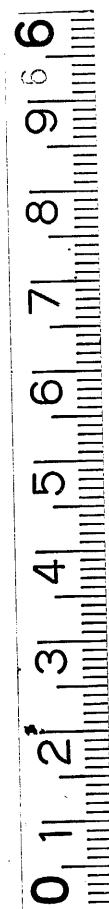


53-15



0015

THE  
LAW  
OF  
PLEDGES, or PAWNS,  
As it was in  
Use amongst the *Romans*,  
AND  
As it is now practiced in most  
FOREIGN NATIONS.

---

Humbly Inscribed to a MEMBER of PARLIAM-  
ENT, by JOHN AYLIFFE, DOCTOR of LAWS.

---

*Gracia capta ferum Victorem cepit, & artes  
Intulit agresti Latio.* ——— HOR.

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[ iii ]



TO A

Worthy Member

OF THE

Honourable House of COMMONS.



*A* *T* a Time, SIR, when a publick Enquiry is making into the many Frauds and Abuses committed by Pawn-Brokers, and other Criminals that have distressed their Fellow-Subjects by their cruel and oppressive Arts, I have thought it not improper, at your Request, to publish some few Sheets of a large Work in the Civil Law, now finish'd and ready for the Press as soon as proper Encouragement shall enable me to print the same: And this I do not only as a Specimen of the Undertaking itself, but likewise in order to show the Nature of Pledges, and how they were anciently managed according to the Roman Civil Law, and under what Dis-

A 2

pensation

compensation they are at present in all Trading Countries. For,

Among the several Titles of the Roman Law, so much applauded by all Foreign Nations for its Wisdom, Equity, and Justice, and even admir'd too by some of our own Nobility and Gentry who have any Knowledge therein, this one Title of Pledges is none of the least valuable for its just Decisions between Debtor and Creditor in this Point. Inasmuch that the learned Cujacius, in his ingenious Defence of it against the senseless Cavils of some Persons, in express Terms declares; That this one Part of the Roman Law alone, for the great Advantage it administers to a State, sufficiently recommends the Study of that Law in other Branches of it. \*

\* Cujac. 12. Obs. 32.

But yet (notwithstanding this high Encomium) it must be acknowledged, There are some particular Matters relating to Pledges in this Title, which are not so well adapted to the Practice of Modern Times (considering the present Posture of Trade and other Circumstances.) And from hence a new Face of Affairs in several Parts of the World has made it necessary to alter some of the Rules of it; as that of continuing a Pledge in the Possession of the Debtor under a general Obligation of all his Goods, in case he injur'd or any wise alienated the same; (a very  
fre-

frequent Practice of holding Pawns in those Days.) The selling of a Pledge by the private Authority of the Creditor alone, if the Debtor redeemed it not within two Years \* after Notice given him for that Purpose; and the like. These, and some other Things being found injurious or inconvenient (at least) the common Law of Pledges among all Nations has in some Points been changed by municipal Laws in divers Countries, according to the Nature of their respective Constitutions and the Condition of Things.

\* C. 8. 33. 33. Sin autem.

Besides, tho' the Roman Policy admitted of Agents and Factors for the sake of disposing of other Mens Goods in the Business of buying and selling, and in all Acts of lawful Commerce †; yet it never suffer'd † Brokers and such like Persons to trade for themselves in Respect of receiving Pawns and selling them, or in any other Kind of Dealing, besides Factoring; lest they should be found guilty of Fraud and other sordid Courses of Iniquity ||. Nor is this Practice of Pawn-Broking in a Man's own Name, or on his own private Account now allow'd in Holland, Genoa, Venice, Florence, nor among any other wise Trading People abroad; but Pledges are taken by the State and its proper Officers, and they have convenient Lumber Houses to lodge them in, and afterwards sell them by Way  
of

† Cujac. 11. Obs. 18.

|| D. 50. 14. 2.

