




B O O K III.

Of Obligations, and personal Rights, their Nature, the several Kinds of them, how acquired, and annulled.

1. BLIGATION is a legal Tie, binding one to pay or perform any Thing to another: It consists of two Parts, *viz.* The Interest of the Creditor therein to exact what is due, whence it is called a *personal Right*; and the Burden upon the Debtor, whence it is term'd an Obligation.

2. Obligations are either natural, or civil.

3. Natural Obligations are those, which arise from mere natural Equity. Whereof some produce Action with us, as the Obligations of Parents to aliment their Children, and Husbands to entertain their Wives, &c. Others are without any civil Effect, or coercive, and are left to the Conscience of the Parties, as the Obligations to Gratitude, Charity and Mercy, &c.

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162 Part II. *Institutes of the* Book III.

4. Civil Obligations are those, which owe their Birth and Authority to positive Law, or municipal Custom, and afford Action for Performance thereof. These are either Principal, or Accessory.

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Of Principal Obligations.

PRINCIPAL Obligations are variously divided. 1. They are either pure and simple, or conditional, or to a Day. 2. They are onerous and lucrative, or gratuitous. 3. They spring either from Contracts, or *quasi* Contracts, or from Crimes and Offences.

T I T. I.

Of Obligations pure, conditional, and to a Day.

1. **A** Pure or simple Obligation is that, which hath present Effect, and the Granter stands bound from the Date to pay or perform.

2. A conditional Obligation is that, which is of no Efficacy, till something is performed, or happen, which may, or may not be. The Condition must, 1. Be possible, that is, such as may naturally happen, or is in the Creditor's Power: For, an impossible Condition voids the Obligation it is adjected to. A Condition is impossible either *de Facto*, which naturally cannot come to pass, or *de Jure*, which is contrary

Ch. i. Law of Scotland. Tit. 2. 163

trary to Law or good Manners. 2. A Condition must be uncertain, and relate to the Time to come. For, if it be certain, by relating only to the present or past Time, tho' unknown to the Parties, the Obligation granted under such Condition, is either effectual, or null from the Date, according as the Condition hath happened, or not. Sometimes a Condition is implied; tho' not expressed: As an Obligation to pay a Tocher, implies this Condition, if the Marriage be perfected.

3. An Obligation to a Day is that, which is presently binding, but, whereof Performance cannot be sought for a certain Time. After elapsing whereof, *dies interpellat pro Homine*; the Debtor is *in Mora*, without Necessity upon the Creditor to require Payment.

4. A conditional Obligation differs from an Obligation to a certain Day; in that the former is annulled, by the Creditor's dying before the Condition exist; whereas, the latter, upon the Creditor's dying before the Day, passeth to his Representatives.

T I T. II.

Of Obligations onerous and lucrative.

1. **A**N onerous Obligation is that, which is made for a valuable Cause or Consideration.

2. A lucrative Obligation is that, which is made for mere Love and Favour, to the Re-

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164 Part II. Institutes of the Book III.

ceiver, or, for which nothing is done or paid, called a *Donation* or *Gift*.

3. A *Donation* is perfected, by Consent of the Donor or Giver, and the Acceptance of the Donee or Donatary, to whom the Gift is made.

4. *Donations* are either Proper, or Improper.

5. A Proper *Donation* is the bestowing something upon another, without any other Motive, than that the Donor may exercise an Act of Liberality. Which is so little favoured in Law, that none are presumed to gift. Far less is a Debtor presumed to do so: So that any posterior Obligation granted by him in Favour of his Creditor, without an onerous Cause, is interpreted to be in Security or Satisfaction of the former *pro tanto*. But, this Presumption of Law may be taken off by stronger Arguments, inferring a Design rather to gift, than pay. Thus, Provisions, by Parents to Children *in Familia*, are not ascribed in Satisfaction of anterior Bonds of Provision granted to them, if the latter were not made in the Childrens Contracts of Marriage. A Father alimending his Children, is presumed to do so *ex pietate*, without any Design to oblige them. Aliment furnished to any Person of Discretion after Pupillarity, without any Agreement to pay for it, is presumed to be given *gratis*; if the Furnisher was not in Use to get Money for so doing. A Debtor granting to his Creditor a Bond, bearing expressly the Motive

Ch. 1. Law of Scotland. Tit. 3. 165

tive of Love and Favour, or to be over and above the Sum formerly due, is not understood thereby to compensate the former Debt.

6. Improper Donations are remuneratory Gifts, made in Recompence of Services, and Donations in Prospect of Death.

A Donation made in Prospect of Death is of the Nature of a Legacy, and voided by the Donor's surviving the Donee or Donatary.

T I T. III.

Of Obligations arising from Contracts, and the several Kinds of them.

1. **A** Contract is an Engagement betwixt two or more Persons, effectual to force Performance by an Action.

2. In all Contracts, some Things are essentially required, as, 1. That the Parties be capable of contracting. Some are simply incapable, as those, who want the free Use of their Reason, married Women, &c. Others cannot contract to their Prejudice, as Persons under Age, &c. 2. Parties must consent, which Consent may be either express, by Word or Writ; or tacit, by Deeds importing Consent. Consent tacitly inferr'd from Fact or Deed, is called *Homologation*. But *Homologation* cannot take Place, where it is not proved or presumed, that the Homologator knew the Right to which his Deed is alledged to import a Consent: Nor, where his Deed may be ascribed to another

166 Part II. Institutes of the Book III.

ther Cause. Nor yet is Homologation inferred from a necessary involuntary Act, to which the Party might have been compelled by Law. Consent must be given with Knowledge of what is necessary to be known, in order to form the Engagement, and with Freedom (a). 3. The Subject Matter of the Contract must be, a Thing in Commerce, and in Man's Power, and such as Law allows of. Thus *pactum de quota litis*, whereby Advocates agree to have a Share of the future Profit of a depending Plea, is null. But a Contract is not quarrellable, upon the Account of enorm Lesion or Prejudice sustained by either Party.

3. Contracts may be variously divided. *imo*, Some are obligatory upon one Side, or upon one of the Parties only; others are reciprocal and obligatory upon both. In reciprocal Contracts, where the mutual Obligements are either conceived conditionally, *viz.* That the one Part being performed, the other should be performed also, or, are Causes of each other; neither Party can demand Implement from the other, till he himself perform. 2. Contracts are, 1. Real, or those perfected, by the Intervention of Things given or done. 2. Verbal. 3. Written Contracts. 4. Those perfected by sole Consent. 5. A Contract perfect, partly by Writ, partly by Consent.

T I T.

(a) *Vid.* Part. I. B. II. Ch. 2. Tit. 1. Sect. 1, and 2.

 Ch. 1. *Law of Scotland.* Tit. 4. § 1. 167

T I T. IV.

Of real Contracts, or those perfected by the Intervention of Things.

THESE are, 1. The Loan of Money, and other Things to be restored in Kind. 2. The Loan of Things to be restored *in Specie*. 3. *Depositum*. 4. Exchange or Exambion. 5. Policy of Insurance.

S E C T. I.

Of the Loan of Money, and other Things to be restored in Kind.

1. THE Loan of Things to be restored in Kind, is a Contract, whereby a certain Quantity of Fungibles, or Things that pass in Commerce by Number, Weight or Measure, such as Money, Corn, Wine, or the like, is given by one to another; on Condition, that he shall restore the Equivalent in Quantity and Quality, at the agreed Time.

2. The Borrower of Corn, Wine, and the like, owes the same Quantity and Quality borrowed, and neither more nor less, whether the Price be risen or fallen. But in the Loan of Money, the Debt is to be paid, according to the Course of Money, or the extrinſick Value set upon it by lawful Authority, at the Time of Payment, *v. g.* 100 Crowns borrowed, may be repaid in fewer, if that *Species* of

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168 Part II. Institutes of the Book III.

Money was cried up, and heighten'd in Value before the Payment ; and more should be repaid, in case of the Value's being lower'd.

3. The ordinary Way of borrowing Money among Merchants is, by an Exchange Contract contained in Bills. Whereof some are conditional, making the Sum therein payable, only upon some Condition, as Bills of Bottomry ; others are pure and simple, which are absolutely to be paid at a precise Time, as Bills of Exchange.

S E C T. II.

*Of the Loan of Things to be restored in Specie,
or in the same Substance.*

1. A Loan of Things to be restored *in Specie*, is a Contract, by which one gives a Thing to another for a special Use, on Condition, that after he hath used it so long, as his Occasions required, the same individual Thing be returned in as good Condition as it was, when lent.

2. He who borrows a Thing for his own Use, as a Horse to make a Journey for his own Business, is obliged to take Care of it, with all the Exactness that is usually observed by the most diligent Persons, and is to answer for all the Loss and Damage happening for Want of such a due Care. When a Thing is borrowed for the mere Behoof of the Lender, as a Horse to go into the Country about his Affairs ; the Borrower is liable only for what
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Ch. 1. Law of Scotland. Tit. 4. § 2. r69

may happen thro' his Fraud, or any gross Fault that is next Door to it. If the Loan be given for the common Advantage of both Borrower and Lender, as a Horse to the Lender's Copartner, to go and look after the common Concerns of the Company; the Borrower must answer for what falls out thro' his Want of that Care, which a discreet and diligent Man takes in his own Concerns. But, if it has been agreed what Care the Borrower should take of the Thing lent, such Agreement is the Rule of his Diligence.

3. Seeing the Lender remains Proprietor of the Thing which he lends, if the Borrower has used it only during the Time, and for the Purpose to which it was lent him, and it perishes, or is diminished, without his Fault, by Accident, or by the bare Effect of the Use, which he had Right to put it to; the Owner bears the Loss: Unless the Borrower took upon himself all Accidents.

4. The Borrower is obliged to restore the Thing back, after it has served the Use for which it was lent, without any Claim from the Lender, of Expences necessary in order to make Use of it; but only of extraordinary Charges bestowed upon it.

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 176 Part II. *Institutes of the* Book III.

S E C T. III.

Of Depositum.

A *Depositum* in general is, the committing of any Thing to the Custody of another in Trust. Which may be divided into *Depositum* properly so called, and *Sequestration*.

