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INSTITUTE

OF THE

LAW OF SCOTLAND.

In FOUR BOOKS.

In the Order of Sir GEORGE MACKENZIE's Inſtitutions of that Law.

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AN INSTITUTE OF THE LAW OF SCOTLAND.

BOOK III.

TIT. I.

Of Obligations and Contracts in general, and of Contracts to be perfected *re*.

THE general method propoſed to be obſerved in this inſtitute was, to treat, *firſt*, Of perſons; 2*dly*, Of things or rights; and, 3*dly*, Of actions. The law of perſons hath been handled in the firſt book; and that of heritable rights in the ſecond. Moveable rights fall now to be explained, the doctrine of which depends chiefly on obligations.

2. An obligation may be defined in our law, as it was by the Roman, A legal tie, by which one is bound to pay or perform ſomething to another. The debtor in the obligation is commonly called with us *the obligant*, or *granter*; and the creditor, *the receiver*, or *grantee*. In the Engliſh law, the debtor gets the name of *the obligee*; and the creditor, of *the obligor*. Every obligation on the debtor implies an oppoſite right in the creditor, who is intitled to demand performance; ſo that what is an obligation or burden in regard of the one, is a right with reſpect to the other. From the above definition, the eſſential difference may be perceived between rights that affect a ſubject itſelf, which are called *real*, and thoſe which are founded in obligation, or as they are generally ſtyled, *perſonal*. A real right, or *jus in re*, whether of property, or of an inferior kind, as ſervitude, intitles the perſon veſted with it to poſſeſs the ſubject as his own; or if it be poſſeſſed by another, to demand it from the poſſeſſor, in conſequence of the right which he hath in the ſubject itſelf: whereas the creditor in a perſonal right or obligation has only a *jus ad rem*, or a right of action, againſt the debtor or his repreſentatives, by which they may be compelled to fulfil that obligation, but without any right in the ſubject, which the debtor is obliged to transfer to him.

3. It is ſaid in the definition, to pay or perform. The firſt, to pay, re-

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lates properly to ſubjects which the debtor is bound to deliver to the creditor; and is reſtricted, in the common uſe of the word, to ſums of money. The other alternative, to perform, includes all articles to which a debtor may be obliged, conſiſting in fact; as an obligation to do, or to procure ſomething to be done, in favour of the creditor; *ex. gr.* an obligation to grant a conveyance, a leaſe, &c. or to procure one to be granted by another. One cannot oblige himſelf, but by a preſent act of the will, conferring upon another a right to demand performance. A bare reſolution, therefore, or purpoſe, to be obliged, infers no obligation: for a reſolution, though it be an act of the will, is only with itſelf, which can have no operation in favour of others; and conſequently may be altered at the pleaſure of the reſolver, *Feb.* 27. 1673, *Kincaid.*

4. The diviſion of obligations, ſtated by civilians, into merely natural, merely civil, and mixed, is alſo applicable to the law of Scotland. Obligations merely natural, are thoſe by which one perſon is bound to another, by the law of nature, or equity only; but which poſitive law does not ſupport by any action that may render them effectual. Such obligations ariſe either, *firſt*, From the nature of the act or writing by which the debtor is bound. Thus one who binds himſelf by writing to pay or perform, is naturally bound to fulfil his engagement, though the written obligation ſhould be civilly null for want of ſome legal ſolemnity. *2dly*, Natural obligations may ariſe from the condition of the perſon obliged. Thus parents are brought under a natural obligation to provide their children in reaſonable patrimonies, though they cannot be compelled to it by the civil judge; a woman is, on her widowhood, naturally bound to fulfil the obligations under which ſhe had laid herſelf *ſtante matrimonio*, though no action lies againſt her for performance; and, in like manner, a minor *pubes* who binds himſelf without the conſent of his curators, though the law declares his obligation void, ſtands naturally bound by it, if no fraud or violence has been uſed againſt him by the creditor. This kind had, by the Roman law, all the effects of full obligations, except the right of producing an action. Hence a debtor in a full obligation, who was creditor to the ſame perſon in a natural one, might compenſate the one debt with the other, *l.* 6. *De compenſ.*; and a debtor in a natural obligation, who had diſcharged it by payment, could not again recover it by a *condictio indebiti*, *l.* 13. *De condict. ind.*; *l.* 10. *De obl. et act.* Hence alſo a cautioner might be interpoſed in natural obligations, who would be effectually bound by his cautionary engagement, though the principal debtor could not be ſued, *l.* 6. § 2. *l.* 7. *De fidej.* The effects given, by the uſage of Scotland, to natural obligations, ſhall be explained under their proper heads.

5. An obligation merely civil, is that tie of poſitive law by which one is bound without any foundation in equity; and conſequently the action which it produces, may be rendered ineffectual by a perpetual exception in equity. Thus an action upon an obligation extorted *vi aut metu*, being founded only in the ſubtlety of law, may be elided by the remedy of an exception or reduction.—— Mixed obligations are thoſe which, at the ſame time that they are grounded in equity, have the ſupport of the civil ſanction, which authoriſes actions for enforcing their performance; and they get that name, becauſe they are not founded barely in natural law, but are confirmed by poſitive. Theſe full or perfect obligations are the only proper ones; for in ſtrict ſpeech he alone is debtor, *a quo invito aliquid exigi poteſt.*

6. Obligations are either pure, or to a certain day, or conditional. Obligations are called *pure*, to which neither day nor condition is adjected: and debts of this kind may be exacted immediately, *l.* 41. § 1. *De verb. obl.*; for

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for in an obligation entered into ſimply, without the incumbrance of any future condition, or future day of performance, the debtor is obliged to immediate performance; and the creditor, who is not limited, may demand it when he pleaſes. Obligations *in diem*, or as they are ſometimes called, *ex die*, *l.* 44. *De obl. et act.* are thoſe in which the performance is deferred to a determinate day. In this kind, *dies ſtatim cedit, ſed non venit*, *d. l.* 44.; *l.* 213. *pr. De verb. ſignif.:* or, in other words, a debt becomes properly due from the very date of the obligation, becauſe it is certain that the day will exiſt; but its effect or execution is ſuſpended till the day be elapſed. A conditional obligation, or an obligation granted under a condition the exiſtence of which is uncertain, has no obligatory force till the condition be purified; becauſe it is in that event only that the party declares his intention to be bound, and conſequently no proper debt ariſes againſt him till it actually exiſt; ſo that the condition of an uncertain event ſuſpends, not only the execution of the obligation, but the obligation itſelf. Upon this ground an obligation granted to a wife, the condition of which did not exiſt till after the diſſolution of the marriage by her death, was adjudged not to fall under the *jus mariti*, *Fount. Dec.* 18. 1694, *Fotheringham*, becauſe the huſband's right ceaſed before it could be ſaid that a debt became truly due. Such obligation is therefore ſaid in the Roman law to create only the hope of a debt. Yet the granter is in ſo far obliged, that he hath no right to revoke or withdraw that hope from the creditor which he had once given him: and hence diligence is competent to creditors in conditional debts, and they tranſmit their right to their heirs, in caſe they ſhould die before the exiſtence of the condition, § 4. *Inſt. De verb. obl.*

7. An obligation to which a day is adjected that may poſſibly never exiſt, though in the form of words it be an obligation *in diem*, is truly conditional, *l.* 21. *pr. Quand. dies leg.*; becauſe all uncertain events are of the nature of conditions. Thus, if a father ſhould grant a bond of proviſion to his child payable at his age of ſixteen years, the obligation, becauſe it is uncertain whether the term of payment ſhall ever exiſt, implies a condition that the child ſo provided ſhall live to that term; and conſequently, if the child ſhould die before ſixteen, the proviſion falls, *Feb.* 16. 1677, *Belſches*. Articles which one of the parties to an obligation or contract undertakes to perform, though they ſhould be conceived in the ſtyle of proviſions, are moſt improperly called *conditions*. A proviſion, *ex. gr.* in a leaſe, that the leſſee ſhould incloſe his grounds within a certain time, though in the form of words a condition or proviſion, is truly one of the obligations he enters into by the contract, the non-performance of which is ſo far from ſuſpending the diligence competent to the landlord, that it is itſelf a ground of diligence. The different nature of the conditions that may be adjected to obligations, will be explained below, *t.* 3. § 85.

8. An obligation may be effectually conſtituted in favour of third parties, though they ſhould be not only abſent, but ignorant of the granting of it; and even in favour of children yet to be born; in which laſt caſe it is in effect conditional, being ſuſpended till the birth of the child. Obligations granted *ſub modo*, or for certain uſes or purpoſes, are not, like conditional ones, ſuſpended until performance by the creditors in them; for their obvious meaning is, that the creditors ſhall firſt get the right, and afterwards perform the granter's will, *l.* 41. *pr. De contr. emp.*

9. It is univerſally affirmed by the Roman lawyers, that all proper obligations muſt be grounded on ſome anterior cauſe, either, *firſt*, expreſs contract; 2*dly*, ſomething reſembling a contract; or, in other words, ſome deed which creates an obligation without expreſs covenant; 3*dly*, delinquency; or, 4*thly*, ſome fact reſembling delinquency. But this diviſion of

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obligations is not adequate to the thing divided; for there are many inſtances of obligations, even proper, which are grounded neither on contract, nor delinquency, nor any fact reſembling either of them. Theſe are called by Lord Stair *obedientiall* or *natural obligations*, in oppoſition to *conventional*. One of the moſt noted examples of natural obligations, is that which lies upon parents, not from contract or delinquency, but merely from the condition in which God has placed them, to maintain their children; of which above, *b.* 1. *t.* 6. § 56.

10. Under this claſs may be alſo reckoned thoſe obligations which ariſe from the natural duty of reſtitution. In conſequence of this, whatever comes into our power or poſſeſſion which belongs to another, without an intention in the owner of making a preſent of it, ought to be reſtored to him: and though the poſſeſſor ſhould have purchaſed the ſubject for a price *bona fide*, ſtill the owner muſt have it reſtored to him, in conſequence of his property, without the burden of repaying that price to the poſſeſſor. As this obligation is founded on the power which the poſſeſſor hath by his poſſeſſion over the property of another, therefore if he ſhall ceaſe to poſſeſs, by ſale, donation, *&c.* the obligation to reſtore ceaſeth alſo. But, *firſt*, if he has given up the poſſeſſion fraudulently, he continues bound; for *is qui dolo malo deſiit poſſidere, pro poſſeſſore habetur*, *l.* 25. § 2. 9. *De her. pet.*; *l.* 131. *De reg. jur.* 2*dly*, Though the poſſeſſor ſhould have ſold it *bona fide* to another, yet if he has received an higher price for it than he purchaſed it at, he muſt reſtore the ſurplus price to the owner towards his indemnification; becauſe as to that, the poſſeſſor, if he did not reſtore it, would turn out a gainer to his neighbour's coſt, contrary to the rule preſcribed by *l.* 206. *De reg. jur.* From this duty of reſtitution it ariſeth, that things given in the ſpecial view of a certain event, *ex. gr.* in the contemplation of marriage, muſt, if the event, in the view of which they were given, ſhall not afterwards exiſt, be reſtored by the grantee, who may be ſued for reſtitution by a perſonal action, ſtyled in the Roman law, *Condictio cauſa data, cauſa non ſecuta*, *l.* 3. § 2. *&c. De cond. cauſ. dat.* If it has become impoſſible that the cauſe of giving ſhould exiſt by any accident not imputable to the receiver, no action lies againſt him, unleſs he hath put off performing it, when it was in his power to perform, before that accident happened, *l.* 5. § 4. *eod. tit.* Thus alſo, what is given *ob turpem cauſam*, muſt be reſtored if the turpitude was in the receiver, and not in the giver, whether the cauſe of giving was performed or not, *l.* 1. § 2. *De cond. ob turp. cauſ.* If, for inſtance, one accuſed of a crime ſhould give money to another, that that other might not bear falſe witneſs againſt him, he may recover the ſum ſo given, by a *condictio ob turpem cauſam*.

11. Another kind of obediential obligations mentioned by Stair, is that of recompence, by which a perſon who is made richer through the occaſion, or by the act of another, without any purpoſe of donation, is bound to indemnify that other, either of his whole expence, or at leaſt in ſo far as he himſelf is a gainer. As this obligation is ſtrongly founded in natural equity, the laws of all civilized nations have adopted it, even in the caſe of pupils, though they cannot be bound by any contract. It is on this principle, that though a houſe built *bona fide* upon ground not the builder's own, accrues to the proprietor of the ground, and not to the builder; *ſupr. b.* 2. *t.* 1. § 15.; yet, by the Civil law, the proprietor claiming the houſe, whether he was a gainer or not by the building, was liable to reſtore to the builder the full expence of the materials and workmanſhip beſtowed upon it, *l.* 7. § 12. *De adq. rer. dom.* By the uſage of Scotland, the claim of recompence is, in the caſe of repairing an houſe by a liferenter or adjudger, reſtricted to ſuch expences as are profitable to the owner, by bringing an higher

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higher rent to him for the houſe than it gave formerly, *Feb.* 23. 1665, *Jack*; *Jan.* 24. 1672, *Halket*; which is alſo conformable to the Roman law, *l.* 48. *De rei vind.* Lord Stair affirms, *b.* 1. *t.* 8. § 6. on the authority of *l.* 38. *De hered. pet.* that this obligation of recompence obtains, in ſo far as the owner is *lucratus*, even in favour of a builder *mala fide* upon another man's ground: but whether this is, or ought to be held as the law of Scotland, may be doubted. One who has only a temporary right in a ſubject, as a church-beneficiary, or a tackſman, has no claim of recompence againſt his ſucceſſor in the benefice, or his landlord, for the expence laid out on the manſe, or the leaſe-grounds; for he is preſumed to have incurred that expence from the ſole view of the pleaſure, profit, or convenience, that it might bring to himſelf while his right ſubſiſted. The extent of the recompence ariſing from *negotiorum geſtio*, the *lex Rhodia de jactu*, &c. will be explained in their proper places.

12. Obligations ariſing from delinquency are alſo obediential. And though the conſideration of crimes and delicts, in ſo far as they draw after them the reſentment of public juſtice, falls under tit. *Crimes*, it may be proper to mention, in this place, ſome rules concerning the obligation under which a delinquent is brought, to indemnify the private party, or make up to him the damage he ſuffered by the wrong, with reſpect, *firſt*, to the nature of the delinquency; 2*dly*, to the extent of the damage; and, 3*dly*, to thoſe who are liable to repair it.

13. *Alterum non lædere* is one of the three general precepts laid down by Juſtinian, which it has been the chief purpoſe of all civil enactments to enforce. In conſequence of this rule, every one who has the exerciſe of reaſon, and ſo can diſtinguiſh between right and wrong, is naturally obliged to make up the damage befalling his neighbour from a wrong committed by himſelf. Wherefore every fraudulent contrivance, or unwarrantable act, by which another ſuffers damage, or runs the hazard of it, ſubjects the delinquent to reparation. Thus a party reſiling after ſubſcribing a marriage-contract, without giving a good reaſon for it, was condemned to the payment of the expence diſburſed by the other party in wedding-cloaths, and other preparations for the marriage, *Fount. Jan.* 2. 1685, *Græme*. Wrong may ariſe, not only from poſitive acts of treſpaſs or injury, but from blameable omiſſion or neglect of duty. Thus a jailor by whoſe negligence a priſoner for debt is ſuffered to eſcape, becomes liable to the creditor in the ſum due, though the creditor receives no immediate damage by that omiſſion, and only loſes one of the chances which he had before of recovering the debt by the *ſqualor carceris*. Thus alſo a clerk of court who has through careleſſneſs loſt the writings of a party which were produced in proceſs, muſt make up to the ſufferer his damage. This obligation to repair the loſs of another, ſuppoſes ſome wrong committed by the party obliged; for no perſon ought to be ſubjected to the reparation of damage who has not by ſome culpable act or omiſſion been the occaſion of it, *l.* 151. *De reg. jur.* One draining marſhy grounds will not be obliged to repair the damage the proprietor of an inferior tenement may thereby ſuſtain, by having a greater quantity of water thrown upon his grounds, becauſe that is a lawful act of property. And, on the ſame ground, if what has brought on the damage be merely accidental, the perſon ſuffering has no remedy.

14. As to the *ſecond* head, Every thing by which a man's eſtate is leſſened is damage or loſs. Damage therefore includes coſts of ſuit, and all ſums expended by the ſufferer towards obtaining reparation; but it never ought to riſe higher than the loſs truly ſuſtained. Thus, ſuppoſe a bond for L. 1000 to be loſt by the negligence of a clerk or doer, the creditor in the

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the bond cannot inſiſt againſt him who hath loſt it for the whole ſum contained in it, if it ſhall appear that the debtor's funds were not fully ſufficient for the payment of his debts, but muſt content himſelf with that ſum which he could have made effectual in a competition with the other creditors had the bond been ſtill extant, *June* 20. 1710, *Hamilton*. Where the party injured can be reſtored preciſely to his former ſtate, that method ought to be followed, both as the moſt natural, and the completeſt reparation. Thus, where goods are carried off from a perſon wrongfully, he receives full indemnification, by having the goods again put into his poſſeſſion, and being reimburſed fully of the loſs he has ſuſtained by being deprived of the uſe of them, and of his expence in recovering them. But where, through the extinction or deterioration of the ſubject, that method of reparation cannot be effected, the value of the damage in money muſt be aſcertained by the judge; inſtances of which daily occur, where a ſubject is either deſtroyed or made worſe by an accident in any degree imputable to another. All are agreed, that the extent of the damage, where the delinquency is not attended with fraud, ought to be eſtimated by its real worth, and not by the *pretium affectionis*, or imaginary value that the ſufferer is pleaſed to ſet upon it; agreeably to the rule of the *lex Aquilia*, *l.* 33. *pr. Ad leg. Aquil.*; ſee *Fount. Jan.* 25. 1687, *Spence*. In ſpecial caſes, however, the judge ought to eſtimate the loſs of the party higher than the ſubject deſtroyed or damaged would have been worth to any other; *ex. gr.* where trees near a gentleman's ſeat are cut down or hurt, which ſerved for policy or ſhelter. Where a delinquent is ſubjected by ſtatute to a determinate penalty, without any mention of reparation to be made to the private party, his claim of damage, which ariſes from the common law, is not, from the ſilence of the ſtatute, conſtrued to be cut off; for no ſtatute ought by implication to be interpreted into ſo glaring injuſtice, as to deprive the party injured of the means of redreſs that was formerly competent to him, eſpecially where the enactment appears to have been made *in odium* of the delinquency.

15. As to the perſons liable to repair the damage, it is he who does the wrong that muſt repair it; and whoever gives a mandate or order for doing it, is held as the doer, *l.* 169. *De reg. jur*. Where two or more perſons have been culpable, either as principals, or ſome of them only as acceſſories, each of them may be ſued for the whole damage; becauſe both of them concurred in committing the wrong: but as ſoon as the damage is repaired or made up to the party hurt by any one of them, the obligation is extinguiſhed as to the reſt; for an obligation founded ſolely upon damage, cannot poſſibly continue after the damage ceaſeth to exiſt. A preſumption of guilt is ſometimes fixed by ſtatute, againſt certain ſocieties or bodies of men, without the leaſt circumſtance of ſuſpicion againſt any individual, other than what ariſes from his vicinity to the place where the wrong was committed. Thus, where trees are cut down, the inhabitants of the next pariſh, becauſe they are preſumed capable of diſcovering the offenders upon proper pains, are ſubjected to the damage, if they do not get them convicted within ſix months, 1° *Geo I. ſeſſ.* 2. *c.* 48. If the delinquent ſhould die, an action of damages lies againſt his heir or repreſentatives; for tho' penalties are not tranſmiſſible againſt a delinquent's heirs, yet as the reparation of damages is grounded on an obligation merely civil, the heir of the perſon obliged muſt be ſubjected to it.

16. A contract is the voluntary agreement of two or more perſons, by which ſomething is to be given or performed upon one part, for a valuable conſideration, either preſent or future, on the other part. If the conſent of parties be implied in the agreement, ſuch as are incapable of conſent, as idiots, pupils,

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pupils, &c. cannot contract. Upon this ſuppoſed incapacity, both the Roman law, *l.* 10. *C. Qui teſt.* and the uſage of Scotland, *July* 9. 1663, *Hamilton*, have diſabled all from contracting who have been deaf and dumb from the birth. But there are inſtances of ſuch now alive, who not only are endued with ſtrong natural parts, but can apply them to all the affairs of life, and who even act in the character of freeholder, &c. in the more public concerns of the kingdom or county. Perſons, while in a ſtate of abſolute drunkenneſs, and conſequently deprived of the exerciſe of reaſon, cannot oblige themſelves; but a leſſer degree of drunkenneſs, which only darkens reaſon, has not the effect of annulling the contract, *July* 29. 1672, *Lord Hatton.* Thoſe who lie under a legal incapacity, *ex. gr.* by attainder, if they come under an obligation, cannot object their incapacity againſt the creditor, being excluded *perſonali objectione*, *Kames*, 64.; for as attainder is deſigned, not as a benefit, but as a puniſhment to the perſon attainted, it cannot be pleaded by him as a pretence to be releaſed from his juſt engagements. This conſent, which is neceſſary to every contract, is excluded, *firſt*, by error in the eſſentials of it: for thoſe who err, cannot be ſaid to agree. This obtains, whether the error regards the perſon of the other contracting party, as if one became bound to James, when he had reaſon to believe he was contracting with John, *arg. l.* 15. *De juriſd.*; or the ſubject-matter of the contract, as if one contracting to ſell a piece of gold plate, ſhould deliver to the purchaſer one of braſs, *l.* 9. § 2. *De contr. empt.* But if the error lies only in the accidental qualities of the ſubject, the contract is valid, *ex. gr.* if the gold has a greater mixture of alloy than it ought to have had, *l.* 10. *eod. tit.* 2*dly*, There can be no conſent, where the words or writings by which it is ſaid to be expreſſed, are drawn from either of the parties by fraud, againſt his real inclination. Fraud, or dole, is defined, a machination or contrivance to deceive: and where it appears, that the party would not have entered into the contract had he not been fraudulently led into it, or, as it is expreſſed in the Roman law, *ubi dolus dedit cauſam contractui*, he is juſtly ſaid not to have contracted, but to be deceived. Hence, if he who is guilty of the fraud ſhall ſue for performance, the other party may be relieved by an exception of dole; or though no ſuit ſhall be brought againſt him, he himſelf may ſue for ſetting aſide the contract *ex capite doli*. Conſent is alſo excluded by violence, or even by the menace of violence, *l.* 116. *De reg. jur.*: for violence, whether uſed, or barely threatened, is a neceſſity laid on a man to act contrary to his will, *l.* 1. *Quod met. cauſ.*; ſo that it is only in appearance, in the form of words, that a perſon forced or menaced gives his conſent; his will hath truly no part in the contract.

17. Contracts were, by the Roman law, divided into thoſe that were perfected by the intervention of things, by words, by writing, and by ſole conſent; *re*, *verbis*, *literis*, *conſenſu*. It was eſſential to real contracts, that beſide the conſent of parties, ſomething ſhould be actually paid or performed by one of them, in order to conſtitute an obligation againſt the other. Thus, to form the contract of *mutuum*, or of *pignus*, it was not enough that one agreed to give a thing in loan or in pledge; the ſubject muſt have been actually lent or impignorated. If there was barely an obligation to give, it reſolved into a *nudum pactum*; which, with the Romans, was not productive of an action. But by the law of Scotland, one who obliges himſelf to give in loan, or in pawn, may be compelled by an action to perform; though indeed, before the ſubject be lent or impignorated, it does not form the ſpecial contract of *mutuum* or *pignus*. —— The real contracts of the Roman law are, loan, commodate, depoſitation, and pledge.

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18. Loan, when it is taken in its full extent, as it commonly is in our language, includes all moveables of whatever kind, the uſe of which may be given by one to another: and when the ſignification of the word is thus unlimited, it is capable of forming, according to the different natures of the ſubject given in loan, either the contract of *mutuum*, or of commodate; which two have properties and effects quite different from one another, and are in themſelves diſtinct contracts. Where a thing is lent which cannot be uſed without either its extinction or its alienation, the property of it muſt needs be transferred to the borrower, who cannot otherwiſe have a right from the proprietor to make the proper uſe of it. Thus corn, wine, &c. cannot be put to uſe without the deſtruction of the ſubject. From this neceſſity has ariſen the contract of *mutuum*; by which the borrower becomes the proprietor of the ſum given in loan. As money or coin cannot be uſed, unleſs the property be transferred, except perhaps in conſignations, money therefore is a proper ſubject of *mutuum*. And in the loan of money, it is not its intrinſic value that is to be conſidered, which indeed was our old law, 1467, *c.* 19. &c. but that which is ſtamped on it by public authority. It is not in the borrower's power, who, in conſequence of the property transferred to him by the contract, has lawfully deſtroyed the ſubject by uſing it, to reſtore that ſelf ſame ſubject to the lender: his obligation, therefore, is fully ſatisfied, by reſtoring to him as much, of the ſame kind, and of the ſame good quality, as he borrowed. Hence thoſe things only can be the ſubject of *mutuum*, which conſiſt, *pondere, numero, et menſura*; which may be eſtimated generically by weight, number, and meaſure; otherwiſe called *fungibles, quæ functionem recipiunt*. By this deſcription, pictures, horſes, jewels, are not fungibles; for as their values differ in almoſt every individual, each muſt be rated by itſelf: but grain and coin are fungibles; becauſe one guinea, or one bulhel or boll of ſufficient merchantable wheat, preciſely ſupplies the place of another. It is true, that ſome ſubjects which are not of their nature fungible, are converted into fungibles, or held for ſuch, in the contract of ſteelbow, explained *ſupr. b.* 2. *t.* 6. § 12.; which is undoubtedly a ſpecies of *mutuum*, the property of the ſteelbow goods being thereby transferred to the tenant; and yet thoſe goods conſiſt frequently, not only of corns, and other fungibles, but of horſes, cows, and moſt of the implements of tillage. But the reaſon of this ſpeciality is obvious. It would be a moſt unequal bargain for the landlord, if the tenant ſhould have it in his power to diſcharge his obligation to him by the redelivery of the ſteelbow horſes, carts, &c. after they had, by a uſe of perhaps a dozen or twenty years, been rendered quite unfit for ſervice.

19. The borrower, to whom the property of the ſubject is transferred, muſt alone ſuffer the loſs ariſing either from its deſtruction or from its deterioration, according to the rule, *Res unaquæque perit ſuo domino*; which is a rule ſo evidently eſtabliſhed in nature, that it admits of no illuſtration. Hence, if the thing lent ſhall afterwards periſh, or be damaged, the borrower, who is the *dominus*, continues bound to reſtore its value to the lender. Where the borrower fails to reſtore at the time and place agreed on, the eſtimation muſt be made according to the price the ſubject would have given at that time and in that place; becauſe it would have been worth ſo much to the lender, had delivery been made in the terms of the contract. A debtor therefore in a quantity of wheat who has not delivered it preciſely upon the day, and at the place prefixed, will not get free from his obligation, if the price of wheat ſhould afterwards fall, by offering to deliver the preciſe number of bolls borrowed: he muſt pay alſo the difference between the price which wheat gave at that day and place, and what it gives when he offers

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offers the delivery. If there be no time and place expreſſed in the contract, the general rule is, that the thing ſhould be valued according to the price it bears at the time and place at which the demand is made, becauſe it is then and there that the borrower ought to have delivered it, *l.* 22. *De reb. cred.*; *l.* 3. *De cond. tritic.* The contract of *mutuum* is obligatory only on one part; the lender is ſubjected to no obligation: the only action therefore ariſing from it is directed againſt the borrower, that he may reſtore as much as he borrowed, and of as good quality, together with the damage the lender may have ſuffered by the borrower failing to perform at the time and place agreed on.

20. Commodate is a ſpecies of loan, gratuitous on the part of the lender, by which the borrower is obliged to reſtore to him the ſame individual ſubject which was lent, and not barely the equivalent, in the ſame condition it ſtood in at the time of the contract. Nothing can be the ſubject of this contract, but what may be uſed, without either its deſtruction or alienation, *l.* 3. § 6. *Comm.*: the property therefore, as it need not be transferred to the borrower, remains with the former owner; the uſe of it is the only right competent to the borrower; who, after that uſe, is bound to reſtore the *ipſum corpus* of the loan to the lender, § 2. *Inſt. Quib. mod. re.* Hence, if the thing lent in commodate periſh, or become worſe, while in the borrower's poſſeſſion, the loſs falls on the lender in conſequence of his property, *l.* 18. *pr. Comm.* Yet where the blame is chargeable on the borrower, he muſt make up the loſs, *l.* 5. § 4. *Comm.*

21. This diſtinction naturally introduces the queſtion, What degree of negligence throws the blame upon any party contracting, ſo as to make him liable for the damage ſuſtained by the other party? This the Romans have ſettled by the following general rules. Where the contract is entered into for the benefit of both parties, each contracter is bound to employ a middle ſort of diligence, ſuch as a man of ordinary diſcretion uſes in his affairs; the oppoſite of which is called *culpa levis*, or ſimply *culpa*. Where only one of the parties is benefited by it, ſuch party is bound in that degree of diligence by which one of the moſt conſummate prudence conducts himſelf; the neglect of which is called *culpa leviſſima*: and the other party, who is no gainer by the contract, is not accountable for any proper diligence; he is liable only *de dolo, vel lata culpa, i. e.* for dole, *l.* 5. § 2. *l.* 18. *pr. Comm.*; or for groſs omiſſions, which the law conſtrues to be dole, *l.* 226. *De verb. ſign.* Where one beſtows leſs care on the ſubject of any contract which requires an exuberant truſt, than he is known to employ in his own concerns, it is accounted dole, though the diligence he hath actually employed be as exact as a man of ordinary prudence would have uſed, *l.* 32. *Depoſ.* Theſe equitable rules have been adopted by us, and by moſt other civilized ſtates; and agreeably thereto the borrower in commodate muſt be exactly careful of the ſubject lent, while in his poſſeſſion, ſince he alone has the whole profit ariſing from the contract. Caſes are figured in the Roman law, where that contract may be formed for the ſole advantage of the lender; in all which the borrower is liable barely *de dolo*, *l.* 5. § 10. *Comm. &c.*: but moſt of the caſes there ſtated do not conſtitute the proper contract of commodate, which is always gratuitous on the part of the lender, § 2. *verſ. Commodata, Inſt. Quib. mod. re.*

22. The ſubject in commodate muſt be lent, either for a determinate time, or for a ſpecial uſe, which implies a reaſonable time for putting it to that uſe: it is not therefore in the lender's power to redemand it arbitrarily from the borrower; who is intitled to hold it, till the time limited by the contract be elapſed, or the purpoſe of the loan be ſerved, *l.* 17. § 3. *Comm.* But if he fail to reſtore it when he ought, or if he ſhall put it to another uſe

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uſe than that for which it was lent, and if after ſuch delay it ſhall periſh, even by mere accident, he is bound to pay the value; becauſe in this at leaſt he was to blame, that he did not reſtore the ſubject at the time fixed by the contract, or that he put it to an uſe to which he had no authority to apply it, *l.* 18. *pr. Comm.*

23. The lender is bound to pay to the borrower a certain part of the expence diſburſed by him on the ſubject while it was in his hands. In this queſtion Mackenzie, § 9. *h. t.* diſtinguiſhes between the conſiderable and inconſiderable expence; but it ought to be judged of, as it was in the Roman law, not from the extent, but from the nature of the diſburſements. If, for inſtance, one ſhall lend his horſe for a journey, the expence laid out by the borrower while he is travelling, for the horſe's maintenance, or getting him ſhod, muſt not be placed to the lender's account, becauſe that is a burden which naturally attends the uſe of the horſe, *l.* 18. § 2. *Comm.*: but if he ſhould be ſeized with a diſtemper, the curing of which might coſt money to a farrier, that expence, becauſe it is caſual, muſt be replaced by the lender to the borrower. The lender is alſo liable to the borrower for the damage ariſing to him from the latent inſufficiency of the thing lent, if it was known to the lender, *l.* 18. § 3. or from his taking it back wrongfully from the borrower, before that uſe could be made of it for which it was lent, *l.* 17. § 3. *Comm.*

24. The action competent to the lender againſt the borrower, for compelling him to the performance of his part of the contract, is called *actio directa commodati*; and that which is competent to the borrower, *actio contraria*. And it may be here obſerved, that in all contracts the ſtrongeſt obligation, or that which is eſſential to the contract, produces the direct action; and the weaker, which is only accidental to it, produces the *actio contraria*; ſo called, becauſe it is deſigned to inforce the counter part of the eſſential obligation. Thus in the contract of commodate the reſtitution of the thing lent is quite eſſential, and to this the borrower is bound from the beginning under certain qualifications: it is therefore productive of the direct action. The obligations on the lender are not eſſential to the contract, but ariſe from incidents which might never have happened; ſo that the contract may ſubſiſt without them.

25. The contract of *precarium* is a gratuitous loan, in which the lender either gives the uſe of the ſubject in expreſs words, revocable at pleaſure, *l.* 1. *pr. De prec.*; or gives it in general terms, to be uſed by the borrower, without ſpecifying any determinate time or uſe, *l.* 2. § 3. *l.* 4. § 4. *eod. tit.* In either caſe, it may be redemanded by the owner when he thinks fit; for no loan ought to be ſo interpreted as to give the borrower a more extenſive or ample right of uſe in the ſubject than the lender hath expreſſed. As a precarious loan may be recalled at the lender's pleaſure, even at a time that may prove hurtful to the borrower, the borrower is liable only *de dolo, et culpa lata*, *l.* 8. § 3. 6. *eod. tit.* But after he is *in mora*, that is, if he retain the ſubject after it is redemanded, he is accountable for the ſlighteſt omiſſions, and even though the ſubject periſh by accident, *d.* § 6. As a precarious loan is granted from a perſonal regard to the borrower himſelf, it ceaſeth by his death, *l.* 12. § 1. *eod. tit.* and conſequently his heir is obliged to account to the lender for the fruits of the ſubject during his poſſeſſion. One might alſo conclude, that it ought to ceaſe on the death of the lender, becauſe its continuance depends on his pleaſure, which muſt end with his life: yet it has obtained, that till the lender's heir redemand the ſubject, his conſent is preſumed for continuing the contract, *d. l.* 12. § 1.