[ vi ]

of publick Cant or Auction, on Application made to the Judge for his Authority, if they are not redeemed by the Time appointed. And,

Though the professed Mystery of private Pawn-Broking has lately crept in among us here in England, by I know not what Devices and Corruptions; yet our prudent Ancestors would never have endured it, as it is openly practis'd at this Day. Bracton and the Old English Lawyers seem to have known little or nothing of it in their Times, when Men were contented to live within the sober Bounds of Frugality; and before a large extended Foreign Trade had made Pledges necessary to enable the provident Merchant to pay Customs and other Duties on Goods imported, and the like: And these Sages in the Law are therefore very brief upon the Topick of Pawns. And the Year-Books themselves, that were subsequent to the Writings of Britton, Glanvill, and other Remembrancers of our ancient Law, assure us; That in those Days Pledges were so far under the Direction of the Courts of Law, that the same could not be sold without the special Order of the Judge, or the Consent of the Debtor\*; and this was then reckon'd a wholesome Institution to prevent and hinder Creditors from enriching themselves by the Spoils and Misfortunes of indigent Men.

\* Vide Ind. v Pledges. &c.

[ vii ]

Men. But now we have Persons, on so mean a Stock or Fund as that of Two or Three hundred Pounds, raise great Estates by the Craft and evil Means of Pawn-Broking, who might otherwise employ their Money to more honest Purposes, if they designed to be beneficial to the State.

The Jews, we read, though prohibited by the Law of God to receive Interest, were formerly driven out of England for their excessive and unlawful Usury in this Particular: And among the ancient Romans, we know, the Interest of Money was not permitted to exceed Twelve per Cent. on any Account, unless it were Nautick Interest, otherwise called Bottomry. Nor was it lawful for the Creditor to receive any Thing by way of Present or Gratuity from the Debtor, or on any other Pretext whatsoever; and if he did, it was converted into Principal\*. And so likewise, if Money was paid on the Colour<sup>26. 1.</sup> of Interest, before such Interest became due, it lessen'd the Principal †; be-<sup>† C. 4. 32. 18.</sup> cause it was only another Way of Extortion. Thus careful is the Civil Law in curbing high and excessive Interest to the Oppression of the poor Debtor. In some particular Cases the Interest of Money was at Eight, Six, Four, and Two per Cent. according to the Danger and Hazard of losing the Principal; and if no Stipulation

[ viii ]

Stipulation was made between Debtor and Creditor about it, the Judge was to ascertain the same with a due Regard had to Circumstances. But if Money was lent to Merchants on Trading Voyages at Sea, or for ensuring Ships and Goods till safely arrived in Port; the Interest of Money was not then limited\* ; for there the Advantages might be greater, and that with Justice too. And, perhaps, it might not be good Policy to make any restraining Laws about it, but to suffer the Rising or Falling of Trade, &c. to direct the Agreements for it. But,

It is fit, that the Damages of Delay in Payment, which we call Interest, shou'd be ascertain'd either by Law or Agreement, otherwise there wou'd be endless Controversies, and Creditors wou'd not fail to alledge extraordinary Damages upon all Occasions. Bankers, and other such like Money-Jobbers, who were commonly reputed griping Usurers in the Roman State, were under severe Regulations, lest they shou'd grind the Face of the poor Debtor: And tho' they were tolerated in their Vocation on the Score of Publick Necessity; yet they never received much Countenance from the Civil Law, as being a devouring Locust. But touching the Use and Interest of Money as govern'd by the Civil Law, and of Bankers

[ ix ]

ers and the like, I have treated under particular Titles by themselves, in a great Work intended for the Publick. And therefore I shall say no more of them in this Place; only that Justinian in his Time reduced the Interest of Money to a greater Certainty\*, and wou'd not allow those Persons to receive above Four per Cent. † unless as before excepted in the Case of Merchants and other Sea-faring Men, and such like Travellers.

If the publishing of the ensuing Sheets, Sir, shall be of any Service to our Legislature, in the forming of some good Bill upon Pledges and the Disposal thereof, in order to prevent the Mischiefs arising from Pawnbrokers and the like set of Usurers, who prey on the Necessities of miserable Men, and destroy publick Credit, I shall think myself happy in being the Means of conveying some Hint or Light, how small soever it be, to so wise a Convention of Men as our Parliament consists of (for in some Points, peradventure, we may be instructed by the Wisdom of other Nations) and then we may (probably) expect to have the Roman Law in a little more Esteem among us than at present, though it may be thought the Interest of some to depreciate it, as it has been the Business of others (that are entirely ignorant of all good Learning) to render the

B

Know-

Knowledge of it as contemptible as possible.