I.

Of Depositum, properly so called.

1. A *Depositum* properly so called is, a Contract by which one Person gives to another Something to keep without Reward, on Condition, that he restore it, whenever demanded by him, who deposited the same. He who deposits, is term'd the *Depositor*, and the other the *Depositary*.

2. If the *Depositary* suffer the Thing deposited to be lost, to perish or be spoiled thro' his Fraud, or gross Fault, or inexcuseable Negligence, or by not taking the same Care of it that he does for his own Concerns; he is bound to make it good: But, if such Loss or Damage happen by Accident, or thro' some small Neglect, or Want of that Care, which another prudent Man probably would have used; the *Depositary* is not accountable for it.

3. The Thing deposited must be restored, when the *Depositor* thinks fit to call for it, with the Produce, *i. e.* the Fruits and Profits:
And

Ch. I. Law of Scotland. Tit. 4. § 3. 171

And the Depositary recovers any necessary and profitable Charges laid out by him in keeping it; but cannot detain it with him, in Compensation of other extrinsick Debt owing to him by the Depositor.

4. That a Writ out of the Hand of the Granter, was deposited upon Terms, can be proved only by the Writ or Oath of the Person, in whose Favour it is conceived, and not by the Depositarie's Oath: But the Terms of Depositing may be proved by his Oath.

II.

Of Sequestration.

1. Sequestration is, the depositing of a Thing, whereof the Property or Possession is disputed, by two or more pretending to it, in the Hands of a Third Person, to keep, till the Controversy be decided, and to restore it to him, who shall be acknowledged or declared the true Owner.

2. Sequestration is either *voluntary*, which is made by the Agreement of Parties; or necessary, which is directed by Authority of a Judge, and is therefore, called a *judicial* Sequestration.

3. Judicial Sequestration with us is, a committing the Custody and Management of a Thing controverted in Judgment among several Pretenders, to some indifferent Person, by an Act and Commission of the Lords of Session,

172 Part. II. Institutes of the Book III.

sion, to be made forthcoming to such, as shall be found to have best Right. This Trustee is appointed, at the Desire of Parties interested, by the Lords, upon several Occasions: As for managing an overburdened Estate, pending the Ranking of the Creditors Interests, or, for managing *Hæreditatem jacentem*, during the Time that the apparent Heir deliberates, or is perhaps Abroad, and ignorant of his Interest, called *Curator bonis*; a Factor on the Estate, for keeping controverted Moveables, as Jewels, Plate, Heirship, &c. Sometimes *Curator bonis* is named by the King's Gift.

4. Factors appointed by the Court of Session, for managing sequestred Estates, must not be Writers or Dependens on the Session; They find Caution for their Diligence and Fidelity; are allowed Salaries, besides their Expences; must, within six Months of extracting their Factories, give into the Lords a Rental of the Estate, and bygone Rents, and yearly give in Schemes of their Accompts; are liable for Annualrent of what Rents they recover, or might have recovered, within a Year after the same are due; cannot, during their Office, become Creditors upon the sequestred Estates, except by Succession, and are exauctorated by the Lords.

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Ch. 1. Law of Scotland Tit. 4. § 4, 5. 173

S E C T. IV.

Of Exchange or Excambion.

EXCHANGE is a Contract, by which any one Thing, except Money, is agreed to be given for another. If either of the Things bartered, appear before Delivery to belong to some Third Person, the other Party may refuse to accept of it, and retain what he was to give in Exchange for it. If it be evicted by the Owner after Delivery, the Contract becomes void, and the Party from whom it was evicted, hath Recourse to what he gave in Exchange: Which he may recover from singular Successors for an onerous Cause.

S E C T. V.

Of the Policy of Insurance.

THE Policy of Insurance is a Contract, whereby one, for a *Premium* or Price stipulated, takes upon him the Peril of Ships, Goods, or any other Thing subject to Hazard.

T I T. V.

Of verbal Contracts:

1. **V**ERBAL Contracts are those, made by the Interposition of Words. Which are either Promises, verbal Offers, or Pactions.

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174 Part II. Institutes of the Book III.

2. A Promise is a Contract, whereby one doth verbally engage himself to pay, or do something to another, without mutual Agreement. Which is binding before the Person, to whom it is made, accept thereof. But some Promises may, even after such Acceptance, be refiled from; As a Promise of Marriage may be past from, before Copulation follow upon it; and a Promise to grant any Right that requires by the Nature thereof, or is agreed by the Parties, to be perfected in Writ, may be refiled from, till the Writ be sign'd, and delivered.

3. A verbal Offer to give or perform Something to another, is not of Force, till it be accepted by him; For, till then, the Offerer may revoke it; and it falls by his Death.

4. A Paction is a verbal Agreement betwixt two or more to do, or not to do.

5. Gratuitous Promises, tho' of a Sum never so small, cannot be proved by Witnesses, but only by Oath of Party. But a Promise incident to a Bargain concerning Moveables, and Merchant Bargains made in Markets, may be proved by Witnesses.

T I T. VI.

Of written Contracts.

1. **A**LL probative Writs with us, are either *publick*, as Instruments of Notaries; or *private* Writs, under the Hands of private Persons;

Ch. 1. Law of Scotland. Tit. 6. 175

Persons, or Corporations, as Contracts, Bonds, Bills, Tickets, Dispositions.

2. Some Obligations require Writ to make them binding, others require it only for Proof.

3. Obligations requiring to be perfected by Writ, are either those that require it as an essential Solemnity, *viz.* Dispositions of Heritage, Tacks for longer Time than a Year, Rentals, Assignations, and all Matters of Importance that is, exceeding in Value 100 *lib. Scots*; or, a Sum never so small that is to be annually paid, which may be paid from by either Party, till the Writ be sign'd; or, such as are agreed to be reduced in Writ, tho' they may be made without it, which may be refiled from, before the Writ be perfected.

4. Many of our Writs must be on stamp'd Paper or Parchment, otherwise are ineffectual, unless the Stamp-duty be paid, and Five Pound *Sterling* to the Crown, to supply the Defect (*a*).

5. Contracts, Dispositions, or other Securities may be written, either on Sheets battered together, and the Margins at the joining of the Sheets signed by the Parties; or by Way of Book, in Leaves of Paper, whereof every Page is marked by the Number, and signed by the Parties, and the End of the last Page, (which the Witnesses need only to sign in Writs, requiring Witnesses) mention how many Pages it consists of (*b*).

6. All

(*a*) 10. A. C. 19. junct. 12. A. Sess. 2. C. 9.

(*b*) Act 15. Sess. 6. Par. K, W.

176 Part II. Institutes of the Book III.

6. All private Rights or Obligations must be signed by the Granters, if they can write, or by Notaries for them, if they cannot. The King superscribes his Deeds, and his Secretary of State subscribes the same. Subjects do only subscribe. Noblemen and Bishops, are allowed to subscribe by their Titles, and all other Persons by their Names and Surnames (*a*), either at length, or by the two initial Letters thereof.

7. Contracts or other Deeds of Importance do commonly require more Solemnity, than others of less Consequence. For no Writ of Importance is sustained, except it be not only signed before two designed Witnesses, if the Party can write; or, by two Notaries in Presence of four designed Witnesses, if the Party cannot write (*b*); but also subscribed by the Witnesses (*c*), and specially name and design the Writer (*d*). Where a Party cannot write, he must give Warrant to two Notaries to subscribe for him, by touching the Notaries Pen. Witnesses in written Contracts, called Instrumentary Witnesses, should be designed (*i. e.* their Additions, by which they may be distinguished from others marked) in the Body of the Writ, and ought not to subscribe as Witness, unless they know the Parties, and saw them sign, or saw or heard them give Warrant

(*a*) Act 21. Par. 2. Sess. 3. Ch. II. (*b*) Act 80. Par. 6. J. VI. (*c*) Act 5. Par. 3. Ch. II. (*d*) Act 175. Par. 13. J. VI.

Ch. 1. Law of Scotland. Tit. 6. 177

rant to a Notary or Notaries, to subscribe for them; and in Evidence thereof, touch the Notary's Pen, or heard them acknowledge their Subscriptions at the Time, under the Pain of Accession to Forgery (*a*). If there be Marginal Notes, or Additions upon the Paper, these must all be sign'd by the Party, and the Writ should bear, that the Witnesses are also Witnesses to the Marginal Note or Notes, whereof the Number, if more than one, should be expressed.

8. But any Writ for a Sum, not exceeding 100 *lib.* (if it be not to be annually paid) needs not Witnesses; and, where the Granter cannot write, one Notary and two Witnesses may subscribe for him. Nay, even some Writs of Importance are sustain'd, tho' wanting Witnesses. As, 1. Contracts of Marriage. 2. A Tripartite Contract. 3. Holograph Writs, that is, all written with the Granter's Hand, are good without Witnesses, but do not prove their Dates. 4. Bills of Exchange, and Letters of Credit. But Promissory Notes are not privileged in *Scotland*. 5. Notes, or Orders for Military Discipline, or circulating the Pay of a Regiment. 6. A Testament, tho' of great Importance, sign'd by one Notary, or a Minister of the Gospel, who may act as a Notary in Testaments for one, who cannot write, in Presence of two subscribing Witnesses, is good.

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9. Date

(*a*) Act 5. Par. 3. *Ch. II.*

178 Part II. Institutes of the Book III.

9. Date and Place are not necessary Essentials in a Writ, unless the Verity of it be questioned.

10. Writs, not excepting Bills of Exchange, wherein the Names of the Persons in whose Favour conceived, are left blank, and not inserted before, or at subscribing, or, at least, in Presence of the Witnesses to the subscribing, before Delivery, are null. But Indorsations of Bills of Exchange, or the Notes of any trading Company are excepted (*a*).

11. An Obligation in Writ is regularly not binding, till it be delivered to the Creditor: But some Writs are effectual without Delivery: As mutual Contracts, Writs bearing a Clause dispensing with the Delivery, or reserving a Liferent or Faculty to the Granter to alter, Bonds granted by Patents to their Children.