26. Depoſitation

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26. Depoſitation is a contract, by which one who has the cuſtody of a ſubject intruſted to him is obliged to reſtore it to the owner when demanded. He who intruſts is called *the depoſitor*, and the truſtee *the depoſitary*. This contract is alſo perfected *re*; for it is the delivery of the ſubject depoſited which founds the obligation upon the depoſitary to reſtore. The property of the thing depoſited remains with the depoſitor; and therefore, if the thing be loſt, it is loſt to him. Depoſitation is a gratuitous contract on the part of the depoſitary. If any conſideration is to be given him for his pains in keeping it, the contract reſolves into a *locatio operarum*, *l.* 1. § 8. *Depoſ.* As a conſequence of this, the depoſitary is liable only *de lata culpa*, for groſs negligence, *l.* 20. *eod. tit.*; but after the depoſit is demanded by the owner, the depoſitary is bound in the moſt exact diligence. Nay, if the ſubject ſhould periſh thereafter, though by mere misfortune, *caſu fortuito*, he is liable for the value, *l.* 12. § 3. *eod. tit.*; unleſs it ſhall appear, that it would have alſo periſhed, or have had the ſame chances of periſhing, tho' it had been redelivered to the owner when he called for it, *l.* 14. § 1. *eod. tit.* Where a cheſt or other repoſitory under lock and key is depoſited, without delivering to the depoſitary the key, and ſhewing him the goods contained in it, he is anſwerable only for the repoſitory itſelf, and not for its contents, of which he could not be ſaid to have undertaken the charge, *March* 18. 1626, *E. Caſſilis*. And though the key ſhould be delivered to him, he ought to be liable only for the conſequences of groſs neglect or omiſſion, according to the rule of diligence already explained. Where a ſubject is committed to the keeping of two or more depoſitaries, each of them is liable for the whole, or *in ſolidum*, *l.* 1. § 43. *Depoſ.*

27. By this contract, the depoſitary is bound to reſtore the ſubject to the depoſitor *cum omni cauſa*, with all its fruits and acceſſories, which obligation is inforced by the *actio directa*: but if a third party ſhall claim the property of it, the depoſitary ought to hold it in his cuſtody till the queſtion of right be diſcuſſed, *l.* 31. § 1. *eod. tit.* The *actio contraria* of depoſitation is competent to the depoſitary, that the owner, for whoſe ſole benefit the depoſit was made, may indemnify him of all the loſs he has ſuſtained through occaſion of the contract, and reimburſe him of the whole expence laid out by him on the ſubject while it was in his cuſtody. The ſpecial engagement under which the depoſitary lies, to redeliver the depoſit when called for, and the exuberant truſt implied in that contract, were by the Roman law ſo interpreted, as to exclude all right of retaining the ſubject towards the payment or ſecurity of any debt that might be due by the depoſitor to himſelf, *l.* 11. *C. Depoſ.* And indeed, where the ground of ſuch debt has no relation to the depoſit, which was perhaps the only caſe the Roman lawyer had in his eye, the practice of Scotland is agreeable to this doctrine, *Fount. Feb.* 23. 1697, *Scot*; *July* 16. 1709, *Cred. of Steuart*. But where the claim ariſes from the depoſitary's damage, or from the expence diſburſed by him on the ſubject, the depoſitary, who has undertaken the office gratuitouſly, may retain that ſubject till he be fully indemnified, *Feb.* 18. 1662, *E. Bedford*. If, on the depoſitary's death, his heir, ignorant of the depoſit, and believing himſelf true owner of the ſubject, ſell it *bona fide*, he is accountable to the depoſitor only for the price he received, though that ſhould be leſs than its true value; and if he has not yet received the price, he will be diſcharged of his obligation, by aſſigning the price to the depoſitor, *l.* 1. § 47. *l.* 2. *Depoſ.* The Roman lawyer applies this doctrine alſo to the contract of commodate.

28. There are ſeveral ſpecial kinds of depoſit which deſerve our particular notice, in ſo far as they differ in their nature from the common contract now explained. By an edict of the Roman pretor, called *Nautæ*, *caupones*, *ſtabularii*, which is with ſome variations adopted into the law of Scotland, an

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obligation is induced, by a traveller's entering into an inn, ſhip, or ſtable, and there depoſiting his goods, or putting up his horſes, by which the innkeeper, ſhipmaſter, or ſtabler, is bound to preſerve for the owner whatever is intruſted to his care. This obligation is formed by the law itſelf; for the bare act of receiving the goods lays them under it without covenant, *l.* 1. § 8. *Naut. caup.* It is limited to what is done in the ſhip, inn, or ſtable; for if the goods be ſtolen or damaged after they are carried off from thence, and ſo no longer under the depoſitor's eye, he is not accountable, *l.* 7. *pr. eod. tit.* But till then he muſt uſe exact diligence; and is anſwerable, not only for his own facts, and thoſe of his ſervants, *d. l.* 7. *pr.* which is an obligation implied in the exerciſe of theſe employments, but for the facts of the other gueſts and paſſengers, *d. l.* 1. § 8. Nay it would ſeem that the ſhipmaſter is bound to make up the damage ariſing to the owner of the goods from unſkilful ſtowage, or their being loaded upon the ſhip's deck without his conſent, *Laws of Wisby, art.* 23.; *Ordon. de Louis XIV. c.* 16. § 11.; and that the maſter is alſo accountable for the condition of his ſhip, and the ſkill of himſelf and his crew. If therefore the ſhip ſhould be crazy, or unſkilfully navigated, or if the maſter ſhould ſail up a river without a pilot where pilots are ordinarily employed, and if through that omiſſion any goods belonging to freighters or paſſengers ſhould be loſt or rendered uſeleſs, he would be chargeable with the conſequences. In theſe caſes a certain degree of blame may be imputed to the maſter; and the law is expreſs, that if the goods periſh, even without his fault, he is liable, unleſs the loſs has happened *damno fatali*, by an accident which could be neither foreſeen nor withſtood; if, *ex. gr.* they have been loſt by ſtorm, or carried off forcibly by pirates or houſe-breakers, *l.* 3. § 1. *eod. tit.* The engagements thus formed are grounded entirely on poſitive inſtitution; and ſtrike againſt common rules, by which depoſitaries are bound only for themſelves and ſervants, and are liable in no more than a middle degree of diligence: but the ſecurity of travellers againſt the frequent thefts committed by that ſet of men and their aſſociates, forced the Romans upon this edict, *ad reprimendam improbitatem hoc genus hominum, d. l.* 3. § 1.

29. The extent of the damage may be aſcertained againſt the innkeeper, &c. by the oath *in litem* of the party ſuffering, *Dec.* 4. 1661, *White.* Yet this oath will not be admitted, upon his allegation that money was taken out of his pocket or trunk while he continued in the inn, unleſs it ſhall appear in proof, that his cloaths have been carried away, or that the trunk has been unlocked, or otherwiſe broke open; ſee *June* 5. 1707, *Browſter.* This edict is, by the uſage of Scotland, extended to vintners in boroughs, tho' they be not innkeepers, *Fount. Feb.* 17. 1687, *Maſter of Forbes*; and to houſeholders who take in lodgers, *Fount. July* 5. 1694, *May*; and would poſſibly, from the parity of reaſon, be alſo applied againſt carriers. Not only maſters of ſhips are included under it, but their *exercitores* or employers, whether they be themſelves the owners, or have freighted the ſhip from the owner, *l.* 1. § 2. *eod. tit.*; not indeed *in ſolidum*, but each for the ſhare or intereſt he hath in the ſhip, *l.* 7. § 5. *eod. tit.* And by a ſtatute, 7° *Geo. II. c.* 15. owners of ſhips are no farther bound for embezzlement by the maſter or crew, without their knowledge, than to the amount of the value of the ſhip, and the freight due upon that voyage in the courſe of which the goods were embezzled. By the preſent cuſtom of trading nations, no goods brought into a ſhip fall under this edict, unleſs they have been delivered to the maſter or mate, or have been entered into the ſhip-books, or ſpecified in t e bills of lading.

30. Sequeſtration is likewiſe a kind of depoſit, by which a ſubject laid claim to by two or more different competitors, is depoſited in the hands of a neutral perſon, to be delivered to him who ſhall be declared to have the

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the beſt right to it. Sequeſtration of lands hath been already conſidered. Moveables may be alſo ſequeſtered, either by the conſent of parties, or by the order of a judge. The firſt is ſtyled a *voluntary*, the other, a *judicial* ſequeſtration. In this, ſequeſtration differs from a common depoſit, that it is not a gratuitous office, eſpecially if it be undertaken by the warrant of a judge, in which caſe a ſalary to the ſequeſtree for his trouble is either expreſſed or implied. Since therefore he reaps a benefit by the contract, as well as the claimants upon the ſubject, he cannot, like a common depoſitary, throw up his office at pleaſure; and, for the ſame reaſon, he is liable in a middle degree of diligence.

31. Conſignation of money is a ſpecies of ſequeſtration, by which a ſum that is claimed by different competitors is conſigned or depoſited in the hands of a neutral perſon, to be delivered up by him to that claimant to whom it ſhall be adjudged by decree. An inſtance of a conventional conſignation has been already given, in the caſe of wadſets, where the conſignatary is named by the parties. Legal conſignations are moſt frequently made in ſuſpenſions of a charge, in which the validity of the debt demanded is called in queſtion by the debtor who ſuſpends, and who is ſometimes laid under the neceſſity of conſigning the ſum charged for, till the iſſue of the ſuſpenſion. The riſk or *periculum* of the conſigned money lies on the conſigner, in the following caſes: *Firſt*, If he had no good reaſon to conſign; if, *ex. gr.* the reverſer in a wadſet conſigns, without being ready to perform his part of the contract; for in ſuch caſe the wadſetter cannot in equity be compelled to accept of the conſigned money. *2dly*, If the conſignation hath been irregular; if, for inſtance, the order of redemption has not been duly uſed, or if part only of the ſums due have been conſigned. *3dly*, The conſignation is upon the conſigner's riſk, if he has not choſen a proper perſon for conſignatary. All are proper conſignataries, who are either authoriſed by law, or named by the parties. If therefore conſignation be made by a ſuſpender to the clerk of the bills, *Feb.* 15. 1673, *Mowat*, or by a judicial purchaſer to the magiſtrates of Edinburgh, in the terms of act 1695, *c.* 6. or by a reverſer to the perſon named in the wadſet-right, the conſigner cannot ſuffer on account of an improper choice. Where no conſignatary is named in the contract of wadſet, the conſignation ought to be made, either to one of entire credit, or whoſe public office ſeems to authoriſe him to receive conſigned money, as the clerk of the bills, or a clerk of ſeſſion, at leaſt if his credit be not ſuſpected. If, on the other hand, the debtor has juſt ground for conſigning, and if the conſignation has been uſed regularly, and made to a proper conſignatary, the loſs ariſing from the conſignatary's ſupervening bankruptcy muſt fall on the wadſetter, ſeller, or other creditor, who ought to have prevented the conſignation by accepting the money offered to him, *l.* 19. *C. De uſur.*; *July* 28. 1665, *Scot.* The fee due to the conſignatary ought alſo, in this caſe, to be charged on the creditor, who, by his groundleſs refuſal of the money, hath made the conſignation neceſſary. It is the office of a conſignatary to keep the ſum conſigned in ſafe cuſtody till it be called for: if therefore, in the view of gain to himſelf, he ſhall put it out at intereſt, the debtor's bankruptcy, though at the time of borrowing he had been of the moſt undoubted credit, muſt be charged to his account. But the intereſt ariſing from the loan of conſigned money, can in no caſe be claimed by the conſigner: for money is conſigned, not to raiſe any annual profit to the conſigner, but merely for cuſtody; and as the conſignatary runs the whole riſk, he is, on the other part, intitled to all the profits, *Br. MS. July* 20. 1716, *Barclay*.

32. A truſt is alſo of the nature of depoſitation, by which a proprietor transfers

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transfers to another the property of the ſubject intruſted, not that it ſhould remain with him, but that it may be applied to certain uſes for the behoof of a third party. As truſt-deeds were frequently granted in the form of abſolute rights, without any defeaſance or backbond from the truſtee, preſumptions, and the teſtimony of witneſſes, were in ſpecial caſes admitted againſt the truſtee, or his heir, in proof of the truſt, *Feb.* 22. 1665, *Viſc. Kingſton*; *Jan.* 12. 1666, *Exec. of Stevenſon*; but ſingular ſucceſſors acquiring from the truſtee were ſecure. To prevent the many law-ſuits purſued on this queſtion, it was enacted, by 1696, *c.* 25. that no action for declaring a truſt ſhould be received, except upon the oath of the truſtee, or a declaration ſigned by him acknowledging it. Since which time, truſt-deeds have been ſeldom granted, without either a clauſe in the deed expreſſing the uſes, or a backbond by the truſtee declaring them.

33. *Pignus*, or pledge, ſometimes denotes the ſubject pledged, and ſometimes the contract of impignoration. This contract, when oppoſed to a right of wadſet, or of an heritable pledge, is that by which a debtor puts into the hands of his creditor a moveable ſubject, in ſecurity of the debt, to be redelivered upon payment. As it is entered into for the benefit both of the giver and receiver, the one being concerned to get money, and the other to lay out a ſum upon good ſecurity, the creditor who receives the pledge is liable in the middle degree of diligence for preſerving it; *præſtat culpam levem.* Becauſe the ſpecial ſubject pledged continues the debtor's property, therefore if it periſhes during the impignoration, it periſhes to the debtor, according to the rule ſtated above, § 20. The creditor is intitled to an action againſt the debtor for the recovery of the expences which he has diſburſed profitably on the ſubject while in his hands, *l.* 25. *De pign. act.* The *pactum legis commiſſoriæ* in moveable pledges has no ſtronger effects than in wadſets of land, as to which ſee *b.* 2. *t.* 8. § 14.; and the ſame equity of redemption is indulged to the debtor in both caſes. By the Roman law, a creditor whoſe debt was ſecured by a pledge, might, after intimation made to the debtor, ſell it, if the power of ſelling was not expreſsly denied to the creditor; and even where it was, the creditor might ſell it for his payment after three intimations, *l.* 4. *eod. tit.*; ſuch prohibition being accounted in ſome degree deſtructive of the nature and intention of the contract. But, by the uſage of Scotland, moveables pledged cannot be ſold without the order of a judge, more than lands hypothecated for a debt. Some creditors have attempted to make a pledge effectual for their payment, by aſſigning the debt to a truſtee; who, upon that conveyance, may arreſt the pledge in the hand of his cedent, the original creditor, and then purſue a forthcoming againſt him. But in this way the original creditor may, by a prior arreſtment of the pledge uſed by another creditor, loſe his right of impignoration; which, from the nature of all real contracts, cannot ſubſiſt but where he who is in the right of the debt is alſo in poſſeſſion of the pledge. The leaſt exceptionable method for the creditor is, to apply to the judge-ordinary for a warrant to diſpoſe of the pledge by a public ſale, to which ſale the debtor muſt be made a party. As in a pledge of moveables the creditor who quits the poſſeſſion of the ſubject loſes the real right he had upon it, ſo a creditor ſecured on land, by infeftment upon his bond, or other ground of debt, if he gives up his old bond, which made part of his real ſecurity, and accepts of a new, loſes the *jus pignoris* he had upon the land: neither will the *ignorantia juris* avail ſuch creditor, though he ſhould be a foreigner, and ſo preſumed unacquainted with the laws of this country; for no equity can revive a real right once loſt, *New Coll.* i. 16.——The right of retention, which bears a near reſemblance to pledge, is to be explained below, *t.* 3. § 4.

34. A

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34. A tacit hypotheck is a ſpecies of pledge, conſtituted without paction, in which the debtor himſelf retains the poſſeſſion of the ſubject impignorated; *vid. ſupr. b.* 2. *t.* 6. § 56. The Romans admitted a variety of tacit or legal hypothecks upon moveables, moſt of which we have rejected, becauſe the impignoration of moveable goods, without their delivery to the creditor, cannot but prove a heavy weight on the free currency of trade, it being impracticable to keep a record for moveables, by which purchaſers may be aſcertained of their danger. But upon this very account, the encouragement of trade, we have adopted into our law ſeveral tacit hypothecks relating to navigation that are generally received by commercial ſtates. Thus mariners may not only recover their wages by a perſonal action againſt the owners of the ſhip with whom they contract, but they have a tacit hypotheck, for ſecurity of theſe wages, upon the freight which is due by the merchant to the owners, *Jan.* 6. 1708, *Sands*. Thus alſo the owners of a ſhip are ſecured in their freight, not only by the merchant's perſonal obligation, but by an hypotheck on the cargo which belongs to that merchant, *Hume, Dec.* 1683, *Mure*. Creditors who lent their money towards the building or fitting out a ſhip, though they had, by the Roman law, no hypotheck upon the ſhip, unleſs it was conſtituted by paction, were nevertheleſs preferable upon it to all the creditors except the fiſk, *l.* 26. 34. *De reb. auct. jud.* By our cuſtoms, the repairers of a ſhip have an hypotheck upon the ſhip, in ſecurity of the expence of reparation, *Nov.* 16. 1711, *Watſon*; *New Coll.* iii. 28.; which is introduced *ex neceſſitate*, becauſe without it the ſhip would be frequently diſabled from proſecuting her voyage, as no ſhipmaſter can be preſumed to have perſonal credit at every port where he may be forced to put in: but there is no ſuch neceſſity for an hypotheck in favour of the builder of a ſhip, *Kames*, 68. The expence of repairing houſes within borough, when it is authoriſed by a warrant of the dean of guild, is ſecured by an hypotheck on the houſe repaired, *ne urbs ruinis deformetur:* but he who repairs without ſuch warrant, and relies on the faith of his employer, hath no ſecurity on the ſubject itſelf, *Home*, 3.; *New Coll.* ii. 86.

35. To conclude the doctrine of real contracts, it may be obſerved, that there is a great variety of them, effectual both by the Roman law and ours, which, becauſe they have not been diſtinguiſhed by ſpecial names, are ſtyled *innominate*. Theſe are by civilians reduced into four general heads; *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*. In all innominate contracts, ſomething muſt have been actually given or performed by one of the contracters, in order to form the contract. If the agreement was barely *dabo ut des*, that certain things ſhould be afterwards given or performed, it reſolved into a ſimple convention, or *nudum pactum*, which, it has already been obſerved, produced no action by that law. The party who gave or performed, had an option, either to reſile from the contract, or to ſue the other party for performance, by an action *præſcriptis verbis*. By our law, all contracts, even innominate, are equally obligatory on both parties from the date, ſo that neither party can reſile, even though the one has, and the other has not performed his part of the contract.

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TIT. II.

Of Obligations by Word and by Writing.

WE now proceed, according to the order of the Roman law, to explain the nature of contracts perfected by word, which is the ſecond branch of the diviſion of contracts ſtated in the preceding title, § 17. Though by that law the greateſt part both of real and conſenſual contracts might be formed verbally, yet neither of them fell under the appellation of contracts perfected *verbis* in the ſenſe of the Roman law, but conſtituted different branches of the ſame general diviſion of contracts, and are accordingly explained under different titles. The only contract of the Romans that can be properly ſaid to be perfected *verbis*, was their *verborum obligatio*, to the forming of which it behoved both parties to utter certain *verba ſolennia*, or words of ſtyle. All other verbal obligations, in which that preciſe form of words was neglected, were accounted *nuda pacta*. As there is nothing in the law of Scotland analogous to the *verborum obligatio*, we may, without impropriety, apply the appellation of verbal obligations to ſuch as have no ſpecial name to diſtinguiſh them by. Of this kind are, *firſt*, promiſes, where nothing is to be given or performed but upon one part, and which are therefore always gratuitous; *2dly*, verbal agreements, (ſo called in contradiſtinction to promiſes), which require the intervention of two different perſons at leaſt, who come under mutual obligations to one another; for theſe two are in this manner diſtinguiſhed by the Roman law, *l.* 3. *De pollicit.* where *pacta* or verbal agreements are ſaid to be formed by the mutual conſent of two perſons, but promiſes to be the ſole act of the promiſer; and they differ chiefly in the different manners of proof which are required by the uſage of Scotland to ſupport them, explained below, *b.* 4. *t.* 2. § 20. The effect given by our law to verbal obligations is, by Stair, *b.* 1. *t.* 10. § 7. aſcribed to an act of ſederunt, *Nov.* 27. 1592, which, as he recites it, declares all pactions and promiſes to be effectual: but that act ſays no more than that *all irritant clauſes in contracts, infeftments, bonds, and other writings, ſhall be judged of, preciſely according to the words and meaning of the ſaid clauſes*, without the leaſt mention of pactions or promiſes. The obvious reaſon why all verbal agreements and promiſes muſt be obligatory, in every nation where no ſpecial exception is made by poſitive inſtitution, is, that by a common rule of law, every agreement in a lawful matter, though conſtituted only verbally, induces a full or proper obligation.

2. From this general rule, That every lawful agreement, even verbal, is obligatory, the cuſtom of Scotland has excepted all obligations relating to heritable rights, which are utterly ineffectual if they are barely verbal: for in the tranſmiſſion of heritage, which is juſtly accounted of the greateſt importance to ſociety, parties are not to be catched by raſh expreſſions, but continue free, till they have diſcovered their deliberate and final reſolution concerning it by writing. This exception therefore takes place in obligations concerning land-rights, *firſt*, where the obligation ariſes from the contract of ſale, in conſideration of a price to be paid; notwithſtanding that ſale, being a conſenſual contract, may, when the ſubject is moveable, be perfected without writing. It holds, *2dly*, even where the heritable right is only temporary, as in a leaſe, which, when conſtituted without writing, hath no force but for one year, though the parties ſhould have verbally agreed, that it was to laſt for a number of years, *July* 15. 1637, *Skene*; and though the tenant ſhould, in conſequence of the bargain, have entered into, and continued in the poſſeſſion of the farm for two years,

July

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July 16. 1636, *Keith*. 3*dly*, No verbal agreement in relation to heritage is binding, though it ſhould be referred to the oath of the party himſelf, that he had agreed to it; for ſo long as writing is not adhibited, both parties are conſidered to have a right of reſiling, as from an unfiniſhed bargain. 4*thly*, Where an agreement concerning heritage is executed in the form of mutual miſſives, both miſſives muſt be probative; otherwiſe either party may reſile, as in the caſe of an incomplete minute or contract; and of conſequence a written offer verbally accepted may be reſiled from, *St. b.* 1. *t.* 10. § 3. & 9.; *New Coll.* iii. 24. *

3. The right competent to a party to reſile from a bargain concerning land, before he has bound himſelf by writing, is called in our law *locus pœnitentiæ;* and it obtains, though one of the parties had written to the other, that he was not to paſs from the bargain; becauſe theſe words ſerve merely to expreſs his preſent intention, and at the ſame time cannot poſſibly bind him to whom the miſſive is directed, *Jan.* 28. 1663, *Montgomery*. If, after a verbal agreement about the purchaſe of lands, part of the price ſhould be paid by the purchaſer, the *interventus rei*, the actual payment of money, creates a valid obligation, and gives a beginning to the contract of ſale, which leaves no room for reſiling, *Fount. Dec.* 23. 1697, *Laury*. And, in general, where-ever *res non eſt integra*, the *locus pœnitentiæ* is excluded, *July* 23. 1674, *E. Kinghorn; Dec.* 1. 1674, *Gordon; Fount. Dec.* 5. 1699, *Thomſon*. As freedom from obligation is favourable, therefore in bargains called *liberatoria*, by which a real right is either paſſed from or reſtricted, there is no *locus pœnitentiæ*, though the agreement be barely verbal, as in the caſe of an annualrenter who has agreed verbally to reſtrict an univerſal infeftment which he had over a debtor's whole eſtate, to a certain part of his lands; ſee *Feb.* 8. 1666, *Ker*. And indeed the purpoſe of thoſe agreements is, not to form any new obligation, but either to extinguiſh an old one, or to bring it within narrower bounds.

4. Writing is alſo required in all bargains where it is a ſpecial condition, or *pars contractus*, that they ſhould be reduced into writing; for there, both parties, by the expreſs tenor of the agreement, reſerve a right of reſiling until writing be adhibited, *Jan.* 12. 1676, *Campbell*. Teſtaments, or laſt-wills, muſt be, in like manner, committed to writing; ſee below, *t.* 9. § 5. 7.

5. Contracts perfected *literis*, or by writing, make the third branch of the Roman diviſion. Their *obligatio literarum* was conſtituted by a writing, in which the granter acknowledged that he had received a ſum of money, and bound himſelf to repay it to the creditor: and becauſe thoſe obligations were frequently granted *ſpe numerandæ pecuniæ*, the granter might elide the creditor's demand, by putting in a plea within two years from the date of the obligation, that he truly received no money, called *exceptio non numeratæ pecuniæ*, unleſs the creditor brought a poſitive proof that it was paid to the debtor. By the uſage of Scotland, all written obligations, and particularly bonds for ſums of money, are founded on prior contracts, and ſo have a cauſe antecedent to and diſtinct from the obligations themſelves, and are therefore effectual from their dates. By the uſual ſtyle of bonds, the

* This point ſeems now to be fixed. In a late caſe, *Mackenzie and Lawſon contra Park, Nov.* 15. 1764, one of the parties having wrote and ſubſcribed an offer to purchaſe an heritable ſubject from the other, upon certain terms, and the other having ſubſcribed a written acceptance, and likewiſe ſubſcribed the offer, but neither of which was holograph of him, or formally atteſted, though there were witneſſes preſent and ſigning; and this party having afterwards reſiled, the court of ſeſſion, in a proceſs againſt him for implement, "found the miſſive and acceptance "not probative, and therefore abſoilzied the defender;" and this although he did not deny his ſubſcription; as the court thought that writing was eſſential, and that the want of legal ſolemnities could not be ſupplied by his acknowledgement.——A ſimilar judgement was given in the caſe of *Biſſet contra Stewart*, in 1765.—— The deciſion, *New Coll.* ii. 197. does not ſeem contrary; as the writing there granted did not import an offer requiring acceptance, but an expreſs obligation to diſpone; and beſides, matters were not entire when he afterwards reſiled.—— The caſe, *Kames, Rem. Dec.* 98. appears to have been of the ſame nature.

debtor

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debtor renounces the exception of not numerated money; which clauſe hath been firſt introduced, from an apprehenſion, that without it that exception would be admitted in our law, as it was in the Roman: but it is merely a clauſe of ſtyle, which takes nothing from the force or effect of the obligation.

6. All obligations reduced into writing, though grounded on contracts which are effectual without writing, require, by the law of Scotland, certain ſolemnities to give them legal effects, which it is neceſſary to explain at ſome length. On this head it may be premiſed, that in every deed, the parties to it, the granter and the grantee, muſt not only be mentioned by their names, but deſigned by proper additions; not barely as a ſolemnity, but becauſe no deed can have effect, unleſs the parties be ſo deſcribed in it as to be diſtinguiſhed from all others. And as this is the only purpoſe of thoſe deſignations or additions, the deed will be ſupported if they be ſuch as ſufficiently mark out who the parties are, (*ſi conſtet de perſona*), in whatever way they may be expreſſed, *Dec.* 22. 1710, *Dickſon*. Bonds, however, were, by our former practice, frequently executed, without filling up the name of the creditor. Theſe got the name of *blank bonds*, and paſſed from hand to hand, like notes payable to the bearer. They were introduced under pretence of ſhunning the trouble and expence of conveyances. They had the effect to cut off from the debtor any ground of compenſation he might have pleaded againſt the bearer, upon debts due to himſelf, by him to whom he firſt delivered the bond, *Feb.* 27. 1668, *Henderſon:* and they were looked on with an unfavourable eye, even while they had the countenance of law; becauſe though the poſſeſſor of a blank bond ſhould be known, yet as it was in his power to transfer it to another, barely by delivering it, his creditors could not, by any diligence, ſecure the ſum for their payment. All deeds, therefore, in which the creditor's name is left blank, are now declared null, as covers to fraud, by 1696, *c.* 25. But as the nullity in this act ſtrikes only againſt writings which are both ſubſcribed and delivered blank in the creditor's name, bonds and other deeds are ſuſtained by our practice, though it ſhould appear from ocular inſpection, that the creditor's name was not inſerted by the writer of the deed, if evidence be not brought that the deed was delivered before filling up the blank, *June* 18. 1746, *Sinclair; July* 23. 1746, *Ruddiman*. From this ſtatute are excepted the notes of trading companies, and the indorſations of bills.

7. Anciently, when writing was little uſed, except either by the clergy, or by perſons bred to the ſtudy of law, or of ſecurities, deeds were never ſubſcribed by the granter; the appending of his ſeal to them was a full proof of his conſent, without ſubſcription, *Reg. Maj. l.* 3. *c.* 8.; and even without witneſſes to the ſealing. For though we learn, both from *Reg. Maj. l.* 2. *c.* 38. § 1.; from Craig, *lib.* 2. *dieg.* 2. § 17.; and from ſeveral of the moſt ancient writings yet extant, that witneſſes were generally called to the ſealing in our earlieſt times; that ſolemnity was not judged eſſential by the court of ſeſſion, *March* 11. 1630, *T. of Edinburgh*. To prevent the frauds frequently practiſed by the counterfeiting of ſeals, and by the appending of one's ſeal after his death to falſe deeds, it was enacted, by 1540, *c.* 117. That no faith ſhould be given to any writing under a ſeal, without the ſubſcription of him who owed it, and witneſſes; and if the granter could not write, a notary was to ſubſcribe for him. But ſtill the ſealing of deeds continued neceſſary: it was expreſsly required as a ſolemnity by 1579, *c.* 80. and was only diſpenſed with in the caſe of deeds which contained a clauſe of regiſtration, by *Aug.* 1584, *c.* 4. Yet ſoon after the laſt-quoted act, it fell quite into diſuſe. As the ſtatute 1540 preſcribed no plain rules about inſerting the names and deſignations of the witneſſes in the deed, or about their ſubſcribing as witneſſes, the ſubſequent practice was far from uniform. In a few inſtances, the witneſſes ſubjoined their ſubſcriptions to the deed, without having their names inſerted in the body of it; and more frequently

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frequently their names were inſerted without their ſubſcribing. But this laſt practice affording no degree of evidence, that the witneſſes inſerted were truly preſent at the granter's ſubſcription, ſince it was in the power of the writer, even where the deed was truly ſigned *remotis teſtibus*, to name any perſons whom he pleaſed as witneſſes, this inaccuracy was rectified by two poſterior ſtatutes; by 1579, *c.* 80. more imperfectly; and afterwards fully, by 1681, *c.* 5.; *vid. infr.* § 11. & 13.

8. Mackenzie, § 4. *h. t.* affirms, that where the granter is in uſe to ſign by two initial letters, i. e. by the firſt letters of his name and ſurname, ſuch ſubſcription ought to be ſuſtained. But it is ſeldom admitted as a ground ſufficient by itſelf for ſupporting a ſubſcription by initials, that the granter uſually ſigned in that way; a proof by the inſtrumentary witneſſes is alſo required, that the granter did *de facto* ſign the deed under challenge, *June* 21. 1681, *Couts*; at leaſt a proof of this is judged neceſſary, if the deed be queſtioned during the life of the inſtrumentary witneſſes, *Harc.* 894; *July* 1729, *Thomſon*. And, ſetting aſide authority, the admitting of initials in place of a full ſubſcription, in any caſe, ſeems to croſs both the words and the ſpirit of the ſtatute; the words, for one cannot be ſaid to write who is only taught to ſcrawl a couple of letters; and the ſpirit of it, for that doctrine would open a wide door to fraud, as the ſigning by initials is much eaſier counterfeited than a full proper ſubſcription. Theſe reaſons ſtrike with ſtill greater force againſt a ſubſcription by a croſs or mark, which bears not the leaſt reſemblance to any letter in the ſubſcriber's name.

9. As a farther guard againſt falſehood, it was provided by 1579, *c.* 80. That all deeds importing heritable title, or other obligations of great importance, ſhould be ſubſcribed or ſealed by the granter, if he could ſubſcribe; or otherwiſe by two notaries, before four witneſſes, denominated by their dwelling-houſes, or by ſome other diſtinguiſhing characters. The two notaries muſt ſign for the granter *unico contextu*, at the ſame time and place; for as they ſubſcribe at the deſire and in the name of a ſingle perſon, the two ſubſcriptions are accounted in law one individual act, *March* 20. 1633, *Cow*. And as a conſequence of this, all the four witneſſes muſt atteſt the ſubſcriptions of both notaries, *Dec.* 24. 1709, *Anderſon*; *Dec.* 27. 1711, *White*. The atteſtation or docket of the notaries muſt expreſs the ſpecial fact, that the granter authoriſed them to ſign; nor can this omiſſion be ſupplied by mentioning it in the body of the deed, *Falc. June* 18. 1745, *Burrel*.

10. By obligations of great importance in this act, are underſtood obligations granted for a ſum or ſubject exceeding in value L. 100 Scots; for ſo the expreſſion hath been uniformly explained by deciſions. A deed which, without laying any new obligation upon the granter, is executed merely in corroboration or ſatisfaction of a former, is not deemed a writing of importance, though the firſt obligation ſhould have exceeded that ſum, *Goſf. Dec.* 13. 1671, *Jack*. The importance of the deed muſt be determined, with reſpect to the debtor in it who comes under the obligation: a deed, therefore, by which the granter is obliged to pay a ſum exceeding L. 100 to ſeveral of his creditors, falls under the act, though not any one of thoſe creditors ſhould be intitled to ſo high a ſum, *Dirl.* 135.; for it is but one obligation in regard of the debtor. In an obligation which is in its nature diviſible, *ex. gr.* a bond for a ſum of money, the ſubſcription of one notary is ſufficient, though the ſum ſhould be above L. 100, if the creditor ſhall reſtrict his claim to the L. 100, *Dec.* 19. 1629, *Elliot*. But an indiviſible obligation, *ex. gr.* for the performance of a fact, which may be the ground of a claim exceeding L. 100, is incapable of ſuch a reſtriction. Yet the damage ariſing to the party from the non-performance is,

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in this caſe, diviſible; and therefore the party who has not fulfilled his obligation, may be condemned in damages to the extent of L. 100, *New Coll.* ii. 113. Though by the act formerly cited, 1540, witneſſes were to atteſt every deed without exception; yet, ſince this laſt act 1579, they have been ſeldom called to obligations for leſs than L. 100.