Ataulphus, a King of the Gothic Race, who though he resolutely labour'd to change every Thing that was of Roman Fashion into the Form and Constitution of the Gothic Nation, yet, upon better Consideration had of the Wisdom of the Roman Laws between one Man and another, entirely alter'd his Resolution, and by all possible Ways endeavour'd to be the Setter up of this Golden Image in Respect to their Laws. For during the Time that the Goths and Lombards were in Possession of Italy, the Theodosian Code, and some Things taken out of the Gregorian and Hermogenian Codes, and Cajus's Institutions, Ulpian's Fragments, and the Notes and Sentences of Paulus (all Parts of the Civil Law, and more ancient than the Body of Laws compiled by Justinian's Order) were taken and admitted into Use together with their own Gothic Laws. And thus we learn, even from a Gothic Prince, That the Roman Law was not of so little Consequence to a People, as some of our Depravers of Learning would have it. The Romans themselves, who as Conquerors were wont to give Laws to the People they subdued, also received Laws from them too: For whatever Laws or Ways of Government they found where ever they

they came, which were useful and laudable in their State, they carry'd home with them, and put them in Practice; observing them rather with Humility, than rejecting them with Scorn. "Our Ancestors (says Salust) were not so high-minded as not to imitate such Rules and Customs of other Nations as they found to be good, chusing rather to tread in the Steps of vertuous and well-disposed People, than to envy them. Therefore, whatever either Allies or Enemies afforded, that was useful and fitting, they greedily embrac'd and practis'd it in their own State. (a)" And if Salust may be thought partial, because a Roman Writer, let Polybius speak, that was a Grecian. "They were always so wise (says he) as to take and apply the best Customs of other Nations to their own Use. (b)" But I fear I have already gone beyond the Length of a Preface to a Pamphlet, as this is design'd to be; and, therefore, shall hasten to the main Subject in Hand relating to Pledges, &c.

(a) Majoribus nostris superbia non obstabat, quo minus aliena instituta, si modo proba erant, imitarentur. Imitari quam invidere bonis malebant, & quod utique apud Socios vel hostes idoneum videbatur, cum summo studio domi exequabantur, Salust. Hist.

(b) Καὶ μεταλαμβάνειν ἔθνη, καὶ ἑλθεῖν τὸ βέλτερον. Polyb.

( I )



THE  
LAW of PLEDGES,

ACCORDING TO

The Rules of the CIVIL LAW, and  
the modern Practice of most  
*Trading Nations.*



AS an entrance to the ensuing Treatise on Pledges, I think it not amiss to observe, that unto all Contracts which are grounded upon Credit, as a *Loan* of Money is, there are sometimes Things, even foreign to the Contracts themselves, which are wont to be added, not only as proof and evidence thereof (among which we may reckon *Deeds* and *Witnesses*) but by way of collateral Security, in order to oblige Men unto the Performance of their Promises; as *Pawns* and *Hypotheques* are by the *Civil Law*, in order to compel Debtors, who borrow Money upon Credit, either to satisfy their Creditors, or else to forego the Goods which they have impawned as such Security.

Now these two Words or Terms of Law, as to the general Signification of them, only differ in point of sound\*, and a Pledge may\* D. 20.  
B be 1. 5. 1.

## CORRIGENDA.

Page 7, l. 7, read of. p. 16, l. 18, r. *when*. p. 17, l. 5, r. *Obligation*. p. 18, l. 34, d. *But*. p. 21, l. 15, after Title add of the Court. p. 23, l. 34, add *may*. p. 25, l. 37, after owed add *me*. p. 27, l. 21, r. *if any due*. p. 31, l. ult. for *But r. And*. p. 33. l. 19. add *is liable*.

be comprehended under each of them: But strictly taken a *Pawn* is said of a Thing, which is deliver'd to the Person to whom it is made; and an *Hypothèque* or Mortgage is predicated of a Thing not yet deliver'd, but in the Possession of the Person that makes it\*. And from hence, according to *Hostiensis* (a good Writer on the Laws) an *Hypothèque* is properly said to be of a Thing immoveable, as a House or Land; and a *Pawn* is of a Thing moveable, because it may be deliver'd by the Hand, and is therefore in the Text of the Law †, and in *Latin* called *Pignus* from the word *Pignus* a Hand. Wherefore the Criticks say, that a *Pawn* cannot be apply'd unto Lands and Tenements (a). But this Difference,

\* D. 50. 16.  
238. 2.

