

obtained Confirmation conformable to a Backbond of the Date of their Bonds for the Price, 13 Decemb. 1672. and 28 January 1673 L. Lyon contra Forbes and Feians of Balvenie. Not only both this holds as to mutual Obligations in the same Contract, but also as to such correlative Obligations in separate Bonds relating to one another and expressing the Cause 28 January 1673 L. Lyon contra Forbes or appearing to be mutual Causes one of another Pair Lib. 5. Tit. 10. §. 16. Vers. As to the second Case. For all mutual or correlative Obligations sibi mutuo inveniunt et se mutuo ponunt et tollunt; and wherever there is a Synallagma, the Insufficiency of the one Part stops the Effect of the other, either simply or for a Time, unless the contrary be expressly agreed. Thus a Buyer of Land having granted Bond for the Price therein mentioned as the Cause, and the Seller having by a Backbond of the same Date, obliged himself to ratify the Sale at his Majority, under the Pain of a Sum exceeding the Price. An Assigny to a Bond for the Price was not allowed to uplift the principal Sum, till either the Cedent ratified the Deed after his Majority conform to the Backbond, or his Annuities were paid without Reduction; altho' the Backbond bore that the Buyer should not pay the Price sooner, but only tied the Seller to pay a great Penalty if he did not ratify 14 Novemb. 1628 Cuming contra Cuming. But in mutual Contracts, not performance of the one Part hinders not Execution for the other Part, where this hath no Delay or Term, and that hath a Term not come 28 Novemb. 1676 Carmichael contra Dempster. An Assigny having no Title whereby to compel the Cedent to perform his Part the other Contracter must either consent to assign his Part of the Contract to the Assigny, that he may assist for Execution before extracting his Decree: Or rather the Lords may decree at the Assigny's Instance, superseding Execution, except by his Surety for his Security, till the Cedent's Part is performed, or decree in Favour of the Assigny, he finding Caution to make up what should be wanting to the other Contracter after Diligence used by him against the Cedent for Performance 15 Feb. 1627 Cunningham contra Robe.

Some Contracts may be declared null on the Part of one of the Contracters, and may subsist and oblige irreversibly on the Part of the other. Thus a Contract between one that is of full Age, and another Person under Age, may be annulled with Respect to him who is under Age, if it is not to his Advantage; and subsist with Respect to him who is of Age, if the Minor do not demand to be relieved l. 13. §. 29. ff. de lit. empti. Which Inequality of the Condition of the Contracters, has Nothing in it that is unjust. For he that was of Age knew, or ought to have known the Condition of him with whom he treated l. 19. pr. ff. de reg. jur.

Against

Again there are 1. Real Contracts, or those perfected by the Intervention of Things. 2. Verbal and Written Contracts. 3. Those perfected by sole Consent. 4. A Contract perfected partly by Writ partly by Consent. Which Distinction is not so to be understood as if any Contract of the first two Kinds required not the Consent of Parties to complete it; or as if other Contracts than those termed Verbal were not entered into by verbal Communion upon the Terms thereof; or as if Contracts Real or Verbal or perfected by Consent might not be reduced into Writ: But the Meaning is, that Real Contracts are not completed by Word or Writ or sole Consent, without the Intervention of Things; verbal Contracts are perfected by the Intervention of Words without Writ or Things; for the Consent of the Parties is necessary in all Contracts, and is given either in Writing, or by the Intervention of Words, or some other Way signifying or presupposing the Consent

Tit. 5.

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

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

All the innominate Contracts or Contracts having no proper Name in the Civil Law are also perfected by Things interdeining upon a previous Consent l. 1. §. 2. ff. de res. permitt. And till something is done or given by either Party conform to the Agreement, no effectual Obligation arises to him for compelling the other to perform his part. For till then he may refuse l. 3. C. de. But after such Contracts with us are perfected by Writ, there is no locus penitentiae 19 January 1691 Sharp contra Sharp.

Sect. 1.

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

The Loan of Things to be restored in Kind is a Contract whereby a certain Quantity of Fungibles, or Things that pass in Commerce, by Number Weight or Measure, such as Money, Corn, Wine, or the like is given by one to another; on Condition, that he shall restore the Equivalent in Quantity and Quality, at the agreed Time. This is termed in the Latin Mutuum, which the generality of the Doctors derive from μ & τ ρ ν , for that ex meo tuum fit l. 2. §. 2. ff. de reb. cred. Pro. (ujace. (ij) Obero. 37)

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