11. Though the words of the act 1579, in ſo far as relates to the deſignation of the witneſſes, ſeem, if ſtrictly taken, to be limited to the caſe where the party cannot write, it can hardly be doubted, but that the law intended it ſhould reach to all deeds, even where the granter ſigned by himſelf. The words are capable of that conſtruction; and if they were to be expounded otherwiſe, the enactment, as to the firſt branch of the ſtatute, would have been but an unneceſſary, and indeed an imperfect repetition of what had been before enacted by the act 1540. According to this plain intendment of the ſtatute, the witneſſes were, by the common practice ſubſequent to it, ſpecially deſigned, even in deeds ſubſcribed by the granter himſelf; and where they were not ſo deſigned, or perhaps not ſo much as named, the omiſſion was accounted a ſufficient objection againſt the validity of the deed: but becauſe the words of the act were not clear with reſpect to that nullity, the grantee was, by the indulgence of the court, allowed to point out by a ſpecial note, or, as it is called in law, a *condeſcendence*, expreſſing who the witneſſes were; which condeſcendence was to be ſupported by the teſtimony of the witneſſes themſelves, if they were ſtill alive; or, if they were dead, and had ſubſcribed as witneſſes, by comparing their hand-writing in other deeds with their ſubſcription, as it appeared in the deed under challenge, *July* 15. 1664, *Colvill*; *Feb.* 3. 1665, *Falconer*; *July* 21. 1711, *Ogilvy*; *Falc.* i. 156.; *New Coll.* i. 84 *. And this practice of admitting a condeſcendence continued till the act 1681, *c.* 5. to be immediately explained.

12. By 1593, *c.* 175. all original charters, contracts, and others whatever, which do not mention the name, dwelling-place, and other denomination of the writer, are declared null: but notwithſtanding the copulative *and* in the ſtatute, a deed is accounted valid, if the writer be deſigned by his dwelling-place, though he be not alſo diſtinguiſhed by a more ſpecial deſignation from others of that name reſiding in the ſame borough or pariſh, *Feb.* 15. 1706, *Duncan*, unleſs he who objects to the deed ſhall bring poſitive evidence that it was written by another. Though the words of this act comprehend, in their literal ſignification, all original writings without exception; yet it hath not been for above a century paſt extended to thoſe more inconſiderable deeds which have not, by our practice, required witneſſes. And even in obligations of importance, that part of the act, injoining the writer's name and deſignation to be inſerted in the body of the deed before inſerting the inſtrumentary witneſſes, ſeems to have loſt its authority; for by a deciſion, *Dalr.* 158. it was adjudged ſufficient for ſupporting a teſtament, that the writer, who was alſo an inſtrumentary witneſs, adjected to his ſubſcription theſe words, *witneſs and writer hereof*.

13. To aſſiſt the memory of witneſſes who, when they did not ſubſcribe the deed, were apt, after ſome diſtance of time, to diſown their having been witneſſes through forgetfulneſs, it was enacted by 1681, *c.* 5. that no witneſs, though inſerted in the deed, ſhould be received as evidence, if he did not alſo ſubſcribe as witneſs. And whereas, by our former cuſtom, the neglecting to deſign the witneſſes might be ſupplied by an after conde-

* By the judgement of the Houſe of Lords in this laſt caſe, it was adjudged, that it was not neceſſary to condeſcend on the deſignations of the witneſſes to a deed executed between the 1579 and 1681.

ſcendence,

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ſcendence, pointing out their deſignations, that act declares all writings to be ſubſcribed for the future, in which the writer and witneſſes are not deſigned, null, and that this defect may not be ſupplied by any condeſcendence. The words in the act, requiring the deſignations of the writer and witneſſes to all deeds without exception, muſt, by the juſt rules of interpretation, be limited to writings of importance to which theſe ſolemnities had been in uſe to be adhibited, in conſequence of the acts 1579 and 1593, and ſo make no alteration in our law with regard to the deeds of leſſer moment; which, by the practice prior to the 1681, required neither writer nor witneſſes. The ſame ſtatute enacts, that no perſon ſhall ſign as witneſs to the ſubſcription of any party, unleſs he knew him when he ſubſcribed, and either ſaw him ſign, or heard him give warrant to the notary to ſign for him; or at leaſt, unleſs he heard him own the ſubſcription to be his: and the tranſgreſſor of this enactment is declared puniſhable, as acceſſory to forgery.

14. Where any ſecurity was to be executed, conſiſting of ſeveral ſheets of paper, the ſheets were, by the former cuſtom, paſted together by the ends, and the granter ſigned upon all the joinings. But this cuſtom of ſigning at the joinings was not ſo univerſal as to acquire the ſtrength of proper law: for it never affected cautioners, *Jan.* 14. 1674, *Ogilvie*; it was ſometimes neglected even by the principal debtor or other granter; and it had received no confirmation from ſtatute. Our ſupreme court, therefore, thought themſelves at liberty to repel the objection, That the granter had not ſigned at the joinings, as well as at the end of the deed, where the ſpecial circumſtances of the deed left no room to ſuſpect fraud; where, *ex. gr.* all the obligations upon the granter's part were contained in the laſt ſheet, *Nov.* 23. 1708, *Sime*. For obviating the inconvenience of rolling down a number of ſheets in a deed, before one could come at the particular clauſe upon which he was to ground his plea, all contracts, decrees, diſpoſitions, and other ſecurities, are allowed, by 1696, *c.* 15. to be written book-wiſe, provided each page be marked by its number, *Firſt*, *Second*, &c. and ſigned by the party, and it be mentioned at the end of the laſt page how many pages the deed conſiſts of; which laſt page is the only one which it neceſſarily behoves the witneſſes to ſubſcribe.

15. After having explained the ſolemnities required in deeds ſubſcribed by private parties, or by notaries for them, thoſe that are eſſential to inſtruments or atteſtations ſigned by the public officers of the law, as notaries or meſſengers, may be conſidered. Inſtruments of ſeiſin, though of the moſt extenſive land-eſtates, are, by *Aug.* 1584, *c.* 4. declared valid, if ſigned by one notary, with a reaſonable number of witneſſes, though the act 1579 had required two notaries to all obligations of importance: which ſpeciality ariſes from this, that the ſuperior, prior to his giving ſeiſin, had virtually bound himſelf to it, by ſigning the charter or precept; ſo that the ſubſequent ſeiſin is no more than the accompliſhment or fulfilling of a former obligation. The words of the act 1584, *with a reaſonable number of witneſſes*, are, in practice, underſtood of two, which is deemed a ſufficient number for every deed that can be executed by one notary, *July* 15. 1680, *Biſh. of Aberdeen*. This enactment of the ſtatute 1584, relating to ſeiſins, has been, from the parity of reaſon, extended by cuſtom to inſtruments of reſignation. That clauſe of the before-cited act 1681, *c.* 5. which requires witneſſes to ſubſcribe their atteſtations, and their names and deſignations to be inſerted in the body of the deed, expreſsly comprehends inſtruments of ſeiſin, of reſignation *ad remanentiam*, of intimation of aſſignations, tranſlations, and retroceſſions.

16. All

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16. All ſeiſins were, by the old cuſtom, extended on a ſingle ſheet of parchment; and when from the long deſcription of the lands contained in the ſeiſin, or the variety of other matter, a ſheet larger than the common ſize was neceſſary, it became hard either for the writer or reader to manage it: by 1686, *c.* 17. therefore ſeiſins were allowed to be written book-wiſe, provided that the notary and witneſſes ſigned each leaf, and that the notary mentioned in his atteſtation the number of leaves of which the ſeiſin conſiſted; the laſt of which proviſos, requiring the atteſtation of the notary to the number of leaves, appears to have been ſeldom or never complied with, *New Coll.* i. 2.; but is now made neceſſary by act of ſederunt, *Jan.* 17. 1756. The act, 1686, has not the leaſt relation to a poſterior one already explained, 1696, *c.* 15. which authoriſes contracts, &c. to be written book-wiſe. The firſt confeſſedly treats of nothing but ſeiſins; and the laſt is confined, both by the preamble and ſtatutory words, to ſuch contracts and other ſecurities as by the former cuſtom had been extended on ſeveral ſheets of paper paſted together, which ſeiſins never were, ſuch at leaſt as flowed from the crown; and the whole of the enactment ſpecially refers to that former cuſtom, without once uſing the word *ſeiſin*, or giving the remoteſt hint that the ſtatute was corrective. Yet the court of ſeſſion ſeem to have explained the laſt act, 1696, into a repeal of the former, *firſt*, by a deciſion, *Jan.* 1725, *E. Buchan*, repelling an objection againſt a ſeiſin, That each page was not atteſted by witneſſes in the terms of the act 1686, becauſe the poſterior act 1696 required the witneſſes to ſign only the laſt page; *2dly*, by act of ſederunt, *Jan.* 17. 1756, ordaining all ſeiſins to be marked in every page by the numbers, *Firſt*, *Second*, &c. according to the directions of the act 1696, under the certification of nullity, though the act 1686 preſcribed no ſuch rule.

17. All executions, or, as they are called in our ſtatutes, *indorſations*, of ſummonſes and diligences, were by the ancient uſage valid, without the meſſenger's ſubſcription, barely by affixing his ſtamp to them, 1540, *c.* 74. After writing came to be uſed more univerſally, his ſubſcription was required to all copies of ſummonſes delivered by him to defenders or parties, 1592, *c.* 139. At laſt, by 1686, *c.* 4. the neceſſity of ſealing executions is aboliſhed, and all executions and citations before any judge, civil or criminal, muſt be ſubſcribed by the witneſſes as well as the meſſenger; but their names and deſignations need not be inſerted in them by that ſtatute. The deſignation of the witneſſes is, by a prior act, formerly cited, 1681, *c.* 5. required in certain executions of meſſengers, viz. in thoſe of inhibition, interdiction, horning, and arreſtment: and it having been objected againſt the execution of a ſummons, That the witneſſes were not deſigned according to the directions of that act, the objection was repelled, becauſe it would have been incongruous for the legiſlature to mention any particular ſpecies of executions, if it had not been intended, that theſe, and theſe only, ſhould fall under the act, *Enumeratio unius eſt excluſio alterius*, *Dec.* 8. 1736, *Napier*. It is not neceſſary for the witneſſes to a notorial inſtrument, or to an execution, to ſee the notary or meſſenger ſign in the terms of the act 1681; for as the witneſſes to theſe are not accounted witneſſes to the ſubſcription of the notary or meſſenger who atteſts, but to the tranſaction atteſted, on which the inſtrument or execution proceeds, the preſence of the witneſſes at the tranſact on, ſupports the inſtrument or execution, *July* 5. 1710, *Lord Gray*. As the act 1593, *c.* 175. by which the inſerting of the name and deſignation of the writer is made eſſential to deeds, expreſſes only original charters, contracts, obligations, &c. the enactment has not been extended by uſage to notorial inſtruments or executions of meſſengers, which are the mere atteſtations of facts by public officers, and cannot be called original writings.

18. The

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18. The inſerting of the time and place of ſubſcribing may, in many caſes, be a ſtrong guard againſt forgery; for which reaſon it is by Stair accounted a ſolemnity eſſential to deeds, *b.* 4. *t.* 42. § 19. But as ſolemnities are not to be multiplied without a warrant either from ſtatute or univerſal cuſtom, deeds have been adjudged valid, without the mention either of the place, *Feb.* 15. 1706, *Duncan*, or of the time of ſigning, *July* 21. 1711, *Ogilvie*, unleſs where the validity or the preference of the deed depends on its date; of which afterwards, § 22.

19. The acts 1579, 1593, and 1681, declare expreſsly, that all deeds which are deſtitute of the ſolemnities thereby required *ſhall bear no faith in judgement*; or *that they ſhall be null, and not ſuppliable by any condeſcendence*; the natural import of which expreſſion is, that they cannot produce an action againſt the granter, or be pleaded as evidence before any court to his prejudice. Agreeably to this interpretation, it has been adjudged by ſundry deciſions, that ſuch deeds could not be ſupported by the moſt pregnant proof that could be offered in their favour, *Fount. Nov.* 21. 1704, *Kirkpatrick*; *Jan.* 25. 1738, *Low*; nor even by referring the verity of the ſubſcription, and the ſubſiſtence of the debt, to the oath of the granter's repreſentative, *Jan.* 4. 1710, *Logie*. But by other deciſions a condeſcendence hath been admitted for ſupplying the defect of the deed, not only where the witneſſes to a party's ſubſcription have not been deſigned; in which caſe a condeſcendence was uniformly allowed till the year 1681, on account of the doubtful meaning of the act 1579; but even where the writer's name and deſignation were omitted, though that is declared a nullity in the moſt expreſs words by the act 1593, *Dec.* 5. 1665, *Cuningham*; *Dirl.* 343.; *Fount. Feb.* 25. 1710, *Maxwell*.

20. From the obſervance of the ſolemnities above explained, a preſumptive evidence ariſes for the genuineneſs of a deed, without which it has no legal force. Where therefore a deed is vitiated, by eraſing certain words, and ſuperinducing others in their place, or by interlineations, ſuch additions or alterations cannot bind the granter, becauſe they are deſtitute of that evidence: the preſumption is, that they have been made after the granter and witneſſes had ſigned the deed, ſince no perſon is preſumed to ſign a blotted or vitiated writing. But if it be either mentioned in the deed itſelf, or acknowledged by the granter upon oath, that thoſe alterations were made before his ſubſcription, they are obligatory on the granter. In ſome ſpecial caſes the inſtrumentary witneſſes are admitted to prove this fact, *Feb.* 1730, *Arrot*; but more frequently that manner of proof is rejected, *Colvil, March* 14. 1579, *Nairn*; *Nov.* 22. 1671, *Pattullo*. Marginal notes, though ſigned by the granter, are in like manner preſumed to have been added after ſigning the deed, if it be not expreſſed in the teſting clauſe, that the witneſſes to the deed were alſo witneſſes to theſe additions. In mutual contracts, a marginal note upon one of the duplicates is probative againſt the party who is poſſeſſed of, and founds on that duplicate, though there ſhould be no ſuch note upon the other duplicate; but if the note ſhall contain any thing in favour of that party, it is not binding on the adverſe party, unleſs it be ſupported either by his oath, or by poſterior relative writings, or in ſpecial caſes by the teſtimony of the inſtrumentary witneſſes.

21. A new requiſite has been added, ſince the union of the two kingdoms, to certain deeds, for the benefit of the revenue, that they ſhall be ſigned on ſtamped paper or parchment, paying a ſtated duty to the crown. Charters, retours, precepts of *Clare conſtat*, and ſeiſins of lands holden burgage, or of any ſubject, muſt, by 10° *Ann. c.* 19. made perpetual by 3° *Geo. I. c.* 7. be written on parchment or paper paying 2 s. 3 d. By 12° *Ann.*

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ſeſſ. 2. *c.* 9. § 21. all bonds, indentures, leaſes, and in general all deeds not charged by the former act, are to be written on paper paying 6 d.; and upon the deeds charged by the laſt of thoſe ſtatutes an additional duty has been ſince impoſed of 1 s. by 30° *Geo. II. c.* 19. Bail-bonds are expreſsly excepted from the act 12° *Ann.*; and ſundry other writings are in practice not charged with any duty, as teſtaments, diſcharges of rent or of intereſt, bills of exchange; and all judicial deeds, as notorial inſtruments, bonds of cautionry in ſuſpenſions, looſings of arreſtment, and others of a like nature. No more than one deed can be written on the ſame piece of parchment or paper, § 24.; and no deed written upon parchment or paper not ſtamped ſhall be available, till it be ſtamped, and a receipt produced for L. 5 paid to the crown over and above the ſtamp-duties, § 25.

22. Sundry obligations, even of the greateſt importance, are in ſo far privileged, that they have the ſupport of law, though they be deſtitute of ſome of the ſolemnities which are eſſential to other deeds. *Firſt*, Holograph deeds, *i. e.* deeds written with the granter's own hand, are valid without witneſſes, becauſe one's hand-writing through a whole deed is harder to be counterfeited, and therefore leſs expoſed to forgery, than the bare ſubſcription of his name and ſurname. This privilege is extended to obligations, the ſubſtantials of which are written by the granter himſelf, *Jan.* 23. 1675, *Vanſe*; ſee *Nov.* 30. 1711, *Cred. of Spot.* Holograph writings ought regularly to mention, that they are written by the granter; in which caſe they are preſumed holograph, unleſs the contrary be proved, *Dec.* 9. 1635, *E. Rothes.* But though this ſhould be neglected, a proof of holograph will be admitted, either *comparatione literarum*, or by witneſſes who ſaw the deed written and ſigned, *June* 11. 1711, *Donaldſon.* It is a rule, That no holograph writing, without witneſſes, can prove its own date; or, in other words, the date of a holograph deed is not proved, barely by the granter's aſſertion in the body of it, that it was ſigned upon ſuch a day; otherwiſe he might, when he is not controlled by witneſſes, antedate writings, by which his heirs might be cut off from the plea of deathbed, creditors-inhibiters from the benefit of legal diligence, or a huſband from the defence, That his wife had granted the obligation ſued upon after ſhe was *veſtita viro.* In queſtions therefore with the granter's huſband, *Jan.* 20. 1636, *Temple*, or his heir, *June* 24. 1681, *Dows*, or creditor-inhibiter, *June* 21. 1665, *Braidy*, or arreſter, *Fount. July* 22. 1708, *E. Selkirk*, the date of holograph deeds muſt be ſupported *aliunde* by adminicles; which adminicles muſt be pregnant where there is any ſuſpicion of fraud.

23. A deed ſubſcribed by a number of perſons, members of a corporate body, or even by a number of private perſons, has been once and again adjudged effectual without witneſſes; the parties in the obligation being preſumed to have been witneſſes to each other's ſubſcribing, *July* 19. 1676, *Forreſt*; *Jan.* 7. 1732, *Sea-box of Queensferry.* Teſtamentary deeds are ſo much favoured, that if the teſtator's intention appear ſufficiently, they are ſuſtained, though not quite formal, eſpecially if they be executed where men of ſkill in buſineſs cannot be had, *Fount. Jan.* 1. 1708, *Ker*; *Jan.* 20. 1709, *Pennycuik.* And let the ſubject of a teſtament be ever ſo valuable, one notary ſigning for the teſtator, with two witneſſes, is ſufficient, *Hadd. Jan.* 18. 1623, , though two notaries are required by ſtatute to all deeds of importance. It was not unuſual for clergymen to enter notaries before the Reformation; but miniſters (by which are meant parochial preſbyters) are, by 1584, *c.* 133. diſabled from exerciſing any civil office, as of judge, advocate, or notary, except in the caſe of teſtaments. The powers which were continued to miniſters by this act, in the ſpecial matter of teſtaments, was originally intended for the ſingle purpoſe of authoriſing the

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the atteſtation of teſtaments by ſuch churchmen as had regularly entered notaries; but cuſtom has long extended it, without diſtinction, to all miniſters, becauſe they are obliged, by their office, to be frequently with dying perſons, where notaries cannot eaſily be got.——Though ſlighter informalities are not ſufficient to ſet aſide teſtamentary deeds, yet more eſſential defects are fatal to them. Hence it was adjudged a good objection againſt a teſtament, that the witneſſes did not hear the deceaſed give orders to the notary for ſigning, or ſee him touch the pen in token of his approbation of the contents, *New Coll.* ii. 222. Receipts and diſcharges granted to tenants for rent, need not, by the uſage of Scotland, be atteſted by witneſſes, let the ſum be ever ſo conſiderable; which hath been introduced in favour of tenants, on account of their ruſticity, as lawyers expreſs it, or their little ſkill in buſineſs, *Nov.* 7. 1674, *Boyd.*

24. Sundry kinds of writings uſed among merchants and trading people in commercial affairs, have been alſo ſuſtained by our uſage, after the example of the moſt civilized ſtates, for the encouragement of trade, though not executed with all the formalities eſſential to common deeds. Miſſive letters *in re mercatoria* are valid, though they be not holograph, *July* 12. 1632, *Ramſay*; and commiſſions from merchant to merchant, though they be ſigned without witneſſes, *Jan.* 11. 1676, *Thomſon.* Neither do fitted accounts among merchants require writer's name or witneſſes, *Forb. MS. Jan.* 27. 1714, *Leſlie.* Yet if the ſubject of the fitted account appears to be in no degree mercantile, it is not ſuſtained without the ordinary ſolemnities. Promiſſory notes, or notes of hand, ſigned in other countries, particularly in France and England, require fewer ſolemnities than other writings. They were adjudged null by our ſupreme court where the writer's name and witneſſes were not inſerted, *Jan.* 29. 1708, *Arbuthnot.* It was afterwards the opinion of the court, that they were valid without witneſſes, even where they were not holograph, *Fount. Dec.* 7. 1711, *King.* But it is a point in which all are agreed, that they are not intitled to the ſpecial privileges of bills, *ibid.*; *Home*, 113.

25. Of all obligations, bills of exchange, on the account of commerce, are the moſt favoured. A bill of exchange is an obligation in the form of a mandate, by which the mandant, or perſon who ſigns the draught in one country, orders his correſpondent in another, to whom the bill is addreſſed, to pay, either upon its being preſented, or within a time ſpecified in it, a certain ſum of money, to a third party, or to any to whom that third party ſhall direct payment to be made. They were introduced to make payment in diſtant places ſafe and eaſy; and they have got the name of *bills of exchange*, becauſe it is the exchange, or the value of money in one place compared with its value in another, which chiefly aſcertains the preciſe extent of the ſum contained in the bill. He who purchaſes it, and ſends it to the creditor, is called *the remitter*; and the creditor to whom it is ſent is called *the poſſeſſor* or *porteur* of the bill. As parties to bills of exchange are of different kingdoms or ſtates, queſtions relating to them are not to be decided by the laws of any particular ſtate, unleſs where ſpecial ſtatute interpoſes, but ought to be decided according to their general nature and properties, as fixed by the received cuſtom of trading nations. Bills therefore have not that limited effect, by the laws of Scotland, which other privileged deeds have, that want ſome of the legal ſolemnities; but are complete *in ſuo genere*, though they are deſtitute of ſome ſtatutory forms. Holograph deeds, for inſtance, not atteſted by witneſſes, are without doubt valid, but they prove not their own dates; whereas bills, though their form admits not of witneſſes, prove their own dates, whether they be holograph of the drawer or not, as effectually as a bond with witneſſes,

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neſſes, *Kames*, 57. But though this doctrine be neceſſary for the ſecurity of merchants, when they are tranſacting proper bills of exchange, in queſtions with either the heir or creditors of the drawer, it ſeems doubtful how far, for the reaſons already aſſigned in the caſe of holograph deeds, § 22. it ought to be extended to ſuch inland bills as are made payable to the drawer himſelf, and where, conſequently, the only perſons concerned in them are the drawer and accepter, *Bankt. b.* 1. *t.* 13. § 20.; ſee *Feb.* 1734, *Chriſtieſons.*

26. Though other deeds require not only the names, but the deſignations, both of the granter and receiver, to be inſerted in them, it is ſufficient to fix an obligation on the drawer of a bill, if the ſubſcription appear to be his: and as for the deſignation of the creditor, that has been thought unneceſſary; becauſe the being poſſeſſed of a bill ſupplies the deſignation, and diſtinguiſhes him to be the true creditor, if he bear the name given in the bill to the creditor. The want of a ſpecial addreſs or direction in a bill is ſupplied by acceptance: for the addreſs ſerves merely to mark out him to whom it is to be preſented for acceptance; and when an accepter appears, even though the addreſs be wanting, he is preſumed to be the perſon whom the drawer had in his eye, *Kames*, 96. By the general cuſtom of trading ſtates, the want of a date makes a nullity in a bill: for which this reaſon is given by ſome writers, that the poſſeſſor, if he uſes not exact diligence in the caſe of non-acceptance or non-payment, can have no recourſe againſt the drawer; and in moſt bills it is by the date only that the fact of uſing exact diligence, or not, can be fixed. But tho' this may be a good reaſon why the poſſeſſor of a bill without a date can have no recourſe againſt the drawer, it can be none why the bill ought not to be effectual againſt the accepter, who is directly liable in payment. Our uſage alſo rejects bills which have no date: the true ground of which appears to be, that our legiſlature intended to reſtrict the privilege conferred by our ſtatutes on bills, to thoſe which were uſed for the more eaſy carrying on of commerce, foreign or inland; that bills drawn without a date, contrary to the practice of other ſtates, cannot bear that conſtruction, but are always deſigned by the parties as laſting ſecurities for ſums of money; and that therefore they are intitled to none of thoſe privileges, but are to be judged of by the common rules of law; and ſo null, if they have not all the ſolemnities required by our uſage to other obligations; ſee *New Coll.* ii. 57.

27. The creditor in a bill may tranſmit, or, in the proper ſtyle, indorſe it to another: which is done, either by an order ſigned by the creditor on the back of it, in theſe words, *Pay the contents to A B*; or barely by his ſubſcription, leaving a blank above it, which the creditor or porteur may fill up at pleaſure. Some foreign writers have maintained, that a bill which is taken payable only to the creditor, and not alſo to his order, is not indorſable: but if all rights, though they ſhould not ſpecially bear to aſſignees, paſs by aſſignation, which is at leaſt a general rule in commercial ſtates; bills, by the ſame rule, though they do not bear *to order*, muſt be tranſmiſſible by indorſation, *Kames*, 78. It is preſumed, that an indorſer has received value from the indorſee, though that ſhould not be mentioned in the indorſation, *Br.* 67.: and therefore, if the indorſee cannot make good his payment from the accepter, he hath recourſe, not only againſt the drawer, but againſt the indorſer, for the recovery of that value; and if there are ſeveral indorſers, one after another, he may inſiſt for his full relief againſt any one of them. Where therefore the indorſer of a bill wants to be free from ſuch recourſe, he ought to ſubjoin to his indorſation the words *without recourſe.*

28. A bill drawn blank in the creditor's name is null, *firſt*, Becauſe bills are not drawn in that form by the cuſtom of any trading nation. *2dly*, A bill

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bill ſo drawn falls under the act 1696, *c.* 25.; for though that act excepts indorſations of bills, which may therefore be taken blank in the name of the indorſee, agreeably to the general cuſtom of other countries, bills themſelves are not excepted from it, *Feb.* 9. 1711, *Brand.* As bills are truly mandates, a bill, even when the creditor's name is mentioned, can infer no obligation till it be ſigned, not only by the mandatary, who accepts the mandate, but by the mandant, who gives it, *Dec.* 6. 1738, *Macraith.* Yet it is in practice ſufficient, that bills kept in the drawer's cuſtody be ſigned by him at any time before they are produced in judgement, though it ſhould be after the death both of the accepter, and of the creditor, when he is a different perſon from the drawer, *Falc.* ii. 15.; *New Coll.* ii. 130. But if a bill appear in judgement without the drawer's ſubſcription, though it ſhould be indorſed by the creditor, it is null, *Tinw. Feb.* 15. 1749, *Grant:* for the bill and indorſation are different deeds; the bill conſtitutes the obligation, the indorſation only tranſmits it, and conveys the bill as it ſtands at that time; but cannot make a good bill of a bad one.

29. After a bill is ſigned by the drawer, he becomes liable for the value to the creditor, if he on whom the draught is made ſhall either not accept it, or after acceptance ſhall not pay; for the law preſumes, that the drawer hath received value from the remitter when he made the draught, and therefore he ought to refund that value, with all the conſequential damages, if he hath drawn on a perſon not able to pay. And this preſumption holds, though the bill ſhould not have the words, *for value received*, *March* 19. 1707, *Scot.* But if he to whom the bill is made payable was creditor to the drawer before making the draught, the bill is preſumed to have been granted, not for preſent value, but towards the payment of that anterior debt, unleſs it expreſsly bear for value, *July* 18. 1712, *Cheap.* If the perſon to whom the bill is addreſſed refuſe to accept, while he is poſſeſſed of the drawer's effects, he is juſtly liable in all the damages which the drawer ſhall ſuffer by that refuſal, ſince he was truly debtor to him previouſly to the draught. And at the ſame time he becomes properly debtor to the creditor in the bill; for the draught, taken payable to the creditor, implies an aſſignment of theſe effects to him, and the proteſt for non-acceptance ſupplies the want of an intimation, *Dec.* 9. 1712, *Gordon.* But, in that caſe, ſummary diligence cannot be uſed againſt the perſon drawn upon; he muſt be ſued in an ordinary action.

30. Payment of a bill, when made by the accepter, extinguiſhes the obligation of *mutuum* that lay both on the drawer and him, with reſpect to the creditor in the bill: but it brings the drawer under a new obligation, ariſing from mandate, to the accepter, who has made the payment at his deſire; for if the accepter was debtor to the drawer, the payment affords him a good ground of compenſation againſt the drawer. If he was not, an action lies at his inſtance for the recovery of the ſum he hath diſburſed in conſequence of the drawer's mandate, over and above a reward for his trouble, which is called *commiſſion-money*. Where the bill does not expreſsly bear value in the hand of the perſon drawn upon, a preſumption ſeems to be received by our practice, that he is not the drawer's debtor; and conſequently an action of recourſe, or *ex mandato*, is competent to him againſt the drawer for repayment, *July* 4. 1711, *Cuningham.* But few perſons drawn upon, who are not poſſeſſed of the drawer's effects, adventure, upon the faith of this preſumption, to accept any draught of his, till they have ſuffered it to be proteſted againſt themſelves for non-acceptance; after which they may accept it *ſupra* proteſt, for the honour of the drawer, without any danger of loſing their recourſe againſt him.

31. A bill, after it is indorſed or aſſigned, is conſidered as ſo much caſh

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delivered to the onerous aſſignee or indorſee; and therefore carries right to the ſums contained in it, free from all burdens but thoſe that are marked on the bill itſelf. Hence no receipt or diſcharge by the original creditor in the bill, if it be written on a paper apart, can defend the debtor from paying a ſecond time to the indorſee, though the indorſation ſhould be poſterior in date to the receipt or diſcharge, *Dec.* 12. 1711, *Erſkine*; *Dalr.* 109. Hence alſo, though the bill ſhould have been granted without value paid for it, or though the accepter ſhould have a ground of compenſation againſt the original creditor who indorſes the bill, by which he might have extinguiſhed the debt, had it continued in his perſon; or though he ſhould be interpelled by arreſtment uſed at the inſtance of the indorſer's creditor; neither of theſe pleas would be good againſt the indorſee, whoſe right cannot be hurt, but by what appears on the face of the bill, *Dalr.* 13. 93.; *New Coll.* ii. 8. But if the debtor ſhall prove by the indorſee's oath, either that the bill was indorſed to him for the indorſer's own behoof, or that he the indorſee hath not paid value for the indorſation, the indorſee is juſtly accounted but as a name; and the common rule which holds in other obligations, obtains, ſuſtaining all exceptions againſt the aſſignee that are pleadable againſt the cedent, or original creditor. One who had accepted of an indorſed bill from his debtor, not *in ſolutum*, but in ſecurity of his debt, was conſtrued to take it *tantum et tale* as it ſtood in his debtor, and ſo not to have the privilege of an onerous indorſee, *Jan.* 15. 1708, *Craufurd.* But by *New Coll.* ii. 8. that diſtinction was diſregarded; and a creditor who had accepted of an indorſation ſimply in ſecurity of a juſt debt, was found not to be affected with a backbond of the indorſer, more than if he had taken the bill *in ſolutum*, or in full payment. Yet if the bill ſhould ſtand in the perſon of the indorſee, as truſtee likewiſe for the indorſer's other creditors, whoſe debts were contracted before the truſt, a backbond granted by the indorſer to the accepter will affect theſe; becauſe creditors cannot be ſaid to lend their money on the faith of a bill which was not indorſed for their behoof till after the debts were contracted. A proteſted bill, after regiſtration, muſt be tranſmitted to others, not by indorſation, but aſſignation; for no decrees are tranſmiſſible by indorſement, and regiſtration is in the judgement of law a decree. But the inference drawn from thence by ſome writers, *Bankt. b.* 1. *t.* 13. § 17. that the aſſignee is afterwards ſubjected to all exceptions competent againſt the original creditor, can hardly be admitted: for though a creditor, by uſing diligence on his debt, frequently acquires a new right, or an additional preference, he can, by no rule of law or equity, forfeit any privilege that was before competent to him, merely becauſe he hath, in the courſe of legal diligence, recovered a decree of regiſtration upon it; and if the right remain entire in his own perſon after obtaining ſuch decree, ſurely a conveyance from him, made according to the proper legal form, muſt, by the common nature of all conveyances, veſt that whole right in his indorſee, or aſſignee, which was formerly in himſelf.

