BOOK III.

OF CREDITORS BY PERSONAL OBLIGATION OR CONTRACT.

RECURRING to the distinction between jus in re and jus ad rem, it will be the object of this Book to inquire into the nature and effect of those obligations from which the JUS AD REM arises; the object of personal actions, and the ground of demands by creditors in bankruptcy. And the subject may be considered in this order:—*First*, The constitution of personal debts originally; and, *Second*, The doctrine of passive titles, or the adoption of the debt by the representative of the original obligant.

PART I.

ORIGINAL CONSTITUTION OF DEBT.

IN this Part an extensive subject presents itself, which, after an introductory Chapter on the general principles of obligation and contract, may be taken in this order:—1. The constitution of debts: 2. Bonds, and unilateral obligations: 3. The various mutual contracts out of which debts may arise: 4. Maritime contracts: 5. The accessory debts of interest, penalties, and damages.

CHAPTER I.

GENERAL PRINCIPLES OF OBLIGATION AND CONTRACT.

THE essence of every obligation is, an engagement or undertaking to give or to do something, conferring on him to whom the engagement is undertaken a right of exacting performance.[1] Without following the elaborate divisions of the civilians, obligations may be distinguished into EXPRESS, or CONVENTIONAL; and OBEDIENTIAL, or IMPLIED. The former are in law perfect obligations, which may be judicially enforced; the latter are sometimes as perfect as a conventional obligation; sometimes imperfect, not requiring

[1] Pand. Just. Pothier in Inst. De Oblig. Pr. vol. i. Paulus in the 3d law of the Dig. lib. 44. tit. 5. De Oblig. 1. Stair, 10. § 1. 3. Ersk. 1. § 1.

the interference of a court of justice, but more conveniently left to the jurisdiction and enforcements of conscience alone.

SECTION I.

OF CONVENTIONAL OBLIGATIONS AND CONTRACTS.

In order to constitute a full and perfect obligation, there must, on the part of the obligor, be a deliberate consent and engagement to him who is to have the right of exacting performance. Of this deliberate consent Lord Stair distinguishes three acts;—desire, or inclination to engage; resolution, or purpose; and engagement, or full obligation. Where the party stops short of the last of these, he has locus pœnitentiæ: 'The act of the will,' says Lord Stair, 'which is efficacious, is that whereby the will confirmeth or stateth a 'power of exaction in another, and thereby becomes engaged to that other to perform.'[1]

It may be proper to consider, 1. The nature of consent necessary in conventional obligations: 2. The legality or illegality of the agreement: 3. The evidence of effectual obligations: 4. The effect of imperfections in point of evidence, and how supplied.

ART. I.—*Of the Consent requisite in Conventional Obligations.*

The state of incapacity of minors, insane and interdicted persons, has already been considered;[2] and need not now be resumed. Assuming, therefore, that the contracting parties are capable of consent, the point of inquiry at present is, what circumstances are in law sufficient to invalidate the consent which a binding and effectual obligation requires.

It is necessary to an effectual obligation, that the contracting parties shall be agreed on all the essential points of the engagement. There must be no error in the substantial parts of the agreement destroying consent; no constraint such as to overmaster a mind of ordinary vigour; no fraud giving birth to the contract, and misleading the objector as to its true nature and substance.

I. ERROR.—There must be, express or implied, a mutual assent,—a contract on one side to accept, on the other to pay, or deliver, the same thing. And the rule is, That those who err in the substantials of the bargain, contract not.[3] Such errors vitiate the contract, whether they relate to the nature of the obligation to be undertaken; to the consideration or counterpart; to the subject of the contract; or even to some essential quality of it.

1. Error in substantials may be in the very nature of the contract; as, if a thing meant to be let, is taken as sold, there is neither sale nor location: Or if one send goods to another as sold, and he receives them only in consignment as factor, there is neither sale nor factory; the goods are not transferred, nor could the factor take them as under his general lien.

2. Error in substantials relates chiefly to the subject of the bargain. It occurs commonly in combination with fraud; but even without fraud, error as to the subject of the contract annihilates the consent. So, if one sell plated goods for silver; or an order for porter is mistaken for an order for port wine; or a purchase of St Petersburgh hemp, when the order is for Riga, there is a substantial and fatal error.[4]

[1] 1. Stair, 10. § 2.

[2] Supra, p. 132.

[3] 1. Stair, 10. § 13. 3. Ersk. 1. § 16. The text of Stair is a translation of the 16th law of the Pandects, De Reg. Juris, 'Non videntur qui errant consentire.' In the Roman law, error is defined, 'Existimatio qua 'approbetur verum esse quod falsum est; vel falsum 'quod est verum; vel certum esse quod incertum est, 'aut contra.'

[4] 1. Stair, 9. § 9. 3. Ersk. 1. § 16. See also case of THORNTON against KEMPSTER, 1814; 5. Taunt. 786.;

3. Error in the person affects the substantials of the contract, if personal identity is of importance, and may be supposed to have entered essentially into the view of the contract. So in marriage, in donation, in the hire of labour, (as of that of an artist), a mistake as to the person will annul consent. So where personal credit enters into consideration: as, in agreeing to take the security of a particular person, there is no contract if the one party had in contemplation a person different from the surety intended by the other; or if, in a contract of sale, the order is understood to have come from one person, when truly it is from another of the same name; personal credit in those cases being a chief inducement to the consent.[1]

4. Error as to the consideration or price, will annul consent: as if goods were sold for a bank-check, which proves to be of no value, the bank credit being exhausted;[2] or if inadvertently a discharge is given to a debtor on receiving such a check; or if an error has been innocently committed as to the price or rate at which the goods were to be sold.[3] But it will not be enough to annul a contract, that the motive which has remotely led to it proves to be a delusion; unless there shall be fraud in the party who profits by the contract.

5. Error as to quality, the thing itself being identically what the parties understood to be the subject of their agreement, may or may not be sufficient to annul the consent. If it be a quality touching the very object of the contract, and of which the seller must be aware, it will be held essential; and a manifest defect in regard to such quality, provided the defect be not open to observation, and such as would have prevented the bargain, will be fatal to the consent required to a valid contract. Thus, it is implied in mercantile bargains, that the article shall be merchantable,[4] and if it be found not so, there is no sale.

II. Constraint.—Where one is compelled into a contract, there is no effectual consent, though ostensibly there is the form of it; and the remedy to which the party is entitled is a reduction declaring the contract to be 'utterly void.'[5] The constraint necessary thus to annul consent, 'must, both by the Roman and Scottish law, be a vis aut metus qui cadet 'in constantem virum, such as would shake a man of firmness and resolution.'[6] This rule, however, must be taken with some qualifications.

1. Where there is no peculiar weakness of age, or sex, or condition, law will require, in order to annul a contract, such fear and compulsion as may reasonably shake a mind of ordinary constancy and resolution; and will not listen to the pretence of every vain and foolish fear.[7]

1. Marshall, 355. Here Kempster wishing to buy a quantity of St Petersburgh clean hemp, employed Riscow and Paterson as brokers. They, mistaking the order, sent to him a bought note of Riga Rhine hemp, as bought from Thornton and West; and to Thornton and West, having discovered their mistake, they delivered a sale note bearing St Petersburgh clean hemp. Thornton and West tendered the St Petersburgh hemp, and Kempster refused it, and it was sold at a loss. The question was, whether there was a binding contract? It was held not; as the defendant was bound to accept one species of hemp, and the plaintiffs were bound to deliver another species.

[1] See above, p. 242. the cases of Christie and Company, of Dunlop, and of Kemp. In these cases fraud was mingled with the error, which indeed is the common case.

See Mitchell against Lassage, Holt's Rep. 254.

[2] If it be a forgery, there is added to error the plea of fraud. See Christies against Fairholmes, below, p. 297. Note [2].

[3] Sword against Sinclairs, 8th August 1771; 5. Fac. Coll. 307. Here a factor sold tea without observing an error, in writing out the note of prices, of 2s. 8d. instead of 3s. 8d. The factor communicated the mistake as soon as he observed it, and refused implement. An action by the buyer was dismissed.

[4] See below, Of Sale, and the cases there cited.

[5] 1. Stair, 9. § 8.

[6] 3. Ersk. 1. § 16.; and 4. 1. § 26.

[7] In modern times this is seldom a ground of reduction, though in the case of married women it still may occur; such persons being subject to the domestic

2. It seems that a distinction is, on the principle of the rule, to be made, according to the weakness of the person to be operated upon by the circumstances of intimidation. A young woman of lawful age, but ignorant of the world and of her lawful rights, without any natural protector, or where the persons who ought to shield her from oppression are themselves the oppressors; a person in the weakness of bad health though of full capacity; an aged parent compelled by the apparent danger of a son; and in many other such cases of peculiar weakness, the state of the person will be taken, in combination with the circumstances of violence or threat, as sufficient to invalidate consent.

3. Imprisonment is one of the most usual instruments of intimidation in modern times. Unlawful imprisonment, as in a lunatic asylum, will be a sufficient ground of reduction ex vi aut metu. Even imprisonment which in itself is lawful, may in some peculiar circumstances perhaps be admitted to the same effect. Whether, if the intimidation produce only a settlement of the debt for which imprisonment is threatened, it would invalidate the transaction in any circumstances, may be doubted. But at least, whenever this instrument of terror is applied to extort from a debtor something more than the debt for which imprisonment is competent; or from others, advantages to which otherwise they would not have consented; there seems to be such a want of lawful consent as to give relief ex vi aut metu.[1]

4. There is a sort of terror, the operation of which in annulling consent may admit of distinctions. The threat of divulging a crime may frequently operate with the most irresistible force, whether the crime has been actually committed, or of so shameful a nature that the least imputation of it is a serious evil. An obligation extorted by the threat of a shameful imputation, constructed with so much art that it may be difficult to refute it, would seem to be reducible ex vi aut metu: and yet it might be argued, that a mind of ordinary constancy and manliness ought not to be moved by such an imputation.

5. The effect of compulsion, as invalidating consent, will not be limited to him who is the party to the contract, but a remedy will be given also against those who profit by the unlawful act. And,

6. Where the constraint is not of that violent or overwhelming nature which can be deemed of a character to influence a mind of ordinary constancy, (as, for example, the terror of a law-suit, or the necessity of a judicial oath, so revolting to some persons of

tyranny of their husbands, without any means of exposure or of protection. In our older cases, there are many strange examples of violence exercised, while the vigilance of public justice was relaxed by rebellion, or the police of Scotland in no state of vigour to restrain the more remote inhabitants. Such are the cases of,—

Earl of MORTON against LOCHLEVEN, 12th April 1543.

Earl of ORKNEY against VINFRA, 21st February 1606.

M'INTOSH against FARQUHARSON and SPALDING, 4th December 1671; Gosf. Mor. 16485.; 1. Stair.

STEWART against WHITEFORD, 10th January 1677.

GRANT against ANDERSON, 11th July 1706; Forbes, 122.

[1] See 4. Ersk. 1. § 26. HERIOT against BIRD, 29th November 1691, where, by threats of imprisonment, one was compelled to grant a disposition of moveables, for payment of a debt not in the caption; the Court held it effectual for the debt in the caption, not for the other.

NISBET against STEWART, 18th December 1708, similar to the above.

WILLOCKS against CALLENDAR, 26th November 1776; a bill was found ineffectual in the hands of an onerous indorsee, having been extorted by violence; 3. Dict. 81.; 1. Hailes, 724.

WIGHTMAN against GRAHAM, 6th December 1787; 10. Fac. Coll. 16. Here Wightman paid a bill due by his father, and afterwards, on assignation from the bill-holder, took out a caption, and threatened the cedent himself with imprisonment, by the terror of which he extorted from him a bill for the original debt, with interest and costs accumulated. A reduction was raised, and the bill afterwards indorsed, and the indorsee brought an action for payment. The Court, holding that a bill impetrated like the one in question was of no validity, dismissed the action.

FRAZER against BLACK and KNOX, 13th December 1810; 16. Fac. Coll. 84.

weakly scrupulous conscience), an admixture of deception or fraud will be required, and may be sufficient to invalidate the consent.[1]

III. FRAUD is a ground of invalidity in obligations, where the direct misrepresentations or manœuvres of the one party are such, that the other party has thereby been induced to enter into an engagement to which he would not otherwise have consented. In such a case there is consent, but it is not such consent as can justly give the right of exaction to the person deceiving or adopting the deceit. And here lies the difference made by lawyers between that nullity which attends error or compulsion, both totally subversive of consent; and that invalidity which is produced by fraud inducing consent upon false grounds. Consent, it is said, may be predicated in the latter case; not in the former. The objection will be good against third parties in the former case; not in the latter, unless such third parties represent the defrauder.

The general rule is, that wherever fraud gives birth to the contract, it will not bind;[2] and it was well laid down in an English case, that where a purchaser has laboured under a deception, in which the adverse party has permitted him to remain, on a point which he thought material to influence his judgment, the contract is void.[3]

The general nature and operation of fraud upon transference has already been considered; and the two kinds of fraud as distinguished by lawyers, fraus dans causam contractui, and fraus incidens.[4] It remains only to mark some of the cases in which fraud, less in degree than would be requisite if it stood alone, combined with other circumstances, also in themselves insufficient, will be held to make out a case subversive of that consent which is essential to contracts.

1. Where one, under the operation of some motive of alarm insufficient of itself to invalidate his contract, has been also deceived by the adverse party in the contract, no advantage can be taken of his engagement. Thus, in a case already alluded to, where a man was induced, by the terror of a law-suit on account of a trespass by cattle, to grant a bill for an exorbitant and misrepresented amount of damages, he was found entitled to relief.[5] And again, the terror of a prosecution for criminal conversation having induced a weak person to grant a bill to the husband, it was found invalid, the husband having fraudulently connived at the intercourse.[6]

2. Lesion, or great inequality or inadequacy of price, has already been seen not to be of itself sufficient to reduce contracts or deeds;[7] but combined with fraud and weakness of mind, it will afford a sufficient ground of reduction.[8]

3. Intoxication, as a ground of relief from an obligation, is in general to be set forth as a plea of fraud. It cannot, indeed, be said that there is consent, where the mind is for the time

[1] See below, Notes [5], and [6]. FORMAN against SHERIFF, 24th May 1791; Fac. Coll. M'ILWHAM against KERR, 22d February 1823; 2. Shaw and Dunlop, 240.

[2] CHRISTIES against FAIRHOLMES, 17th December 1748; 2. Falc. 30.; Kilk. 216. Tobacco sold on a bill with a forged name as co-acceptor. The vendor claimed the goods in the hands of creditors as not effectually sold: And the Court so held. See above, p. 290.

[3] HILL against GRAY, 1816; 1. Starkie, 434. Here a purchaser of a picture as a Claude, was misled by the vendor's agent into a belief that it had formed part of a particular collection, which he thought sufficient evidence of its genuineness. It was not of that collection, but he was allowed to buy under that misconception. Lord Ellenborough tried the case.

[4] See above, p. 240. et seq.

[5] FORMAN against SHERIFF, 24th May 1791; 4. Dict. 395.

[6] M'ILWHAM against KERR, 22d February 1823; 2. Shaw and Dunlop, 240.

[7] See above, p. 141.

[8] In England, inadequacy of price alone will invalidate a contract, if so strong, gross, and manifest, that a man of common sense will start at the bare mention of it; such inadequacy being taken as evidence of fraud, according to Lord Thurlow; 1. Brown's Cases in Chan. 9. Or 'if there is such inadequacy as to shew, that the 'person did not understand the bargain he made, or 'was so oppressed that he was glad to make it, knowing 'its inadequacy, it will show a command over him 'which may amount to fraud.' HEATHCOTE against PAIGNON, 1787; 2. Brown's Chan. Cases, 175.

destroyed by intoxication; and standing alone, it will be a good ground of reduction, that the party was so drunk as not to know what he did; or, according to Erskine, 'in a state 'of absolute drunkenness, and consequently deprived of the exercise of reason.'[1] In general, intoxication only 'darkens reason,' and does not of itself invalidate a contract; but the advantage taken of this state of imbecility may infer the existence of fraud, or aid the force of the objection grounded on deceit or extortion.[2] In England, accordingly, this degree of intoxication is taken as an ingredient of fraud, where the adverse party has led the person into intoxication;[3] or where he is shewn to have taken advantage of his weakness.

ART. II.—*Of Obligations and Contracts considered as Legal or Illegal.*

The consent which forms the essence of all contracts and obligations, must be not only deliberate, but the agreement must be of a description which law will sanction; otherwise no debt can arise out of it, and a court will not lend its aid to enforce it. The contract must be neither illegal nor immoral: It must not be a contract prohibited; or against the policy of the laws of trade; or prejudicial to the community.

The general rule of law is, that no claim or right of action can spring out of an illegal contract; that no court will lend its aid, and no trustee in bankruptcy is entitled to give sanction, to a claim grounded upon an immoral or an illegal act.[4]

The acts which may be thus distinguished may be illegal, either on the principles of common law, or by the force of statute. It may be convenient to consider these cases under the following heads:—1. Contracts and obligations immoral, or contra bonos mores; 2. Contracts and obligations against public policy; and, 3. The force of contracts thus exceptionable, when pleaded against third parties not participant in the offence.

§ 1. OF OBLIGATIONS AND CONTRACTS IMMORAL, OR CONTRA BONOS MORES.

These again are reducible to several classes:—

1. INCENTIVE TO CRIME.—Agreements or obligations inductive to crime, cannot be the foundation of a claim; for the law says, 'You shall not stipulate for iniquity.' Neither will a claim be sustained on a bond for compounding a crime; as, for example, a prose-

[1] 3. Ersk. 1. § 16. 'Persons while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige (bind) themselves.' See also, 4. 4. § 5. Lord HALTON against NORTHESK, 29th July 1672; 2. Stair, 3.

In England, Sir W. Grant says, that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason, would be invalid even at law. COOK against CLAYWORTH, 18. Ves. 16. See also, PITT against SMITH, 3. Camp. p. 34.

