

2. A Grant or Gift may be base and unlawful only on the part of him who receives: As if a Depository demands Money for the Thing deposited with him, or a Thief for giving back what he has stolen, or any Person exalts Money to hinder him from committing Theft, or Murder. In which case he who has given Money on such Account, may recover it again altho' the Receiver has performed what he was bound to by his Engagement. *l. s. ff. de cond. ob. turp. caus.* Where a Cautioner took Bond from the principal Debtor for a Sum of Money, as a Reward of becoming cautioner for him, the Bond was annulled as *contra bonos mores* 24 January 1711 King contra Ker. A Bond granted by one in Right of a Woman to her Father for interposing and promoting the Marriage, was not sustained as *contra bonos mores* 23 June 1690 Hamilton contra Borthwick. Because it is not lawful for one who is in Place of a Parent and obliged to be for the Honour to do any thing for her Sister, serving a gratification, without betraying his Trust by matching his Child to an undeserving Person. But Motive may be base and unlawful both on the part of the giver and Receiver: As when a Person receives Money from another either by himself or by a third Hand, to commit some Crime some Offence or injustice; or when a Woman bargains with a Man to let him have the Use of her Body for a Sum of Money; or when one who had a Law Suit depending gives Money to the Judge to engage him to give Judgement in his favour; he who has given the Money is justly stripped of what he laid out to so bad a Purpose and cannot recover it *l. s. ff. de cond. ob. turp. caus.* Nor can the Receiver reap the Profit of the Crime, altho' he had executed the unlawful Engagement for which he received the Money, but it becomes caducous in Effect, *Les Lois Civiles cc. Tom. 1. Part. 1. Liv. 1. Tit. 10. Sect. 4. Part. 1. Cyprian Regner Consus. Belgica ad d. l. s. Stair Lib. 3. Tit. 4. §. 8.* It is true, unlawful on both Sides, the Condition of the Receiver is better and more advantageous than that of the giver by the Receiver's not being made to restore what he has received *l. d. in fin. ff. de cond. ob. turp. caus. l. 2. c. ed.* But on the contrary it is both just and reasonable, that he should be chastised, not only for approving him of such a gain, but likewise by the other Punishments which he may have deserved. And the Roman Law in another Case enables that those who receive Money to create Trouble to one, to bring an Action against him or to accuse him of a Crime, or to desist from so doing, shall be made to restore fourfold what they have received *l. s. ff. de calumniat.* Again with us, a Bond for a Sum of Money given as a Reward by a Man to a Woman he had committed Adultery with and Red was *Quidam turpiter fact quod sit meretrix, non turpiter accipit cum sit meretrix* *l. 3. ff. de cond. ob. turp. caus.* But this Reason is not sure and sound, because both Giver and Receiver were alike base, and so the Decision clashes with the Principle formerly laid down, and is contrary to the Opinion of the best

best Lawyers *Les Lois Civiles cc. Tit. 10. ff. de cond. ob. turp. caus. n. 2. Stair Lib. 3. Tit. 4. §. 8.* The Action which lies for Restitution of Money or other Things given for a Base and Unlawful Cause, is termed *condictio ob turpem causam*. *Restitutio of Things or Money given as due by Mistake.* He who receives Payment of what is not due to him, thro' the Payors Mistake, lies under an Obligation to restore the Money, as in *ob. turp. caus.* By an implied Contract as if he had actually received the Money, which some Lawyers therefore call *promissio* or *quasi mutuum*. Two Things are required to create this Obligation, 1. The Thing given must not belong to the Receiver nor the Money paid to him. 2. The Payment must be made thro' Ignorance or Mistake, not only in the Dayer as Sir George Mackenzie (Inst. Lib. 3. Tit. 3. §. 15) insinuates, but in both Dayer and Receiver who are of the same Mind: The former must not have had in his mind better in what he paid, and the latter must be receiver what was due to him. For one who takes Payment of what he knows not to be due, is guilty of Theft *l. 4. §. 1. ff. de furt.* But Error in the Dayer is mainly noticed, who paying what he knows not to be due, is guilty of Repetition *l. s. §. 1. ff. de cond. ob. turp. caus. l. 5. ff. de rep. iur.* The problem *Quidam d. 1. ff. de rep. iur.* will have Ignorance of the Law as well as of the fact to create this obligation, and restore. But others hold more probably that the latter must be of Fact: For Ignorance of the Law is with no Man excusable, *l. 1. ff. de iur. iur. l. 9. c. ad S. Fulcra. l. 6. c. 7. C. de iur. iur. ff. de iur. iur. l. 1. c. 7.* *l. s. ff. de cond. ob. turp. caus. l. 1. c. 7.*

A Thing is not due either *ex re* or *ex persona*. A Debt is not due *ex re*, unless either Nothing is due at all, or not so much as is paid. If Nothing was due, Restitution certainly lies *l. s. ff. de cond. indeb.* If what is paid was partly due partly undue only so much as was not due can be sought back, so be it is a *Furtive*, or at least such as admits of partial Restitution, without Detriment to either Party. If any Thing of an individual Nature more valuable than the real Debt, is given by Mistake, the whole may be recalled, the former obligation remaining always in Force *l. 26. §. 1. §. 6. l. 24. ff. de Reg. iur.* If a Debtor pays before the Term, even altho' the Thing were not due, till after his Death, the Money is not to be restored, as if *plus tempore* were paid and the Creditor who receives the Payment, altho' he had no Right to demand it, may nevertheless retain it *l. 50. c. 17. ff. de cond. indeb.* For the Debtor might if he thought fit, pay before it was due, and he has paid only what he owed. Nor can Interest for the Money during the Interval be claimed, *Arg. l. 26. C. de Usur.* Because *unnacbrent* as *Acceptio* follows the Principal. But if it was a conditional Debt depending on the Event of something which had not happened, and which might perhaps never happen, he who had received Payment of it thro' Mistake could not retain it.