PART I.

OBLIGATIONS AND CONTRACTS, AND THEIR EXTINCTION.

PRINCIPLES

OF THE

LAW OF SCOTLAND.

1. THE object of Jurisprudence is the protection and enforcement of Civil Rights; and the system is perfect or imperfect, in proportion as the doctrine of Rights is regulated on sound principles and enlarged views of the happiness of men; and as the means of protecting and vindicating them are well or ill provided.

The Civil Jurisprudence of Scotland comprehends, First, A knowledge of the Rules and Exceptions relative to Civil Rights, with the grounds on which they rest: and, Secondly, The application of those Rules and Exceptions to judicial determinations for the protection or enforcement of right.

2. RIGHT, in Jurisprudence, differs from Right in morals; in so far as the latter term is used to express what ought to be; while the former expresses that which, as belonging to a person, he may vindicate by judicial aid.

Rights of this latter species may be distinguished into, 1. those which relate to Property or Things external,—as land, moveables, goods, money, debts, estates, and effects of all kinds; and, 2. those which relate to the Person,—the safety, liberty, and reputation of men.

3. Of the rights relative to Property, another division has been made by lawyers, into those which depend upon the engagement or obligation of the person to give the thing, or to

make it available to another, in perpetual or temporary use; and those in which, by immediate connexion with the thing itself, without the intervention of another, it is said to belong to the person. Rights of the former kind are sometimes termed Personal Rights relative to things; being available only by demand against a particular person: Rights of the latter kind are called Real Rights, and are available against the thing itself, in whose hands soever it may be found. The former the Roman lawyers called Jura *ad rem;* the latter, Jura *in re;* and the distinction is very important in practical Jurisprudence.

2 Stair, 1. § 1. 3 Ersk. 1. § 2. Pothier, Dr. de Propriété, § 245. 7.

4. The doctrine of rights may be explained in the following order—

Rights personal; arising from contract express or implied.

Rights real; of property, heritable and moveable.

Rights arising from marriage, and the constitution of a family; with the laws of succession.

Rights relative to the person.

I.

OF PERSONAL RIGHTS TO THINGS ARISING FROM CONTRACT.

5. ONE has a Right to demand of another person a thing, or the use of it, or the services of that other person, in virtue of an engagement to deliver the thing or to perform the service. The counterpart of Rights thus derived through personal engagement, is OBLIGATION. Such obligations are either unilateral or mutual; the former being strictly called OBLIGATIONS, the latter CONTRACTS. The peculiarities of mutual obligations will be explained hereafter (§ 70); but whether the right in question arises from a unilateral or from a mutual agreement, Obligation or Engagement is the essential point.

3 Ersk. 1. § 2.

6. Obligation is express or implied; the former being Conventional (§ 7–524), the latter what some lawyers have called Obediential (§ 525–551).

I. OF CONVENTIONAL OBLIGATIONS IN GENERAL.

1 Stair, 10. 3 Ersk. 1. 2 Blackst. c. 30. 2 Kent. Com. 449. Domat, Loix Civ. Pothier, Tr. des Oblig. Toullier, Droit Civ. Franç. v. 6.

7. A Conventional obligation is an engagement or undertaking to deliver, or to pay, or to do, or to abstain from doing, something; conferring on him to whom the engagement is undertaken, a right to demand performance of it (*a*).

Three separate acts of the will, terminating in such engagement, have been distinguished—deliberation, resolution, engagement. It is the Engagement only which law will enforce (*b*).

(*a*) 1 Stair, 10. § 1, 2. 3 Ersk. 2. § 3. Pothier, Tr. des Oblig. p. 2. Toulier, tom. vi. p. 1. et seq. See Instit. de Oblig. Lib. iii. tit. 14.

(*b*) 1 Illus. 1 and 2. Kincaid, July 17. 1673; M. 12,143. Kennedy, Jan. 2. 1723; M. 9441. Tunno, Dec. 1681; M. 9438. Reoch, Jan. 2.1712; M. 9440. Paterson, July 10. 1717; M. 9441. Kerr, Nov. 29. 1751; M. 9442. M'Queen, March 3. 1812; F. C. M'Lachlan, June 1. 1821; 1 S. D. 49.

8. A promise is an engagement (to which no preceding consideration is, by the law of Scotland, essential) to give, or deliver, or pay, or do, or abstain. It may be either absolute or conditional (*a*). It is binding if undertaken as a final engagement; but not if mentioned only as a probable intention (*b*). It may be proved by writing; or by oath (*c*); or even by witnesses, when followed by rei interventus, or when forming part of a bargain of moveables (*d*). But a promise may be discharged by rejection express or implied; or by the failure of any annexed condition (*e*).

NOTE.—The law of Scotland does not, on the one hand, follow the Roman law of Nudum pactum (*f*); nor recognise the subtilties of the English and American law on the other (*g*).

(*a*) 1 Stair, 10. § 4. 3 Ersk. 3. § 88.
(*b*) 1 Illus. 2. Kintore, Jan. 6. 1623; M. 9425. Clackmannan, Feb. 6. 1624; Spottiswoode, 248. Gordon, June 16. 1740; M. 9425. Kerr, Nov. 29. 1751; M. 9442, and Cases, § 7.
(*c*) 1 Illus. 3. Deuchar, Jan. 19. 1672; M. 12,387. Harvie, Feb. 19. 1732; M. 12,388.
(*d*) Grant, Feb. 8. 1827; 5 Shaw and Dunlop, 317; F. C. See Bell, Nov. 13. 1812; F. C. Rhind, Feb. 20. 1816; F. C. See below, § 249.
(*e*) 1 Stair, 10. § 4. Allan, June 25. 1664; M. 9428. 1 Illus. 82.
(*f*) Pand. Justin. Pothier, lib. 2. tit. 14.
(*g*) 1 Plowden, 308. 2 Blackst. 445. Rann *v.* Hughes, House of Lords, 7 Term Rep. 350, note. Pillans *v.* Microp, 3 Burr. 1663. 1 Illus. 3 and 4. 2 Kent. Com. 464.

9. A promise differs from an offer; as being a unilateral engagement, to which acceptance is presumed; while an offer is always and in terminis conditional, raised into an obligation only by acceptance (§ 73).

1 Stair, 10. § 4. 3 Ersk. 3 § 88.

1. *Nature and Requisites of Consent.*

10. To a perfect obligation (besides the proof requisite), it is necessary that there shall be a deliberate and voluntary consent and purpose to engage; excluding, on the one hand, Incapacity by nonage, disease, or imbecility (see § 2065–2113), and on the other, Error, Force, and Fraud.

11. ERROR. Error in substantials, whether in fact or in law, invalidates consent, where reliance is placed on the thing mistaken (*a*). Such error in substantials may be,

1. in relation to the *subject* of the contract or obligation; as when one commodity is mistaken for another (*b*); 2. in relation to the *person* who undertakes the engagement, or to whom it is supposed to be undertaken; wherever personal identity is essential (*c*); 3. in relation to the *price* or consideration for the undertaking (*d*); 4. in relation to the *quality* of the thing engaged for, if expressly or tacitly essential to the bargain (*e*); or, 5. in relation to the *nature* of the contract itself supposed to be entered into.

NOTE.—Although error in *law*, as well as error in *fact*, will invalidate a contract, it will not always entitle to restitution after the contract is fulfilled or money paid. 1 Pothier, Pand. Justin. 645, No. 2. Domat. l. i. tit. 18. § 14. Cod. Civ. No. 1109. See the distinction in Herbert *v.* Champion, 1 Camp. 134. Wilson and M'Lellan *v.* Sinclair, 4 W. S. Appeal Cases, 398. See below, § 534. See 1 Illus. 327–8.

(*a*) 1 Stair, 10. § 13. 3 Ersk. 1. § 16. Dig. lib. 50. de Reg. Juris, l. 116. § 2. and lib. 44. tit. 7. de Oblig. et Act. l. 44. § 7. Pothier, Tr. des Oblig. § 17. et seq. Toulier, Dr. Civil Français, 43.

(*b*) Stair and Ersk. ubi sup. 1 Illus. 4. Hepburn, July 4. 1781; M. 14168. Grieve, Jan. 25. 1828; 6 S. D. 454; F. C. Bingham *v.* Bingham, 1 Ves. Jr. 126. Thornton *v.* Kempster, 5. Taunton, 786; 1 Marsh. 355. Emanuel *v.* Dane, 3 Camp. 299.

(*c*) 1 Illus. 5. Christie and Co., Dec. 17. 1748; Kilk. 216; M. 4897. Dunlop, Jan. 18. 1752; Kilk. 220; M. 4879. Love, June 24. 1786; F. C.; M. 4948. Mitchell *v.* La Page, Holt's Rep. 253. Fellows *v.* Lord Gwyder, 1 Russ. and Mylne, 83.

(*d*) 1 Illus. 5, 6. See Christie and Co., supra. Sword, July 8. 1771; Ham. 307.

(*e*) 1 Illus. 6, 7. Adamson, May 14. 1799; F. C.; M. 14244. Dickson, Dec. 15. 1808; F. C.; Baird, Dec. 14. 1765; M. 14240. See Coutts and Co., Jan. 9. 1758; M. 11549.

12. FORCE and FEAR annul engagement, when not vain or foolish fear, but such as to overpower a mind of ordinary firmness (*a*); or such as, applied to a person of weaker age, sex, or condition, will produce the effect of overpowering violence on a firmer mind (*b*). Among the instruments of force and fear which have been held to annul engagement, are, threats and terror of death; pain to one's self, or parent, or child (*c*); infamy and disgrace; imprisonment, when employed to obtain an advantage beyond the lawful object of it (*d*); and even loss of property (*e*). But mere vexation and inconvenience (as the threat of a lawsuit) will not be sufficient.

(*a*) 1 Stair, 9. § 8. 3 Ersk. 1. § 16; and 4, 1. § 26. Domat, 138. Pothier, des Obligations, § 25. 6 Toulier, 81. 1 Bell, Com. 295. 1 Illus. 8 et seq.

Earl of Orkney, Feb. 26. 1606; M. 16481. Cassie, June 27. 1632; M. 16482. Barclay, Feb. 19. 1674; M. 16488. Burnet, Feb. 18. 1680; M. 16494. Gray, February 1688; M. 16497; 2 Brown's Sup. 120. Boyd, July 17. 1694; 4 Brown's Sup. 314. Rutherford, Dec. 9. 1698; M. 16502. Howston, July 13. 1668; 1 Brown's Sup. 570. Mair, Jan. 22. 1667; M. 16484. Bishop of Ross, June 30. 1670; 2 Brown's Sup. 479. M'Intosh, infra (*c*). Murray, June 28. 1672; M. 16487. Thomson, Dec. 2. 1675; M. 12370. Stewarts, Jan. 10. 1677; M. 16489; 3 Brown's Sup. 199. Pringle, Dec. 1682; 2 Brown's Sup. 27. Whiteford, June 1688; M. 16497. Kerr, Dec. 9. 1698; M. 16503. Peel, 16 Ves. 157. Woodman; Preced. in Chan. 266.

(*b*) Alexander, July 6. 1694; 4 Brown's Sup. 186. Johnston, June 29. 1708; 5 Brown's Sup. 50.

(*c*) Dig. L. 4. t. 2. c. 8. Stair, ubi sup. 1 Illus. 9. M'Intosh, Dec. 8. 1671; M. 16485; 2 Brown's Sup. 634. See in further illustration, The King *v.* Southerton; 6 East. 226.

(*d*) Murray, Kerr, Rutherford, supra (*a*). Blair, July 29. 1673; 2 Brown's Sup. 170. Herriot, Nov. 29. 1681; M. 16496. Lutwidge, July 23. 1706; 4 Brown's Sup. 652. Nisbet, Dec. 18. 1706; M. 16512. Arrat, March 23. 1718-19; Robertson's App. Cases, 234. Munro, May 17. 1721; Ib. 387. Bell, Feb. 24. 1762; M. 16515. Willocks, Nov. 26. 1776: M. 1519; 2 Hailes, 724. Wightman, Dec. 6. 1787; F. C.; M. 1521. Fraser, Dec. 13. 1810; F. C.

(*e*) 1 Illus. 10. Wiseman, Feb. 14. 1700; M. 16505. Dundas, July 18. 1700; M. 16506. Forman, May 24. 1791; M. 16515.