[2] Erskine says, 'A lesser degree of drunkenness, 'which only darkens reason, has not the effect of annulling the contract;' ubi sup.

[3] See JOHNSON against MEDLICOT, 3. P. Williams, 130. Note (a). Where Sir J. Jekyl at the Rolls said, 'The having been in drink, is not any reason to relieve 'a man against any deed or agreement gained from 'him when in those circumstances, for this were to 'encourage drunkenness: *Secus* if, through the management or contrivance of him who gained the deed, 'and the party from whom such deed has been gained, 'was drawn into drink.'

[4] Lord Mansfield says, in HOLMAN against JOHNSTON, Cowp. 343.—'No court will lend its aid to a 'man who founds his cause of action upon an immoral 'or an illegal act.'

Mr Justice Ashhurst, in BLAMBFORD against PRESTON, 8. Term. Rep. 93. says,—'It is a clear rule of 'law, that no right of action can spring out of an 'illegal contract.'

Lord Kenyon, in same case, says,—'One who comes 'into a court of justice to enforce a contract, must 'come on legal grounds; and if he have not a legal 'title, he cannot succeed, whatever the private wishes 'of the court may be.'

cution for perjury,[1] or for procuring a pardon.[2] And it is not enough that the document of debt has received the unsuspicious appearance of a simple and legal bill or bond. Whenever courts of law, said an eminent Judge, see attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light.[3]

A distinction is admitted between bonds given as the price of prostitution, and bonds granted subsequent to such a connexion, as a provision due in honour and justice for an injury accomplished. On a bond of the former description no claim can lie;[4] on one of the latter description, the claim is admissible.[5] But the favour indulged to bonds of the latter description is withheld, where the grantee is a prostitute,[6] or where she knew the granter to be married at the time of their connexion.[7] And a distinction, again, has been taken between the person with whom the connexion was formed, and the children of such connexion; the claim of the latter being admitted in cases where the former was rejected.[8]

2. Indecent, or Mischievous Consideration.—An obligation or stipulation is void, which is prejudicial to the feelings or interests of a third party; or offensive to decency or morality; or which has a tendency to mischievous and pernicious consequences: As a contract of sale of obscene and indecent publications;[9] or an obligation to induce an immoral action, as a violation of chastity, or personal injury to another; or a contract which gives a subject of this country an interest in the life of an enemy;[10] or which resolves into an inquiry concerning personal defects or blemishes.[11] The cases in the English books which illustrate this rule, are chiefly cases of wagers; which, on another ground, would be dismissed in Scotland.[12]

3. Gaming.—Gaming was prohibited by statute, as a most pernicious vice, as early as

[1] Collins against Blantern, 2. Wils. 341. 347.

[2] Stewart against Earl of Galloway, 3d June 1752; Select Decisions, 11. A bond of L. 200 to one about the King's person to obtain pardon for murder, held bad.

Grant against Davidson, 2d August 1786; 9. Fac. Coll. 447. An agreement to pay a sum to the poor for quashing an action for penalties, held by Lord Hailes illegal: Court altered, on ground of usage as well as policy. See 2. Hailes, 1001.

[3] Lord Chief-Justice Wilmot in Collins against Blantern, above, Note [1].

[4] It is doubtful whether, even to the children of such a connexion, the bond would be good. See Lord Eldon in Hamilton against Waring, 1. Bligh, 269.

[5] Walker against Perkins, 3. Bur. 1568. A promise, in consideration of future illicit connexion, denied action.

March. of Annandale against Harris, 2. Peere Williams, 432.

Gibson against Dickie, 3. Maule and Selw. 463.

See D. of Hamilton against Scott Waring, 21st May 1816; 19. Fac. Coll. 128. This part of the case given up in the House of Lords, 2. Bligh, 197.

[6] Whaley against Norton, 1. Vernon, 483. Mathew's case, 2. Vernon, 187.

[7] Durham against Blackwood, 20th July 1622; 2. Dict. 21. Here the Court of Session denied effect to a bond, even to the unlawful issue of the connexion. But the distinction is correctly taken in a subsequent case; Sir W. Hamilton against Mary de Gares, 26th June 1765; Fac. Coll. 218.; where action was denied on a bond to an adulteress, but sustained on a bond to the child of the connexion.

See the case of Priest against Parrot, in England, 2. Vesey, 160.; where a girl came to live as a companion to Parrot's wife, and Parrot seduced her, and gave her afterwards a bond. Action denied.

[8] See the cases in the preceding Note.

[9] Fores against Johnes, 4. Espin. Cases, 97. where an order for *all* prints was held not to oblige the orderer to take *obscene* ones; and an action is not maintainable for the value of such prints.

See also Du Bost against Beresford, 1810; 2. Camp. 511.; where, in an action for the value of a picture which the defendant had cut in pieces, held that, being libellous, law cannot consider it valuable as a picture.

[10] Gilbert against Sykes, relative to a wager on the life of Bonaparte, 16. East. 150.

[11] Da Costa against Jones, a wager as to the sex of the Chevalier D'Eon, Cowp. 729.

[12] See below, Of Wagers, p. 300.

James VI.'s time, 1621, c. 14. By this Act, the winnings above 100 merks to go to the poor, 9. Anne, c. 14.; 18. Geo. II. c. 34. By an ordonnance of Louis XIII. of France, in 1611, winnings were limited to a small sum, the excess being given to the poor. This probably suggested the remedy provided in our Act of 1621. In England, there are three principal statutes; one in the time of Henry VIII., another in the dissolute reign of Charles II., and a third in Queen Anne's time.[1] By the last of these Acts, which has received effect in Scotland,[2] 'all bonds, or other securities given 'for money won at play, or money lent, at the time, to play with,' are declared utterly 'void;' and 'all mortgages or encumbrances of lands, made on the 'same considera-'tion, are ordered to be made over to the use of the mortgagor.' This objection was held to affect any one holding a bond or bill as trustee for the winner;[3] but not onerous and bona fide indorsees, without notice of the objection.[4] The Act of 1621 is not however in desuetude, as might be supposed from one case,[5] but only effectual to the poor, not to the winner.[6]

4. WAGERS.—By the law of Scotland, a rule has been followed on the subject of wagers, which is opposite to that of the English law; but which English Judges of the highest name have regretted that it is almost too late to adopt in England.[7] The view which has been taken in Scotland is, that the laws of the country and its judicatures were instituted to determine adverse rights, and not the idle or impertinent doubts and inquiries of persons not interested in the matter. In a case determined in 1799, the Court, proceeding not on the statute against gaming, but on the common law, held, 'that Courts were instituted to enforce the rights of parties arising from serious transac-'tions, and can pay no regard to sponsiones ludicræ.'[8]

This doctrine may now be held as the settled law of Scotland; for not only was it applied in the Court of Session to rule a case decided some years before the case above mentioned, but the judgment was affirmed in the House of Lords.[9]

[1] 33. Henry VIII. c. 9.; 16. Charles II. c. 7.; 9. Anne, c. 14.

[2] NEILSON against BRUCE, 25th January 1740; Kilk. 70. Sir R. PRINGLE against BIGGAR, 7th November 1740.

[3] Sir R. PRINGLE against BIGGAR, 7th November 1740; C. Hume, p. 261.

[4] NEILSON against BRUCE, Jan. 25. 1740; supra.

[5] STRAITON against Laird of CRAIGMILLER, 19th July 1688; Harc. 263.

[6] MAXWELL against BLAIR, 14th July 1774; 6. Fac. Coll. 338. The Act 1621 held not in desuetude, but available to the poor; and notice given to the kirk-treasurer to appear for the interest of the poor.

[7] This regret has been expressed by Lord Mansfield, who says,—'Whether it would have been better policy 'to have treated all wagers originally as gaming con-'tracts, and so have held them void, is now too late to 'discuss;' Cowp. 729. Mr Justice Ashhurst has said, —'In my opinion, the Courts have gone far enough 'in encouraging impertinent wagers. Perhaps it would 'have been better for the public, if the Courts had 'originally determined, that no action to enforce the 'payment of wagers should be permitted;' 2. Term. Rep. 615. And Mr Justice Buller has said,—'Such 'a wager is not permitted by the laws of other coun-'tries; it is not allowed by the civil law, nor by the 'law of Scotland; and a determination on that point 'which came from the Court of Session in Scotland, 'was affirmed here in the House of Lords, on an ap-'peal;' Ib. 616. And again, in alluding to Lord Mansfield's opinion, above quoted, he says,—'With 'great deference to that very high and respectable 'authority, I doubt whether it be too late to consider 'that question or not: For in BRUCE against Ross, 'Dom. Proc. 14th April 1788, a decree in Scotland 'was affirmed, on the ground that all idle wagers were 'void. In the printed cases, which is all we have to 'go upon, it is stated, that the rule and principle of 'the civil law, relative to the sponsiones ludicræ, were 'early adopted as common law in that kingdom, and 'have been constantly adhered to; and the great and 'laudable pains which, on all occasions, have been 'taken to preserve an uniformity between the laws of 'that country and of this, make that case of consider-'able authority here;' 3. Term. Rep. 697.

[8] WORDSWORTH against PETTIGREW, 15th May 1799; 12. Fac. Coll. 281.

[9] The consequence of not having followed the same course in England is, that it has been necessary to

If a sum has been paid, to receive a larger sum on a certain event, there seems to be no doubt that a claim will lie, at least for the sum so paid, as a debt.

5. LIQUOR ACTS.—By 24. Geo. II. c. 40., in order to prevent the pernicious effects of dram-drinking, no action is maintainable for money, &c. for spirituous liquors, unless bona fide contracted at one time to the amount of 20s. or upwards. And the claim is not even valid as an item in an account, where the liquor at once delivered, and mentioned in the item, is not to the amount of 20s. On this statute, action has been refused on a bill granted for the amount of an account for spirits furnished.[1]

§ 2. CONTRACTS AGAINST PUBLIC POLICY.

The private interests and stipulations of individuals must yield, and their natural rights and powers suffer restraint, wherever they are inconsistent with the public interest. This great consideration furnishes the ground of several important restraints on the freedom of contracting obligations; and they may be considered as connected, 1st, With internal policy; and, 2d, With the policy of foreign relations.

1. CONTRACTS INCONSISTENT WITH INTERNAL POLICY.

This class of restraints frequently combines the consideration of immorality, already taken notice of, with those of general policy, as in bribery in elections; sometimes no other consideration operates, but the general policy of the law in securing the freedom of the subject from undue restraint.

1. DOMESTIC RELATIONS.—The law is jealous of all contracts which restrain the freedom, or taint the purity of the domestic relations.

RESTRAINTS ON MARRIAGE.—All contracts imposing restraints on marriage, though clear of direct fraud, are to be looked on with great jealousy, and generally it may be laid down that they are void. A bond not to marry is bad, as encouraging irregularity, and as devoid of proper interest to the obligee. But where the bond has relation to the party, distinctions have been contended for:—1. If there be a subsisting engagement to marry the obligee, in relation to which the obligation is granted, it has been greatly doubted, whether, the sum in the bond being the price of reciprocally abstaining from engagement, a woman holding such a bond, and, in reliance on it, avoiding other engagements and suffering injury, has not a good ground of action for the sum. But, taking the matter on broad grounds, this has been held a dangerous and illegal sort of traffic; all that is beneficial in the subsisting engagement being demandable on the obligation to marry. 2. Where, on the other hand, there is no subsisting obligation to marry, or only an implied contract; such obligations to pay forfeits are bad, as savouring of improper restraint. It is held, that where there is a proper impediment, the parties should continue

enter into many distinctions in determining what wagers deserve support, and what are to be rejected. See JONES against RANDAL, Cowper, 37.; FOSTER against THACKERY, 1. Term. Rep. 57. Note (o); and many others.

BRUCE against ROSS, 26th January 1787; 9. Fac. Coll. 465.; 2. Hailes, 1016. There were two grounds of judgment commingled in this decision: 1. That a wager is not actionable; and, 2. That a wager relative to the election of a member of parliament, is against public policy. In the House of Lords, the decision was affirmed on the former ground, 14th April 1788.

See for the grounds of that judgment, above, p. 300. Note [7]. Mr Justice Buller's opinion in ATHERFOLD against BEARD, 2. Term. Rep. 616.; and in GOOD against ELLIOT, 3. Term. Rep. 697.

[1] RUSSELL against RUSSELL, 6th July 1808.

free; where there is none, they should marry; and law ought not to sanction what may encourage illicit connexion or improper advantages taken in delicate circumstances.[1]

MARRIAGE BROCAGE CONTRACTS are agreements or bonds promising a reward to one who, by reason of the influence he may have over one of the parties, shall procure a marriage between them; and are void, on account of their pernicious tendency to unhappy marriages, the infamous profit derived, disobedience to parents encouraged, the destruction of the peace of families, and the ruin and unhappiness of the parties themselves.[2] The first case which occurred 'moved laughter.'[3] The next seems to have suggested more serious reflections on the dangerous tendency of such agreements;[4] and at last, in a case where the point came fairly to trial, the Court held the engagement undertaken to be contra bonos mores, and the contract to afford no ground of action.[5]

2. RESTRAINTS ON NATURAL LIBERTY may, to a certain extent, be effectually imposed. Thus, although it is unlawful to bind one's self to perpetual banishment, or perpetual service,[6] an engagement or mutual contract of service, and wages for a long term of years, or even for life, seems effectual.[7] Again, it not unfrequently happens, that an engagement is undertaken, by which one, in entering to the service of another, restrains himself from that particular line of trade within a certain district, for the purpose of avoiding rivalship, and disadvantage to his master. On this subject several distinctions have been admitted; and, 1. A general restraint extending to the whole country is void, whether with or without a consideration given for it; on the ground, not only of injury to the one party by loss of livelihood and the subsistence of his family, without a corresponding advantage to the other; but of injury to the public, by depriving it of a useful member. 2. Particular restraints are effectual, on the principle that a man may, by his own consent, give over his trade, and part with it to another in a particular place:[8] And so agreements have been sustained restraining the granter from particular trades within the same parish,[9] or within half a mile,[10] or within ten miles,[11] or within the same city.[12]

[1] See these views illustrated in two English cases under Lord Hardwicke and Lord Mansfield; WOODHOUSE against SHEPLEY, 2. Atk. 540.; LOWE against PEERS, 4. Burr. 2225. See GIBSON against DICKIE, 3. Maule and Selwyn, 463.

[2] Comyn's Dig. vol. ii. p. 631. and the cases there cited.

[3] CAMPBELL against BARNS and STEWART, 6th June 1678; 1. Fount. 1.

[4] Earl of BUCHAN against COCHRAN, 22d June 1698, where the bond was first sued on in England, and the plaintiff nonsuited, as the bond was contra bonos mores. The action here was for the expenses of Sir John Cochran in England, while negociating the marriage. The case does not appear to have come to a decision. 2. Fount. 5.

[5] THOMSON against MACKAILE, 14th February 1770; 5. Fac. Coll. 50. and 1. Hailes, 339.; where, by a series of manœuvres, a young woman was led into a marriage, and action was brought by the manœuvrer, who held a bond for a sum to be paid if the marriage should be accomplished. The Court held this an obligation which could not be enforced.

[6] WEDDERBURN against MONORGAN, 6th March 1612; 2. Dict. 19. CAPRINGTON against GEDDIE, 24th March 1632; Durie, 632.

[7] 1. Ersk. 7. § 62. See the case of REID against SCOTT, 13th January 1687; 1. Fount. 439.; where a very odd contract of apprenticeship to a mountebank was sustained.

[8] See a very elaborate argument of Parker, Chief-Justice, in MITCHELL against REYNOLDS, 1. Peere Williams, 181.

[9] MITCHELL against REYNOLDS, preceding Note.

[10] CHESMAN against NAINBY, 2. Strange, 739; 2. Lord Raymond, 1456.

[11] DAVIS against MASON, 5. Term. Rep. 118.; where one so agreed, on being taken as assistant to a country surgeon.

[12] STALKER against CARMICHAEL, 15th January 1735; 2. Dict. 19.; where two persons entered into partnership as booksellers in Glasgow for three years, and with a stipulation, that 'after the expiration of 'three years, either of them refusing to enter into a 'new contract upon the former terms, should be de-'barred from any concern in bookselling within the 'city of Glasgow.' 'The Court found this debarring 'clause in the contract a lawful paction, and not con-'trary to the liberty of the subject.'

3. Invasion of Freedom of Election.—This has not been left to the common law. The Act of 49. Geo. III. c. 118. proceeds on a preamble, that giving or promising money to procure a seat in Parliament is not bribery, if the money is not given or promised to a voter or returning officer; but that such gift or promise is contrary to the ancient usage, right, and freedom of election, and laws and constitutions of the realm; and therefore, if any person give, directly or indirectly, any sum, &c. on an engagement, &c. to procure, or endeavour to procure, the return of any person to serve in Parliament for any county, &c. the consequences shall be,—1. Forfeiture of L.1000 by the person so offending: 2. If returned, incapacity to serve in that Parliament: 3. Forfeiture to the Crown of the gift, &c. by the receiver, besides a penalty of L. 500.

No action is maintainable at common law on bonds of this description;[1] and this principle, combined with the rule against sustaining wagers, was fatal to an action on a wager respecting the result of an election.[2]

2. CONTRACTS AGAINST PUBLIC POLICY AND THE REVENUE LAWS.

The public interest requires, both in peace and in war, the imposition of customs and other taxes to furnish the necessary revenues for the use of government. In war, the hands of government must be strengthened to the utmost, that with the greatest possible efficacy the operations of this great engine of justice amongst nations, may be directed to the accomplishment of the policy at which the wisdom of government aims. Individual rights or contracts, where they interfere with public interest, must suffer limitation; and in peace, nothing must be done by individuals to diminish the public revenue; in war, nothing to cripple the resources of the country, or to aid the operations of the enemy.

