

as a risk under the policy. Such events have been held, even without express stipulation, fatal to an insurance effected by the guilty person, and not available even to his creditors (*a*). But the objection will not annul a policy effected by a third party interested. Death in a foreign country, unless excepted, is a risk under the policy.

(*a*) *Bolland v. Disney*, 3 Russ. 351, as reversed in the House of Lords, July 9. 1836.

IV. CONCLUSION OF CONVENTIONAL OBLIGATIONS.

524. CONSTRUCTION OF CONTRACTS. With all the care which can be taken, disputes will arise as to the meaning of contracts; and construction is the art of collecting from proper indications what the parties held out to each other as their meaning and intention in the contract, and what, in concluding their contract, they mutually agreed to, understood, and relied on.

Words expressive of engagement, when proved by a writing executed at the time, furnish the clearest of all indications of intention.

Wherever this precaution of writing has not been followed, and witnesses are to be relied on, the object of the inquiry at the trial must be to get from them as nearly as possible the words made use of.

In either case, where the words are ascertained, the great rule is, that those words, according to their plain meaning and obvious intent, are to be taken as conclusive of the mutual intention of the parties: and that constructive or explanatory evidence is to be admitted only where the words are ambiguous and the agreement uncertain (*a*).

There are two kinds of ambiguity; which are to be dealt with differently: 1. an ambiguity patent or apparent on the face of the contract, which, unless it can be solved by the context and nature of the contract, may be fatal; 2. a latent ambiguity, arising not from the words, but in their application; and in this case, extraneous evidence is admissible to clear up the difficulty.

But in bargains there is so much taken for granted, so loose a confidence, so vague an adoption of usage, so great uncertainty as to the ordinary understanding in such cases,

and so much ambiguity and imperfection of language, even where the identity of the words is not disputed ; that courts of justice are frequently compelled to make an election between different meanings, and sometimes to admit the evidence of usage to qualify the whole. The rules in this respect seem to be,—

1. That the popular sense of the words, as known and used at the place and time, is to be followed, unless the words be technical.

2. That technical words are to be taken technically, if no doubt can be entertained of the meaning and application : And for their meaning usage may be resorted to (*b*). .

3. That the sense which gives validity and effect to the agreement, is to be preferred to that which invalidates or defeats it.

4. That usage enters into, extends, limits, and qualifies contracts, especially in matters of trade. But the usage must be consistent with law ; and either general, universal usage ; or usage of the particular trade or line of dealing ; or, if local, known and relied on by both parties : and when it is so, it tacitly enters into the contract.

5. That words, however general, are to be confined to the subject and matter of the agreement contemplated by the parties.

6. That in the several contracts, sale, location, &c. the naturalia of the particular contract are tacitly part of the agreement (*c*).

7. That if the meaning and import of the agreement is to be collected from what has passed in correspondence, the meaning is to be taken according to the import of the whole. And if a series of conversations and communings, or of letters, has resulted in a distinct written agreement, all previous correspondence and communings are discharged (*d*).

Finally, That the true point of inquiry in all doubtful cases is not (as in a will) the intention of one party, but that meaning of the terms made use of which the adverse party understood, and on which he was entitled to rely.

(a) *Petty v. Royal Exchange Assurance Company*, 1 Burr. 341. *Newman v. Cazalet*, Park, 630. *Palmer v. Blackburn*, 1 Bing. 61. *Inglis*, July 14. 1826 ; 4 Murr. 73. *Pollock*, Dec. 12. 1828 ; 7 S. D. 189. *Yeatts v. Pym*, 2 Marsh. 141. *Robertson v. French*, 4 East. 135.

- (b) *Bowman v. Horsey*, 2 Mood. and Roll. 85.
- (c) *Petty v. R. Ex. Ass. Co.* 1 Burr. 341.
- (d) *Kain v. Old*, 2 Barn. and Cr. 634.

V. OBLIGATIONS INDEPENDENT OF CONVENTION.

Instit. lib. 3. tit. 18. De Oblig. Quæ quasi ex contractu nascuntur. l. 1. tit. 1. De Oblig. ex delicto, and lib. 5. De Oblig. quæ quasi ex delicto, nasc. 3 Ersk. 3. § 1. Toulier, Dr. Civ. Franc. vol. ii. p. 15.

525. Amid the accidents of human life, many invasions of right occur, and many grounds of action for redress are required, which are not derived from convention or express contract. The Roman lawyers, instead of contemplating the rights encroached upon or violated, were accustomed to refer all personal actions to obligations express or implied or presumed; and they made three classes of constructive obligations corresponding to the rights invaded:—Those included, 1. Obligations arising quasi ex contractu; 2. Obligations arising ex delicto; 3. Obligations arising quasi ex delicto. Without following the subtleties connected with this arrangement, it seems to be simpler to consider all such grounds of action, on account of rights invaded, under the heads of, Restitution; Recompense; and Reparation of injuries.

1. *Doctrine of Restitution.*

1 St. 7. 3 Ersk. Pr. 1. § 5. 3 Ersk. 1. § 10.

526. The law gives an action of Restitution against one in possession of the property or goods of another without his consent; or who has, in consequence of error, received payment of money not legally due to him.

527. 1. GOODS STOLEN. For things stolen the owner who has been unlawfully deprived of them has an action not only against the thief, but against third parties, who may even have purchased them in bona fide, or received them in pledge. In such cases, an obligation arising from the natural duty of restitution is presumed (a). The only doubt which disturbs the simplicity of this rule, arises from the sanction due to a sale in public market. In England, this overcomes the right of the true owner (b): but it is not so in Scotland (c). With us the privilege of public market is of force only to overcome the landlord's hypothec, in regard to corn sold there in bulk, and not by sample (d).

But if a purchaser in public market have fairly disposed of the thing to another, before any claim made by the owner, he will not be bound to restore to the owner the price which he has received, unless in so far as it shall exceed what he himself paid ; to which extent he is a gainer by the loss of the original owner (*e*).

- (*a*) 3 Ersk. 1. § 10, with Ivory's Notes. 1 Bell, Com. 281.
- (*b*) 2 Blackst. 449. *Wilkinson v. King*, 2 Camp. 335.
- (*c*) Bishop of Caithness, July 2. 1629 ; M. 9112, 4145. Ferguson, July 19. 1639 ; Ib. Wright, Jan. 1662 ; M. 9112. Forsyth, Nov. 18. 1680 ; M. 9120. Henderson, June 17. 1806 ; M. *Moveables*, App. 1. See also Ramsay, Jan. 1666 ; M. 9113. Pringles, Jan. 3. 1710 ; M. 9123.
- (*d*) See below, § 665 and 1243.
- (*e*) 3 Ersk. 1 § 10. Scott, June 15. 1704 ; M. 9123. Walker, Nov. 13. 1765 ; M. 12802.

528. It is an exception to the above rule of restitution, that money, bank-notes, and bills payable to the bearer, or blank indorsed, cannot be vindicated against one who acquires them in bona fide, in the course of trade. In such case, the property passes with the possession.

Crawford, Feb. 24. 1749 ; M. 875. Swinton, June 21. 1799 ; M. 10105. Lambton and Co. June 21. 1799 ; M. *Bill*, App. 6. Scott and Co. Feb. 28. 1812 ; F. C.

529. But if one in lawful possession of a thing sell it to another without notice, the sale is good.

530. One who by mistake has received any thing (as from a carrier), is liable in restitution : and so, one to whom a thing has been transferred, or an obligation undertaken and fulfilled, on a consideration which has failed, is also liable to restitution, under the condition, *causa data causa non secuta*.

3 Ersk. 1. § 10. Webster, Feb. 16. 1830 ; 8 S. D. 528.

531. 2. CONDUCTIO INDEBITI. Whatever has been delivered or paid on an erroneous conception of duty or obligation, may be recovered on the ground of equity ; provided the person receiving it has no reason, on natural right, implied donation, or compromise, to rely on the acquisition as his own (*a*). The action by which, in the Roman law, this was effected, was called *Condictio Indebiti* ; and the term has been adopted by us. It was an action founded not on convention, but quasi ex contractu ; a sort of pro-mutuum or quasi mutuum. (See above, § 200.) (*b*).

(a) 1 Stair, 7. § 9. 3 Ersk. 3. § 54. Pothier, Tr. de Cond. Indeb. § 160. Voet, lib. 12. tit. 6. § 7.

(b) 1 Stair, 11. § 5.

532. The following are the rules on this subject :—

(1.) As restitution is grounded on equity, it has no place if the transference or payment have proceeded on a natural obligation ; for that is binding in equity, as a bar ; although it would not have grounded a demand at law.

3 Ersk. 3. § 54.

533. (2.) If the payment have been made, with full knowledge of the person who makes it that he is under no debt or obligation to pay, it is held a *donation*, and irrevocable.

NOTE.—See as to Donations between Husband and Wife below, § 1616.

3 Ersk. 3. § 54.

534. (3.) If the payment have been made under an unavoidable error in *fact*, restitution may be demanded (a). But,

1. If the error be in law, although sufficient to relieve from an *obligation* (See above, § 11), it is more doubtful whether it affords a good ground of *restitution* (b). In several cases the Court of Session held error in law to ground restitution (c) ; but this doctrine is much shaken by a late case in the House of Lords (d).

2. If the person in error have in his own hands the means of correct knowledge, he cannot plead his error arising from gross negligence (e).

(a) 3 Ersk. 3. § 54.

(b) See the controversy among the civilians on the distinction between error in law and fact. Voet, lib. 12. tit. 6. § 7. Pothier, Tr. de Cond. Indeb. No. 160. Vinnius, Quest. Sel. lib. 1. c. 47. Huber, lib. 2. tit. 6. §. 1. It is settled in France by the rule which we have adopted ; Code Civile, § 1377.

In England the controversy came to a solemn discussion in *Brisbane v. Davies* (1813), 5 Taunt. 143, and was settled against the right to restitution on mistake in law.

(c) 3 Ersk. 3. § 54. Stirling, July 26. 1775 ; M. 2930. Carrick, Aug. 5. 1778 ; M. 2931 ; 2 Hailes, 783. Keith, Nov. 14. 1792 ; M. 2933.

(d) *Wilson v. McLellan*, House of Lords, Dec. 7. 1830 ; 4 W. S. 398.

(e) *Wilson v. McLellan*, supra.

535. (4.) If the payment have been made in the way of transaction or compromise, it is not revocable.

Ersk. ut supra. Oliver, May 15. 1798 ; noted in Ivory's edition of Erskine, p. 673.† Simpson, Feb. 10. 1710 ; 4 Brown's Sup. 791.

536. (5.) In the Roman law there was no *condictio*, if the person who received the payment was really the creditor, and entitled to receive it, although the payment had been made by one erroneously supposing himself the debtor. This is not law with us; though perhaps, in equity, where, in consequence of such negligent proceeding by him who pays, the creditor has been led into some expenditure which may bear hard upon him if obliged to refund; or where, in consideration of the payment, he has foregone some advantage, or given up a security, or liberated his debtor, he ought to be entitled to retain what he has got.

3 Ersk. 3. § 54. Kerr, March 1684; M. 2928. Duke of Argyle, July 24. 1723; M. 2929.

537. (6.) If restitution be demandable, not of money, but of a thing delivered and received unduly, the thing must be restored in the same condition in which it was received, barring accidents. If it have perished by the receiver's fault; or, even without his fault, if he have received it in *mala fide*; the value must be restored. If it have been sold in *bona fide*, the price must be paid over.

2. *Recompense.*

Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain.

538. *MELIORATIONS.* A prominent example of the doctrine of *Recompense* occurs where one in *bona fide* builds on another's ground. Although the property of the building passes as an accessory to the owner of the ground, he is liable in recompense to the extent of what he has thus acquired (*a*). But, in this matter,

(1.) The doctrine of Lord Stair seems to be carried too far, in giving the benefit of this law of recompense to one who in *mala fide* builds on another's ground (*b*).

(2.) The case between a liferenter and fiar is peculiar when the rebuilding of a ruined or burnt tenement is in question. (See below, § 1063.)