13. FRAUD is a machination or contrivance to deceive, and annuls obligations induced by it (*a*). There is in such obligations apparently consent and engagement, but not such as the party defrauding is entitled to rely upon (*b*). Fraud is either such as gives *rise*, or *leads*, *to* the engagement; without which the engagement would not have taken place: Or such as is only *incident* to or an accompaniment of a contract, in which, independently of it, the parties were engaged (*c*). Error by fraud of the former kind, though not in substantials (§ 11), if induced by stratagem sufficient to deceive a person of ordinary capacity; or accompanied by imbecility and loss on the part of the obligor; or induced in a case in which the obligor relies on the obligee for his information, as in insurance contracts (§ 474); will ground an action for reducing the contract, or an exception in defence against an action grounded on it: Error by fraud of the latter kind, will give relief by damages only. There is an important distinction between fraud of the contracting party, and fraud of a third party, in which the contracting party does not participate. The former entitles the obligor to redress by exception or by reduction; the latter directs his remedy against the third party (*d*).

(*a*) 1 Stair, 9. § 9. 3 Ersk. 1. § 16. 1 Illus. 10. and 3 Illus. 101. Sanderson, Nov. 17. 1821; 1 S. D. 149. M'Niel, May 21. 1824; 2 Shaw's App. Cases, 206. Power *v.* Barham; 4 Ad. and Ell. 473.

(*b*) 1 Stair, 9. § 9. 15. 3 Ersk. 1. § 16; and 4, 1. § 27. 1 Bell, Com. 297. See also 240, et seq. 6 Toulier, 88.

(*c*) Huber, in Dig. lib. 4. tit. 3. § 4. Voet, 1. 4. tit. 3. § 3, 4; 6 Toulier, 91. 1 Illus. 10. Ewing or Graham, Nov. 17. 1830; House of Lords, 4 W. S. App. Ca. 346. Keith, March 24. 1832; 10 S. D. 514.

(*d*) Webster, May 28. 1813; House of Lords, 1 Dow. 247. 1 Illus. 11.

14. Fraud may be, 1*st*, by false representation (*a*); 2*d*, by concealment of material circumstances (*b*); 3*d*, by underhand dealing (*c*); 4*th*, by means of intoxication (*d*), or imbecility (*e*).

(*a*) 1 Illus. 11. 1 Stair, 9. § 9. Scott, Feb. 9. 1670; M. 4867. Dickson, Jan. 19. 1671; M. 4870. Nisbet, Dec. 6. 1698; M. 4872. Christie, Dunlop, and Love, ut supra, § 11. Hill, June 10. 1809; House of Lords, May 4. 1814; 2 Dow, 263. Webster, ut supra, § 13.

(*b*) 1 Illus. 11. et seq. 1 Stair, 9 § 9. Dunbar, July 2. 1670; 2 Brown's Sup. 482. Kennedy, July 1. 1687; M. 4858. Wood, June 5. 1696; M. 4860. Taylor, June 8. 1821; 1 S. D. 233; May 28. 1824; 2 Shaw's App Cases, 233. Prince, Feb. 24, 1680; M. 4932. Main, Jan. 18. 1715; M. 4934 Rogers, Feb. 5. 1735; Elchies, *Fraud*, 3. Inglis, Dec. 8. 1736: M. 4936; 5 Brown's Sup. 193. Forbes, Feb. 25. 1752; M. 4940; Elchies, *Fraud* 27. Grey, July 7. 1753; M. 9560. Robertson, July 27. 1757; M. 4941. M'Kay, Jan. 20. 1758; 5 Brown's Sup. 341. Gordon, Dec. 15. 1784; M. 4946. Sandieman and Co. June 24. 1786; M. 4947. 2 Hailes, 1014. Crawford Newal, Feb. 27. 1765; M. 4944. Shepherd, June 28. 1795; 2 Hailes, 637. Allan and Stewart, Dec. 4. 1788; M. 4949. 2 Hailes, 1059. 71, and 1 Bell, Com. 246. Arrol, May 29. 1810; Ib. Gordon Mack, Nov. 25. 1814; Ib. Anderson, Dec. 16. 1814; F. C. Arrol and Cook, Feb. 24. 1826; 4 S. D. 499. Smith, in House of Lords, 1 Dow, 272, and 7 S. D. 244. Brown, March 5. 1834; 12 S. D. 536. Frazer, Nov. 7. 1834; 13 S. D. 703. Hill *v.* Grey, 1 Starkie, 434. See Verplancke on Concealment in Contracts.

(*c*) 1 Illus. 17. Campbell, July 15. 1681; M. 4889. Ballantyne, Nov. 1682; M. 4891. See Walker, Dec. 24. 1695; 4 Brown's Sup. 290.

(*d*) *Drunkenness.*—3 Ersk. 1. § 16. 1 Illus. 17. Pothier, Oblig. No. 49. Gardner, July 1677; 3 Brown's Sup. 162. A. *v.* B. Feb. 9. 1682; 2 Brown's Sup. 19. Haltoun, Jan. 29. 1672; M. 13384. M'Kie, Nov. 24. 1752; M. 4963. Johnston, Nov. 15. 1823; 2 S. D. 495. Cook *v.* Clayworth, 18 Ves. 16. Pit *v.* Smith, 3 Camp. 34. Cockshott *v.* Bennet, 2 Term. Rep. 765.

(*e*) *Imbecility.*—1 Illus. 18. Trinch, Feb. 18. 1669; M. 4958. Alison, Nov. 27. 1696; M. 4954. Smith, Dec. 23. 1697; M. 4955. Graham, Feb. 1. 1715; 5 Brown's Sup. 120. Gordon, Feb. 7. 1729; M. 4956; Maitland, Feb. 13. 1729; M. 4956; House of Lords, 1 Cr. & St. App. Cases, 73. Gordon, April 28. 1730; 1 Cr. & St. App. Cases, 47. Cowper, Dec. 5. 1740; Elchies, *Fraud*, 10. Irvine, March 2. 1753; Elchies, *Fraud*, 32. M'Ilwham, Feb. 22. 1823; 2 S. D. 240.

NOTE relative to Sections 11, 12, and 13.—The want of consent, where the obligation proceeds from error or force, annuls the contract: But the nullity must be declared judicially. The contract ostensibly is valid and regular; and, 1. it subsists till it be reduced; 2. it will be effectual against third parties without notice; under the exception of land or heritable securities acquired on the faith of the records, moveables corporeal, and bills and notes. A distinction has been taken in the case of fraud that it will not be effectual as a ground of reduction against third parties; seeing there is here consent, though proceeding on a false ground. Is there any real ground for such a distinction?

2. *Proofs of Consent to Engagement or Obligation.*

15. In order to distinguish the requisites of final and conclusive engagement in different situations, contracts have been arranged into Consensual; Real; Written.

16. CONSENSUAL CONTRACTS, strictly speaking, are those in which mere consent proved by writing, by witnesses, or by confession, is sufficient to establish the obligation; sale, barter, or location of moveables; mandate; and partnership. But every obligation to which writing is not indispensable is effectual where consent is proved.

1 Stair, 10. § 11. 3 Ersk. 3. § 1.

17. REAL CONTRACTS require to their completion as such, an act of delivery or possession; as, loan, commodate, deposit, pledge: But the consent alone will bind the party to complete the contract.

1 Stair, 10. § 11. 3 Ersk. 1. § 17.

18. WRITTEN CONTRACTS, in strict technical language, are those to which authentic written evidence is required, not merely in proof, but in solemnity; as, obligations relative to land; or obligations agreed to be reduced to writing; or those required by statute to be in writing. On other occasions, writing is required only in evidence; as in promises to pay money, or in cautionary obligations, and so may be supplied by oath, or admission of the party. See below, § 1322, 1360.

1 Stair, 10. § 11; also § 9. 3 Ersk. 2. § 1, 2. 1 Bell, Com. 322-28.

Written obligations and contracts may be distinguished into three classes: Attested, Holograph, and Privileged. These will be more particularly discussed as part of the Law of Evidence, (see below, § ~~2293~~ 2125); at present a general statement is sufficient.

19. (1.) *Attested Writings* are subscribed by the granter, either in presence of two witnesses, or acknowledged to them by him: Or if the granter cannot write, by two notaries subscribing for him, duly authorized so to do (orally and symbolically) before four witnesses. 2. The witnesses subscribe, adding the word "witness" in attestation of the party's subscription, or of that of notaries as duly authorized by the party. 3. The writing bears a clause attesting the fact of the sub-

scription of the party (or notaries) and witnesses, and expressly mentions the name and designation of the writer of the deed, and of the witnesses; And the parties and witnesses are by their subscription held to attest the contents of this clause.

20. (2.) *Holograph Writings* are wholly or in the essential parts written by the party, and subscribed by him. They are held equivalent to attested writings, in affording proof at once of authenticity and of deliberate engagement. But they are probative only during twenty years. They do not at any time prove their own date: but to that effect must be attested by instrumentary witnesses. See below, § 2293.

21. (3.) *Privileged Writings* are such as law sanctions, although defective in some of the proofs or solemnities necessary in attested or holograph writings: So, 1. Last wills, from peculiar favour, and from respect to the tranquillity of dying persons, are sustained, although subscribed only by one notary (or a clergyman acting as such), and two witnesses; and, 2. Mercantile writings are effectual, although neither attested nor holograph; on account of the rapidity which may be necessary in preparing them, the immediate use to which they are to be applied, and the interests of merchants, who are often unacquainted with the peculiar usages of Scotland. Bills, notes, bank-checks, orders, mandates, guarantees, and letters in re mercatoria, fall under this rule. See below, § 2293.

22. (4.) *The Stamp Laws*, of which the primary object is revenue, though not intended to regulate the proof of contracts and obligations, indirectly affect it; and in questions of evidence as to the authenticity of writings, the chronology of the Stamp Acts (as well as the paper mark) may be of importance (*a*).

The general rules are,—1. That a stamp is required in all agreements which admit of pecuniary estimation; not being for the hire of a labourer or servant, nor a memorandum, letter, or agreement for or relative to the sale of goods. 2. That a bond for money, or in security of an indefinite sum, or for an annuity or sum payable at stated times, requires a stamp; provided it is not for rent reserved in a lease, or for a yearly sum in the farming of tolls. 3. That bills and notes, and policies of insurance, require a stamp so absolutely, that it

cannot afterwards be supplied. 4. That no stamp duty is imposed unless the words of the act clearly apply to the specific description of transaction (*b*). 5. That stamps of a denomination applicable to the particular instrument shall be effectual though of greater value than required; and even those of improper denominations, if equal or of higher value, shall be good, unless specially, by the act and on the face of the paper, appropriated to some other instrument. 6. That the agreement duty of L.1, 15s. is sufficiently complied with if affixed to any one of a series of letters making the contract. 7. That however numerous the parties, one stamp is sufficient when the instrument relates to one subject-matter; as to a security by several co-obligants for all the debts of a bankrupt (*c*): But where the transactions are different, the stamp will validate only one of them (*d*). 8. An action raised on an unstamped instrument, which may by the act be stamped ex post facto, is sisted till the stamp be procured (*e*); but when adhibited, the whole proceedings on the instrument are held to be retrospectively rendered unexceptionable (*f*).

(*a*) 44 Geo. III. c. 98. 48 Geo. III. c. 149. 55 Geo. III. c. 184; and Schedule of Duties. 1 Bell, Com. 319. Impey's Com. on the Stamp Act. Coventry, Tr. on the Stamp Laws.

(*b*) Warrington *v.* Forbes, 8 East. 244. Lawrie *v.* Ogilvie, Feb. 6. 1816. F. C.

(*c*) Johnston, March 7. 1801.

(*d*) Parry *v.* Boucher, 1814; 1 Camp. 80.

(*e*) Hatton, June 15. 1833; 11 S. D. 727.

(*f*) Creditors of Kingstorie, Jan. 12. 1743; Elch. Writ. 14. Lamont, Dec. 4. 1789. Rob, July 7. 1830; 8 W. S. 740. Davidson, Dec. 13. 1838. Ward (same day), 1 D. B. and M. 10. and 14.

23. *Delivery of Written Obligation.* The general rule is, that an obligation in writing, in order to be effectual, must be delivered to the obligee, or a third party for him, in token of complete engagement (*a*). Questions of delivery of writings occur chiefly in relation to deeds of succession and provision. In ordinary contracts and obligations there is seldom room for the question, unless in those cases in which several obligants are concerned. Delivery does not, as in England, require any ceremony; the fact of the deed being in the obligee's, or in neutral custody, or recorded in a public register, or followed by sasine, being sufficient in the ordinary case to infer delivery (*b*). In doubtful cases, 1. one's agent is as himself; so possession by the granter's agent is not delivery; possession by

the grantee's agent is; and if he be agent for both, the presumption is for delivery (*c*): 2. a neutral person is presumed to hold for the *creditor*, when the bond is for a consideration given; for the *debtor*, when the bond is gratuitous (*d*): 3. the presumption as to time is, that delivery took place at the date (*e*).