Out of these considerations arise two classes of restraints upon contracts; one relating to the policy to be pursued during war; the other relating to contraband goods, or the commercial restraints for protecting the revenue.

I. Of War Policy.[3]—The great principle which regulates this department of law is, that war is the operation of the great governing power of the state, aiming at the attainment of national good, or the avoidance of national evil; and by the infliction of such inconvenience and distress on the enemy, as may induce them to grant the terms of peace for which it is thought expedient to insist. It implies, that individuals, (who are necessarily without the information which directs the policy of the state), shall not be permitted to interfere. And the rule is, that there is not a war for arms, and a peace for commerce. It is a necessary consequence of this, that no contract entered into against the war policy can receive effect in a court of law. Whatever individual suffering may arise, the result of the general policy is a benefit to the whole community; and the result of that comprehensive view which government is enabled to take of the national relations and policy, is not to be disturbed by the officious interference, and narrow or selfish views, of private men, not having before them the materials of a wise deliberation.

[1] Glen against Dundas, 1822; 1. Shaw and Ballantine, 256. This action was for arrears on a bond of annuity, given as a bribe to secure the vote of a brother of the obligee. The Court, being satisfied that the bond was granted for an illegal purpose, refused action.

[2] Bruce against Ross, 26th January 1787. See above, p. 301. Note.

[3] On this subject it may be sufficient to state the great outlines of the doctrine. The authorities to be referred to are, in the first place, the series of determinations by Lord Stowel, preserved by Dr Robinson, in his Reports of Cases in Admiralty from 1797 to 1808, in six volumes; by Dr Edwards, in his Reports from 1808 to 1811; by Dr Dodson, from 1811 to 1817. Reference may also be made to Horne on Captures, Baring on the Orders in Council, and Dr Phillimore on Licenses.

1. NEUTRALS.—The operation of this great principle is, to a certain extent, impeded by the rights of Neutrals. By their interposition, trade between the belligerents continues open. For, although the subjects of the belligerent powers cannot carry on direct intercourse, there is nothing in their hostility against each other to affect neutrals.

Neutrals may carry on with belligerents a trade which is beneficial to the one belligerent state, and hurtful to its antagonist: Or even they may carry on trade indirectly between the belligerents themselves; although the effect may be, that in mitigating the present evils of war, they protract its duration. This right of neutrals, however, is subject to certain operations of the war policy of the belligerents, which may entirely interrupt their commerce. For, 1. The ships of neutrals are liable to search, in order to prevent any contravention of the necessary regulations of the war policy; 2. They are also subject to prohibition against trading in certain articles called contraband of war; and, 3. Their trade with the belligerent may be entirely cut off, and prevented by blockade.

2. LICENSES.—As government is intrusted with the ruling power, and sole direction of the war policy of the country, it has necessarily a right to relax the great rule of prohibition of trade, even with the enemy.

Licenses are granted by a high act of sovereignty, proceeding on all the considerations of commercial and political expediency by which such an exception from the ordinary consequences of war must be controlled. They are granted either to a merchant of this country to trade directly with the enemy, or to an enemy to import goods into this country.

Two circumstances are required to give due effect to a license:—1. The fair intention of the granter must be pursued; and, 2. The license must be used with perfect bona fides.

Great doubts have been entertained as to the rules according to which licenses are to be construed; and there appears to have been a change in the spirit of construction arising from the extraordinary and unprecedented events of the late war. It may be sufficient, in the general view of the subject, to say, that the eminent Judge who has in these extraordinary times presided in the British Court of Admiralty, seems to have entertained these views:—In former wars, the general prohibition of intercourse between belligerents being attended with little inconvenience, the greater part of the countries of Europe remaining neutral, and affording various indirect channels of communication; licenses were granted only in very special cases, where there appeared to be a necessity for direct communication with the enemy: And they were construed with the greatest strictness, as matter of special indulgence; not, however, so as to exclude a rational exposition, and liberal interpretation of the granter's intention. But there arose, in later times, a very extraordinary course of public events, which had great influence on the character of licenses. The power or the influence which Bonaparte acquired over all those continental states which in former wars had remained in neutrality, enabled him to impose on neutrals a total interdiction of trade with the enemy, as a part of the policy by which he hoped to injure the commercial power of Britain. In this interruption to foreign commerce, the alternative seemed to be, either that Britain should relax the old principle, and permit to her subjects unlimited intercourse with the ports of the enemy, or that a greater extension should be given to licenses. To the former the consent of both parties is always required; and if at any time given, there is danger of going beyond what might be safe in policy. Licenses, therefore, came to be extended, as the best expedient to be adopted by this country to support its trade, in defiance of all the obstacles which the enemy might interpose. They were granted, therefore, with great liberality, to all merchants of good character; were expressed in very general terms; and received an enlarged and liberal interpretation.

These are the general principles which regulate this important department of national policy; and on these principles the following rules may be laid down:—

1. The subjects of the belligerent powers cannot trade with one another; their vessels or goods are lawful prize; and no action lies for enforcing their reciprocal obligations. The limitations of this rule are,—1. That the obligation is good, if hostilities have not commenced at the time of the contract, or if their commencement was not known at that time to the parties; and, 2. That if war should thus intervene, no demand can be effectual during the subsistence of hostilities; the obligation, however, reviving on the termination.

2. The subjects of the belligerent states may trade with each other under license. The limits of the trade, prescribed in the license, must with bona fides be fairly observed; for if they be exceeded, the contract is exposed to the hazard of being annulled, and the cargo or goods to confiscation.

3. Neutrals, who trade with both belligerents, must observe a strict and rigid neutrality; and with that observance, the trade is permitted under certain exceptions:—

(1.) *Contraband of war* is the first exception, including all the implements of war. These vary according to the mode of conducting the war, and the progress of invention in such implements; but, generally speaking, they include arms, ammunition, timber for the navy, naval stores, and provisions, going direct to the enemy; whatever, in short, is directly instrumental in carrying on the war.

But, on the other hand, there are relaxations in the description of contraband of war: For example, *First*, The raw material, in its natural state, is not a commodity falling under this prohibition; nor, *Secondly*, Are commodities intended, not for ships of war, but for domestic use, or for trading ships; nor, *Thirdly*, The natural produce of one of the belligerent countries.[1]

(2.) *Blockade* imposes another obstruction on the trade of neutrals. This is either directed, for some particular purpose of the war, against a particular port, proclaimed by competent authority; or against part of the coast; or even against whole coasts. This last use of blockade was an extension of power reserved for the extraordinary manœuvres of the last war, in which, at one time, the whole ports on the continent of Europe were declared by this country to be under blockade. In such a case, neither neutrals nor any other vessels can trade with the blockaded ports, without danger of capture.

(3.) In its colonial and coasting trade, during peace, every country gives a monopoly to its own subjects.[2] During war, this exclusive trade is thrown open to neutrals, with a view to protect it, or to allow it to proceed without interruption from the enemy. But neutrals so interfering are held to depart from the strict duties of the neutral character, in stepping in to aid the depressed party, and enable it to carry on safely a trade which the war would have effectually destroyed. For the duty of a neutral is, 'non interponere se bello; non, hoste imminente, hostem eripere.' Such interference on the part of neutrals being against the war policy of nations, it is not to be permitted under the right of neutrality, unless where there has been the same permission to neutrals during peace.[3]

The right assumed by Great Britain of visiting neutral ships, the object of so warm a contest in Europe, had for its object to furnish evidence on the points now enumerated. Neutrals contend, that free ships make free goods; and object to the right of search. And on this question Great Britain has long been at variance with the continental states; the power assumed by her being one which her naval superiority gives her the means of enforcing, with an advantage which they cannot enjoy.

[1] This, of course, however, must always be a question considerably influenced by the particular circumstances and existing policy at the time.

[2] See above, of the Navigation Laws, p. 152.

[3] EMANUEL, 1. Rob. 296. IMMANUEL, 2. Rob. 197.

In insisting on the right of visitation and search, our cruisers call, 1. For the passport; 2. For the manifest; 3. For proofs of the property; 4. For the charter-party; 5. For the bills of lading and invoices; and, 6. For the log-book.

These are proofs by which to ascertain, whether the voyage be honestly neutral and impartial, or intended to assist the belligerent in the conduct of the war; and according to the result, taking this criterion, questions of this kind will be adjudged in a court of international law; and vessels or goods condemned, or otherwise.

ALIEN ENEMY'S DEBT.—Connected with this subject is the inhibition or prohibition of the payment and recovery, during the subsistence of war, of debts due to alien enemies, that the arm of the enemy may not be strengthened by money paid to its subjects. Unless a debt arise under a license, (as to which no war exists), the aid of a court will not be given for recovery of it. Although originating during peace, and however trifling the amount, the principle is general, that the enemy is not to be benefited even to the smallest extent. Execution is on this ground suspended until the conclusion of the war. The person employed to recover a debt of this kind, may perhaps take steps however to *secure* it until the issue of the war. In England, on bankruptcy, dividends have been set apart for debts in this situation;[1] and there seems to be no doubt that in Scotland such a debt might be claimed in bankruptcy, to the effect of having a dividend set apart as for a contingent debt.

II. CONTRABAND OF TRADE, OR SMUGGLING CONTRACTS, form the next class of contracts falling under the principle of public policy, as controlling the private rights of individuals.

This doctrine is grounded on the commercial policy of the nation during peace, as the other is grounded on its war policy. It is the right of a nation to regulate, for the public interest, the conduct of its trade; and, in particular, to encourage certain lines of industry by means of prohibitions or bounties, and to impose high duties on the importation or exportation of particular commodities.

The contempt and breach of those laws is called SMUGGLING; the goods as to which the evasion is attempted, CONTRABAND; and the great rule is, That no action is maintainable on the contract, or for the price of the goods purchased, in contempt of those laws. In the one case, 'Potior est conditio possidentis;' in the other, if an action is brought for money, 'Potior est conditio defendentis.' In other words, courts in such circumstances allow the parties to remain just as they were.

Contracts may be distinguished as, 1. For smuggling; and, 2. For goods smuggled.

1. In cases of the former description, the party bringing the action is participant in the smuggling contract; and no action lies. This comprehends, 1. Natives settled abroad, who are not entitled to the aid of a British court of justice to assist in their breach of the laws of their country.[2] 2. In cases also where *foreigners* have a direct accession, action has been denied to them, on the ground that they ought to know the law of the country with whose regulations they presume to interfere.[3] 3. In certain cases

[1] Ex parte BOUSSMAKER, 13. Ves. 71. See 1. Montagu's Bankrupt Law, 163.

[2] CANTLEY against ROBERTSON, 11th February 1790; 8. Fac. Coll. 210.; 2. Hailes, 1077. YOUNG and Company against IMLACH, 7th July 1790; 8. Fac. Coll. 236.

[3] NISBET against ROBERTSON, January 1791; 4. Dict. 33. Here an heritable bond was granted for the price of smuggled goods by a person in this country to his correspondent in Holland, who was accessory to the smuggling. The bond was assigned to a third party, who took infeftment, and in an action at the instance of the trustee for the creditors of the granter, it was set aside as *pactum illicitum*.

See also the English case of WAYMELL against REID, 5. Term. Rep. 599.; where a foreigner at Lisle sold a quantity of lace, which he knew was to be smuggled, and packed in a particular way to facilitate its clandestine importation. CLUGAS against PENALUNA, 4. Term. Rep. 466.; similar, as to brandy packed in ankers for smuggling.

the rule has been enforced generally both against natives and foreigners, there being direct participation.[1] In the proof of accession to the smuggling transaction, several cases may be distinguished. Where the goods have been sold abroad, it has been held, that the packing of the goods in a particular way, so as to facilitate the *running* of them, is one indication of accession: That the managing and preparing of the papers of the ship, so as to evade detection, is also a proof of accession: That corresponding with the parties concerned, detailing the plan of operations, and concerting the accomplishment, is sufficient to establish accession: That actually sending the goods to this country is also sufficient; for a person doing so ought to be acquainted with our importation laws.

2. In contracts for the purchase of smuggled goods, where the vendor has no accession to the breach of the revenue laws, action is not denied. 1. If the sale is abroad by a foreign merchant, although he may suspect or even know that the goods are to be smuggled, but has not been actually concerned in the smuggling, an action will lie. And even to a native settled abroad, action will not be denied, if he has dealt as a vendor merely. In both cases, the law of the country where the contract was made is to be administered.[2] 2. Where the goods have come into this country, the criterion of decision to sustain or to dismiss the action, is knowledge of the contraband nature of the goods.[3] The decisions have varied; but it would seem, 1. That where the goods are *prohibited*, no bona fides can justify the contract: 2. That where the goods are not prohibited, but may lawfully be sold, provided the duties have been paid, action is denied where the party knows the duties to be unpaid:[4] 3. That after the goods are in the circulation of this country, the bona fide purchaser has action for their delivery although smuggled.[5]

Although at first the Court seems to have held action or diligence competent on bills for the price of contraband goods, they afterwards refused to sustain them; the bills being in the hands of the original parties, or of their trustees.[6]

[1] CULLEN and Company against PHILP, 15th May 1793; Fac. Coll. 102. REID and PARKINSON against M'DONALD, same date; Fac. Coll. 103.

[2] HOLMAN against JOHNSON, Cowper 341. Holman, residing at Dunkirk, sold tea to Johnson's order, knowing it was to be imported into England: But he had no concern in the smuggling scheme himself, and merely sold the tea to Johnson, as he would to any other person, in the course of his trade. Action was brought in King's Bench for the price, and it was sustained. Lord Mansfield said,—'There can be no 'doubt, that any action tried here must be tried by 'the law of England; but the law of England says, 'that in a variety of instances with regard to contracts 'legally made abroad, the laws of the country where 'the cause of action rose should govern.' 'The gist 'of the whole turns upon this, that the conclusive de- 'livery was at Dunkirk. If the defendant had bespoke 'the tea at Dunkirk, to be sent to England at a cer- 'tain price, and the plaintiff had undertaken to send it 'into England, or had any concern in the running it 'into England, he would have been an offender against 'the laws of this country. But upon the facts of the 'case, from the first to the last, he clearly has offended 'against no law of England.'

The same doctrine has been held in Scotland. The opinion of the Court in CULLEN and Company against PHILP, is thus expressed: 'When a merchant settled 'abroad, whether a foreigner or native of this country, 'simply sells goods to a smuggler *tanquam quilibet*, and 'makes delivery on the spot, he can maintain action 'for them in our Courts, though he suspected or even 'knew that they were meant to be smuggled into 'Britain; but if he is accessory to the smuggling, and 'thereby to an infringement of the law of the land, '(which he is bound to know as far as concerns his 'trade), he cannot demand the aid of the British Courts 'for the recovery of his debt.'

See also HODGSON against TEMPLE, 1813; 5. Taunt. 181.

[3] SCOUGAL against GILCHRIST, 16th November 1736. COCKBURN against GRANTS, 11th November 1741; Kilk. 363. and Elchies' Notes, 310.

[4] M'LURE and M'CREE against PATERSON, 3d November 1775; Tait, 5. Brown's Sup. 532. The Court at first was inclined to sustain action, as there is no criterion of the payment of duties: But afterwards altered, and action was denied. DUNCAN against THOMSON, 8th February 1776; 7. Fac. Coll. 184.; Tait's Coll. 5. Brown's Sup. 632.; 2. Hailes, 683. M'LURE and M'CREE against PATERSON, 26th February 1779; 8. Fac. Coll. 138. See Opinions of Judges, 2. Hailes, 829.

[5] M'LEAN against SWORD, 5th December 1788; 8. Fac. Coll. 2.

[6] See Cases in Note [4]. above.

3. CONTRACTS USURIOUS.

The doctrine of the interest of money, considered as the hire of the use, or as the damage for non-fulfilment of the obligation to pay, will be explained afterwards. It has seemed expedient to the legislature to restrain the rate of interest within certain limits. To take a higher rate of interest than is thus limited, is usury; and the offence of so taking usury is punished by certain penalties, while even the stipulation of it has the effect of annulling a security of which it forms a part.

There are many statutes in both countries on the subject of usury. Those of Scotland worthy of notice are, the Act of 1597, c. 247., and that of 1621, c. 28. By the former, the usurious contract is annulled, the sum lent forfeited, and the debtor to have restitution of exorbitant profits. By the latter, it is declared lawful to take a bond at the term of payment for principal and interest; but usury to take interest before the term of payment. These statutes have not been abrogated, but are superseded by an Act of Queen Anne, which is now the law of the empire; the law of England and of Scotland in this respect being the same. In this Act there are two distinct provisions; one directed against the persons guilty of usury, and imposing penalties; the other pointed against the usurious obligation or contract.[1]

It is of some consequence to observe the distinction between these two parts of the Act, and their effects:—

To ground an action for penalties, the offence to be proved must be the *taking* of usury. The *stipulation* is of no avail in sustaining such an action, further than as it may be a circumstance in the evidence; nor is it any defence against the penalties, that there is no stipulation of usury. But in its effect in the avoidance of the security under the annulling branch of the Act, the stipulation is as effectual as the taking, while the taking, if relied on, must be a part of the bargain. Under the words '*whereupon* or *whereby* 'there shall be *reserved* or *taken*,' it is held, that to the effect of annulling the security, either there must be an agreement to take the higher rate previous to or at making the security; or that, at the time of the agreement, the higher rate shall be taken. If the usury be stipulated, the bond will be void, although the creditor should do diligence, or claim in bankruptcy, only for the principal and legal interest. If the bond be unexceptionable in its terms, but by a collateral stipulation at the time of the contract usury is bargained for, the bond is null.[2] If the bond or security be given partly for a usurious

[1] 12. Anne, c. 16. In the first section there is a general description of usury. 'No person, upon any 'contract made after 29th September 1714, shall take, 'directly or indirectly, for loan of any monies, wares, 'merchandise, or other commodities whatsoever, above 'the value of L. 5 for forbearance of L. 100 for a year; 'and so after that rate, for a greater or lesser sum, or 'for a longer or shorter time.'