12. Publick Writs, as the Instruments of Notaries, Acts of Office written by common Clerks, are null, for wanting the Writer's Name and Designation. And seeing Incorporations and publick Offices are allowed to print their Bonds, with Blanks for the Substantials, to be filled up as Occasion offers; such printed Bonds are good, if the Filler up of these Blanks, *viz.* the Debtor's Name and Designation, Sum, Date and Witnesses be named and designed: Otherwise they are null.

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(*a*) Act 25. Seff. 6. Par. K. W.

Ch. 1. Law of Scotland. Tit. 7. § 1. 179

13. A foreign Deed, which, by its own Nature, is *modus habilis*, to convey any Right or Estate belonging to the Granter in *Scotland*, will, if solemn, according to the Law of the Place, where it is made, be sustained here. But a foreign Deed, which, by the Nature of it, is not habile to convey such Interest belonging to the Granter in *Scotland*, tho' effectual by the Law of the Place, where it is made, would not be sustained here.

T I T. VII.

Of Contracts perfected by sole Consent.

These are Selling and Buying, Letting out and Hiring, Partnership, and Mandate or Commission.

S E C T. I.

Of Selling and Buying.

1. **SELLING** and Buying is a Contract, by which one gives a Thing for a Price in current Money.

2. A Sale is, either private, betwixt the Buyer and Seller; or publick and open, by Auction or Roup.

A Sale, by Way of Auction or Roup, is, when publick Intimation is made of a Day when, and the Terms upon which, the Goods are to be exposed to Sale. Which is either vo-

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180 Part II. Institutes of the Book III.

luntary, at the Pleasure of the Owner, or necessary, by a Decree of a Court of Justice.

3. All Things that ly in Commerce, either actually existing, or the uncertain Expectation of what may be ; as a Draught of Fishes before the Net is thrown, may be sold. Yea, the Sale of a Thing belonging to a Third Person subsists, to make the Seller liable for Damages to the Buyer, in case it be evicted by the true Owner. But there are some Things, which, tho' not altogether exempted from Commerce, the Owner cannot warrantably sell to some Persons ; as, contraband Goods to Enemies. Other Things some Persons are discharged to buy, tho' others are not : As, Members of the College of Justice are prohibited to buy depending Pleas, upon Pain of losing their Places, and all the Privileges thereof (*a*). Things again, which are the proper Subject of Commerce, are restrain'd, as to the Manner of Buying, by the Laws against Fore-stalling, Re-grating, and In-grossing, or, as to the Manner of Selling, by the Law against Monopolies.

4. The Seller is obliged to declare to the Buyer any latent or secret Insufficiency or Defect of the Thing sold, which renders it so unfit for the Use for which it was bought, that if it had been known to the Buyer, he would not have bought it : Otherwise, there is Place for Redhibition ; that is, the Seller is obliged

(*a*) Act 21 6. Par. 14. §. VI.

Ch. 1. Law of Scotland. Tit. 7. § 1. 181

obliged to take back the faulty Thing, and the Sale may be dissolved.

5. The Price must be certain, or such as may be ascertained by the Determination of one, to whom it is referred. It may be referred either to a Third Party, or to the Seller. In which Case, if the Third Party neither can, nor will determine the Price, or the Seller make it extravagantly high; the Lords of Session will determine or modify.

6. When an individual Thing is bought, or a Parcel of Goods sold by Bulk, the Sale is perfect, at the same Time that the Parties are agreed about the Merchandise and Price thereof. But, if Goods of such a Number, Measure or Weight are sold, the Sale is not perfect, till they be counted, measured or weighed: Because, till then, it cannot be known precisely what is sold. And, if it be agreed, that the Bargain should be put to writing, it is not perfected, till the Writing be signed.

7. The Effect of a Sale, perfected in either of the Ways aforesaid, is, that the Seller is bound to deliver the Goods, and the Buyer to pay the Price, and the Bargain cannot be avoided, unless both consent. Again, the Buyer stands to all Loss happening to the Goods, while undelivered, without the Seller's Fault or Negligence, tho' the Property is not transferred to the former, till Delivery; and reaps the Profit of all Changes, which make them better. But, if they happen to be destroyed or

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182 Part II. *Institutes of the* Book III.

diminished, after the Seller is in Fault for not delivering them, he bears the Loss.

8. Some accidental Accessaries, not essential to this Contract, may be added to it. 1. Earnest (which we call *Arles*) is frequently given by the Buyer to the Seller, as a Symbol of the Bargain, which is a Piece of Money, or other Thing. The Effect of Earnest is sometimes regulated by Agreement: And where nothing is expressed about it, the Earnest, if it be a Species, ought to be returned after the Price is paid; if it be Money, it is reckoned as a part of the Price. 2. It is an usual Pactio in Sales, that if the Price be not paid at the Time appointed, the Sale shall be void. 3. It is sometimes agreed, that the Seller shall be at Liberty to take back the Goods, he restoring the Price, which is called a *Reversion*, or Power of Redemption. 4. That the Seller and his Heirs shall have the Privilege to buy back again what is sold, before any other offering the like Price, which is called *jus Retractus*.

S E C T. II.

Of Letting out and Hiring.

I. LETTING and Hiring is a Contract, by which one Party gives to the other the Enjoyment or Use of a Thing, or of his Labour, during a limited Time, for a certain Rent or Hire,

Ch. 1. Law of Scotland. Tit. 7. § 2. 183

Hire, which may be either in Money, or any other Fungible.

2. Not only Moveables, but also Immoveables, as Houses, Lands, &c. may be Let out for Hire: But the Letting of Lands is called a *Tack*, of which I have treated in another place (a).

3. He who Lets a Thing, is bound to give the free Use and Enjoyment of it, to him to whom he Lets it out; to make the necessary Repairs, which the latter is not bound to make by Agreement; to maintain him in the free and undisturb'd Possession; and if evicted from him, is liable for Damage.

4. He who takes a Thing to Hire, cannot put it to any other Use, than that for which it was given him, is accountable for any Damage happening to it, thro' his Fault, which any careful and diligent Man would not have fallen into; and after the Time, for which the Thing was Let, is expired, he who hired it ought to restore it to the Person who Let it to him, and to pay the agreed Rent or Hire. But the Hire is not due, if the Thing Let, by reason of some Defect therein, be not in a Condition to serve the Use for which it is Hired.

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(a) Supr. B. II. Ch. 4. Tit. 4. Sect. 6.

184 Part. II. *Institutes of the Book III.*

S E C T, III.
Of Partnership.

I. PARTNERSHIP is a Contract, by which two or more Persons join in common Money or Goods, and Labour or Service, for carrying on some lawful Commerce, Work, or other Business, that they may share among them all the Gain or Loss thence arising.

2. Money or Goods only, or Labour and Service only may be contributed by all the Partners; or Money and Goods by some, Labour and Service by others: Whereof the Contribution may be equal, or unequal. Where nothing is expressly agreed as to the Communication of Gain or Loss, all are to share therein, proportionably to their Contribution of Money, or Goods, or Pains. If the Shares of Profit and Loss, that every one is to expect, be expressed, that must be observed; whether it be agreed, that those shall be equal, where the Contribution is unequal; or unequal, where the Contribution is equal. For it may be justly stipulated, that one shall have a greater Share of the Profit, than he shall bear of the Loss; and that another shall bear a greater Part of the Loss, than he shall have in the Profit; and that a third shall have a share of the Gain, and be altogether free from Loss. Because the Advantages which the Company may reap from the Credit, Interest, or Knowledge

Ch. 1. Law of Scotland. Tit. 7. § 3. 185

ledge of one Partner, or from the Pains he takes, or Dangers he exposes himself to in the Management of the common Concern, may compensate the allowing to share in the Profit, without Hazard or Loss. But such an Agreement, that the whole Loss should fall upon one of the Partners, and the whole Profit go to the other, is unlawful, and inconsistent with a Partnership. If the Portions of the Gain only to accrue to the respective Partners, be expressed, those of the Loss will be regulated on the same Foot: And the mentioning only what Part of the Loss every one must bear, imports, that they shall share of the Gain in the same Proportion.

3. That is only understood to be Gain, in order to a Division among the Partners, which remains clear after all the Losses and necessary Expences are deducted: Loss is reckoned only so far, as it exceeds what is gain'd.

4. Partnerships are limited to the Commerce, or other peculiar Business thereof, and doth not extend to other Things which were to be joined in common.

5. Partners are obliged to advance, according to their Shares, for furthering the Affairs of the Community. One of more Partners, by doing in the common Concern, as buying Goods, borrowing Money, &c. doth oblige and profit the rest, if he act either in the Name of the Society, or by their express Warrant, or according as they have been accustomed

185 Part II. Institutes of the Book III.

ed to act. But what he other Ways does, binds only himself. Each Partner has a Negative in what is necessary for the Design of the Society; unless it be otherwise provided, *viz.* That the Plurality should determine in all Matters. Partners are liable to such Diligence, as Men use in their own Affairs.

6. Partnership is dissolved, 1. Not only by Consent of all the Partners, but any one may break it off when he pleases, either expressly, or tacitly, by trading separately, provided he do it fairly and seasonably, without any sinister View. 2. The Death of one of the Partners, dissolves the Partnership, with Regard to them all, unless it be otherwise agreed. 3. It is at an End, by the Accomplishment of the Business for which it was contracted.

S E C T. IV.

Of Mandate or Commission.

1. A Mandate or Commission is a Contract, by which one gives Power to another accepting, to look after his lawful Concerns, Judicial, or Extrajudicial, as if he were present. The Giver of the Mandate, or Person authorizing, is call'd the *Mandant*, and the Undertaker to perform, the *Mandatary* or *Proxy*.

2. The Mandant is obliged to approve and ratify what is done, pursuant to the Power he has given; and to reimburse, indemnify, and save harmless the Proxy, if there be Occasion
for

Ch. 1. Law of Scotland. Tit. 7. § 4. 187

for it. If several Persons have named one Proxy, every one of them are bound to him *in solidum*, for the whole Consequences of the Commission.