(3.) Those whose right is merely temporary, are presumed to make improvements or additions only for their own convenience, and so have no claim of recompense (*c*). So it is when a tenant builds for his own accommodation. But,

(4.) When a right is prematurely terminated, there seems to be room for a claim of recompense ; as when a tenant becomes bankrupt after having erected valuable buildings on his farm (*d*) ; so, on the reduction of conveyances, under which the purchasers have in bona fide made meliorations, the principle of recompense applies ; though there seems to be a distinction between simple fiars and heirs of entail as to right to resort to the land in security (*e*).

(5.) One who is only a creditor holding a security over the subject meliorated, is not liable for recompense, or for the cost of meliorations made by order of the proprietor (*f*).

(*a*) 3 Ersk. 1. § 11. Jack, Feb. 23. 1665 ; M. 13412. Halket, Jan. 24. 1672 ; M. 13412. Duke of Lauderdale, Feb. 1687 ; 2 Brown's Sup. 105. Rutherford, Feb. 28. 1782 ; M. 13422.

(*b*) 1 Stair, 8. § 6. See Rutherford, *supra* (*a*).

(*c*) 2 Stair, 1. § 40. 3 Ersk. 1. § 11. Hodge, Feb. 1664 ; M. 13400.

(*d*) See Morton, Feb. 22. 1822 ; 1 S. D. 322.

(*e*) Binning, Jan. 18. 1676 ; M. 13041. Duke of Gordon, May 13. 1824 ; 3 S. D. 8. Vans Agnew, July 7. 1824 ; *Ib.* 161.

(*f*) Selby, June 5. 1795 ; M. 13438. Burns, Dec. 4. 1735 ; M. 13402 ; Elch. *Hyp.* 2.

539. *Remuneration for Services.* 1. Where one has been lawfully employed in services relative to a common subject, he has a right to recompense, in respect of the benefit derived from those services by any one taking advantage of them (*a*). 2. Employment in an office requiring skill and attendance, is to be recompensed, although at entering on the employment nothing was said as to salary (*b*). But this does not hold as to a political agent (*c*) ; nor as to a partner employed in extraordinary labour for the company. (See *sup.* § 370.)

(*a*) Forbes, Jan. 6. 1676 ; M. 13414.

(*b*) M'Evers, Nov. 17. 1761 ; M. 13435. Smellie, July 19. 1835. But see Carmichael, May 22. 1836 ; 8 S. D. 753.

(*c*) Bulman, Jan. 16. 1766 ; M. 13435.

540. 2. *NEGOTIORUM GESTIO* is the management of the affairs of one who is absent, spontaneously undertaken without his knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference. An obligation is hence raised by legal construction, to the effect of indemnifying the negotiorum gestor.

1 Stair, 8. § 3, 4. 3 Ersk. 3. § 52. 2 Pothier, 919. See Johnston, June 21. 1726 ; M. 9281.

541. The rules of this obligation are,—

(1.) That the negotiorum gestor is bound, 1. to com-

plete the performance of the act which he has begun, as if he held a proper mandate ; unless the principal shall relieve him ; 2. to account for his intromissions, and restore all that he has received ; 3. to bestow a degree of care and diligence, altering with circumstances,—subjecting him for *culpa levissima*, if his interference be officious, exclusive, and interested ; for *culpa levis* only, if he have interfered in the fair course of friendly intercourse, without very strong necessity ; and for no more than *culpa lata*, in cases of necessary interference or sudden emergency, § 233, 4 (a).

(2.) The person for whom the negotiorum gestor interferes, is bound, 1. to indemnify him for expenditure, necessarily, or usefully, or even reasonably and in bona fide, laid out (b) ; 2. to relieve him from all engagements undertaken for his benefit in the course of his interference.

(a) 3 Ersk. 3. § 53. Maule, March 4. 1757 ; M. 3529.

(b) Smith, Dec. 1. 1714 ; M. 9275. Campbell, July 20. 1725 ; M. 9276.

3. LEX RHODIA DE JACTU. Recompense has been held due quasi ex contractu to those who suffer by loss of goods, &c., sacrificed at sea for the common safety. See this doctrine, already considered, § 437. et seq.

3. Reparation of Injuries.

3 Ersk. 1. § 13-15. Inst. lib. 1. t. 1, and 5. Toullier, Dr. Civ. Franc. vol. ii. p. 136.

543. The rights of individuals, either to property, or to personal liberty, safety, or reputation, are not only protected by penal law, but in civil law they furnish, when invaded, ground of action for reparation. This class of civil remedies has by lawyers been divided into actions grounded on delict, and actions grounded on something short of delict, but which, to the purposes of civil reparation, is so considered—quasi delict. The remedies for injury to the person will be discussed hereafter (see § 2828-2057.) Here it is sufficient to state the general principles of the obligation to repair damage.

544. 1. DELICT. A delict is an offence committed with an injurious, fraudulent, or criminal purpose. Criminal law looks to the prevention of delict, by punishment, example, and terror, without any view to indemnification ; while civil jurisprudence, looking only to indemnification, without regard to punishment or example, raises for this purpose, by construction of

law, an obligation to repair the damage occasioned by the delict.

3 Ersk. 1. § 13. Duff, May 19. 1825; F. C.; 4 S. D. 22. Clark (in Jury Court), Nov. 8. 1816; 1 Murray, 161. Gordon, Dec. 19. 1826; 5 S. D. 164.

545. There is this difference between the responsibility for damage arising from breach of contract (§ 29. et seq.), and the liability for damage occasioned by delict, that the former gives reparation of *direct* damage only; the latter, the highest advantage which, but for the delict, would have been enjoyed.

546. The civil action for reparation, grounded on delict, is not, like the penal action in criminal law, confined to the delinquent. The wrong-doer's representative is liable for reparation; in which we follow the rule of the canon rather than of the civil law.

3 Ersk. 1. § 15. in fin. M'Naughtan, Feb. 17. 1809; F. C. Morrison, May 25. 1809.

547. Distinctions are necessary as to the responsibility of a master, or of one having authority, for the delicts of servants; and, 1. If a master give express directions, in obeying which damage is done, he is liable for it. 2. Where something is directed to be done, or is in the common line of the servant's duty, but no special directions are given, the servant's act, and even his exercise of discretion, is the act and discretion of the master, and he is liable. 3. Where the master has not ordered, or authorized, the thing to be done; and especially where he has forbidden it, he is not liable. And, 4. If the servant wilfully or maliciously do an injurious act, his master will not be liable.

3 Ersk. 1. § 15. Lord Keith, June 10. 1812; F. C.; Linwood, May 14. 1817; F. C.; House of Lords, March 19. 1821; 1 Shaw's App. Cases, 20. Thorburn, May 24. 1811. M'Kenzie v. M'Leod, 10 Bing. 385. M'Mannus v. Cricket, 1 East, 106.

548. The imposition of a penalty by statute is no discharge of the civil claim for reparation. See above, § 36.

3 Ersk. 1. § 14.

549. Where exact restoration is impracticable, damages are due; to be ascertained by the verdict of a jury.

Judicature Act, 6 Geo. IV. c. 120. § 28.

550. Although in *criminal* law each party is liable only to

his own punishment; in civil reparation, the partners or associates in a crime perpetrated by united counsels and means, are liable *singuli in solidum*, unless the acts are distinct.

1 Stair, 9. § 5. Hay, Jan. 11. 1763; M. 14658. Duke of Athole, June 20. 1822; 1 S. B. 511.

551. The punishment of the crime does not extinguish the civil claim of damage, except where the punishment is capital.

1 Hume, 279. Foster's Criminal Law, 287. Kames' Law Tracts, Tr. 1.

552. Reparation includes not merely the pecuniary loss, but also a *solatium* for injury.

Black, Feb. 9. 1804; M. 13905; affirmed. Milne, March 8. 1810; F. C.; 2 Dow, 390. Brown, Feb. 26. 1813; F. C. See also Innes, Feb. 6. 1798; M. 13189.

553. 2. QUASI DELICTS. Gross negligence or imprudence, though it should bear no such character of fraud, malice, or criminal purpose as to subject the person to criminal cognizance, is, as a ground for an action for damages, held as a delict, to the effect of making the person, guilty of the imprudence or negligence, liable to indemnify the person who suffers by the fault. These are by lawyers called quasi delicts (*a*); and,

1. Injury to the property of another (even where it appears that extraordinary vigilance and skill might have prevented loss), will not ground an action of damages; unless negligence or want of competent skill be shewn, as in cases of COLLISION OF SHIPS (*b*): as to which the rules are, 1. that the ship going to windward is to keep to windward, and the ship which has the wind free is to bear away (*c*); 2. that where no blame is imputable to either party, but the damage is by storm, the loss falls where it lights, and neither is liable to the other; 3. that where both are to blame for want of the requisite vigilance or skill, the loss is apportioned between them; 4. that if the suffering party alone has been to blame, he must bear the burden; 5. that if the fault is with the vessel which has run down and injured the other, the latter will be entitled to an entire compensation (*d*).

2. Carelessness in the keeping of a dangerous dog, or in the management of fire-arms, subjects to damage in reparation (*e*).

3. The use of diligence (as arrestment, &c. in security), is always *periculo petentis* ; and where injury arises, will entitle to reparation if nimious or groundless (*f*).

4. Carelessness on the part of public officers, magistrates, or road trustees, or their managers or workmen, has in Scotland been held to render them liable as trustees for reparation, with relief against the trust fund, though not in their private capacities. It is otherwise in England (*g*).

(*a*) 3 Ersk. 1. § 15. Cases of Black, Brown, and Innes, above cited (§ 552.) Chapman, Feb. 1825 ; 3 S. D. 585. Brown and Co. June 26. 1824 ; 3 S. D. 187. Mack, Feb. 17. 1832 ; 10 S. D. 349.

(*b*) Vandersplank, 1 Mood. and Mal. 169.

(*c*) Handyside v. Wilson, 3 Carr. and Payne, 528.

(*d*) Hay, June 15. 1824. 2 Sh. Ap. Ca. 395, and the cases there quoted by Lord Gifford. The Woodrop Sinus, 2 Dod. Ad. Rep. 83. Montgomerie, June 15. 1826 ; 4 S. D. 769 ; 4 Murr. 167.

(*e*) Brown and Co. June 26. 1824 ; 3 S. D. Sarch v. Blackburn, 4 Carr. and Payne, 294. Dixon v. Bell, 5 Maule and Selw. 198.

(*f*) Clark, Nov. 1816 ; 4 S. D. 23.

(*g*) Findlater, June 19. 1838 ; 16 S. D. 1150. Harris v. Baker, 4 M. and Sel. 27. Hall v. Smith, 2 Bing. 156.

554. One is liable for the faults or gross negligence of those in his employment, or under his command, according to the rules already laid down, § 547.

Fraser, Jan. 22. 1822 ; 1 S. B. 284. Baird, July 4. 1826 ; F. C. ; 4 S. D. 790. Waldie, March 1. 1822 ; 1 S. B. 409. Lord Keith and Linwood, ut supra, § 547. Sword v. Cameron, Feb. 13. 1839.

VI. EXTINCTION OF OBLIGATIONS.

555. Obligations are extinguished, either, 1. by actual fulfilment of the engagement ; payment, performance, or satisfaction made to the creditor ; or, 2. by virtual fulfilment ; compensation, novation, or confusion ; or, 3. by discharge on the part of the creditor ; or, 4. by presumed abandonment or satisfaction.

1. *Extinction of Obligations by actual Fulfilment or Performance.*

556. PAYMENT or PRESTATION, by the true debtor in the obligation, to the true creditor, satisfies and extinguishes the engagement (*a*). But the creditor is not bound to accept of a partial payment, or of any thing but proper payment according to the obligation (*b*).

(a) 1 Stair, 18. § 3. 3 Ersk. 4. § 1-6. Kilkerran, 284.

(b) 3 Ersk. 4. § 1.

557. 1. *By whom Payment may be made.* (1.) Payment, to the effect of extinguishing the obligation, may be made not only by the debtor himself, but by any one acting for the debtor: Or even by a stranger, where the debt is pecuniary, and due, and demanded; or where any penal effect may arise from delay; or where the creditor has no interest in demanding performance by the proper debtor. (2.) The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it. (3.) The creditor cannot be compelled to grant an assignation, unless the debtor shall consent, and the granting of the assignation shall not interfere with any other interest of the creditor himself.

M'Gilvray, June 10. 1826; 4 S. D. 697. Austin, May 24. 1827; 5 S. D. 701. Yet see Rainnie, March 7. 1822; 1 S. D. 377.