The clause imposing penalties is in these words:— 'That all persons who shall take, accept, and receive, 'by way or means of any corrupt bargain, loan, ex- 'change, chevizance, shift, or interest of any wares, 'merchandise, or other thing or things whatsoever, or 'by any deceitful way or means, or by any covin, en- 'gine, or deceitful conveyance, for the forbearing or 'giving day of payment for one whole year of and for 'their money or other thing above the sum of L. 5 'for the forbearing of L. 100 for a year, and so after 'that rate for a greater or lesser sum, or for a longer 'or shorter term, shall forfeit and lose, for every such 'offence, the treble value of the monies, wares, mer- 'chandises, or other things so lent, bargained, ex- 'changed, or shifted.'

The annulling clause is in these terms:—'That all 'bonds, contracts, and assurances whatsoever, made 'after the time aforesaid, for the payment of any prin- 'cipal, or money to be lent, or covenanted (should 'be covenant) to be performed upon, or for any usury, 'whereupon or whereby there shall be reserved or 'taken above the rate of L. 5 in the hundred, shall be 'utterly void.'

[2] See Comyn on Usury, 166. and cases there cited. STRACHAN against GRAHAM, 12th June 1823; 2. Shaw and Dunlop, 391.; 3. Murr. Jury Court Rep. 434. A lady became bound as cautioner in a bond for L. 2000, with legal interest. A reduction was raised on discovering that the lender had stipulated that the

debt, the whole will be tainted.[1] If the usury be taken by a subsequent act, without being agreed to be taken at the time, it is not truly reserved on the security, and makes no part of it to taint and injure it. By such after act there may be the crime of usury personally, and to the effect of grounding a prosecution for penalties, but not to annul the contract or security.[2]

The general Limitation Act of 31. Elizabeth, c. 5. applies in Scotland, so as to restrain all prosecution for the penalties within the space of twelve months. But the Act of Limitation has no application to the annulling clause. The *contract*, once illegal, is so beyond remedy; and this character depends, in no degree, on the action for declaring it, or the time at which such action is brought. But the personal *act* of criminality in usury consists in the taking of usurious interest, and the penalty must be demanded within the limited time.[3]

It is essential that the higher interest be taken with usurious intent, in order to ground an action for penalties. This does not by the words appear necessary for the annulling of the instrument: But, to a certain extent, the same principle rules decisions even respecting nullity; for where it can be shown that there has, in the conception of the bond or other instrument, or in the calculation of the loan, been a *mistake*, so as to relieve from the imputation of usurious intent, the bond will be sustained.[4]

It is usury, to the effect of annulling the instrument or contract, if the creditor either stipulates or takes interest before it becomes due, although the *rate* is no higher than the law allows.[5] The custom of trade allows this to be done in discounting a bill; and without this no merchant could get his bills converted into cash. But it has been held, that the rule must be strictly confined to transactions within the usage of trade.[6] Although, therefore, a discount of a bill would not probably be held as usurious, merely because it exceeded a little the ordinary discountable date of the time; any great and uncommon length of credit and discount would not be sustained. If carried to a great extent, the interest would annihilate the principal.[7]

borrower should pay interest at the rate of 7½ per cent. The cause was sent to the Jury Court for trial of the fact, and failed for want of evidence.

[1] HARRISON against HANNEL, 1814; 1. Marsh. 349. Bills partly for price of goods, partly for money lent on usurious interest. Two of them covered exactly the legal debt, and on one of these the action was laid. But they were all given to secure the debt due, part of which was usurious; and the Court held them all tainted. The objection, it was said, was, 'not that the bills 'themselves are usurious, but they were given in furtherance and support of an usurious contract. It is 'contended for the plaintiff, that he is entitled to support his action on this bill, because it would not cover 'the amount of the legal debt. But I hold,' said Lord Chief-Justice Gibbs, 'that if a person borrow L.1000 'on usurious interest, and afterwards obtain the security of another person for L. 800 of it, such security 'would be void, not because it would be itself usurious, 'but because it would have been given to support a 'usurious contract.'

[2] FERRAL against SHAEN, 1. Saunders, 295.

[3] It may be doubted whether the law had full effect given to it in the case of MEAL against THOMS, 27th November 1810; 16. Fac. Coll. 50.; although there the doctrine was clearly held, that the elapse of the period of limitation did not bar the reduction. The deed should have been annulled.

[4] See Comyn on Usury, 16. and cases there quoted. GLASFUIRD against LAING, 1807; 1. Camp. 149. A bill in which the future interest till the day of payment had been miscalculated, was held good, as from mere mistake.

[5] 1621, c. 28. 'No person who lends or gives out 'money, and receives annual therefor, shall retain the 'time of the lending, exact, crave, or receive from 'their debtors the annual of their lent sums, until 'the term of payment appointed by their bonds be 'first come.' JOHNSTON against the Laird of HAINING, 1st December 1680; 2. Stair, 809. If the lender deduct and retain from the sum in the bond or bill legal interest to the term of payment from the time the money is advanced, the sum really forborne is not the whole sum mentioned in the bond or bill.

[6] MARSH against MARTINDALE, 3. Bos. and Pull. 154.; where a transaction in redeeming an annuity was settled on the footing of the discount of a bill of L. 5000 for three years; and the Court held it corrupt in law, whatever was the intention, (the jury having declared their belief that Sir C. Marsh did not think he was acting contrary to law), and nonsuited the plaintiff.

[7] See Case in preceding Note.

Banker's Commission.

In discount within the ordinary limits, it is usury if a higher interest than five per cent is taken, unless in so far as the additional sum can be justified as not for forbearance of money, but as a fair compensation for trouble, or an usual allowance for a banker's interference, the keeping up an establishment for such transactions wherever the money is to be paid, and the expense of remittance.[1] Country bankers are held entitled to commission on bills sent to them from London to be discounted, unless there is collusion.[2] And a charge of ten shillings commission by a bill-broker in the country on a bill payable in London, has been held not usurious.[3] Not bankers only, but also merchants, may charge commission; but the onus probandi of corresponding and trouble is laid on merchants, though not on bankers.[4]

It is usury to take the full discount of a bill, and to give in part-payment as cash another bill which has some time to run.[5] But in such a transaction, complicated with a remittance, the delivery of bills for cash is not held usurious, as the surplus of interest may be ascribed to the expense of remittance.[6]

Whether the commission is a fair remuneration for trouble, expense, &c. or a mere colour to obtain the accommodation and secure a higher interest, is for a jury to determine upon the view of the whole transaction. At one time it was the opinion in England, that a commission should not exceed one-fourth per cent; but certainly there is no rule of law to that effect: No such rule is judicially entertained; but the jury is left to decide.[7] And in the English books we find examples of juries finding

[1] See WINCH against FENN, before Mr Justice Buller at Westminster; 2. Term. Rep. 52. Note. AURIOL against THOMAS, Ibid. Sir B. HAMMET against Sir J. YEA, 1. Pull. and Bos. 144. Below, Note [5].

This was also the doctrine of the House of Lords in WALKER against ALLAN, 2d March 1802. The Lord Chancellor said,—'If the statute of Queen Anne 'be law for Scotland as well as England, it ordains 'that more than five per cent for one year shall not 'be taken; otherwise, usury. What has been held 'here in other cases, must also be law in Scotland; 'namely, that whatever is taken above five per cent 'shall be only compensation for trouble. Onus pro-'bandi lies on the takers;—bound to satisfy the Court 'that they have taken nothing but compensation for 'trouble. New to me, that if I go to a merchant to 'discount a bill, and he takes more than five per cent, 'he has a right to do so. When cases of this kind first 'occurred, it was matter of consideration, whether the 'extent of compensation ought not to be regulated. 'That is now left to jury. But question always is, 'Whether is it merely for trouble, and not for forbear-'ance of money?'

HARRIS against BOSTON, 2. Campbell, 349.; where a factor advancing money was said to have taken a larger compensation than, by the custom of the trade, he could have had for mere agency. Lord Ellenborough held the excess ascribable to forbearance.

Contrast with this the case of MASTERMAN against COWRIE, 3. Camp. 488.; where trouble, and an establishment for answering the bills, held a good justification of commission.

See also PITCAIRN's Creditors against FOGGO, 1st December 1768; 4. Dict. 393. Here a commission of half a per cent was charged by a banker. Lord Pitfour said,—'This point of commission is of great conse-'quence: upon it commerce, in its infant state, de-'pends. To exact money for labour, is not usury. 'There may be excess, but excess may be corrected.' 1. Hailes, 259.

PLAYFAIR against HOTCHKIS, 6th June 1797; 12. Fac. Coll. Ap. 3.

[2] Ex parte JONES, 1810; 1. Rose's Cases, 29.

[3] Ex parte HANSON, 1815; 1. Madox, 112.

[4] See MARSH against MARTINDALE, p. 309. Note [6].

[5] PARR against ELLEASON, where the chief question was, Whether this was a taint which affected an innocent third party afterwards becoming indorsee of the bill? 1. East. 92. See MATTHEWS against GRIFFITHS, cited 1. Bos. and Pull. 153.

[6] Sir B. HAMMET against Sir J. YEA. Here Haviland applied to have a number of bills discounted, which having been agreed to, the discount was calculated as usual. Haviland being desired to say how he would have the money, and having it in his option to have cash or bills for remittance, desired to have part in account, part in cash, and part in London bills of different dates. In giving those bills, no rebate of interest was allowed for the time they had to run. In an action of debt, one of the pleas was usury. The jury gave a verdict for the plaintiffs, but it was thought better to put the case into a course of trial in Court. The Judges placed the case on the counter transaction of discount and remittance. It was observed, that country bankers have credits in London maintained at great expense for the purpose of remittance; and that in accommodating their customers, they are entitled to a remuneration for the remittance so accomplished. 1. Bos. and Pull. 144.

[7] CARSTAIRS against STEIN, 1815; 4. Maule and

verdicts against the direction of a Judge forming his opinion on the nature of the transaction.[1]

It is not usury, in discounting a bill, to substitute goods for money at a fair though high price, provided it is not so extravagant that it appears to be for the purpose of reserving exorbitant interest under cover of it.[2] But if, instead of goods of ascertained value, goods or articles be given at an arbitrary and exorbitant valuation, it will be usury.[3] The onus probandi is held to lie upon the lender, who gives goods in discount, that the goods were reasonably worth the price fixed upon them:[4] But evidence that the borrower accepted the goods in hope of a distinct profit on them, has been thought to turn the presumption.[5]

It is held as a cover for usury, that one has lent his acceptance on an agreement to have a commission for doing so: Under the direction of Lord Ellenborough, a verdict was given on the principle, that such commission is to be allowed only in *discounting* bills,[6] and that it was here a mere cover for usury. The same has been held, where one took a commission of three and a half per cent at discounting a bill, for *being allowed* to guarantee the solvency of an acceptor in undoubted credit.[7]

It is a usurious contract, if a trader stipulate to give to one who shall advance to him money from time to time, a commission beyond the legal interest upon all goods purchased with those monies, although it may be covered by the pretence of a compensation for trouble in making the purchases.[8]

Where the creditor or lender runs any part of the risk of the employment of the money; such as bottomry, partnership, or joint adventure, it is not held usury. The Court, how-

Selw. 192. The question here was, Whether a commission of one-half per cent on a banking account was usurious? Kensington and Company of London, bankers, opened in 1807 a banking account with Stein, Smith and Company, of London, and another with Scott, Smith, Stein and Company, of Edinburgh, (these forming one and the same house). Kensington and Company being to allow the Scottish house to draw to the extent of L. 20,000 on a commission of 10s., or one-half per cent on the amount of bills drawn, and that they should not be required to advance money. The business for which the commission was allowed was, the accepting and paying the bills of the Scottish house, taking charge of their remittances, and obtaining acceptance, and paying them in London and in the country, and negociating foreign bills. It is unnecessary to state the particulars of their transactions. They terminated in a balance of L.314,581. 3s. 6d. against the Scottish house, L.53,000 being for commission. There was a contrariety of evidence as to the reasonableness of the commission of one-half per cent, many witnesses stating the accustomed charge on a banker's account never to exceed one-fourth per cent. Lord Ellenborough directed the jury, that if the commission could be fairly set to account of trouble and inconvenience, it was not usurious; otherwise, if it overstepped the bona fide trouble, and was mixed with an advance of money, in order to effect an inducement for such advance from time to time. He left it to the jury, but inclined himself against the commission, and the jury found for the plaintiffs, *i. e.* sustained the commission. On a motion for a new trial, Lord Ellenborough delivered the opinion of the Court, that the case was properly left to the jury, and cannot now be touched.

[1] See, for example, BROOKE against MIDDLETON, 1. Camp. 448. HARRIS against BOSTON, 2. Camp. 348.

[2] RICH against TOPPING, 1. Espin. Cases, 176.

[3] PRATT against WILLEY, 1. Espin. Cases, 40. where a diamond was so given at an exorbitant valuation.

[4] DAVIES against HARDACRE, where a landscape in imitation of Poussin given in the discount at a value of L.150. Lord Ellenborough held, that where one is compelled to take goods in the discount, a presumption arises that the transaction is usurious; and he intimated, that by this rule he meant to proceed in future, requiring the lender to show evidence of the value. 2. Camp. 375.

[5] COOMBE against MILES, 2. Camp. 553.

[6] KENT against LOWEN, 1. Camp. 177.

[7] LEE against CASS, 1809; 1. Taunt. 511. It was stated in evidence, that the defendant consented to discount the note, on condition that he should be permitted to guarantee the payment of the bill by the acceptors, and receive three and a half per cent for doing so; that there was no doubt of the acceptors' solvency; and that the sole reason for the guarantee was, that the defendant would not discount the bill otherwise.

[8] See BARNES against HEADLEY, 1. Camp. 157.

ever, still exercises its discretion to discover whether the contingency be a mere shift to evade the act, or a lawful contract, and fair and reasonable risk. The above rule holds, 1. Where the principal sum and interest are both put in hazard; 2. Where the principal sum is so hazarded; but, 3. Where the interest alone is hazarded, the contract is usurious if exorbitant interest be stipulated.[1] Where the interest only is hazarded, the party being sure of his principal whatever may happen, it will be held a mere device to cover usury.

To establish usury as an objection to a bond or contract, it is necessary that there should be either a loan, with a taking of more than the legal interest for the forbearance of repayment; or some device contrived for the purpose of concealing or evading the appearance of a loan and forbearance, where, in truth, it was such. But under this description the practice of acceptors paying by anticipation, or receiving a premium, does not fall.[2]

But it is to be observed particularly, that although the statute annuls the bond or other assurance, it does not necessarily forfeit the debt. The benefit of the security and of the evidence it affords is gone; but the party may use any other competent evidence to prove the debt. So, 1. If the debt has been paid, repetition cannot be demanded on proving usury:[3] 2. If the debt has existed before, independently of the usurious bond, the creditor may rest his claim on the evidence of that debt, and will recover:[4] 3. It has been questioned, whether a debt, originating in a usurious contract, can be placed subsequently on the footing of a legal contract, by cancelling the original documents, and granting new ones? Such a case having occurred in bankruptcy in England, a feigned issue was directed to try the question. It came first before Mr Justice Chambre, who held the subsequent contract void;[5] but the Court of Common Pleas reversed that judgment.[6]

4. EFFECT OF ILLEGALITY OF DEBT AGAINST THIRD PARTIES.

It is an important question, How far bills, which have originated in transactions prohibited by law, and so are null in the hands of the parties themselves, will be effectual in the hands of third parties, acquiring them in bona fide, and without notice of the illegality? In England, the nullity declared in the statutes is held a nullity to all intents and purposes, to the effect of reaching bona fide holders of the bills, as well as the original

[1] Comyn on Usury, and the cases cited by him, p. 34. et seq.

[2] BARCLAY against WALMSLEY, 4. East. 57.; where the acceptor of a bill due 7th September, paid it on 20th August, when presented for acceptance, on getting an allowance of sixpence in the pound. This challenged as usury, but held not so by Lord Ellenborough and the Court of King's Bench, though a very improper practice.

[3] NISBET and BUCHAN against CULLEN, 1st February 1811; 16. Fac. Coll. 172.

[4] In GRAY against FOWLER, 1. Hy. Blackst. 462. malt to a great extent had been supplied to a brewer, and bills accepted for the price. To induce the creditor to give delay on these bills, new bills were given with an addition of L. 150; and afterwards an assignment made in security of a balance on these renewed bills. The Court of Common Pleas, on a case sent from Chancery in bankruptcy, held, that the fair debt for the goods sold still subsisted unimpeached by the usurious transaction, and was not a colourable pretence to cover a real loan.

In PHILIPS against COCKAYNE, 3. Camp. 119. before Lord Ellenborough at Westminster, a bill of exchange was accepted for L. 28, 'value received in 'lead.' The supply of the lead was proved. The bill was renewed on a premium of L. 1, and so it was tainted. But Lord Ellenborough,—'If there was once a 'valid debt, that cannot be destroyed by a void secu-'rity. The bill here is void by reason of the usury; 'but the plaintiff is in the same situation as if no bill 'had ever been given, and may clearly recover the 'amount of his demand for goods sold and delivered.'

[5] BARNES against HEADLEY, 1. Camp. 157.