† D. ut supra.

(a) Tho' we here in *England* vulgarly distinguish between *Pawns* and *Mortgages*, as the *Roman* Law does between *Pignus* and *Hypotheca* in the strict Sense of the Words; yet we have been obliged to borrow these two Terms from foreign Languages, so little was the practice of Impawning anciently known among us. *Mortgage* from the *French* Words *Mort* and *Gage*, a dead Pledge or Obligation; and the Word *Pawn* of *German* Extraction, viz. a moveable Chattle bound as a Security for a Debt. In Law the Word *Mortgage* is a *Pawn* of Lands and Tenements laid or bound for Money borrow'd, to be the Creditor's for ever, if the Money be not paid at the Day agreed upon: And the Creditor holding Lands or Tenement upon this Agreement, is called *Tenant in Mortgage*. Of this we read in the *grand Customary of Normandy*\*, which see. *Glanvill* likewise defines it thus, viz. *Mortuum vadium dicitur illud, cujus fructus vel reditus interim percepti in nullo se acquiescant* †. So that he seems to have borrow'd the Notion of it from the *Roman* Law, and calls it a *dead Pledge* or *Gage*, because whatever Profit it yields, yet it redeems not itself by yielding such Profit, except the whole Sum borrow'd be paid on the Day. See *Skene de Verb. Sign. v. Mortgage*. He that pledges this *Gage* is called the *Mortgagor*, and he that takes it the *Mortgagee*. The Word *Pledge* or *Plegius* anciently did not denote a Thing, but a Person being Surety for another, from the *French* Word *Pleiger*, and so it is used by ‡ *Lib. 10. Glanvil* †. The Reader may make his Inferences from what I have here said.

\* Cap. 113.

† *Glanv. lib. 10. cap. 6.*

‡ *Lib. 10. Glanvil* †.

ference, as it rather depends upon sound alone, and not on the Nature of the Obligation itself, I shall here chuse to wave, and use the two Words indistinctly, as the Doctors or Interpreters of the Law have done before me: For in other respects, especially in the Obligation, they are almost the same. For the general Word (*Hypothèque*) appertains to all Things that are subject to an Obligation, by way of Caution or Security: *Hypotheca* in *Latin* being derived from the *Greek* Word *ὑποθήκω*, to subject or put under. And thus in *Greek* we use the Word *Hypotheca* for every Thing, which is subject and liable to an Obligation; wherefore we may define a *Pawn* or *Hypothèque* to be a Thing, which is bound or subject to an Obligation by way of Security for the Payment of a Debt\*. And the Contract itself, which gives the Creditor his right unto the *Pawn*, and whereby the same is bound to him, is also in the Books of the *civil* Law termed by the name of a *Pignus* †, as well as the Thing itself, which is impawned ‡. A *Pawn* strictly so called, is not contracted by a *Nude-pact*, or a bare Promise, but by something done ||; but an *Hypothèque* may be contracted by a *Nude-pact*, or an Assurance of the Thing to be deliver'd hereafter; though (I think) this Distinction is now taken away entirely, by what I shall observe by and by: And each of these ways of Pledging may be contracted either *purely* or *conditionally*, or else *in diem*\*\*.

\* D. 20. 1.

34.

† D. 20. 3.

t. t.

‡ D. 20. 5.

t. t.

|| D. 44.

7. 1. 6.

D. 20.

1. 4.

\*\* D. 20.

1. 155.

As a Pledge or *Pawn* has both a general and a particular Acceptation (of which in the foregoing Paragraphs) so in the general sense thereof, it includes what the *Civil Law* calls an *Antichresis*, or a mutual Use: As when a Man borrows one Thing, and leaves another



in Pawn for the Lender to make use of, till such Time as he restores the Thing borrow'd. And thus a Creditor may make use of the Land mortgaged, or in lieu of Interest for Money lent, may live in the House of his Debtor, which is mortgaged to him, till such Time as the Money borrow'd be paid or satisfy'd to the Creditor \*; whereas otherwise the Fruits and Profits of the Pawn, or Mortgage, are reckon'd into the Principal, and computed as Part thereof. And, in this sense, an *Antichresis* is a *Fiduciary* Possession, or a Possession in Trust: which kind of Possession is not perfect and absolute, but (as it were) a depositary Thing, out of which an Account must afterwards be given touching the Fruits and Profits thereof received; and the *Fiduciary*, or Person in Trust, may be compelled to render this Account.