(*a*) 3 Ersk. 3. § 43. Fisher, Nov. 19. 1788; Elch. *Presumption.*

(*b*) 4 Stair, 42. § 8. 3 Ersk. 2. § 43, 44. Tait on Evidence, 147. 1 Illus. 19. et seq. Hindrick, Dec. 5. 1627; 1 Brown's Sup. 238. Dischingtoune, June 24. 1628; Ib. 259; See M'Gill, March 5. 1628; M. 16991. Glendinning, July 24. 1634; M. 16992. Bathgate, Jan. 1685; M. 17004. Bruce, June 23. 1675; M. 17000. Stamfield's Creditors, Dec. 22. 1696; 4 Brown's Sup, 344. Leckie, Nov. 22. 1776; M. 11581; 2 Hailes, 721; 5 Brown's Sup. 432.

(*c*) 3 Ersk. 2. § 43. 1 Illus. 20. Byres, Dec. 16. 1626; M. 16990. Irvine, Nov. 1738; M. 11576. Logan, Feb. 27. 1823; 2 S. D. 253. Maule, Jan. 15. 1828; affirmed. 4 W. S. App. Cases, 58.

(*d*) Stair, as corrected by Ersk. ubi supra; 1 Illus. 21-2. Kerr, Dec. 9. 1676; M. 3243. Sinclair, June 26. 1707; M. 11572. Holwell, May 31. 1796; M. 11583. Ramsay, ut supra. Cormack, July 8. 1829; 7 S. D. 868.

(*e*) Gordon, Dec. 1. 1757; M. 11161. See Scott, Jan. 29. 1663; M. 5799.

24. The general rule suffers exception, 1. in testaments; 2. in mutual contracts (see below, § 82.); 3. where, by a clause in the deed, delivery is dispensed with; 4. where the granter is the natural custodier for the obligee, as parents for their children; 5. where the granter is himself interested to detain the deed, it is good without delivery; 6. the presumption may be overcome by evidence.

3 Ersk. 2. § 44. and cases there cited. Ellies, July 23. 1669; M. 16999. A. B. March 1683; M. 17003. Hamilton, Jan. 9. 1741; M. 11576; Elch. *Prov. to Heirs*, 5. Cormack, July 8. 1829; 7 S. D. 868. Drummond, July 5. 1662; M. 12309.

3. *Doctrine of Locus Pœnitentiæ, Rei Interventus, and Homologation.*

1 Stair, 10. § 9. 3 Ersk. Pr. 2. § 2, 3. 1 Bell, Com. 327.

25. LOCUS PŒNITENTIÆ (a corollary to the rule of final engagement) is a power of resiling from an incomplete engagement; from an unaccepted offer; from a mutual contract to which all have not assented (*a*); from an obligation to which writing is requisite, or has been stipulated (*b*), and has not yet been adhibited in an authentic shape (*c*); from a marriage, which, by marriage-contract, is agreed to be afterwards solemnized (*d*).

The principle is, that the final assent is not yet given; so that a reference to oath is no answer to the plea of Locus Pœnitentiæ (*e*). But, 1. It is necessary, where writing is stipu-

lated, to distinguish whether it be the intention of parties thereby to *suspend* the engagement, or only to bind the parties in the mean while: There is locus pœnitentiæ in the former case: not in the latter (*f*). 2. In marriage-contract, although there is locus pœnitentiæ from the *marriage*, the obligation is so far binding as to give action for damage if not fulfilled. (See § 1508).

See below, of Mutual Contracts, § 70.

(*a*) 1 Illus. 23. Edinham, March 25. 1634; M. 8408. Hope, Jan. 6. 1727; M. 8409. York Building Co. July 23. 1724; M. 8435.

(*b*) 1 Stair, 10. § 9. More's Notes, p. lxv. 3 Ersk. 2. § 3. 1 Illus. 23. 1 Bell, Com. 327. Keith, July 16. 1636; M. 8400. Skene, July 15. 1637; M. 8401. York Building Co. and Hope, supra (*a*). Oliphant, Dec. 5. 1628; M. 8400. Montgomery, Jan. 28. 1663; M. 8411. Barron, July 16. 1736; Elch. *Loc. Pœn.* 2. Christie, Feb. 22. 1745; M. 8437. Buchanan, Dec. 15. 1773; M. 8478. Maitland, July 29. 1779; M. 8459; 2 Hailes, 840.

(*c*) Ogilvie, Jan. 5. 1700; 4 Brown's Sup. 473. Park, Nov. 29. 1764; M. 8449. Stewart, Feb. 5. 1765; 5 Brown's Sup. 902. Fulton, Feb. 26. 1761; M. 8446; Barron, sup. (*b*). Sheddan, July 6. 1768; M. 8456. Muir, Feb. 16. 1770; M. 8457; 1 Hailes, 340; 5 Brown's Sup. 639. Grieve, May 26. 1790; M. 8459; 2 Hailes, 1080. Campbell, Jan. 12. 1676; M. 8470. Wallace and Co. June 13. 1766; M. 8475; 1 Hailes, 27. Macfarlane, May 22. 1791; M. 8459. Paterson, June 17. 1830; 8 S. D. 931.

(*d*) 1 Ersk. 6. § 3.

(*e*) Barron and Grieve's Cases, supra (*a*) and (*b*).

(*f*) 3 Ersk. 2. § 4. Campbell, Jan. 12. 1676; M. 8470. Wallace and Co. June 13. 1766; M. 8475; 1 Hailes, 27. Broomfield, Aug. 11. 1757; M. 9446. Rutherford, June 7. 1748; M. 8443. Muirhead, Aug. 10. 1759; M. 8444. Fulton, Feb. 26. 1761; M. 8446.

26. REI INTERVENTUS raises a personal exception, which excludes the plea of locus pœnitentiæ (*a*). It is inferred from any proceedings not unimportant on the part of the obligee, known to, and permitted by, the obligor to take place on the faith of the contract, as if it were perfect (*b*); provided they are unequivocally referable to the agreement, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable (*c*).

See below, of the Sale of Lands, § 889.

(*a*) 3 Ersk. 2. § 3. 1 Bell, Com. 328. 1 Illus. 27. See also 2 Illus. 92. et seq. Hamilton, Jan. 22. 1836; 14 S. D. 323.

(*b*) Scot, Jan. 1587; M. 8410. Cromy, Feb. 11. 1628; 1 Brown's Sup. 245. A. B. July 13. 1553; M. 8410. Earl Kinghorn, July 23. 1674; M. 8414. Gordon, Nov. 12. 1674; M. 8415. Park, Dec. 10. 1675; M. 2535. Lawrie, Dec. 23. 1697; M. 8425. Graham, July 14. 1708; M. 8428. Thomson, Dec. 5. 1699; M. 8426. M'Kenzie and Wylie, Nov. 18. 1729; M. 8437. Moodie, June 21. 1745; M. 8439. Elch. h. t. 7. Wemyss, Nov. 16. 1768; M. 9174. Countess of Moray, House of Lords, March 24. 1773. Rymer, July 14. 1781; M. 5726; 2 Hailes, 887. Grieve, June 15. 1797; M. 5951.

M'Rory, Dec. 18. 1810; F. C. Bill's Creditors, June 14. 1810; F. C. Paterson, July 14. 1810. Gibb, March 5. 1835; 13 S. D. 612.

(*c*) 1 Illus. 28. No. 11. § 30. No. 19. Correct Kilkerran's rule (M. 8439) by Dunmore Coal Company, Feb. 1. 1811; F. C.; and 1 Bell, Com. 329, note. Keith, July 16. 1636; M. 8400. Buchanan, Dec. 15. 1773; M. 8478. M'Pherson, May 12. 1815; F. C. E. of Elgin's Tr. May 14. 1833; 11 S. D. 585. Cairns, June 18. 1833. Ib. 737. Carruthers, Feb. 11. 1836; 14 S. D. 464.

27. HOMOLOGATION (in principle similar to rei interventus) is an act approbatory of a preceding engagement, which in itself is defective or informal, either confirming, or adopting it, as binding. It may be express, or inferred from circumstances (*a*). It must be absolute, and not compulsory, nor proceeding on error or fraud, and unequivocally referable to the engagement; and must imply assent to it, with full knowledge of its extent (*b*), and of all the relative interests of the homologator (*c*). It establishes the engagement as if granted at the date of the homologation (*d*). Homologation may be—1. by the obligor, otherwise imperfectly bound (*e*); or, 2. by another having an interest adverse to the obligation (*f*). It sanctions the whole obligation (unless fairly divisible into parts), according to its true nature and meaning; and bars the homologator and his representatives; not third parties in competition (*g*). It may be effectual to sanction even deeds which are null by defect in form, provided they have been granted by persons not incapable (*h*); and it may operate as a bar against a claim of damage for breach of contract (*i*).

(*a*) 1 Stair 10. § 11; Elchies' Notes on Stair, 58: More's Notes, p. lxvii. 3 Ersk. Pr. 3. § 15. 1 Bell, Com. 144–5. 1 Illus. 30. et seq. Stein's Assignees, June 2. 1829; 7 S. D. 686; reversed Feb. 22. 1831. Grant, Feb. 26. 1830; 8 S. D. 606.

(*b*) 1 Illus. 32. et seq. Rires, Jan. 1663; M. 5619; Linton, Jan. 1729; M. 5624. Brown, Jan. 10. 1739; M. 5659. M'Naughton, May, 30. 1792; Bell, 253. Hamilton, House of Lords, April 8. 1712; Rob. 37. Gardner, July 20. 1738; M. 8474. Rig, Dec. 17. 1776; M. 5672. Rymer, July 19. 1781; M. 5726. Powrie, June 8. 1613; M. 5629. Walwood, July 28. 1625; M. 5630. Veitch, Feb. 1. 1676; M. 5646. Davidson, July 13. 1714; M. 5652. Johnstone, July 7. 1725; M. 5657. Bothwells, Feb. 11. 1748; M. 5662. Dallas, Jan. 13. 1704; M. 5677. Riddel, Dec. 20. 1728; M. 5681. Campbell, June 5. 1812; F. C. Johnson, Nov. 29. 1825; 4 S. D. 234. Gardener, Dec. 3. 1830; 9 S. D. 138. See Brown, June 19. 1832; 10 S. D. 667. Drummond, May 22 1834; 12 S. D. 620. Taylor, June 10. 1836; 14 S. D. 935. See M'Crae, Nov. 22. 1836; 15 S. D. 54.

(*c*) 1 Illus. 33. Johnstone and Brown, ut sup. Hope, Dec. 17. 1833; 12 S. D. 222.

(*d*) Harvie, June 1726; M. 5712. Mitchel, Dec. 20. 1672; M. 5711. Gordon, Nov. 19. 1766; 5 Brown's Sup. 932.

(*e*) Christie, Feb. 22. 1745; M. 8437. See Lady Bute's Chaplain, Jan. 1. 1666; 2 Brown's Sup. 423.

(*f*) Riddel, Dec. 20. 1728; M. 5681.
(*g*) Steel, Jan. 13. 1774; Tait's Cases, 5. Brown's Sup. 471; M. 5609. Primrose, Nov. 22. 1662; M. 5702. Liddel, July 20. 1744; M. 5721; Elchies' Notes, 185, and Liddel, July 26. 1744. Kilk. Elch. M. 5721.
(*h*) 3 Ersk. 3. § 47. 1 Illus. 35. Lady Bute's Chaplain, supra (*e*). Wemyss, Nov. 16. 1768; M. 9174. Christie, supra (*e*).
(*i*) Graham *v.* Muir, Jan. 24. 1833. 11 S. D. 308.

4. *Object and Effect of Obligations and Contracts.*

28. The essence of an obligation consists in the obligor being so bound to give, or do, or abstain, as to entitle the obligee to rely on fulfilment. The jus exigendi is the right conferred, and forms part of the universitas of the creditor's estate. The necessity of fulfilment is the obligation imposed, and forms a charge upon the debtor's funds. The effect of the obligation is to confer the right, and to impose the duty which the engagement fairly and equitably imports. Dismissing all distinction (as in the Roman law) between contractus stricti juris, and contractus bonæ fidei, the subject of obligations may be either specific or general; present, future, or contingent.