[6] Same Parties, 2. Taunton, 184.

parties themselves. Very serious doubts have been entertained on this subject, and an inclination strongly expressed to follow the same spirit of construction which has been adopted in Scotland.[1] But notwithstanding these doubts, it has been judicially held, that the statutes are too clear to be denied; that the doctrine as against third parties rests on cases which cannot now be questioned;[2] and that the innocent party can only resort to the party from whom he received the bill, or other document, as for a debt on the original contract or consideration between them. The hardships arising from this state of the law, and the doubts and regret expressed by the Judges, have led to an alteration in respect to usurious debts; not probably because these were more entitled to favour, but because they more frequently, and with less possibility of detection, get into the daily course of trade.[3] In Scotland, we have been accustomed to a different line of determi-

[1] In JONES against DAVIDSON, 1816, Holt. Rep. 257, 258., Gibbs, Chief-Justice, says,—'The construction upon the 12th of Anne, which avoids all 'usurious contracts, has been fixed and settled by 'many cases; but I must say, I could never under-'stand the equity of the rule which has so long ob-'tained under this statute, that an innocent indorsee 'shall be prevented from recovering upon a bill of 'exchange which has been contaminated in its crea-'tion with usury, by means to which he is not privy, 'and of which, when he receives the bill, he can 'know nothing. I own I have serious doubts upon 'this construction; and if the case renders it neces-'sary, I will reserve the point,—Whether a bill of ex-'change can be void, except for usury committed by 'the parties who originally create the instrument? If 'the parties who create the instrument, and agree to 'put their names upon it, commit usury, it is reason-'able that they should answer for the consequences. 'But I do not understand why the security should be 'avoided in the hands of one who takes it for a valid 'consideration, in the common course of business, and 'without any thing to awaken his suspicion. He can-'not tell, upon looking at the outside of the bill, 'whether usury has been committed or not; he re-'ceives it upon the credit of the names which he sees 'upon the instrument, and has no other means of 'judging of it. Can law, and the interests of com-'merce, avoid a security thus taken? These are my 'reasons for doubting the old rule which has obtain-'ed; and I should wish, upon a fit occasion, to have 'it discussed again.'

[2] BOWYER against BAMPTON, 2. Strange, 1155.

LOWE against WALLER, Douglas, 716. Here the question was raised of the effect of usury against a bona fide holder of a bill. Lord Mansfield said,—'We have considered this case very attentively, and I 'own, with a great leaning and wish on my part that 'the law should turn out to be in favour of the plain-'tiff. But the words of the Act are too strong. Be-'sides, we cannot get over the case on the statute 'against gaming, which stands on the same ground. 'This is one of those instances in which private must 'give way to public convenience. It is less mischie-'vous that the law should be as it is with respect to 'bills and notes than other securities, because they are 'generally payable in a short time, so that the indor-'see has an early opportunity of recurring to the in-'dorser, if he cannot recover upon the bill.'

LOWES against MAZZAREDO, 1816; 1. Starkie, 385. Here the payee of a bill of exchange indorsed it for a usurious consideration; and, in the course of trade, Lowes discounted the bill on an indorsation from him who had so acquired it, but without notice of the objection. Lord Ellenborough was of opinion against the bill-holder, as not entitled to recover, being obliged to claim through an indorsement vitiated by usury. But on former cases being pressed on him, he put the case into a course for trial. 'But the Court were of 'opinion, that the case of Parr against Elleason, 1. 'East. 92., was distinguishable from this, and might be 'supported upon other grounds; and that the indorse-'ment was utterly voided by the statute of usury, and 'could not be dismissed for one purpose, and retained 'for another; and that after the case of Lowe against 'Waller had been acted upon so long, its foundation 'could not now be inquired into.'

[3] By 58. Geo. III. c. 93. it is enacted, that 'where-'as by the laws now in force, all contracts, and assur-'ances whatsoever, for payment of monies made for 'a usurious consideration, are utterly void: and where-'as, in the course of mercantile transactions, negoci-'able securities often pass into the hands of persons 'who have discounted the same without any know-'ledge of the original considerations for which the 'same were given; and the avoidance of such secu-'rities in the hands of such bona fide indorsees with-'out notice is attended with great hardship and injus-'tice; for remedy thereof, be it enacted by the King's 'most excellent Majesty, by and with the advice and 'consent of the Lords Spiritual and Temporal, and 'Commons, in this present Parliament assembled, and 'by the authority of the same, that no bill of exchange 'or promissory-note, that shall be drawn or made after 'the passing of this Act, shall, though it may have 'been given for a usurious consideration, or upon a 'usurious contract, be void in the hands of an indor-'see for valuable consideration, unless such indorsee 'had, at the time of discounting or paying such con-'sideration for the same, actual notice that such bill 'of exchange or promissory-note had been originally 'given for a usurious consideration, or upon a usurious 'contract.'

nations from that adopted in England. Thus, a bill for a gaming debt has been held effectual to a bona fide indorsee,[1] although it would not be available against persons holding as trustees for the party concerned in the offence, or holding it without value.[2] The statute (which I have no doubt is to be held applicable to both countries) settles the matter as to all objections of usury. As to other nullities, should the question occur again, it will deserve serious reconsideration, whether the English determinations are not more strictly correct than ours; and how it is possible to hold bills, &c. to be null as to some effects, and valid as to others.

However this difference of decision between the two countries may be reconciled, at least the consideration given for the bill may be proved as sufficient to ground a claim on the part of a stranger. Nay, in England, a distinction has been taken between the case of money lost at play, and money borrowed to play with: in the former case, the debt or contract, as well as the security, being held null; in the latter, the security being null by the force of the statute, but the contract effectual in so far as money has been lent.[3]

5. DEBT PARTLY ILLEGAL.

If the debt for which an obligation has been granted be partly illegal, the legal part of it may be proved in bankruptcy. 'The equity is, that where the considera-'tion consists of two parts, one bad, the other good, the bill should stand as to what 'is good.'[4]

§ 2. OF OBLIGATIONS ONEROUS OR GRATUITOUS; PURE, FUTURE, OR CONTINGENT.

There are characters distinguishing obligations, which it is often of importance to mark as attended with particular effects.

1. GRATUITOUS OBLIGATIONS.—Obligations are called gratuitous in Scotland, which are granted spontaneously, and without an adequate consideration.

In England, a voluntary and gratuitous bond, though effectual against the debtor himself, is not to be set up against creditors.[5] In Scotland there is no such distinction. The case must either be brought within the statute 1621, c. 18. by which gratuitous grants or bonds to confidants or relations are challengeable by prior creditors, on account of the granter's insolvency at the time of granting; or the bond must be collusive and fraudulent at common law. Every person who is solvent may effectually give away his property, or bind himself to pay a sum gratuitously. Gratuitous bonds, and other obligations, may therefore be ranked in competition with the claims of other creditors, without any preference to the latter, in respect of the consideration on which the obligation has proceeded.

[1] NEILSON, 25th January 1740; where the Court 'repelled the reason of suspension founded on the 'Gaming Act, in respect the bill in question was pur-'chased by the charger for onerous causes; and that 'there is no evidence offered of his being in the 'knowledge that the bill was granted for a game 'debt.'

[2] So held in the above case of Sir R. PRINGLE, p. 300. Note [3].

[3] ROBINSON against BLAND, 2. Burr. 1080.

[4] Ex parte MATHER, 3. Ves. Jun. 373.

[5] PILLANS against VAN MIEROP, 3. Burr. 1663. But see, in House of Lords, RANN against HUGHES, 7. Term. Rep. 350.

Lord Redesdale, though he would not order such a bond to be expunged, would not allow it to be set up against creditors; admitting it to come in if there should be a surplus. Assignees of GARDNER against SKINNER, 2. Schoale and Lefroy's Irish Chan. Rep. 228.

2. DEBTS, PURE, FUTURE, AND CONTINGENT.—Debts are either presently due; or due at a future day certain; or due provisionally, in a certain event. The first are called pure; the second, future; the last, contingent debts.

There is a remarkable difference between the jurisprudence of England and that of Scotland respecting future and contingent debts. Previous to certain statutes, no debt could, by the law of England, be either the ground of an action, or the subject of a demand under a commission of bankruptcy, unless it had actually become a debt at the date of the proceedings. In bankruptcy, the commission is regarded as a statute execution; which, as it cannot proceed upon, so it cannot include any claim which has not already become a proper debt: On the other hand, the creditor had process against the bankrupt, notwithstanding the certificate or discharge, when his debt did not accrue till after the bankruptcy; for the privilege of creditors to prove, and of bankrupts to be discharged, was held to be co-extensive and commensurate.'[1]—1. This law excluded from an English commission all contingent debts; 2. It also excluded all future debts; and, 3. Claims for damages were excluded, where both the right to damages, and the amount, were questions for a jury; and the claim was of course uncertain and contingent. In these points, except the last, there are remarkable changes, to be immediately explained.

By the Scottish law, for the purposes of security to the creditor, proceedings are competent on debts, not only future but contingent: and on the bankruptcy of the debtor, whatever be the form according to which his funds are to be distributed, (whether a ranking and sale, with multiplepoinding, as applicable to ordinary bankruptcies; or a sequestration in the case of a merchant; or a voluntary trust), every claim is admissible against the estate, to the effect of drawing a dividend, or having it laid aside, which forms, or may form, against the bankrupt himself, during his life, a proper debt; whether due presently; or at a certain future day; or depending on a contingency which may emerge during the bankrupt's life. As the creditors, in all these various descriptions of debt, are entitled to claim upon the divisible funds, either for payment and satisfaction, or at least for security, they are all equally restrained by the bankrupt's discharge.

It may be useful to explain shortly the grounds of this distinction between the laws of the two countries.

In Rome, a creditor might attach the funds of his debtor, not only for a pure, but also for a future or contingent debt.[2] It was also established in the civil law, that, in the distribution of the attached fund, a future creditor was entitled to a share, proportioned to his debt, after the proper discount; and a contingent creditor, to security for payment, when his obligation should be purified.[3] This law was followed in Holland, as Voet informs us; and in France, where an enlightened system of jurisprudence was established on the foundation of the Roman code, the rule was similar.[4] The future creditor was allowed a share proportioned to his debt, after the proper discount; the

[1] Cullen, p. 83. See also 49. Geo. III. c. 121. § 17.

[2] Voet, lib. 2. tit. 4. § 20.

[3] Voet, lib. 3. tit. 1. § 28.

[4] The principle is well explained by M. Pothier. Of future debts he says,—'Le terme accordé par le 'creancier au debiteur, est censé avoir pour fonde- 'ment la confiance en sa solvabilité; lors donc que 'ce fondement vient à manquer l'effet du terme cessé. 'De là il suit, que lorsque le debiteur a fait faillite, 'et que le prix de ses biens est distribué entre les 'creanciers, le creancier peut toucher, quoique le 'terme de sa dette ne soit pas expiré.' Traité des Oblig. vol. i. p. 99. Of contingent debts, he speaks thus:—'Quoique le creancier conditionel n'ait encore 'aucun droit avant l'accomplissement de la condition, 'neanmoins il est reçu à faire tous les actes conser-

contingent creditor was entitled to security for payment of the share accruing to him, should the condition be purified.[1]

In Scotland, the same general principles have always been recognized. Creditors may arrest, or adjudge, in security of debts, though only future, or even contingent.[2] But doubts have been entertained concerning the effect of such diligence, when standing in competition with creditors entitled to parata executio. It has, for example, been supposed, that a creditor in a future or contingent debt, arresting a fund of the debtor, is to be postponed in a multiplepoinding to arresting creditors on bills, the term of payment of which are past. This is consistent with the notions of our older lawyers;[3] and although Erskine corrects this doctrine in part, he still expresses himself so as to give countenance to it in some very material points.[4] His authority, and the analogy of English law, may mislead a careless observer, as to the true doctrine of Scottish jurisprudence. But while Mr Erskine has not sufficiently discriminated the case of insolvency, the English law proceeds on a peculiarity quite unknown in Scotland.

There is no express law or decision in Scotland, which condemns future or contingent creditors to exclusion, in competition with creditors having parata executio; and therefore the question is left open to decision on general principles. It may be admitted, that where insolvency is not presupposed, neither a future nor a contingent creditor can insist instantly to be paid, to the effect of preventing a creditor in a debt which is due from recovering payment out of his debtor's funds; and so far, undoubtedly, the rule of preference of a creditor having parata executio is well founded. But where the debtor is insolvent, another principle comes to operate. A debtor who fails, or who, by his own fault, lessens the security of his creditor, is no longer entitled to the benefit of any stipulated term of forbearance, or of the condition suspensive of the claim; and, if so, neither can his creditors, who come into his place, be entitled to claim the benefit of such suspension, so as to defeat the right of the future or contingent claimants. The competition on the attached fund is of the nature of a general distribution, from which, if any one is excluded, he is for ever deprived of his debt. If Mr Erskine's opinion be supposed applicable only to the case where there is no insolvency, it is unobjectionable; if to the case of insolvency, it seems to be unsound. But an arrestment, or other diligence in security, presupposes insolvency, since that alone can justify it; and it may be loosed or removed on proof of solvency: and if the law means any thing in providing a remedy for the security of future and contingent creditors in such cases, it must protect that remedy against the right of other creditors.

The law of England has not acknowledged these principles. There is not in England, at common law, (as in Scotland, and in other countries where the Roman jurisprudence has been followed), any remedies for intermediate security, during the dependence of an action, or prior to the term of payment. The writ of execution *follows* the judgment, and therefore must abide the emergence of 'a cause of action,' which may *found* the judgment. This peculiarity has been fatal to the claims of future and contingent credi-

'vatoires du droit qu'il espère avoir un jour.' Ib. p. 95.

[1] Pothier, after the above passage relative to future debts, says,—'C'est encore une difference entre le 'terme et la condition: car le creancier conditionel, 'en ces cas, n'a pas droit de toucher, mais seulement 'd'obliger les autres creanciers, qui toucheront, à 's'obliger rapporter à son profit, si par la suit la con- 'dition existe.' Pothier, vol. i. p. 99.

[2] Dirleton and Stewart, *voce* Debitum in diem.

[3] 3. Stair, i. § 46.; CHARTERIS against NICHOLSON, 29th July 1670; 1. Stair, 701. See other cases, 1. Dict. 61.

[4] 3. Ersk. 6. § 18.

tors in England at common law. When the statute execution of a commission of bankruptcy was introduced, it was intended to come in place of the ordinary execution; and therefore could not, without an express declaration, be held to include creditors, who, at common law, were entitled to no judicial interference in their favour.[1] It sometimes happens, that a general admiration of the great system of English law operates so strongly, as to prevent one from distinguishing, in particular cases, whether the rule proceeds from a peculiarity in the system, or is a point of the mercantile law, fixed by the decisions of juries of merchants, with the assistance of enlightened Judges. Perhaps something of this kind has happened in the case we are now discussing. But no one can read the preamble of the statute 7. Geo. I. c. 31. and observe how inconsistent the peculiarity of the English common law, with respect to future debts, was found to be with the best interests of commerce, and the plainest principles of mercantile jurisprudence, without learning to trust less to such analogies, and to have greater reliance on the principles of the law of Scotland.

Many of the great Judges of England, Lord Hardwicke, Lord Mansfield, Lord Kenyon, Lord Chief-Justice Eyre, seem to have regretted the peculiarity of the English law, which excludes from the commission contingent debts. Lord Hardwicke, in particular, expressed a wish,—'that such debts were provided for by Act of Parliament, and a hope that some 'gentleman who heard him would consider how to rectify this by a future statute;' and in this wish Lord Eldon concurred.[2] The evils were great: To the *bankrupt*, in so much that a debtor in an annuity bond, for example, was excluded from all the benefit of a discharge; and instances have occurred of men being confined for years in prison on such debts, after all their funds had been given up, and all their other debts discharged: To a *contingent creditor*, also, the hardship of this state of the law was very great; for he had no right to demand that any share of the effects of his debtor should either be paid over to him, or set apart for his security, although the condition on which his debt depended might be purified in the course of a few hours. These evils were in part removed, as to debts payable in futuro, by 7. Geo. I. c. 1.; as to annuities, by Sir Samuel Romilly's law, 49. Geo. III. c. 121. § 17.; and the remedy is now completed, and all the distressing cases which fill the English books on bankruptcy, in relation to the consequences of the old doctrine, removed, by the late statute consolidating and uniting all the provisions made for cases of this description, and improving the system of English legislation with regard to them.[3]

In Scotland, the principle of justice is happily unopposed by any legal or formal impediment. The creditor in a debt depending on a contingency which may emerge in the debtor's life, is as truly a creditor as the holder of a bond not yet due: Where the debt is certain in its amount, he is a creditor for a security to that extent: Where it is uncertain, he is a creditor for a security to the extent of the probable debt; and, in either case, he is in law, as well as in justice, entitled to be ranked to the effect of having a contingent dividend set apart.

ART. III.—*Of the various ways in which Obligations and Contracts are constituted.*

In most codes of jurisprudence, with a view to the sure establishing of that consent which is of the essence of all contracts and obligations, there have been appointed certain requisites and solemnities, as at once evincing the deliberate act of consent, and the authenticity of the contract. These commonly vary with the importance or insignificance

[1] See CALDWELL *v.* CLUTTERBUCK, 2. Strange, 867. TAYLOR *v.* MILLS, Cowp. 525.

[2] 1. Atk. 115.; 9. Ves. Jun. 110.

[3] 6. Geo. IV. c. 16. § 51. 56.

of the transaction, or with the plain or elusory nature of the agreement. It has appeared fit that some contracts, called Consensual, may be proved by witnesses swearing to the words that were used, and are to be held as perfect from the moment that those words are deliberately used to bind the parties. In others, called Real contracts, there is required to their completion some overt act, without which the contract is not held to be concluded; but the agreement and the real act which perfects the contract, may be proved by witnesses. In others again, more exposed to misapprehension, as being of no recognized character, or having no defined object and extent, it is held, that without some special ceremony, calling on the witnesses for particular attention, and clearly expressing the agreement; or without writing delivered to testify both the fact and the words; the contract or obligation is not binding.

1. The Consensual contracts of the law of Scotland comprehend a class of well known and very common agreements; the parts of which, and the obligations arising from them, are so simple and so well defined, that the witnesses being once satisfied of the nature of the contract and of its subject, there can be no mistake of importance enough to forbid the proof of such agreements by parole evidence. Such are Sale, Location, Society, and Mandate.[1] The binding words being proved, either by writing or by witnesses, to have passed between the parties conclusively, the contract is complete. It forms the titulus transferendi dominii,[2] if the transference of property be the object; or confers the power and raises the reciprocal obligations involved in the contract.