3. The Mandatary, if he accept the Order and Power given him, is bound to execute it; and if he fail to do it, will be liable for the Damages occasioned by his not acting, unless he have a lawful Excuse for his Omission. He should take Care not to transgress the Limits of Authority given him; for, if he do, he himself only is obliged, and his Employer not bound to stand to it: Unless it is manifestly for his Advantage, or equivalent to that given in Commission. But a Mandatary buying a Thing dearer than he had Power to do, may oblige the Mandant to take it at the Price he allowed the former to give. When two or more Proxies are intrusted with, and undertake Direction of the same Affair, if they be named separately, as A. or B. or C. to manage it, any one may act effectually by himself; if named jointly, as A. B. and C. they must all exercise the Commission. Where a certain Number is appointed a *Quorum*, no fewer can do Business; and, if one or more be named *sine quo*, or *sine quibus non*, the Person or Persons so named must act and consent. Each of several Mandataries or Proxies appointed for the same Affair, are answerable to the Mandant for the whole; unless their Commission regulate it otherwise. A Mandatary cannot subcommit his Authority, or authorize another

188 Part II. *Institutes of the Book III.*

ther Person to perform the Thing committed to him.

4. Mandates are, 1. Either *general* and indefinite, for managing all Affairs, or *special*, for some particular Affair or Affairs.

A general Mandate doth not impower to transact or alienate Immoveables, or to gift, or to serve one Heir to his Predecessor: And a Mandate bearing Authority, as to some special Things, with a General to do all other Affairs whatsoever, is not extended to any of greater Importance, than those expressed.

A special Mandate is either exprefs, declared by Word or Writ, or tacit. A tacit Mandate is that, which is inferr'd and collected from Circumstances of Fact: As from one's suffering a Person in his Presence to act in his Affairs without Contradiction; or from the giving or having Writs; from a Banker's setting a Person over his Office, or a Retailer's committing the Charge of his Shop to one, and allowing him to trade and do Business there for the Employer.

2. Mandates are either undertaken gratuitously, merely to serve the Authorizer, or for a Reward, as Factors.

A gratuitous Mandate obligeth to no Diligence, but only to be honest. But Factors, who have Salaries, are liable to the exactest Diligence. A gratuitous Mandatary gets Allowance of his reasonable Charges and Expenses in executing the Commission: But Factors, who

Ch. 1. Law of Scotland. Tit. 8. 189

who are paid for their Pains, cannot seek incident Charges from the Mandant.

5. Mandates expire, 1. By the timely Revocation of him who gave it, or Renunciation of the Mandatary. 2. By the Death of either.

T I T. VIII.

Of a Contract perfected partly by Writ, partly by Consent.

1. **A**N Exchange Contract, is a Contract perfected, partly by Writ, partly by Consent, betwixt two Parties, either really, or representatively, whereof one draws, and gives to the other a Bill, which is a written Mandate to his Correspondent, to pay to the Creditor in the Bill, the Sum therein contained, at a certain Time, and sometimes in a particular Place, for such a Cause, implying sometimes, and at other Times not, an obligation for Repetition upon the Drawer, or some other in Favour of the Person, on whom the Bill is directed.

2. This Contract is perfected, partly by Writ, in so far as the Drawer of the Bill is obliged to make the Money effectual to the Creditor; partly by Consent, in so far as the Creditor tacitly engages himself duly to negotiate the Bill.

3. He who pays the Value for a Bill, is called the *Remitter*, and the Person to whom the Bill

190 Part II. *Institutes of the* Book III.

Bill is payable, is called the *Porteur*, or the *Bearer*, or the *Possessor* of the Bill.

4. Bills are payable, either at Sight, or so many Days Sight, or on a certain fixed Day, or so long after Date, or at such Usance. And such as bear simply an Order to pay, without specifying any Time, are to be paid at Sight.

5. They bear ordinarily, as the Cause thereof, either Value received, or make no Mention of Value, which implies Value received: And are shut up with these Words, as, *Per Advice*, or, *Without further Advice*.

6. Bills are negotiated by voluntary, or necessary Acts.

[1.] A voluntary Act of negotiating a Bill, is the Indorsement thereof, which is a Mandate to pay the Contents to such a one, or his Order; to whom the Indorser becomes as liable as the Drawer. Indorsement (which commonly bears no Date) transfers the Right to a Bill, without Necessity of Intimation to the Debitor therein.

[2.] The necessary Act of negotiating Bills upon Days Sight, or Days after Date, is the Possessor's demanding immediately Acceptance of the Bill by him on whom it is directed; and in Case of Refusal, protesting for not Acceptance. Acceptance of a Bill is a sign'd Obligation to pay it: And the Person thus obliged, is called the *Acceptor*. The Party upon whom any Bill is drawn, may accept either simply, or *Super-protect* in Honour of the Drawer, or Indorser,

Ch. 1. Law of Scotland Tit. 8. 191

dorfer, or with any Quality or Condition, as to accept to a longer Day, or for a less Sum, or if Provisions come betwixt and the Day. But the Possessor cannot safely receive a conditional, or qualified Acceptance, without Order from the Drawer, or last Indorfer. Any third Person may accept a Bill *supra Protest*, for Honour of the Drawer, or Indorfer, after it hath been protested for not Acceptance, against the Person drawn upon. Bills, if Acceptance be refused, ought instantly to be protested for not Acceptance, by taking Instruments thereupon, in the Hands of a common Notary. The Acceptor of a Bill has, beyond the Day in the Bill, three Days allowed him to make Payment, called *Days of Grace* or *Favour*, or *Respite Days*. Upon the last of these Days of Grace, the Creditor in the Bill ought to protest it against the Acceptor, for not Payment. In all Cases, where Bills are protested for not Acceptance, or not Payment, Advice thereof must be sent by the next Post to the Drawer and Indorfer. And if the Possessor of a Bill neglect in due Time, to present it, in Order to Acceptance, or to protest for not Acceptance, or not Payment, or to send Advice of the Bill's being dishonoured and protested; he loses his Recourse against the Drawer and Indorfer, if the Person drawn upon, or Acceptor, do in the Interim prove insolvent. Which Steps of negotiating must be observed, both in Foreign and In-land Bills.

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192 Part II. Institutes of the Book III

7. A Bill of Exchange, whether Foreign (*a*) or In-land (*b*), is registrable within six Months after the Date of the Bill, against the Drawer or Indorser, in Case of a Protest for not Acceptance, or after falling due thereof, against the Acceptor, in Case of a Protest for not Payment : That Horning on a Charge of six Days, and other summary Executorials may pass thereon, for Payment of the Principal Sum and Exchange, if contain'd in the Bill, with Annualrent from the Date thereof, in Case of not Acceptance, and from the Time it falls due, in Case of Acceptance, and not Payment. But Exchange, if not contain'd in the Bill, with Re-exchange, Damage, Interest, and all Expences, must be pursued for in an ordinary Action; because they want to be rendred liquid and clear, by a Sentence of a Judge : Or, in Case of a Suspension of the Bill, may be eiked, or added to the Charge, and liquidated in the Decreet of Suspension, finding the Letters orderly proceeded.

8. Receipts or Discharges of the Sum in a Bill from the Creditor, not being upon the Bill, but on Papers apart, will not defend the Payer against a new Possessor; nor is Compensation or Arrestment sustained against an Indorsee, upon a Debt due by the Indorser to the Acceptor, before the Indorsation : Provided the Bill be granted, or indors'd for Value given at the Time. But Bills, as well as other Obligations.

(*a*) Act 20. Par. 3. *Ch.* II. (*b*) Act 26. Seff. 6. Par. 1.
K: W:

Ch. 1. Law of Scotland. Tit. 9. 193

ons, are affectable by Compensation, or Arrestment, for the present Possessor's Debt, or by his separate Receipts, and liable to any other legal Exception founded on his own Deed. Bills of Exchange drawn or indors'd by Bankrupts, in Satisfaction or Security of prior Debts, and not for present Value received, are allowed to be question'd upon the Act of Parliament 1696 (a), in the Person of the first Possessor, or Indorsee; but not in the Person of a posterior Indorsee, for present Value, who is not bound to know the Condition of the first Drawer, or Indorser.

T I T. IX.

Of Obligations arising from Quasi-Contracts.

A *Quasi-Contract* is, an improper Obligation created by the presum'd Consent of two, or more Persons, arising from some Fact or Affair, without any previous Agreement, or express Consent. *Quasi-Contracts* are many, according to the great Variety of humane Deeds and Business. Some whereof, as the *Quasi-Contracts* betwixt Heirs and Executors, and the Creditors of the deceas'd; and betwixt Minors and their Tutors and Curators, are handled elsewhere in their proper Places. I shall here take notice of these following.

1. The having Possession of a Thing given to one for something to be done on his Part,
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which

(a) *Viz.* Act 5; Sess. 6. Par. K. W.

 194 Part II. *Institutes of the* Book III.

which he hath not performed, as Gifts, in Contemplation of Marriage, after the Treaty is broke off, &c. Which the Haver is obliged to restore; and if he refuse, may be recovered from him by an Action, call'd *Condictio Causa data non secuta*.

2. Where any Thing is received for an unjust Cause, Law obliges the Receiver to restore it to the Giver, if he was innocent; and confiscates it, if guilty: Altho' the Receiver had perform'd the unlawful Engagement, for which he got it.

3. He who receives Payment of what is not due to him, thro' the Payer's Mistake, lies under an Obligation to restore the Money as *indebite solutum*.

4. Where one has Writs or Moveables in his Custody belonging to another, without any Title to detain them, he is bound to make Restitution to the Owner, in whose Favour there lies an Action against him, called Exhibition and Delivery.

5. He whose Affairs are carried on prudently, tho' by some Accident unsuccessfully in his Absence, without his Knowledge, or Authority from him, is liable to the Manager for his necessary Expences: And the latter is answerable to the former, if he fail in the exactest Diligence.

6. When, in Order to lighten a Ship at Sea, that is in Danger by a Storm, Part of the Cargo is thrown over Board, the Master of the Ship,

 Ch. I. *Law of Scotland.* Tit. 9. 195

Ship, and those whose Goods and Effects are thereby saved, are obliged to bear their Share of the Loss of that which was thrown over Board, for the common Safety, in Proportion to the Value, and not to the Burden or Weight of what is sav'd, which Contribution is call'd *Average*.