32. Bills muſt be negotiated by the poſſeſſor, againſt thoſe upon whom they are drawn, within a determinate time, which if he neglect, he loſes his recourſe againſt the drawer. But ſome bills require a more preciſe negotiation than others. It might be thought, that the creditor in a bill payable ſo many days after ſight, ought immediately after his being poſſeſſed of it, to preſent it to him on whom it is drawn, for acceptance, and in caſe of refuſal, proteſt it for non-acceptance; becauſe the leaſt delay in the preſenting of ſuch bill for acceptance, prolongs the term of payment, which the poſſeſſor ought not to do to the prejudice of the drawer. But in our practice, the creditor in bills drawn payable ſo many days after ſight, has

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has a diſcretionary power to fix the payment ſomewhat ſooner or later as his exigencies ſhall require, *Feb.* 7. 1735, *Gordon; New Coll.* ii. 199. It is a fixed point, that bills payable ſo many days after date, or on a certain day or month therein mentioned, need not be preſented before the term of payment; becauſe that term, being preciſely fixed by the bill, can be neither prolonged nor ſhortened by the time of acceptance, *Kames*, 93.; *Falc.* ii. 75.: and as the debtor ought at that term to pay, and not ſimply to accept, a bill preſented upon the day of payment was, upon the report of merchants, adjudged to be duly negotiated, where the poſſeſſor, upon the debtor's refuſal to pay, proteſted it for not payment, without taking a previous proteſt for non-acceptance, *Tinw. June* 28. 1749, *Jamieſon.* For a like reaſon, it is unneceſſary to date the acceptance of a bill payable ſo many days after date; becauſe the date of the acceptance has no connection with, or influence on the term of payment; whereas in bills payable ſo many days after ſight, or, in other words, ſo many days after they are preſented, the acceptance muſt be dated; becauſe the term of payment depends, in that caſe, on the date of the acceptance; for the bill is preſumed to be preſented of the ſame date with its acceptance, unleſs the contrary ſhall be proved by an inſtrument.

33. All bills, in whatever form they may be taken payable, muſt be proteſted for non-payment if they are not duly paid. Though bills are, in ſtrict law, due the very day on which they are made payable, and may therefore be proteſted on the day after; yet three days immediately enſuing the day of payment are indulged to the creditor in the bill, upon any of which he may, without loſing his recourſe againſt the drawer and indorſer, proteſt the bill; which are therefore called *the days of grace:* but if the creditor ſhall delay proteſting till the day after the laſt day of grace, he loſes his recourſe, *Kames, Rem. Dec.* 42.; *Jan.* 29. 1751, *Cruikſhanks* *; *New Coll.* ii. 123. If Sunday be the laſt day of grace, the proteſt muſt be taken on the Saturday preceding. Where a bill is proteſted, either for non-acceptance or non-payment, the diſhonour muſt be notified to the drawer or indorſer within three poſts at fartheſt; and in this notification the bill proteſted muſt be ſpecially diſtinguiſhed by its date, ſum, and other eſſential marks, *Tinw. July* 21. 1747, *Johnſton* †. Proteſts for non-acceptance, may be taken by any perſon who holds the bill in his hand, againſt him upon whom it is drawn, either at his dwelling-houſe; or if he be dead, at the houſe where he laſt reſided: but proteſts for non-payment, muſt be taken at the place where the bill is made payable, if any place be ſpecified in it; and by none other than the creditor. The ſtrict negotiation of bills is confined to ſuch as are in a capacity of being proteſted on the laſt day of grace: when therefore the days of grace are expired before diligence can be uſed againſt the debtor, *ex. gr.* where bills are indorſed after that period, the indorſee is left more at liberty, and is not tied to any preciſe form of negotiation. He ought indeed to preſent the bill for payment; but though he ſhould not formally proteſt it for non-payment, he preſerves his recourſe, if he ſhall, within a reaſonable time, give notice to the indorſer that the accepter hath refuſed to make payment, *Falc.* ii. 76. As one to whom a right is aſſigned, not *in ſolutum*, but ſimply in ſecurity of a debt, is not bound to uſe diligence, *infr. t.* 5. § 8. neither is an indorſee in ſecurity; and conſequently he preſerves his recourſe againſt the indorſer, though he ſhould entirely neglect all the rules of diligence required in the negotiation of bills, *New Coll.* ii. 82.

34. It is a moſt equitable rule, That the poſſeſſor of a bill who has not

* This deciſion, in 1751, is by an error of the preſs marked, in Mr Falconer's collection, as if the poſſeſſor had preſerved his recourſe, notwithſtanding the delay.

† See *New Coll.* iii. 41.

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uſed exact diligence, ſhould loſe his recourſe againſt the drawer, if the perſon drawn upon become afterwards inſolvent; for ſince the drawer transfers by the draught the whole right he had to demand payment from himſelf to the creditor, to whom it is made payable, that creditor, if he ſhall ſuffer the debtor to fail, when he might by a due negotiation have recovered payment, ought to ſuffer for his negligence; and not the drawer, whoſe hands were bound up by the draught. But even where the debtor continues ſolvent, the law is the ſame: for in that caſe the poſſeſſor can ſuffer nothing by loſing his recourſe againſt the drawer; he may recover the ſum from the proper debtor, and therefore is not to be indulged in any unneceſſary action of recourſe againſt the drawer, which he is accounted to have renounced, by neglecting the due negotiation of the bill, *Tinw. Dec.* 1744, *Littlejohn.* In the ſpecial caſe where he to whom the bill is addreſſed hath no effects of the drawer in his hands, the poſſeſſor's recourſe againſt him is preſerved, though he ſhould have uſed no diligence; for there the drawer, who cannot alledge that he hath ſuffered the leaſt damage by the poſſeſſor's negligence, ought not to have drawn upon one who owed him nothing.——As to the extinction of bills by preſcription or taciturnity, ſee below, *t.* 7. § 29.

35. Hitherto of the general nature of bills of exchange in ſo far as they are regulated by the *jus gentium*; they may be now conſidered with reſpect to the ſpecial privileges eſtabliſhed in their favour by ſtatute. It has been already obſerved, *b.* 2. *t.* 5. § 54. that debts proceeding on written obligations, let them be ever ſo clear, cannot be the foundation of ſummary execution, without a clauſe of regiſtration; and though they have that clauſe, horning cannot proceed in leſs than fifteen days, unleſs a ſhorter time be expreſſed in it. But as bills of exchange ought, out of favour to commerce, to have the moſt ready execution, notorial proteſts of them, either for non-acceptance or non-payment, having a copy of the bill prefixed to them, are, by 1681, *c.* 20. regiſtrable within ſix months after the date of the bill, in the caſe of non-acceptance, and ſix months after its falling due, in the caſe of non-payment: And on the bill thus regiſtered, horning upon ſix days may paſs at the ſuit of the creditor, either againſt the drawer or indorſer, in the caſe of non-acceptance, or againſt the accepter in the caſe of non-payment. This ſtatute is extended in all points by 1696, *c.* 36. to inland bills, *i. e.* bills both drawn and taken payable in Scotland.

36. By the aforeſaid act 1681, the creditor in a bill hath ſummary recourſe by horning, againſt the drawer and indorſers, even before the term of payment, if he who is drawn upon ſhall not accept the bill; becauſe the creditor in a bill frequently conſents to a diſtant term of payment, in conſideration of the additional ſecurity he acquires by the ſolvency of the perſon drawn upon; and it were hard, if, upon his refuſal to accept the bill, the creditor ſhould be both diſappointed of that ſecurity, and be alſo obliged to wait the long term of payment, to which he agreed merely in the view of that ſecurity. But after a bill is accepted, the ſtatute authoriſes no ſummary diligence againſt any other than the accepter: the creditor, if the accepter ſhould fail, muſt inſiſt by way of ordinary action againſt the drawer and indorſers. The reaſon of this may be, that the accepter is accounted the principal debtor, from the firſt intention of the parties to have the ſum paid by him; and the drawer and indorſers only cautioners, who conſequently ought not to be made liable till the proper debtor be diſcuſſed. It is only the principal ſum in the bill, with the intereſt, that can be charged for ſummarily: The exchange, when it is not included in the bill, the re-exchange, which is incurred by ſuffering the bill to be proteſted and returned; and the expence of diligence, muſt be recovered by an ordinary action; becauſe theſe not being liquid debts, muſt be previouſly conſtituted by the ſentence

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ſentence of a judge, that the quantum of them may be legally aſcertained.

37. Though bills, when they are not proteſted and regiſtered within the ſix months limited by this act, loſe the ſtatutory privilege of ſummary diligence; yet as they continue to be the neceſſary vehicles of commerce for a longer time, they do not, immediately after the elapſing of the ſix months, loſe the other privileges of bills, of not being affectable, either by compenſation, arreſtment, or the ſeparate receipts of the original creditor, ſtated above, § 31. What length of ſilence or taciturnity in the creditor or indorſee is required, to extinguiſh all the extraordinary privileges of bills, ſeems to depend much on the cuſtom of trading nations. By two deciſions of our ſupreme court in 1715, bills, on which no diligence had been uſed for five years after their dates, were declared to have loſt their extraordinary privileges, *Br.* 80. 82.; and by two later judgements, *Feb.* 6. 1719, *Farquharſon*, compared with *Feb.* 1728, *Grierſon*, theſe privileges were reſtricted to the ſhorter term of three years; ſince which time it has been received as a rule, that bills which lie over for three years loſe the peculiar privileges of excluding arreſtment, compenſation, ſeparate receipts of payment, &c.

38. It is not to every thing in the form of a bill that the law indulges the privileges of a bill of exchange; for theſe privileges, having been introduced merely for the encouragement of commerce, ought not to be applied to writings intended to lie in the hands of creditors, like bonds, as common money-ſecurities. Inland bills, therefore, where they are drawn payable at a diſtant term, loſe the nature, and conſequently the privileges, of bills of exchange. Bills not payable till three years after date, enjoy no privilege by our practice, *Kames*, 55. *ad fin.*; but a bill payable one year after date does, *June* 21. 1748, *Tudhope*. For a like reaſon, no extrinſic ſtipulation or clauſe ought to be inſerted in a bill, which deviates from the proper nature of bills: and hence a bill bearing a penalty is null; ſee *Kames*, 99.; *Kames*, *Rem. Dec.* 46. Bills containing a clauſe of intereſt from the term of payment, are not null; becauſe they carry intereſt from that term *ex lege*, though no ſuch clauſe had been inſerted: but a clauſe of intereſt from the date is inconſiſtent with the nature of a bill, and ſo infers a nullity, *Falc.* ii. 228.; *New Coll.* ii. 57. Yet a bill, though it both bore *intereſt and penalty conform to law*, was ſuſtained, where it was acknowledged by the accepter, theſe words having been held as ſuperfluous, and *pro non adjectis*, *New Coll.* ii. 206. Inland bills muſt have not only the form, but the proper ſubject of bills of exchange. By the older deciſions indeed, bills drawn, not for money, which is the neceſſary medium of trade, but for fungibles, *ex. gr.* for the delivery of barley, ſalt, &c. were ſuſtained as probative writings, though without the privileges competent to the indorſees in a proper bill, *Br.* 82.; but they are now declared to have no obligatory force, as wanting writer's name and witneſſes, in conſideration of the dangerous conſequences of giving legal force to writings in the form of a bill, which are more eaſily forged than perhaps any other, *Nov.* 1729, *L. Powfoulis*. On the ſame ground, no donation can be validly conſtituted in the form of a bill, *Home*, 36.; *New Coll.* iii. 20. —— Of the legal effects given to promiſſory notes, *vid. ſupr.* § 24.

39. After having explained the ſolemnities required by our law to deeds ſigned in this country, it may be proper to conſider the caſe of deeds ſigned in a foreign country, according to the laws of that country, when they come to receive execution in Scotland. On this head, it is a rule generally allowed, That as no law has authority beyond the dominions of the lawgiver, they who found on foreign deeds, though perfected agreeably to the laws of that country where they are ſigned, cannot, in ſtrict law, demand exe-

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cution of them in another country, where different ſolemnities are required to deeds of that kind; but that ſuch deeds are nevertheleſs, by the practice of all civilized nations, ſupported *ex comitate*, from the regard due by one ſtate to the laws of another. And this *comitas* is founded, not only in the higheſt policy, (for without it, that freedom of intercourſe, which is on many occaſions neceſſary between the inhabitants of diſtant kingdoms, would be greatly marred), but in the eſſential rules of equity; for as every man ought to ſtand and fall by the laws of that ſtate where he reſides, and from which he receives protection, it would be a groſs perverting of judgement, to ſet aſide a deed perfected according to that law, by which the parties were to regulate their conduct, merely becauſe it was deſtitute of the ſolemnities required by the laws of another ſtate, which were not enacted for them, and which they are not preſumed even to know: the rules for determining queſtions of this ſort ought therefore to be drawn from the *jus gentium*. Thoſe which follow ſeem to be received by our ſupreme court of ſeſſion.

40. All perſonal obligations or contracts entered into according to the law of the place where they are ſigned, or, as it is expreſſed in the Roman law, *ſecundum legem domicilii, vel loci contractus*, are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scottiſh form, *July* 5. 1673, *Maſter of Salton*; *Kames* 23. And this holds, even in ſuch obligations as bind the granter to convey ſubjects within Scotland; for where one becomes bound by a lawful obligation, he cannot ceaſe to be bound by changing places, *July* 5. 1706, *Cuningham*. But though obligations to convey, if they be perfected *ſecundum legem domicilii*, are binding here; yet conveyances themſelves of ſubjects within Scotland are not always effectual, if they are not executed according to the ſolemnities of our law. As to which the following diſtinction appears to be obſerved. In the conveyance of an immoveable ſubject, or of any right affecting heritage, the granter muſt follow the ſolemnities eſtabliſhed by the law, not of the country where he ſigns the deed, but of the ſtate in which the heritage lies, and from which it is impoſſible to remove it: for though he be ſubject, with reſpect to his perſon, to the *lex domicilii*, that law can have no authority over property which hath its fixed ſeat in another territory, and which cannot be tried but before the courts and according to the laws of that ſtate where it is ſituated. And this rule is ſo ſtrictly adhered to in practice, that a diſpoſition of an heritable juriſdiction in Scotland, executed in England after the Engliſh form, was not ſuſtained, even as an obligation to compel the granter to execute a more formal conveyance, *Feb.* 1729, *E. Dalkeith*. But in the caſe of a moveable ſubject lying in Scotland, the deed of tranſmiſſion, if perfected according to the *lex domicilii*, is effectual to carry the property, *July* 16. 1636, *Sinclair; Dirl.* 390.: for moveables have no permanent ſituation, but may at the pleaſure of the proprietor be brought from any other place to his own domicil, and therefore are conſidered as lying in that territory where the deed is ſigned, according to the rule, *Mobilia ſequuntur perſonam.*

41. It would be abſurd to give the ſmalleſt effect to a foreign deed perfected according to the law of the place where it was made out, which would not be effectual here though it had been perfected with all the ſolemnities required by our own law. Hence a teſtament made by a baſtard in England, has no effect as to moveables in Scotland; becauſe by the law of Scotland no teſtament made by a baſtard is valid, let it be ever ſo formal, *Had. Feb.* 1. 1611, *Purves*. Hence alſo a foreign teſtament, bequeathing heritable ſubjects ſituated in Scotland, is not ſuſtained in Scotland, though by the law of the country where the teſtament was made, heritage might have been

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been ſettled by teſtament, becauſe by our law no heritable ſubject can be diſpoſed of in that form, *Dec.* 9. 1623, *Henderſons*; *July* 3. 1634, *Melvill.* This rule is alſo applicable to verbal obligations or ſettlements: thus nuncupative or verbal ſettlements made in England, though they have the ſame legal force by that law as written teſtaments, cannot carry moveables lying in Scotland; becauſe by our law no proper teſtament can be made, or executor appointed, without writing, *Jan.* 19. 1665, *Shaw.*

42. On a ſimilar principle, where a foreign ground of debt, perfected *ſecundum legem domicilii*, is ſuſtained by our ſupreme court, the diligence which is to proceed upon it, and the other judicial ſteps neceſſary for giving it full effect, muſt be governed by the law of Scotland; becauſe theſe previous ſteps are required to deeds of the ſame kind, even ſuppoſing them perfected in the Scottiſh form; and that judge within whoſe territory the debt is ſituated, and under whoſe authority it is to be recovered, muſt neceſſarily determine all queſtions of diligence and competition concerning it, according to the laws of his own country, and not according to thoſe of a foreign ſtate, which may be utterly unknown to him, and which have no authority, nor were ever deſigned to bind the judges of any ſtate which is not ſubject to the legiſlature who enacted them. Thus becauſe no aſſignation is, by the law of Scotland, effectual againſt an arreſter, if it has not been intimated previouſly to the arreſtment; neither is a foreign aſſignment not intimated effectual againſt him, though the *lex loci* ſhould not require aſſignations to be intimated, *Fount. July* 22. 1708, *E. Selkirk.* And on the ſame ground no executor named in a teſtament ſigned in England, hath any legal title to ſue for the moveables lying in Scotland, till he be confirmed executor in the Scottiſh form, though the teſtament ſhould have been proved before the proper eccleſiaſtical court in England; *arg. July* 18. 1666, *Brown.* As the law of one country is in moſt caſes matter of fact to the judges of every other country, the proper way of proving it, in points which carry the leaſt degree of doubtfulneſs, is by a written opinion of the foreign judges, which is readily granted *ex comitate*, upon a recommendation from the court before whom the queſtion which gave riſe to the doubt has been brought; ſee *Jan.* 18. 1676, *Cuningham.*

43. A writing, while it is in the granter's own cuſtody, is not obligatory; for as long as it is in his own power, he cannot be ſaid to have come to a final reſolution of obliging himſelf by it. And becauſe one may hold the cuſtody of his writings, either by himſelf or his doer, a deed which appears in the hands of the granter's doer, has as little force againſt him as if he had retained the cuſtody of it by himſelf. When the granter of a deed puts it into the hands of a third party, he is ſometimes underſtood to depoſit it with him, not to be delivered to the grantee as his own, till the exiſtence of a certain event, or the performance of certain facts by the grantee. Thus a gratuitous writing, where it was found in the cuſtody of one who was a ſtranger both to the granter and grantee, was preſumed to have been depoſited with him, under the tacit condition, that it ſhould be returned to the granter, if he called for it during his life; but that if he did not, it ſhould be delivered upon his death to the grantee, *Jan.* 25. 1677, *Ker.* But Lord Stair, without diſtinguiſhing between onerous and gratuitous deeds, affirms, *b.* 4. *t.* 42. § 8. that all deeds in the hand of a third perſon are preſumed to have been delivered by the granter, abſolutely for the grantee's behoof, and conſequently become the grantee's unlimited property, unleſs it ſhall be proved by the writing or oath of the grantee, that they were depoſited in that perſon's hand under certain limitations or conditions. Accordingly a deed put by the granter into the poſſeſſion of one who was doer both for the granter and grantee, was preſumed to have been given

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given to that perſon for the behoof of the grantee, 1735, *Mrs Seton*. It cannot well be denied, however, but that in ſpecial caſes the depoſitation of a deed with a third party may be proved, not only by the oath or writing of the grantee, but by the oaths of the writer and inſtrumentary witneſſes; ſee *July* 5. 1662, *Drummond*. Where the depoſitation of a writing is either acknowledged by the grantee, or otherwiſe ſufficiently verified, the conditions of it may be proved by the oath of the depoſitary, *March* 5. 1624, *Hay*; *Edg. Jan.* 29. 1724, *Garden*; unleſs where theſe conditions appear to have been reduced by the granter into writing, *Feb.* 24. 1675, *Cowan*; in which caſe, the written articles afford a ſtronger and more unexceptionable evidence than the oath of the depoſitary. After a deed appears in the cuſtody of the grantee, the preſumption of delivery to him is ſo ſtrong, that it can in no caſe be elided but by his own oath or writing, *Mack.* § 6. *h. t.*; and if the delivery be confeſſed by the granter, or his repreſentatives, the deed becomes the abſolute right of the grantee, not to be defeated under the pretence of its having been granted in truſt, unleſs the truſt be proved, either by the ſigned declaration, or by the oath of the truſtee. All deeds that appear in the hands of the grantee, are preſumed in law to have been delivered at their dates, eſpecially where they are either onerous or rational, *New Coll.* ii. 63. § 3.

44. The general rule, That deeds are not obligatory upon the granter before delivery, ſuffers ſeveral exceptions. *Firſt*, Writings, if they contain a clauſe diſpenſing with the delivery, are good to the grantee, though they ſhould be found in the granter's own cuſtody at his death. Theſe are of the nature of revocable deeds: for the granter, by continuing them in his own keeping, continues a power with himſelf to cancel them; but if he do not exerciſe that power, they become effectual upon his death. Death is in ſuch caſe equivalent to delivery, becauſe after it there can be no revocation. *2dly*, No deed of a teſtamentary kind requires delivery, becauſe the effect of teſtamentary writings commences only at the period of the granter's death. *3dly*, Bonds, and other writings in favour of children, need no delivery; becauſe parents have, by a natural right, the cuſtody of their childrens writings. Nor is this exception, as ſome writers have imagined, confined to proper bonds of proviſion granted by fathers to lawful children. The ſame reaſon for which the law diſpenſes with the delivery of bonds of proviſion by fathers to their lawful iſſue, is equally applicable to other deeds that do not properly fall under that appellation: and in practice, bonds by a mother to her child, and by a father to a ſon who is forisfamiliated, and even to a natural child, have been adjudged effectual without delivery, *June* 29. 1624, *L. Silvertonhill*; *Dec.* 16. 1712, *Munro*; *Feb.* 25. 1663, *Aikenhead*. On the ſame general ground, poſtnuptial ſettlements by the huſband to the wife, are obligatory without delivery; the huſband himſelf being the legal keeper of his wife's writings, *Br.* 78. *4thly*, A deed in which the granter himſelf hath an intereſt, *ex. gr.* a reſerved liferent, is good without delivery; for it is preſumed, that the granter holds ſuch deed in his own cuſtody, not becauſe his intention is not finiſhed concerning it, but to ſecure that intereſt which he has reſerved to himſelf, *June* 19. 1668, *Hadden*. *5thly*, Deeds which the granter lies under an antecedent obligation to execute, are valid without delivery; for he in whoſe favour ſuch deed is conceived, as he had a right to demand the granting of it, is alſo intitled to compel the granter to exhibit it after it is ſigned: thus an aſſignation by a principal debtor, of certain rights in his perſon to his cautioner, the better to enable him to recover payment or relief, is effectual without delivery, *Jan.* 18. 1677, *Dick*. *6thly*, Mutual obligations or contracts, ſigned by two or more parties for their different intereſts, require no delivery,

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very, *June* 29. 1625, *Craufurd;* becauſe every ſuch deed, the moment it is executed, becomes a common right to all the contracters. The bare ſubſcription of the ſeveral parties, proves the delivery of the deed by the other ſubſcribers to him in whoſe hands it appears; and if that party can uſe it as a deed effectual to himſelf, it muſt alſo be effectual to the reſt. Hence a decree-arbitral was adjudged to have full force, in all queſtions with the ſubmitters, from the time it was ſigned by the arbiter, even while it remained in the arbiter's own cuſtody, or his clerk's; for the law conſidered them merely as the depoſitaries employed in keeping it for the common behoof of all the ſubmitters; each of whom had a proper intereſt in it the moment it was executed, *Home*, 41. *Laſtly*, Where the granter of a deed inſerts it in a public regiſter, his publication of it to the whole people of the kingdom, cannot be otherwiſe conſtrued, than that he intends it ſhould have full effect in favour of the grantee; and is therefore equivalent to delivery, *Dirl.* 272.

45. As the granter of a deed cannot be bound by it, till he deliver it, either to the grantee, or to a third party, neither can the grantee be bound, until he accept of it with all its limitations and burdens. The bare receiving of it from the granter ought not, in reaſonable conſtruction, to infer acceptance; for where the granter of a deed gives it to the grantee, without expreſsly tying him to acceptance, the natural preſumption is, that he leaves him at liberty to deliberate whether to accept or repudiate. Acceptance may be proved by the grantee's expreſs declaration, either written or verbal; or by acts done by him, after receiving the deed, which import acceptance; ſuch as putting it into a public regiſter, taking the benefit of certain clauſes in it beneficial to himſelf, or otherwiſe uſing it as his own: all which acts may be proved, either by writing, or by the teſtimony of witneſſes. A creditor preſent at a general meeting of creditors, where a truſt-deed offered to them by the common debtor had been agreed to, was underſtood to have acquieſced in the reſolution of the meeting; and therefore was tied down to acceptance of the deed, though he had given no opinion actually approving of it, ſince he did not expreſsly declare againſt it.

TIT. III.

Of Obligations ariſing from Conſent, and of acceſſory Obligations.

CONSENSUAL contracts are thoſe, which, by the Roman law, might be perfected by conſent alone, without the intervention either of things or of writing. Of this ſort were reckoned the contracts of ſale, location, ſociety, and mandate; to which our cuſtoms have added permutation or exchange. All theſe muſt, according to the law of Scotland, be limited to moveable ſubjects; for, as has been already obſerved, heritage can neither be ſold, let, nor exchanged, without writing.

2. In the firſt ſtate of things, commerce was managed entirely by barter. One thing was given for another, and work was either paid in work or in commodities. After luxury, however, had multiplied the neceſſities of mankind, this became in a great meaſure impracticable. It ſeldom happened that one had juſt ſuch a quantity of goods he had no occaſion for, as might anſwer in value to thoſe he wanted in exchange, or of ſuch a kind as to be uſeful to the perſon with whom he wanted to make the exchange. Hence was introduced the uſe of coined money, which, having a fixed va-

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lue ſtamped on it by public authority, might be a common meaſure or ſtandard for eſtimating every thing elſe. From this origin, ſale, or as it is called by the Romans *emptio venditio*, had its riſe, *l.* 1. *pr. De contr. empt.*; which may be defined, A contract, whereby one of the parties becomes bound to deliver a certain ſubject or commodity to another, with a view of tranſferring the property, in conſideration of a determinate price in current money to be paid for it. Though this contract is perfected by conſent alone, it does not ſtrike againſt the rule of law, That the property of things cannot be transferred but by tradition; for though the contract is entered into and perfected with a view of transferring the property to the buyer, it is not actually transferred, but remains with the ſeller or vendor till the delivery of the ſubject.

3. Whatever falls under commerce may be the ſubject of ſale; and even things not yet exiſting, but which are only in hope; as the draught of a net, or the hope of a ſucceſſion, *l.* 8. § 1. *De contr. empt.* Things, the importation or uſe of which is abſolutely prohibited, cannot be the ſubject of commerce, nor conſequently of ſale, *l.* 34. § 1. *eod. tit.* But where the importation of particular goods is only burdened with a duty, a contract may be effectually entered into concerning them: for though the law enacts penalties, if they ſhould not be regularly entered, it allows the uſe of them to all the community, and ſo leaves them as a ſubject of commerce, *Kames*, 40. Yet even in the ſale of run goods, no action for damages lies againſt the ſeller for not delivery, if the buyer knew that the goods were run, *Home*, 34.; ſee 11° *Geo. I. c.* 30. The ſubject to be ſold ought, by the Roman law, to have been alſo certain; *i. e.* the individual itſelf ought to have been, by ſome obvious character, diſtinguiſhed from all others of the ſame kind; inſomuch that even in a ſale of fungibles *quæ recipiunt functionem*, ſuch as ſugar, oil, corns, &c. the ſale was not perfected till the quantity to be ſold was meaſured out or weighed, *l.* 35. § 5. *eod. tit.* But there is nothing more uſual in our practice, than to ſell wheat, barley, wine, &c. by ſamples, without ſetting apart any preciſe *corpus* for the buyer.

4. The price in a contract of ſale muſt conſiſt in current money, *i. e.* either in the known coin of the country, or in foreign coin which hath a determinate value or currency ſet upon it by the tacit conſent of the ſtate, § 2. *Inſt. De empt.* If the price ſhould be payable in bullion, or in wrought plate, the Romans pronounced it to be, not a ſale, but barter or exchange. But this diſtinction, though it might have been of uſe in the Roman law, which attributed different natures and properties to thoſe two contracts, *infr.* § 13. can be of little uſe in ours, where the nature of both, and the obligations on the contracters, are in effect the ſame. *2dly*, The price muſt not be merely eluſory; otherwiſe the contract will reſolve into a donation, where the ſeller is only liable in that degree of warrandice which is implied in donations. The price ought alſo to be juſt, *i. e.* in the ſenſe of the Roman law, in ſome degree proportioned to the value of the thing ſold; and therefore, when a ſubject was ſold for leſs than the half of its true value, the ſeller might have recovered it, on paying back the price to the buyer, *l.* 2. *C. De reſc. vend.* But this doctrine being repugnant to the common nature of contracts, is rejected by our uſage; for every price which the parties have agreed upon, is, in the judgement of the law of Scotland, juſt, if they have not been drawn into the contract by fraud or deceit, *June* 23. 1669, *Fairie*. The price muſt be certain, as well as the ſubject ſold. It is moſt commonly fixed by the parties themſelves at ſtriking the bargain; and ſometimes by a third perſon, to whom the parties refer the determination of it: but if that third perſon either could not, or would not, determine the price, the bargain was void by the Roman law, *l.* 15. *C. De contr. empt.*

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The price could not, by that law, be referred to the buyer, *l.* 35. § 1. *De contr. empt.*; but by our practice it may, *March* 13. 1639, *E. Montroſe*. Yet the buyer's determination upon ſuch reference, ought to be ſubject to the modification of the judge; for that cannot be called an obligation which depends entirely on the will of the perſon obliged, *l.* 108. § 1. *De verb. ob.* Sometimes alſo the price in ſales of grain is fixed by the ſheriff-fiars. Theſe are the rates ſettled by a ſentence of the ſheriff, proceeding on the report of a jury, on the different kinds of grain, of the growth of the county for the preceding crop; and ſerve as a rule for aſcertaining the prices, not only in contracts where the parties themſelves cannot fix them, but in all ſales where it is agreed to accept of the rates ſettled by the fiars, *New Coll.* ii. 244. By act of ſederunt, *Dec.* 21. 1723, the jury ought to be ſummoned before the 20th of February, and the majority of them to conſiſt of landed men: but this laſt injunction was never in univerſal obſervance; or at leaſt, is now in diſuſe in moſt counties.

5. Though this contract is perfected by conſent alone, yet earneſt is frequently given by the buyer *in majorem evidentiam*, or as a corroborative ſymbol or mark that the bargain is perfected. Some civilians have affirmed, on the authority of *l.* 17. *C. De fid. inſtr. &c.* and of *pr. Inſt. De empt. vend.* that the giving of earneſt, or *arrhæ*, in place of confirming or aſſuring the contract, weakens it; becauſe a power is thereby granted to either party to reſile, notwithſtanding the earneſt; to the buyer, upon forfeiting what he had given; and to the ſeller, upon reſtoring what he had received, with as much more. But theſe texts are expreſsly confined to the ſpecial caſe where the parties have it in view to reduce the contract into writing, and where, conſequently, the bargain is not complete till a written contract be ſigned: and the extending of that doctrine to all contracts of ſale indiſcriminately, appears contrary, to the obvious intention of parties at giving earneſt, to the known meaning of the word *arrhæ* or *arrhabo* in all approved writers, and to the plain principles laid down in other texts of the Roman law, *l.* 35. *pr. De contr. empt.*; *l.* 3. 6. 12. *C. De reſc. vend.*; *l.* 5. *C. De obl. et act.* If, therefore, he who hath given the earneſt reſiles, he not only forfeits it, but may be ſued by the other party for performance; ſince what was intended for ſtrengthening the contract cannot be wreſted to the weakening of it. Since the queſtion, In what caſes earneſt is to be imputed in part of the price? is never fixed by the parties at giving it, the ſolution ſeems to depend on the amount of the ſum that is given *eo nomine*. Where it bears no proportion to the value of the ſubject ſold, *ex. gr.* a ſhilling in the purchaſe of a ſhip, or of a box of diamonds, it is preſumed to be given merely in evidence of the bargain, or, in the common way of ſpeaking, dead earneſt; but if the ſum be more conſiderable, it is reckoned up in the price. Another ſymbol was anciently uſed in proof that a ſale was perfected, which continues to this day in bargains of leſſer importance among the lower rank of people, the parties licking and joining of thumbs: and decrees are yet extant in our records, prior to the inſtitution of the college of juſtice, ſuſtaining ſales upon ſummonſes of thumb-licking, upon this medium, That the parties had licked thumbs at finiſhing the bargain.

6. What is ſaid by Juſtinian, *pr. Inſt. De empt.* and copied by Mackenzie, § 1. *h. t.* that how ſoon parties are agreed concerning the price, the contract is perfected, muſt be underſtood with caution, and not in the full extent of the words; for ſo long as the ſmalleſt difference remains between the parties, with regard to the term of payment of the price, the time or place of delivery, or any other article whatever that may have been the ſubject of communing, the bargain remains unfiniſhed, though the price ſhould be agreed upon.

7. Though

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7. Though the ſeller continues proprietor until delivery, yet if the ſubject periſh before delivery, it periſhes, not to him, but to the purchaſer; who may therefore be compelled to pay the price to the ſeller, notwithſtanding the deſtruction of the ſubject, according to the rule, *Periculum rei venditæ, nondum traditæ, eſt emptoris*, *l.* 8. *pr. De per. et com. rei vend.* This makes an exception from another known rule, That every thing muſt periſh to the proprietor: and the reaſon of it is, that the property, which continues in the ſeller till after delivery, is but nominal; he is truly no better than the keeper of the ſubject for behoof of the purchaſer, and ſo he is debtor for its delivery; and no debtor for the delivery of a ſpecial ſubject can in equity be anſwerable for the caſual misfortunes to which it may be expoſed. Stair is of opinion, *b.* 1. *t.* 14. § 7. that by the uſage of Scotland the ſeller hath no claim for the price where the thing ſold periſhes in his poſſeſſion, even without his fault; but no judgement hath been given on this point, by which any ſuch cuſtom might have been eſtabliſhed. Admitting however his Lordſhip's doctrine to be well founded in the caſe of the entire extinction of the ſubject, it is agreed on by all, that the ſeller is intitled to the full price, though the ſubject ſhould, by mere accident, have turned worſe while in his hands; becauſe, ſeeing the purchaſer has the whole benefit ariſing from the improvement of it, he ought alſo to run the riſk of its deterioration; *Cujus eſt commodum, ejus debet eſſe periculum.* It is alſo inconteſted on the other hand, that the ſubject periſhes to the ſeller before delivery in the following caſes. *Firſt*, If it periſhes through his fault. The ſeller is accounted in fault, where he has, either by ſome poſitive act expoſed the ſubject unneceſſarily to danger; or hath not employed that middle degree of diligence which is required in the contract of ſale, by the rule laid down in *l.* 5. § 2. *Comm.*; or where the ſubject has been loſt through any latent inſufficiency or diſtemper anterior to the contract, *arg. l.* 6. *C. De per. et com. rei vend.*; or where the ſeller has been *in mora*, for not delivering it to the purchaſer when he ought. But it is not accounted *mora*, if the not delivery by the ſeller be owing to the purchaſer's declining to pay the price; for the ſeller may lawfully retain the thing ſold as a pledge, or in ſecurity of the price, *l.* 13. § 8. *De act. empt.* 2*dly*, If, by a ſpecial article in the contract, any part of the riſk ſhould be laid on the ſeller, the *lex contractus* muſt be the rule. Thus, where the ſeller becomes obliged to deliver the ſubject at a certain place, the *periculum* continues his till it be ſo delivered, *Fount. Jan.* 25. 1687, *Spence.* 3*dly*, Where a commodity is ſold as a fungible, not as a *corpus*, the hazard lies alſo upon the ſeller: a proprietor of lands, for inſtance, who ſells a certain quantity of his farm-wheat of a particular crop to a merchant, without ſpecifying any individual parcel, ſuffers the whole loſs, if any part of that year's wheat ſhould be deſtroyed by fire, ſhipwreck, or any other misfortune, before he had performed his part of the bargain; becauſe the buyer did not purchaſe that preciſe part of the ſeller's farms which was loſt, more than any other.