2. Real contracts require an act of delivery, or payment, or performance on one part, to bind the bargain. The evidence may be parole, but its object is twofold; the agreement and the act of real intervention. 1. This class of contracts comprehends the nominate contracts of Loan, commodate, pledge and deposit; and the innominate contracts of Do ut des; do ut facias; facio ut des; facio ut facias, to which lawyers have been unable to assign any appropriate name. In the nominate contracts, unless evidence be given of the delivery of the thing lent, or pledged, or deposited; or in the innominate, unless it be proved that the thing to be given or done has been actually given or done; the special contract has no existence. There may be an obligation incurred to lend, or to pledge, or to do, or to give something; which, if lawfully proved, it will be competent to enforce. But wherever the point is the constitution of the particular contract, as loan or pledge, the delivery of the thing, the real act which is the badge of the contract, is indispensable.

3. Obligations and contracts which fall under neither of these classes, were, in the civil law, constituted by stipulation; consisting of a solemn question and distinct answer, in words appropriate, accompanied by ceremonies fit to excite attention and impress the transaction on the memory. With us, writing delivered is requisite for matters so elusory. So a promise to pay money, or a cautionary obligation, must be established by written evidence, and accompanied by delivery of the document.

4. The written evidence which is necessary in the description of cases now stated, is useful, and easily applicable to all sorts of contracts; and now forms the usual evidence of all contracts and obligations. But it is further, in many cases, made absolutely requisite for the purposes of revenue, that contracts shall be in writing, bearing a stamp; although in point of evidence writing might not otherwise be necessary. In all questions concerning the evidence necessary for particular obligations and contracts, the stamp laws, in this way, form an important point to be attended to.

[1] With regard to Sale and Location, there is an exception to this rule, where the subject is land or other heritage. The importance of this species of property in the law of Scotland, and the permanent nature of the rights relative to it, have led to the rule, that written evidence alone shall be received in proof of such contracts concerning heritage.

[2] The passing of the property, or modus transferendi dominii, depends on tradition, of which above, p. 171.

COMMENTARY ON THE STAMP ACTS.—The rules of the Stamp Acts interfere with the ordinary rules of law relative to the application of written and parole evidence; and on some occasions, so imperative is the requisition, that the want of a stamp is fatal, and cannot afterwards be supplied. But although intended only for the purposes of revenue, they often add an unforeseen auxiliary to the checks against fraud, by circumscribing the means of forgery, and exposing unskilful attempts to detection, by incongruities in the paper or stamp, as relatively to the assumed tenor and date of the deed.

The Stamp Acts, which reach back about a century and a half, have till lately been in a state of great and distressing confusion, from the variety of statutes to be referred to: But the Acts were consolidated by the 44. Geo. III. c. 98., and the 48. Geo. III. c. 149., and afterwards by 55. Geo. III. c. 184., by the schedules annexed to which all the details are distinctly settled as from August 1815.[1] Without entering into details, the following points are important:—

1. The general rule is, that agreements, whether relative to real or personal property, require a stamp, where the matter of the agreement shall be of the value of L.20 or upwards.[2] But, 1. If the agreement be of a nature not to admit of pecuniary calculation, it may be proved by unstamped letters.[3] 2. An agreement for the hire of a servant or labourer is exempted: But an agreement for an assignment of an apprentice from one master to another must be stamped.[4] 3. A memorandum, letter, or agreement for or relating to the sale of goods, wares, or merchandise, requires no stamp; as, for example, the correspondence of merchants relative to sales and bargains of goods. But the sale of goods must form the *primary* object of the instrument, in order to entitle it to exemption.[5] It was once held, that an agreement for the future manufacture of goods, not the simple sale of existing goods, was not within the exemption; but this is not now held to be the construction of the Act.[6] 4. Where an agreement is contained in a series of letters, it is by the Act sufficient to have the agreement stamp affixed to any one of the series.

2. Bonds for repayment of a definite sum of money, or for security of a definite sum, or for payment of any annuity, or any sum of money at stated periods, bear a stamp duty after certain rates ad valorem.[7] But, 1. A bond for a rent reserved or payable on a lease, is excepted in the Act. 2. A bond for a yearly sum on farming tolls, payable by quarterly instalments, has been held to fall under the first branch, as a definite sum payable at

[1] I believe there is some reason to expect a new consolidating Act still more perfect.

[2] 55. Geo. III. c. 55., Schedule title Agreement.

[3] ORFORD against COLE, at Lancaster, 1818; 2. Starkie, 351. This was a promise of marriage, to prove which letters were produced. Want of stamp held no objection by Mr Justice Bayley.

[4] REX against The INHABITANTS of St Paul's Bedford, 6. Term. Rep. 452.

[5] SMITH against CATOR, 1819; 2. Barn. and Ald. 778. Laing and Company having oats ordered from Cator, Hunt and Company, of Russia, sent invoices, and promised bills of lading to Smith, together with bills for acceptance, engaging, by the letter in which they were transmitted, to provide funds, should the oats remain unsold when the bills should fall due. The bills were accepted, and the bill of lading indorsed to Smith, who now brought his action for the oats, grounded on the letter. Lord Chief-Justice Abbot received the letter in evidence, reserving leave to move a nonsuit. The Court of King's Bench held this not to be a case exempted; the primary object here appearing to be the obtaining of money, upon a pledge of goods expected to arrive in England, and intended to be placed in the hands of Smith upon arrival. The Court held the sale to be made by Smith, if they had been placed with him, to be a secondary or collateral object.

[6] WILKS against ATKINSON, 1815; 1. Marsh. 412.; 6. Taunt. 11. This was an agreement to furnish a quantity of linseed oil, for the manufacturing of which the plaintiff had the seed, but it was not then crushed. The Court held it clearly within the exemption.

But an agreement between merchants that one shall take a share in the outfit of a ship, and in the adventure, is not an agreement for the sale of goods within the exception; LEIGH against BANNER, 1. Esp. 403. Nor is an agreement for the making and putting up of machines in the party's house exempted; BUXTON, &c. against BEDDALL, 3. East. 303.

[7] Schedule, Branch 1. and 2.

future periods.[1] 3. A bond to secure the performance of certain conditions by a penalty, is not within the rule of ad valorem stamp.[2] 4. A bond for an annuity for a certain number of years, for the relinquishment of a business and the use of premises, is not a conveyance of the property subject to ad valorem stamp as such.[3]

3. Bills of exchange and promissory-notes are liable to a rateable stamp-duty, so absolute, that besides the penalty for breach of the Act, it is expressly declared not to be in the power of the commissioners of stamps to supply the defect.[4] And, 1. Not only every instrument which is drawn in the form of a bill, note, or order, falls under the statute; but whatever is substantially an order for payment of a certain sum of money out of a fund, which may or may not be available, requires a stamp as a bill, before it can be given in evidence.[5] But where the order is not for a definite sum, the Act does not apply.[6] In that case, or where the money is payable to representatives after death, the instrument truly is an agreement, and the stamp proper to agreements is required and sufficient.[7] It might be a distressing question, Whether there would be power under the statutes to the commissioners to stamp an order of this kind? But it would rather appear, that they can have no such power, if the letter is to be held as strictly under the rule of the Act, whatever it may be as a mercantile document. 2. The addition of interest, from the date of the bill to the term of payment, does not raise the sum for which the bill is held to be drawn, so as to require a higher duty than the Act appoints for the sum mentioned in the bill.[8] 3. The duty rising with the time, a note at two months after *sight* is different from one at two months after *date;* and as exceeding sixty days, it is not good on a stamp appropriate to that instrument.[9] 4. The duties are meant to affect only British bills and notes: Therefore bills drawn abroad are not liable; and bills in Ireland are under the

[1] ATTREE against ANSCOMB, 1813; 2. Maule and Sel. 88.

[2] HUGHES against KING, 1815; 1. Starkie, 119. The stipulation was, not to convert a public-house into a wine vault, under a penalty of L.500. A twenty shilling stamp held sufficient by Lord Ellenborough.

[3] LYBURN against WARRINGTON, 1816; 1. Starkie, 162. Deed of mutual covenants, the one to relinquish the trade of butcher, with house and fixtures, for ten years; the other to pay down L.1000, and L.1000 a-year for ten years.

[4] An unstamped bill is a nullity, and imposes no obligation to present it; WILSON against VYSAN, 2. Taunt. 288.

[5] FIRBANK against BELL, 1817; 1. Barn. and Ald. 36. Here, to prove a payment in pursuance of directions previous to bankruptcy, the defendant gave in evidence a letter desiring him, 'when the mahogany 'per the Roquet is sold, to pay over L.1500, in such 'bills as you receive at the sale, to Pease, Harrison, 'and Watson.' P. H. and W. also wrote to the defendant, sending a copy of the order; and he acknowledged the letter, and promised to attend to the order. One of the letters was stamped with an agreement stamp. The objection was to the production of the bankrupt's order, not being stamped as a bill-draft or order. Baron Wood admitted the evidence. On a rule nisi for a new trial, Lord Ellenborough said, 'It was 'the object of the Legislature, in forming this provi-'sion, to treat as promissory-notes and bills of ex-'change, and to subject to a stamp-duty, such instru-'ments as, being payable on a contingency, or out of a 'particular fund, could not in strictness fall under the 'denomination. This order appears to me to come 'as well within the spirit as the letter of the Act of 'Parliament, and therefore ought to have been stamped 'with the appropriate stamp.'—A new trial.

BUTTS against SWAN, 1820; 2. Brod. and Bing. 78. Case almost precisely the same, only the correspondence was not confined to a single letter, but consisted of several.

[6] JONES against SIMSON, 1823; 2. Barn. and Cress. 318. The order was, on a consignment of woollen goods, 'to pay to N. the proceeds of a shipment, &c. 'value about L.2000.' The undertaking was 'to pay 'over the full amount of the net proceeds.' The question was sent for trial from Chancery, Whether the two instruments, or either of them, required such a stamp as the Stamp Act imposes on bills. The Court of King's Bench were unanimous in the negative.

[7] BARLOW against BROADHURST, 4. Moore, 471. Note for a sum payable to representatives three months after his death, under deduction of sums due, held an agreement.

[8] PRUESSING against ING, 1821; 4. Barn. and Ald. 204. A note at three months for L.30, with lawful interest from the date, was written on a stamp applicable to a L.30 note. Objection, it is a note for L.30. 7s. 6d. Holroyd, J. directed a verdict for plaintiff, with liberty to move a nonsuit. The Court of King's Bench refused the rule affirming the direction.

[9] STURDY against HENDERSON, 1821; 4. Barn. and Ald. 592. Note, 7th July 1818, for L.400, at two months after sight, on a 6s. stamp. Objection, that it

Irish stamp law. But they must truly be foreign bills in order to be exempted; and bills drawn in Britain, though dated abroad, are under the Act.[1] It is however sufficient, if drawn abroad, (as in Ireland), though sent to Britain in skeleton to be filled up and used.[2] But although a British stamp is not necessary on foreign bills, they are not receivable in evidence if not stamped according to the foreign law.[3]

4. Policies of insurance require certain pro rata stamps, as fully laid down in the Act. And, 1. The slip that precedes a policy cannot be received in evidence unless stamped; but it is not stated in the Act what stamp is necessary.[4] 2. The policy may, on certain conditions, be altered before notice of the risk being determined.[5] 3. The alteration may be of the marks of the goods,[6] or for the correction of a mistake in declaring a wrong ship, under a policy on goods by ship or ships.[7] But there must be no alteration of the subject, or of the right of property. It is not, however, an alteration of the subject in an insurance on goods, that the cargo is changed in the course of a trading voyage.[8] 4. If a policy has been originally effected on unstamped paper, it cannot afterwards be stamped; and even if a stamp should be adhibited to it by the commissioners of stamps, evidence will be received that it had no such stamp when effected, in which case it is null.[9]

5. Conveyances and transmissions of property bear an ad valorem duty. But a trust-deed for the payment of debts, with a resulting trust for the truster, does not require such a stamp.[10]

is a note exceeding two months after date, and requiring a stamp of 8s. 6d. ABBOT, Ch. J. directed a non-suit. Court confirmed it, 'as the two months after sight 'do not begin to run from the day of the date, but 'from the day of the note being presented for sight.'

[1] JORDAIN against LASHBROOK, 7. Term. Rep. 601. Evidence, that a bill, dated Hamburgh, was drawn in London, was held good to require a stamp.

ABRAHAM against DUBOIS, 1815; 4. Camp. 269. Bill dated at Paris. Proof offered of drawer being in London two days after, held competent by Lord Ellenborough to infer the bill to be really drawn in England: but the proof insufficient.

ROBERTSON and Company against ROUTLEDGE, 1. Shaw and Ballantine, 600. Bill dated Hamburgh, and bearing to be drawn by Elliot, Page and Company, merchants there. Objection, that it was drawn in London on unstamped paper; and proof offered. Bill in hands of indorsee. Lord Ordinary held it good, as bearing the name of a Hamburgh house as drawers, dated Hamburgh, and in hands of onerous indorsee. Court passed bill of suspension.

[2] SNAITH against MINGAY, 1813; 1. Maule and Selwyn, 87. A copper-plate impression, with Irish stamp, was signed at Waterford, blank in every thing but the subscription of the drawer, and sent to be used in London, where it was filled up with the sum appropriate to the stamp. Indorsed for accommodation; dishonoured by acceptors; and the defendants, the indorsers, defended themselves on want of English stamp. Verdict subject to opinion of the Court; who were clear that the bill was Irish, and that the moment it was filled up, it became the bill of the party in Ireland.

So where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a bona fide holder filled in his own name as payee, it was considered that no English stamp was necessary. CRUTCHLEY against MANN, 1. Marsh. 29.

[3] CLEGG against LEVY, 1812; 3. Camp. 166. Here an agreement offered in evidence, but said to require stamp by the law of Surinam. Held by Lord Ellenborough good objection, on foreign law being proved.

[4] MARSDEN against REID, 3. East. 512. The ship was stated to be American to the first underwriter. Reid's name stood first on the policy. To prove that he was not truly the first, the slip was offered in evidence. Lord Ellenborough, and afterwards the Court, refused to receive it for want of a stamp.

See 1. Marshall on Insurance, 347.

[5] KENSINGTON against INGLIS, 8. East. 273. Policy dated February 1800; altered, to extend the time, on 11th June 1800; loss of ship, 18th July. Held a good policy without a new stamp.

RIDSDALE against SHEDDAN, 1814; 4. Camp. 107. Policy dated June 1810; altered by memorandum, 29th November 1810; ship lost some time subsequent to 31st October, on a voyage from Quebec. Held this a memorandum only to modify a subsisting contract, and good.

See also RAMSTROM against BELL, 5. M. & S. 267.

[6] HUBBARD against JACKSON, 4. Taunt. 169.

[7] ROBERTSON against TOURAY, 3. Camp. 158.

SAWTELL against LOUDON, 1814; 5. Taunt. 359. The words 'on ship' struck out, and 'on goods, as 'interest may appear,' inserted, the assured having no interest in the ship.—Held new stamp not necessary.

[8] HILL against PATEN, 8. East. 373. The insurance on ship and outfit not allowed to be changed to ship and goods. But in insurance on goods, though they are not all co-existing, but successive and dissimilar, yet the adventure is the same, and the subject-matter retains its original denomination of goods.

See also FRENCH against PATTON, 9. East. 351.

[9] See RODERICK against HOVIL, 3. Campbell, 103.

[10] COATES *v.* PERRY, 1821; 3. Brod. and Bing. 48.

6. A single stamp is sufficient, if the interest of the parties, however numerous, relate to one subject-matter: So in a composition with creditors, it may be said that each creditor compromises his separate debt; but being one transaction, one stamp is sufficient: So in a subscription to a common fund: So also in a reference by the underwriters in a policy.[1] The same rule, (as indeed is sanctioned by daily practice), will apply to a trust-conveyance by creditors to do common diligence for saving expense: If several persons bind themselves respectively in a penalty by one bond, conditioning the performance by each and every of them *of the same matters*, such bond requires only *one stamp*.[2] But where there are several transactions, distinct as to the several parties, it is not a single deed, and the stamp will maintain the action only as to the person to whose name it is affixed.[3]

7. The extent of alteration admissible in one species of instrument has been stated: It may further be observed, 1. That to correct a mere mistake, and in furtherance of the original intention, it is permitted to make an alteration.[4] What shall be deemed an alteration of this kind may be a difficult question in various cases, which will more properly be discussed under each head. 2. If the original intention be altered, and a new instrument be substituted different from the first, a new stamp will be necessary: so a bill of exchange cannot be altered after it is perfected in date, sum, time of payment, and drawer.[5]

8. The consequences of not having a stamp, or having an improper one, are, 1. That no action can proceed, nor instrument be received in evidence, till the defect be supplied, if suppliable; and it is pars judicis to refuse sanction to any evasion of the Act. 2. That if the instrument be lost, it cannot be supplied by proving the tenor, this being one of the risks which the party runs by breach of the law.[6] 3. That the want of the stamp only destroys the instrument, leaving the party to resort to other evidence; and so, where a party admits on the record the fact which the instrument might have been necessary to prove, it is sufficient.[7] So also, of course, a reference to oath is competent with us.

§ 1. OBLIGATIONS AND CONTRACTS CONSTITUTED BY WRITING.

The peculiar advantage of written evidence is, that, provided the writing be authentic, it presents the very words which, at the time of the contract, the parties themselves have selected to express their obligation, and is subject to no ambiguity which they themselves have not left in their agreement. The chief points, therefore, in the law of written evidence of contracts are, 1. The authenticity of the writing as truly that of the obligor: 2. The solemnity and deliberation with which it has been prepared and recognized as a con-

[1] See GOODSON against FORBES, 1815; 6. Taunt. 171. in Common Pleas, as to a reference by underwriters.

DAVIS against WILLIAMS, 13. East. 232. in King's Bench, as to a subscription for constructing a dock.