7. The inherent Obligation of mutual Relief, competent to several Persons liable *in solidum* for the same Debt or Deed, as Co-principals, is another improper Contract, whereby Payment, or Satisfaction made by one of more than his own Share, doth oblige all the rest *pro rata*, tho there be no exprefs Clause of Relief.

8. Community of Goods is a *Quasi-Contract*, by which two, or more Persons falling, without exprefs Agreement, to have the same Things in common, are oblig'd to divide them at the Desire of one of the Parties concern'd, who, for that Effect, obtains a Brief of Division, directed forth of the Chancery to the Judge of the Jurisdiction, where the Lands, &c. in common lie. When the Division is made, the Writings and Rights, which are common to all the Copartners, are left in the Custody of him who hath the greatest Interest, and the rest get Transumps, or authentick Copies, and an Obligation from the Keeper to produce the Originals, when it is necessary.

9. Another *Quasi-Contract* is that, whereby the Masters of Ships, Inn-keepers, and Hostlers,

196 Part II. *Institutes of the* Book III.

are answerable to Passengers and Travellers, for exact Diligence in preserving the Goods and Baggage of Passengers or Travellers brought into their Ships, Inns, or Stables; and to make up any Loss or Damage therein: Albeit the Thing were neither known nor shewed to the Master of the Ship, Inn-keeper, or Hostler. In which Case, the Passenger, or Traveller, is allowed to prove his Loss by his Oath *in litem*, which the Lords will modify, if it seem extravagant.

10. The Owners or Freighters of Ships, are obliged, by the Deeds of the Ship-Master, or Supercargo, whether Major or Minor, Man or Woman, and of those substituted by them, in what relates to the Commerce or Business, over which they are plac'd, and for all the Consequences, and necessary Expences thereof. If there be several Owners of the Ship, or Merchants, every one is liable for the whole of what is so done, or contracted by their Skipper, or Supercargo. The Creditor may^r also, if he think fit, pursue the Ship-Master, or Supercargo, upon his Contract.

11. In like Manner, those who have any Commerce, or Business at Land, are obliged by the Deeds of their Factors, and others, set over it, in what relates to such Commerce, or Business; but not by the Deeds of those substituted by their Factors, or other Overseers. Nor are Factors treating in the Name of their Masters personally liable, by the Engagements they

Ch. 1. Law of Scotland. Tit. 10. 197

they contract on account of the Business intrusted to them.

The Power of Factors and Agents expires by the Master's Revocation thereof.

T I T. X.*Of Obligations arising from Crimes and Offences.*

SEEING by the Commission of Crimes and Offences, the Offender stands bound not only to publick Punishment, to which he may be brought by a Criminal Action; but also to repair the Loss and Damage of private Persons he hath injured, which he may be compelled to do by a civil Action: I shall, leaving the publick Satisfaction that is due by Offenders, to be treated in the second Volume, consider here the civil Obligations arising from Crimes and Offences for Damages to the Parties injured, as the Obligation called Assythment, and those springing from Breach of Arrestment, Deforcement, Breach of Lawburrows, Ejection, Intrusion, Molestation, Force, Fraud, granting double Alienations, and Usury. As to the civil Obligation arising from Forgery, that is explain'd in its proper Place (a).

1. Assythment is an Obligement to repair Damage done by Killing, Maiming, or laming one. Which for Slaughter produceth

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Action

(a) Vid. Part IV. Ch. 2. Tit. 3. Sect. 2. Reduct. & Improb.

198 Part II. *Institutes of the Book III.*

Action to the Wife or Children, or nearest Kindred of the Person slain, and for Mutilation to the Party maim'd, for a pecuniary Compensation of the Injury.

2. Breach of Arrestment is, a delivery of Moveable Goods to the Owner, after they had been arrested in the Deliverer's Hand.
3. Deforcement is, a resisting and opposing Heralds, Pursuivants, and other Officers of Court, or Justice, in the Execution of their Office, and upon Account thereof.

Both which Offences are of the same Nature, and civilly redress'd the same Way: For the Party injured, has a civil summary Action before the Session, against the Offender, for Payment of the Debt and Expences, and of a Sum to be modified by the Lords for Damage and Interest (a).

4. For understanding Breach of Lawburrows, we must first explain what Lawburrows is. When any Person dreads bodily Harm, Injury or Oppression from another, he may obtain Letters of Lawburrows under the Signet, directed to Messengers at Arms, commanding them to take his Oath, that he dreads such Harm, and then to charge the Person of whom he

(a) Act 118. Par. 7. §. VI. Vid. Part III. B. I. Ch. 2. Tit. 2.

Ch. 1. Law of Scotland. Tit. 10. 199

he dreads it, to find Caution within six Days, if on the South-side *Tay*, and 15 Days, if on the North-side : *That the Complainer, his Wife, Bairns, Tenants and Servants shall be harmless and skaithless in their Bodies, Lands, Tacks, Possessions, Goods and Gear, and noways troubled or molested therein, by the Person complain'd upon, or others of his causing, sending, Hounding, Receipting, Command, Assistance and Ratihabition, whom he may stop or let, directly, or indirectly, otherwise than by Order of Law and Justice (a) : Under the pain of 2000 lib. for a Peer, 1000 lib. for a great Baron, 1000 Merks for a Free-holder, (or a Burges having Land holden Burgage) 500 Merks for a Feuar (or one holding Feu of a Burgh), 200 Merks for an unlanded Gentleman, (or a Burges without Land) and 100 Merks for a Yeoman (b), which Penalties are determined according to the Quality of the Person charged to find Caution.*

A Person charged with Lawburrows, sometimes summarly takes out an Act of Caution, under the Clerk of the Bills Hand, importing, that he hath found Caution, conform to the Charge; sometimes he suspends the Charge. But if he neither suspend, nor find Caution, the Charger may proceed to Denunciation and Caption, and the Person charged will be liable to the Pains of Lawburrows, if he wilfully do harm to the Charger, his Wife, Bairns, &c. To which, his doing so, after Caution found,

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will

(a) Act 117, Par. 7. J. VI. (b) Act 166. Par. 13. J. VI.

200 Part II. *Institutes of the* Book III.

will subject him and his Cautioner *in solidum*. This is term'd a *Breach or Contravention of Lawburrows*, and is pursued by an Action of Contravention, rais'd with the Concourse of the King's Advocate, for His Majesty's Interest. The Pains of Lawburrows incurr'd by Contravention, are divided equally betwixt the King, whose Authority is contemn'd, and the injured Party, (a).

5. A Spuilzie, is the taking away of one's Moveables, without Order of Law, or Consent of the Owner. Who has, within three Years after Commission of the Offence, an Action of Spuilzie, for Restitution of the Things taken away, with the violent Profits, *i. e.* all possible Advantage that he might have made of them, to be estimated by his own Oath *in Litem*. Possession is a sufficient Title to found this Action, without Necessity for the Pursuer to dispute his Right, which lies, not only against the principal Offender, but also against such as were accessory to it, who are all liable *in solidum*.

The ordinary Defences in this Action are,
 1. That the Things were meddled with fairly, by a colourable Title, or were delivered to the Defender by the Pursuer. 2. That they were restored within 24 Hours, in as good Condition, as when taken. 3. That they were lawfully poided, &c. Spuilzie is *vitium reale*, affecting the spuilzied Goods so, as they may
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(a) Act 77. Par. 6. Act 166. Par. 13. §. VI.

Ch. 1. Law of Scotland. Tit. 10. 201

be recovered from fair and honest Purchasers of them for onerous Causes.

A Spuilzie not pursued within three Years prescribes, as to the Benefit of violent Profits, and proving Damages by the injured Person's Oath (a). And there is Place to claim only simple Restitution, and ordinary Profits, in so far as the Intrometter was a Gainer, by an Action of wrongous Intromission.

6. { *Ejection* is the unlawful Entrance into Lands and Tenements, by violently dispossessing another or his Family, or Goods on the Ground.
7. { *Intrusion* is one's Entry, without any Shadow of Right, or Order of Law, to the Possession of Lands void for the Time, as to natural Possession, and civilly possessed by another.

Ejection and *Intrusion* differ, in that the former is attended with Violence, and cannot be justified by a Title to possess; and the latter is peaceable, and excused by the Intruder's having a Right for attaining Possession. But both Actions of *Ejection* and *Intrusion* agree with that of Spuilzie, in being sufficiently founded upon Possession, as their active Title, and privileged only, as to three Years, with the Claim to violent Profits, and the Oath *in Litem* (b).

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(a) Act 8th Par. 6. §. VL (b) *Ibid.*

202 Part II. *Institutes of the Book III.*

8. *Molestation* is the disturbing, molesting, and disquieting an Heretor of Lands, and his Tenants, or others claiming under him, in the free and peaceable Possession, and Enjoyment of some Part, or Pertinent thereof, by the Proprietor, or Proprietors of adjacent Lands, their Tenants, Servants, or others in their Names, Tilling or Sowing it, or Pasturing their Cattle upon it, as if it were their own. For redressing which Injury, the Party injured, if he desire only to maintain his Possession, without bringing his Property in Question, raises a Summons of Molestation before the Lords, against the Disturbers, &c. concluding they should desist and cease from troubling and molesting him, in the peaceable Possession of his Lands.

But, if he desire to have his Property of the said Parts and Pertinents also declared, he raises a Summons of Molestation containing a Declarator of Property, founded upon his, and his Author's Right thereto.

In which Actions, the Lords grant Commission to the Judge of the Place, or to some other of their Number, to visit the Ground, and examine Witnesses there *hinc inde*, as to Possession and Interruption. Whose Report being advised, the Commission is renewed to some, for settling the Boundaries of these Lands, confining upon one another, and riding Marches betwixt them, by setting March-Stones, or Land-Marks.

Marches

Ch. 1. Law of Scotland. Tit. 10. 203

Marches may be also tried and fix'd, betwixt neighbouring Heretors at Variance about the Boundaries of their Lands, by the Sheriff, or other inferior Judge, where the controverted Ground lies, upon a Brief of Perambulation issued forth of the Chancery to him for that Effect.