1 Stair, 10. § 2. et seq. 3 Ersk. 1. § 2. 3. and t. 3. § 83.

29. *Effect of Obligation.* 1. If the obligation be *general*, not confined to a specific thing, the engagement is absolute; provided the object of it be intelligible: 2. If the object be some *specific* thing, the obligation is so far conditional that it may be defeated by extinction of the thing: 3. A pecuniary obligation may be enforced by execution against the estate, and against the person: 4. An obligation to perform an act (ad factum præstandum) has been held, in England, not to ground an action at law, but only a remedy in equity. Such contracts may, in Scotland, be specifically enforced where the act can be performed by another, and the action may be laid alternatively for performance or for damages. Where the obligor is *himself* to perform the act and refuses,—or where the act becomes impossible,—damages are substituted for specific performance; and the imprisonment of workmen for non-performance of their engagement, rests now entirely on the statutes relative to workmen: 5. An obligation to abstain may be enforced by interdict.

1 Stair, 17. § 16. 3 Ersk. 3. § 86. and § 62. 1 Maddock on Chancery, 360.

Murray, May 15. 1810; F. C. Reid, June 4. 1824; F. C.; 3 S. D. 104. Gentle, July 9. 1825; 4 S. D. 163. Campbell, Dec. 3. 1825; F. C.; 4 S. D. 471. See Bookless, Nov. 20. 1832; 11 S. D. 50; also below, § 190. et seq. 4 Geo. IV. c. 34. § 3.

30. An obligation may ground a claim of damages either tacitly or expressly.

31. The general rule is, that if one bound absolutely (§ 29.) become, without fraud or fault, unable to fulfil his engagement, damages are due; the damage being indemnification for that which, by the breach of engagement, the obligee has directly lost, or been prevented from gaining; with the expense of the proceedings for obtaining reparation (*a*). Under such claim of damage will fall, 1. lawful interest in pecuniary obligations, as the damage for money not paid (*b*): 2. the loss sustained on the thing itself (*propter rem ipsam non habitam*); or foreseen, or naturally in the contemplation of the parties (*c*): But not collateral or consequential damage (*d*); unless either such damage has, by special stipulation of the parties, been brought into view; or unless it be a loss on the *thing itself*, as by rise or fall of markets.

(*a*) 1 Stair, 17. § 16. 3 Ersk. 3. § 75. 86. 1 Bell, Com. 448. Brown on Sale, 211–26. Pothier, Oblig. § 159. et seq. 1 Illus. 37. Strachan and Gavin, in House of Lords, Feb. 22. 1828; 3 W. S. 19. See for the distinction of damage from delict below, § 545 and 553.

(*b*) 1 Illus. 38. 3 Ersk. 3. § 75. et seq.

(*c*) Anderson, Feb. 21. 1809; F. C. See Murray's Jury Court Cases, *Damages.*

(*d*) Dunlop, May 31. 1815; F. C. Walton *v.* Fothersgill, 7 Carr. & P. 392.

32. *Damage in Pecuniary Obligations.* Here interest is the damage due—1. by law on bills and notes from the date of the bill, in case of non-acceptance; from the day of payment of a note or of an accepted bill; from the date of presentment, if payable on demand; and from the date of acceptance, or if the acceptance is not dated from the date of the bill, if drawn at sight (*a*): 2. after denunciation, interest is due on the whole sum as accumulated in the diligence (*b*): 3. interest is due on sums paid by a cautioner for the principal debtor: 4. by agreement, interest may be stipulated not to exceed five per cent. on a British debt, but on a foreign debt the rate may be according to the law of the place (*c*): it cannot be continued beyond 5 per cent. after the debt becomes British by judgment or novation (*d*): 5. interest is due as damage from delay raised by a judi-

cial demand or protest; or from the rendering of accounts (*e*); or by duty under trust to pay money; 6. where money has been improperly obtained, and is detained against the will of the owner, interest is due at the full legal rate, not the current rate merely (*f*): 7. by implied agreement, interest is due in all cases of intromission, possession, loan, and the enjoyment of the use of money after it ought to have been paid (*g*): 8. interest is given, by decree of the House of Lords, on the interest included in judicial accumulations (*h*); 9. accumulation of interest also is allowed on bankers' accounts periodically settled, and the interest added to the principal; on writers' accounts of cash transactions, settled annually like bankers'; on accounts of judicial factors; and on India accounts, by usage (*i*): and, 10. the law agent and cashier of tutors and curators (himself being one of them, liable for interest), has been held bound to settle yearly, and to lend out the balance or pay bank interest on it till lent out (*k*).

(*a*) 1681. 20. 1696. 36. 12 Geo. III. 72. 3 Ersk. 3. § 77.
(*b*) 1621. c. 20. and 1 and 2 Vict. c. 114. § 5.
(*c*) 1 Illus. 39. Wilkinson, June 28. 1821; F. C. Campbell, Feb. 15. 1809; F. C. Graham, July 19. 1820, in House of Lords. 2 Bligh, 127 and 6 S. D. 119. Palmer and Co. Jan. 24. 1835. 13 S. D. 308.
(*d*) Graham's Case, supra (*c*).
(*e*) See Bremner, Dec. 13. 1837; 16 S. D. 213.
(*f*) Duncan, Feb. 27. 1836; 14 S. D. 583.
(*g*) See 1 Bell, Com. 647. 2 More's Notes on Stair, lxxviii.
(*h*) 48 Geo. III. 151. § 19. 2 Bligh, 145. Napier, Dec. 1. 1829; 8 S. D. 149. Affirmed Oct. 3. 1831. 5 W. S. 745.
(*i*) Duke of Queensberry, Dec. 21. 1826; 5 S. D. 180. Graham and Palmer's Cases, supra (*c*). Fyffe, May 25. 1838; 16 S. D. 1038. Lambe, Dec. 14. 1837; 16 S. D. 219. 1 Illus. 40–1.
(*k*) Lady Montgomery, 4 Dow, 110; June 4. 1822; 1 S. D. 491.

33. *Damage in Obligations not Pecuniary.*—To the above general rule, as to damage, (§ 31.) it is an exception, that if the failure to fulfil the engagement be fraudulent or wilful, damage, both direct and collateral, is demandable.

In England, a distinction has been made, in awarding damages for not delivering goods, between that case and the failure to restore stock lent; on the ground that, in the case of lent stock, the borrower has the lender's means in his hand; whereas in the non-delivery of goods, the vender has still his money with which to buy, and so may indemnify himself by going to market on or about the stipulated day of delivery; and so in that case the damage is calculated according to the

price at or about the day when the goods should have been delivered (*a*). In Scotland, the course has been to take either the highest price which might have been got for the goods at any time after the day of sale, or the average value between the stipulated day of delivery and the date of the action (*b*): but the fair criterion seems to be that of the English practice, namely, the price at which the buyer could procure the goods in market at the stipulated time of delivery. Damage is to be given as at the stipulated *place* of delivery (*c*).

(*a*) Gainsford *v.* Carrol, 1824; 2 Barn. and Cress. 624. Leigh *v.* Paterson; 8 Taunt. 540.

(*b*) 1 Illus. 41, 42. Morrison, March 4. 1806, affirmed; M. *Damage*, App. 1. Shirra and Mains, Dec. 11. 1807; F. C. Robinson and Company, Dec. 23. 1808; F. C. Taylor, June 17. 1809; F. C.

(*c*) 1 Illus. 37. Anderson, Feb. 21. 1809; F. C.

34. In relation to stipulated damages, these points are to be marked:—1. That the parties may fix the amount of loss resulting, or likely to result, from the breach of engagement, as *estimated damages;* in which case, no inquiry into the actual damage seems competent (*a*). 2. That the obligation may be fortified by a penalty; which is held to cover but not to assess the damage; to entitle the jury to find under it the true amount of damage, not exceeding the penalty (*b*); and, 3. That the stipulation of a penalty (unless when expressly so declared), is not alternative, and does not discharge the obligation on payment of the penalty (*c*).

(*a*) 1 Bell, Com. 653–4. et seq. 1 Illus. 42. et seq. Craig, Dec. 16. 1628; M. 10034; 1 Brown's Sup. 227. Skene, July 15. 1637; M. 8401. M'Intosh, Feb. 1. 1798; M. Tack, App. 5. Henderson, Feb. 24. 1802; M. 10054. Frazer, Feb. 25. 1813; F. C. Graham, in House of Lords, May 11. 1789. Morrison, Feb. 22. 1823; 2 S. D. 241. Miller, May 26. 1824; 3 S. D. 65.

English Cases.—Barton *v.* Glover, Holt's Cases, 43. and cases cited. Rolfe *v.* Paterson, 2 Brown's Parl. Cases, 436. Lowe *v.* Peers, 4 Burr. 2225. Smith *v.* Dickinson, 3 Bos. and Pull. 630.

(*b*) 1 Illus. 42. et seq. Johnson, Feb. 22. 1639; M. 10037. Pollock, Feb. 24. 1777; 2 Hailes, 766. Muir M'Kenzie, June 18. 1811; F. C. Wortley M'Kenzie, Dec. 13. 1811; F. C. Wright, Feb. 9. 1826; 4 S. D. 434.

English Cases.—William *v.* Ashton, 1 Camp. 78. See Holt's Cases, 45. note. Astley *v.* Weldon, 2 Bos. and Pull. 346. Smith *v.* Dickinson, 3 Bos. and Pull. 630.

(*c*) 1 Illus. 47. Beattie, Dec. 27. 1695; M. 10039. Clark, June 14. 1632; M. 10036. Crichton, March 19. 1630; M. 10035. Broomfield, Aug. 11. 1753; M. 9446. Muir M'Kenzie and Wortley M'Kenzie, supra (*b*). See Elch. *v.* Alternative, notes, p. 23.

5. *Various Characters of Contracts.*

35. LEGAL OR ILLEGAL CONTRACTS. No obligation is recognised as a ground of action, which is derived from an illegal or immoral contract. In such a case, "melior est conditio possidentis vel defendentis."

36. 1. CONTRACTS VOID BY STATUTE. No obligation to give, do, or abstain, against the express prohibition of a statute, will sustain an action. A penalty imposed by statute is for punishment, not to give license; and it implies prohibition. In contracts, by force of stipulation, the penalty may discharge the obligation, § 34.

1 Ersk. 1. § 59. 60. 1 Bell, Com. 298. et seq. 1 Illus. 47. Bartlet Carth. 252. Law *v.* Hodson, 11 East. 300; Canaan *v.* Bryce, 3 Barn. and Ald. 179.

(1.) *Purchase of heritage*, while it is the subject of a depending lawsuit, is forbidden to any member of the College of Justice, or any inferior court, directly or indirectly; and the contract is null. In construction this is extended to all matters in depending suits (*a*). But security for the costs may be taken on the subject of the lawsuit (*b*).

(*a*) 1594. c. 220. Sir G. M'Kenzie, Obs., James VI. par. 14. c. 116. 1 Illus. 48. Mowat, July 6. 1625; M. 9496. Purves, Dec. 20. 1683; M. 9500. Home, Dec. 15. 1713; M. 9502. Richardson, July 30. 1635; M. 9496. Earl Home, July 30. 1678; M. 9498.
(*b*) Forbes, July 30. 1774; 5 Brown's Sup. 530.

(2.) *Pactum de quota litis*, or a bargain by an advocate or law agent to receive, in remuneration of his professional services, a share of the subject in contest, is unlawful at common law, and according to the spirit of the above statute (*a*).

The principle of the rule has been applied to an agreement by a country writer to employ an Edinburgh agent, and make advances of money, on condition of receiving a share of the profits (*b*). It was even held an agreement to be discouraged in general (though in some cases allowable), for an agent to stipulate for remuneration only on success (*c*).

(*a*) 1 Stair, 10. § 8. 1 Illus. 49. Ruthven, June 23. 1680. 9499 M'Kenzie, July 23. 1774. 5 Brown's Sup. 528. Johnson, Feb. 1. 1831; 9 S. D. 364.
(*b*) A. and B. May 12. 1832; 10 S. D. § 23.
(*c*) Clyne, Jan. 26. 1830; 8 S. D. 391.