\*D. 20. 1.  
II. 1.

*Note*, This *Fiduciary* Possession is in *France* called a *Re-credence*, and a Possession granted *sub manu Regis*, by the King, viz. on a Person's plighting his Faith for the Restitution of the Thing Impawned or Mortgaged to him, whenever it shall be lawfully demanded of him. See *Imbert's Enchiridion Juris*.

†D. 20. 1.  
II. 1.

And thus, from what has been before offer'd, an *Antichresis* may be defined to be the Possession of a Thing, which is impawned to the Creditor to be made use of by him, for the use of Money due to him: And the Pact or Covenant, whereby this Assurance or Possession is convey'd to him, is by the *Civilians* stiled *Pactum Antichreses* †. But more of this is in the Sequel of this Discourse. Only thus much I have thought fit to premise, for the better understanding of the Reader: That having a thorough knowledge of the Terms of a *Pawn* and *Hypothèque*, from the Books themselves as well as from the Etymo-

Etymologies of the Words, he may be the better able to go through with this short Essay on Pawns and Mortgages with Ease and Pleasure.

And therefore, I shall next consider, how many kinds of Pledges, there be according to the *Roman* Law, and after what manner they are distinguished into *Conventional*, *Prætorian*, and *Judicial* Pledges. And then I shall enquire what is the Object of a Pledge, what Persons may make the same, and what kind of Contract this is. And, after this I shall examine into the antient and present Method of letting of Pledges, and shew what Persons have a precedent or better Right therein, and what Actions arise hereupon. And, *Lastly*, I shall speak of the Remission of Pledges, and how the *civil* Law is changed at this day, by the Laws and Modern Practice of most Trading Countries. These Considerations and Enquiries shall be the main drift of the Detail in the following Sheets; with some few general Remarks on the whole.

And, *First*, it has been observed; that a Pawn or Pledge is distinguished in a threefold manner, according to the *Roman* Law, viz. into a *Conventional*, *Prætorian* and *Judicial* Pawn. The *first* is that, which is contracted by the Consent and Convention of the Parties themselves \*, and is most common in practice † among trading and necessitous People; and under such a Pawn or Pledge, both a *general* Hypothèque of all a Man's Goods and Estate, and a *special* Hypothèque of one particular Thing alone, may be included: and it matters not by what form of Words such a Pledge is made; nay it may, according to the *civil* Law, be made without writing, provided it may be proved, that the Parties made such an † Agreement † D. 10. 1. ment. c.

\*D. 13. 7.

†D. 10. 1.  
ment. c.

( 6 )

ment. But in *Holland, France, &c.* Mortgages are now made in writing always before Notaries or publick Officers, according to *Groenwegen de Legibus abrogatis* on the *Justinian* Institutions\*. And in *England* by writing when Lands are mortgaged † (for that is the Distinction among us at present between Pawns and Mortgages) but not of Necessity to be registred or engrossed, unless it ‡ be a Conveyance of the Freehold ‡, or in some particular Counties according to some Acts of Parliament in the Reign of Queen *Anne*, which the Reader may see.

Besides the Pact or Covenant itself, whereby a Mortgage or Hypotheque is established, other Pacts may be added thereunto, as a *Pactum Antichreseos* ||, before mentioned and the like. But a *Pactum legis commissoriae*, or a commissory Pact cannot be added thereunto, since such a Pact is more cruel and oppressive in the Eye of the *civil* Law unto the poor Debtor than any Usury almost can be \*\*. Now a *commissory* Pact is, when it is agreed between Debtor and Creditor, that if the Debt be not paid within a certain Time, the Pledge shall be absolutely forfeited without any equity of Redemption; and it was called in the *Roman* Law a *commissory* Pact, because the Word *committere* sometimes denotes the same as to forfeit by an Offence committed. This Agreement (I say) was forbidden, that cruel Creditors shou'd not take the Advantage of indigent Debtors.

