orchard happens to be barren the two laſt years of the leaſe, and he claims a deduction upon that account. No one would give this cauſe againſt the poor widow. Such influence have extraneous circumſtances, even where the judges are not conſcious of them.

Partial failure has hitherto been conſi-

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dered in its conſequences with reſpect to the perſon who has failed to execute a commiſſion. I proceed to the effect of a failure with reſpect to thoſe who give the commiſſion. A ſubmiſſion is a proper example. It being the profeſſed intention of a ſubmiſſion to put an end to all the differences that are ſubmitted, the arbiters, choſen to fulfil that intention, are bound by acceptance to perform. An award or decreet-arbitral is accordingly void at common law, if any article ſubmitted be left undecided; for in that caſe the commiſſion is not executed. Nor will ſuch a decreet-arbitral be ſuſtained in a court of equity, where claims made by the one party are ſuſtained, and the other left to a proceſs; which is partial and unfair. But where the claims are all on one ſide, and ſome of them only decided, equity will ſupport the decreet-arbitral; it being always better to have ſome of the claims decided than none. But in this caſe, the decreet-arbitral, ſo far as it goes, muſt be unexceptionable; for a court of equity will never ſupport a deed or act void at common law, except as far as it is juſt.

SECT. IX.

Indirect means employed to evade performance.

AMong perſons who are ſway'd by intereſt more than by conſcience, the employing indirect means to evade their engagements, is far from being rare. Such conduct, inconſiſtent with the candor and *bona fides* requiſite in contracting and in performing contracts, is morally wrong; and a court of equity will be watchful to diſappoint every attempt of that kind. Thus, if a man, ſubjected to a thirlage of all the oats growing on his farm that he ſhall have occaſion to grind, ſell his own product of oats, and buy meal for the uſe of his family, with no other view but to diſappoint the thirlage; this is a wrong *contra bonam fidem contractus*, which will ſubject him to the multure that would have been due for grinding the oats of his own farm. The following caſe is an example of the ſame kind. A gentleman be-

ing abroad, and having no proſpect of children, two of his neareſt relations agreed privately, that if the eſtate ſhould be diſponed to either, the other was to have a certain ſhare. The gentleman, ignorant of this agreement, ſettled his eſtate upon one of them, reſerving a power to alter. The diſponee ſent his ſon privately to Denmark, where the gentleman reſided: upon which the former deed was recalled, and a new one made upon the ſon. In a proceſs, after the gentleman's death, for performance of the agreement, the defence was, That the agreement had not taken place, as the diſpoſition was not in favour of the defendant, but of his ſon. The court judged, That the defendant had acted fraudulently in obtaining an alteration of the ſettlement, in order to evade performance of the agreement; and that no man can take benefit by his fraud. For which reaſon he was decreed to fulfil the engagement, as if the alteration had not been made *.

* Stair, 15th July 1681, Campbell contra Moir.