(3.) *Usury*, forbidden by early Scottish statutes, and by an act in Queen Anne's reign, is the taking or contracting, in the loan

of money, wares, or commodities, for more than the value of L.5 for the forbearance of L.100 for a year; or after that rate for a greater or lesser sum, or longer or shorter time. The contract is annulled, 1. if usury be taken; or, 2. if it be stipulated (*a*): But the penalties are incurred only by the actual taking of the usurious interest. Where there is risk in the contract beyond that of insolvency, it legalises a greater rate of interest; as in bottomry (see § 453). The annulling of the bond or contract does not annihilate the debt, if it can be proved otherwise (*b*). By recent statutes it is provided, 1. that in the hand of an indorsee for value, a bill, though given on a usurious bargain, shall not be null, without notice of the usury (*c*); and, 2. that no bill of exchange or promissory-note payable within twelve months from the date, or not having more than twelve months to run, shall be null on usury (*d*).

(*a*) 1597. 247; 1621. 28. 12 Anne, 16. 31 Eliz. c. 5. 1 Illus. 50. Colville, Jan. 26. 1709; M. 6825. Aberdeen, Jan. 29. 1714; M. 16421. M'Lellan, Feb. 1727; M. 16426. Charteris, March 23. 1728; Rob. App. Cases, 471. Cuming, April 28. 1726; Ib. 582. Statten, Jan. 15. 1735; M. 16427. Abercromby, July 13. 1745; M. 16429. Elch. *Pact. Ill.* 17. Glen, June 30. 1790; M. 16437. Pitcairn, Dec. 1. 1768; M. 16433; 1 Hailes, 259. Playfair, June 6. 1797; M. 16438. Walker, May 15. 1800; and in House of Lords, March 2. 1802; M. 16440. 1 Bell, Comm. 310, note. Morrison, June 24. 1808. Meal, Nov. 27. 1810. Surties, April 6. 1814; House of Lords, 2 Dow. 254. Paul, Jan. 20, 1824. Hamilton, Feb. 15. 1826. Campbell, Dec. 15. 1773; 5 Brown's Sup. 396; 58 Geo. III. c. 93. Carstairs *v.* Stein, 4 Maule and Selwyn, 192. Marsh *v.* Martindale; 3 Bos. and Pull. 154. Harris *v.* Boston; 2 Carys, 349. Matthews *v.* Griffiths; Peake, 200. Yea *v.* Hammett; 1 Bos. and Pull. 144.

(*b*) Gray, 1790; 1 H. Black, 460.

(*c*) 58 Geo. III. c. 93. and 5 and 6 Wil. IV. c. 41.

(*d*) 3 and 4 Wil. IV. c. 98. § 7. and 1 Vict. c. 80.

(4.) *Gaming, and Betting on the Game*, are forbidden both in Scotland and in England, to the effect of entitling the poor of the parish in Scotland to all winnings within twenty-four hours above 100 Merks; and in both countries of annulling notes and other securities for gaming debts; entitling the loser of money above L.10 at a sitting, or L.20 within twenty-four hours, to recover it from the winner; and giving action to common informers for the winnings and triple value, one-half to himself and the other to the poor of the parish. But, by recent statutes, 1. bills, notes, and mortgages in the hands of purchasers for value, shall not be void, but only held as for an illegal consideration; and, 2. if on such instruments the granter or maker shall pay to the holder the money so se-

cured, he shall be entitled to recover it as money paid to the original payee on an illegal consideration.

See Statutes 1621. 14. 9 Anne, 14. § 1. 2. 13 Geo. II. c. 19. 18 Geo. II. c. 34. and 114. 5 and 6 Will. IV. c. 41. 1 Illus. 487. Wilson, Jan. 25. 1740; M. 9507. Pringle, Nov. 12. 1700; M. 9509. Stewart, Feb. 18. 1741; M. 9510. M'Coull, March 5. 1767; M. 9518. Russell, July 6. 1808. Edwards, *v.* Dick, 1821; 4 Barn. and Ald. 212. Ferrier, May 16. 1828; 6 S. D. 818.

(5.) *Sale of offices* of public trust, and those connected with the receipt of the revenue, or administration of justice, or the public departments of Government at home or in the Colonies, is prohibited by statutes grounded on the policy of the common law. This extends to the right of appointing deputies.

Sale of Offices, 5 and 6 Edw. VI. c. 16; 49 Geo. III. c. 126. 2 Black. 36; 3 Kent's Com. 454. See also Young, Feb. 9. 1759; M. 9526. Dalrymple, Feb. 1. 1786; M. 9531; 2 Hailes, 989. Thomson, Feb. 16. 1811; F. C. Haldane, March 6. 1812; F. C. See Gardiner, March 11. 1835; 13 S. D. 664 Tyndal Bruce, Feb. 27. 1839.

(6.) *Liquor Act.* No one may sue for the price of spirituous liquors, unless the debt shall have been *bona fide* contracted to the amount of twenty shillings at one time. But this does not apply to liquor sold for resale.

Liquor, 24 Geo. II. c. 40. Burnyat, 5 Barn. and Ald. 241. Alexander and Co. March 10. 1824; 2 S. D. 788; F. N.

(7.) The Printer's name and residence is, by statute, required under high penalties, on the first and last leaf of each book or paper which he prints, and he will not be allowed to sue for the price of printing, if he neglect these orders.

39 Geo. III. c. 79. § 27; Bentley *v.* Bignold, 5 Barn. and Ald. 335.

37. 2. CONTRACTS VOID AT COMMON LAW. Obligations or Contracts immoral, or contra bonos mores, are ineffectual (*a*). Such are, 1. an incentive or encouragement to crime (*b*): but with us the sale of an expected inheritance is not so considered, though it was so in the Roman law (*c*). 2. The price of prostitution; from which, however, is to be distinguished a compensation for injury already sustained (*d*):* 3. Contracts for

* It has been contended, that there is a sub-exception, restoring the general rule, where the obligee is a prostitute, or is aware of the connexion being adulterous: It was so held in Scotland in Durham's case, cited above; and in England in Priest's. But this has been denied in Nye's case; see above.

indecent or mischievous purposes or considerations (*e*): 4. for purposes or considerations, prejudicial or offensive to the public or to third parties (*f*): 5. for purposes inconsistent with public law or arrangements (*g*): 6. for money given as a bribe for appointing a factor or tutor-dative to a pupil (*h*): and, 7. wagers and sponsiones ludicræ (*i*).

(*a*) 1 Stair, 10. § 8. More's Notes, lxii. 3 Ersk. 1. § 10. 1 Illus. 59. Toullier, tom. 6. p. 123.
(*b*) Stewart, June 3. 1752; M. 9466. Grant, Aug. 2. 1786; F. C.; M. 9571; 2 Hailes, 1001. Collins *v.* Blantern, 2 Wils. 341, 347.
(*c*) 1 Stair, 10. § 8. Aikenhead, July 6. 1630; M. 9491. Ragg, July 15. 1708; M. 9492. See Beaton, June 7. 1821; 1 S. D. 53.
(*d*) Durham, July 20. 1622; M. 9469. See Ross, June 25. 1642; M. 9470. Sir W. Hamilton, June 26. 1765; M. 9471. Duke of Hamilton, March 21. 1816; F. C.; House of Lords, 2 Bligh, 197. Priest *v.* Parrot, 2 Ves. 160. Walker *v.* Perkins, 3 Burr. 1568. Marchioness of Annandale, 2 Peere Williams, 432. Turner *v.* Vaughan, 2. Wils. 339. Gibson *v.* Dickie, 3 Maule and Selwyn, 463. Nye *v.* Mosely, 6 Barn. and Cress. 133.
(*e*) Forbes *v.* Johns, 4 Espinasse, 97. Du Bost *v.* Beresford, 2 Camp. 511. Poplott *v.* Stockdale, Ry. and Moodie, 337.
(*f*) Gilbert *v.* Sykes, 16 East, 150. Da Costa *v.* Jones, Cowper, 729.
(*g*) Blachford *v.* Preston, 8 Term Rep. 89. Glen, Jan. 15. 1822; 1 S. B. 266.
(*h*) Muschet, Feb. 27. 1639; M. 9456. Scott, Feb. 19. 1736; M. 13433.
(*i*) Bruce, Jan. 27. 1787. 2 Hailes, 1016; House of Lords, April 14. 1788. See 2 Term Rep. 616, and 3 Term Rep. 697. Wordsworth, May 15. 1799.

38. CONTRACTS INCONSISTENT WITH PUBLIC POLICY ARE VOID. Of these the following are the most remarkable:—

39. (1.) *Contracts against the policy of the domestic relations.* So, 1. a bond imposing a restraint on marriage (not to marry at all, or not to marry a particular person), is ineffectual. And the exception contended for, where the person imposing it has an interest in the prohibition, seems not to be law; the party being left to make effectual, judicially or otherwise, any right existing independently of the forfeiture (*a*). 2. When an engagement to marry is fortified by a bond in case of marrying another, the engagement may ground an action of damages for breach of promise; but no action will lie on the bond, on account of marrying another (*b*). Marriage brocage bonds, or obligations to give a reward for influence exerted for bringing about a marriage, are void from their pernicious tendency (*c*).

NOTE.—See below as to conditions annexed to Bonds, § 49; to Settlements, § 1785; to Legacies, § 1881.

(*a*) 1 Illus. 63. Key *v.* Bradshaw, 1689. 2 Vern. 105. Baker, 2 Vern. 215. Cock *v.* Richards, 10; Ves. 429.

(*b*) Lowe *v.* Peers, 4 Burr. 2225. Gibson *v.* Dickie, 3 Maule and Selwyn, 463; 1 Bell, Com. 301.

(*c*) 1 Bell, Com. 302. 2 Comyn's Digest, 631. 1 Illus. 63. Campbell, June 6. 1678; M. 9505. Earl of Buchan, June 22. 1698; M. 9507. Thomson, Feb. 14. 1770; M. 9519; 1 Hailes, 339; 5 Brown's Sup. 532. Stribblehill *v.* Brett, 2 Vern. 406. Keat. 2 Vern. 588. Duke of Hamilton, 2 Vern. 652. Smith, 3 Atk. 567. Cole *v.* Gibson, 1 Ves. 503. Johnson *v.* Mackenzie's Exrs. Dec. 4. 1835.

40. (2.) *Obligations in restraint of the liberty of the person*, if absolute and unqualified (or virtually so), are void (*a*). But contracts for service during a certain time, or obligations in restriction of the exercise of trade to particular districts, and for protection by reasonable restraint of a fair interest, are good (*b*): It has even been held that a restraint on trade for the lifetime of the parties is binding (*c*).

(*a*) 1 Ersk. 7. § 62. 1 Bell, Comm. 302. Allan, Dec. 1728; M. 9454. Wedderburn, March 6. 1612; M. 9453. Caprington, March 24. 1632. M. 9454.

(*b*) Stalker, Jan. 15. 1735; M. 9455. Mitchell *v.* Reynolds, 1 P. Williams, 181. Chesman *v.* Nainby, 2 Strange, 739; 1 Brown's Parl. Cases, 234. Hayward, 2 Chit. 407. Davis *v.* Mason, 5 Term Rep. 118. Horner *v.* Ashford; 3 Bing. 322. Horner *v.* Graves; 1 Bing. 735. Wickins; 3 Glen and Jam. 313.

(*c*) Hitchcock *v.* Cocker; 1 Adol. and Ellis. 438.

41. (3.) *Contracts tending to disturb public arrangements*, or to impede the course of justice, are void;—as when a parochial schoolmaster agreed to hold his office at pleasure (*a*); for simoniacal pactions (*b*); for restraining witnesses from giving testimony (*c*); for preventing a bankrupt from making a full disclosure (*d*); for compromising felony, or procuring pardon (*e*); for securing indemnification to a magistrate or jailor against the escape of a prisoner (*f*); for defeating the laws against slavery (*g*).

(*a*) Duff, Feb. 20. 1799; M. 9576.

(*b*) Steven, Feb. 20. 1759; M. 9578. Maxwell, Jan. 19. 1775; M. 9580.

(*c*) Pool *v.* Bonsfield, 1 Camp. 55.

(*d*) Nerot *v.* Wallace, 3 Term Rep. 17.

(*e*) Stewart, June 3. 1752; M. 9465 (correct the Faculty Report by that of the Select Decisions). Grant, Aug. 2. 1786; M. 9571. Collings *v.* Blantern, 2 Wils. 349. M'Leod, Dec. 14. 1758; 4563. Lee, May 20. 1795. Bell's Cases, 176. Kennedy, Feb. 7. 1832; 2 S. D. 92. See Wallace *v.* Hardacre; 1 Camp. 44. Edgecomb *v.* Rood; 5 East. 294.

(*f*) Shoolbred, June 18. 1789; M. 9468. Sed quære?

(*g*) Gibson, March 7. 1828; 6 S. D. 733. 1 Illus. 69 and 63, p. 103.