A *Pratorian* Pawn is that, which the Judge or *Prator* establishes by decreeing a Person to be let into the Possession of another's Goods or Estate: And this is, when the Judge, without any previous definitive Sentence, proceeds against the Defendant (perhaps) on the score of Contumacy, and the like; and, according to

( 7 )

o an ancient Edict of the *Prator* in the *Digests*, does by his first decree put the Plaintiff into the Possession of the Debtor's Goods †, as afore-† C. 8. 2 t. said: and this he may do in some Cases besides Contumacy, according to the Books of the *civil* Law, as upon suspicion of Flight, &c. In a *Pratorian* Pawn it is sufficient, if there be no Deceit or Fraud in the Case either on the Debtor or Creditor. But touching the difference between this and a *Conventional* Pawn, I shall speak by and by in the next Paragraph saving one; for there is a manifold Distinction to be seen between them.

A third kind of Pledge or Pawn is called a *Judicial* Pawn, which is induced when the Judge has pronounced a definitive Sentence, and in Execution of such Sentence puts the Creditor into Possession of the Debtor's Goods after a Condemnation of him, if the Person condemned does not appear, but remains contumacious in refusing to satisfy the Judgment: || And herein the Authority of the Judge has || D. 42. 1. the same operation in Law in settling a *Judicial* Pawn, as the consent of the Parties contracting has in ascertaining a *Conventional* Pawn. Nor ought it to be thought strange, that a Judge should have the Power of appointing a *Judicial* Pawn, since every Person may in his last Will and Testament order a Pledge to be given for the fulfilling thereof; and ascertain the same. Though a *Judicial* Pawn is sometimes by the Law stiled a *Pratorian*, because both of them are sped by the Office of the Judge: yet there is a remarkable difference between these sorts of Pawns; one being after a definitive Sentence given, and the other before, as already noted.

A

( 8 )

A *Conventional* Pledge differs from a *Prætorian* in many particulars. For, according to the *Civil Law*, a *Conventional* Pledge may be contracted by Consent alone without any Delivery thereof: And thus it *first* differs in the way and manner of constituting the same; because a *Prætorian* Pledge is only contracted by Possession and Delivery of the Goods, according to a Decree of the Judge, as before intimated: And this, when the Pledge is in the Hands of the Court, or a third Person, may be termed a *Sequestration*. Secondly, A *Prætorian* Pawn may be contracted on the Goods of a Minor, as well as of a Major, or Person of full Age; which is otherwise in a *Conventional* Pawn. For a Minor cannot impawn or mortgage an Immoveable Estate without the Decree of the

\* D. 4. 4. t. t. Judge \*. They also differ in the effect of Acquisition in respect to the Creditor. For in a *Conventional* Pawn the Possession passes to the

† D. 41. 2. 3. 23. Creditor by a Delivery made; but it is otherwise in a *Prætorian* Pawn †, for the Reason just now assigned, *viz.* because it is in the Hands of the Court, or a third Person. And from hence another difference arises or follows; *namely*, That in a *Conventional* Pledge the Creditor receives the Profits by his Possession thereof, called the *Utile Possessorium*: But it is

‖ D. 43. 17. 3. 8. otherwise in a *Prætorian* Pledge ‖; for there the Court or Sequestrator receives the Profits, and is accountable for them, when the Possession is delivered to the Creditor, or again restor'd to the Debtor. Yet they both agree in this, *viz.* That every Creditor has an *Hypothecarius* Action. See what this Action is afterwards. But it is not my Design or Business here to treat of *Prætorian* and *Judicial* Pledges, because they more properly come under the several

Titles

( 9 )

Titles of a *first Decree* or *Sequestration*, and of the Execution of a definitive Sentence, to be handled in a larger Work of the *Civil Law*, which I shall soon publish. Only thus much I shall further observe, touching the Difference of these two kinds of Pledges, stiled *Conventional* and *Prætorian*, *viz.* That in the former he that is first in point of Time is prefer'd in respect of Right, unless there be a privileged Creditor: But it is not so in a *Prætorian* Pledge. From henceforward I shall confine my self to a *Conventional* Pledge; as being the main Business in Hand.

As to the Object of Pawns, all Things which may be bought and sold, that is to say, which consist in Commerce, may become subject unto a Pledge or Hypotheque\*: As Lands, Houses, <sup>\* D. 20. 1.</sup> moveable Goods; and also Things of an incorporeal Nature, as Debts, Actions, and other Rights. But it is otherwise by the Laws of *England*; for a *Chose in Action* (as our common Lawyers call it) cannot be transfer'd. The Tools of Husbandry and other Mechanical Implements heretofore were not subject to an Hypotheque †: But at this Day it is otherwise, as <sup>† C. 8. 17.</sup> I shall hereafter remark.