Marches of the Pertinents of Burgher Tenements, as Gardens, Court-Yards, &c. may be heard and determined upon a *Brief of Lying*, directed to the Magistrates of the Burgh. But there is rarely Occasion for such a Brief; Differences about the Limits of Burgher Tenements, being commonly decided by the Dean of Guild.

9. Force is all unlawful Impressions, which move any one against his Will, for Fear of some great Evil, to give or do what he would not, if free from such Impression. Which Deed may be reduced upon that Head. But it is not every Ground of Fear that will be sustained, as a Reason of Reduction in this Case. For legal Force, as a Caption, or Imprisonment for civil Debt, or simple reverential Fear of offending a Parent, without any external Force or Threats used by him, is not allowed as a relevant Reason to reduce a Deed, in Favour of the Creditor or Parent. But it must be an unlawful Force, or just Fear of Danger to what is dear to one. Which is to be determined according to Circumstances, as the Quality of the Parties, whether the one was a
weak

204 Part II. *Institutes of the* Book III.

weak Person, and the other of a violent Temper ; the Place where the Deed was granted, whether in the Town, or in the Fields ; the Time when, whether in Day Light, or under Cloud of Night, &c.

The Allegedance of Force and Fear is taken off ; 1. By proving that the Deed quarrelled was a Transaction. 2. By a subsequent Ratification thereof, after the Cause of Fear is over.

10. Fraud is any unfair Way, that is used to cheat another. For clearing whereof, I distinguish a Deed elicited by Fraud, from a fraudulent Deed : By the former, the Granter is deceived and imposed upon ; by the latter, he deceives or defrauds his Creditors, or others.

[1.] Deeds elicited by Fraud may be annul'd, by Reduction *ex capite Doli*, at the Instance of the Party cozened, or his Heirs or Creditors, against the Deceiver or his Heirs, but not against singular Successors, innocent of the Fraud, acquiring honestly from the Deceiver.

[2.] A fraudulent Deed is, that of a Debtor to deceive his Creditors, and defeat or disappoint the Payment of what he owes to them : By granting to their Prejudice, Alienations, Dispositions, Assignations, Translations, Bonds, Discharges, or other Rights, or by omitting to acquire what he might have by Law ; or, by acquiring in a Trustee's Name.

All

Ch. 1. Law of Scotland. Tit. 10. 205

All such Alienations, Dispositions, Assignations, and Translations made by Debtors, of their Lands, Tithes, Reversions, Actions, Debts, or Goods whatsoever, to any conjunct or confident Person, without true, just and necessary Causes, and a just Price really paid, may be declared null, at the Instance of their true Creditors, by Way of Action, Exception, or Reply (a).

By Debtors here, are understood Bankrupts, or Dyvours, or Persons actually insolvent, whose Estates are, by the Alienation, rendered insufficient to satisfy their Debts. For gratuitous Deeds, even in Favour of conjunct Persons, are sustained, where the Granter had, at the Time, enough beside to pay his Debts, tho' he afterwards became insolvent.

Any Creditor, whether he be a gratuitous or onerous Creditor, whether he hath done Diligence or not, and whether the Term of Payment of his Debt be come or not, may quarrel such Deeds.

Real Rights ordinarily must be reduced, but Dispositions of Moveables, and Rights of small Moment, may be annull'd by Exception.

Not only Rights made to conjunct and confident Persons, without an onerous Cause, but even those granted to any Person, are reducible, at the Instance of the Granter's anterior Creditors: With this Difference, that the former must prove the onerous Cause of theirs, tho' the

(a) Act 18. Parl. 23. §: VI:

 206 Part. II. *Institutes of the* Book III.

the Right bear to be granted for onerous Causes; whereas the latter, needs not to instruct the onerous Cause of Rights granted to him, otherwise than by the Narrative of the Writ. But, according as the Relation betwixt the Granter and Receiver of a Writ is near or remote, and the Presumption of the Latter's Honesty strong or weak, more or less Proof of the onerous Cause is sustained. Where a Disposition to a conjunct Person bears for *Love and Favour*, it will be reduced as such, tho' the Receiver should undertake to instruct, that he had it for an onerous Cause, unless the Presumption arising from the Narrative, that it was given merely on the Score of Liberality, and Affection, be taken off, by clear contrary Evidence.

If any Third Party, not Partaker in the Fraud, acquire lawfully the Thing alienated from the first fraudulent Receiver, for a just Price, or in Satisfaction of lawful Debt, the Right made to him shall stand good. But the Receiver of the Price is obliged to make the same forthcoming to the Bankrupt's lawful Creditors: Deducting what he hath already paid to any of them without partial Favour, conform to their Diligences; and answering for the Remainder to such, as want to be paid (a), according as they shall affect the same by their respective Diligences.

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(a) d: Act 18.

Ch. 1. Law of Scotland. Tit. 10. 207

Tho' Deeds for a valuable Consideration, in Favour of conjunct or confident Persons, are not quarrellable by anterior Creditors, who had done no Diligence against the Disponer: Yet the Dyvour, or his interposed Confident, privy to the Fraud, cannot, to the Prejudice of the more timely Diligence, by Inhibition or Arrestment, Horning, Comprising, or Adjudication, or other Ways, used by one Creditor to affect the Bankrupt's Estate or Price thereof, gratify another Creditor, by any voluntary Payment or Right of the Estate. For such Right is reducible, at the Instance of the User of the Diligence, to whom the Creditor preferred by partial Favour, is liable to make Forthcoming what he so received (*a*). Which is not so to be understood, as if any of these Diligences were a sufficient Ground, to quarrel promiscuously any Right granted by the Bankrupt to his beloved Creditors: But *applicando singula singulis*, that heretable Rights may be questioned by the Users of Horning, Inhibition, or Comprising, and Dispositions of Moveables, by such as have used Horning or Arrestment. Nor are Creditors, who have completed their Diligence only so privileged; but even those, who are in a Course of Diligence, or have only made some Steps therein, as by Execution of Horning, Inhibition, or a Summons of Adjudication, or by Denunciation of Lands to be apprifed; or, by a Charge upon

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(a) d. Act 18.

208 Part II. Institutes of the Book III.

a Precept of Poinding; provided such Creditors have not too long delayed to complete their imperfect Diligence.

Heretable Rights granted by a Person insolvent, to one or more of his Creditors, to the Prejudice of the current Diligence of others, are reducible at their Instance, even against third Parties innocently acquiring from the Creditor prefer'd: But a third Party so acquiring a Right to Moveables, from such an interpos'd Creditor, could not be quarrelled.

For yet farther restraining the Frauds of Bankrupts, if any Debtor, under Diligence by Horning and Caption, at the Instance of his Creditor, be either imprison'd, or retire to the Abbay, or other privileg'd Place, or flee, or abscond for his personal Security, or defend his Person by Force, and be afterwards found, by Sentence of the Lords of Session, to be insolvent; shall be held and reputed upon these joint Grounds of Horning, Caption, and Insolvency, with one or other of the said Alternatives of Imprisonment, retiring, or flying, or absconding, or forcible defending, to be a notour Bankrupt from the Time of his said Imprisonment, retiring, flying, absconding, or forcible defending (a). A Person may be declared a notour Bankrupt, by Sentence of the Lords of Session, in a Process raised and prosecuted by any of his just Creditors. And being declared such, all voluntary Deeds made directly, or indirectly by
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(a) Act 5. Sess. 6. Par. K. *W*

Ch. 1. Law of Scotland. Tit. 10. 209

the Bankrupt, at, or after, or in the Space of sixty Days, before his becoming so, in Favour of any of his Creditors, whether in Satisfaction, or for Security, are void and null. And heretofore Rights, whereupon Infeftment may follow, are reckoned, as to this Case of Bankrupt, to be only of the Date of the Seisin, without Prejudice to their Validity as to other Effects (a).

Law doth not only reduce and annul fraudulent Deeds, to the Prejudice of Creditors, but also punish the Granters and their Accessories, who are reputed dishonest, false, and infamous, incapable of all Honours, Dignities and Offices, or to pass upon Inquests, or to bear Witness in, or out of Judgment (b). The fraudulent Bankrupt is also punishable by Banishment, or otherwise, (Death excepted) as the Lords of Session shall see Cause (c).

11. He who grants double Alienations of Lands, or Annualrents, or double Affedations or Assignations; and a Superior, who wittingly receives double Resignations, are declared infamous, punishable in their Persons and Goods (d), and guilty of the Crime of Stellation (e).

12. Usury, called also Ocker, is the taking at any Time more than the legal established Interest for Money, directly (f), or indirectly, under the Colour of Back-tack Duty, in Money

O

or

(a) Act 5. Sess. 6. Par. K. W. (b) Act 18. Par. 23. 7. VI.
 (c) d. Act 5. Sess. 6. Par. K. W. (d) Act 105. Par. 7. 7. V.
 (e) Act 140. Par. 12. 7. VI. (f) Act 222. Par. 14. 7. VI.

210 Part II. *Institutes of the* Book III.

or Victual, or under the Pretext of buying and felling (*a*), or obtaining a proper Wadset in Lands, exceeding in Annualrent the Interest of the Money lent, with a Provision, that the Granter of the Wadset should bear all Hazard of the Rent (*b*), or taking the ordinary Annualrent before-hand (*c*). The usury Bond, or Contract, may be reduced at the Instance of the Party injur'd, with the Concurrence of the King's Advocate, or at his Instance, without the Party: And being reduc'd, the principal Sum, with the ordinary Annualrent unpaid, falls to the King or his Donatary. But the Party, if he concur with His Majesty's Advocate, (and no otherwise) is entitled to recover from the Usurer the exorbitant Profits exceeding the ordinary Annualrent paid to him (*d*). Now, when more than the legal Interest is taken for the Loan of Moneys, Wares, Merchandize, or any other Commodities, the Contract is void, and the Offender forfeits treble the Value of the Money, Wares Merchandize, and other Things so lent, bargained, &c. (*e*).