558. Payment made by one interested in the debt (as co-obligant or surety) will take away the right of the creditor, but will not extinguish the debt of the principal obligant. The person so paying is entitled to an assignation, to the effect of operating his relief.

559. Payment is presumed to have been made by the proper debtor where the evidence is ambiguous; even in the case of bills and promissory-notes.

Webster, Jan. 15. 1819; F. C. and cases there cited. Jackson, Dec. 9. 1824; 4 S. D. 292. Ewing, Dec. 13. 1825; 4 S. D. 310. Soutar, June 29. 1827; 5 S. D. 876.

560. Payment made by one administering for the debtor in any representative capacity, as tutor, trustee, factor, &c. is presumed to be made from the funds of the principal; and so to extinguish the debt. Otherwise it is negotiorum gestio, § 539.

3 Ersk. 4. § 6. Trotter, Jan. 20. 1672; M. 11526. Donaldson, June 11. 1711; M. 11511. Jack, Dec. 9. 1825; 4 S. D. 292. See M'Lachlan, June 16. 1831; 9 S. D. 753.

561. 2. *To whom payment may be effectually made.* Payment will extinguish the debt in the following cases;—1. if made to the true creditor, or to his heir with his title completed, provided they shall be in full capacity to discharge the debt (a).

2. Or if made to one duly authorized by the creditor to receive it, as assignee, trustee, factor, &c.: But a wife has no such power: Neither has a messenger or officer of the law employed to do diligence for the debt; so that payment to him is no extinction of the debt, unless, as is sometimes the case, such messenger is employed as agent (*b*). 3. Payment is good if made in bona fide to one, to whom the debtor has been led or allowed by the creditor to believe, in point of fact (*c*), that he has given authority to receive it (*d*);—as, (1.) to the original creditor after assignation or diligence not duly intimated (*e*); or, (2.) after bankruptcy unknown to the debtor (*f*); or, (3.) by tenants to a landlord after a sale of the estate; or, (4.) by tenants after the landlord has granted an heritable bond, if either it has not been intimated (*g*), or, though intimated, if the creditor has not taken possession, or demanded the rents; or though he has taken decree of maills and duties, if he has allowed it to remain for a long time without a charge or claim against the tenant (*h*). 4. Payment made in bona fide to the creditor after arrestment of the funds of one abroad is good, if there has not been personal notice given to the debtor (*i*); and it has been held that even a payment made by a debtor at a distance from home after arrestment, used at his dwelling-house, was good (*k*); (5.) Payment to one who had been factor, without notice of recall of the factory is good (*l*); (6.) So also, if made to one possessed of the documents of debt, with apparently a good title to receive payment; or, (7.) to one by acquiescence allowed to receive rents for an apparent heir (*m*).

See below, § 562.

(*a*) 3 Ersk. 4. § 3. See Halkerton and Drummond, Jan. 1729; M. 1799. Howes, Dec. 2. 1758; Ib. Somerville, Nov. 21. 1823; 2 S. D. 509.

(*b*) Ibid.

(*c*) Ignorantia juris neminem excusat.

(*d*) 1 Stair, 18. § 3. 3 Ersk. 4. § 3.

(*e*) 3 Ersk. 4. § 3, and cases there cited. Lyon, Feb. 23. 1610; M. 1736. Home, July 21. 1632; M. 848. Hamilton, Feb. 27. 1759; M. 1802. Blackwood, Dec. 16. 1703; M. 1793.

(*f*) 54 Geo. III. c. 137. § 38, in fin.

(*g*) York Building Co. Feb. 17. 1736; M. 1784; Elch. *Bona and Mala Fides*, 2. Home, Feb. 10. 1666; 1 Brown's Sup. 522. M'Gill, July 4. 1716; M. 1783. See Robertson, Dec. 16. 1755; 5 Brown's Sup. 838; and Gordon, Jan. 1757; Ib. 855.

(*h*) Garden v. Lindsay, Jan. 28. 1757; 5 Brown's Sup. 838.

(*i*) 54 Geo. III. c. 137. § 3; and 1 and 2 Vict. c. 114.

(k) Laidlaw, Jan. 25. 1838 ; 16 S. D. 367. See Fludyer, March 8. 1770 ;
1 Hailes, 348.

(l) 3 Ersk. 4. § 3.

(m) Somerville, Nov. 21. 1823 ; 2 S. D. 509.

562. *Forehand Payment.* To prevent collusion between tenants and landlords to the prejudice of singular successors, a tenant's payment of rent before the legal term, is not a bona fide payment to save him from the demand of a creditor or purchaser (a). But, 1. This does not prevent a payment after the legal and before the conventional term (b). 2. It does not apply to the payment of a debt before the time of payment (c). 3. It holds respecting the payment of feu-duties, and it would seem also to hold as to the interest of the heritable debts.

(a) 3 Ersk. 4. § 5. Gray, June 12. 1629 ; M. 10023. E. of Lauderdale, Jan. 7. 1662 ; Ib. Lady Traquair, Feb. 5. 1667 ; Ib.

(b) York Building Co. Feb. 17. 1736 ; *Elchies v. Payment*, 1.

(c) Ersk. ut supra.

563. 3. *Indefinite Payments.* Indefinite payments, where several debts are due, are applied thus :—1. The debtor may, in making the payment, appropriate it to a particular debt ; under this limitation, that the creditor cannot be compelled to take a partial payment. 2. If there be no distinct appropriation by the debtor, the creditor may, by his receipt, appropriate it (a). 3. If there be no such appropriation by either, the creditor may ascribe it to which debt he pleases ; to interest, for example, and not to the principal debt ; or to the worst secured debt ; or to a debt bearing no interest instead of one on which interest runs ; or to a debt in danger of prescribing, leaving a more recent one unpaid (b). Nay, it has even been held that he was not bound to apply it to a debt which he was employed to recover (c). But, 4. This is to be received under the equitable limitation, that the debtor shall not, by such appropriation of the creditor, be left exposed to penal consequences ; nor have the payment ascribed to a disputed debt ; nor a cautioner deprived of the benefit of the payment where the debtor is insolvent ; nor a payment, as understood at the time of payment, ascribed differently on emerging circumstances ; nor a dividend from a sequestrated estate applied otherways than to the whole debt (d).

(a) 3 Ersk. 4. § 2. Kilk. 284 ; M. 6813. Campbell, May 20. 1828 ; 6 S. D. 830.

(b) Ersk. ut supra. Duck, June 28. 1717; M. 6804. Paterson, Jan. 1744. cited by Ersk. Forbes, Nov. 9. 1739; M. 6813; Elchies, *Ind. Pay.* 1; 5 Brown's Sup. 690. Harwood, Jan. 8. 1742; Ib. 726. Strittel, March 2. 1779; M. 6815. Good, June 30. 1779; M. 6816; 2 Hailes, 837. Reid, Jan. 29. 1782; M. 6818. McLeod, June 26. 1821; 1 S. B. 89. Cochran and Company, June 22. 1821; Ib. 82. Houston's Executors, June 25. 1824; 3 S. D. 180; see also 4 S. D. 566; and 3 W. S. App. Cases, 394. Maitland, Nov. 23. 1827; 6 S. D. 109. Clyne, Jan. 26. 1830; 8 S. D. 391. Bremner, Dec. 13. 1837; 16 S. D. 213.

(c) McLeod, June 26. 1821; 1 S. D. 86.

(d) Ersk. ut supra. McRaith, Feb. 13. 1680; M. 6801. Duchess of Buccleugh, Feb. 1. 1725; M. 6807. McNee, May 25. 1824; 3 S. D. 60; and in House of Lords, Feb. 24. 1826; 2 W. S. App. Cases, 7. Bannatyne's Representatives, Feb. 26. 1825; 3 S. D. 593. Allan, March 1. 1831; 9 S. D. 519. Devaynes v. Noble, 1 Merivale, 585.

564. 4. *Evidence of Payment.* The general rule is, “*unumquodque eodem modo solvitur quo colligatur.*” So,

565. Payment of an obligation constituted by writing must be proved by written evidence; as in a money debt. But parole evidence is sufficient where the contract is parole, and payment an integral part of it; as in sale for ready money.

Crawford, Feb. 25. 1823; 2 S. D. 243.

566. Payment is not in general to be presumed, unless the circumstances are irreconcilable with the subsistence of the debt (a). But,

1. It is presumed, from the document being found in possession of the debtor, according to the maxim, *Chirographum apud debitorem repertum presumitur solutum* (b). This presumption however yields to proof; as in a bill sent for acceptance, and kept by the drawee; or a receipt or document lost, and falling into the debtor's hands; or a bill stolen from a messenger (c).

(a) Graham, Dec. 18. 1823; 2 S. D. 594.

(b) 3 Ersk. 4. § 5. Gordon, Feb. 5. 1703; M. 11408. Rollo, Jan. 26. 1710; M. 11411.

(c) Ersk. ut supra. Fithie, Feb. 14. 1693; 4 Brown's Sup. 70. Ross, Nov. 29. 1699; Ib. 464. Edward, June 26. 1823; 2 S. D. 431.

567. 2. From three consecutive discharges of periodical payments (as rents, interests, feu-duties, or salaries), payment of all preceding is presumed (a). But, 1. It is not enough that there have been three consecutive payments, without a discharge (b). 2. It has been doubted whether the presumption holds where the discharges are by a factor (c); but such discharge has by a recent case been held sufficient. 3. One

discharge for three consecutive years is not held to raise the presumption; and, 4. It is not enough, to shew irregular payments amounting in all to three years' rent or interest (*d*).

(*a*) 3 Ersk. 4. § 10, and cases cited. Errol, Jan. 16. 1605; M. 11392. Williamson, Feb. 17. 1631; M. 11393.

(*b*) Morrison, Feb. 19. 1631; M. 11394.

(*c*) Lord Wedderburn, Feb. 14. 1612; M. 6322. Preston, July 27. 1667; M. 11397. Earl Marischal, Feb. 1682; M. 11399. Blackadder, Nov. 12. 1687; M. 3552.

(*d*) Hunter, March 5. 1827; 7 S. D. 548.

568. 3. Physicians' and lawyers' fees are presumed to have been paid (*a*). But, 1. In the case of the former, this presumption does not hold during the deathbed sickness (*b*). 2. If a promise or contract shall be established, the presumption will not hold (*c*). 2. If local custom be different, the presumption will not hold (*d*).

(*a*) Johnson, July 31. 1716; M. 11419. Russell, below (*b*). Park, Feb. 7. 1755; M. 11421. Malcolm, *infra* (*b*). Hamilton, June 15. 1781; M. 11422. Sanders, Feb. 19. 1822; 1 S. D. 333.

(*b*) Park, *sup.* (*a*). Russell, Feb. 7. 1717; M. 11419. Malcolm, July 31. 1744; Elch. *Presump.* 15. Hamilton, June 15. 1761; M. 11422.

(*c*) Johnson, *ut supra* (*a*). McKenzie, Dec. 26. 1728; M. 11421.

(*d*) Flint, June 17. 1795; M. 11422. Saunders, Feb. 19. 1822; 1 S. D. 310.

569. Obligations *ad factum præstandum* may be implemented by any one representing the debtor; or by his authority; or by one interposing for his relief from the obligation; provided, in those several cases, the creditor have no interest to insist on the debtor himself fulfilling his obligation, § 29.

570. Where the engagement is peculiarly personal, it is discharged by the death or incapacity of the debtor.

571. When the obligation relates to a specific subject, the destruction of the subject, without fault, extinguishes the obligation; if the subject be destroyed by fault of the obligor, the obligation resolves into a claim of damage. See above, § 29.

2. EXTINCTION OF OBLIGATIONS BY VIRTUAL FULFILMENT.

1592. c. 141. Stair, 18. § 6. More's Notes, p. cxxxviii. 3 Ersk. Prin. 4. § 2. 3 Ersk. 4. § 11-19. 2 Bell, Com. 129-145.

572. COMPENSATION. The concurrence of two liquid debts reciprocally due, may be made to operate as payment from the moment of concurrence, § 575. This is called in England *Set-off*; with us, *Compensation*. It rests on two principles; the expediency

of abating lawsuits, and the avoiding of injustice; and this doctrine is in Scotland established and regulated by statute.