8. Delivery in a ſale may be either real, by putting the *ipſum corpus* ſold into the poſſeſſion or under the power of the purchaſer; or ſymbolical, if the thing ſold does not admit of real delivery. By this delivery, the property is transferred to the buyer. By the Roman law, the property was not transferred till the price was alſo paid, or the ſeller ſatisfied with the ſecurity he had got for it. But whether this would be held for the law of Scotland remains a doubt. Though the ſeller, where the property is truly in another, cannot transfer that right to the buyer which is not in himſelf; yet the purchaſer, who bought under the belief that the ſeller was proprietor, is intitled to all the intermediate fruits of the ſubject, according to the rules of *bona fide* poſſeſſion ſet forth *ſupr. b.* 2. *t.* 1. § 25. Delivery in a

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sale, *ubi dolus dedit causam contractui*, *ex. gr.* where the buyer knew himself insolvent, has not the effect to transfer the property to him; it remains with the seller, who was insnared into the bargain; so that the contract becomes void, *New Coll.* i. 5. And even though the goods so delivered should be afterwards disposed of to a *bona fide* purchaser, the former proprietor, as he would on that ground have been preferred to the right of the goods themselves, in competition with the arresting creditors of the bankrupt, had they been still *in medio*, is also preferable upon the price lying in the hands of the purchaser from him, as coming in place of the goods, *New Coll.* ii. 47.

9. The seller is, by the nature of this contract, obliged not only to deliver to the buyer the thing sold, with all the fruits of it arising after the sale, to which he may be compelled by the *actio empti*, but to make that subject effectual to the buyer, though there should be no obligation of warrandice expressed; and consequently, if it should be evicted from the buyer, an action of recourse lies against the seller upon that implied warrandice, according to the rules that have been already explained in the sale of heritage. On the other hand, the buyer may be compelled by the *actio venditi*, to make payment of the price, together with the profitable expence disbursed on the subject by the seller while it continued in his hands after the sale.

10. It was reckoned one of the *naturalia* of this contract by the Roman law, that if the goods bought had, at the time of the sale, a latent fault or insufficiency not easily discoverable by the buyer, and of that kind that he would not have purchased the goods at any rate had he known it, the buyer was intitled, at any time within six months after the delivery, to sue for the recovery of the price, by the *actio redhibitoria*, upon his returning the goods to the seller, *tit. ff. De ædil. edict.* This action is, by our usage, limited to the special case where the buyer, in a few days after the goods have been delivered to him, offers them back to the seller; for otherwise it is presumed, from the buyer's silence, either that he hath passed from all objections to the sale, or that the insufficiency has happened after the goods came to his possession, *Jan.* 29. 1668, *L. Ayton*; *Fount. Feb.* 16. 1681, *Welwood*, stated in *Dict.* ii. *p.* 357.; *Fount. Feb.* 22. 1694, *Mitchell*; *New Coll.* iii. 38. If the insufficiency was of a slighter kind, it was lawful for the buyer, by the *actio quanti minoris*, to have sued for the recovery of as much of the price as exceeded what he might reasonably have given for the subject had he known the defect. But as no action is, by our usage, competent for setting aside sales on account of the disproportion of the price to the value of the commodity, it may well be doubted, whether the buyer would, in consideration of its insufficiency, be intitled to the abatement of any part of the price.

11. Among the conditions which are only accidental to a sale, and are not admitted except they be expressed, is the *pactum legis commissoriæ*, by which the sale becomes void, *res fit inempta*, if the price be not paid within a determinate day. This condition, where it is stipulated by an express clause, does not suspend the sale; the property is transferred to the buyer upon the delivery: but if he fail to pay the price within the time limited, the sale resolves, and the property returns from him to the seller, *l.* 1. *De leg. comm.* But if a sale should be entered into, under condition that the price shall be paid on or before a day prefixed, such condition, before it be purified, is, as Stair justly observes, *b.* 1. *t.* 14. § 4. truly suspensive of the sale, which is not understood to be perfected till the condition exists; insomuch that though the subject should be delivered to the buyer, the property continues in the seller till the price be paid.

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12. Among the *accidentalia* of this contract may be alſo reckoned the *pactum de retrovendendo*, or right of reverſion in ſales, by which the thing ſold is ſtipulated to return to the ſeller, if he ſhall, within a limited time, repay the price to the purchaſer. And this condition, when it is adjected to the contract, is moſt ſtrictly obſerved; ſo that the ſeller, if he ſhall ſuffer that time to elapſe without making payment, loſes his right of reverſion from that moment, and cannot be reſtored by any ſubſequent offer of the price: for as in ſales an adequate price is preſumed to be paid to the ſeller, there is truly nothing penal in limiting the reverſion, and therefore the buyer's abſolute right of property ought not to be poſtponed or ſuſpended beyond the agreement of the contracters. Though the right of reverſion of lands is declared by ſpecial ſtatute to affect ſingular ſucceſſors; yet, in the ſale of moveables, reverſions retain their genuine nature of perſonal obligations, and conſequently are effectual only againſt the buyer himſelf, but not againſt his aſſignee.

13. Permutation is a contract, by which one moveable ſubject is exchanged or bartered for another. It was deemed by the Romans an innominate contract, which therefore produced no action till one or other of the parties had actually performed his part of the contract by delivery, *ſupr. t.* 1. § 35. But it is, by our practice, fully perfected by conſent alone, without any *interventus rei*. The Roman law ſeems to have held it for a rule, that where either of the things exchanged belonged to a third perſon, the property was not transferred on either ſide; and that therefore he from whom one of the ſubjects happened to be evicted, might recover from the other what he gave in exchange for it, as ſtill continuing to be his property, *l.* 1. § 3. 4. *De rer. perm.* This doctrine may be equitable, if directed only againſt the party himſelf and his heir; but there could be little ſecurity in the commerce of moveables, if it were extended againſt a ſingular ſucceſſor, who had *bona fide* bought the ſubject from the party after the exchange.

14. Location is that contract, in which a hire is agreed upon, for the uſe of any moveable ſubject, or for the work or ſervice of perſons. He who lets his work, or the uſe of his property, to hire, is called the *locator*, or *leſſor*; and the other, the *conductor*, or *leſſee*. It is the leſs neceſſary to inſiſt minutely on the nature of this contract, that it is governed nearly by the ſame rules which are obſerved in that of a ſale, *pr. Inſt. De loc. cond.*; of which location may, without impropriety, be conſidered as a ſpecies: for the uſe of the thing, or ſervice of the perſon, in location, anſwers to the property which is acquired in a ſale; and the rent or wages in location, that generally conſiſts in money, and muſt always be certain, anſwers to the price. It is obvious, from the name and nature of location, that no property is transferred thereby to the leſſee, who is intitled to the bare uſe of the ſubject let, which ſubject is again to be reſtored to the owner at the time agreed on by the parties. If therefore the leſſor, who remains proprietor, ſhall make over his property to a third perſon, the right of uſe in the leſſee ceaſeth, from whom the new proprietor may recover the poſſeſſion of the ſubject, notwithſtanding the prior location. This rule, which by its nature may be applied equally to all locations, *l.* 9. *C. De locat.* obtained with us, even in leaſes of heritable ſubjects, till it was altered by ſpecial ſtatute.

15. As the contract of location is entered into for the benefit of both parties, they are liable in a middle kind of diligence, *præſtant culpam levem*. The leſſor is, by the nature of the contract, bound to procure and to continue the free uſe and enjoyment of the ſubject to the leſſee, and he muſt deliver it in ſuch condition that it may ſerve the purpoſe for which it was let. If by ſome fatality, or *vis major*, which cannot be imputed to himſelf, it ſhall not be in his power to get the leſſee into poſſeſſion, he cannot be ſued

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ex locato for damages, *l.* 15. § 2. *Loc.:* and, on the other hand, he has no claim for hire from the leſſee, who was, without his own fault, debarred from the uſe of the ſubject, *l.* 33. *eod. tit. verſ. Sin vero.* But if the leſſee ſhall be kept or turned out of poſſeſſion by any fact of the leſſor which infers blame, *ex. gr.* by having, after the contract, ſold the ſubject to another, without properly ſecuring the leſſee's intereſt, he not only loſes his hire, but is bound, by an implied obligation of warrandice, to make up to him all the damage he ſhall ſuſtain through the eviction of the ſubject, *l.* 25. § 1.; *d. l.* 33. *Loc.*

16. The leſſee is, on the other part, obliged to uſe the ſubject well, to put it to no other uſe than that for which it was let, to preſerve it in good condition during the leaſe, and to reſtore it to the leſſor, and to pay to him the rent or hire agreed upon: and he is intitled to the neceſſary and profitable expence diſburſed by him on the ſubject. If a mechanic, or workman, who lets his labour or ſervice, ſhall, either from careleſſneſs neglect to perform the work he has undertaken, or from want of ſkill make it uſeleſs or inſufficient, he is liable to his employer in damages, *l.* 9. § 5.; *l.* 13. § 1. 2. *Locat.*; for he ought not, as an artiſan, to have undertaken a work to which he was not equal. But if it cannot be imputed to him that the work was not performed, he is intitled to the full wages agreed on, *l.* 38. *pr. eod. tit.* A workman or ſervant, who is hired to a preciſe day or term, is intitled to his full wages, though he ſhould by ſickneſs or other accident be diſabled from his ſervice for a part of that time; but if he die before the term be elapſed, his wages are only due for the time he actually ſerved. If a maſter dies, or without good reaſon turns off a ſervant who was intitled to maintenance at bed and board in his family, before the term agreed on, the ſervant has a right to his full wages, and alſo to his maintenance till that term. And, on the other hand, a ſervant, who without a reaſonable cauſe deſerts his maſter's ſervice before the term, forfeits his wages and maintenance, and is liable to his maſter in damages. For a like reaſon, if an apprentice either die, or deſert his apprenticeſhip, before the term thereof be expired, the maſter is intitled to the whole apprentice-fee ſtipulated to him by the indentures, without any abatement, ſince he has done nothing to render the performance of the contract for the remaining years of the apprenticeſhip impracticable, *New Coll.* ii. 267.

17. The contract by which the owner of a ſhip or veſſel freights her to a merchant for the tranſportation of goods from one port to another, for a certain ſum, to be paid either by the day or upon the whole voyage, is a ſpecies of location. But though that contract may be perfected by conſent alone, it is uſually reduced into writing in the form of a mutual deed, called *a charter-party*. Beſides the freight ſpecially covenanted to be paid to the maſter, he is alſo intitled to average; by which is underſtood, in the common acceptation of the word, that ſum which is given to maſters of ſhips, over and above the freight, upon account of the extraordinary charges they may be put to in the courſe of the voyage, by employing pilots to direct the navigation in rivers, or through banks or rocks near the ſhore, or of the damage they may ſuſtain by the loſs of maſts, anchors, or other ſhip-apparel in a ſtorm, &c. No part of the freight is due to the maſter or owner of a ſhip till the whole intended voyage be finiſhed, by unlading the cargo, and diſcharging the ſhip at the laſt port mentioned in the charter-party; which obtains even in a trading voyage, where there are perhaps five or ſix different ports at which the maſter is bound to put in one after another. In moſt charter-parties, the maſter is obliged to remain a certain number of days at every port, for unlading the old cargo and taking in the new; in conſideration of which, no allowance can be claimed by him over and a-

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bove the ſtipulated freight; and frequently a power is given to the freighter to whom the goods belong, in caſe of neceſſity, to keep the ſhip at demurrage (from the French *demeurer*, to ſtay or continue) in each port, a farther number of days, at the rate of a determinate ſum to be paid to the owners or maſter of the ſhip, for each additional day that the ſhip ſhall be ſo detained in any of the ports aforeſaid.——The owner of a ſhip, when he wants money to purchaſe proviſions or other neceſſaries for any intended voyage, frequently borrows money; for which the lender's only ſecurity is upon the ſhip, without any perſonal obligation againſt the borrower. Debts of this kind are conſtituted by bond or bill of bottomry, ſigned by the borrower, acknowledging the receipt of the ſum, and charging the ſhip with the payment thereof upon her ſafe return home, after finiſhing the voyage; but declaring, that if ſhe be loſt during the courſe of the adventure, the obligation for the payment of that ſum ſhall ceaſe and determine, and that the whole loſs ſhall, in that caſe, fall upon the lender.—— Sometimes merchants who are unwilling to engage in an adventure upon their own riſk, chuſe to give a certain ſum as a premium to one or more; who, in conſideration thereof, grant to the merchant an obligation in writing, ſtyled *a policy of inſurance*; by which the inſurers oblige themſelves to undertake the whole riſk of the ſhip or goods inſured upon themſelves, at a certain rate *per centum*, proportioned to their value, and to warrant them to the owner during the courſe of the adventure, againſt all dangers ariſing from the ſea, enemies ſhips, pirates, or other misfortunes whatſoever. Inſurers are frequently called *underwriters*, from the ſtyle of moſt policies, which begin with the words, *We the underwritten*, &c. A merchant, or owner, who inſures ſhip or goods, knowing that they are already loſt, has no claim againſt the inſurers for any part of the ſums inſured: and if the maſter of a ſhip, after ſecretly unlading the cargo, ſhall fraudulently ſink her, by boring a hole in the hold, or other ſuch device, with an intention to recover from the inſurers the value at which the ſhip or goods inſured are eſtimated, the inſurers are diſcharged from their obligation, and the maſter is puniſhable criminally *ex dolo*. In caſe part only of the ſubjects inſured be loſt, each inſurer or underwriter muſt pay at the rate of ſo much *per cent.* to the owner, in proportion to the ſum for which he ſubſcribed.

18. Society, or copartnery, another conſenſual contract, may be defined, that by which the ſeveral partners agree, concerning the communication of loſs or gain ariſing from the ſubject of the contract. Among the Romans, copartneries were ſometimes entered into *omnium bonorum*, of the whole eſtate belonging to the partners or *ſocii*, *l.* 1. 5. *pr. Pro ſocio.* But by the preſent cuſtom of nations, they are limited to a determinate ſum of money, put by the partners into a common ſtock, to be employed in trade, agriculture, manufactures, or other lawful negotiation from which profit is expected. It is not enough towards conſtituting this contract, that two or more perſons have the ſame thing in common among them, as in the caſe of co-heirs, or of ſeveral legatees in the ſame ſubject; ſeeing ſuch communion is not formed by the mutual choice of the proprietors of each other for partners, *l.* 31. *Pro ſoc.*

19. Equality among the partners is the great characteriſtic of this contract; and therefore, *firſt*, if the copartnery be entered into by writing, as it is moſt frequently in all trading countries, and if the contract expreſs the ſeveral ſums put in by each partner into the common ſtock, the proprietors are intitled to ſuch a ſhare of profit and loſs as anſwers to the proportions of theſe ſeveral ſums, unleſs it be otherwiſe covenanted. *2dly*, Where neither the quantity of ſtock put in by each partner, nor their ſhares of profit and loſs are mentioned, their ſeveral ſtocks are preſumed equal, till the contrary

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trary be proved; and of conſequence, their ſhares of profit and loſs will be alſo equal, *l.* 29. *pr. Pro ſoc.* But a copartnery may be ſo formed, without breaking in upon the equality eſſential to the contract, as to give one of the partners an equal ſhare of profit with the others, though his ſtock ſhould be leſs than theirs, or indeed though he ſhould have no ſtock; becauſe the ſkill or induſtry of one partner may be worth the ſtock of another. Nay, this conſideration will juſtify a copartnery, by which one of the partners, either from his ſuperior ſkill in the management, or his ſole right of property in the ſubject, ſtipulates for a certain ſhare of the profits to himſelf, without being ſubjected to any part of the loſs, *l.* 29. § 1. *Pro ſoc.* This is the caſe in leaſes of mines, granted by the proprietors of the ground, for a ſtated proportion of the ore brought up from the ſhaft; which proportion is not chargeable with any part, either of the loſs, or even of the neceſſary expence attending the work: for ſuch contracts, though made out in the form of leaſes, are as proper copartneries as thoſe granted by a proprietor of land to the *coloni partiarii*, *l.* 25. § 6. *Locat.* But copartneries by which one of the partners is ſubjected even to the ſmalleſt ſhare of the loſs or expence, without being intitled to any chance for ſome part of the profits, called in the Roman law *leoninæ*, are juſtly reprobated; ſince it is quite irreconcileable to equity, that one ſhould loſe, or run a riſk of loſing, ſomething, while at the ſame time he hath not the leaſt chance of gaining any thing, *d. l.* 29. § 2. *Pro ſoc.*

20. Where a partner acquires a right in name of the company, the property, by the obvious nature of the acquiſition, is veſted directly in the company; and when he acquires in his own name with the company's money, he lies under an obligation to communicate the benefit of the purchaſe to them. Nay, it ariſes from the good faith implied in partnerſhip, that a partner, when he purchaſes, even with his own money, or at his own expence, a right which is naturally connected with, or falls under the copartnery, is, like a tutor with reſpect to his pupil, preſumed to purchaſe, not for himſelf, but for the company, *March* 26. 1624, *Inglis*: but as the property ſtill remains in the acquirer, thoſe who purchaſe from him are ſecure againſt any challenge from the company; whoſe only remedy is an action of damages againſt the firſt purchaſer for not having taken the right in their name, or communicated it to them. It hath been much diſputed, how far an obligation ſigned by one of the partners, affects the company or copartnery by the Roman law; as to which a variety of diſtinctions hath been imagined by doctors, to reconcile the different expreſſions of the Roman juriſconſults. According to our preſent practice, the partners in private companies generally aſſume to themſelves a firm or name proper to their own company, by which they may be diſtinguiſhed in their tranſactions; and in all deeds ſubſcribed by this name of diſtinction, every partner is, by the nature of copartnery, underſtood to be intruſted with a power from the company of binding them. Any one partner therefore who ſigns a bill or other obligation by the company's firm, obliges all the other partners; but where he ſubſcribes a deed by his own proper ſubſcription, the creditor, who followed his faith alone in the tranſaction, hath no action againſt the company, unleſs he ſhall prove that the money lent or advanced by him was thrown into the common ſtock, *l.* 82. *Pro ſoc.* No partner, however, can, without a ſpecial warrant from the company, bind them by any deed of his, though ſigned by the ſocial firm, in a matter which falls not under the ordinary courſe of adminiſtration. Hence a bond of arbitration, or reference of certain company-claims, made by a partner in name of himſelf and company, to arbiters, was adjudged ineffectual, *Nov.* 1728, *Lumſdaine*, obſerved in *Dict.* ii. *p.* 376.

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21. It alſo proceeds from the mutual confidence inherent in this contract, that the ſeveral partners are not always obliged to uſe that middle kind of diligence which prudent perſons employ in their own affairs; they are ſecure if they manage the company's concerns as they would do their own. If therefore a partner ſhould fall into an error in management, for want of a larger ſhare of prudence or ſkill than he was truly maſter of, he is not anſwerable for the conſequences: he did his beſt; and the other partners have themſelves to blame that they did not make choice of a partner of greater abilities, § 9. *Inſt. De ſoc.*

22. As partners are, from a *delectus perſonæ*, or the reciprocal choice they make of each other, united in a kind of brotherhood, no partner could by the Roman law transfer his intereſt or ſhare in the ſociety to a third perſon, without conſent of the company, *l.* 19. 59. *pr. Pro ſoc.*; but copartneries, even private ones, may be now ſo conſtituted by a ſpecial article for that purpoſe, that the partners are left at liberty to transfer their ſhares to whom they pleaſe. If any of the partners ſhall aſſume a third perſon into partnerſhip with him, ſuch aſſumed perſon becomes partner, not to the company, but to the aſſumer, *l.* 19. 20. *eod. tit.* The company are not bound to regard the ſecond contract formed by the aſſumption, which is limited to the ſhare of the partner aſſuming. He ſtill continues, with reſpect to the company, the ſole proprietor of that ſhare, and muſt ſuſtain all actions concerning it.

23. Every partner is obliged to advance the ſums neceſſary for carrying on the company's buſineſs, in proportion to the original ſhare he has in the copartnery. If one of them has advanced any ſum out of his proper money, upon the common account, or hath ſuffered any damage by robbery, ſhipwreck, or other misfortune, while he is managing the company's affairs, the expence ſo incurred, or the loſs ſo ſuſtained, muſt be made up to him out of the common ſtock, *l.* 52. § 4. *eod. tit.*; and if that is not ſufficient to repay it, all the partners muſt indemnify him out of their proper money, each in proportion to his ſhare of profit and loſs; and if any one of them ſhall have become bankrupt, that burden falls on thoſe who remain ſolvent, with the deduction of the ſhare falling on the partner himſelf who has expended the money or ſuſtained the loſs. But if the loſs be more remote or indirect, *ex. gr.* if one, from malice againſt the company, ſhould have diſinherited his lawful heir, becauſe he entered into that partnerſhip, or revoked a legacy he had formerly granted him, the partner has no claim for indemnification, as he would not be obliged to communicate to the company any benefit of that ſort that might accrue to him by his partnerſhip, *l.* 60. § 1. *eod. tit.*

24. The company-effects are not the property of every individual partner, according to their ſeveral original ſhares, but are the common property of the company, ſubject to their ſole adminiſtration; ſo that no partner can withdraw out of the common ſtock any part of his own ſhare, or even of its profits, till the company ſhall direct a dividend. If the common ſtock, together with its produce and profits, belongs in property to the company, it muſt be ſubject to their debts; ſo that it is only the reſidue, or the ſtock remaining after the payment of the company-debts, that can be the ſubject of diviſion after the diſſolution of the ſociety. No creditor, therefore, of a partner can by poinding affect his debtor's ſhare in the copartnery, ſo as to transfer the property of it to himſelf, to the prejudice of a company-creditor; but he may attach it by arreſtment in the hands of the company, to be made forthcoming to him on the diſſolution of the partnerſhip, in ſo far as ſhall appear to be at that period due to the debtor, after payment of all the company-debts; ſee *New Coll.* iii. 11.

25. As

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25. As to the ſeveral ways in which this contract may be diſſolved, no private ſociety is underſtood to continue longer than the lives of the partners, *l.* 1. *pr. Pro ſoc.*; nor to deſcend to their heirs, *l.* 59. *pr. eod. tit.*; for that contract is founded in the perſonal confidence that the partners have in one another. Upon this ground, the death of any one of the partners diſſolves the ſociety, if the contrary be not expreſsly covenanted, § 5. *Inſt. De ſoc.*; becauſe the copartnery might poſſibly have been entered into, with a ſpecial view to the diligence or abilities of that particular partner. What is ſtyled *civil death*, has, in this queſtion, the ſame effect as natural, *l.* 4. § 1. *Pro ſoc.* For a partner who is attainted, or lies under the ſentence of death, is diſabled from contributing either ſtock or induſtry, or from performing any of the obligations or duties incumbent on a partner.

26. Conſent is eſſential to the contract of ſociety, not only in its conſtitution, but in its continuance; the renunciation therefore of any partner, as well as his death, diſſolves the copartnerſhip, § 4. *Inſt. De ſoc.*: and tho' the ſociety ſhould be conſtituted to endure for a limited time, partners may renounce before that time be elapſed, upon reaſonable grounds, *l.* 14. *h. t.*; and in that caſe the renouncer has a right to demand his juſt proportion of the common ſtock and profits. But if a partner ſhall renounce from unfair or intereſted views, *ex. gr.* to purchaſe on his own account what the company intended to have bought for themſelves; or if he ſhall withdraw before the term fixed by the contract, or at an unſeaſonable conjuncture, which may bring damage to the company, he ſets his partners free from all their engagements to him, while he continues liable to them for the unjuſt profits he may have made by quitting the ſociety, and for the damage ariſing to the company from his renunciation, § 4. *Inſt. De ſoc.*; *l.* 65. § 6. *Pro ſoc.* In the caſe, either of death or of renunciation, the remaining partners may, if they ſhall judge proper, continue the copartnerſhip, either expreſsly, by entering into a new contract, or tacitly, by going on in the management of their common affairs upon the former plan, *arg.* § 8. *Inſt. De ſoc.* The Roman lawyers tell us, that ſociety is alſo diſſolved *egeſtate*, or by a partner's bankruptcy: and without doubt, where all the partners, or rather when the company itſelf becomes bankrupt, and hath no common ſtock left, *deeſt res*; there can be no ſociety without a ſubject capable of yielding profit. But if the caſe be put, that after goods are purchaſed on the company's credit, for the price of which all the partners are bound, one of them ſhall become bankrupt, the inſolvency of that partner confers no title upon the reſt to pocket up the whole profits, to the excluſion of him who has failed, on pretence that the ſociety is diſſolved as to his ſhare, and that therefore they are intitled to the whole profits, as they run the whole riſk of the price, *July* 12. 1749, *Paterſon.*

27. Upon the diſſolution of the ſociety, the company-goods fall to be divided among the ſurviving partners, and the repreſentatives of thoſe that are deceaſed, according to the ſeveral proportions either expreſſed or implied in the contract: and if the company-debts exceed the funds, the ſolvent partners muſt make payment to the creditors out of their proper eſtates. Where one of the partners is, by the conception of the contract, bound to contribute nothing more than ſkill and ſervice, he is not ſubjected to any part of the loſs; for ſuch ſtipulation ſeems to exempt him from the payment of money. As to the profits, he is, without doubt, intitled, upon the diviſion of the ſociety-goods, to ſuch a ſhare of them as is allotted to him by the copartnerſhip; but he has no claim to any part of the original ſtock, *arg.* § 2. *Inſt. De ſoc. verſ. Nam et ita.* His ſervice is underſtood to be compenſated with the uſe of that ſtock, not with the property of it: and as, upon the diſſolution of the contract, he retains his ſkill and ſervice to himſelf,

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ſelf, it is equitable that the other partners ſhould alſo retain what was contributed by them towards the common ſtock, and the hazard of which lay upon them alone. But from this rule, the caſe muſt be excepted, where the contrary is expreſsly covenanted, or at leaſt implied from the ſpecial nature of the agreement; an inſtance of which laſt is ſtated by Puffendorf, *De jur. nat. lib.* 5. *c.* 8. *n.* 2.

28. Public trading companies are now frequently conſtituted into corporate bodies, ſometimes by ſtatute, and ſometimes by grant from the crown, with rules very different from thoſe which either obtained in the Roman law, or to this day obtain with us in private partnerſhips. They are underſtood to be perpetual, if their duration is not limited by their charter or patent; and conſequently, a partner after his death tranſmits his ſhare to his repreſentative, who thereby becomes one of the partners. Any member of the company may alſo, during his life, by transferring the ſtock, ſubſtitute another in his place, without conſent of the company; but he cannot, in conſequence of his renunciation, claim from the company his ſhare of the common effects, as he might by the Roman law. By the charters or patents erecting theſe public companies, no obligation can be granted that ſhall be binding upon the company, nor can any ſubject be either ſold or acquired for their behoof, but by the order of certain directors, who muſt be choſen according to the preſcription of the grant. And a majority of proprietors at a general meeting have power, as a corporate body, to enact corporation-laws for the better managing and expediting their affairs.

29. There is a great difference, by the acknowledgement of all trading nations, between a proper copartnerſhip and a joint trade. A copartnerſhip is a collective and permanent ſociety, in which all the *ſocii* are, in regard to ſtrangers, conſidered as one perſon; and conſequently are bound *ſinguli in ſolidum* for the company's debts. A joint trade, on the contrary, is only a momentary contract, where two or more perſons agree to put a ſum of money into a common ſtock, to be employed as an adventure in a particular courſe of trade, the produce of which, after the trading voyage is finiſhed, is to be divided among them, according to their ſeveral ſhares in the adventure. In this laſt kind of contract, no adventurer can be hurt by any deed not ſubſcribed by himſelf, though it ſhould be ſigned by a co-adventurer in his name; for where there is no proper copartnerſhip, there is no ſubſcription by a firm, the eſtabliſhment of which, by an unanimous reſolution of the company, is the only ground upon which the deed of one partner can induce an obligation upon the reſt. If, for inſtance, that particular adventurer who was intruſted with the common ſtock for the purchaſing of goods, ſhall be afterwards found to have given bills for them in place of money, the ſeller has no action for the price upon theſe bills againſt the co-adventurers; becauſe he followed the faith of the buyer only, and not of the others, who were perhaps unknown to him; and therefore he can recover no more from theſe others but that part of the buyer's ſhare which may happen to remain ſtill in their hands. Yet even in a joint trade, if one of the adventurers ſhall become inſolvent, the others have a right to retain the whole ſtock, as long as it continues undivided, againſt the bankrupt's creditors, till they be relieved of all the engagements they may have entered into upon account of the adventure: for though the partners in a joint trade are not proper *ſocii*, they are proprietors of the ſtock or ſubject of the adventure *pro indiviſo*; and conſequently, while it exiſts, they are preferable to the creditors of any particular adventurer, *Jan.* 11. 1740, *Cred. of Macaul.*

30. Marriage is truly a ſociety. The nature of the communion of goods between

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between the *socii*, implied in marriage while it subsists, has been already spoke to. The legal effects of special settlements contained in marriage-contracts, in so far as they relate to the heirs or children of the marriage, are to be considered *infr. t.* 8. § 38. *et seqq.* It may suffice, in this place, to explain shortly the import of some doubtful expressions that have been used in marriage-contracts, in the case of conventional provisions granted to the surviving wife. A provision by a husband to the widow, of the liferent of all his goods and gear, moveable and immoveable, excludes the legal right which she would otherwise have had to the property of the third or half of his moveables: for it is presumed, that the liferent of the whole was granted in full satisfaction of her *jus relictæ*; and that the husband had no intention to give her both the property of that share to which she is intitled by law, and the liferent of the rest, *Dec.* 20. 1664, *Young*. A provision to the widow for her liferent use, of all the goods and gear that shall be acquired by the husband, is to be understood only of free gear, *deductis debitis*, and therefore cannot exclude the husband's creditors from attaching the subject of that provision, *Dec.* 23. 1668, *Smith*. Though the word *moveables*, when adjected to the word *furniture*, or *plenishing*, and limited to such moveables as are in the granter's possession, does not comprehend *nomina debitorum*, or moveable bonds, which cannot, like the *corpora* of moveables, be properly said to be possessed, *Falc.* i. *Feb.* 19. 1745, *Ker*; yet where the liferent of lands, annualrents, goods, and gear, that shall be acquired by the husband during the marriage, is granted to the wife, without limitation, the provision extends to such moveable bonds as bear date while the marriage subsisted, but to none bearing date afterwards, if it do not appear that the sums contained in them were made up of the price of goods acquired during the marriage, *July* 15. 1673, *Robson*. Though, in testamentary deeds, a provision to the wife, of the granter's moveables, is not understood to comprehend heirship moveables, which are reserved to the heir, *infr. t.* 9. § 11.; yet a provision to her, contained in a marriage-contract, or other deed *inter vivos*, of the moveables, or a certain part of them, which shall belong to the husband at his death, includes heirship moveables, *July* 12. 1734, *La. Kinfawns*; *Home*, 76.

31. Mandate was also ranked by the Romans among the consensual contracts, which might be perfected without either writing or the *interventus rei*. Absence, indisposition, and many other impediments, may disable one from looking after his own business; in which case, since he cannot act in person, it behoves him to employ one to act for him. Mandate is that contract by which one thus employs his friend to manage his affairs, or any branch of them. The person employed is generally called a *mandatary*, and sometimes an *attorney* or *factor*, according to the different nature of the mandate; and he who employs is called the *mandant*. As the bare granting of a power to act, can infer no obligation upon the person impowered, who is at liberty to refuse the office, this contract cannot be perfected till the mandatary has undertaken to execute the mandate; which he may do, either by word, by writing, or by any deed which sufficiently discovers his resolution. Mandate therefore, where it signifies a mutual contract, includes not only the act of the mandant who employs, but the acceptance of the mandatary. Hence it arises, that mandates or orders for the sole behoof of the mandatary, cannot constitute this contract; for they are truly no other than advices, which the mandatary is at liberty to follow or not at pleasure. And even when mandates of this kind confer a positive right on the mandatary, *ex. gr.* procuratories of resignation, or precepts of seisin, he lies under no obligation, even after acceptance, to execute them; for no man can come under an obligation to himself.