CHAP.

(*a*) Act 247. Par. 15. §. VI. (*b*) Act 62. in fin. Par. 1. Sess. 1. Ch. II. (*c*) Act 28. Par. 23. §. VI. (*d*) Act 247. Par. 15. §. VI. (*e*) 12. A. Sess. 2. Ch. 16.

Ch. 2. *Law of Scotland: Tit. 1. 211*

C H A P. II.

Of Accessory Obligations.

AN Accessory Obligation is, That which is made for the Sake of another. Such are, 1. The Obligation for Annualrent or Interest of Money. 2. Pledges. 3. Cautionry, or Suretiship. 4. Bonds of Corroboration. 5. Letters of Credit. And, 6. The Obligation arising from Oath.

T I T. I.

Of Annualrent, or Interest of Money.

1. **A**Nnualrent, or Interest is, a Reward, or moderate Profit due by the Debtor of a Sum of Money to the Creditor, for the Use which the former had thereof, and the other wanted. The Money for which Interest is claimed, is called *Sors*, the Stock or principal Sum.

2. Interest is fix'd by Law at a certain Proportion of so much in the Pound every Year, and for more or less Time in Proportion: Which varies in different Nations, and hath not been always the same among us; but now stands at 5 *per Cent.* (a).

3. Annualrent is due, either by Agreement of Parties, or by the Provision of Law:

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[1.] 'Tis

(a) 12. A. Seff. 2. Ch. 16.

212 Part II. Institutes of the Book III.

[1.] 'Tis due not only by exprefs, but by tacit Agreement, inferr'd from bygone Use of Payment, or Paction for Interest of Years preceeding.

[2.] Annualrent is due by Provision of Law:
 1. For Sums in all Bills of Exchange, Foreign or In-land (*a*). 2. To Cautioners paying Debt upon Distrefs. 3. To Minors by their Tutors and Curators (*b*). 4. For the Price of Land from the Term of Payment, where the Buyer gets the Profits of the Land. 5. Interest is sometimes allowed to Merchants, in Lieu of Damages. 6. By the Debtor's being denounc'd to the Horn for not Payment.

4. The Course of Annualrent once due, stops and ceases, when the Debt is paid or acquitted; or orderly configned upon the Creditor's Refusal, or by Compensation upon another liquid Debt due by the Creditor to the Debtor.

T I T. II.

Of Pledges or Pawns.

1. **A** Pledge, or Pawn in general is, an Appropriation to a Creditor, of the Goods or Estate of his Debtor, moveable, or immoveable, for Security of the Engagement he lies under, till it be fulfilled, or acquitted.

2. 'Tis divided into a Pledge, properly so called, and a *Wadset*, whereof the former only falls

(*a*) Act 20. Par. 3. Ch. II. junct Act 36. Sec. 6. Par. K. W.
 (*b*) Vid. Part I. B. I. Ch. 2. Tit. 3. § 2.

Ch. 2. Law of Scotland. Tit. 2. 213

falls to be explain'd here, the latter being treated of elsewhere (a).

3. A Pledge in a proper Sense is, an Obligation, whereby a Creditor has Right to the Moveables of his Debtor, till he be paid or satisfied.

4. 'Tis either conventional, that is, acquired by Pactum; or legal, that is, acquired by the bare Effect of the Law.

[1.] A conventional Pledge is, an Obligation, by which a moveable Thing is given by a Debtor to his Creditor, for Security of the Debt, on Condition, that when the Debt is paid, the same individual Thing shall be return'd.

The Creditor is accountable for what Prejudice happens to the Pledge in his keeping, thro' any Fault, which a careful and circumspect Person would not readily be guilty of; and would not use it, against the Will of the Owner, it being given him as a Security, not for Use.

A Creditor cannot lawfully stipulate, that if he is not paid at the Term agreed on, the Pledge shall from thenceforth be his, in Lieu of his Payment, called *Pactum Legis Commissoriae*, which is disallowed by Law, as contrary to Humanity and good Manners. But the Creditor may procure Leave from a Judge, to have the Pledge appraised and sold; or may assign his Debt to a Trustee, who may arrest it in his Hand, and pursue a Forthcoming thereof.

O 3

If

(a) Vid. Part III. B. I. Ch. 1. Tit. 2. § 3.

214 Part II. *Institutes of the* Book III

If the Creditor has been at any necessary Charges for Preservation of the Pledge, the Debtor is bound to reimburse him.

[2.] A legal Pledge is, a Right of Pledge, which a Creditor acquires by Law in his Debtor's Goods, without being put in Possession of them, called a *tacit Hypothec*. Tacit Hypothecs in Force with us, are, 1. That competent to Heretors of Country Land, for a Year's Rent, in the Fruits of the Ground, or these falling short in the Goods thereon; and to Proprietors of Houses for a Years Rent, in the Goods brought into them. 2. To the Superior for his Feu Duty. 3. To Titulars of Tithes, and Ministers for their Stipends, payable out of the Tithes. 4. Seamen have a tacit Hypothec upon the Freight, for their Wages. And 5. The Repairer of a Ship hath a tacit Hypothec upon her for his Expences.

5. Payment of a Debt, or what is equivalent to Payment, extinguisheth a Pledge, or Hypothec for it.

T I T. III.

Of Cautionry or Suretiship.

1. **C**Autionry or Suretiship is, an Obligation to pay a Sum, or perform a Deed for another bound jointly for the same. The Person so obliged is term'd a *Cautioner*, *Bail*, or *Surety*: Because, the Creditor following his Faith,

Ch. 2. Law of Scotland. Tit. 3. 215

Faith, doth contract with the Person undertaken for, who is called the principal Debtor.

2. Cautionry may be accessory to an Obligation, that is not altogether null; tho' Action be not effectual against the principal Debtor, because of some Privilege by Statute or Custom, upon the Account of Minority, &c. But, where the principal Obligation is quite null in it self, as being granted by a Fool, or not subscribed by the principal Debtor, the Cautioner is free.

3. Cautioners cannot, as such, be sued, till after the Creditor has used all necessary Diligence against the principal Debtor, and such Effects as he has; which is called the *Benefit of Discussion*. When there are several Cautioners for the same Debt, who are all solvent, the Creditor can demand from each of them only his Share of the Debt; which is called the *Benefit of Division*: Tho' the Shares of insolvent Co-cautioners are thrown upon the rest, who are solvent proportionably. But, if Cautioners oblige themselves, as is usual, jointly and severally with the Principal, they, and every one of them are, with Regard to the Creditor, in the same Condition as the Debtor, and understood to have renounced the Privileges of Discussion and Division. So that the Creditor may pursue any one of them for the whole Debt, without seeking after the principal Debtor, or other Cautioners, tho' all of them be able to pay.

216 Part II. Institutes of the Book III.

4. Cautioners have no Relief against the principal Debtor, till they be distressed: Nor, yet for Payment upon Distress, unless they intimate the same to the Principal, before *Litif-contestation*; if he the Principal had a relevant Defence against the Creditor. But otherwise, a Cautioner may bring Action of Relief against the principal Debtor, and his Heirs, not only for the principal Sum and Annualrent paid to the Creditor; but also for Annualrent of the said Principal and Annualrent, and for all other Damage and Expence incurred thro' the Cautionry without his Fault.

5. If one of several Sureties pay the whole Debt, he may obtain Relief thereof from the rest, deducting his own Part. But then he must communicate to them, the Benefit of any Ease got from the Creditor by Transaction, but not such as he got by mere Gratification, as a Friend or Relation.

6. Cautionary Engagements in any Bond or Contract for Sums of Money, by Persons named Cautioners, or having either a Clause of Relief in the Bond, or a Bond of Relief, a Part intimated personally to the Creditor at his receiving Bond, continue no longer than seven Years from the Date: But any legal Diligence against the Cautioners, for what fell due in that Time, stand good, and hath its Effect after the seven Years (a). In which seven Years, those of the Creditors Minority are not deducted, to pre-
serve

(a) Act 5. Sess. 5. Par: W: and M:

Ch. 2. Law of Scotland. Tit. 4, 5. 217

serve the Obligation longer. This Septennial Indurance of Cautionry, is understood only of Cautionry in Bonds of borrowed Money, and not of Cautionry for Facts, or annual Prestations, or in Contracts of Marriage, or Clauses of Warrandice or Requisition. Nor is a Bond of Corroboration such a Cautionary Obligation, as expires after seven Years.

T I T. IV.

Of Bonds of Corroboration.

A Bond of Corroboration is, a new Bond to strengthen a former, or other Obligation granted by the Debtor therein, or any other Person, to the original Creditor, or to his Representatives or Assigny, without Prejudice or Derogation to the former Bond or Obligation, or to any Diligence that has followed, or may follow thereupon.

T I T. V.

Of Letters of Credit.

A Letter of Credit is either general, or special.

A special Letter of Credit is, an open Letter bearing Orders to furnish such a Man with such a Sum, at one or several Times, upon his Bills of Exchange, or Receipts, and to charge it to his Accompt, who gives the Letter of Credit.

A

218 Part II. *Institutes of the* Book III.

A general Letter of Credit is, an ample Letter directed to some particular Correspondent, or to any Person who shall advance Money thereon, to such a one, without Restriction as to Time or Place, or Sum, or other Circumstances, obliging the Writer for Repayment, and for Annualrent to the Possessors of the Bills.

T I T. VI.

Of the Obligation arising from Oath.

1. **A**N Oath is, a religious Invocation of the Name of Almighty **G O D**, to assure the Truth of what is done ; or a calling **G O D** to witness the same.

2. The Form of an Oath with us is, by pronouncing with an uplifted Hand these Words, *By G O D Himself, and, as I shall answer to G O D at the Great Day, &c.* But, instead of this Form, a Quaker is permitted to make the solemn Affirmation or Declaration following, *viz. I A. B. Do solemnly, sincerely and truly, declare and affirm (a).*

3. Oaths may be divided into Promissory, and Decisive Oaths.

[1.] A Decisive Oath is that, which is taken in Judgment by a Witness, or, by one of the Parties, which falls in more properly to be spoke of afterwards (b).