42. (4.) *Contracts for defeating the revenue laws are void*, and action is denied, according to the maxim, 'Potior est conditio possidentis vel defendentis' (*a*). 1. This rule holds

in contracts for *smuggling:* action being denied, if the party who brings the action is aware of the design to defraud the revenue; as, for example, when he is a native of this country (*b*); or when, although a foreigner, he engages for, or knows of the goods being packed in the way necessary to evade the revenue laws; or is participant in preparing false papers; or active in planning, forwarding, or giving aid in the scheme of evasion; or in actually landing the goods in this country (*c*). 2. The same rule applies to contracts *relative to contraband goods*, which are known to be, or purchased *as*, contraband; being either absolutely prohibited or manifestly smuggled with the duty unpaid (*d*). But, 3. The rule does not hold where the goods are only *sold* abroad (*e*); or where they have been *bought* fairly in the market of this country (*f*).

(*a*) 3 Ersk. 3. § 3. Story's Com. on Conflict of Laws, § 246–259. 6 Geo. IV. c. 108; 3 and 4 Will. IV. c. 53, and 4 and 5 Wil. IV. c. 13. for the prevention of smuggling.

(*b*) Duncan, Feb. 7. 1776; M. 9546; 5 Brown's Sup. 531; Hailes, 683. M'Master, March 2. 1775; 5 Brown's Sup. 530. Mitchell, June 22. 1780. Ib. 533; 2 Hailes, 859. Cantley, Feb. 11. 1790; F. C.; M. 9550; Hailes, 1077. Young and Co. July 7. 1790; F. C.; M. 9553.

(*c*) Nisbet, Jan. 1791; M. 9554; Bell's Cases, 349. Cullen and Co. May 15. 1793; F. C.; M. 9554. Reid and Parkinson, same date; M. 9555. Stoddart, July 28. 1779; 5 Brown's Sup. 533. Waynell *v.* Reed, 5 Term Rep. 599.

(*d*) Scougall, Nov. 16. 1736; M. 9536; Elch. *Pact. Ill.* 7. Cockburn, Dec. 5. 1741; M. 9539; 5 Brown's Sup. 714. M'Lure and M'Cree, Nov. 3. 1775; Tait's Cases; 5 Brown's Sup. 532. Duncan, Feb. 8. 1776; F. C.; Hailes, 683. M'Lure and M'Cree, Feb. 26. 1779; M. 9546; 5 Brown's Sup. 532; Hailes, 829. Gibson, March 7. 1828; 6 S. D. 733.

(*e*) Holman *v.* Johnson, Cowper, 341. Clugas *v.* Penaluna, 4 Term Rep. 466. Hodgson *v.* Temple, 5 Taunt. 181.

(*f*) Walker, Nov. 6. 1740; M. 9538; Elch. 11; 5 Brown's Sup. 217. M'Lean, Dec. 5. 1780; F. C.; 9549.

43. (5.) *Contracts inconsistent with the national war policy are void;* for war is an instrument of national justice, under the direction of government, and is not to be interfered with by individuals (*a*). There is no war for arms, and peace for commerce; and the hands of the enemy are not to be strengthened. Therefore, 1. The subjects or citizens of the belligerent states are enemies, and cannot lawfully trade with each other; 2. When war intervenes, payment of debt due by the subjects of the one state to those of the other cannot be exacted during hostilities: But by the practice and public law of Europe the debt is not forfeited, but payment suspended; the debt reviving on the termination of hostilities (*b*).

NOTE.—In America, the severe rule of an immediate confiscation of property and of debts on the breaking out of a war, has been judicially declared, after very learned discussion, and by two judges whose names are among the highest of judicial authorities, Marshall and Story; leaving the hardship to be relieved by the discretionary act of Congress; Brown *v.* United States, 8 Cranch, 10. Ware *v.* Hylton, 3 Dallas, 199. See also 1 Kent, Com. 55, et seq.

There are two exceptions to the general rule of non-intercourse during war,—

1. Neutrals may trade with either belligerent; and, indirectly, even between the belligerents (*c*). But this neutral trade is liable to these interruptions:—1. The right of searching private neutral merchant vessels during war to detect any breach of neutrality (*d*): 2. The necessity of being furnished with neutral documents, register, passport, sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading; the want of which will strongly infer a breach of neutrality, and, much more, the destruction of papers (*e*): 3. The prohibition of Contraband of war; as ammunition, arms, artillery, timber for ships, naval stores, tar, pitch, hemp, sail-cloth; and also provisions going to a besieged port or country; or in circumstances indicating aid to hostilities; as to a naval and military, not a mercantile port (*f*): 4. Interruption by blockade; by which is meant an actual existing siege or blocking up of a city, port, or coast; known and enforced by a present and effectual force (*g*); although by accident or storm the blockading power may be removed for a time (*h*).

2. Licences by authority of Government may open, to the persons to whom they are granted, the whole, or certain parts, of the prohibited trade, so far as the Government which grants it is concerned: But the use of this privilege to trade with the enemy is an act of hostility (*i*). License has of late years been freely granted, and liberally construed (*k*).

(*a*) 2 Stair, 2. § 10, et seq. 3 Vattel, 5. § 70. 1 Kent, Com. 55.

(*b*) 3 Vattel, 7. 1 Kent, Com. 115; and Judgment in Admiralty, as mentioned below.

(*c*) 3 Vattel, 4. § 63. 1 Emerigon, 567.

(*d*) The Maria, 1 Rob. 287. The Mariana Flora (American), 11 Wheaton's Rep. 42. 1 Kent, Com. 153.

(*e*) Bernardi *v.* Matheaux, Dougl. 581. The Hunter, 1 Dods Adm. Rep. 480. The Pizarro, 2 Wheaton, 227 (American).

(*f*) 2 Valin, 264. Pothier de Proprieté, § 9. 3 Vattel, 7. § 112. The

Jonge Margaretta, 1 Rob. Adm. Rep. 189. The Commerce (American), 1 Wheaton, 382.

(*g*) The Mercurius, 1 Rob. Adj. Rep. 80. The Betsy, Ib. 93. The Stert, 4 Rob. 65.

(*h*) The Frederic Molke, 1 Rob. 86. The Hoffnung, 6 Rob. 112.

(*i*) The Elizabeth, 5 Rob. 2. The Julia (American), 8 Cranch, 181. The Caledonia (American), 4 Wheaton, 100.

(*k*) The Goede Hoop, Edw. Ad. Rep. 327, for Lord Stowell's Exposition of the Rules of Construction of Licenses.

NOTE.—See, on the whole subject of war policy, the Reports of Lord Stowell's Judgments in Admiralty, by Robinson; 1798, 1808. Edwards, 1808, 1811. Dodson, 1811, 1822. Also Horne on Captures. Baring on Orders in Council. Wheaton's Digest of Law of Maritime Captures and Prizes. Dr Phillimore on Licenses. See below of Prizes and Captures, § 1295, et seq.

44. Bargains or engagements made on Sunday are not null in Scotland (*a*), though forbidden in England (*b*); nor are they void at common law even in England (*c*).

(*a*) Oliphant, Feb. 3. 1662; M. 15001 Duncan, March 1684; M. 15,003. Reid, March 15. 1820; 2 Murray, 238, 244. M'Pherson and Co. 1824. Thomson on Bills, 79. See 1579. c. 70. 1690. c. 21. Phillips, May 19. 1535; reversed, Feb. 20. 1837; 2. S. M. App. Cases, 465. 3 Illus. 104.

(*b*) Bloxham *v.* Williams, 3 Barn. & Cress. 232. Fennel *v.* Ridler, 5 Ib. 406. Smith *v.* Sparrow, 4 Bing. 84.

(*c*) Drury *v.* De la Fontaine, 1 Taunt. 135; Fennel, 5 Barn. & Cress. 406. Williams, 6 Bing. 655. Begbie, 1 Cr. & Jerem. 180.

OBLIGATIONS, PURE, FUTURE, or CONDITIONAL.

45. *Pure* or *Simple Debts* are debts presently due, and for which execution may immediately proceed.

1 Stair, 3. § 7. 3 Ersk. Pr. 1. § 3. 3 Ersk. Inst. 1. § 6, 7.

46. *Future.* A debt payable on a future day certain, or an event that must arrive, is improperly termed *future.* It is debitum in præsenti solvendum in futuro: 'Dies cedit etsi nondum venerit.' A proper debt exists from the moment of completion of the engagement; the execution only is suspended till the arrival of the appointed day (*a*). But, 1. At common law, where the debtor whose solvency is relied on in the contract, is vergens ad inopiam, or when he is diminishing a security relied on, diligence for *security* may proceed, but not for payment; and so retention may be competent, but not compensation (*b*). 2. By statute, in the case of bankruptcy, and in contemplation of a division of funds, a creditor may claim in a sequestration, with abatement of interest, to the day of payment, for a debt payable at a future day (*c*). 3. The creditor cannot be compelled to take payment before the term,

especially of large sums lent out at interest (*a*). 4. The term of payment which suspends the demand, in favour of the debtor, may be fixed by the original obligation, or by subsequent agreement (or supersedere), sometimes made a part of an arrangement with creditors (*e*). 5. The day of payment appointed makes part of the time of suspension; so that execution cannot proceed till the following day (*f*). 6. When the term is fixed by the lapse of a certain space (as to pay in ten days), the day on which the obligation is made is not included, but the term begins to run with the next day (*g*). 7. Where a large sum is payable by instalments, the failure to pay one of them does not infer a power to demand the whole as a pure debt; but only to proceed to diligence in execution for what is due, and diligence in security for the rest. But it may be stipulated, that failure in one or more instalments will justify a demand for the whole, and in such a case (as when the failure of three terms is stipulated as making the whole a present debt) the debtor may avoid the penalty, by requiring the creditor to receive payment of the first instalment when two are due and the third current; leaving the second unpaid.

(*a*) 2 Voet, 4. § 20; and 3 Voet, 1. § 28. Pothier, Tr. des Oblig. No. 228. et seq. 6 Toullier, 675. Dirl. and Stewart, voce *Debitum in diem.* 3 Stair, 1. § 46. 3 Ersk. Inst. 6. § 18. and 2. 12. § 42. 1. Bell, Com, 315. 714.

(*b*) Pothier, ut supra, No. 234. 6 Toullier, 690. Duke of Queensberry's Executors, July 11. 1817; F. C.

(*c*) 54 Geo. III. c. 137. § 47. Lord Henley's Bankrupt Law of England, 125. 6 Geo. IV. c. 16. § 51. See below, § 573.

(*d*) 6 Toullier, 706.

(*e*) 4 Ersk. 3. § 24. 2 Bell, Com. 600.

(*f*) Instit. de Verb. Oblig. § 2.

(*g*) 6 Toullier, 711.

(*h*) Pothier, Oblig. ut sup. 6 Toullier, 719.

47. *Contingent Debts.* An obligation, of which the efficacy depends on an event which must certainly happen, is properly a future debt (§ 45): But one which depends on an *uncertain future event*, is properly contingent. The contingency operates either, 1. in suspending the debt; or, 2. in dissolving it. In either case, the engagement or obligation is independent of the event—the existence or discharge of the debt rests on it entirely. Under a *suspensive* condition there is no debt till the event exists (dies nec cedit nec venit), and yet the engagement cannot be defeated otherwise than by failure of the con-

dition. When the condition is fulfilled, the debt becomes perfect. If the condition be resolutive, the debt at once ceases on the event stipulated.

Conditions must be lawful in order to receive effect. What conditions are so to be regarded will be discussed hereafter, § 1785, et seq They may be not only express but implied: Thus an obligation to pay a tocher implies marriage as a condition.

1 Stair, 3. § 7. 3 Ersk. Inst. 1. § 6-7. and 3. § 85. Pothier, Oblig. § 99. 6 Toullier, 501. et seq. 1 Bell, Com. 315. 6 Geo. IV. c. 16. § 56.

48. As a creditor in a future debt may insist for additional security, should the credit fail on which he had relied (§ 46), so a contingent creditor may, for the protection of his right, follow a similar course (*a*). In the case of a suspensive condition, the creditor is in bankruptcy not admitted to draw a dividend, but only to have one set aside to abide the event: under a resolutive condition, the obligee is creditor de presenti, and entitled to claim for the computed value (*b*).

NOTE.—It may be doubted whether future and contingent estates coming to a bankrupt, can be regarded as funds of his, which *his* creditors can attach by diligence of adjudication, or arrestment in security. Aikenhead and Ragg, supra, § 37 (*b*). Beaton, Jan. 7. 1821; F. C.