[2] BOWEN against ASHLEY, 1. N. R. 274. GOODSON against FORBES, 1. Marsh. 531.

[3] PERRY against BOUCHEIR, 1814; 4. Camp. 80. A release to the master and three others, the crew of a ship which ran down another, having only one stamp, was admitted by Lord Ellenborough as good to admit the master first mentioned. See cases cited.

[4] SANDERSON against SYMMONDS, 1819; 1. Brod. and Bing. 426.; and ROBINSON against POURAY, 1. Maule and Selw. 215.

[5] Bayley, 159. et seq. Mr Thomson, in his Treatise on Bills of Exchange, 206. has very concisely collected rule of the revenue law is, that there can be no alteration of a stamped instrument after it has been used for one purpose. Per Le Blanc, J.; 15. East. 416. BATHE against TAYLOR.

[6] RIPPINER against WRIGHT, 1819; 2. Barn. and Ald. 478. Defender proposed to give parole evidence of an agreement, which had been written on unstamped paper, to pay a certain value for a crop. The plaintiff had taken an opportunity of snatching it from the hands of the defender's attorney, and destroying it. The Court held the evidence to be properly rejected. See also REX against INHABITANTS of Castle-Morton, 3. Barn. and Ald. 588.

It will be presumed that the instrument was stamped till the contrary appear. CRISP against ANDERSON, 1815; 1. Starkie, 35.

[7] So laid down by Lord Eldon in HUDDLESTON against BRISTOE, 11. Ves. 596. See also THYME

tract meant to bind: And, 3. The final act which makes it binding against the one party, and available as a jus quæsitum to the other.

In England, all contracts are by specialty or by parole. The former require a seal; the latter are either agreements merely verbal, or such as are evidenced by a note or memorandum in writing signed by the party, but not under seal. Agreements by parole were of old generally entered into without writing; but, in the reign of Charles II., a statute, called the Statute of Frauds and Perjuries, was passed, whereby certain agreements required a memorandum in writing signed by the party, or by his authorized agent; such as a promise to answer for the debt, default, or miscarriage of another; a sale of lands or hereditaments, or of an interest in them; an agreement to be performed at the distance of more than a year, &c.; and contracts for sale of goods, wares, and merchandise, to the value of upwards of L.10; require either delivery, or earnest, or a written memorandum.[1]

The written evidence admitted judicially in Scotland to serve the purposes already enumerated are either SOLEMN or PRIVILEGED: the one being used in conveyances, deeds, settlements, and more solemn contracts; the other being those writings of daily mercantile intercourse on which men rely in their ordinary dealings.

1. SOLEMN WRITINGS.

The law relative to solemn writings is established by certain statutes, on which it would be out of place here to deliver a commentary. A very general statement of the import of the rules will suffice.

Solemn deeds are of two kinds:—1. Such as are written by another hand than that of the granter, and for proof of the authenticity of which the law trusts to the attestation of witnesses: And, 2. Holograph deeds, written wholly, or in the principal and binding parts, by the granter, in which the proof of authenticity is by comparison of handwriting.

1. ATTESTED DEEDS.—The proof here, at once of deliberation and of authenticity, depends on the subscription of the parties and witnesses; on the disclosure of all the information that can be necessary to check fraud relative to the preparation of the deed; and on the disclosure also of the names and designation or description by which the witnesses who have seen it subscribed may be found.[2]

The rules are,—1. That the party shall with his own hand subscribe the writing; or if he cannot, that two notaries shall subscribe for him, his warrant for their doing so being given, not merely by word of mouth, but also by the marked symbol of touching the pen. 2. That this subscription shall be attested by the subscription of two witnesses where the party signs; of four, where notaries subscribe for him. This is in token of their having been present at the ceremony, and having seen the subscription; or of their having heard the party acknowledge the subscription to be his; or, where notaries sign, of their having seen and heard the warrant given, and seen the notaries subscribe. 3. That the witnesses shall be named and designed in the deed. 4. That the writer shall also be named and designed. And, 5. That where there are more pages than one, the number shall be mentioned in the deed.[3] Where these requisites are complied with, the deed is held to be at

[1] See 1. Comyn on Cont. 47. 1. Selwyn's Nisi Prius, 43. et seq. The English action of ASSUMPSIT is confined to agreements by parole, the action of COVENANT or DEBT being the proper remedy for non-performance of contracts by specialty.

[2] In England a seal is necessary; and so it was by our early law, but not now. The seal is not, in English law, a proof of authenticity; for it is not only by his own seal that a man attests a deed. It is a mark of solemn deliberation; like the touching of the notary's pen in our notarial subscription.

[3] This is the general result of the statutes 1540, c. 117.; 1579, c. 80.; 1593, c. 175.; 1672, c. 21.; 1681, c. 5.; and 1696, c. 15.

See M'Kenzie's Observations on these several statutes; 4. St. 42. § 1.; 3. Ersk. 2. § 5. et seq.; 1. Bank. 11. § 24.; and a very full Commentary on the Acts in the late Mr Robert Bell's Lectures on the Testing of Deeds.

in this way. The 'consensus in idem placitum,' by the exchange of the letters, makes the contract.

It is dangerous to rely on a long correspondence from which to collect the terms of a contract. The engagement should be so distinct and specific, that the party may be enabled at once to put his finger on it, and say, 'Here is my agreement.' And in courts of law, nothing short of this can be relied on as the ground of an action.

Offer and Acceptance.

An offer is a resolution or engagement, provisional on acceptance, and as such proposed to the adverse party. By acceptance, it becomes a contract; and this acceptance may be either in words, or by writing, or by doing what is required as the counterpart of the offer. Thus one offers so much for a cargo of corn, and it is sent; or to guarantee a loan, and the money is advanced; or one offers to become cautioner for a composition, and the creditors accede.[1]

An offer is necessarily under the condition of acceptance; and this must take place debito tempore. There may either be a time implied, or a time limited expressly: 1. Where an offer is made simply, the general rule at common law is, that it may be accepted at any time till withdrawn; and that an action to enforce performance will be a sufficient acceptance. The necessary rapidity of mercantile transactions, however, has introduced an exception in the case of commodities offered to sale, or of an offer to purchase commodities in the ordinary course of trade. For every dealer must know, that commodities offered are lying in wait for a market; that the price is subject to fluctuation; and that opportunities for disposing of such goods may open and be lost by delay: Or that the person who makes an offer for goods, may lose by delay some other opportunity of procuring them. Unreasonable delay in the answer being therefore inconsistent with the spirit of trade, it is an implied condition of a mercantile offer to sell or to purchase, that it ought to be instantly accepted; or at least without any undue delay. And therefore, the person to whom the offer is made has no reason to complain of disappointment, and no ground of action for implement, should the offer be withdrawn after such delay. As another exception to the rule, it is held, that acceptance must take place while yet there is no alteration of circumstances detrimental to the offerer.[2] 2. Where there is an express appointment of time for acceptance, it must be correctly observed. Thus, an offer which bears that an answer is expected in course of post, is no longer binding than till the arrival of that post.[3] A letter by the first mail packet from abroad is in time, although private ships may have sailed previously.[4]

It is the act of acceptance that binds the bargain; and in the common case it is not

[1] M'Intyre against Tweedie, 5th June 1823; 2. Shaw and Dunlop, 361.

[2] Allan against Colzier, 25th June 1664; 1. Stair, 206.; where one offering to guarantee a debt, and requiring an answer whether this offer was to be accepted; and no answer having been made till after the death of the debtor whose obligation was to be guaranteed; the offerer was held entitled to resile.

[3] Farries against Stein, 7th March 1799. Farries, on 7th November, wrote to Stein, expressing his desire to have an addition to a quantity of spirits he had purchased, and asking the lowest price. To this Stein agreed by letter, 10th November, and noted the prices, in which he says, 'Expecting 'your answer in course, I am,' &c. On the 17th November Farries assented: but on 19th Stein rejoined, 'That not having had your answer in course 'to my letter of the 10th, I have since disposed of 'the spirits, and cannot now accept of your offer.' The Court of Session found Stein liable in damages. Reversed 24th March 1800. Lord Eldon, Ch. said, the condition on which the offer was made not having been complied with, Stein was entitled to consider it as at an end: that it would place the offerer on very unequal terms, were it to be left to the person to whom an offer is made, to accept it, after a rise, perhaps, had taken place in the price of the commodity: that it was incumbent, in this case, upon Farries to use due diligence in answering Stein's letter, which he had not done: and that an apology, attempted on the ground of the former course of dealings, had no place in the question, which depended entirely on the latter making the offer and the answer to it.

See the distinction in Jaffrey against Boag, 2d December 1824; 3. Shaw and Dunlop, 375.

[4] Watson against O'Reilly and Company, 16th February 1826; 4. Shaw and Dunlop, 475.

necessary that the acceptance shall have reached the person who makes the offer. An offer to sell goods, is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offer, or by the law. Until the expiration of that time, the consent to the sale is held to subsist on the part of the offerer, provided he continues alive and capable of consent at the time of acceptance. From the moment of acceptance there is between the parties 'in idem placitum concursus et conventio,'[1] which constitutes the contract of sale. To this, however, an exception may be made by the offerer, limiting it so that the *arrival* of the acceptance only shall bind the bargain. Thus, a merchant in Leith offers 500 quarters of wheat to a merchant in London, at a certain price, 'receiving 'your answer at Leith in course.' He, by this form of answer, stipulates absolute freedom, if it should in any way happen, though by no fault or neglect of the other party, that the acceptance does not arrive by that post.

The acceptance must precisely meet the offer; and so, if it be provisional only, or if it include a counter offer, the bargain is not complete till the offerer assent to the qualification.

If a mutual agreement is proposed, and provisionally assented to, and signed by several, (as in agreements with creditors in bankruptcy), it is an implied condition, that all shall be bound before any is bound.

An offer is revoked by death or incapacity before acceptance: but if it should happen, that, while yet it is not too late to accept, the person to whom the offer was addressed should, in consequence of, and relying on it, have lost an opportunity of supplying himself; or have proceeded bona fide to form arrangements which cannot be recalled; or in any other way should have suffered loss; this may be a bar to revocation of the offer; and in case of death, insanity, or bankruptcy, it may ground a claim against the representative or estates of the offerer for damages.[2]

If a merchant has sent, not an offer to purchase, but an order for goods, it is so far of the nature of an offer, that it may be rejected: But the person to whom it is addressed binds the bargain, by proceeding with all due diligence to execute the order; nor is it necessary for him to accept it, in order to bind the bargain. It is an equitable part of this rule, however, that if he do not mean to execute the order, he must instantly communicate his refusal; and should he neglect to do so, he will be held to have engaged himself to the performance of it.

Mercantile obligations are in another respect privileged. A minor cannot bind himself effectually in ordinary contracts, without the consent of his curators; or, if he have no curators, still his acts and deeds are challengeable on minority and lesion;[3] but when a minor acts as a trader, and holds himself out to the world as such, his dealings are on the same footing with a major.[4]

DOCTRINE OF LOCUS PŒNITENTIÆ, REI INTERVENTUS, AND HOMOLOGATION.

I. The doctrine of locus pœnitentiæ is a corollary from the law which appoints particular evidence or solemnities for the constitution of obligations. Till the final purpose to undertake an engagement be declared, and the pledge of faith conclusively given, there is no binding obligation; there is locus pœnitentiæ.

The plea of locus pœnitentiæ is grounded, not merely on the want of evidence of a

[1] Dig. de Pactis, lib. 2. tit. 14. l. 1. § 2.; et De Pollicit. lib. 50. tit. 12. l. 3.

[2] Pothier grounds this doctrine on the maxim, Nemo ex alterius facto prægravari debet. Tr. du Cont. de Vent. No. 32. vol. i. p. 472.

[3] 1. Ersk. 7. § 34.

[4] GALBRAITH against LESLY, 20th June 1767; Dirl. No. 360.; Gosford, Morr. 9027. CRAIG against GRANT, 5th July 1732; 1. Dict. 585.

bargain, but on the want of that perfect and full consent which stands contradistinguished from imperfect resolution or intention. The want of evidence may be supplied by a reference to oath; the want of the badge of full and perfect consent never can be so supplied. Such evidence may supply the *loss* of the document, after it has been completed as an irrevocable engagement; but it will not destroy the privilege of resiling, where the irrevocable obligation has not been legally declared.[1]

This principle rules all the cases, and the points of the doctrine may be thus stated:—

1. Faith is not irrevocably pledged, and so there is locus pœnitentiæ, while an offer remains unaccepted, or while a mutual agreement has not been acceded to by all the proposed parties.

2. Where a writing is de solennitate necessary to bind the party, there is no engagement till the writing be completed.[2] Cases falling under this rule are, conveyances of land,[3] leases of land,[4] constitutions of servitude,[5] assignations of written obligations.

3. Where writing, though not by law required, is stipulated by the parties, there is locus pœnitentiæ till it be completed.[6] But here it must be carefully distinguished, whether an agreement, preceding a more solemn deed, is meant to *suspend* or to *bind* the bargain,[7]—whether the parties meant, agreed, and understood that they were to stand free till regularly bound in writing; or, on the other hand, meant to engage and pledge their faith to each other, so that the time necessary for completing the solemn writing should not give locus pœnitentiæ.[8]

4. Where the agreement is reduced to writing, but the writing is defective and informal, there is locus pœnitentiæ, and a reference to oath will not bar it.[9]

II. The privilege of resiling from an incomplete bargain may be barred by two personal exceptions, Rei interventus, and Homologation. The doctrine of homologation has already been considered:[10] That of rei interventus is proper to this place.

Rei interventus is a doctrine qualifying the power to resile, and barring the exercise of it. It is grounded on the fact of the person, otherwise imperfectly bound, having permitted another to proceed on his obligation or agreement as if it were complete, and to

[1] MUIR against WALLACE, 14th February 1770; 5. Fac. Coll. 60.; 1. Hailes, 340.
M'KENZIE against PARK, 29th November 1764; Select Decisions, 289.
GRIEVE against M'FARLAN. See below, Note [9].

[2] Lord Stair places this on the same footing with the Roman stipulatio. 1. Stair, 10. § 9.
MAITLAND against NEILSON, 29th July 1779; 3. Dict. 395.; 2. Hailes, 840. In this case Lord Braxfield says, 'The writing by which this bargain is constituted is informal. The subscription is not denied: but that is not enough in this case. It is enough where writing is only necessary in modum probationis; but not so where writing is necessary to the constitution of the obligation.'

[3] OLIPHANT against MONORGAN, 5th December 1628; Durie, 406.
Sir P. WALKER against Sir D. MILNE, 10th June 1823; 2. Shaw and Dunlop, 379.

[4] BUCHANAN against EDGAR, 15th December 1773; Fac. Coll. 239.
M'FARLAN against GRIEVE, 22d May 1790; Fac. Coll. 252.

[6] CAMPBELL against DOUGLAS, 12th January 1676; 2. Stair, 396.
CATHCART against HOLLAND, 16th June 1681; 2. Stair, 876.
See Instit. lib. 3. tit. 24. De Emp. Vend. and Cod. lib. 4. tit. 21. l. 17. Pothier, Traité des Oblig. vol. i. p. 9. No. 11.
See 1. Stair, 10. § 3.

[7] An obligation to grant a lease is as effectual as a lease; 2. Ersk. 6. § 21. Dirleton and Stewart, voce Locus Pœnit. 198.

[8] RUTHERFORD against FEUARS of BOWDEN, 7th January 1748; 1. Fac. Coll. 342.
MUIRHEAD against CHALMERS, 10th August 1759; Fac. Coll. 351.
FULTON against JOHNSON, 26th February 1761; Sel. Dec. 239.

[9] GRIEVE against M'FARLAN, 26th May 1790; 10. Fac. Coll. 45.; 2. Hailes, 1080.
BARRON against ROSE, 23d January 1794; Fac. Coll. 218.
See also PARK against M'KENZIE, supra, Note [1].

perform on the faith of it acts unequivocally referable to, or resulting from, the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed. The propositions into which this doctrine is resolvable are these:—

1. Rei interventus includes such acts, unequivocally referring to the agreement and resulting from it, as are either done as a part of the agreement, or which at least would not otherwise have been done than on the faith of it.[1] Difficulty sometimes arises in the case of leases, whether the act done is truly referable to the imperfect engagement. Mere possession, for example, may be ascribed to a lease for one year, which is good without writing, and does not necessarily infer an intention to confirm the entire agreement. There must be something done to characterize the possession as under the contract: A grassum paid, for example, or money expended to a great amount, in improvements or in building.[2]

2. The knowledge of the party who is imperfectly bound, that the other is proceeding on the faith of the agreement, is a necessary ingredient in the plea of rei interventus; and this either actual knowledge, or knowledge to be implied from circumstances necessarily leading to the probability of loss, without any means taken to prevent it.

3. There must be an inconvenience or alteration of circumstances to the party who has been led to rely on the agreement, though the change is not required to be irreparable. It is sufficient that it be considerable, and that the disappointment would be attended with loss. On this ground, the doctrine delivered by Lord Kilkerran, though it describes correctly enough the effect of rei interventus in the most common and clearest set of cases, is not correct, in so far as it professes to furnish a criterion for the application of the doctrine, and to exclude all cases in which the parties can be replaced in their former condition;[3] and accordingly the Court has not regarded this as law.[4]

Commentary on certain Prescriptions presuming Falsehood.—As an appendix to this matter of evidence in these several cases, certain short prescriptions demand notice. Of the shorter prescriptions, two classes may be distinguished:—One raising the presumption of falsehood in the constitution of the debt; the other combining with this a presumption of payment. The former, as modifying some of the doctrines above discussed, may be fitly considered here: Of the other class, one example will immediately call for attention, the Triennial;[5] another, in treating of Bills of Exchange.