[2.] A

^r (a) 7, & 8. W. III. ch. 34. 13,^r & 14. W. III. ch. 4. 1. G. Seff. 1. ch. I. junct. 8. G. ch. 6. (b) Vid. Part IV. B. I. chap. 2. Tit. 1. § 2.

Ch. 2. Law of Scotland. Tit. 6. 219

[2.] A Promissory Oath, which is used to enforce or corroborate an Engagement, is a religious Invocation, whereby one doth sacredly promise, either actively to perform Something, or passively never to quarrel it.

To make such an Oath binding, the Obligation must be lawful, and not forbidden. Effectual Obligations may be fortified, by the Accession of an Oath, taken to observe and fulfil them. But, tho' a Partie's Oath to observe a Thing ineffectual in Law, will hinder him to quarrel it, the Judge may refuse to sustain it. A Right formal in the Essentials, tho' labouring under circumstantial Defects, as a Deed extorted by Force or Fear, may be supported by the Party's Promissory Oath, never to quarrel it. But Obligations of Minors confirm'd by Oath are null, and the Persons infamous, who made them swear (a).

4. Having thus opened the Nature and Effect of Obligations or personal Rights; and the several Kinds of them; how they are form'd, and in what particular Manner special Obligations are dissolved: I shall now explain the common Ways, how Obligations or personal Rights are annulled, and extinguished.

C H A P;

(a) Act 19. Par. 3. *cb.* II.

 220 Part II. *Institutes of the* Book III.

C H A P. III.

How Obligations or personal Rights are annulled and extinguished,

I. **T**HE proper Ways of extinguishing Obligations, are either by Agreement of Parties, or by Performance : Which, according as the Obligation was entered into, with, or without Writ, or, according to the Manner of the Satisfaction given, require, or do not require to be instructed by Writ. But all Ways of extinguishing Obligations, may be prov'd by Writ, or Oath of the Creditor.

2. If it be agreed, never to crave Payment or Performance of an Obligation : This, if made with a sole Debtor, imports a passing from an Obligation ; but, if made with one of more Persons bound for the same Debt, is effectual only to free him, and Payment may be required from the rest, who yet have Relief against him for his Share thereof.

3. Performance of Obligations, which is their attaining the designed Effect, is either Real and Proper, or Improper and Imaginary. Real or Proper Performance is, Payment or Consignation. Improper and feigned, or Imaginary Performance is, by Something equivalent in Law to Real Performance, such as,
 Dis-

Ch. 3. Law of Scotland. Tit. 1. 221

Discharges, Compensation, Innovation, and Confusion.
T I T. I.
Of Payment.

1. **P**ayment is a satisfying the Obligation in the precise Terms of it.

2. Payment must be made of the same Thing in Kind, which one owes, as Money for Money, Goods for Goods ; unless the Creditor consent to take some other Thing in Stead of it. Nor can he be forc'd to receive Payment in Part, unless it was so agreed, or to receive in a *Species* of Money, that is just going to be cried down.

3. In an Alternative Obligation to one or other of two Things, the Debtor has the Election what to pay, which he loses, after the Creditor has made his Demand by Process.

4. When several Debtors are bound to the Creditor jointly, they are liable only *pro Rata*, if all be solvent, and the Shares of the insolvently upon the solvent Debtors. But, if they are bound jointly and severally, or bound jointly to deliver a Thing, or perform a Deed that is indivisible, they are liable *in solidum*. Obligations expressing no Term of Payment, or Performance, are to be paid or perform'd immediately : That is, Money must be paid within 24 Hours, and a Work must be perform'd within such a Time, as is necessary to do it.

5. If

122 Part II. Institutes of the Book III.

5. If the Creditor refuse Payment of Money offered to him, the Debtor may take Instruments upon his Offer, and the Creditor's Refusal, and deposite the Money in the Hands of the Clerk of the Bills, which is called *Consignation*. Due and orderly Consignation, is equivalent to Payment, stops the Course of Annualrent, and frees the Consigner from the peril of the Money (a).

6. A Person owing several Debts to one and the same Creditor, is at Liberty to pay which of them he pleases first. Yea, tho' he don't declare his Mind at the Time, concerning the Application, he may make his Election thereafter, while he is able to pay all the Debts, but no longer. Where Payment is made without Application to any one Debt, it is imputed to extinguish such Debt as lies heaviest upon the Debtor, and concerns him most to discharge. But partial payment of a Debt bearing Annualrent, is applied, in the first place, to the discharge of the bygone Interest, and the Overplus to the discharge of Part of the Principal Sum.

7. Payment *Via Facti*, as by the Creditor's Intromission with Victual-rent of the Debtor's Lands, &c. may be prov'd by Witnesses: But Payment of Money must be cleared by Writ, or Oath of Party. But sometimes Payment is presum'd: As Payment of a Bond retired by, and

(a) Vid Part III. B. I. Ch. 1. Tit. 2. §. 3.

Ch. 3. Law of Scotland. Tit. 2. 123

and in the Custody of the Debtor, or which the Creditor cannot produce, unless the contrary be proven.

T I T. II.

Of Discharges:

1. **A** Discharge is, an Acquittance or Release in Writing, granted by the Creditor to the Debtor, acknowledging that he hath got Satisfaction from him, whether he hath got Payment, or not.

2. Total Discharges of Obligations must be writ upon stamped Paper (a): But partial Discharges or Receipts of Annualrents are good upon any Paper. A Discharge regularly requires the same Solemnities as written Obligations: But Discharges or Receipts by Masters to their Tenants of their Rents, and by Merchants and Factors in Mercantile Business, are sustain'd, tho' not holograph, and wanting Witnesses.

3. Discharges are either General, or Particular.

A general Discharge, which is, an Acquittance from all Claim, either in general Terms, without mentioning Particulars, or mentioning Particulars, with a general Clause subjoined.

A general Discharge specifying no particular Uses not to be extended to Clauses of Warrantance, or Relief, or Obligements to infest,

or

(a) 12. Act Ch. 9.

124 Part II. Institutes of the Book III.

or purchase real Rights. A Discharge of many particulars expressly, with a general Clause, is not extended to Particulars of a different Kind, or of greater Importance than those expressly mentioned. But a general Clause in a Discharge, doth reach Particulars of greater Consequence than those expressly mentioned, if all be of the same Nature.

4. Three particular Discharges of Rents, or Annualrents of three Years or Terms immediately subsequent to one another, according as the Payment is annual or termly, infer a Presumption of Law, that all Precedings are satisfied, if the Granter of the Discharges had Power to discharge all bygones: Unless it appear by good Proofs, that the Arrears of former Years are still due. But one Discharge for three Years or Terms, or two Discharges of two Years or Terms, and particular Receipts making up the third, or partial Receipts for more than three Years Rent, do not work this Presumption.

T I T. III.

Of Compensation:

1. **W**HEN two Persons become mutually Creditor and Debtor to one another, Exception made upon the one Debt, excludes Action for Payment of the other, either wholly, if both Debts be equal, or for so much as the least Debt amounts to: Which Exception is called *Compensation*.

2. It

Ch. 3. Law of Scotland. Tit. 3. 125

2. It is not sufficient to make a Compensation, that there be a Debt on the one Side and the other; but it is moreover necessary, 1. That both the Debts be liquid and clear, that is, certain, and not liable to dispute. 2. They must consist in Quantity, and of the same Kind and Quality. 3. They must be such as are already due, and not such as are conditional, or whereof the Payment is suspended to a Day. In short, no Debts can compensate one another, except such as can be offered in Payment.

3. Compensation lies not only against a Creditor for his own Debt, but against an Assigny upon a Debt due by the Cedent to the Debtor himself; before he was denuded by Intimation of the Assignation; but not against the Possessor of a Bill of Exchange, upon the Indorser's Debt prior to the Indorsation.

4. Compensation must be instantly verified, and cannot be founded on by Suspension of Reduction after Sentence (a). When a Debtor, having several Debts owing to him by one Person, sues for Payment of one of them, if the Defender object Compensation upon a Debt due to him by the Pursuer, he the Pursuer may reply upon another of these Debts owing to him by the Defender: Which is termed *Recompensation*.

5. Compensation stops the Course of Annual-
 P sating
 rent of the Debt compensated, tho' the compen-

(a) Act 141, Par. 12. §. VI.

 126 Part II. *Institutes of the Book III.*

fating Debt bore no Annualrent, from the Time that both Debts concurr'd.

T I T. IV.

Of Novation or Innovation.

I. **N**OVATION in general, is a transferring or substituting a new Obligation in the place of a former. 'Tis distinguish'd into *Novation*, properly so called, and *Delegation*. *Novation* in a proper Sense happens, when the Nature of the Obligation is changed betwixt the same Creditor and Debtor: As when a Debtor for the Price of Goods sold, takes a Bond of borrowed Money for it; or a Debtor by Bond or Ticket, takes a Bond bearing Annualrent for the Sum, or a Clause of Infestment.

2. Novation is inferr'd from the presum'd Meaning of Parties, not to corroborate the former Obligation, tho' no Reservation thereof be made in the new Obligation. It hath this Effect, that the former Obligation with all its Accessories, are thereby extinguished.

3. Delegation is, when a new Debtor is put in lieu of the former, and charges himself with the Debt owing by the former, or grants a new Bond for it to the Creditor. Whereby the Obligation of the Person who delegates, is extinguished by the Obligation of him who is delegated.

T I T.

Ch. 3. Law of Scotland. Tit. 5. 127

T I T. V.*Of Confusion.*

1. **C**onfusion is, when the Debt and Credit meet in the same Person; or, when one becomes Debtor and Creditor to himself, as when the Creditor is Heir or singular Successor to the Debtor, or the latter to the former, or a Stranger to both.

2. This confounding one Right with another, extinguisheth the Debt, except a Debtor becoming Creditor in Manner aforesaid, has no Relief of such Debt against some other Person. Which Extinction is sometimes Absolute, and sometimes only Temporary:

3. Having explain'd Original Property, Real and Personal, I shall in the next Place consider, how both may be transmitted and passed over by Progress, from one to another:

**P A R T**