573. The general rules of compensation are,—

1. That the debts must be of the same nature;—so an obligation to deliver grain or goods, cannot be set off against a pecuniary obligation (*a*); but a claim for damage sustained in the carriage of goods, has been allowed to be set off against freight (*b*).

2. That the debts must both be due; so there is no compensation between a present debt, and one that is future or contingent (*c*).

3. That the debts must both be liquid, “certum an et quantum debeatur;” (*d*) it being, however, sufficient, that the debt shall be instantly verified by writ or oath (*e*): But the bankruptcy of one of the parties seems to entitle the other in equity to *retain* till the illiquid debt be constituted; or in security of a future debt.

4. That the parties shall be debtor and creditor, each in his own right, and at the same time (*f*).

5. A factor will, to this effect, be held as principal where he has sold goods consigned to him without notice to the buyer of his being only a factor (*g*); but if before the goods are delivered, the purchaser has notice that they belong to a third party, there will be no compensation on a debt of the factor (*h*).

6. When the sale is by a broker, without disclosing the name of his principal, the buyer cannot plead compensation on a debt due by him to the broker (*i*).

7. Difficult questions have arisen as to compensation between company debts and debts of the partners. And the rules seem to be these; 1. that in the common case there is no concurrence of debt and credit between the debt of the company and the debt of any individual partner, the company forming an entirely separate person in law (*k*). 2. That it may be doubted whether a company, called upon to pay a debt to one who is creditor of a partner, may not arrange with that partner to enable them to satisfy the debt by assigning his debt to the company, so as to make a concurrence (*l*). 3. That such arrangement cannot be made after bankruptcy (*m*). 4. That where the company debt is demanded from a partner, or

where the company is bankrupt or dissolved, the partner may set off the debt due to him against the company debt (*n*).

8. If one has an interest in extinguishing the debt claimed he may plead compensation (*o*). See below, of Retention, § 1411. and wherein it differs from Compensation.

(*a*) 3 Ersk. 4. § 15. Elliot, July 1. 1631; M. 2649. Tulliallan, June 17. 1664; M. 2559.

(*b*) Taylor, Dec. 2. 1830; 9 S. D. 113.

(*c*) 3 Ersk. 4. § 15.

(*d*) Monro, Dec. 14. 1823; 2 S. D. 306. Dun, Nov. 24. 1824; 3 S. D. 274. Mowat, Nov. 29. 1828; 7 S. D. 88. Cargill, May 27. 1829; 7 S. D. 662. Finlayson, June 4. 1829; 7 S. D. 698.

(*e*) Ersk. ut supra, § 16; and cases there cited. Sligo, Feb. 28. 1777; 5 Brown's Sup. 420. Seaton, Nov. 22. 1683; M. 2566. Brown, Jan. 14. 1686; M. 2566. M'Dowal, July 31. 1707; M. 2568. Ross, Feb. 13. 1711; M. 2568. Edwards, May 24. 1821; 1 S. D. 27. Grierson, Dec. 6. 1821; 1 S. 191. Mitchell, June 4. 1822; 1 S. 451. M'Neil, July 2. 1824; 3 S. D. 204. Ewing, Dec. 13. 1825; 4 S. D. 310. Dunbar, July 11. 1826; 4 S. D. 124. Dickson, Nov. 25. 1826; 5 S. D. 43. Fisher, June 5. 1829; 7 S. D. 704. Downie, June 24. 1829; 3 Wil. and Sh. 472. Thomson, Dec. 18. 1829; 8 S. D. 267. M'Kenzie, Feb. 4. 1830; 8 S. D. 436. Hagart, June 3. 1830; 8 S. D. 852. Clark, July 7. 1830; 8 S. D. 1025. See Sibbald, Feb. 17. 1837; 15 D. 4.

(*f*) Ersk. ut supra, § 13. Ferguson, Dec. 28. 1711; M. 2659. Mackie, Nov. 29. 1774; M. 2575. Auld, July 5. 1810; F. C. Pearson, March 10. 1814; F. C. Wilson, May 17. 1822; 1 S. D. 417. Lumsden, Dec. 16. 1823; 2 S. D. 585. Campbell, Nov. 13. 1823; 2 S. D. 484. M'Leay, July 9. 1825; 4 S. D. 161. Hay, Dec. 22. 1825; Ib. 344. Menzies, June 22. 1826; 4 S. D. 747. Anderson and Co. Feb. 26. 1829; 7 S. D. 462. Fleming, Jan. 29. 1832; 10 S. D. 739.

(*g*) Belches, Jan. 31. 1770; Compens. App. 2. Baxter, Dec. 11. 1800; Ib. No. 4. Hitchiner, Dec. 8. 1803; M. 14206. Johnson, Nov. 14. 1818; F. C. See *George v. Clagget*, 7 Term. Rep. 359. *Rabone v. Williams*, 7 Term. Rep. 360. note. *Carr v. Hinchcliffe*, 4 Barn. and Cr. 547.

(*h*) *Moor v. Clemenston*, 2 Camp. 22.

(*i*) *Baring v. Corrie*, 2 Barn. and Ald. 137.

(*k*) *M'Ghie*, Nov. 29. 1774; M. 2575.

(*l*) *Galdie v. Gray*, June 16. 1774; M. 14598.

(*m*) *Cauvin*, June 18. 1783; M. 2581. See *Doe v. Darnton*, 3 East, 149.

(*n*) *Bogle v. Ballantyne*, July 8. 1793. *Scott*, June 13. 1809. *Salmon*, Dec. 17. 1824; 3 S. D. 285. *Low*, June 1. 1839; 16 S. D. 1092. See *Slipper v. Hidstone*, 5 Term. Rep. 493. *French v. Andrade*, 6 Term. Rep. 582.

(*o*) *M'Bride*, Jan. 7. 1680; M. 2570. *Town of Aberdeen*, July 1. 1709; M. 2570. *Rae*, June 30. 1738; M. 2571. *Middleton*, Feb. 26. 1743; M. 2573. But see *Lord Kilkerran's* doubt, Ib.

574. The exceptions to these rules are,—1. That there is no compensation in deposite, § 212. (*a*). 2. That specific appropriation bars compensation; as in the case of an obligation by the debtor to pay certain debts; or where money is given for the purpose of retiring a bill; or when a bill is given to a banker for discount—or sent for payment (*b*). 3. That

a debt prescribed cannot compensate a debt not prescribed, unless upon a reference to oath in the short prescriptions (*c*).
 4. That a debt acquired after bankruptcy, or after diligence to attach the debt claimed, is not a sufficient ground of compensation (*d*).

(*a*) 1 Stair, 13. § 8. 3 Ersk. 4. § 17, 18. Campbell, Dec. 11. 1781; M. 2665.

(*b*) Douglas, Dec. 8. 1699; M. 2624. Stewart, Feb. 16. 1770; M. *Comp.* App. 2; 1 Hailes, 342. See cases of Haig and Mathison, 1 Illus. 473.

(*c*) Carmichael, July 1719; M. 2677. Baillie, Aug. 10. 1753; M. 2680. Clark, Aug. 6. 1773; M. 2665.

(*d*) Crawford, Feb. 8. 1662; M. 2613. Mousewell, Feb. 14. 1662; M. 2614. Cauvin, June 18. 1783; M. 2581. Mill, Nov. 22. 1825; 4 S. D. 219. M'Lure v. Brown, July 16. 1678; M. 2617.

575. Compensation operates according to these rules, 1. it must be pleaded (*a*), not having with us (as it had by the Roman law) any effect ipso jure: And so it does not stop prescription (*b*). 2. It must be pleaded before decree; not being competent by suspension after judgment pronounced (*c*): Even where the decree is in absence the general rule holds (*d*); but it has been sometimes relaxed (*e*). 3. It is competent to be stated by suspension against a decree of registration (*f*) in cases of insolvency, or where the party is *vergens ad inopiam* (*g*). But, 4. When pleaded it operates retrospectively to the period of concurrence, and so stops interest (*h*).

(*a*) Graham, Nov. 3. 1693; 4 Brown's Sup. 86.

(*b*) 1 Stair, 18. § 6. corrected by 3 Ersk. 4. § 12. Lord Kilc. in Maxwell, Nov. 15. 1738; M. 2550. Baillie, Aug. 10. 1753; M. 2680. Cleland, Feb. 5. 1669; M. 2682.

(*c*) Martin, Dec. 12. 1632; 1 Brown's Sup. 78. Nicol, July 12. 1664; 2 Brown's Sup. 340. Logan, Feb. 5. 1678; M. 2641. Brown, Feb. 6. 1694; 4 Brown's Sup. 142. Gordon, July 9. 1697; M. 2642. Anderson, July 20. 1669; M. 2646. Downie, Nov. 20. 1832; 11 S. D. 51.

(*d*) Paterson, Dec. 9. 1742; M. 2646. Cunningham, Jan. 17. 1809; F. C.

(*e*) Corbet, March 21. 1707; M. 2644. Baillie, June 29. 1733; Elch. *Comp.* 1. A. v. B. Feb. 25. 1747; M. 2648. Same case, Monboddio, 5 Brown's Sup. 747.

(*f*) Hill, Nov. 23. 1822; 2 S. D. 35.

(*g*) Barclay, Jan. 1683; M. 2641. M'Laren, Feb. 18. 1736; M. 2646.

(*h*) Cleland, ut supra (*b*). Campbell, July 21. 1756; M. *Tack*, App. 1.

576. 2. NOVATION. A debt is extinguished by novation in two several ways; Novation, properly so called, and Delegation.

NOVATION is the substitution of a new engagement or obligation by the same debtor to the same creditor, to the effect of extinguishing the original debt.

1 Stair, 18. § 8. 3 Ersk. Pr. 4. § 9. 3 Ersk. 4. § 22. Pallet, Feb. 19. 1675; 1 Brown's Sup. 733. Douglas, Heron, and Co July 24. 1785; M. 7070; 2 Hailes, 979.

577. DELEGATION is the substitution of a new debtor for the old, with consent of the creditor. The person thus substituted was in the Roman law called EXPROMISSOR.

Ersk. and Stair, ut supra. Hay, July 6. 1697; M. 11520. Oswald, July 24. 1678; M. 5030. Kincaids, Jan. 24. 1696; M. 7060. Oswald, June 20. 1733; M. 7061; Elch. *Society*, 1. Buchanan and Co. Feb. 19. 1799; M. 3402. Dudgeon, June 9. 1829; 7 S. D. 729.

578. Novation is not to be presumed where the circumstances are consistent with the subsistence of the original debt (*a*), unless the old security be given up; or the new one expressly taken in satisfaction; or a new debtor taken in place of the old. Any other alteration on the security is held to be for the convenience and intermediate security or use of the creditor, and in corroboration of the original engagement; as where the creditor in a book-debt takes a bond or bill for the amount (*b*).

(*a*) King, May 29. 1626; M. 11518. Binny, Feb. 5. 1675; M. 7057. Callender, Feb. 8. 1677; 1 Brown's Sup. 781. and 3 ib. 138. Ardblair, July 24. 1678; M. 5030. Kincaids, Jan. 24. 1696; M. 7060. Oswald, June 26. 1711; M. 11521. Ross's Crs. July 24. 1713. Grant, Feb. 11. 1715; M. 7060. Thomson, Feb. 25. 1736; Elch. *v. Presumption*, 6. Bank of Scotland, March 1. 1781; M. 14121; 2 Hailes, 870; and 2 Bell, Com. 249. note. Rutherford, Feb. 25. 1785; M. 7069; 2 Hailes, 968. Skinner, May 31. 1823; 2 S. D. 354. Buchanan and Co. June 20. 1833; 11 S. D. 762.
(*b*) Gordon, Nov. 28. 1678; M. 7059. Duke of Norfolk, Feb. 14. 1752; M. 7062. See also Davidson, June 28. 1733; M. 7061. Dougal, Nov. 17. 1795; M. 851. Bell's Cases. Moubray, June 17. 1824; 3 S. D. 146. Edgar, Feb. 8. 1825; 3 S. D. 513. Linning, June 27. 1821; 1 S. D. 90. Skinner, May 31. 1833. 2 S. D. 312.