(*a*) 1 Pothier, Tr. des Oblig. 99.
(*b*) 1 Bell, Com. 316. Lord Henley, Bankrupt Laws, 126. 6 Geo. IV. c. 16. § 56. See new sequestration act.

49. Conditions in obligations are possible or impossible. The latter (including unlawful conditions) annul the obligation to which they are annexed, as not being seriously intended, nor relied on. But an important distinction is to be marked, 1. in settlements; and, 2. in obligations and provisions to which the granter is naturally bound. Of these notice will be taken hereafter, § 1785 and 1881.

1 Stair, 3. § 7, 8. 3 Ersk. Pr. 3. § 34, 35. 3 Ersk. Inst. 3. § 85.

50. Conditions are Potestative, Casual, or Mixed. The Potestative depend on an act which is in the power of one or other of the parties; the Casual depend on mere accident, or the will of a third party; the Mixed partake of both.

If time be annexed to the condition (as the arrival or non-arrival of a ship), the expiration of the time, the happening of

the event, or the impossibility of it, terminate the contingency, and, as lawyers term it, purify the condition. If there be no time annexed, the contract is pendent while the condition is possible.

The condition may be precedent or subsequent; which nearly corresponds with the condition suspensive or restrictive (see sup. § 47). In the former, as in a conditional bond, dies nec cedit nec venit, till the event: in the latter, as in an annuity bond, the obligation ceases on the event.

If the debtor, bound under a certain condition, have impeded or prevented the event, it is held as accomplished. If the creditor have done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement.

3 Ersk. Pr. 3. § 35. Pothier, Tr. des Oblig. No. 198. et seq.

51. Of Joint and Several Obligations. Obligations may be viewed as joint or several, either as in relation to the creditors or to the debtors. The general rule and presumption is, that each co-obligant is concerned to the extent of his own share only, not for the whole: And this applies equally to creditors and to debtors.

1 Stair, 17. § 20. 3 Ersk. Pr. 3. § 29. 3 Ersk. 3. § 74. See Voet. lib. 45. tit. 2. De duobus reis const. Vinnius, lib. 3. t. 20. De inut. stip. § 4. No. 9, 10. Campbell, Nov. 25. 1724; M. 14626. Alexander, Nov. 28. 1827; F. C.; 6 S. D. 151. Gibson *v.* Lupton; 9 Bing. 297.

52. 1. *Creditors, Correi Credendi.* When a bond or bill is granted to two or more persons, or when two or more succeed to a debt (as, for example, heirs-portioners), their right is pro rata, each for a share. The entire debt cannot be sued for, or assigned, or fully discharged, but by them all; though each co-creditor may assign his individual share, or sue for it separately, or grant an effectual discharge for it (*a*). But a right may be established in solidum in each, 1. by convention; as where the obligation is taken to them jointly and severally, in which case a mandate is held as given to each co-creditor; or, 2. by partnership express or tacit (*b*): And under such a right each may sue or discharge the debt; and judicial proceedings taken by one will, in a question of prescription, be available to all.

(*a*) Pothier, Oblig. No. 258. Ferguson, Jan. 18. 1671; Gosf. 1 Br. Sup. 623. Robertson, Jan. 17. 1695; Harc. M. 14675; Bayley on Bills, 43. Carrick *v.* Vickery; Douglas, 653.

(*b*) See below, § 354. Lord Lyon, Dec. 15. 1744; M. 14676.

53. 2. *Debtors, Correi Debendi.* The general rule and presumption (sup. § 51) holds, with regard to debtors, whether bound simply in a bond or bill, or becoming liable as heirs-portioners (*a*). The rule is confirmed when the obligant is taken bound for his own share only, as in a policy of insurance (*b*).

(*a*) 3 Stair, 5. § 14. Home, Feb. 7. 1632. M. 14678. Duncan, July 3. 1635; M. 14680. Jordanhill, July 1687; M. 14682. See Lockhart, Nov. 14. 1770; M. 7424.
(*b*) See below, § 472.

54. Exceptions are admitted to the rule either on express or on implied agreement.

1. *Express Contract.* If the obligation bear the money to be " for the use of one," or if the obligants are bound for a town or corporation, all are held as cautioners, and liable each for the whole. See below, § 246.

Grant, July 6. 1721; Rem. Dec.; M. 14633. Provost of Inverness, Feb. 10. 1631; M. 14628.

55. If the obligants are taken bound *as co-principals and full debtors*, each is bound for the whole.

Cloberhill, Jan. 26. 1631; M. 14623. Dunbar, July 1665; M. 3584. Cleghorn, Dec. 26. 1707; M. 14624.

56. If they are bound *jointly and severally*, each is liable for the whole, or for a share, at the option of the creditor.

3 Ersk. 3. § 74.

57. If they are bound *conjunctly*, each is liable for the whole; though at first this point was doubted (*a*); and they are held to be so liable, if such be the fair import of the obligation taken in all its parts (*b*). But any one called on to pay, is entitled to have the others also called before he is forced to pay.

(*a*) Campbell, Nov. 25. 1724; M. 14626. M'Millan, Feb. 5. 1751; Elchies' Notes, 431. M'Kellar, June 7. 1811; F. C.
(*b*) Boyd, July 3. 1649. Foord, 1 Br. Sup. 403. Wallace, July 7. 1671; Gosf. 1 Br. Sup. 635.

58. 2. *Implied Contract.* If the subject of the obligation be indivisible, or the obligation ad factum præstandum, each is bound for the whole, though the words jointly, &c. be not used (*a*). But the liability is only pro rata, according to the general rule and natural construction, where the obligation is alternative (one divisible the other not), and the indivisible

alternative becomes imprestible. The obligation for the divisible alternative binds the debtors pro rata. The mere resolving into a claim of damages, does not alter the obligation in solidum to an obligation pro rata (*b*).

(*a*) 1 Stair, 17. § 20. 3 Ersk. 3. § 74. Grott, June 14. 1672; M. 14631. Urie, Jan. 20. 1630. M. 14626. Grant, July 6. 1721; M. 14633.
(*b*) Correct Ersk. ut sup. Denniston, July 16. 1669; M. 14630. Darlington, Dec. 6. 1835; 15 S. D. 197.

59. Partners in trade, or joint adventurers, or joint purchasers, or even joint pursuers in an action in which expenses are found due to the defender, are each in solidum bound for the whole.

3 Ersk. Inst. 3. § 74. 1 Illus. 73. Mushet, Dec. 16. 1710; M. 14636. Sutherland, Feb. 24. 1776; 5 Br. Sup. 439.

60. Parties jointly interested in any employment, the prosecution or accomplishment of which they have authorized, are held each in solidum bound for the whole debt incurred by such employment (*a*). But this may be counteracted by an express stipulation to the contrary (*b*); and by a bill now before Parliament the rule formerly applied in sequestration is altered, and the claim of an agent restricted to the amount of the funds, or the express engagement of individual creditors (*c*).

(*a*) 1 Illus. 74. Anderson, Feb. 1726; M. 14706. Chalmers, Feb. 1730; Ib. French, Nov. 21. 1730; Ib. Walker, Nov. 23. 1803; F. C.; M. *Sol. et pro rata*, App. 1. Wilson, July 10. 1813; F. C. Wilson, May 17. 1822; 1 Shaw and Bal. 455. Ellis, June 26. 1822; Ib. 566.
(*b*) Murdoch, Feb. 15. 1815; F. C.
(*c*) See new Sequestration Act.

61. Bills and promissory-notes, by usage, bind the drawers or acceptors, jointly and severally, without the use of these words (*a*); nay, even where it is otherwise expressed (*b*).

(*a*) Ersk. 3. § 74. 1 Illus. 74. Gordon, Jan. 20. 1761; M. 14677. MacMorland, Jan. 19. 1675; M. 14673. Rutherford, Feb. 18. 1707; M. 14675. M'Kellar, June 7. 1811; F. C.
(*b*) Alexander, June 17. 1742; M. 14675. Sharp, June 24. 1808; Bell, App. 22.

62. But co-obligants, even when bound in solidum to the creditor, are, in relation to each other, liable only pro rata in relief or indemnification to those of their number who shall have paid more than their share.

The right to relief is regulated by these rules:—1. If bound, *each for his share*, no one can be called upon by the creditor to pay more; but if he should pay more, he becomes the creditor

of the co-obligants whose shares are thus paid. 2. A co-obligant bound *jointly* may refuse to pay till each co-obligant shall be called: 3. If bound *jointly and severally*, any one may be selected by the creditor for payment of the whole: 4. In either of these cases, the person who shall pay the portion of another, will be entitled to relief to that extent without an assignation: 5. The insolvency of a joint obligant lays on the rest pro rata the burden of his share: 6. If the obligation be *indivisible*, or expressly *several*, there is no relief but against the principal debtor: 7. A co-obligant making payment of the debt, is bound, in claiming relief, to communicate the benefit of any deduction or ease (as it is sometimes called) which he may receive at settling, or which may accrue from the funds of insolvent co-obligants.

3 Ersk. Pr. 3. § 29. Craigie, Dec. 21. 1720; 14649. Muir, Feb. 2. 1682. Lamberton, Feb. 1683. Lillie, July 26, 1705; 14655. Ledingham, June 5. 1824; 3 S. D. 74.

6. *Of Obligations—Unilateral and Mutual.*

63. I. UNILATERAL OBLIGATIONS may be either gratuitous, or for valuable consideration.

It is not necessary that an obligation shall proceed upon a valuable consideration adequate or inadequate. It is effectual if an engagement (§ 7.) be proved by such evidence as law requires in the special case (§ 15, &c.) But still there is a distinction of importance, in some respects, between obligations with or without consideration.

64. 1. *Gratuitous.* Obligations which are, as free gifts, voluntarily undertaken, or at least without an adequate consideration, are called gratuitous, and are effectual. Donations once made, otherwise than by last will, are not revokable (*a*), except between husband and wife. (See below, § 1616.)

But although gratuitous obligations are effectual against the obligor and his heirs, they are by statute liable to he declared void at the suit of a prior creditor, if the granter is already insolvent, and the grantee a near relation, or confidant (*b*.)

In England, obligations without consideration are nuda pacta (*c*), but a moral cause is a good consideration. If the consideration be inadequate, or the obligation fraudulent, it will not be admitted into competition with creditors who have given value for the debt on which they make their demand (*d*);

and the existence of debt at the time of granting is of importance as grounding a presumption of fraud (*e*).

(*a*) 1 Illus. 75. Warnoch, Jan. 8. 1759; M. 7730.

(*b*) 1621. 18. 2 Bell, Com. 205. D. of Queensberry, Jan. 5. 1677. Remington, Dec. 10. 1829; 1 Illus. 75; 8 S. D. 215. Bruce, June 9. 1831; 9 S. D. 695.

(*c*) 1 Illus. 3, 4. Pillans, *v.* Mierop, 3 Burr. 1663. Rann *v.* Hughes, 7 Term Rep. 350. Gardiner's Assignees *v.* Skinner, 2 Schoale & Lefroy, 228.

(*d*) 13 Eliz. c. 5. § 2; 29 Eliz. c. 5. Ex parte Smith, 1 Rose, 208. See Lord Mansfield's argument in Doe *v.* Routledge, Cowper, 710.

(*e*) Lord Townsend's Case, 1 Vesey senior, 11. Battersbie *v.* Farrington, 1 Swanst. 113. Kidney *v.* Coussmaker, 12 Ves. 155. Montague *v.* Lord Sandwich, 12 Vesey, 148, *note*.

65. Of gratuitous obligations alimentary provisions are among the most frequent. They are, in relation to the debtor and his creditors, under the same rules as other obligations. But the nature of the right conferred on the creditor is very different and specially considered as a fund attachable for his debts. (See § 2026.)

66. 2. *Onerous* Obligations are such as are granted for a valuable consideration; to which, however, by the law of Scotland, something more is necessary than a mere obligation in morality. Every obligation is *presumed* to be for an adequate consideration.

NOTE.—The word *onerous* in contradistinction to *gratuitous*, is used in the law of Scotland, as synonimous with the English phrase "for a valuable consideration."

67. Money obligations are required to be in writing; the essential and indispensable part of which is, the personal engagement to pay. And this may either be by formal bond; or by simple engagement to pay the sum, as in a promissory-note. See below, § 307.