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32. The contract of mandate, when underſtood ſtrictly, and in the ſenſe of the Roman law, is grounded entirely on perſonal conſiderations of friendſhip; and was therefore always deemed a gratuitous contract. When he who was employed could claim a reward for his trouble, it reſolved into a *locatio operarum*, *l.* 1. § 4. *Mandat.* But the honoraries of lawyers and phyſicians, though they may be ſued for without a previous agreement, *l.* 1. § 1. 10. 12. *De extr. cogn.* do not alter the nature of the contract from mandate to location; becauſe they are, as Stair expreſſes it, *b.* 1. *t.* 12. § 5. the reward of ſervices which can receive no proper eſtimation; and therefore the action by which they are recovered is the *actio mandati*, not *locati*, *l.* 6. *pr. Mandat.* * By our uſage, all commiſſions for the tranſacting of buſineſs where no reward is promiſed, are preſumed to be gratuitous, and conſequently proper mandates, *Jan.* 4. 1738, *Truſtees of Johnſton*, ſtated in *Dict.* ii. *p.* 317. unleſs a ſtronger contrary preſumption for a reward ariſes from the ſpecial circumſtances of the mandatary, or his way of life.

33. Mandate is either expreſs, which is given in writing or in words, ſuch as properly ſignify the mandant's deſire; or tacit, which, without an expreſs commiſſion, is inferred or preſumed from facts implying it. Thus a mandate is inferred from one's ſuffering another to act for him in his preſence without contradiction, *l.* 18. 53. *Mandat.*; *Feb.* 23. 1667, *L. Renton*; agreeably to the rule, *Qui tacet, conſentire videtur.* A mandate to appear judicially, in name of a party to the ſuit, is preſumed with reſpect to a procurator before an inferior court, from his being poſſeſſed of that party's writings; and as to an advocate, from his bare appearance in court for him. Thus alſo, a ſervant's buying ſhop-goods in his maſter's name, and granting receipt for them, infers a mandate, which is preſumed to be known to the merchant, *Nov.* 17. 1665, *Howieſon.* Things lawful are the only ſubject of mandates. If one ſhall unwarily accept of a commiſſion to do what is diſhoneſt or immoral, he is ſo far from being obliged to performance, that it is his duty not to perform; and no action is competent, either to the mandant or mandatary, upon ſuch mandate, § 7. *Inſt. De mandat.*; *l.* 6. § 3. *Mandat.*

34. Where a number of mandataries are named by a proprietor for the management of the ſame affair, without a power to the plurality, or any determinate number, to act as a quorum, they are conſidered as joint mandataries, and muſt therefore all concur in every act of adminiſtration, *Fount. Feb.* 10. 1693, *More*; yet this rule ought not to be rigorouſly extended to ſteps taken by a leſſer number, in points conſiſting merely in form, or to ſuch acts as are a neceſſary conſequence of what had been before reſolved by the mandataries at a full meeting. By the Roman law, a mandatary might have committed the execution to any third perſon, *l.* 8. § 3. *Mandat.* But though in moſt mandates the execution of certain previous ſteps muſt, by the nature of the management, be intruſted to others, it is inconſiſtent with the duty of a mandatary, who is himſelf named by the mandant *propter delectum perſonæ*, to ſubcommit the whole, or the principal parts of his truſt, to a delegate; and ſuch mandatary is accountable for the whole damage ariſing to the mandant from the unfitneſs or unſkilfulneſs of the ſubſtitute, *Fount. Nov.* 12. 1696, *Macneil.* It is alſo a breach of truſt in a mandatary, to employ the mandant's money to his own uſe, or to tranſfer the property of any of the mandant's effects to himſelf; and if he ſhould take a bond in his own name for a ſum which truly belonged to the man-

* It was found, that phyſicians fees are preſumed to have been paid, except during the death-bed ſickneſs, *New Coll.* i. 134.

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dant, a direct action is competent to the mandant, against the debtor in the bond, for payment of the sum to himself, where the mandatary's creditors are not in the question, *June* 9. 1669, *Street*. * But if a mandatary who has received money from the mandant to purchase goods for him, buys them in his own name, he becomes the proprietor; so that the mandant cannot recover them as his own, *rei vindicatione*, but must be contented with a personal action against the mandatary for damages, *Jan.* 24. 1672, *Boylston*. Merchants residing abroad, who purchase goods for their correspondents in this country upon commission, are proper factors or mandataries. If a foreign factor should, in pursuance of a commission from Scotland, ship goods, whereof the importation is prohibited, to be brought hither, he is not, under pretence of the unlawfulness of contracts relating to such goods, deprived of his right of action against his correspondent, for the price of them: for it was the factor's duty, who is not presumed to know the different revenue-acts passed in Britain, to execute his commission: his powers from the mandant ceased so soon as the goods were shipped, in which there was nothing unlawful; and as the whole crime lay in transporting them to this country, which was the act, not of the mandatary, but of his employer, the employer ought to be the alone sufferer by the penal consequences of it, *New Coll.* ii. 16.

35. The chief obligation arising from this contract lies upon the mandatary, who, by his acceptance, is bound to the execution of the mandate, *l.* 22. § 11. *Mandat.*; in which he must follow the precise rules prescribed by his employer; for as all his powers flow from the mandant's commission, whatever he does *ultra fines mandati*, is without authority, and cannot bind his constituent, *l.* 5. *pr. eod. tit.* Neither is it a sufficient defence to the mandatary, that the method he took was more rational than that which was pointed out by the mandant; for in that, his employer, and not he, was the proper judge. A mandatary who purchases a subject for the mandant at a lower price than is contained in the commission, does not exceed his powers; for a greater sum includes the lesser: and though he should go beyond his commission by purchasing at a higher price action is competent to him against the mandant for relieving him of the bargain, if he shall restrict his claim for the price to the sum expressed in the commission, *l.* 4. *eod. tit.* contrary to the opinion of the Sabiniani, § 8. *Inst. De mandat.* Where no special rules are laid down by the mandant, the mandatary must be governed by those which prudence suggests; in which case he is safe, whatever may be the success. A mandatary, being in truth a trustee, is obliged to communicate to the mandant the benefit or ease allowed to him in any purchase which is naturally connected with the subject of the mandate, *Nov.* 15. 1667, *Maxwell*; *June* 24. 1712, *Wright*. In the case of two or more mandataries, they are, like tutors, liable *singuli in solidum*, *l.* 60. § 2. *Mandat.*

36. Mandataries, though they have no benefit by the contract, are, by the Roman law, liable in exact diligence, *l.* 13. *C. Mand.* But this doctrine contradicts the general rule laid down by that law in relation to diligence. Lawyers have attempted to justify it upon this medium, That the contract of mandate, because it implies trust, requires exact diligence in the trustee: but depositaries and copartners are as properly trustees as mandataries; notwithstanding which, they are liable in the several degrees of diligence which are suitable to the nature of their several contracts. Our judges have therefore governed themselves in this point by the equity of the Roman law,

* The same decision was lately given where the creditors were in the field, 1765, *Alison contra Fairholmes & Malcolm*.

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as it has been already explained; by which a mandatary in a proper mandate, where no benefit accrues to him, is liable only for actual intromiſſions, or for ſuch diligence as he employs in his own affairs, *July* 17. 1672, *E. Wemyſs*; *Harc.* 705.; *Fount. Feb.* 8. 1701, *Irvine.*

37. But this rule muſt not be applied to the following caſes, where the reaſon of it fails. *Firſt*, A mandatary who plainly exceeds the limits of his mandate, is accountable for every accident, or *caſus fortuitus*, that through occaſion of ſuch delinquency ſhall afterwards bring hurt to the management, *Dirl.* 259.; *Br. MS. June* 28. 1716, *Young*. *2dly*, In improper mandates, where ſalaries are either expreſsly given or preſumed from circumſtances, the mandatary, conformably to the general rule of the Roman law, *præſtat culpam levem*; he is obliged to act with that diligence and diſcretion which a man of prudence uſes in his affairs, *Jan.* 7. 1680, *Macbride*; *July* 18. 1710, *Gibſon*; and conſequently, if through any neglect in the execution of his commiſſion, a damage ſhall ariſe, he is liable to make it up to his employer, or other perſon who ſuffers by it, *New Coll.* ii. 2. This is the caſe of factors, whether granted by the court of ſeſſion on ſequeſtered eſtates, or by private perſons, with ſalaries annexed to them; or of merchants who are employed by others to purchaſe or ſell goods, where a reward for pains is implied, though it ſhould not be expreſſed. And this doctrine alſo obtains in factors who are appointed by the court of ſeſſion *loco tutoris*, in conſequence of an act of ſederunt, *Feb.* 13. 1730, and who are bound by their office to take care that their pupil's money be lent out on proper ſecurity, and taken out of the hands of debtors ſo ſoon as they appear to be declining in their circumſtances, *New Coll.* ii. 251.

38. The mandant is, by this contract, obliged to replace to the mandatary all the reaſonable expences diſburſed *bona fide*, and the damage ſuſtained by him in the execution of the mandate, even though the management ſhould not have had the expected ſucceſs; for *officium nemini debet eſſe damnoſum*, *l.* 56. § 4. *Mandat.*; *l.* 4. *C. eod. tit.* Where there are two or more mandants, each of them may be ſued by the mandatary *in ſolidum*, *l.* 59. § 3. *eod. tit.* Thus an agent who had managed a law-ſuit at the deſire of ſeveral common purſuers, was allowed to bring his action againſt any one of them for his whole claim of diſburſement and pains, *Feb.* 1730, *Chalmers*, ſtated in *Dict.* ii. *p.* 385.

39. Mandates, though they are for the greateſt part confined to ſpecial matters, are ſometimes conceived in general terms for the management of the mandant's affairs. But there are certain limitations implied in the powers even of general mandataries, ariſing from the reaſon of things, or the known nature of adminiſtration. *Firſt*, No mandate, however ample, can be conſtrued into an order to commit crimes; becauſe the giving of ſuch orders being in itſelf criminal, is not to be inferred by implication. *2dly*, General mandates imply no power of gifting what belongs to the mandant; for as donation is not preſumed to be made by the owner himſelf, far leſs is a power of donation preſumed to be conferred by the owner upon another, in a mandate granted merely for the good management and adminiſtration of buſineſs. *3dly*, A power to ſell an heritable eſtate, or even moveables of more than ordinary value, though for a juſt price, ought not to be preſumed; and therefore requires a ſpecial mandate: but a general mandatary may, and ought, to ſell ſuch of the mandant's moveable goods as are of a more periſhing nature, *quæ ſervando ſervari nequeunt*. *4thly*, No general mandatary hath a power to enter the mandant heir to his anceſtor, becauſe of the riſk which the mandant runs by being ſubjected univerſally to his anceſtor's debts. *5thly*, A general mandate gives no power to tranſact, or refer to arbiters, any debateable right ariſing between the mandant and a third party. In this point, the power of tutors is greater than

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than that of general mandataries. For which this reaſon may be given, that the powers of tutors ought to extend even to uncommon acts of adminiſtration, when they appear profitable to the minor; becauſe minors having tutors or curators, can do no deed without their authority or conſent: but there is no ſuch neceſſity to ſtretch the powers of a general mandatary; for the mandant is capable by himſelf of tranſacting, or referring to arbiters, any debateable claim: and if he wants to devolve that power on a mandatary, he may do it by a ſpecial commiſſion. *Laſtly*, If in a general mandate, ſome particular caſes are expreſſed, the mandate is not to be extended to caſes of a different kind from thoſe which are expreſſed; for though ſuch mandate be in the form of words general, yet the ſubjoining of certain particulars makes it ſpecial, and ſo reſtricts it to the particulars of the ſame kind and nature with thoſe which are expreſſed.

40. Mandates expire, *firſt*, by the revocation of the employer, who, as proprietor, is intitled to direct the management of his property at pleaſure. This revocation may be not only expreſs, but tacit or implied; *ex. gr.* when the mandant, by his poſterior nomination of a ſecond mandatary, virtually revokes the powers conferred upon the firſt. But in order to give ſuch revocation full effect, (1) It muſt be notified to the former mandatary, *l.* 15. *Mandat.*; (2) Matters muſt be entire: for if the mandatary has executed part of his commiſſion, and thereby becomes concerned that it ſhould not be revoked; if, for inſtance, he ſhould, on the faith thereof, have obliged himſelf to purchaſe goods from a third party; the mandant cannot effectually revoke his commiſſion till he relieve the mandatary from ſuch engagements, *l.* 27. *pr. De procur.* *2dly*, Mandates expire by the renunciation of the mandatary, even after he has accepted, and in part executed the commiſſion; but if he does not notify his renunciation to the mandant immediately after giving up the management, he is liable for the damage occaſioned by the delay, *l.* 27. §2. *Mandat.* A mandatary who ſhall renounce *doloſe*, at a critical time, which muſt be attended with loſs to the mandant, is alſo liable in damages, *l.* 22. § 11. *eod. tit.* *3dly*, Mandates expire by the death of the mandant, both becauſe it is preſumed that the commiſſion was accepted from a perſonal regard to him, and becauſe the will of the mandant, which alone ſupports the commiſſion, ceaſeth neceſſarily upon his death. *4thly*, They expire by the death of the mandatary; becauſe the commiſſion was given from the mandant's ſpecial confidence in him: And in the caſe of two or more mandataries, the mandate where no quorum is named, expires by the death of any one of them; becauſe in ſuch caſe, they are all conſidered as joint mandataries, *ſupr.* § 34. The reaſon why this doctrine does not hold in tutors, has been explained *b.* 1. *t.* 7. § 30.

41. If a mandatary, ignorant of the mandant's death, continue to execute the commiſſion *bona fide*, what he doth under that, *ignorantia facti*, muſt be ratified by the mandant's heir; for till the mandatary knew of his employer's death, it was his duty to go on in the management, § 10. *Inſt. De mand.* But if the mandatary, ignorant perhaps that mandates are vacated by the death of the mandant, ſhall, after his knowledge of it, proceed to execute a commiſſion which he had accepted at the deſire of the deceaſed, what he does cannot affect the mandant's heir; for ignorance of law can give no man a right to manage the affairs of another who had given him no commiſſion. Yet this is to be underſtood *rebus integris:* for if part of the commiſſion had been executed before the mandant's death, by which the management would ſuffer if the whole were not to be carried into immediate execution, the powers given by the mandate are not accounted to have expired; and the mandatary not only may, but ought to continue his management. In the ſame manner, if the mandatary ſhould die, after having

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begun a courſe of management which required to be carried on without delay, his heir may execute what was left unfiniſhed by his anceſtor, *arg. l.* 27. § 3. *Mand.*; § 10. *Inſt. eod. tit.*

42. Procuratories of reſignation, and precepts of ſeiſin, are mandates or orders by one who makes over a land-eſtate, directed to the grantee, not for the behoof of the granter himſelf, but of the grantee, who has the ſole intereſt in the execution of them. As theſe orders are not given on perſonal conſiderations of friendſhip, nor are revocable, no good reaſon can be given why they ſhould fall by death; nevertheleſs, becauſe they carried the form of mandates, they were, by our former law, underſtood to expire by the death of either the diſponer or diſponee. As it required a conſiderable expence to renew them, all procuratories of reſignation and precepts of ſeiſin are, by 1693, *c.* 35. declared to be a ſufficient warrant for reſigning or taking ſeiſin, as well after as before the death, either of the granter or of the grantee, or of both; but precepts of *Clare conſtat*, being rights granted voluntarily by ſuperiors, and indeed deviations from the law, *t.* 8. § 71. are expreſsly excepted from the ſtatute. As mandates contained in clauſes for the regiſtration of deeds, are alſo granted ſolely *gratia mandatarii*, and ſo not revocable by the granter, they are, in like manner, made regiſtrable after the death of either the grantee or granter; *vid. infr. b.* 4. *t.* 1. § 63.

43. The obligation which the law hath impoſed on exercitors to fulfil the contracts of their ſhipmaſters, may be conſidered as a tacit mandate. By the *jus civile* of the Romans, when oppoſed to the *jus prætorium*, no man could be obliged by the contract or deed of another, *l.* 3. *in fin. C. Ne uxor:* but the pretor ſoftened this rigour in many caſes, where equity or public utility required it; and particularly by an edict calculated for the encouragement of commerce, by which it is declared, That exercitors ſhall be obliged by the contracts of their *magiſtri navium*, for all repairs, proviſions, or furniture, neceſſary for the ſhip or crew. An exercitor, from *exercire*, to employ, or uſe, is he who employs a ſhip in the way of trade on his own account, whether he be himſelf the owner, or whether he freight her from the owner. This obligation is truly grounded on the mandate which is preſumed to be given by the exercitors to the maſter whom they ſet over the ſhip, to contract in their name for whatever may be neceſſary for upholding her in a condition fit for ſervice, *l.* 1. § 5. *De exerc. act. verſ. Omnia enim.* Any perſon may be named maſter, without diſtinction of age, ſex, or condition, even pupils, and women clothed with huſbands; in which character they will effectually oblige the exercitors, though they cannot oblige themſelves by any contract, *l.* 1. § 4. *eod. tit.*; for the exercitors might have ſet whom they thought proper over the ſhip; and if they have given powers of contracting for them to one whom they knew incapable of binding himſelf, the law muſt needs compel them to fulfil his obligations to the other party, who contracted with him upon their faith, *l.* 7. § 2. *De inſt. act.* Leſt the furniſhers, who cannot always know who the maſter of the ſhip is, ſhould be inſnared by their ignorance, the obligation is not limited to the contracts of him who is truly intruſted by the exercitors with the command of the ſhip. Whoever has the actual direction of her is, in this queſtion, deemed to be *præpoſitus*, *præſumptione juris et de jure*, though he ſhould have no commiſſion from the exercitors, or ſhould even be ſubſtituted in the direction by the true maſter, without their knowledge, nay, againſt their expreſs orders, *d. l.* 1. § 5. *De exerc. act.*; and conſequently his contracts oblige not only himſelf, but the exercitors, *d. l.* 1. § 5. 17.

44. Exercitors are liable whether the maſter has purchaſed the neceſſary furniture or proviſions with his own money, or has borrowed money for that purpoſe. The furniſher or lender lies under no neceſſity of performing the

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the office of an overseer, by superintending the actual application of the money or materials for the use of the ship; and so is not bound to prove *in rem versum*, *l.* 1. § 9. *De exerc. act.* Yet equity demands, that he should inquire so far into the condition of the ship, as to know that it wanted repairs or provisions to such an extent; otherwise every shilling that an exercitor could call his own, must depend on the probity of the shipmaster. Where money is borrowed for refitting or victualling a ship, the bond must, for the exercitor's greater security, express the cause of borrowing, *arg. d.* § 9. Exercitors are not obliged by the shipmaster's contracts concerning things which have no relation to the subject of his trust, *l.* 1. § 12. *eod. tit.*; and therefore, as by the present custom of trading nations, masters are set over the ship, not over the cargo, exercitors, if they have not given the master a special commission, are not bound by any contract or obligation of his concerning the purchase of goods, *Dec.* 12. 1707, *Coltran.* The care of disposing of the exercitors goods, and of purchasing others with the price, is now generally given to supercargoes, who therefore oblige their constituents for what sums they borrow in the course of the voyage, though no power of borrowing be expressed in their commission, *July* 25. 1732, *Rogers.*

45. Exercitors, whatever their number may be, are, by the Roman law, liable each for the whole, even he whose interest in the ship is the most inconsiderable, *l.* 1. § 25. *l.* 2. 3. *De exerc. act.*; for the contracter with the shipmaster might have had one particular exercitor in his eye, upon whose faith alone he was induced to make the bargain. By the customs of Holland, exercitors are liable only *pro rata*, lest they should be discouraged from employing their stock in commerce, from the danger attending such unlimited obligations; and in no case are they bound beyond the value of the ship and cargo, *Grot. De jur. bell. et pac. lib.* 2. *c.* 11. § 13. No decisions of the court of session occur precisely applicable to this question; but it is certain that the British statute, 7° *Geo. II. c.* 15. which has with a small variation adopted the law of Holland, in so far as concerns the delinquencies of shipmasters, *ex. gr.* their embezzling any part of the cargo, without the privity of the exercitors, makes no alteration from the former law as to the obligations arising from their contracts. Where the exercitors manage the ship by themselves, without appointing any of their number for master, each is accounted master for his own share, and consequently the contract of any one of them binds the contracter alone; and if they all become bound in one obligation, they are liable in proportion to their several interests or shares, *l.* 4. *pr. &* § 1. *De exerc. act.*

46. The pretor in like manner introduced the *actio institoria*, whereby prepositors, or undertakers of any negotiation at land from which profit may be expected, as of a farm, manufactory, shop, *&c.* may be sued upon the contracts of those whom they have set over it; who are called *institors*, from *instare*, to superintend, *l.* 3. *De inst. act.* Factors, to whom goods of the produce or manufacture of another country are consigned by merchants, are proper institors. The obligations of exercitors, and of prepositors, are of the same general nature; and both of them produce actions of the same kind, with the two following exceptions. *First*, The contract of him who acts as shipmaster, though he should have no commission, binds the exercitors; because few would be willing to advance money in the course of a voyage, upon the single faith of a shipmaster, who possibly may be unknown to them, *l.* 1. § 5. *De ex. act. vers. Alioquin*; but there is no such necessity in furnishings made for carrying on negotiations at land, where one may be easily informed who he is that is truly employed by the undertaker, and how far his powers extend, *d.* § 5. *vers. Et facilius.* Yet even in land-negotiations, the prepositor will be bound, if he who acts as institor,

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inſtitor, though he ſhould have no commiſſion or factory, hath been in the courſe of managing that branch of buſineſs for a tract of time, the prepoſitor all the while fulfilling his contracts relative to it. *2dly*, It would ſeem that the Roman law does not account ſhipmaſters as bare adminiſtrators; and therefore they bind themſelves by their contracts, as well as the exercitors, *l.* 1. § 17. *De ex. act.* But inſtitors are deemed proper adminiſtrators; and conſequently, like tutors or curators, they bind their conſtituents without binding themſelves, *l.* 20. *De inſt. act.* except in ſo far as they are poſſeſſed of their conſtituent's money.

47. It may be obſerved, as to all obligations ariſing from contract, that though they labour under legal nullities, they may become effectual by the poſterior approbatory acts of the granter, or, in the ſtyle of our law, by acts of homologation; for ſince it imports not, whether the conſent eſſential to contracts be expreſſed by word, writing, or facts, nor whether it be given at the time of entering into them or afterwards, every act done by the granter after their date, which implies approbation, ſupplies the want of an original legal conſent. A queſtion hath been moved, Whether deeds intrinſically null, can receive ſtrength or validity by homologation? As to this the following diſtinction may perhaps be received. A deed ſigned by one naturally incapable of conſent, as an idiot, or by one whom the law preſumes to be ſuch, as a pupil, infers no degree of obligation, and is truly no deed, but a kind of *non ens*, which cannot admit of homologation; but all informal or defective deeds which induce a natural obligation, may, by approbatory acts, be improved into proper or full ones, whether the nullity ariſe from the condition of the perſon obliged, as if the deed ſhould be granted by a minor without the conſent of his curators, *June* 28. 1671, *Hume*, or by a woman clothed with a huſband, *Goſf. Dec.* 10. 1672, *Mitchel*, who, though they are legally incapable of obligation, are naturally capable of conſent; or though the nullity ſhould ariſe from the want of ſome eſſential ſolemnity, *Br.* 71.; *Jan.* 21. 1735, *Tailfer.* For though it be declared by ſeveral ſtatutes, that deeds deſtitute of the legal ſolemnities are null, that they cannot be ſupported by any condeſcendence, and that they ſhall bear no faith in judgement, theſe enactments are made merely in favour of the granter, that he may be the better ſecured againſt the conſequences of forgery; but they cannot be ſo interpreted as to deprive him of the power of ſupplying the defect himſelf; *quilibet enim juri pro ſe introducto renunciare poteſt.* Where the act of homologation is itſelf invalid, the defects of the original deed cannot be thereby ſupplied. A woman, for inſtance, while ſhe is clothed with a huſband, is incapable of homologating an informal or defective deed which ſhe had granted previouſly to her marriage, becauſe the conſent given by her in the act of homologation is as invalid and ineffectual as it was in the deed homologated.

48. Homologation cannot be inferred, *firſt*, From the act of one who was not in the knowledge of the original deed: for homologation imports an approbation of that deed; and he who is ignorant of a deed, cannot be ſaid to approve of it. Hence the ſubſcribing as witneſs to a deed, infers not the witneſs's homologation, becauſe witneſſes are called merely to atteſt the ſubſcription of a deed, and are ſeldom told its contents. But in the caſe of witneſſing the marriage-contract of a daughter or ſiſter, by the bride's father or brother, a preſumption ariſes from the atteſter's near relation to the bride, that he both knew and approved the contents of the deed to which he was an inſtrumentary witneſs, *Forbes, MS. July* 15. 1714, *Davidſon; Feb.* 1725, *Johnſton.* *2dly*, The approbatory acts muſt be ſo ſtrong and expreſs, that no reaſonable conſtruction can be put on them, other than that they were performed by the party from his approbation of the

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the deed homologated; for no man is *in dubio* preſumed to have an intention of obliging himſelf. Hence the atteſtation by an heir, of a deed of his anceſtor *in lecto*, is preſumed to have proceeded, not from his approbation of the contents, though he ſhould be ſuppoſed to know them, but from the authority and influence the granter had over him, and his fear of offending; and therefore does not infer homologation, *Dalr.* 46. 47. By the ſame rule, neceſſary deeds, as charters or precepts granted by a ſuperior in obedience to a charge, infer no homologation of the right of him at whoſe ſuit the charge is given, *Dec.* 20. 1662, *Dunbar*. But a marriage-contract, though defective in the legal ſolemnities, is held, from the favour of marriage, to be homologated by the ſubſequent marriage of the parties, *Mackenz. b.* 3. *t.* 2. § 5. Thus a contract of marriage ſubſcribed only by one notary, was found to be homologated by the marriage following upon it, *Dec.* 10. 1630, *Nisbet*; *July* 1. 1662, *Brydie*. *

49. The proper effect of homologation is, to cut off the perſon homologating from all objections otherwiſe competent to him againſt the original deed; and, conſequently, to give the right the ſame effect againſt him and his heirs, as if it had been valid from the beginning. But in relation to third parties, who are not bound to acknowledge the deeds of him who homologates, homologation can have no effect; and the right in reſpect of theſe, muſt continue as liable to exception as before. Where a deed was conceived, partly in one's favour, and partly ſubjecting him to burdens, it was uſual for the perſon concerned, if he was adviſed to do any approbatory act, before he had reſolved to homologate it *in totum*, to proteſt that what he did might not be deemed an act of homologation. After ſuch proteſtation, the act to which it is interpoſed, is not conſtrued as a total approbation of the original deed, *July* 12. 1671, *Murray:* and the court of ſeſſion have in ſeveral inſtances ſuſtained partial approbatory acts as acts of total homologation where this caution was omitted, *Feb.* 19. 1663, *Muir*; *June* 28. 1671, *Hume*. It would ſeem, that one may avail himſelf of a deed in his own favour, and at the ſame time object againſt another tortious deed granted by the ſame party, which he had no power to grant, and which tends to cut the grantee of the firſt deed out of ſome juſt right. The grantee does not in ſuch caſe approbate and reprobate the ſame deed: he homologates that of which he claims the benefit, with all its qualities; and only objects againſt a ſeparate deed, which it was not lawful to the granter to execute, and which, were it ſuſtained, would wrongfully deprive him of a legal right otherwiſe competent to him.

50. It is affirmed by Mackenzie, § 22. *h. t.* that becauſe homologation is an act of the mind, it cannot be proved by witneſſes. But by this rule no contract ought to be proved by witneſſes; ſince conſent, which is eſſential to all contracts, is *actus animi*. It might have been more juſtly inferred, that becauſe no act of the mind can be diſcovered but from exterior circumſtances, every circumſtance expreſſing conſent or approbation ought to be ſuſtained as homologation, whether it be by writing, or by facts which cannot in their nature be proved but by witneſſes. Thus the debtor's paying intereſt for a ſum due by him upon an informal or invalid bond, will be accounted an act of homologation, on the creditor's bringing a proof of that fact by the teſtimony of witneſſes; becauſe, even ſuppoſing the creditor had granted a written diſcharge of that intereſt, yet as it fell

* In a late caſe, *Nov.* 17. 1768, *the widow and younger children of James Wemyſs contra David Wemyſs*, a marriage-contract, ſigned only by the bridegroom, and by the bride's father, as taking burden on him for his daughter, but not by the bride, though named as a party in the deed, was found obligatory, in reſpect of the ſubſequent marriage of the parties.

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naturally to be in the debtor's keeping, he could not prove the payment by writing.

51. Obligations are formed, not only by proper contracts, but by *quaſi* contracts. Theſe are conſtituted, not by explicit conſent, as proper contracts are, but *ex re;* that is, merely by one of the parties doing ſuch deeds as in their nature infer an obligation upon him in favour of the other party, or upon that other party, though he be perhaps ignorant of it, in favour of the firſt. Thus *quaſi* contracts are formed by the obligations ariſing from the office of tutory, of which *ſupra, b.* 1. *t.* 7. § 24. *et ſeqq.* and from ſervices as heir, *infr. t.* 8. § 50. *et ſeqq.* And we may rank under the ſame claſs thoſe ariſing from *negotiorum geſtio, indebiti ſolutio,* communion of goods, and *jactus mercium navis levandæ cauſa.*

52. *Negotiorum geſtio* produces thoſe obligations which ariſe from the management of one's affairs in his abſence, by another, without a mandate from the owner. The *negotiorum geſtor* is accountable to the owner for all the ſums of money and ſubjects belonging to him, with which he has intermeddled during his management, with all the fruits and profits of them, even for the intereſt of the money, *l.* 31. § 3. *De neg. geſt.* if the owner was a money-lender, *l.* 13. § 1. *De uſur.* But this perhaps would not be received by the law of Scotland, unleſs where the *geſtor* received a ſum which carried intereſt formerly. He is, on the other hand, intitled to ſue the owner for the recovery, not only of all the diſburſements he hath made upon his account in the courſe of the management, but of the intereſt, *l.* 19. § 4. *De neg. geſt.* for without the intereſt he would be a loſer; and alſo for relief from all the engagements he has entered into in conſequence of his *geſtio:* and if theſe diſburſements appear rational, it makes no difference, though the ſubject on which they have been made ſhould by misfortune have afterwards periſhed, *l.* 10. § 1. *eod. tit.*; but he hath no title to any reward or recompence for his ſervice. The text quoted by Stair, in ſupport of the contrary opinion, *l.* 2. *eod. tit.* reſtricts the geſtor's claim to that which *ei abeſt*, or *abfuturum eſt*; an expreſſion which never includes loſs by pains or attendance.

53. By ſome texts of the Roman law, the *negotiorum geſtor* ought to uſe the moſt exact diligence, *l.* 24. *C. De uſur.*; § 1. *Inſt. verſ. Quo caſu, De obl. quæ quaſ.* By others, he is liable only in the middle kind of diligence, *l.* 11. *De neg. geſt.*; *l.* 20. *C. eod. tit.* But in truth the degree of diligence ever riſes or falls according to the views of the geſtor in undertaking the management, and the nature of the *geſtio.* Where the geſtor, from friendſhip, and the neceſſity of the caſe, takes upon him the direction of an affair which requires immediate execution, he is accountable only for groſs omiſſions, *l.* 3. § 9. *eod. tit.* If, on the other hand, his motives appear ſelfiſh and intereſted, or if he acts contrary to the expreſs will of the owner, or if he has involved him in a new negotiation, in which he never dealt formerly, he is anſwerable even for caſual misfortunes; and is not intitled to the recovery of any diſburſements, except in ſo far as the owner has been a gainer by them, *l.* 6. § 3.; *l.* 11. *verſ. Veluti ſi novum, eod. tit.*; *l.* 40. *Mand.* The texts requiring a middle kind of diligence, may be equitably applied to the caſes where no ſpecial circumſtances occur on either ſide: for though the geſtor's office be gratuitous, he ought to be the more ſtrictly accountable, that he aſſumed it to himſelf, without the owner's authority.

