

thinking this Etymology more witty than true, will have the Word borrowed from Mutatio: Because in this Contract one Thing is exchanged for another of the same Kind. It imports little to object, that in Exchange and Sale also a Thing fit de meo tuum: Seeing all Etymologies are not essential and convertible with the Thing; but some are accidental and applicable to other Matters. However I will not stickle hard in Defence of this: Lawyers are pleased so to foliow upon the Origin of some Words, as when they say that Testamentum is so called, for that it is testatio mentis pr. Inst. de Testam. We, having no one particular distinguishing for Mutuum in our Language, are forced to express it by a Circumlocution, calling it the Loan of Money and other Things which may be repaid in Kind; that it may be distinguished from the Loan of Things that are to be restored in specie or in the same Substance, of which we shall treat in the following Section: For these are two different Contracts which are not to be blended together. He who lends such Things as are consumed by Use, is called the Creditor, because of the Credit he gives to the Person to whom he lends; and he who borrows is called the Debtor, because he is bound to restore the same Sum or the same Quantity which he has borrowed. But since there are other Ways of being indebted as well as by borrowing; Doctors may likewise become Debtor and Creditor for other Causes besides that of Loan.

Mutuum consists in Quantity, that is Things whereof the Value or Worth is known from the Weight, that is Bullion Lead Tin Iron; or from Measure, as Wine, Corn, or from Number, as Coin, Money. These are called res fungibiles, because una alterius vice fungi potest, one satisfies for another in the same Kind, without noticing Individuals. But it is not sufficient, that Things may be numbered to make them the proper Object of a Loan of this Kind, unless the same Quantity and Quality can be known from the Number. So that Horse Cattle or Sheep are not proper mutuales; because tho' the Number of these given were restored, more or less in Value would be returned l. 2. §. 1. ff. de reb. cred. Yet these pass with us in this Manner of Loan, when Steelbow Goods are delivered to a Tenant at his Entry to Land, for the like Number in Kind to be left on the Ground at his Removal Sair Lib. 1. Tit. 11. §. 4. The Thing lent ought to be such as is fit for its Use; as Money that is neither counterfeited nor once down; and Corn or Liquors that are not spoiled or sofisticated, Les Sair liviles &c. Tom. 1. Part. 1. Liv. 1. Tit. 6. Sect. 2. Art. 3. To perfect this Contract the Quantity or Fungible must be delivered to the Borrower either really, as by down told Money; or feignedly per fictionem brevis manus, as when a Debtor upon his Creditor's Order, delivers so much to the designed Borrower, or one Person is allowed to keep that as a Loan

Loan which he should bound to restore to him, by another Contract, or upon some ~~different~~ Consideration, l. 15. C. g. §. 9. l. 11. pr. ff. de reb. cred. It being frequent and natural to convert into an Obligation alone those which proceed from other quite different Causes.

The mutuum be reckoned here among the real Contracts that are perfected by the Intervention of Things given or done; yet the Loan of Money must be instructed by Writ or Oath of the Borrower. Money is therefore ^{ordinarily} borrowed upon a written Bond or Bill subscribed by the Debtor or Debtors as Law directs. By the Roman Law, Receipt of Money acknowledged by a Writ under the Borrower's Hand, may be regarded and disproved exceptioe non numerata pecunie at any Time within two Years after the Date, as understood to be given spe numerandae pecunie: Tit. Inst. de lit. Oblig. l. 14. C. de non numerat. pec. After elapsing of which two Years without such Exception made, Delivery of the Money is presumed Presumptioe juris et de jure. With an Exceptio non numerata pecunie is not relevant against a Bond, viaring borrowed Money: because it might have been given for nought Spotswood Hall. Tit. Contracts and Obligations. The Borrower's subscribed Acknowledgment per se, proves Delivery of the Money from the Date, unless it is improved without obliging the Creditor to instruct otherwise. Our Bonds of borrowed Money to money ordinarily contain a Clause renouncing the Exceptio non numerata pecunie. But that is only superabundant Stile in majorem cautelam, yet albeit the Debtors Bond be sufficient Evidence, that he received the Money: The Creditor's counter ~~acknowledgment~~ by his Writ or Oath, takes off that Evidence arising from the Bond, tho' the Bond bear the Money to have been down told, or expressly renounce the Exceptio non numerata pecunie. Sair Lib. 1. Tit. 10. §. 11. Vers. Contracts perfected by Words Tit. 11. §. 16. Sometimes the Lender takes the Borrower obliged to restore him his Money or other Fungible with Interest or Annuitrent for the Use thereof. But seeing no Annuitrent is due by the Nature of this Contract which is gratuitous, but ariseth only from express paction Sair Tit. 11. I shall treat of Annuitrent or Interest, among accessory Obligations.

The ordinary ^{way} of borrowing Money among Merchants is by an Exchange Contract contained in Bills: Whereof some are pure and simple which are absolutely to be paid at a precise Time, as Bills of Exchange; others are conditional making the Sum therein payable only upon some Condition, as Bottomry. Bills of Bottomry are either proper or Improper. The first are made and subscribed by the Master of a Ship upon the Keel ^{or Bottom} thereof at high Interest in a Case of Necessity when Money must be had in foreign Countries to perform a Voyage. Whereby he acknowledges the Receipt of so much Money on Account of ~~the Ship~~ ^{Bottomry} on his Ship for such a Voyage: And binds himself his Heirs and Exors, as also the Ship with her Furniture