68. Bond. A formal bond has, added to the obligation or engagement, a consent to the registration of the bond in the books of a competent Court, and to a summary warrant for execution being issued, as if decree were pronounced on the bond. And on such registration, at any time of the year (Session or Vacation), execution may proceed (*a*). A similar expedient for saving the delay and expense of an action was, without the necessity of any express consent, adopted by statute in the case of promissory-notes and bills of exchange (*b*).

(*a*) 2 Ersk. 5. § 54. See for the history of this clause, 1 Ross, 192. See the analogous remedy in England, 3 Blackst. 395, 1 Tidd, Pract. of K. B. 490.

(*b*) See below, § 343.

In every bond there must be an obligor, an obligee, and a sum engaged to be paid, or act to be performed.

It is important to observe the distinction between a bond as the groundwork of summary execution, and as the groundwork of an action. The difference of effect practically is, that summary execution, besides avoiding delay and expense, cannot be questioned or suspended without finding caution; while there is no such necessity in defending against an action. 1. For summary execution, the obligation must be so certain and precise, that it may at once be inforced without further inquiry. But this, in bank bonds for cash-accounts, or suretyship for bank agents, is sufficiently complied with, if the sum for which execution is to proceed is fixed by reference to an account from the bank-books, to be signed by the accountant or some other officer of the bank (*a*). 2. A bond not in itself clear and conclusive, but indefinite, or requiring something to be ascertained judicially before it can be put to execution, must be followed by an action, in order to obtain a warrant for diligence (*b*). But though defective in the expression of the obligatory clause, if, from other parts of the instrument the obligation is clear, the bond will be effectual (*c*).

(*a*) 1 Illus. 77. Forrester, June 27. 1815; F. C. Smith, June 25. 1829; F. C.; 7 S. D. 792. Paisley Bank, Feb. 24. 1731; 9 S. D. 488.
(*b*) 1 Illus. 78. Hamilton, Jan. 31. 1708; M. 5909.
(*c*) Cochran, Nov. 17. 1713; M. 11627. Coult, July 12. 1749; M. 17040. Coles *v.* Hulme. 1828; 8 Barn. & Cress. 568. Waugh *v.* Russell, 1 Marsh. 214; 1 Illus. 78.

69. Execution of the obligation is to be enforced according to its terms and extent, express or implied: and so, 1. Execution may at once proceed for a pure debt (§ 45.): 2. If payable at a future term, no proceedings can be taken upon it, unless the debtor be vergens ad inopiam; in which case diligence *for security* is permitted (§ 46): 3. If the debt be contingent, proceedings to the same effect may be taken where the debtor is vergens ad inopiam (§ 48).

70. II. Mutual Contracts. A mutual contract is the reciprocal undertaking or engagement of two or more persons, whereby something is to be given, or done, or abstained from, on the one side, for a valuable consideration or counter-engagement on the other: Duorum pluriumve in idem placitum consensus et conventio; each being bound, and each acquiring a right, by the convention.

71. Those engagements are either strictly reciprocal, or with a difference in time or place. Hence arise these important consequences,—1. That both are bound, or neither (*a*): 2. That where the obligations are strictly reciprocal, if one refuse, or delay performance, the other whose part is still unfulfilled, is entitled to refuse or retain (*b*): 3. That where the obligations are not strictly reciprocal in point of time, the anterior obligation may be suspended, if the party whose performance is postponed be vergens ad inopiam (*c*): 4. That if the one party cannot fulfil his part, the other may be free, or may insist for damages (*d*).

NOTE.—These are the principles on which the right of Stopping in Transitu depend. See post, § 1307, et seq.

(*a*) 1 Stair, 10. § 16. 3 Ersk. 3. § 86–90. 1 Bell. Com. 431.
(*b*) 1 Illus. 79. Selkrig, Dec. 1721; M. 9167. Hope's Creditors, July 1732; M. 9195. Watson, July 9. 1738; M. 9196. Crawford, June 22. 1743; M. 8266. Murray, Dec. 11. 1744; M. 9140. Gordon, Dec. 12. 1749; M. 9141. Woollen Manufactory of Haddington, Jan. 20. 1781; M. 9144. Buchanan, March 6. 1787; M. 9201.
(*c*) 1 Illus. 81. Carmichael, Nov. 28. 1776; M. 9163.
(*d*) Raith and Wauchope, July 13. 1670; M. 9154–5. Maitland, July 20. 1675; M. 9158. Drummond, July 26. 1729; M. 9168. Jordanhill's Creditors, Dec. 9. 1747; M. 9170. Shaw, March 3. 1786; M. 9185. Constable, June 1. 1808; More's Notes, lxx. Hunter, Jan. 17. 1822; 1 S. D. 271.

72. *Offer and Acceptance.* A mutual contract may commence by offer, and be completed by acceptance.

1 Stair, 3. § 9. 3 Ersk. 3. § 98. 1 Bell, Com. 326. Pothier, Tr. du Cont. de Vente, No. 32. 6 Toullier, 26.

73. An offer is an obligation provisional on acceptance. It is presumed to be continued till acceptance (*a*); but may, before acceptance, be recalled under the burden of making reparation for any loss fairly occasioned by the offer (*b*).

(*a*) 1 Stair, 10. § 3. 3 Ersk. 3. § 88. Allan, Jan. 25. 1664; M. 9428. M'Iver *v.* Richard, Jan. 1813; 1 Maule & Sel. 557; Pothier, Vente, No. 32 and 476; 1 Pardessus, 252; 6 Toullier, 26.
(*b*) Pothier and Pardessus, ut sup.; 6 Toullier, 27.

74. An offer may be made by parole; by letter; or even tacitly, as when goods are sent without an order or contrary to order, in which cases acquiescence is acceptance.

1 Illus. 84. Lombe, Nov. 17. 1779; M. 5627. 1 Pardessus, p. 256, No. 253.

75. Acceptance is either Tacit or Express.

76. Tacit acceptance may be inferred from silence, where the proposal is so put, as to require rejection if the party do not mean to assent (*a*); as when a merchant writes to another, that he is against a certain day to send him a certain commodity at a certain price, unless he shall previously forbid (*b*). An offer may be tacitly accepted by immediate compliance in sending the goods; for then the execution is the acceptance; or by proceeding on the offer to transact with third parties when a mandate to that effect is implied in the offer (*c*); or by a demand or action for implement before the offer is withdrawn (*d*).

(*a*) Pardessus, p. 256.
(*b*) Jaques Gerrings and Co. Feb. 12. 1817; F. C. M'Neil, Jan. 21. 1830; 8 S. D. 362. Harford Brothers and Co. Jan. 29. 1831; 9 S. D. 352.
(*c*) Tweedie, June 5. 1823; 2 S. D. 361.
(*d*) M'Duff, Feb. 9. 1627; M. 8406.

77. Express acceptance must precisely meet the offer. If it substantially differ from the offer, the alteration is equivalent to a new offer, which requires acceptance.

3 Institut. t. 20 De inutil. Stip. § 5. 6 Toulliers, 28. et seq. Smith *v.* Surman, 9 Barn. and Cress. 569. Routledge *v.* Grant, 4 Bing. 660.

78. The acceptance completes the contract. The agreement is not suspended till the offerer has received notice of the acceptance (*a*); though contended for by some commentators (*b*): But this is under the qualification that there shall be no undue delay in notifying the acceptance (*c*).

(*a*) 1 Stair, 10. § 3. 3 Ersk. 3. § 88. 1 Pardessus, 254. Adams *v.* Lindsell, 1 Barn. and Ald. 681.
(*b*) 6 Toullier, No. 29.
(*c*) 1 Bell. Com. 326.

79. The provisional engagement of an offer may become ineffectual, 1. By the death of the offerer, or by his bankruptcy before acceptance; there being no final consent or contract on the part of the offerer till acceptance (*a*). 2. It is held to be withdrawn by an alteration of circumstances before acceptance (*b*). 3. If a time be limited for acceptance, the offer is held to subsist, and not to be revocable during that time; and to be withdrawn by the expiration of that time without acceptance; and the return of post is, in mercantile cases, *presumed* to be the time limited (*c*). 4. If under such limitation of time, the delay in the acceptance beyond the time allowed have been occasioned by the offerer himself (as by a wrong

address of the offer), the mere expiration of the time mentioned in the original offer, or implied in it, will not discharge the offer (*d*). 5. If the offer be accompanied by a recall sent by the same post, it is not binding (*e*).

(*a*) 6 Toullier, 34.
(*b*) Allan, June 25. 1664; M. 9428.
(*c*) Farries, March 7. 1799; House of Lords, May 24. 1800; 1 Bell, Com. 326. Jaffray, Dec. 7. 1824; 3 S. D. 375. Watson, Feb. 16. 1826; 4 S. D. 475.
(*d*) Adams *v.* Lindsell, 1 Barn. and Ald. 681.
(*e*) Countess of Dunmore, Dec. 15. 1830; 9 S. D. 190. Pothier, Tr. de Vente, No. 32. 6 Toullier, p. 32. No. 29. Merlin Repertoire, tom. 14. p. 494, et seq.

80. *Order in trade.* An order must be distinguished from an offer. It is a part of the law of mandate (§ 217, 226), and acceptance is presumed from the undertaking which one in trade is held to profess, that he will answer any orders in the line of his trade or immediately intimate his refusal; and more especially when the dealer has circulated current price lists of goods to be sold by him.

81. An order in trade must be absolute, and neither uncertain, conditional, nor alternative, otherwise it becomes a mere offer. An order may be rejected; but does not require acceptance to bind the person who gives the order. It will bind also the person to whom it is addressed, if strictly in his line of trade, unless refused in course of post,—as an order for goods to a dealer; for insurance to an insurance-broker; for carriage of goods to a public carrier.

Pierson, Dec. 1. 1812; F. C.

82. An order may, by the law of Scotland, be in writing or parole (*a*). It is otherwise in England, by the Statute of Frauds; and this must be attended to in making use of English cases and authorities on this point (*b*).

An order must be executed in the terms in which it is given, and is not otherwise binding on the person who gives it (*c*): But acquiescence in the mode of execution followed, may make an effectual agreement (*d*).

(*a*) Milne, Jan. 4. 1803; M. 8493.
(*b*) 39 Char. II. c. 3. § 17. See below, § 89.
(*c*) Richardson, May 18. 1837. 15 S. D. 952.
(*d*) Champion *v.* Short, 1 Camp. 53. Lombe *v.* Scott, Nov. 17. 1779; 5627.

83. Mercantile usage when general, consistent with law, and

not departed from by express contract, is held and read as a part of every mercantile bargain.

Per Holt in Blunt *v.* Cumyns, 2 Vesey senior, 38. Newman *v.* Cazlitz, per Buller; Park, 630. Robertson *v.* French, per Lord Ellenborough; 4 East. 135. See below, § 101.

84. Mutual contracts in writing do not require delivery (§ 23), but are completed by the subscription of all the parties.

Crawford, June 29. 1625; M. 12304. Lockhart, Dec. 23. 1709; M. 8430.

II. PARTICULAR CONTRACTS.

The main objects of contracts are, 1. the transferring and disposing of property,—by sale, or location, or loan, or deposite, or pledge: 2. the employment of manufacturers, and workmen whose labours are used in the common intercourse of life; or the engaging of professional aid in law, medicine, &c.: 3. the carrying trade of the country by land and sea: 4. the administering of affairs during absence, by means of factors or mandataries: 5. the insuring of property against perils by sea, fire, &c.: 6. the combination in partnership of the capital, skill, and industry of several in one common concern; or, finally, the circulating of money and credit by means of notes and bills negotiable. In considering these several contracts and forms of engagement, they may be reduced to these four classes: *First*, The Contract of Sale, by which goods and commodities are transferred. *Secondly*, Those Contracts in the course and existence of which the property of one is necessarily entrusted to the care or custody of another. *Thirdly*, Those in which personal credit is more immediately the object of convention; and, *Fourthly*, Those by which maritime concerns are carried on or made safe.

1. CONTRACT OF SALE.

3 Ersk. Pr. 3. § 2–4. 1 Stair, 14. 3 Ersk. by Ivory, 3. § 2–13. Brown on Sale. 2 Kent, Com. 468. 1 Bell, Com. 434. Pothier, Tr. du Cont. de Vente. 1 Domat, tit. 79. Code Civ. § 1582–3. 4 Van Leeuwin, c. 17.

85. The contract of sale is a mutual consensual contract, for the transference of property, in consideration of a price; the seller binding himself to deliver and transfer the thing; the buyer to pay the price.

86. Sale, as a *contract*, is contradistinguished from sale as a *transference*. The contract of sale, when completed, is, in the law of Scotland, nothing more than the titulus transfe-