Viennial Prescription of Holograph Obligations.—By 1669, c. 9. 'holograph 'missive letters, and holograph bonds and subscriptions in compt-books without witnesses, 'not being pursued for within twenty years, shall prescrive in all time thereafter, except 'the pursuer offers to prove by the defender's oath the verity of the said holograph bonds

[1] It is not enough, however, in all cases, though sometimes it may be admissible, to allege negatively that something has been omitted which might have been done. Hill's Creditors against Dunbar, 14th June 1810. See 16. Fac. Coll. 170. Note.

[2] Grieve against Pringle, 15th January 1797; 12. Fac. Coll. 82. M'Rorie against M'Whirter, 18th December 1810; 16. Fac. Coll. 86.

[3] 'The rule,' says Lord Kilkerran, 'by which it is 'to be judged whether res be non integra, so as to 'exclude the locus pœnitentiæ, was laid down to be 'this, that wherever any thing has happened on the 'faith of this verbal agreement which cannot be re-'called, and parties put in the same place as before, 'then res is understood not to be integra, and there is 'no longer locus pœnitentiæ.' Kilk. 340.

[4] Dunmore Coal Company against Youngs, 1st February 1811; 16. Fac. Coll. 169. Here one was taken on a meditatio fugæ warrant, and liberated on his father becoming bound to pay a large balance. The obligation was not holograph; and the defence was, that the obligation was improbative. The answer was, rei interventus by liberation. The reply was, that the person liberated has not fled, but is in Court, which is all that could have been required under the meditatio fugæ warrant. The Court disapproved of Lord Kilkerran's doctrine, and held the locus pœnitentiæ to be barred.

[5] See p. 331.

'and letters, and subscriptions in the compt-books.' The object of this law is, to avoid the danger of false deeds being founded on as holograph after the means of detection are gone or weakened.

1. The terminus a quo, from which the twenty years are to be reckoned, is the date of the writing, not the time of payment, as in the prescriptions implying payment; for the question is the genuineness of the writing.

2. The point to be proved by oath of party, when the time has run, is the authenticity of the whole deed. To prove the subscription merely, would leave it in the condition of a deed signed without witnesses.[1]

3. By the Act it is expressly declared, that this prescription 'shall not run against 'minors, during the years of their minority.'

QUINQUENNIAL PRESCRIPTION OF BARGAINS.—By the same Act, 1669, c. 9. it is enacted, 'that all bargains concerning moveables or sums of money proveable by wit-'nesses, shall only be proveable by writ or oath of party, if the same be not pursued for 'within five years of the making of the bargain.' And the same declaration as to minority is applied by the Act to this case. The presumption here then, as in the former case, is falsehood in the alleged bargain,—that no bargain ever existed; and the proof is, writing or oath of party.

§ 2. OF VERBAL AGREEMENT AND BOOK DEBTS.

VERBAL CONTRACT.—The principles above explained relative to offers and acceptance in writing, apply equally to debts of this description. The claim rests on parole proof, aided by invoices, memorandums, &c.; but once established, the obligation is equally valid as if established by the most solemn writing.

DEBT ON OPEN ACCOUNT, OR BOOK DEBT.—The most common form of debt is by account. Retail dealers furnish the goods in which they deal on the general credit and verbal order of their customers, or of those authorized to act for them; a running account being kept in their books in the name of the customer. By this sort of traffic most of the commodities necessary in the ordinary intercourse of life are circulated. Current accounts are sometimes also kept in wholesale dealings, where the parties carry on a course of furnishing. The evidence of furnishings so made, either in the wholesale or retail trade, is generally parole: accounts are sometimes checked by pass-books, or by check-notes, as in cash-accounts with bankers. In wholesale dealing, proofs are supplied by invoices, bills of lading, shipping receipts, and notes transmitted at the time.

The prima facie proof of a book debt, or debt on account, is a distinct specification, from the books, of the several articles; and, if that is made the subject of a claim in bankruptcy, the specification is accompanied by an affidavit to the verity of the debt. Where such evidence stands uncontradicted by other circumstances, and unquestioned by the bankrupt, or where it accords with the bankrupt's books, the state of his stock, &c. this is held as sufficient evidence to authorize the trustee on a sequestrated estate to admit the proof. Where farther evidence is required, a dividend must be set apart to be paid to the claimant, provided he shall fully establish his claim.

Where the debt is suspicious or contested, recourse must be had to other evidence.—1. The evidence of the clerks and porters of the seller or furnisher is admissible to prove delivery of the several articles. But it may not always be possible to prove the delivery of each several article: And it will remain for determination, by a jury or by arbiters, whether a proof of being a customer, and receiving articles about the time stated in the

[1] On this point, Erskine's doctrine (3. Ersk. 7. § 26.) is refuted by the very cases to which he refers.

account, and of the general description there set down, will not be sufficient. 2. The letters that have passed between the parties, the invoices, carriers' notes, bills of lading, rendered accounts, &c. may be resorted to in aid of the claim. 3. The books of a regular merchant have been held to afford a semiplena probatio, to the effect of the claim being supported by the evidence of a single witness, confirmed by the oath of the merchant in supplement.[1] In bankruptcy, the bankrupt himself will not, as such, be incompetent as a witness in support of the claim. He is not liable to the objection of interest; for any interest which he may have lies against the claimant, not for him.

COMMENTARY ON THE SHORT PRESCRIPTION OF BOOK DEBTS.

Book debts, or debts by account, are subject to a limitation or prescription of three years. This prescription infers a double presumption: *First*, Of falsehood in the constitution of the debt; and, *Secondly*, Of payment and extinction. It is established by an early statute, 1579, c. 83.: But it is a regulation not unsuitable to the practice of the present day, and attended with many salutary effects. The words of the statute are, that 'all actions of debt for house-mails, men's ordinaries, servants' fees, merchant 'counts, and others the like debts, that are not founded upon written obligation, be 'pursued within three ziers, utherwise the creditor sall have nae action, except he either 'prove be writ or be aith of his partie.' And there is no exception in the case of minority, as in the other prescriptions already considered.

I. The debts to which this statute applies are merchants' accounts, under which are comprehended the accounts of artificers, or tradesmen, for their work or wages;[2] Accounts of law-agents;[3] Accounts of surgeons, apothecaries,[4] and the like; Servants' wages; House-rents;[5] the expense of boarding, or 'men's ordinaries,' as it is called in the Act. And the enumeration in the Act concludes with 'others the like debts, that are not founded 'on written obligation.' These are debts, in short, which depend not on a single contract or bargain, but are apt to run into credit; and which, as they are commonly contracted without writing, are discharged either at the time, or afterwards, without any written acquittance being thought necessary: And as, by the law of Scotland, the payment of money cannot be proved by parole evidence, while the furnishing of the articles may be so proved, this Act was intended by a presumption to protect persons dealing with retail merchants, and those in a similar situation, from a second demand.

II. The term of three years, if the debt be payable termly, (as servants' wages), runs on each term's debt severally.

Where the debt is by account of successive articles, the term does not run on the several articles as separate debts, but on the whole account considered as one debt;[6] and it begins to run, not while the account is current, but only when it is closed. The close of the account is therefore an important point. And, 1. If the account be continuous, or without any interval of three years, the date of the last furnishing, act done, or article not

[1] This was decided so early as 5th June 1672, Wood against Kello, 'In respect of the great pre-'judice that merchants might sustain if they were 'restricted to a full probation, especially if the parties 'were dead; and, therefore, the Court decerned the 'probation by one witness being semiplena. And the 'count-book, with the merchant's oath in supplement, 'was sufficient to make it a full probation.' Gosford, No. 487. p. 256.; Mor. Dict. 12,728.

[2] Bayne, 21st December 1692; 1. Fount. 535.

[3] Somervel, 16th December 1675.

[4] 3. Ersk. 7. § 17.

[5] Cuming's Trustees against Simpson, 18th February 1825; 3. Shaw and Dunlop, 545.

[6] A against B, 16th December 1675; Dirl. No. 183. Ross against Master of Salton, 12th February 1680; 2. Stair, 755. It is different with servants' wages. Each year's wages prescribe separately.

being a mere accessory article of interest, is the close of the account. 2. An interruption or interval of three years closes the account of what precedes it. 3. The death of the debtor closes an account.[1] This point occasioned some doubt; as, for example, Whether the funeral expenses of the debtor should form an article in continuation of the account?[2] Whether furnishings to the family immediately following upon the death, should be held a continuation of the account?[3] Whether the account continued with the heir, being eadem persona cum defuncto, was not strictly to be held as the same account?[4] But it is now quite settled, that the debtor's death closes the account, and that furnishings to the widow or heir commence a new account.[5]

III. There are two points of fact to be established by a creditor against whom the triennial prescription has run, namely, the *constitution* of the debt, and its *subsistence;* and two kinds of evidence by which they may be established,—writing, or the oath of the debtor.

1. It will be a good answer to the plea of prescription on both points, if the creditor produce a written constitution of the debt. This comes under the exception in the Act, of proof by writ; so if a bond or bill is granted for the balance, or an acknowledgment by missive, the triennial prescription is excluded; and the matter will then depend on the rule of law applicable to such evidence; as, for example, a holograph writing will be available for twenty years from its date—a more formal one, for forty years—a bill, for six.

2. But if the writing go only to the origin or first constitution of the debt, as a written order for articles to be furnished; this, although, when completed by a carrier's receipt for the goods, it will be good evidence of the constitution of the debt, will not satisfy the law on the other point, viz. that the debt is resting owing. That will still remain to be established by the creditor. It has indeed been often contended, that where a written order is given, the debt is of a description to which the triennial prescription does not apply, as being a debt founded on a written obligation. But this plea the Court has uniformly disregarded, on the principle, that the legislature meant to apply the triennial prescription to all debts in which there is not such a regular written constitution of the obligation as naturally requires a written discharge.[6]

3. As to the *subsistence* of the debt, it is necessary to distinguish, respecting proofs in writing, whether they are dated subsequently to the expiration of the three years, or within that time. If the writing is dated after the expiration of the three years, provided it plainly evinces the then subsistence of the debt, it will be a sufficient answer to the plea of triennial prescription, as counteracting the statutory presumption of payment. If the writing is dated within the three years, it is not held enough that it shows the debt to have been in existence during the three years, since the presumption of payment still remains: it would seem to be requisite that the writing should be intended to constitute

[1] LESLIE against MOLLISON, 15th November 1808; 15. Fac. Coll. 3. See below, p. 334. Note [4].
WILSON against RUTHERFORD, 7th February 1826; 4. Shaw and Dunlop, 427.

[2] Lady ORMISTON against HAMILTON of Bangour, 11th November 1709; 2. Fount. 489. 525.

[3] WILSON against TOURS, 28th July 1680; 1. Fount. 84. 110.

[4] GRAHAM against the LAIRD of Stonebyres, 26th February 1670; 1. Stair, 675. Erskine says, that an account is deemed current, though part of it was furnished to the deceased, and the remainder to the heir, when the question is with the heir; because the heir is eadem persona cum defuncto: and the same doctrine, he says, may, perhaps, extend to executors. 3. Ersk. 7. § 17.

[5] KENNEDY against M'DOUGAL, 23d June 1741; Kilk. 419.

[6] Contrast the case of WATSON against Lord PRESTONHALL, 21st February 1711, Forbes, 502. with the following cases:—ROSS against SHAW, 19th November 1784; DOUGLAS against GRIERSON, 18th November 1794; SADLER against M'LEAN, 18th November 1794. See Signet Collection, p. 97. and 104.

the debt as on a new footing, to serve as a voucher to the creditor for his debt. Where such voucher or acknowledgment is given, the debt, as if originally constituted in writing, will require not merely the triennial prescription, but a written acquittance, or the long prescription, or at least the prescription applicable to the document, to discharge it.

It has not been required that the acknowledgment of the debt shall be formally authenticated; a mere jotting, holograph of the debtor, if manifestly admitting the debt to be due, has been sustained as sufficient.[1] But to this the distinction already observed applies: if it be beyond the three years it will be good; if within the three years, it still leaves the doubtful point unsatisfied. Erskine says, that a book of accounts, regularly kept by the debtor, will be sufficient, if he there charge himself with the debt. If this doctrine is to be adopted in its full extent, the *regularity* of the books forms a chief part of the proof; for although a book of accounts showing, *after the three years*, the subsistence of the debt, may be a good answer to the plea of prescription, it is not easy to see how, without relying on the regularity of the books, such entries within the three years can answer the legal presumption of payment. The supposition of the law is, that the furnisher of goods compels payment against the expiration of the three years; and the clearest proof of the debt being due at some time during that period, is no answer to the legal presumption. It seems to be otherwise, however, in England.

4. The proof of a prescribed debt by oath of party, depends for its effect on the judicial transaction by which the issue of the cause is *referred* to this test. The points referred in the triennial prescription are those specified above; constitution and subsistence. If both are admitted on oath; or if without oath they are judicially admitted; this is a good answer to the plea of prescription.[2] On such reference the debtor is bound to answer; but he is not entitled to give a mere general answer: he must answer to particular questions. His oath will not be proof against him, unless he admits that payment was not made. If he swear that payment was made, and his answers to the special questions do not contradict that general affirmation, the demand of the creditor must be rejected.

It is a point of much nicety, What shall be held intrinsically an answer to the reference? On this subject the general rule is, That a direct answer to the question, Whether the presumption of the law be true? is an intrinsic quality, while all collateral matter is extrinsic. But the presumption of the law is here twofold:—1. That no debt ever existed; and, 2. That if a debt existed, it was paid. In a reference to oath, then, under this presumption, the pursuer puts to the defender these two questions; and a denial of the constitution of the debt, and of its subsistence, will be intrinsic. These, as Dirleton says, are 'inherent in the act and matter in question.'[3]

A distinction has been stated by Mr Erskine between the case of a debt demanded before or after the three years. Where the debt is demanded *after* the three years, and there is no proof by writing, so that recourse must be had to the oath of the defender, that oath embraces the two points of constitution and subsistence. Mr Erskine erroneously conceives, that in a demand *during* the three years, where there is no proof by writing or parole testimony in support of the claim, it is enough to refer to the oath of the debtor the constitution of the debt; and that upon establishing this, the onus probandi of payment lies on the defender, and so makes an extrinsic quality of his oath. But in this case, no less than in the other, the whole debt is referred for want of other evidence; and

[1] DONALDSON against MURRAY, 15th January 1766; 4. Fac. Coll. 54. This was an action for the price of malt, and the writing relied on to answer the triennial prescription was:—'1st November 1755. G. Murray 'to Mrs Kedslie, To 4 bolls of malt at different times, 'this day included, at 13s. 4d. per boll.' This note was admitted to be holograph, but not signed. It was held a good answer to the plea.

[2] BRYSON against AYTON, 16th November 1825; 4. Shaw and Dunlop, 180.

[3] Dirleton, Doubts, *voce* Qualified Oath, 214.

so, in the same way as after the three years, the constitution and subsistence of the debt are both the subject of the judicial transaction of reference.[1]

If the import of the oath is only, that the defender has, on account of something collateral, a defence against the debt, as compensation, the quality is not intrinsic; unless it was pars contractus originally that there should be such set-off.[2]

The debtor's bankruptcy does not make it incompetent for the claimant to refer the debt to his oath: For although at one time it was held, that the bankrupt was not competent to prove against his creditors on a reference by a claimant,[3] this doctrine is now confined to those cases in which the debtor's evidence is objectionable on account of relationship or interest.[4]

IV. Where the original debtor has died, a distinction may be admitted, according as the prescription has begun to run before the opening of the succession, or otherwise. Where the whole term of prescription runs during the heir's time, (as where the account was closed only by the ancestor's death), the oath of the heir negative of payment will establish resting owing.[5] But if the account was closed, and any part of the term has run during the ancestor's life, the heir's oath that *he* did not pay the debt, will not make out the pursuer's case.[6]

V. Minority is not pleadable in bar of the triennial prescription. It is a plea not available against any of the prescriptions, unless by force of statute; and it is not made an exception in the statute of triennial prescription, as in the Act 1669, 9. relative to the other prescriptions already taken notice of.

CHAPTER III.

OF UNILATERAL OBLIGATIONS.

UNILATERAL obligations and bonds are either simple in their object and form, as obligations to perform an act, or to grant or to deliver a deed, or not to do a particular act; or they are more complex, as bonds of annuity, and bonds of cautionry or suretiship. There is also a peculiar form of obligation, of the first importance in a commercial country, namely, by promissory-note or bill of exchange. These shall be considered in their order.

[1] 3. Ersk. 7. 18.; 4. Ersk. 2. § 11. and 13. See also the case of DOUGLAS against GRIERSON, 18th November 1794; Signet Coll. p. 97.

[2] Contrast these cases,—RANKIN against ADAIR, 29th June 1799, Fac. Coll.; BROWN against Dow, 23d December 1707, Forb. 211. where the oath resolved into compensation, or payment to a third party; with the following, where it was at the first agreed that there should be a compensation,—MAITLAND against BAILLIE, 8th February 1707, 2. Fount. 348.; FORBES against CRAIG's Creditors, 5th June 1711, 2. Fount. 643.

[3] MORTON against GILCHRIST, 10th February 1680; 2. Stair, 754. NAIRN against DRUMMOND, 25th November 1725; Kames' Rem. Dec. p. 120.

[4] BLAIR against BALFOUR, 9th July 1745; Kilk. 444. GRANT against GRANT of Carron's Creditors, December 1788; 4. Dict. 164.

[5] LESLIE against MOLISON, 15th November 1808; 15. Fac. Coll. 3. This was an action for a law-agent's account for defending an action brought against Molison's father, whom he represented, and in which, on his father's death, Molison appeared as a party, the account continuing with him. The defence was, belief of payment by the father, and triennial prescription. On reference, the defender said he believed his father to have paid all accounts due by him, but that he did not know. The Court held the law not to presume payment during the currency of an account, but only after its close; and this presumption they held in this case to be regulated by establishing that no payment had taken place since the death of Molison's father.

[6] See WILSON against RUTHERFORD, 7th February 1826; 4. Shaw and Dunlop, 427.