579. Novation of either kind extinguishes the debt with its accessories. But, 1. special stipulation may preserve them; 2. the old debtor may guarantee the credit of the new; 3. if the old debtor knew, while the creditor was ignorant, that the substituted debtor was insolvent, the original debt will subsist.

580. 3. CONFUSION. When the same person becomes both creditor and debtor in an obligation, without any right of relief against another, the *jus crediti* is suspended (*a*); and if no interest of the creditor interferes to make it desirable to keep up the debt, it is held to be satisfied and extinguished (*b*).

Where the creditor has an interest to keep up the debt, it is held to be only suspended, not extinguished (*c*). So

the debt may be assigned and money borrowed on it; or it may be kept up for the benefit of children, as by an heir of entail; or in contemplation of a divergence of the lines of succession, it may be made available to a particular heir; or where the creditor succeeds to the debtor in a character entitled to relief, the debt will not be entirely extinguished, but the right of relief will remain (*d*).

(*a*) 1 Stair, 18. § 9.

(*b*) 3 Ersk. pr. 4. § 10. 3 Ersk. 4. § 23. Hart, March 18. 1630; M. 3035 and 5566.

(*c*) Cunningham, Dec. 21. 1680; M. 3038. Cuming, Jan. 4. 1726; M. 3042. Murray, Jan. 27. 1728; M. 3043. Carmichael, May 12. 1821. Codrington, House of Lords, March 31. 1824; 2 Shaw's App. Cases, 118. Laurie, Dec. 7. 1830; 9 S. D. 147.

(*d*) Gordon, Dec. 1. 1757; M. 11161. Crawford, March 11. 1809; F. C.

581. Confusion takes place, 1. where the debtor succeeds to the creditor; 2. where the creditor succeeds to the debtor, and to the extent of the right thus arising; 3. where a stranger succeeds to both; 4. where the creditor and debtor intermarry, and the debt is moveable.

3 Ersk. 4. § 23, 24. Codrington, March 31. 1824; 2 Shaw's App. Cases, 118. See Hog, Dec. 11. 1832; 11 S. D. 198.

582. 4. DISCHARGE AND ACCEPTILATION. A Discharge is properly the acknowledgment of payment or performance actually made: But it may be granted independently of performance or payment, which is called Acceptilation.

Express discharge must be established by evidence equally available with that which constitutes the obligation. A discharge extinguishes the debt—but it is frequently combined with an assignation; as where a cautioner is called upon to pay a debt, he gets from the creditor a discharge of his own obligation, and an assignation of the debt, for the purpose of operating his relief without the necessity of raising an action.

3 Ersk. 4. § 8. also § 7.

583. A special discharge, with a general clause superadded, is limited to debts of the same kind with that specially discharged.

3 Ersk. 4. § 9. 1 Stair, 18. § 2. Talbot, June 29. 1705; M. 5027. Logan, Dec. 13. 1797; M. 11379.

584. The words of a general voluntary discharge include all debts of which, at the date, the granter could demand payment, except those of an extraordinary description; as cau-

tionry, feu-duties, heritable burdens, &c. (a). A general discharge in bankruptcy comprehends all debts, of every description, present, future, and contingent, contracted previous to the date of the first deliverance on the petition for sequestration (b).

(a) 3 Ersk. 4. § 9. Campbell, Jan. 23. 1678 ; M. 5035. Oliphant, March 1682 ; M. 5035. M'Taggart, Feb. 28. 1828 ; 6 S. D. 641 ; 4 W. S. App. Cases, 361. Grahame, Jan. 15. 1823 ; 2 S. D. 612 ; reversed on appeal, 1 W. S. App. Cases, 595. Same case, 6 S. D. 479 ; 4 W. S. 346. Adam, March 9. 1831 ; 9 S. D. 570.

(b) 54 Geo. III. c. 137. § 59 and 61.

585. Discharge is presumed,—1. from three consecutive receipts for rents or other periodical payments (§ 568) ; 2. from the settlement of a factor's periodical accounts.

3 Ersk. 4. § 10. M'Arthur, May 30. 1821 ; 1 S. and B. 37.

3. EXTINCTION OF OBLIGATIONS BY LAPSE OF TIME.

586. The mere lapse of time in some cases bars action on an obligation ; in others it extinguishes the obligation entirely. But in order correctly to mark the principle on which this doctrine proceeds, it is necessary to distinguish between Limitation properly speaking, and what more correctly is called Prescription. Limitation is a denial of action on an instrument or document of debt, after the elapse of a certain time, without regard to the actual subsistence of the debt ;—as in holograph writings ; bonds of caution ; bills and notes :—Prescription is a legal presumption of abandonment or of satisfaction ; and so extinguishes the debt,—as in the long negative prescription, the decennial, quinquennial, and triennial prescriptions.

This distinction is grounded on a real difference in principle ; and, although it may seem unimportant, it enters into all arguments on the more nice and difficult questions in this department.

1. *Limitation of Action.*

587. Limitation of action is either by convention or by statute—the former being a condition in the obligation (see § 50), the latter established on grounds of public expediency.

588. 1. CONVENTIONAL LIMITATION OF OBLIGATIONS depends entirely on the will of the parties. And,

1. An obligation stipulated to be binding for a certain time, is extinguished by the elapse of that time ;—as an obligation

to guarantee a loan during six months; or an obligation to pay a sum of money, provided a demand shall be made within a year; or to pay an annuity during a certain term of years.

2. In such stipulations, it is important to observe the distinction between engagements to *endure* for a time certain, and engagements for collateral matters to *take effect* provisionally within a time certain. The expiration of the limited time extinguishes the one—it only points the application of the other.

3. An obligation may be limited to a particular event (as the provision of a sum on A's attaining a certain age); in which case by predecease the obligation is extinguished; the condition becoming impossible.

4. Obligations are sometimes specially limited to the person of the debtor or of the creditor, in which case the death of the party, or incapacity to perform the thing undertaken, will extinguish the right, and discharge the obligation: So an obligation by an artist to paint a picture, or an agreement to give the use of a thing to one during life, or to pay an annuity during life—expires with the life of the person.

589. 2. LIMITATION OF OBLIGATIONS BY STATUTE. The laws by which the effect of written obligations is limited to a certain term, proceed on the obvious expediency of protecting persons against demands, after the ordinary checks against forgery may have been removed; or against the consequences of too easily putting their hand to cautionary engagements, after so transitory an act may have been forgotten. There are statutes of this description, establishing the vicennial, the quinquennial, the sexennial, and the septennial limitations.

NOTE.—It has sometimes been held that *actions* raised on holograph writings fall under the quinquennial prescription of the act 1685, 14, and on this Ersk. speaks ambiguously. I do not see any ground for such an opinion in either of the statutes.

590. 1. *Vicennial Limitation.* By statute, ‘holograph mis-
sive letters, and holograph bonds, and subscriptions in compt-
books without witnesses, not being pursued for within twenty
years, shall prescribe in all time thereafter, except the pur-
suer offer to prove, by the defender's oath, the verity of the
said holograph bonds, and letters, and subscriptions in compt-
books’ (a).

The statute seems to contemplate only contracts or obliga-

tions, and it may be doubted whether it is to be held as quite settled by the case below (*b*), that a writing not itself an obligation, but a collateral proof merely, falls under the act.

(*a*) 1669, c. 9. 3 Ersk. 7. § 26. 1 Bell, Com. 329.

(*b*) Bank of Scotland, July 9. 1747; Lord Monboddo; 5 Br. Sup. 748.

591. The time runs from the date of the writing, not from the day of payment or purifying of a condition.

Hume, Jan. 19. 1773; M. 10992. 1 Hailes, 511.

592. After the lapse of the statutory period, the authenticity of the writing, not that of the subscription merely, must be established by the debtor's oath, or that of his heir (*a*); and in that case it is not necessary to prove the debt (*b*).

The vicennial prescription does not run against a minor (*c*).

(*a*) 3 Ersk. 7. § 26. Correct Sir G. M'Kenzie's Obs. on the act 2. Parl. ch. 11. sess. 1. c. 9. Earl of Leven, July 28. 1715; M. 10991. Graham, July 3. 1725; M. 10992. Brown, July 17. 1741; Kilk.; M. 9417. Dalzel, Nov. 19. 1784; M. 10994; 2 Hailes, 984.

(*b*) Muir, Feb. 19. 1675; 4 Brown's Sup. 269. Earl of Leven, ut sup. (*a*).

(*c*) 1669, c. 9. in fin. See Gray, Feb. 27. 1700; M. 10987.

593. 2. *Quinquennial Limitation*. By statute, 'all bargains, concerning moveables; or sums of money proveable by witnesses, shall only be proveable by writ or oath of party, if the same be not pursued for within five years after the making of the bargain' (*a*).

Under this limitation are comprehended sale of moveables, and the contracts of hiring, loan, deposit, pledge (*b*). But it has been held not to apply to a consignment of goods not being a sale, or account of furnishings (*c*).

(*a*) 1669, c. 9. 3 Ersk. Pr. 7. § 8. 3 Ersk. 7. § 20.

(*b*) White, Jan. 1683; M. 11065. Ewart, June 1730; M. 11067. Nobles, June 11. 1813; F. C.

(*c*) M'Farlane, Jan. 17. 1827; 5 S. D. 205.

594. 3. *Sexennial Limitation of Bills and Notes*. This is, strictly speaking, a statutory limitation of action, by which, 1. No bill of exchange, or inland bill, or promissory-note, shall be of force, or effectual to produce any diligence or action in Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the term at which the sums in the said bills or notes become exigible: But, 2. It is provided, that it shall be lawful and competent, at any time after the expiration of the said six years, in either of the cases mentioned, to prove the debt contained in the bill or note, and

‘ that the same is resting owing, by the oath or writ of the debtor.’ 3. ‘ The years of minority of the creditor are not to be reckoned.’ See above, § 349.

12 Geo. III. c. 72. made perpetual by 23 Geo. III. c. 18. § 55. 1 Bell, Com. 393.

595. The terminus a quo, is the time at which the debt is exigible (see above, § 326–7). 1. This is the last day of grace, in bills and notes at a fixed term (*a*). 2. The date of the bill itself, if payable on demand (*b*). 3. In bills and notes at sight, the point is still left unsettled; it cannot be till presentment, and the safe course is to hold the presentment of the bill to be the terminus a quo (*c*).

(*a*) Douglas, Heron, and Co. Nov. 19. 1793; M. 4602; affirmed, 6 Brown’s Parl. Cases, 276.

(*b*) Stevenson, June 16. 1807; F. C.; M. Bill, App. 20.

(*c*) 1 Bell, Com. 393. Thomson on Bills, 674.

596. The effect of the limitation is, that, by mere elapse of time, the instrument, as a ground of action or diligence, is extinct, but the debt left unaffected. Therefore, 1. diligence cannot proceed on the registered protest (*a*); 2. in order to establish the debt the action must not be laid on the *bill*, but on the *debt*; to be established by other proofs than the bill. A certain degree of looseness, however, has crept into practice, which has confounded in some degree the principles on which this matter should be regulated. Libels laid on the bill have been sustained as sufficient to justify a reference to oath, and to entitle the pursuer to judgment on an affirmative oath; or even on a defence admitting the debt (*b*). But the correct decision was pronounced in a recent case (*c*) where a summons laid on the bill was held incompetent, reserving action in the proper form. A decree in absence on such incompetent libel, with all diligence by adjudication or otherwise following on it, would be ineffectual in competition.

(*a*) Douglas, Heron, and Co. Nov. 26. 1784; M. 11127. Armstrong, May 16. 1804; M. 11140.

(*b*) Campbell, May 19. 1797; M. 1648. Philip, Jan. 15. 1800; M. Bill, App. 9. See Clarkson’s Trustees, June 8. 1820; F. C. Sinclair, Dec. 19. 1823; 2 S. D. 600. Strathallan, May 29. 1828; 6 S. D. 881. Stirling, March 4. 1830; 8 S. D. 638.

(*c*) Sinclair, March 4. 1830; 8 S. D. 638.

597. Another important consequence has been argued as necessarily following from the extinction of the bill as an obligation or ground of action, namely, that one who is bound

only by signing the bill as a cautioner, with notice to that effect, but no otherways than by the verborum obligatio of the bill, is discharged by the lapse of the six years which terminates its existence (*a*): But a different construction of the act has been adopted, and the cautioner held liable, if, on reference to oath, the debt is admitted not to have been paid (*b*).