54. *Indebiti ſolutio,* or the payment to one of a debt not truly due to him, is in effect a *pro-mutuum* or *quaſi mutuum,* by which he who made the payment is intitled to an action againſt the receiver for repayment, called by the Romans *condictio indebiti*; which ariſes, not from any explicit conſent or agreement of parties, but ſolely from equity. This action does not lie in in the following caſes. *Firſt,* Though poſitive law could not have forced the payment of a ſum due by an obligation merely natural, yet being once paid,

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paid, it cannot be again recovered by him who made the payment; for as the action for repayment is introduced merely from equity, it cannot be admitted, where the ſum paid was due in equity, *arg. l.* 66. *De cond. ind.* 2*dly*, If he who made the payment knew at the time that no debt was due, the action is not competent; for he who deliberately gives what he knows is not due, is preſumed to intend a preſent: ſo that to found this action, the ſum muſt be paid through miſtake or ignorance. Civilians are not agreed, whether it takes place, where one pays the *indebitum* through a miſtake in law, becauſe by a known maxim, *Ignorantia juris neminem excuſat:* but the court of ſeſſion has juſtly ſuſtained action, even where the payment had proceeded upon an error in law; becauſe the action being grounded on equity, the payer ought in equity to have redreſs, from whatever miſtake the *indebitum* was paid. Neither did the Romans admit the *condictio indebiti*, where the debt paid was truly due to the creditor, though he who made the payment was not the debtor, *l.* 44. *eod. tit.* This exception ſeems to have been alſo grounded on the rule, *Ignorantia juris neminem excuſat*, which our law has rejected in the *condictio indebiti:* and indeed the applying of it to this queſtion is hardly reconcileable to the obvious rules of equity. Some writers ſtate another exception, that this condiction hath no room in tranſactions, tho' it ſhould appear that the ſum paid in conſequence of the tranſaction was not due, either in law or in equity: but this exception is improper; for where a ſum is paid in conſequence of a tranſaction, the ſum paid is truly due, the debtor having bound himſelf to pay it at finiſhing the tranſaction, for avoiding the expence or uncertainty of a law-ſuit; ſo that though there had been no obligation of debt, either civil, or even natural, anterior to the tranſaction, the tranſaction itſelf forms an obligation, and ſo creates a debt, *l.* 65. § 1. *eod. tit.*

55. Obligations are alſo formed *ex quaſi contractu*, by the *jactus mercium levandæ navis cauſa*. Theſe were introduced by the Rhodian law *de jactu*, adopted firſt by the Romans, and ſince by all commercial nations; which moſt equitably enacted, that where goods or merchandiſe carried by ſea were in a ſtorm thrown overboard for lightening the ſhip, the owners of the ſhip, and of goods ſaved, ſhould contribute for the relief of thoſe whoſe goods were ejected, in ſuch manner that all who had profited by the ejection might bear a proportional loſs of the goods ejected for the common ſafety, *l.* 1. *De leg. Rhod.* The moſt valuable goods, though their weight ſhould have been incapable of putting the ſhip in the leaſt hazard, as diamonds, or other precious ſtones, muſt be valued at their juſt price in this contribution, becauſe they could not have been ſaved to the owners, but for the ejection of the other goods. Neither the perſons of thoſe in the ſhip, nor the ſhip-proviſions, ſuffer any eſtimation; but wearing-apparel is eſtimated, *l.* 2. § 2. *in fin. eod. tit.*; which laſt is, by the preſent practice, reſtricted to what is put up in boxes or cheſts. In this eſtimation the goods ejected are valued at prime coſt; and the goods ſaved, at the price they will give at the next port, *l.* 2. § 4. *eod. tit.* A maſter who has cut his maſt, or parted with his anchor, in a ſtorm, to ſave the ſhip, is alſo intitled to this compenſation: but if he ſhould loſe them by the ſtorm, the loſs falls only on the ſhip and freight, according to the known rules of location, *l.* 2. § 1. *eod. tit.* By the later laws of Wiſby, which have great authority with all ſtates in matters of commerce and maritime queſtions, *art.* 20. goods may be warrantably ejected, if the maſter and a third part of the mariners ſhall judge that meaſure neceſſary, though the owners ſhould oppoſe it; and the goods ejected are, by theſe laws, to be valued at the ſame price that the goods of like ſort which are ſaved ſhall be ſold for. There can be no contribution without the ejection of ſome goods, and the ſaving of others: but it is not always neceſſary,

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neceſſary, in order to make room for it, that the ſhip ſhould be ſaved; for though ſhe ſhould be loſt after the ejection, yet if any of the goods which periſhed with her ſhall be recovered by divers, the owners are obliged to contribute with thoſe whoſe goods had been ejected, and who thereby loſt the chance of recovering them by the ſame method of diving, *l.* 4. § 1. *eod. tit.* This law obtains, not only in the ejection of goods, but when a merchant-ſhip taken by pirates, or by an enemy, is to be ranſomed for a certain ſum; becauſe by the payment of that ſum the ſhip and cargo are ſaved to the owners, *l.* 2. § 3. *eod. tit.*: and if any perſon belonging to the ſhip is detained as ranſomer till payment be made, he is for the ſame reaſon to be ſet free at the joint expence of the owners of the ſhip and cargo.

56. The communion of goods is alſo reckoned among the *quaſi* contracts: for where two or more perſons become common proprietors of the ſame ſubject, by legacy, purchaſe, or gift, without the view of any copartnerſhip, an obligation is thereby created among the proprietors, without any covenant, by which they are mutually obliged to communicate the profit and loſs ariſing from that ſubject while it remains common. Common ſubjects might, by the Roman law, have been divided at the ſuit of any of the proprietors, by the action *communi dividundo*; and ſuch diviſion, when limited to moveable ſubjects, has been always competent by the law of Scotland. Becauſe the part-owners of ſhips, though not properly copartners, ſuffer frequently by the contracts or delinquencies of ſhipmaſters, perhaps not of their own chuſing, for which they are anſwerable, not only to the extent of their own ſhare, but to the value of the whole ſhip, *Dec.* 11. 1672, *Carnegy*; *Dec.* 2. 1725, *Mackgivan*; an action therefore has been indulged, without any ſtatute, to the majority of the owners, for bringing the ſhip, not indeed to a diviſion, for a ſhip is an indiviſible ſubject, but to a public ſale before the court of admiralty. Nay, any one owner may inſiſt in an action before that court, againſt the reſt, that they may either purchaſe his ſhare at the price he puts upon it, or ſell theirs to him at the ſame rate, or otherwiſe that the ſhip itſelf may be put up to ſale, *St. b.* 1. *t.* 16. § 4. Lands belonging in common to the heir and tercer have been alſo divided by our practice, for ſome centuries paſt, by the brief of terce; and lands belonging to heirs-portioners by that of diviſion. But no method was known in our law for dividing commons or commonties, till the legiſlature, ſenſible of the many inconveniencies ariſing from the poſſeſſion of them *pro indiviſo*, enacted, by 1695, *c.* 38. that all commonties, except thoſe belonging to the crown or to royal boroughs, might be divided by the court of ſeſſion, at the ſuit of any perſon having intereſt.

57. Not only a joint proprietor, but every one who hath a bare right of ſervitude upon the property, is intitled to demand this diviſion; for the act allows commonties to be divided at the ſuit of any having intereſt. But whether the ſtatute extends to the diviſion of lands of which one has the ſole property, burdened with ſervitudes in favour of ſeveral neighbouring tenements, hath been much diſputed. On the one hand, the word *commonty*, in its moſt obvious ſenſe, denotes a ſubject belonging in common property to ſeveral perſons, and therefore ſuppoſes two common proprietors at leaſt. On the other hand, heaths belonging in property to one perſon, are not only in common ſpeech, but in the language of our charters, called *common muirs*, or *communia*, merely becauſe the proprietor's tenants have been in uſe to paſture promiſcuouſly upon them: and in this very ſtatute, an exception is made of commonties belonging to the King, where there is but one proprietor; which exception muſt be admitted to be extremely incongruous, if commonties of that ſort had not otherwiſe fallen under the general rule. The court of ſeſſion, by their firſt deciſion upon this point, authoriſed

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thoriſed the diviſion of ſubjects where there was but one proprietor, *Kames*, 42. By a later deciſion, *Home*, 143. they declared, that the act only concerned common property; and at laſt, *anno* 1748, *Falc.* i. 251. the court waved the general queſtion, but directed, that where the property of one perſon was affected with ſervitudes of paſturage, or feal and divot, the ſeveral rights of ſervitude might be limited in the terms of the ſtatute, without prejudice to the right of property; which effectually obviates the inconveniencies ariſing from common poſſeſſion.

58. The rule which governs this diviſion, where the ſeveral proprietors are the only parties, is fixed by the laſt clauſe of the act, *according to the valuations of the ſeveral lands and properties;* but where the queſtion lies between the proprietors on the one part, and thoſe who claim ſervitudes on the other, it is more equitable to obſerve the rule laid down in a preceding clauſe, *according to the value of the intereſts of the ſeveral perſons concerned.* The proprietors therefore were formerly intitled to a ſeparate allowance, or a *præcipuum*, for their right of property, over and above the ſhare due to them on account of their own or their tenants poſſeſſion by paſturage, *Kames*, 42. But as it may be extremely difficult to ſettle the proportion of this *præcipuum* with judgement, where there happens to be a valuable mine of gold, ſilver, or other metal, in the grounds, the method fixed by the above-quoted deciſion, *anno* 1748, appears the ſafeſt, by which the ſervitudes upon the ſurface are limited, according to the rule above mentioned, leaving the extent of the claim ariſing from the right of property undetermined.

59. A ſeparate act paſſed in the ſame ſeſſion of parliament 1695, *c.* 23. for dividing lands belonging to different proprietors which lie runrig, with the exception of acres belonging to boroughs or incorporations. Lands are ſaid to lie runrig, where the alternate ridges of a field belong to different proprietors. The execution of this laſt ſtatute is committed to the judge-ordinary, or the juſtices of the peace; whereas the diviſion of commonties is appropriated to the court of ſeſſion; with power nevertheleſs to them to grant commiſſion to ſheriffs, &c. to perambulate the grounds, take the neceſſary proof, and report their opinion. The diviſion competent to landholders by the laſt-quoted act, 1695, is not in practice confined to runrig lands in a ſtrict ſenſe of the word, but is by a liberal interpretation extended to caſes, where the properties of the ſeveral heritors are broke off, not by ſingle ridges, but perhaps by roods or acres, *New Coll.* i. 213.; and without this extenſion, the ſtatute would have contributed little, either to the beauty of the country, or to the improvement of agriculture, which nevertheleſs were the chief purpoſes of the ſtatute.

60. There are certain obligations, called *acceſſory*, which cannot ſubſiſt by themſelves, but are acceſſions to, or make part of other obligations to which they are interpoſed. Of this kind are promiſſory oaths, by which obligations may be corroborated; 2*dly*, fidejuſſion, or cautionry; and, 3*dly*, the obligation to pay intereſt. As to promiſſory oaths, *firſt*, it is obvious, that when the ſubject of them is unlawful, that is, when it is repugnant to any divine or natural law, they can have no force whatever; and ſo cannot give ſtrength to any prior engagement to which they were interpoſed. 2*dly*, If a party ſhould promiſe upon oath, not to impugn an obligation, which is declared defective in eſſentials, by the poſitive law of the ſtate; the judge, as he could not ſuſtain action upon ſuch obligation, though the party did not compear, and object againſt it, neither ought he to ſuſtain it, tho' the debtor ſhould have interpoſed an oath to corroborate it; becauſe no paction of a private party can conſtitute a rule of judgement by which a public law would be eluded. Thus, though one who makes over a right of

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annualrent to another, ſhould declare, and confirm it by oath, that the deed itſelf ſhall be a ſufficient foundation for poinding the ground without infeftment; yet if the debtor, contrary to his oath, ſhall afterwards object againſt ſuch poinding, that it was uſed by a creditor not infeft, it behoves the judge to declare ſuch diligence null, becauſe the law hath ſaid, that no poinding of the ground is valid without ſeiſin, which enactment cannot be altered by any private compact, though of the moſt ſolemn kind. Upon the ſame footing, no action will be admitted for a debt contracted by a woman clothed with an huſband, though ſhe ſhould have ſworn never to object againſt it, *Feb.* 18. 1663, *Birſh.* 3*dly*, Where an oath is adjected to a deed which is not void *ipſo jure*, but may be ſet aſide by an action or exception, the ſwearer is by ſuch oath barred from uſing the right of action, or pleading the exception, otherwiſe competent to him: for as the right upon which the action is laid, is not of itſelf void, it muſt be ſuſtained by the judge; whoſe office does not authoriſe him to regard the plea of the granter, who has corroborated the right by his oath, unleſs it be judicially laid before and admitted by him; and this plea, whether it conſiſts of a right of action or exception, may be effectually renounced by ſuch oath; ſo that the judge, upon its being offered by the ſwearer in judgement, ought to declare it excluded by a perſonal exception againſt him. Thus a minor, who had granted bond for a debt contracted by his father, whom he did not repreſent, and had ſworn never to impugn it, was found precluded by his oath from the right of action competent to minors to ſet aſide deeds on the head of minority and leſion, *Feb.* 10. 1672, *Wauch.* But as a minor could be induced with equal eaſe to ratify his deed by oath, as to grant it, it is therefore ordained by 1681, *c.* 19. that no ſuch oath of ratification ſhall be exacted from minors for the future, and that the deeds ratified ſhall be void; and as minors might be averſe to plead againſt their own oaths, it is further declared competent to any perſon related to the minor to obtain the deeds declared null. Bonds of corroboration ſigned by a debtor, ratifying and confirming his former debts, and perhaps accumulating the intereſt that has grown upon the bonds into a capital, though neither ſtrengthened by any promiſſory oath, nor by the intervention of a new obligee, are truly acceſſory obligations, ſince they always preſuppoſe, and muſt neceſſarily refer to ſome antecedent debt. But though they be thus acceſſory in their firſt conſtitution, they may ſubſiſt of themſelves after they have been formed, and are the proper foundations both of action and of diligence at the creditor's ſuit, though the original bonds ſhould not be produced; becauſe the debtor's corroboration of the debt referred to, induces a proper obligation againſt him, *Gilm.* 89.; *Dirl.* 347.

61. Cautionry is that obligation by which one becomes engaged for a debtor, who hath bound himſelf to pay a ſum, or perform a deed, that he ſhall truly fulfil it. As this obligation by the cautioner is barely adjected to the debtor's obligation, without extinguiſhing it, cautioners were, by the Roman law, ſtyled *adpromiſſors*. This obligation may be conſtituted indirectly, without any proper fidejuſſory clauſe: thus one, merely by giving a mandate to lend money to a third perſon, becomes cautioner for him. It may be alſo conditional; as if one whoſe friend was threatened with jail, ſhould, by a bond of preſentation to the creditor, oblige himſelf to this alternative, either to preſent the debtor's perſon to him at a time and place therein ſpecified, or to pay the debt; for in ſuch caſe, no obligation is created againſt the granter for the debt, till he has failed to preſent the debtor. A cautioner for a ſum of money may be bound, either ſimply as cautioner for the proper debtor, or conjunctly and ſeverally for and with him. The firſt hath, both by the Roman law, *Nov.* 4. *c.* 1. and ours, the *beneficium ordinis*, or as we expreſs it, the benefit of diſcuſſion, by which the cautioner may

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may demand, that before uſing diligence againſt him for the debt, the debtor himſelf, whoſe proper debt it is, may be diſcuſſed. This privilege ariſes from the nature of the engagement, which implies nothing more, than that the cautioner is to make the debt effectual, if the debtor, who is primarily liable, ſhall not make payment. By diſcuſſing the debtor, is not barely meant the making a demand of the debt from him. The creditor muſt diſcuſs the debtor's perſon, by denouncing him at the horn, and regiſtering the denunciation; his moveables, by poinding, or arreſtment and forthcoming; and his heritable eſtate, by adjudication, *July* 24. 1662, *Brisbane*; *Harc.* 242. But, this notwithſtanding, the cautioner may be ſued on the ſame ſummons with the principal debtor; in which caſe execution againſt him is ſuperſeded till the principal debtor be diſcuſſed, *Dec.* 2. 1662, *Douglaſſes*; *July* 1. 1737, *Primroſes*, ſtated in *Dict.* i. *p.* 538. Where one is bound in a ſum, not barely as cautioner for the debtor, but as full debtor with and for him, or conjunctly and ſeverally with him, the obligations are in either caſe equally ſtrong and direct upon both obligants; each of them is liable *in ſolidum*; and conſequently, as the proper debtor may be ſued by himſelf, ſo may alſo the cautioner, without the neceſſity of previouſly diſcuſſing, or even citing the proper debtor, *June* 18. 1713, *Montgomery*.

62. But a cautioner for another, that he ſhall perform a fact, is in no caſe liable, till the principal obligant be diſcuſſed. The reaſon of the difference is obvious. In money obligations, not only the principal debtor, but the cautioner can by himſelf perform the obligation ſpecifically; and therefore, where both are bound conjunctly and ſeverally, either of them may be ſued for payment: but where one is bound, that another ſhall perform a fact, *ex. gr.* that an architect ſhall build a bridge ſufficiently, that an apprentice ſhall perform his part of the indentures, or that a tutor ſhall faithfully diſcharge his office, the cautioners, though the architect or tutor ſhould fail upon their parts, cannot perform for them; all that they can poſſibly be bound to is, that if the perſons who are properly bound ſhall not perform, they the cautioners ſhall make up the loſs, the *damnum et intereſſe*, to the parties ſuffering; ſee *New Coll.* ii. 110. This ſort of obligation therefore is barely ſubſidiary; ſo that the failure muſt be previouſly conſtituted againſt the proper debtors, before diſtreſſing the cautioner, *Harc.* 242. &c.; *Fount. Nov.* 13. 1677, *Sandilands*, quoted in *Dict.* i. *p.* 248.

63. Cautioners were, by the Roman law, bound by pronouncing certain *verba ſolennia*; and where ſeveral cautioners were interpoſed to one obligation, each of them pronounced the words of ſtyle ſeparately; and conſequently every cautioner became, by the nature of his ſeparate engagement, bound to the creditor *in ſolidum* for the whole ſum or other ſubject contained in the principal obligation. This rigorous interpretation of cautionary engagements continued, till the Emperor Adrian introduced from equity the *beneficium diviſionis*, which authoriſed any one co-cautioner to inſiſt, that the demand of the whole debt might not be made againſt him alone, but divided *pro rata* between him and the other ſolvent cautioners, § 4. *Inſt. De fidej.* But as all the co-cautioners in an obligation are, by the forms of our law, taken bound in the ſame writing, there can be no room with us for the *beneficium diviſionis*; ſince where ſeveral cautioners become bound conjunctly and ſeverally with and for the principal debtor, that privilege is excluded by the explicit agreement of parties, againſt which no privilege can operate: and, on the other hand, where two or more become ſimply bound as cautioners for the proper debtor, each co-cautioner may, by the nature of ſuch obligation, without any ſtatutory privilege, inſiſt for ſuch a diviſion as was competent to co-cautioners by the Roman law, if the matter of the obligation be diviſible; and ſo is liable only for his own ſhare, except in ſo far as through

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through the inſolvency of the other obligants, the creditor cannot recover payment from them.

64. A cautioner can in no caſe be bound in an higher ſum to the creditor than the proper debtor is; for there cannot be more in an acceſſory obligation than in the principal, *l.* 8. § 7. *De fidej.* Yet he may be more ſtrictly obliged than the proper debtor; as when the cautioner gives the creditor a pledge, or a real right on his lands, *l.* 59. *eod. tit.*; or where one is cautioner for a debtor, who is not himſelf civilly or fully obliged; for a cautionary obligation may be effectually interpoſed to an obligation merely natural, *l.* 6. § 2. *eod. tit.* Thus a cautioner in an obligation, where the debtor's ſubſcription is not legally atteſted, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himſelf ſhould get free, by pleading the ſtatutory nullity, or his own legal incapacity, *Fount. Feb.* 2. 1700, *Hepburn*; *Nov.* 28. 1623, *Shaw*; *Feb.* 8. 1748, *Taylor.* The reaſon of this is obvious: *ſibi imputet* who interpoſed in ſuch a caſe; as the cautioner is preſumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he the cautioner ſhall make good the debt. But ſince fidejuſſion is but an acceſſory obligation, it cannot ſubſiſt without ſome obligation to which it may accede; and therefore where the debtor has not ſubſcribed his obligation, the cautioner, though he ſhould have ſigned it, is not bound, *Had. Dec.* 1612, *contra Crichton*; for in ſuch caſe, not even a natural obligation is created againſt him for whom he became bound. All legal defences pleadable by the debtor againſt the creditor, are alſo pleadable by the cautioner; nay a relevant defence, though it ſhould be omitted by the debtor in an action for payment againſt him, continues competent to the cautioner, *July* 9. 1623, *Arnot.*

65. As a cautioner binds himſelf at the deſire of the principal debtor, he has an *actio mandati* againſt him, either upon his being diſtreſſed for the debt, or on his actual payment thereof to the creditor; concluding, in the firſt caſe, That the defender may relieve him from his diſtreſs, by procuring a diſcharge of the obligation; or, in the ſecond, That he may repay to him the purſuer the principal ſum, of which he has made payment to the creditor, with intereſt and damages. But under damage is not comprehended the loſs ſuſtained by the cautioner through his own fault, *ex. gr.* in ſuſpending the debt upon frivolous grounds, or allowing diligence to proceed on it againſt his eſtate; for which *vid. infr.* § 86. A debtor is ſaid to be diſtreſſed for a debt, where the creditor uſes any legal ſtep againſt him for obtaining payment. This *actio mandati*, or of relief, is competent againſt the debtor, before either payment, or even diſtreſs againſt the cautioner, in the following caſes. *Firſt*, Where the debtor is taken expreſsly obliged to deliver to the cautioner his obligation cancelled, at the ſame term at which he hath bound himſelf to make payment to the creditor; for, upon that alternative, the cautioner may ſue the debtor, if he fail to perform, as effectually as the creditor himſelf can do, *Goſf. July* 7. 1668, *Paton.* *2dly*, If the debtor be *vergens ad inopiam*, the cautioner may, by proper diligence, ſecure his funds, towards his own relief, before either payment or diſtreſs, *arg. l.* 10. *C. Mand.*; *Jan.* 19. 1627, *Thomſon.* *3dly*, The Roman law, moſt equitably, allowed action for relief to the cautioner againſt the debtor, where the debtor ſhifted the payment of his debt from day to day, for a conſiderable time together; eſpecially if the cautioner's circumſtances at the ſame time diſabled him to make payment of the debt himſelf, by which he might be intitled to a proper relief, *l.* 38. § 1. *Mand.* Upon a ſimilar ground of equity, the court of ſeſſion admits adjudication to paſs at the ſuit of cautioners in conditional obligations, (becauſe theſe may be long pendent),

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pendent), without any previous distress, under this quality, That no execution shall be used on the decree till distress, *Fount. Nov.* 20. 1685, *Burnet.* This action of relief lies *de jure*, though the creditor should not have assigned the debt to the cautioner on payment; because the right of relief arises *ex natura rei*, from the mandate given by the debtor to the cautioner to bind for him; and it appears contrary to the nature of a fidejussory obligation, that the cautioner should pay, without recourse against him at whose desire, and on whose account, he made the payment, *l.* 10. § 11. *Mand.*

66. In the general case, therefore, the cautioner is no longer obliged, after his relief is cut off. Thus, where the creditor suffers the obligation to prescribe, the plea of prescription saves the cautioner as well as the principal debtor, *Fount. Dec.* 19. 1695, *Doul*; *July* 12. 1735, *Haliburtons.* For the same reason, a debt cannot be fixed on a cautioner, though the creditor should offer to prove by his oath, that he heard the debtor acknowledge the debt; for as such oath cannot be received as evidence against the debtor, the cautioner, if he were made liable, would pay without relief, *Dalr.* 17. But the oath of the debtor himself, in points referred to him concerning the debt, affects the cautioner; because the accessory obligation must of necessity be subjected to the same mean of proof as the principal. Nay, the cautionary obligation ceaseth, if the creditor shall do any act which hath a tendency even to weaken the cautioner's right of relief; as, *first*, If he should release the debtor from prison, and so lose that chance of recovering payment which arises from the *squalor carceris*. But the cautioner continues bound, though the creditor should set the debtor at liberty, after he was apprehended by the messenger, but before his actual imprisonment; for as no creditor can be compelled by a cautioner to use diligence against the debtor, neither can he be compelled by him to consummate an incomplete diligence, *July* 16. 1730, *Grahams.* *2dly*, The obligation is also extinguished by the creditor's passing from any right in his person, in farther security of the debt, *Dalr.* 167.; see *infr. t.* 5. § 11.

67. The cautioner however loses his relief against the debtor in the two following cases. *First*, Where his engagement is interposed to an obligation merely natural, he has not a total relief against the debtor: his relief is restricted to what he can prove is *in rem versum* of the debtor, or to the sums which have truly turned to the debtor's profit; for if the creditor hath no action against the debtor for payment, neither can the cautioner have an action against him for his relief. *2dly*, The cautioner who pays, without either a previous action in which the debtor is called, or a declaration by the debtor that the debt is still due, pays at his peril; and consequently, if the debtor had a sufficient defence against the debt, *ex. gr.* of payment, or of compensation, the cautioner loses his relief, *Dec.* 19. 1632, *Maxwell.*

68. As to the obligations among the co-cautioners, each co-cautioner was, by the Roman law, bound by a separate obligation; and consequently, a cautioner who paid the debt, though he had an *actio mandati* against the debtor, had none against his co-cautioners, whose obligations had no connection with his. The payment therefore was considered, in respect of these co-cautioners, as an entire extinction of the principal obligation; and, consequently, of all the accessory ones, *l.* 39. *De fidej.* To remedy this hardship, the cautioner, who was to make payment, might have demanded an assignation or cession from the creditor; and if he refused to assign, he might have been compelled to it by the *beneficium cedendarum actionum*, *l.* 11. *C. eod. tit.*; by which assignment, the right of action formerly competent to the creditor against the co-cautioner, was fully vested in the cautioner. But since, by our customs, the obligations of all the co-cautioners are contained in the same writing, and mutually connected with one ano-

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ther, a right of relief is competent *de jure* to the cautioner who pays the debt, againſt the other co-cautioners, without any aſſignment, or even without any clauſe of mutual relief in the obligation, unleſs where the cautioner appears to have renounced it. And it is becauſe the cautioner's right of relief is good without a conveyance, that our law does not compel the creditor, upon payment made by a cautioner, to aſſign, either againſt a co-cautioner, or againſt the principal debtor, *July* 10. 1666, *Hume*; *Fount. Dec.* 31. 1697, *Panton*; ſince the diſcharge hath as ſtrong effects as an aſſignment, except that of ſummary diligence; ſee *Fount. Dec.* 12. 1695, *Wood*. But the creditor may be compelled to aſſign to the cautioner all ſeparate ſecurities obtained by him for the debt after its conſtitution; becauſe the cautioner cannot plead upon theſe, without a formal conveyance, *Jan.* 10. 1665, *Leſly*; *Feb.* 1735, *Garden*. From this relief competent to co-cautioners, it follows, that the creditor, if he have granted a diſcharge to one of ſeveral cautioners, of his part of the debt, cannot demand the whole debt from the others; becauſe the relief competent to them for that ſhare is cut off by the diſcharge, and cautioners cannot be compelled to pay, without relief againſt their co-cautioners.

69. Our deciſions which relate to the extent of the relief competent to a cautioner in a bond of corroboration, againſt the cautioner in the bond corroborated, are far from uniform. This appears to be inconteſted, that where the cautioner in the firſt bond ſigns as a principal obligant in the bond of corroboration, and with him a new cautioner, the cautioner in the corroboration is underſtood to have bound himſelf at the deſire of, and is conſequently intitled to a total relief againſt, the firſt cautioner, who, being a principal obligant in the corroboration, muſt be conſidered as a principal debtor in reſpect of the laſt cautioner, *Falc.* i. *July* 10. 1745, *Mirrie*; ſee *New Coll.* i. 168. And the law appears to be the ſame, where the principal debtor alone is party to the corroboration, or where the new cautioner grants a corroboration by himſelf, without either the principal debtor, or the cautioners in the firſt bond; for a corroborative ſecurity, in which the firſt cautioner hath no concern, ought not to make his condition better, by throwing part of his cautionary engagement upon another; *Res inter alios acta, aliis nec nocet nec prodeſt*. The ſecond cautioner's only view in obliging himſelf is for the ſecurity of the creditor: but no intention can be preſumed in him to looſe any obligations lying on the firſt cautioner, and thereby to weaken and reſtrict the relief competent by the law to himſelf againſt all who were bound in the debt corroborated. This opinion is ſupported by two deciſions, obſerved by Preſident Dalrymple, 38. 60. See, on the other ſide, *Harc.* 243.; *Kames*, 37.

70. Cautioners inſiſting for relief againſt the co-cautioners, muſt communicate to them the benefit of the eaſes they have got from any creditor upon payment, and reſtrict their claim to what they have truly paid, *July* 27. 1672, *Brodie*; except where the creditor intended the eaſe for a preſent to the cautioner, *Mack.* § 27. *h. t.* Where one who has become liable *ſubſidiariè* to pay a debt, from any real or conſtructive delinquency of his own, *ex delicto vel quaſi delicto*, hath made payment of it, he is not intitled to any relief againſt the proper cautioners. This is the caſe of magiſtrates who have ſuffered debtors to eſcape from their priſons, or of the granter of a bond of preſentation who has failed to preſent the debtor's perſon in the terms of his obligation, *Feb.* 1731, *Graham*.

71. Cautionry may be alſo judicial. The moſt common inſtance of this kind is cautionry in a ſuſpenſion, whereby one obliges himſelf that the ſuſpender of a debt, for whom he becomes cautioner, ſhall pay to the charger, or other having right, the ſums contained in the charge, in ſo far as they ſhall be decreed againſt him by a ſentence of the court of ſeſſion. By our older cuſtoms, theſe cautioners got free, if either the charger or the ſuſ-

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pender died before diſcuſſing the ſuſpenſion, until it was ordained, by act of ſederunt, *Jan.* 29. 1650, that ſuch cautioners ſhould be taken bound in the ſame manner as the ſuſpenders themſelves; ſee *Kames, Rem. Dec.* 48. Nevertheleſs, cautioners in a ſuſpenſion, even after that regulation, got free, if, through any informality, the decree ſuſpended had been turned into a libel, (*i.e.* declared to have the bare effect of a libel), though the ſuſpender ſhould have been afterwards condemned in the ſums contained in it. It was declared, by a poſterior act of ſederunt, *Dec.* 27. 1709, that the cautioner ſhould be from thenceforth ſubjected, though the decree were turned into a libel, to the payment, not only of the whole ſums that ſhould be awarded againſt the ſuſpender, but of ſuch coſts of ſuit as ſhould be modified againſt him. But though the ſums contained in the charge ſhould be decreed againſt the ſuſpender, it is ſufficient at this day for diſcharging the cautioner's obligation, that when he became bound there was good reaſon for ſuſpending, *ex. gr.* if the charger had at that time no title in his perſon, or if he had not then performed his part of the obligation, though he ſhould afterwards have obtained a decree in his favour on a ſupervening title, or upon his coming at laſt to perform what was incumbent on him, *Pr. Falc.* 105.; *Fount. July* 5. 1706, *Macdougal.* Where a cautioner in a ſuſpenſion was offered, whoſe ſolvency was not known to the clerk of the bills, the officer authoriſed to receive ſuch ſecurity, he uſually demanded an atteſtation from ſome perſon of good credit, that the cautioner offered was reſponſible. As this was frequently the ſource of tedious proofs of the ſufficiency of the cautioner at the time of the atteſtation, the atteſters are, by ſaid act of ſederunt 1709, ordained to be taken bound, as cautioners for the cautioner in the ſuſpenſion, and of courſe they are made liable *ſubſidiariè* for him; and the clerks of the bills, if they take an atteſter bound after the old form, are themſelves declared to be liable as cautioners; ſee alſo act of ſederunt, *Nov.* 23. 1717.

72. A cautioner in a ſuſpenſion is, for the reaſons above aſſigned, intitled to a total relief againſt the cautioner in the bond ſuſpended, *Harc.* 247.; and a cautioner in a ſecond ſuſpenſion, to a total relief againſt the cautioner in the firſt, *Fount. Feb.* 27. 1685, *Fleming.* By our conſtant practice, cautioners in a ſuſpenſion, though they ſeeem intitled, in the character of proper cautioners, to the benefit of diſcuſſion, may, after the proceſs of ſuſpenſion is cloſed in favour of the charger, be charged ſummarily on their bond of cautionry, without diſcuſſing the defender, who is the principal debtor, *Dalr.* 105. *

73. In all maritime cauſes before the court of admiralty, where foreigners are frequently parties, the defender muſt give ſecurity *judicio ſiſti, et judicatum ſolvi*; to appear at all the diets of court, and pay the ſums which he may be awarded to pay by the judge. A cautioner of this kind does not get free from his engagement, though the defender die before ſentence, *Kames, Rem. Dec.* 47.; contrary to our former practice, *Jan.* 20. 1680, *Hodge*; and he continues bound, though the cauſe ſhould be carried by ſuſpenſion from the admiral-court to the ſeſſion, *Nov.* 16. 1636, *Steuart*; ſee *New Coll.* iii. 87. Where the action purſued before the admiral is barely mercantile, which, from the reaſon of the thing, does not neceſſarily call for ſecurity *judicatum ſolvi*, the judge cannot demand it from the defender, and thereby make his condition worſe than if the action had been brought before the judge-ordinary, but muſt reſt contented with caution *judicio ſiſti*, unleſs there ſhould be ſpecial circumſtances, from which fraud in the debtor may be juſtly ſuſpected, *New Coll.* i. 123. 153.

* Cautioners in the looſing of an arreſtment are not intitled to the benefit of diſcuſſion, *Kames, Rem. Dec.* 49.

74. It

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74. It happens frequently, that a creditor takes two or more bound to him, all as principal debtors, without any fidejuſſion, in the Roman law ſtyled *correi debendi*. Where ſeveral obligants ſtand thus bound, by the ſame obligation, for the delivery of a ſubject, if it be a ſpecial *corpus*, as a field, or an horſe, particularly deſcribed, the obligation is indiviſible; and, conſequently, every obligant is bound *in ſolidum:* but in the delivery of corns or money, which are fungibles conſiſting in quantity, the obligation may be divided into parts; and, of courſe, every obligant can be ſued only for his own part, *l.* 85. § 1. *De verb. obl.* The Romans conſidered no fact to be capable of performance in parts; and ſo held all obligations which conſiſted *in faciendo* to be indiviſible, as the building of a ſhip, the incloſing of a field. In conſequence of which, all the obligants in that kind of obligations were liable *ſinguli in ſolidum*, *l.* 72. *pr. De verb. obl.* And this doctrine has been received by us, in the caſe of facts that appear to be truly incapable of performance in parts, *ex. gr.* the tranſporting of goods from port to port, *Dirl.* 166. or the providing a ſoldier or levyman for the public ſervice, *Fount. Dec.* 24. 1697, *Dickſon.* But if two or more become obliged to perform a fact, of whatever quality, againſt ſuch a day, or otherwiſe to pay a determinate ſum, or if the performance of the fact is by ſome accident rendered impoſſible, the damage and intereſt ariſing to the creditor through the non-performance, being reduced to a ſum of money, is diviſible, and muſt therefore be proportioned among the obligants *pro rata*, *d. l.* 72. *pr.*; *d. l.* 85. § 1.; ſee *July* 16. 1669, *Denniſton.* Though the obligation ſhould be for the payment of a ſum of money, yet the obligants are liable *ſinguli in ſolidum*, in the ſpecial caſe where all of them are expreſsly bound conjunctly and ſeverally, or as full debtors with one another: for theſe words plainly mean, that each of them may be ſued by himſelf for the whole. Nay, perſons bound in a contract which imports a copartnerſhip, are liable *ſinguli in ſolidum*, though theſe words ſhould be omitted, *Fount. Dec.* 16. 1710, *Muſhet.* And it has obtained in practice, from favour to commerce, that two or more accepters of a bill, or obligants in a promiſſory note, are liable each for the whole, though they ſhould be neither *ſocii*, nor bound conjunctly and ſeverally, *Nov.* 13. 1746, *Elliot*; *New Coll.* iii. 7. One of ſeveral *correi debendi*, who hath paid the whole debt, is intitled, even without an aſſignation from the creditor, to a proportional relief againſt the reſt; which proportion muſt in every caſe be ſo ſtated, that the loſs ſhall fall equally on all the obligants who continue ſolvent, *Fount. Dec.* 22. 1710, *Craigie.* But an obligant who upon payment gets a conveyance of the debt from the creditor, is thereby, in his right, intitled to ſue any one of the co-obligants for the whole, leaving to that one his action of relief againſt the others; deducting nevertheleſs his own ſhare, and thoſe of the other co-obligants who are become notoriouſly inſolvent, *Harc.* 241.