(*a*) Arg. ex Russel, Dec. 14. 1822; 2 S. D. 88.

(*b*) Phillip, Jan. 15. 1800; *M. Bill*, App. 13. McNeil, Jan. 21. 1825; 3 S. D. 459. Laidlaw, May 31. 1826; F. C.; 4 S. D. 636. Baird, June 21. 1827; 5 S. D. 820. Wilson, March 3. 1830; 8 S. D. 625. Christie, Jan. 19. 1833; 11 S. D. 744.

598. 2. The bill or note may be preserved in force by diligence or a judicial demand (*a*). But,

1. Protest, with decree of registration, is not diligence to this effect: The diligence must be executed (*b*).

2. It is not available to preserve the bill in force, that the creditor has made affidavit and claimed under a private trust (*c*); but where, in the course of such trust, the debt has been *recognised*, it will be a bar to the plea on the statute (*d*). It is sufficient to lodge a claim in a sequestration; but this must be correctly done in terms of the act (*e*). So a claim made in a multiplepounding, or any process of competition, is held equivalent to an action. But an action of cognition, and sale of a minor's land, is not an action of that description. See § 620 (*c*).

3. In order to be effectual to preserve the bill, the action must be called in court, or at least there must be citation.

(*a*) Gordon, June 23. 1784; M. 7532.

(*b*) 12 Geo. III. c. 72. Douglas, Heron, and Co. *ut supra*. Scott, Dec. 12. 1828; 7 S. D. 192. Henderson, Dec. 14. 1830; 9 S. D. 180. Frazer, June 11. 1831; 9 S. D. 723. McLachlan, June 16. 1831; 9 S. D. 753. Walker, June 17. 1831; 9 S. D. 759.

(*c*) Watson March 9. 1822; 1 S. D. 395.

(*d*) Ettles, Feb. 15. 1833; 11 S. D. 397.

(*e*) 54 Geo. III c. 137. § 52. Crawford, May 25. 1827; 5 S. D. 705.

599. 3. When the six years have expired before the action has been raised, the only sufficient proof of the debt is by writing or oath of the debtor. And,

1. Such proof, if within the six years, must amount to an acknowledgment of the debt, superseding the bill (*a*);—and so payment of interest within the six years, or of part of the sum in the bill, is not enough (*b*). If the acknowledgment refer only to the bill as the document on which the debt depends, it seems not sufficient to sustain action after the six years (*c*).

2. If the proof offered be subsequent to the six years, it seems sufficient that the acknowledgment shall refer to the bill, and recognise the debt as subsisting (*d*).

3. The debt is restored, not as if the bill were re-established to run a new course of six years; but, as a debt subject to the prescription of forty years (*e*), only as against him who recognises the obligation (*f*).

4. The privilege of summary execution does not revive in consequence of the acknowledgment of the debt (*g*).

5. The limitation does not affect the claim of recourse of one who signs an accommodation-bill for another (*h*).

(*a*) Russell, May 23. 1792; M. 11130. Bell's Cases, 125. Lindsay, May 19. 1797; M. 11137. M'Tavish, Jan. 25. 1825; F. C.; 3 S. D. 472. Hunter, June 9. 1831; 9 S. D. 703.

(*b*) Horsburgh, Feb. 13. 1811; F. C. Ferguson, March 7. 1811; F. C.

(*c*) See case of Stirling, March 4. 1830; 8 S. D. 638.

(*d*) Russell, May 23. 1792; M. 11130; Bell's Cases, 125. Scott, Feb. 3. 1784; M. 11126; 2 Hailes, 939. Black, Jan. 16. 1823; 2 S. D. 118. M'Indoe, Nov. 18. 1824; 3 S. D. 205. M'Kenzie, Feb. 15. 1827; 5 S. D. 367. Elder, Dec. 3. 1830; 9 S. D. 133.

(*e*) Ferguson, ut supra. M'Indoe, ut supra.

(*f*) Houston, May 31. 1822; 1 S. B. 149. M'Neil, Jan. 31. 1823; 2 S. D. 174. M'Indoe, ut supra (*d*).

(*g*) Armstrong, May 16. 1804; M. 11140.

(*h*) Ralston, May 23. 1792; M. 11130. Jolly, May 28. 1829; 7 S. D. 666.

600. 3. *Limitation of Cautionary Obligations.* It has been provided, as a protection against 'facility to engage as cautioners for others, who, afterwards failing, have left a growing burden on their cautioners without relief,' that 'no man binding or engaging for hereafter, for and with another conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond; but that, from and after the said seven years, the said cautioner shall be eo ipso free of his caution.' This however is subject to certain conditions. See next section.

1695, c. 5. 3 Ersk. 7. § 22, 24. 1 Bell, Com. 356. See Opinion of the Court in Stewart's case (Dec. 10. 1712; M. 11151), M. 11154.

601. 1. Conditions requisite to give the Cautioner the benefit of the Act. The act provides that 'whoever is bound for another, either as express cautioner, or as principal, or co-principal, shall be understood to be a cautioner to have the benefit of this act, provided that he have either a clause of

‘ relief in the bond, or a bond of relief apart, intimated personally to the creditors at his receiving of the bond.’

Under this provision,

1. He only is held a cautioner who has total relief: So co-obligants stipulating for mutual relief, are not cautioners within the meaning of the act (*a*); although it should be known that one was only a cautioner (*b*).

2. But total relief (as to a cautioner) is not sufficient to raise the plea under the Act, unless the cautioner be “ bound with and for another,” or as “ express cautioner:” And if he be so it is sufficient (*c*).

3. If he “ be bound as principal or co-principal,” the bond must contain a “ clause of relief,” or there must be a bond of relief “ apart” (*d*), intimated personally to the creditor at his receiving of the “ bond” (*e*). It is not indispensable to give notarial intimation; but mere private knowledge is not enough (*f*). It must be either notice judicial, if not notarial; or at least notice established by clear written evidence (*g*).

(*a*) Ballantyne, Jan. 21. 1708; M. 11010. Park’s Creditors, Feb. 16. 1785; M. 11031. See Muir, Jan. 1728; M. 11014. Smith, Nov. 22. 1821; affirmed, June 7. 1825; 1 W. S. 315.

(*b*) Smith, Nov. 22. 1821; 1 S. D. 159; affirmed, 1 W. S. 315.

(*c*) Ross, Dec. 11. 1729; M. 11014. Scott, Feb. 8. 1715; M. 11012. Douglas, Heron, and Co. Nov. 20. 1792; 11032; affirmed in House of Lords, M. 11048. Yuille, Feb. 27. 1827; F. C.; 6 S. D. 137; affirmed, Sept. 15. 1831; 5 W. S. Same case, 8 S. D. 485.

(*d*) Ross, Dec. 11. 1729; M. 11014. Smith, Feb. 19. 1829; 7 S. D. 771. Douglas, Heron, and Co. ut supra. Burnet Jan. 29. 1742; M. 11018. Elch. v. Caut. 13.

(*e*) Bell, Feb. 14. 1727; M. 11039.

(*f*) Bell, sup. (*e*). Burnet, Jan. 29. 1742; M. 11018.

(*g*) M’Rankin, June 23. 1714; M. 11034. Drysdale, Jan. 25. 1839; 1 D. B. M. 409.

602. 2. Description of Obligation. 1. To give the benefit of the act, the obligation must be for a sum of money, to be paid within the seven years (*a*). 2. It is not available to cautioners ad facta præstanda (*b*); or to judicial cautioners (*c*); or cautioners in marriage contracts (*d*); or cautioners for the discharge of an office (*e*); or cautioners for relief (*f*); or for a composition in bankruptcy (*g*); or in bonds of corroboration (*h*). 3. One engaging by a missive letter to procure security to the creditor, or binding himself as guarantee for debts due, or for mercantile credit, is not within the protection of the act (*i*). 4. One guaranteeing a bond by missive letter not

referred to in the bond, is not entitled to the protection of the act (*k*). 5. Action of relief by one cautioner against another is not cut off by the statute (*l*).

(*a*) Anderson, May 25. 1821; F. C.; 1 S. B. 28. Balvaird, Jan. 18. 1709; M. 11005. Borthwick, Feb. 4. 1715; M. 11008. Millers, Feb. 19. 1762; M. 11027.

(*b*) Stewart, *infra* (*d*). Robertson, Dec. 3. 1736; M. 11010. Elchies, *Caut.* 5, 6. Sir R. Monro, July 22. 1741; Kilk. M. 11017. Elchies, *Caut.* 10. Marshall, July 22. 1736; *Ib.* 5.

(*c*) Hope, Feb. 4. 1715; M. 11009. McKinlay, Feb. 14. 1781; 2 Hailes, 881. Hog, June 13. 1826; 4 S. D. 702. Gallie, March 4. 1836; 14 S. D. 647.

(*d*) Stewart, July 1726; M. 11010.

(*e*) Caves, Jan. 3. 1743; M. 11020. Elchies, *Caut.* 12. Strang, Jan. 5. 1709; M. 11005.

(*f*) Forbes, Feb. 1726; M. 11014. Bruce, June 26. 1793; M. 11033.

(*g*) Cuthbertson, May 23. 1823; 2 S. D. 330.

(*h*) Rutherford, Feb. 8. 1715; M. 11012. Lady H. Gordon, Nov. 16. 1748; Kilk.; M. 11025; Elchies.

(*i*) More, Feb. 16. 1710; M. 11011. Spence, Feb. 3. 1742; Elch. v. *Caut.* 12. Hog and Co. July 9. 1765; M. 11029. Howison, Dec. 7. 1784; M. 11030.

(*k*) Howison Dec. 7. 1784; M. 11030. Tait, Dec. 8. 1836; 15 S. D. 221.

(*l*) Forbes, Feb. 1726; M. 11014.

603. 3. How the obligation may be prolonged. In order to continue the obligation beyond the seven years, in cases to which the act applies, it is necessary, 1. That the bond shall be renewed or corroborated; or such negotiations at least for that purpose commenced by the cautioner as to bar the plea on the statute (*a*). Or, 2. That the creditor shall have "done diligence within the seven years" (*b*). Or, 3. That the creditor shall at least have obtained decree against the cautioner within the seven years; it being doubtful whether a mere citation, or even a summons, called and in dependence, is sufficient (*c*). But, 4. The effect of interruption by diligence or decree, is only to preserve to the creditor his claim against the cautioner for the debt, with such interest as shall have fallen due within the seven years (*d*).

(*a*) 3 Ersk. 7. § 24, to be noted for correction. 1 Bell, Com. 358. Douglas, Heron, and Co. March 1. 1793, as decided in House of Lords; 1 Bell, Com. 358, note 8. Gordon, Jan. 19. 1715; M. 11037. Yuille, Feb. 9. 1830; 8 S. D. 485.

(*b*) 1695, c. 5. Irvine, Jan. 7. 1752; Kilk.; M. 11043. Elchies, *Caut.* 21. Reid, Feb. 17. 1780; M. 11043; 2 Hailes, 850.

(*c*) Douglas, Heron, and Co. March 1. 1793; 1 Bell, Com. 358, note 10. Clark, March 10. 1779; M. 11043. Stewart, Jan. 24. 1712; M. 11039. Ewing, July 20. 1839; 5 Brown's Sup. 211.

(*d*) 3 Ersk. 7. § 24. Correct the inaccuracy of the first annotator on Erskine by the text and Ivory's note; 1 Bell, Com. 358. Semple, Nov. 24. 1741; 5 Brown's Sup. 713.

604. There is no interruption to the running of the term of limitation on account of minority.

Ramsay, Feb. 26. 1706; 4 Brown's Sup. 644. Stewart, Dec. 10. 1712; Ib. 913; M. 151-4.

2. *Prescription, raising a presumption of Abandonment, or of Payment.*

605. The doctrine of prescription is distinguished from that of limitation (§ 587). It infers, by operation of the law itself, from the mere lapse of time, a presumption of abandonment or of payment. Payment, or satisfaction or abandonment, is the inference from the lapse of the long term of forty years; payment is the inference from the lapse of certain shorter terms which have been appropriated to debts of different kinds.

606. The Long Prescription is negative or positive. 1. The abstinence of a creditor from demanding fulfilment of a right or obligation during forty years, has been held a fair ground to presume satisfaction and abandonment or payment; in consideration of the danger of demands upon false evidence; of the probability of payment and loss of documents; of the equity of discouraging forgotten debts; and of the disfavour to one guilty of such negligence. This is **NEGATIVE PRESCRIPTION**. 2. The **POSITIVE** is the application of the same principle to the fortification of a title to land: Where one has had a long continuance of uninterrupted possession as owner, on a title apparently good, the law, on grounds of policy, for the settling of men's minds, and the encouragement of improvement, holds the title so fortified as unexceptionable. See below, § 2002.

3 Ersk. 7. § 8-15.

607. **NEGATIVE PRESCRIPTION**. By the lapse of forty years from the day of payment, and neglect during that time to take document upon the debt, without excuse from incapacity or nonage, a debt or right is held to be discharged or abandoned. Three statutes have been passed on this subject. The words of the first statute are, " That the party to whom the obligation is made, that has interest therein, shall follow the said obligation within the space of forty years, and take document thereupon: And gif he dois not, it shall be prescribed

“ and be of nane avail, the said forty years being runnin
 “ and unpersewed by the partie” (*a*). By a subsequent act, it is provided that, “ in time to cum, all obligations made or
 “ to be made, that beis not followed within forty years, sall
 “ prescribe and be of nane avail” (*b*). By a still later statute it is declared, “ that all actions competent of the law on heritable bonds, reversions, contracts, or utherris whatsoever,
 “ sall be persued within the space of forty years after the date
 “ of the same, except the said reversions be incorporated in
 “ the body of an infeftment ; and that in the course of the
 “ said forty years’ prescription, the years of minority and lesse
 “ age sall no ways be counted, but only the years during which
 “ the parties against whom the prescription is used were majors, and past twenty-one years of age” (*c*).

(*a*) 1469, c. 29.

(*b*) 1474, c. 55.

(*c*) 1617, c. 12.

608. The statutes were at first held to apply only to simple and unilateral obligations ; but now abandonment is presumed in respect to all absolute rights and obligations whatever, mutual or unilateral, heritable or moveable, if not insisted on within the term (*a*).

(*a*) 1617, c. 12. 3 Ersk. 7. § 815. Lauder, Nov. 27. 1630 ; M. 10655. Paul, Feb. 8. 1814 ; F. C. Ogilvie, Dec. 23. 1630 ; M. 6541. Kirk Session of Aberscherder, Dec. 7. 1633 ; M. 10972. Magistrates of Linlithgow, June 21. 1822 ; 1 S. B. 553. See Bar, Dec. 5. 1823 ; 2 S. D. 556.

609. Where the obligation is incorporated in the body of an infeftment used as a title, the action on it does not prescribe (*a*). And where it is prestable periodically, the several terms’ payments may be severally extinguished by prescription, while the general obligation subsists (*b*) ;—as in the case of feu-duties (*c*), rents, and annuities (*d*). Interests are extinguished by prescription periodically, term after term ; or by extinction of the principal debt by negative prescription, the whole interests fall as accessories.

(*a*) 1617, c. 12. 3 Ersk. 7. § 12. Stewart, July 6. 1711 ; M. 10722.

(*b*) 3 Ersk. 7. § 13. Kames’ Elucid. art. 33.

(*c*) L. Gairntully, Dec. 15. 1638 ; M. 10750.

(*d*) Lockhart, July 1730 ; M. 10736. Anstruthers, Dec. 9. 1779 ; M. 10713.

610. The right to set aside a deed, settlement, or instru-

ment on *extrinsic* objections falls by the negative prescription ; a challenge on *intrinsic* objections appearing *ex facie* does not prescribe.

3 Ersk. 7. § 9. See below, § 871. et seq. Ainslie, July 25. 1738 ; M. 10736.

611. In order to ground the plea of prescription, the right must have been neglected or abandoned during the whole term of forty years, without any document taken on it, or payment of interest or of principal made. See the several statutes cited above, §. 607.

612. It is not necessary to the plea of negative prescription, that the debtor shall bona fide believe the debt to be paid ; nor is reference of non-payment to his oath, a good answer to the plea of the long prescription.

Ersk. ut supra, § 15. Napier, Dec. 7. 1703 ; M. 10656. See, as to mala fides proceeding from the title, Kinloch, May 27. 1800 ; M. *Prescription*, App. 4. and same case, March 1. 1808 ; Ib. 7.

613. The term of prescription, by the construction, though not by the express words of the act, runs from the day of payment (*a*) ; not from the date of the bond as in the vicennial limitation, § 590. The day of payment is, 1. The day specified in a pure or future obligation. 2. The event stipulated, if the obligation be conditional. 3. The eviction, if the obligation be of warrandice ; the statute excepting from the ordinary rule "all actions of warrandice, which shall not prescribe from the date of the bond or infeftment whereupon the warrandice is sought, but only from the date of the distress which shall prescribe, it not being pursued within forty years, as said is" (*b*).

(*a*) Butter, Feb. 17. 1665 ; M. 11183. Kames' Elucid. art. 33. 3 Ersk. 7. § 36.

(*b*) 1617, 12.

614. The effect of the prescription is extinction of the debt ; or, more properly, a perpetual exception to the action of debt. And the pleas in answer to the exception are,—1. Interruption ; 2. Minority ; 3. Non valens agere.

615. 1. *Interruption*. The term of prescription may be interrupted by taking document on the debt ; either judicially or extrajudicially. And the effect of that is not to suspend the running of the term of prescription, but to break it off,

and to render it necessary to begin a new course of prescription.

616. *Extrajudicial interruption* may be express or implied.

1. Express interruption is by a new voucher, document, or acknowledgment of the debt, as shewing it not merely to be subsisting, but insisted on (*a*);—such is a bond of corroboration (*b*); an engagement to pay interest (*c*); a special submission of the debt (*d*). But it has been said (though it would seem not entirely free of doubt) that an assignation intimated is insufficient to interrupt (*e*).

2. Implied interruption is by partial payment, or by payment of interest, evincing that the debt is neither paid nor abandoned. But indefinite payment secretly ascribed by the creditor to the debt, will not interrupt.

(*a*) Pitmedden, July 4. 1705; M. 11261. Haliburton, Feb. 6. 1736; M. 11015; Elch. Pres. 8. Aitken, Nov. 19. 1776; 1 Hailes, 148. See M'Tavish, Jan. 25. 1825; 3 S. D. 472.

(*b*) Haliburton, ut supra.

(*c*) Skene, Feb. 1686; M. 11256.

(*d*) Vans, June 14. 1816; F. C. See also Buchanan, June 19. 1765; M. 1676. Hay, March 9. 1756, House of Lords; M. 11276. Garden, Nov. 25. 1743; M. 11274; Elch. Pres. 25.

(*e*) 3 Ersk. 7. § 38.

617. *Judicial interruption* is by action, or diligence; in either case notice being given to the true debtor of a demand for the particular debt in question.

618. 1. Interruption by *citation* is not competently made, unless the debtor be lawfully (*a*) cited specially to pay the debt in question (*b*). And then it is only a temporary interruption, requiring to be renewed every seven years (*c*).

(*a*) Campbell, June 18. 1799; M. 11120. Baillie, March 2. 1790; M. 11286.

(*b*) See Garden's case, and Vans, supra. 3 Ersk. 7. § 38. M'Dowal, Nov. 30. 1739; Elch. Pres. 19. Menzies, Feb. 17. 1779; M. 11258.

(*c*) 1669, 10. Camerons, July 30. 1761; M. 11331.

619. 2. In order to interrupt by *action*, the summons must be called in Court: And must be libelled upon a legal title to the debt; or at least there must be in the pursuer a radical title completed, and capable of operating retro.

Blair, Feb. 3. 1736; M. 11270; Elch. Pres. 7. Earl of Home, Feb. 22. 1765; M. 5555. Robertson, July 5. 1776; M. Pres. 2; 2 Hailes, 707.

620. It is not strictly necessary that a special action should be raised for the debt: It is sufficient to enter a claim in a proper process of competition; as ranking and sale, multiple-poining, or sequestration (*a*). See above, § 597. Even a claim lodged in a process as a counter demand, and in defence, has been held an interruption (*b*). But a claim lodged with a trustee under a private trust is not sufficient; nor the production of a claim in a process of cognition and sale by tutors (*c*), nor a claim of retention made judicially by a law-agent without producing his account (*d*). And it has also been held, that where, in an action of relief against a co-obligant, the creditor was examined, and produced his ground of debt in the action, this was no interruption* (*e*).

(*a*) Crawford, July 20. 1732; M. 11049. Thomson, July 28. 1774. Ib. 2 Hailes, 591. Douglas, Heron, and Co. Nov. 26. 1784; M. 11127. Graham, May 30. 1811; F. C. See Menzies, Feb. 17. 1699; M. 11258. 54 Geo. III. c. 137. § 52. Crawford, May 25. 1827; 5 S. D. 785.

(*b*) Sloan, June 1. 1827; 5 S. D. 742.

(*c*) Ferrier, July 9. 1812; F. C.

(*d*) Executors of Couper, Nov. 26. 1753; M. 11107.

(*e*) Viscount Arbuthnot, March 3. 1795; M. 11133.

621. 2. In interruption by *diligence*, it is not enough to extract a decree of registration; or even to raise horning, without giving a charge; or poining, without following it up by execution (*a*). Informal diligence will not interrupt (*b*).

(*a*) Johnson, Jan. 11. 1672; M. 11237. Thomson, July 16. 1708; M. *General Charge*, 11264. Wright, Dec. 11. 1717; M. 11268. M^cNicol, Nov. 29. 1821; 1 S. B. 175. See also Lauder, Nov. 27. 1630; M. 10655. Douglas, Heron, and Co. *supra*, § 621 (*a*).

(*b*) Cameron, July 30. 1761; M. 11331. Earl of Hopetoun, July 21. 1784; M. 11285. Grant, July 21. 1784; M. 11283.

622. Prescription runs *de momento in momentum*, and the interruption may be on the last moment of the 40th year.

3 Ersk. 7. § 30.

623. Interruption by a co-creditor having a *pro indiviso* right, is available to all the creditors in the obligation; and interruption to one of several persons bound in *solidum*, is an interruption against all.

Clerk, Jan. 27. 1747; M. 10662. Gordon, June 23. 1784; M. 11133; 2 Hailes, 947.

624. Besides interruption, there are two answers to the plea of prescription, 1. Minority; or, 2. *Non valens agere*.

625. 1. *Minority*. The years of Minority of the immediate creditor must be deducted from the term of negative prescription (*a*): So also must the time during which a child is in utero (*b*). See below, of Positive Prescription. § 2002.

By the words of the statute, the rule applies only to incapacity from infancy, or "less age." Furiosity must be pleaded on the ground of non valens agere, § 627.

(*a*) 1617, c. 12. § 3 Ersk. 7. § 35. Earl of Marchmont, Feb. 23. 1714; M. 11154. Dalrymple, 1737; Elch. Pres. 14. Blair, July 1741; Ib. 8. Ruddiman, June 25. 1746; Ib. 28; M. 11155. Inveraw, Jan. 20. 1747; M. 11156. Cumming, Dec. 8. 1790; M. 11170.

(*b*) Campbell, Dec. 19. 1765; 5 Brown's Sup. 917.

626. The rule is absolute, that minority must be discounted, whether the minor have guardians or not.

627. 2. *Non valens agere cum effectu*. This is an answer in equity to the plea of prescription; and proceeds on the *principle*, not on the *words* of the law; for no man can be held to abandon a right by abstaining from an act which he has no capacity to perform, or which is of no avail if performed. Under this principle, 1. Prescription does not run where the creditor is in a state of personal disability;—as by imprisonment abroad; by a wife's disability while under cura maritalis; by furiosity (*a*). But forfeiture or outlawry does not bar the running of prescription (*b*). 2. Claims which cannot at the time be made effectual, do not prescribe; so a fiar while excluded by a liferenter, is under no necessity to bring forward his claim (*c*), § 1085. See below, of Positive Prescription, § 2023.

(*a*) Duke of Lauderdale, Jan. 25. 1678; M. 11193. Whiteford, Jan. 1682; M. 11196-7. O'Neil, Nov. 23. 1803; M. 11201. McHie, July 5. 1665; M. 11204. Gow, June 22. 1675; M. 11183, compared with Taylor, Nov. 16. 1675; M. 6055. See Dirlt. and Stewart, 374.