75. Obligations for ſums of money are frequently accompanied with an obligation for the annualrent or intereſt thereof, which therefore may be accounted an acceſſory obligation. Intereſt is the profit due by the debtor of a ſum of money to the creditor for the uſe of it. In the Roman law, it got the appellation of *uſuræ*, becauſe it was given for the uſe of money; but that only falls under the name of uſury in our language, which is illegally taken from the debtor, in name of intereſt, over and above the rate allowed by law. The Jews were, by the law of Moſes, forbidden to take intereſt from their brethren, but they might exact it from ſtrangers, *Levit.* xxv. 36.; *Deut.* xxiii. 19. 20. It was abſolutely prohibited by the Canon law. There appears however nothing inconſiſtent, either with law or equity, in taking a moderate profit for the uſe of money. On the contrary, it is become neceſſary in countries ſo conſtituted as the nations of Europe are at this day. Accordingly the ſtipulation for intereſt is authoriſed

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riſed by the preſent practice of all civilized ſtates, even of the Roman Catholic, in matters of commerce, at certain rates fixed by ſtatute.

76. Soon after the Reformation, when it became firſt lawful to bargain for intereſt in this kingdom, the legal intereſt was, by 1587, *c.* 52. fixed to the rate of ten *per cent.* And it would ſeem, that, from the Reformation downwards to that enactment, intereſt was allowed to be taken, without limitation as to the rate; for that ſtatute ſaves the right of all prior contracts, in which an higher rate of intereſt was ſtipulated. Intereſt has been, ſince the aforeſaid act, gradually reduced, till at laſt, by 12° *Ann. ſt.* 2. *c.* 16. it is brought down to the rate of five *per cent.* The obligation for intereſt is more reſtricted by our law than it was by the Roman. Intereſt, by the Roman law, was due upon all contracts *bonæ fidei, ex mora debitoris, i. e.* from the time of the demand made on the debtor, *l.* 32. § 2. *De uſur.*; and in all other caſes, from litiſconteſtation, *l.* 35. *eod. tit.*: but, by the uſage of Scotland, it is due only upon one of two grounds, *ex lege*, or *ex pacto.*

77. Intereſt may be ſaid to be due *ex lege*, *firſt*, From the force of ſtatute, or of acts of ſederunt; 2*dly*, From the nature of the tranſaction. *Firſt*, From ſtatute. Thus all bills of exchange carry intereſt, by 1681, *c.* 20. either from the date, in caſe of not-acceptance, or from the day of their falling due, in caſe of acceptance, and not payment. And this ſtatute is extended to inland bills and precepts, by 1696, *c.* 36. A doubt hath been moved, Whether bills not proteſted fall under the act? The firſt part of it gives ſundry privileges to bills which are proteſted, and then there is the following clauſe: *And farder, that the ſums in all bills of exchange ſhall bear intereſt, in caſe of not acceptance, from the date; and in caſe of acceptance, and not payment, from the day of their falling due.* It was formerly thought, that the quality of proteſting, though not mentioned in the laſt clauſe, was implied, as a form required by the firſt, for proving the not acceptance or not payment, *July* 15. 1713, *Watſon*; but, by later deciſions, the laſt clauſe, making bills to carry intereſt, which is abſolute, and quite independent of the firſt, has been juſtly declared to extend to all bills, proteſted or not proteſted, *Kames*, 15. Where a bill bears no term of payment, or is made payable on demand, no intereſt can be exacted till demand be made, which muſt appear by a notorial proteſtation; but where a term of payment is adjected, there is no need of a formal demand by proteſtation; *dies interpellat pro homine.* Thus alſo, where horning is uſed againſt a debtor, on which he is denounced, intereſt is due after denunciation for all the ſums contained in the diligence, though theſe ſums ſhould, either in whole or in part, be made up of intereſt, 1621, *c.* 20. Denunciations, though not regiſtered, or though liable to objection in point of form, had by our former practice the effect of creating a currency of intereſt againſt the debtor; becauſe the ſtatute was intended as a penalty on the debtor for his contumacy; which is equally blameable, whether the denunciation be valid or not. This in particular was found with regard to a denunciation at the croſs of Edinburgh, againſt a perſon not living within the county of Mid-Lothian, *Fount. Dec.* 17. 1686. But by later deciſions, denunciations at the croſs of Edinburgh, againſt perſons living without the county, though a ground for raiſing caption, were found not to have the effect of making the ſums in the diligence bear intereſt againſt the debtor, *Kames, Rem. Dec.* 43.; *Falc.* i. 214. Ceſs is made to bear intereſt, after it has been ſix months due, though no horning, or other diligence, ſhall have been uſed againſt the debtor, by 1686, *c.* 2.

78. By act of ſederunt, *Feb.* 1. 1610, according to Spottiſwoode, or *Dec.* 21. 1590, according to Stair and Durie, ſums paid by cautioners on diſtreſs are made to carry intereſt, not only as to the capital ſum, but as to

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the intereſt paid by them; for theſe make truly a capital ſum in reſpect of the cautioner who pays them, without the repayment of which he is not fully indemnified. The regiſtering of the bond is held to be ſufficient diſtreſs for intitling the cautioner to this benefit, though no charge ſhould have proceeded on it, *Jan.* 24. 1627, *L. Waughton.* Cautioners paying without diſtreſs, are not intitled to the intereſt of the intereſt in the terms of the act; but the court modifies largely of the penalty, in name of damages, though ſeldom to the full extent of that intereſt, *Goſf. July* 18. 1668, *Sir J. Stewart.* And, by our preſent practice, where a cautioner, paying even without diſtreſs, leads an adjudication againſt the debtor's eſtate, the intereſt of the intereſt paid by the cautioner is made part of the accumulate ſum: nor does it appear, that any decree of adjudication hath been objected to on that account. Factors named by the court of ſeſſion on ſequeſtered eſtates, are alſo, in conſequence of an act of ſederunt, *July* 31. 1690, made liable in intereſt, for what rents they either have actually, or by proper diligence might have recovered, from a year after they fall due.

79. Intereſt is alſo due *ex lege*, from the nature of the tranſaction. Thus, in a ſale of lands, or of a liferent-right, the purchaſer is, by an act of the law itſelf, bound to pay intereſt for the price of the ſubject bought, from the term at which he enters into the poſſeſſion, as long as he retains the price: for the price becomes a *ſurrogatum*, or thing ſubſtituted in place of the ſubject ſold; and therefore the intereſt of the price muſt be given in conſideration of the fruits of that ſubject. This obtains, though the price ſhould be arreſted in the purchaſer's hands, after which he cannot pay ſafely, *Feb.* 17. 1624, *L. Durie*; or tho' the delay of payment ſhould be owing to the ſeller, who had not furniſhed the purchaſer with a connected progreſs of title-deeds ſufficient for his ſecurity, *Jan.* 28. 1663, *L. Balnagown*: for from whatever cauſe the non-payment may proceed, good conſcience will not ſuffer the purchaſer, at the ſame time that he enjoys the fruits of the lands, the property or liferent whereof he had bought, to enjoy alſo the profits or intereſt of the price, *July* 23. 1707, *Baillie.* But if the purchaſer, unwilling to retain the price, ſhall, on the ſeller's refuſal to accept of it, conſign it in a proper and legal way, it ſtops the currency of intereſt, ſince the price is no longer in his hands. It ariſes from the ſame ground, that one who receives money belonging to another, which formerly carried intereſt, ought to reſtore, not only the principal ſum, but the intereſt; for he muſt be accountable for the ſum received, *cum omni cauſa*, in as good condition as it ſtood in at the time of his intromiſſion, and muſt therefore reſtore the whole intermediate intereſt, which, as an acceſſory, is to be held as part of the ſum itſelf, *Dec.* 22. 1710, *L. Drum*; *Feb.* 18. 1736, *Erſkine*, ſtated in *Dict.* i. *p.* 42.; ſee *Fount. Jan.* 25. 1699, *Inglis.* This doctrine is alſo applicable to executors who have received ſums belonging to the deceaſed, that carried intereſt, and who upon that ground are liable to legatees, not only for the ſum itſelf bequeathed to them, but for all the intereſt which has grown upon it ſince the teſtator's death, *New Coll.* ii. 80. It is alſo *ex lege*, from the nature of the grant, that a ſum of money, provided to one in liferent, and to another in fee, muſt carry intereſt to the liferenter: for the only fruit whereby profit ariſes from money, is the intereſt annually growing upon it, which therefore the grantee is neceſſarily intitled to in virtue of his right; ſince a ſubject which produces no yearly fruits that bring profit to the liferenter, cannot be the proper ſubject of a liferent, *Fount. July* 12. 1699, *L. Kinſawns.*

80. One who at the deſire of another pays a ſum of money on his account, is alſo intitled, *ex lege*, to reimburſement from his employer, not only of the ſum paid, but of its intereſt from the time it was advanced; ſince it is a rule in mandates, That the mandant ought fully to indemnify the

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the mandatary, *l.* 12. § 9. *Mand.* On this ground, interest is frequently allowed, not only to merchants, but others, not simply *ex mora debitoris*, which was indeed a sufficient reason of itself by the Roman law for allowing it, but *nomine damni*, or as a recompence or compensation to the creditor for wanting the use of his money, *New Coll.* i. 42.; which holds though no backwardness should appear in the debtor, *Home*, 48.; see *Dec.* 8. 1677, *Aperon.* The commencement of interest against the debtor in such cases, is frequently regulated by the term of payment, where that term is expressed in the ground of debt, *New Coll.* i. 223. By analogy, interest has been found due *nomine damni*, on a debt payable upon demand, from the citation against the debtor in an action for payment, which is equivalent to a demand, *Falc.* ii. 248.; and where no term of payment is stipulated, *ex. gr.* in an open account, decree is generally awarded for the interest from the time at which the account ought to have been regularly paid, *viz.* after the elapsing of a year from the date of the last article, *Jan.* 25. 1754, *Grant against Lady Newmore. Lastly*, Where the claim of interest arises from the unjustifiable act or omission of either of the parties, which the other had it not in his power to guard against, equity will interpose for the reparation of the party hurt. From this source may be derived the obligation upon tutors to employ the *nummi pupillares* to advantage, and to account for interest to the pupil after certain periods; for the pupil's condition disables him from securing any benefit to himself by paction.

81. Interest also may be due by paction, either express or tacit. It is due by express paction, when money is, by an explicit clause in a bond or obligation, made to carry interest. It is unlawful to accumulate interest by any previous conditional stipulation. Thus it is criminal to stipulate in a bond, that the interest, if not paid precisely as it falls due, shall be accumulated into a principal sum bearing interest. Neither is it lawful, where the interest has run on unpaid for several years together, to state interest against the debtor upon that arrear of interest, from the day or term at which it fell due, except in the cases of a distressed cautioner, or of a denunciation. On this ground, adjudications are sometimes set aside *in totum*, and sometimes restricted to a security, because the creditor had in his decree accumulated the interest, or made it to carry interest from a term prior to the date of the decree. Yet in the following cases, law supports the accumulation of interest. *First*, Where the interest has been for some time unpaid upon a bond, the creditor may take a bond for the past interest, by which it is made a principal sum carrying interest from the date of the accumulation. And though this was not admitted by the Roman law, *l.* 28. *C. De usur.* it contradicts no rule of law, more than a creditor does, who, after receiving the arrears of interest from his debtor, delivers them back to him upon a bond bearing interest. *2dly*, It is made lawful, by 1621, *c.* 28. to take bonds or other obligations, not only for the sum lent, but for the interest of it to the day of payment of the bond; by which means the whole sum contained in the obligation carries interest from the term of payment, not only the sum lent, but the intermediate interest from the date of the obligation to that term. This is daily practised by bankers, and dealers in exchange.

82. Interest may be also due from tacit or presumed paction. Thus a promise to pay the interest which is become already due, implies a general paction for interest while the debt remains unpaid, *Jan.* 13. 1669, *Hume.* Thus also, from the use of payment of interest, it is presumed that there was a paction for interest at constituting the debt; and when interest is stipulated for one term, it is presumed to be stipulated till payment, *Dirl.* 408. The obligation for interest, being merely accessory, cannot subsist without a principal debt to which the interest corresponds; and hence interest

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tereſt cannot in any caſe begin to run before the principal debt is created, *Jan.* 2. 1739, *Anderſon*, quoted in *Dict.* i. *p.* 293.

83. After having deſcribed at ſome length the ſeveral contracts and obligations that are moſt known in our practice, with their diſtinguiſhing characters, it may be proper to explain ſome of the properties and effects that are common to all obligations.——The ſubject-matter of obligations conſiſts either of things or of facts. Things exempted from commerce, either by nature, by the deſtination of the owner, or by ſtatute, cannot be the ſubject of obligation; *vid. ſupr. b.* 2. *t.* 1. § 5. *et. ſeqq.* Under this claſs may be reckoned ſtolen goods, which acquire ſuch a turpitude, or *vitium reale*, by the theft, that they fall no longer under commerce, § 2. *Inſt. De uſuc.* On this ground, no contract of ſale, or other obligation, entered into by a bankrupt knowing himſelf to be ſuch, can be a foundation for transferring property to the prejudice of his creditors; who therefore may recover the ſubject ſold from the purchaſer, though he ſhould be put into the poſſeſſion of it; the dole or fraud of the bankrupt being accounted theft; ſee *ſupr.* § 8.

84. As to facts, no perſon can lay himſelf under an obligation to perform what is naturally impoſſible; or to do any immoral or unlawful action, which is ſaid to be legally impoſſible; becauſe what is forbidden either by the rule of reaſon, or by poſitive inſtitution, is, in the conſideration of law, out of our power, *l.* 15. *De cond. inſt.* But though a *pactum ſuper hereditate viventis*, was by the Romans accounted *contra bonos mores*, *l.* 61. *De verb. obl.*; yet the uſage of Scotland permits an heir to ſell or make over his hope of ſucceſſion during the life of his anceſtor, *July* 6. 1630, *Aikenhead*; *Fount. July* 29. 1708, *Rag.* And on this footing mutual tailzies, though they are in truth a mutual purchaſe of one another's ſucceſſion, are effectual. One who obliges himſelf to what is not the proper ſubject of obligation, is not truly bound; and conſequently cannot be ſubjected to a penalty in default of performance; for a penalty implies a delinquency in him who incurs it. But all facts in themſelves poſſible, are the ſubject of obligation, though they ſhould be beyond the power of the party bound, who ought not to have undertaken what he knew or might ſuſpect could not be performed by him.

85. Conditions are frequently adjected to obligations. As an obligation to perform impoſſible facts is null, ſo are thoſe granted under an impoſſible condition; for the adjection of a condition which cannot exiſt, is an evidence that the parties did not ſeriouſly intend a bargain. But deeds are conſtrued to be granted abſolutely, and the condition is held *pro non ſcripta*, not only in teſtaments and legacies, but even in grants *inter vivos*, where the granter of the obligation lies under a natural tie to execute them. Thus bonds of proviſion granted by a father to a child, under condition, that the grantee ſhall travel over Britain in a day, or ſhall commit murder, are held to be granted *purè*, or without any condition. This laſt rule obtained formerly, not only in unlawful, but in unfavourable conditions; a condition, for inſtance, that the grantee ſhould not marry without the conſent of certain friends named in the grant; becauſe that condition reſtrained the natural liberty of marriage; ſee *Gilm.* 60. And even by our later practice, conditions of this ſort, though they are not utterly ineffectual, have no greater force allowed them than to the judge ſhall appear proper; for if the friends ſtand off without ſufficient grounds, the child is intitled to the ſubject provided, tho' ſhe ſhould have counteracted the condition, *Fount. July* 6. 1688, *Dalziel*; *Fount. July* 20. 1688, *Pringle.* Where the granter lay under no natural obligation to provide the grantee, ſuch conditions were, by our old cuſtoms, ſtrictly adhered to, *Jan.* 17. 1673, *Rae.* But the irritancy has been ſince that time ſo ſoftened, that if the conſent be refuſed unreaſonably, the grantee may marry without conſent, and be nevertheleſs intitled to the proviſion, *March* 1682, *Ford*, quoted in *Dict.* i. *p.* 190. Yet it would ſeem,

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ſeem, that if a father ſhall provide one of his children in a ſum, under a condition, that part of it be given to another child, if that other ſhall marry with the conſent of particular friends, the grantee, who has by the bond of proviſion a *jus quæſitum* to the whole, ought not to be ſubjected to an action at the inſtance of the child in whoſe favour a part of it is eventually provided, for the payment of that part, unleſs the purſuer ſhall have literally performed the condition, on the exiſtence of which alone the grantee is liable in the payment of it. All poteſtative conditions, the performance of which is in ſome degree in the creditor's own power, are held as fulfilled, if he has done all he could to fulfil them, *l.* 11. *De cond. inſt.* If, for inſtance, an obligation be granted under the condition, that the grantee ſhall intermarry with a particular lady, law conſiders the condition as purified, if he has made addreſſes to her, though ſhe ſhould have rejected them. But if he ſhall put off performing his part till performance becomes impoſſible, the obligation in the grantee's favour is extinguiſhed. Conditions, where they depend merely on accident, muſt actually exiſt before the granter becomes liable: but where the non-performance is owing to the oppoſition made by him whoſe intereſt it is that the condition ſhall not exiſt, the law, which ſuffers no perſon to profit by his own fraud, looks on it as purified or fulfilled, *l.* 161. *De reg. jur.*

86. In all obligations concerning things lawful, and in themſelves poſſible, the obligant who fails in the performance of his part, muſt make up to the creditor the damage he has ſuſtained through the non-performance, agreeably to the rule, *Loco facti non præſtabilis, vel non præſtiti, ſuccedit damnum et intereſſe.* All the rules mentioned above, *t.* 1. § 14. for aſcertaining the extent of the damage ariſing *ex delicto*, may be applied to this caſe; to which may be added, that no damage which is remote or indirect, ought to enter into the computation. Thus, though the debtor's failing to make punctual payment, ſhould have drawn after it the utter ruin of the creditor, ſtill the creditor can demand no more *nomine damni*, than the reimburſement of the coſts of ſuit or expence of diligence truly diſburſed in recovering his debt, *l.* 21. § 3. *De act. empt.* Far leſs ought that damage to be reckoned which ariſes from the creditor's own fault. Thus, where a cautioner, who is a creditor in reſpect of the principal debtor, has, upon frivolous grounds, ſuſpended the creditor's charge, or ſuffered adjudication to paſs againſt his eſtate, he cannot claim againſt the principal debtor any ſum in name of ſuch damage; for he ought to have paid, and relied on his right of relief. Fixed penalties were, by the Romans, ſometimes adjected to obligations for the performance of facts; which ſeemed to be deſigned chiefly to remove the inconvenience ariſing in moſt caſes from the uncertainty of the creditor's damage, by ſubſtituting a preciſe penal ſum, which was underſtood to come in place of it, § 7. *Inſt. De verb. obl.* By our cuſtoms alſo, ſuch penalties are not unfrequent: but they have no tendency to weaken the obligation itſelf, being adjected purely for quickening the performance of the debtor; who therefore cannot get free by offering payment of the penalty, though the words of ſtyle, *by and attour performance*, ſhould be omitted, *Fount. Dec.* 27. 1695, *Beatie; New Coll.* i. 89.; *St. b.* 1. *t.* 17. § 20. It muſt, however, be admitted on all hands, that a debtor who is bound for a fact to be performed by another, cannot, in the nature of things, be bound to preciſe performance; and ſo is liable no farther than for the conventional penalty, *July* 27. 1706, *Bairdner.* No party in a mutual contract, where the obligations on the parties are the cauſes of one another, can demand performance from the other, if he himſelf either cannot or will not perform the counter part; for the mutual obligations are conſidered as conditional. Thus, in a marriage-contract, if the huſband ſhall, before

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receiving the tocher, become inſolvent, and thereby incapable of ſecuring his wife in the ſtipulated jointure; neither he, nor even his creditors, tho' ſingular ſucceſſors, can demand it, till the wife's jointure, and the other rights provided to her and her children by the marriage-articles, be ſecured to them, *Home*, 94.; ſee *New Coll.* iii. 2. But after the death of the wife, and of the iſſue, if any ever exiſted, the huſband can effectually ſue the perſon liable for the tocher. Nor can the defender ſave himſelf from payment, by pleading the huſband's inability to perform his part: for as the obligations he lay under were entered into, ſolely in favour of the wife and children, no other has a right to offer that defence; and after their death, his obligation is totally extinguiſhed, *New Coll.* ii. 132. The equality eſſential to mutual contracts, requires, that the mutual contracters be bound effectually to one another. If either of the parties can, by any defect in the contract, ſhake himſelf looſe of the obligation, equity will not ſuffer the other party to be fettered, *Tinw. June* 30. 1756, *Hays contra D. Roxburgh.*

87. Doubtful clauſes in obligations are to be interpreted againſt the granter; for *ſibi imputet* that he did not expreſs his mind more clearly when it was in his power, *l.* 99. *pr. De verb. obl.* Where the granter ranks among the lower orders of the people, and is unaſſiſted by men of ſkill in drawing the obligation, the words ought to be underſtood in the vulgar ſenſe, *St. b.* 4. *t.* 42. § 21. In a mutual contract, in which each contracter has the framing of the contract equally in his power, it would ſeem, that dubious clauſes ought to be explained, not in favour of the creditor, as ſome have affirmed, but of the debtor, agreeably to the rule, That obligations are not to be preſumed. Where a clauſe in a contract obliges one of the parties to a fact which appears impoſſible, and where the alteration of a ſingle word or two will bring it to a meaning which was obviouſly the intention of the contracters, our ſupreme court have preſumed, that the miſtake proceeded from the inaccuracy of the writer, and have therefore exerciſed their pretorian power of correcting the clauſe accordingly, *New Coll.* ii. 81. In obligations to extend more ſolemn deeds, in which ſome clauſes may poſſibly have been overlooked or neglected, the writer, inſtrumentary witneſſes, or others preſent at the communing, are ſometimes, though ſeldom, examined for the diſcovery of the truth; but in formal or ſolemn deeds, this is hardly to be admitted, *Jan.* 5. 1667, *Cheap*; except for the proof of fraud, violence, or ſome ſuch unjuſtifiable act. Moſt of the rules for interpreting laws, drawn from the intention of the lawgiver, or from the preamble, or from the ſubject-matter of the ſtatute, may be fitly applied to the interpretation of contracts and obligations.

88. Moſt of what hath been hitherto ſaid of obligations and contracts, is applicable only to ſuch as are onerous, where mutual engagements are entered into *hinc inde* by the ſeveral contracting parties: we may therefore, in this place, ſhortly explain the doctrine of gratuitous obligations, otherwiſe called *donations*, in ſo far as their nature, properties, and effects, differ from the other.—— Donation is that obligation which ariſes from the mere liberality of the giver. It is ſometimes conſtituted by writing; but a verbal obligation to gift moveable ſubjects, which is uſually called *a promiſe*, is equally effectual with a written obligation; and may be proved againſt the promiſer by his oath, provided the promiſe be made in words proper to expreſs a preſent act of the will, ſuch as, *I promiſe*, or, *I oblige myſelf, to give*, or *make over in a preſent.* Lord Stair is of opinion, *b.* 1. *t.* 10. § 4. that promiſes are effectual, without being accepted by the donee; becauſe a right may be acquired by thoſe who are abſent, or ignorant that it is conferred upon them; as to which, ſee *New Coll.* ii. 156. Grotius, on the contrary, *De jur. bell. et pac. lib.* 2. *c.* 11. § 14.; and Puffendorf, *De jur. nat. et gent.*

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gent. lib. 3. *c.* 6. § 15. affirm, that the most absolute promises require acceptance, because no obligation can be formed without the joint consent or concurrence of both parties. But acceptance, admitting that it is necessary towards constituting an obligation, may be reasonably presumed, without any formal act, in pure and simple donations, which imply no burden upon the donee; and Stair's opinion is agreeable to our practice. His Lordship distinguishes between promises and offers, *ibid.* § 3.; which last do not in his opinion infer an obligation upon the offerer till acceptance. And it must be acknowledged, *first*, That an offer, where it implies something to be done by the other party, is not binding on the offerer, till it be accepted with its limitations by him to whom the offer is made; and, 2*dly*, That the offer, even of a pure donation, if it be made under the express condition of acceptance, requires a formal act of acceptance, in order to purify the condition: but in the general case, though a donation should be made in the form of an offer, yet if the offerer do not insist on acceptance from the other party, it can hardly be distinguished from an absolute promise, where acceptance is presumed.

89. The Roman law indulged to every one who laid himself under a gratuitous obligation the *beneficium competentiæ*, by which he might have retained as much to himself as was necessary for his subsistence, if, before fulfilling the obligation, he happened to be reduced to indigence, § 38. *Inst. De act.* Our present practice allows this privilege to fathers and grandfathers against their children and grandchildren, *Falc.* i. *Feb.* 21. 1745, *Bontin*; but rejects it in the case of collateral relations, even of a brother against his sister: and indeed the admitting it in favour of a parent against his child is a natural consequence of the doctrine formerly explained, *b.* 1. *t.* 6. § 57. that children are bound to maintain their indigent parents.

90. Though the *pactum donationis* confers on the donee a *jus ad rem*, a right of suing for performance, it gives him no right in the thing itself; the donor continues proprietor till delivery: and therefore, if after having become bound to give it to one, he should actually deliver it to another, upon the title of a gratuitous obligation posterior to the first, the second donee, whose right was perfected by tradition, becomes proprietor. Where the donor is not himself the proprietor, all the right which the donee acquires, even after delivery, is a power or faculty of making the subject his own by prescription, if the true owner shall neglect to claim it for forty years. Nor is there an action of recourse competent to the donee against the donor, tho' the subject should be evicted from him by the right owner, because it is a rule founded in the nature of donation, That the donor is only liable to warrant the gift against his own future deeds. Donations, though perfected by delivery, were revocable by the Roman law for ingratitude in the donee, *l.* 9. 10. *C. De revoc. donat.*: and Bankton, *b.* 1. *t.* 9. § 4. mentions a decision, without names or date, to prove that this doctrine is received by our usage. As this ground of revocation is personal to the donor, his heirs cannot revoke; because a presumption arises from the ancestor's silence, that he had forgiven the injury, *l.* 10. *vers. Hoc tamen, C. eod. tit.* Neither is revocation on the head of ingratitude received against the heir of the donee, *l.* 7. *vers. Actionem vero, C. eod. tit.*; for no action *ex delicto* is transmitted against the heir of the delinquent.

91. Neither remuneratory donations, nor donations *mortis causa*, are to be considered as pure donations. A remuneratory donation does not proceed from mere liberality: for though the donor could not have been compelled to it by law, he was bound to it by gratitude; which makes it accounted to be the discharge of a debt, or the giving in exchange, rather than

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than a donation, *l.* 25. § 11. *De hered. pet.* Hence, though pure donations between huſband and wife are revocable by the donor, remuneratory donations cannot be revoked. The *donatio mortis cauſa* of the Romans, where the ſubject was given to the donee, under the tacit condition that it ſhould be returned to the donor, either on his revocation, or on the predeceaſe of the donee, is little known in our practice. What comes neareſt to it is a gratuitous bond or aſſignation, revocable by the granter. Theſe bonds partake much of the nature of a legacy, both as they are granted for love and favour, and as they are, like all other revocable rights, ſuſpended during the life of the granter. Upon this laſt ground, all the granter's creditors, even thoſe whoſe debts have been contracted after the revocable bond, are preferable thereto, *Nov.* 1721, *Cred. of Ruſco.* Nevertheleſs, as ſuch bond is a deed *inter vivos*, it is accounted a debt due by the granter in a queſtion with legatees; and is therefore preferable to proper legacies. If the revocable deed be not expreſsly granted to the donee and his heirs, it may, like a legacy, be underſtood to be given from a perſonal regard to the donee, and therefore to fall by his predeceaſe. This rule may be juſtly applied to bonds of proviſion by fathers to children; for as the purpoſe of ſuch bonds is ſolely for the behoof of the children, the father's obligation ceaſeth upon the children dying before him. No deed, though gratuitous, is revocable after delivery, if a faculty to revoke be not reſerved in it; for the implied power of the granter to revoke undelivered deeds, is excluded by delivery, *Feb.* 15. 1637, *Lauder*; *Dec.* 8. 1675, *Thomſons.*

92. No deed is preſumed a donation if it can bear another conſtruction; for no perſon is preſumed to do what, in place of bringing him profit, muſt certainly be attended with ſome pecuniary loſs. Yet the maintaining at bed and board of one who is come of full age is in law accounted a donation, becauſe it is preſumed that he who affords the alimony, if he does not ſtipulate for himſelf, that he ſhall have an allowance in name of board, makes him whom he maintains welcome to his houſe, either for the ſake of his company, or in conſideration of the ſervice he expects from him. But if he earns his bread by the entertainment of ſtrangers, this ſtronger preſumption intitles him to board, even without a previous paction, *Dalr.* 147.; *Br.* 106. If one affords alimony to a minor, the queſtion, Whether he be intitled to board? falls to be decided differently, according to the different conditions of him who entertains, and of the minor who is entertained. If the minor's father be alive, he who maintains the minor is preſumed to do it *animo donandi*; for if he had intended to exact board, he ought to have made a previous bargain with the father: but if the father be in another kingdom, or ſo ſituated that no bargain can be made with him, he who maintains the ſon has a juſt claim for board againſt the father, *Nov.* 18. 1707, *Chiſholm.* Upon the ſame ground, aliment which is given to a minor who has tutors or curators, is preſumed to be given *animo donandi*, if no paction hath been entered into with the guardians, *July* 21. 1665, *L. Ludquhairn*; *June* 11. 1680, *Gordon contra Leſlie*: but if the minor has no tutors or curators, and is poſſeſſed of a fund capable of maintaining himſelf, the giver of the alimony is intitled to an allowance for board; unleſs it be a mother or grandmother, whoſe natural affection for her iſſue may create a preſumption, that ſhe has no intention of rearing up a claim againſt him; eſpecially if the minor's ſtock can do no more than maintain him, *Feb.* 2. 1672, *Guthrie*; or if her own eſtate can ſpare the expence of the alimony without pinching her. Where a minor enjoys an eſtate independent of the father, law preſumes not, even againſt the father himſelf, that he means to maintain his child, without an allowance for board: and by ſtronger reaſon, if

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ſuch minor ſhall, on the father's death, be left without tutors, any perſon, whether kinſman or ſtranger, who takes him into his family, is in the general caſe intitled to board. Nay, though a child without tutors ſhall be at firſt maintained by his mother *ex pietate*, yet if he ſhall afterwards, while he yet continues in his mother's houſe, ſucceed to funds ſufficient for his alimony, an action lies at the mother's inſtance againſt him for board from the time that the ſucceſſion opened to him, *Dirl.* 165.; *Fount. Nov.* 17. 1697, *Gourlay:* but he is ſubject to no demand for prior aliment afforded to him while he had no fund of ſubſiſtence, *New Coll.* ii. 43. One who is intitled to an allowance for the maintenance of a minor, and ſhall continue to maintain him in his houſe after he is come of age, has a claim againſt him for board, even without any covenant, as long as he ſhall remain in his family, *Feb.* 16. 1681, *Spence*. An eldeſt ſon who ſtands indebted to his brothers or ſiſters for their proviſions, and who has maintained them in his family, is intitled to a reaſonable conſideration for board, which he may retain to himſelf out of the intereſt of their proviſions, even though they were of perfect age when they came firſt to live in their brother's family, *New Coll.* ii. 63. § 5.

93. As a neceſſary conſequence of the preſumption againſt donation, there ariſes yet a ſtronger, *Debitor non præſumitur donare*; for where a debtor gives money or goods, or grants bond to his creditor, the natural preſumption is, that he means to get free from his obligation, and not to make a preſent, unleſs donation be expreſſed. Hence, though aſſignations of a debt, without mentioning any cauſe of granting, may, in the general caſe, as ſome writers affirm, be accounted donations; yet when they are thus granted by a debtor, they are preſumed to be intended, either in ſecurity, or in ſatisfaction of the debt due by the granter, *July* 4. 1712, *Hamilton*; *St. b.* 1. *t.* 8. § 2. But an obligation which expreſſes a ſpecial cauſe of granting, *ex. gr.* a bond of borrowed money, which bears no relation to a former debt due by the borrower, is not preſumed to be granted towards the payment of that debt, but conſtitutes a new and ſeparate obligation againſt him, agreeably to the rule to be explained next title, *Novatio non præſumitur*. The rule, *Debitor non præſumitur donare*, being only a preſumption, muſt yield to contrary preſumptions, where they are more forcible. Hence bonds of proviſion by a father to a child, eſpecially one who is not foriſfamiliated, are from the preſumption of paternal affection, underſtood to be granted, not in ſatisfaction of former bonds, but as an addition to the child's patrimony, *St. ibid.* But even this preſumption may be over-ruled by circumſtances, which point out an intention in the father to include the firſt bond in the laſt. Thus a ſettlement to a daughter in a marriage-contract, is preſumed to be granted in ſatisfaction or *ſolutum* of all former proviſions, though it ſhould not bear the words, *in ſatisfaction*; becauſe proviſions granted by fathers in marriage-contracts are generally intended to comprehend the whole eſtate that is to be expected by the huſband from the wife, or her father, in name of tocher, *June* 29. 1680, *Young*; *Harc.* 221.; *Pr. Falc.* 107.