(*b*) Robertson, July 7. 1758; 5 Brown's Sup. 357. Campbell, Dec. 19. 1765; Ib. 915, 926. Brodie, Feb. 20. 1821; F. C. See Wemyss, Dec. 19. 1766; 5 Brown's Sup. 933.

(*c*) Elliot, Feb. 16. 1724; M. 11209. Brown, Feb. 5. 1680; M. 11028. Scott, Dec. 25. 1756; 5 Brown's Sup. 854. McGhie, Dec. 17. 1776; M. 11112. Lawrie, Dec. 7. 1830; 9 S. D. 147.

II. SHORTER PRESCRIPTIONS. The shorter prescriptions were introduced chiefly in order to establish a presumption of payment in particular cases; where injustice might be suffered by forgetfulness, or the loss of vouchers. And the rule is, that the defender in such cases, defending himself on the ground

of payment having been made, requires no proof of this beyond the legal presumption.

628. 1. *Triennial Prescription*. In debts arising out of a course of service, or of dealing, and not founded on written obligation, the law has raised, on the expiration of three years, a double presumption, 1. that no such debt ever existed; and, 2. that if it ever did exist, it has been paid. The words of the Act are, ‘that all actions of debt for house-maills, men’s ‘ordinaries, servants’ fees, merchants’ accounts, and others, ‘the like debts that are not founded upon written obligations, ‘be pursued within three years, otherways the creditor shall ‘have na action, except he either prove by writ or by oath of ‘the party.’

1579, c. 83. 3 Ersk. Pr. 7. § 6. 3 Ersk. Inst. 7. § 17.

629. *Description of Debt*. The Act applies to the following debts, namely,

1. Traders’ accounts, whether in retail or in wholesale (*a*); but not the price of goods consigned between foreign merchants (*b*); nor bargains of moveables (*c*); nor contracts for repairs (*d*); nor accounts between masters and owners of a ship (*e*).

2. Workmen’s wages (*f*).

3. Writers’ accounts (*g*), salaries to factors (*h*), claims of the clerk to a submission (*i*). But this does not apply to cash advances, though it does to the charge for commission on advances (*k*), nor to the agent’s travelling expenses (*l*), nor to advances for articles purchased and sent abroad to a factor’s constituent (*m*).

4. Furnishings to a family or domestic establishment (*n*).

5. Servants’ wages; each term running a separate course (*o*).

6. House rents, where the lease is verbal; each term running also a separate course (*p*).

7. Aliment furnished (*q*); and like rents and wages, each term’s aliment runs a separate course. And even where the aliment was payable weekly, it was held that this rule applied, and that it was not a continuous account (*r*).

8. It is no defence against an action for money recovered, *ex mandato* (*s*), or for money advanced (*t*).

(*a*) Ord, Feb. 15. 1630; M. 11083. Bruce, Feb. 11. 1760; 1 Brown’s Sup. 609.

- (b) Hamilton and Co. Jan. 24. 1795 ; M. 11120. M'Farlan, Jan. 17. 1827 ; 5 S. D. 205.
- (c) Baird, Feb. 1688 ; M. 11092. Smith, Feb. 15. 1827 ; 5 S. D. 338, and D. C. ; 14 S. D. 12.
- (d) Bell, Dec. 16. 1755 ; 5 Brown's Sup. 840.
- (e) Butchart, June 13. 1781 ; 2 Hailes, 885.
- (f) Bayne, Dec. 21. 1692 ; M. 11092. Tweedie, June 8. 1694 ; M. 11092.
- (g) Dallas, Feb. 21. 1695 ; 4 Brown's Sup. 271. Mason, Nov. 29. 1709 ; M. 11094. M'Adam, Dec. 22. 1786 ; 2 Hailes, 875. Campbell, Nov. 23. 1813 ; 6 Dow, 116. Wallace, March 4. 1829 ; 7 S. D. 542. Smith, June 19. 1829 ; 7 S. D. 771.
- (h) Smith, Dec. 3. 1714 ; M. 11096. Grubb, March 3. 1835 ; 13 S. D. 603.
- (i) Farquharson, July 23. 1755 ; M. 11108.
- (k) Scott, Feb. 24. 1832 ; 10 S. D. 375. Kerr, June 15. 1827 ; 5 S. D. 802. See Drummond, Feb. 19. 1740 ; M. 5858. Tod, Feb. 5. 1836 ; 14 S. D. 432.
- (l) Moncreiff, May 26. 1836 ; 14 S. D. 830.
- (m) Grubb, March 3. 1836 ; 13 S. D. 603.
- (n) Russell, June 1613 ; M. 11082. Guthrie, Feb. 11. 1724 ; M. 11101.
- (o) 1579, 83. Robertson, Dec. 10. 1740 ; 1 Cr. and St. 293. M'Dougal, Jan. 22. 1830 ; 8 S. D. 959. Smellie, Feb. 1835 ; 13 S. D. 544.
- (p) Ferguson, Jan. 14. 1737 ; M. 11103. Cumming, Feb. 18. 1825 ; 3 S. D. 545.
- (q) Hamilton, July 25. 1716 ; M. 11100. Cumming, Jan. 1722 ; M. 11101. Forsyth, Feb. 15. 1791 ; Bell's Cases, 361. Finlayson, July 7. 1809 ; F. C. M'Dowal, Feb. 19. 1807 ; Pres. App. 6.
- (r) Fraser, May 25. 1838 ; 16 S. D. 1045.
- (s) Frier, Jan. 27. 1826 ; 4 S. D. 396.
- (t) Paterson, March 5. 1825 ; 3 S. D. 620. Smith, June 10. 1829 ; 7 S. D. 771.

630. It is sufficient to elide the prescription if an action have been raised in a competent court (*a*) ; Or if in defence, as a counter claim on account have been produced judicially (*b*). But it has not been held enough that the creditor holds a lien (*c*) ; though in England, perhaps more correctly, the matter has been viewed differently ; the remedy only, being held discharged by the statute of limitations, but not the debt (*d*).

- (a) See M'Laren, Feb. 27. 1829 ; 7 S. D. 483.
- (b) Sloan, June 1. 1827 ; 5 S. D. 742.
- (c) Mason, Nov. 29. 1709 ; M. 11094. M'Adam, Dec. 22. 1780 ; M. 6252 ; 2 Hailes, 875. See M'Callum, Jan. 25. 1833 ; 11 S. D. 321.
- (d) Speirs v. Hartley, 3 Esp. 81. Higgins v. Scott, 2 Barn. and Ad. 419.

631. The terminus a quo is, 1. The day of payment of termly debts, as servants' wages, house rents, alimony. See above, § 630. 2. The close of the account ; which is the date either of the last unpaid article (*a*) ; or of the last article preceding an interruption of three years ; or of the last article preceding the day of the death of the debtor (*b*). But it is a continuous account, if it proceed without interruption, although each year's account should be summed up, and interest charged on it (*c*). And where a town agent has been employed by a country agent for several clients, the country agent is himself

the debtor ; all the accounts form one continuous account in a question of triennial prescription ; the whole is saved from prescription if the last article is within the three years ; and a payment of one of the intermediate accounts by one of the clients will not avail the country agent as an interruption or breach of the continuity.

(a) Beck, Nov. 30. 1831 ; 10 S. D. 81. See Fisher's case, below (d).

(b) 1 Bell, Com. 331. Graham, Feb. 26. 1670 ; M. 11086. Ross, Feb. 12. 1680 ; M. 11089. Wilson, July 28. 1680 ; M. 11099. Lady Ormiston, Nov. 11. 1709 ; M. 11093. Wright, Feb. 14. 1753 ; M. 11106. Lesly, Nov. 15. 1808 ; F. C. Wilson, Feb. 7. 1826 ; 4 S. D. 427.

(c) Whyte, Dec. 1. 1829 ; 8 S. D. 153.

(d) Fisher, March 5. 1836 ; 14 S. D.

632. In answer to the triennial prescription, 1. It will be sufficient to shew, by written mandate, the constitution of the debt (a) ; so as to bring it within a different class of debt from that provided for in the act. But it is not, for this purpose, sufficient to shew a written order for goods with a carrier's receipt (b), or a letter from a country writer employing a town agent (c).

2. In debts falling under the act, it is necessary after the term, to prove both the constitution and the subsistence of the debt, by the writing or the oath of the debtor, or of his representatives ; or in a concern under the sole superintendence of a manager, by his writing or oath (d). And, on a reference to the defender's oath, it seems to be sufficient that he shall swear that payment has been made in his usual way, by money having been given to his steward, son, wife, &c. for that purpose, where they have had the superintendence (e).

3. If the original debtor have died, a distinction has been taken as to the demand against the heir. If he have died within the three years, and so there has not yet arisen any presumption of payment, proof of the constitution of the debt, with the heir's oath negative of payment, will be sufficient to support the action. If the three years have expired before the original debtor's death, the presumption of law is held to attach, and the heir's oath negative of payment does not overturn it (f).

(a) Sadler, Nov. 18. 1794 ; M. 11119 ; Bell's Cases, 104.

(b) Bell, Nov. 16. 1755 ; 5 Brown's Sup. 840. Douglas, of same date ; M. 11116. Bell's Cases, 97, and cases cited.

(c) Wallace, *supra* (g).

(d) See the cases cited above, § 630. Donaldson, Jan. 15. 1766 ; M. 11110. Bryson, Nov. 16. 1825 ; 4 S. D. 180. See 3 Ersk. 7. § 18 ; and 4. § 11-13 ;

and 1 Bell, Com. 332. 4. Lesly and Wilson, *supra*. Nisbet's Trustees, Jan. 23. 1829; 7 S. D. 307. Smith, Feb. 17. 1831; 9 S. D. 474. See Duncan, July 2. 1829; 7 S. D. 821. Buchanan and Paterson, Nov. 20. 1828; 7 S. D. 35.

(e) Hay Newton, March 1. 1825; 8 S. D. 387, f. n. Mette and Carl, Jan. 26. 1830; *Ib.* 387. Smith, Feb. 17. 1831; 9 S. D. 474.

(f) Lesly, *supra*, § 631 (b). Granger's Exrs. May 15. 1833; 11 S. D. 591. See Ritchie, Jan. 15. 1836; 14 S. D. 206.

633. Minority is not pleadable as an exception to the triennial prescription (a); nor interruption, as in the long prescription (b); nor is there any deduction of the time of absence from the kingdom (c); nor of the annus deliberandi (d).

(a) Brown, Jan. 26. 1709; M. 11150. See 5 Brown's Sup. 915.

(b) M'Laren, Feb. 27. 1829; 7 S. D. 483.

(c) M'Ghie, Dec. 17. 1776; M. 11112.

(d) Duke of Argyle, July 27. 1736; Elch. *Prescrip.* 10.

634. 2. *Quinquennial Prescription.* 1. Ministers' stipends, and multures, are presumed to be paid after five years from the term of payment (a). And, 2. The like presumption holds as to rents, or maills and duties, after five years from the tenant's removing from the lands (b); and the dependence of a sequestration for rents does not bar the prescription (c).

(a) 1669, cap. 9. 3 Ersk. 7. § 20, with Ivory's Note, p. 766-7. Nisbet, July 10. 1729; M. 11059. Fairholm, Feb. 3. 1725; M. 11058.

(b) Murray, Dec. 9. 1709; M. 11054.

(c) Cochrane, Jan. 15. 1830; 8 S. D. 324.

635. 3. *Decennial Prescription of Tutorial Accounts.* The reciprocal obligation on tutors and curators, and on their wards, to account and reimburse, is extinguished, or presumed to be satisfied, if ten years have expired from the termination of the guardianship. See below, § 2086, and 2097.

1669, c. 9. 3 Ersk. 7. § 25.

It is important to observe, in reviewing the doctrine of obligations and contracts,—

1. That the several contracts and obligations may be variously combined for accomplishing the purposes of an extended commerce; and,

2. That they are qualified, and the rights arising from them restrained, by the inadequacy of the debtor's funds, and the community of interest thus arising among his creditors; leading to the establishment of the system of the Bankrupt Laws.

1 Bell, Com. 7-17. See below of Bankruptcy.