In respect of moveable Goods pawned, the Inconvenience is so great of having them out of the Possession of the Creditor (as formerly they might be) That, in *France* and other Foreign Countries at this Day, they are no longer a Pledge than they remain in the Custody of the Creditor, and his Power. See *Groenwegen de Ll. abrog.* on the Code ‡. But we have some Things, <sup>‡ C. 4. 10.</sup> which cannot be impawned or mortgaged, either <sup>†</sup> because they do not admit of an Obligation in their own Nature; or because they are not plighted by proper Persons, and the like. Now

C

all

\* D. 20. 1. all those Things, which are extra-commercial \*,  
 or which the Law forbids to be alienated †, are  
 † D. 20. 1. not the proper Object of a Gage or Pawn, as  
 1. fin. Things sacred, &c. And hence Feudal Estates,  
 according to the Feudal Law, are not subject to  
 a Mortgage against the Will of the Lord, or the  
 † F. 2. c. Consent of the Kindred by the Father's Side †,  
 34. tho' the Fruits of such Estates may well enough  
 be impawned. There are some Persons, who cannot  
 make a Mortgage, tho' their Estates may be  
 otherwise engaged: As a Pupil without the Consent  
 of his Guardian and the Decree of the Judge;  
 a Son, heretofore under the Power of the Father,  
 without his Father's leave, in respect of those  
 Goods which he acquir'd for his Father's use;  
 and a Bondman without the Will of his Master ||. But the Power of the Father  
 † D. 20. 1. so peculiar to the Romans, and the Obligation  
 1. pr. & 1. of Bondage is now at an end. He who was  
 redeemed or ransom'd from the Hands of the Enemy,  
 was formerly in the place of a Pawn, till such  
 Time as he paid off the Price of his Redemption  
 by his Labour, or otherwise \*.  
 \* D. 49. 15. 15. A Conventional Pledge, according to the  
 more general Division of it, is two-fold, viz. express  
 and tacit. The first is that, which is either  
 established by an express Agreement of the Parties  
 \* D. 20. 1. 4. ; and then it is called a voluntary Pawn  
 or Hypotheque: or else it may be without such  
 Agreement, viz. by the Authority of the  
 † C. 8. 22. Magistrate †, and then it is stiled a Sequestration  
 1. or Pretorian Pledge, of which before. A voluntary  
 Pledge was often performed without writing  
 † C. 8. 18. in the Presence of three honest Witnesses ||, and  
 11. without being acknowledged before a publick  
 Officer: So that Debtors from hence often  
 took occasion to antedate Mortgages unto later  
 Creditors. To cure this Fraud or evil Practice,  
 it

it is now in most Countries order'd; That all  
 Mortgages shall be made in writing before  
 Notaries or publick Officers, as before related.  
 Tacit Pledges, or such as are made by Im-  
 plication of Law, are in our Books called *Pignora  
 legitima*. By a Decree of the Senate, a tacit  
 Pledge is given to him, who has lent Money for  
 the repairing of Houses, on those Houses on  
 which the Money is lent and appropriated \*.  
 \* D. 20. 2. 1. And in the same way a Pupil has a tacit Hypo-  
 D. 42. 6. theque or Mortgage on the Estate and Goods of  
 8. 1. his Guardian, to answer all Accounts and Dam-  
 ages †; and a Wife on the Allodial, but not on  
 † C. 8. 15. the Feudal Goods of her Husband, which kind  
 of Hypotheque is not only understood to be con-  
 tracted on the Account of her Dowry, accord-  
 ing to the Gloss and Doctors on the Law here  
 cited ||, but likewise on the score of Alimony  
 † D. 24. 3. 22. 8. and her Paraphernalia, as Jason observes \*.  
 \* In l. 21. c. 2. 13. And the same tacit Security has a Landlord on  
 the Goods of his Tenant (brought into the  
 House, or upon the Farm) for his Rent †: But  
 † C. 8. 15. not on the Goods of an Under-Tenant ||; be-  
 † D. 13. 7. 11. 5. cause there is no Contract between him and  
 the Proprietor.

In England the Goods upon the Estate are liable to a dis-  
 tress for Arrears of Rent, whether they belong to the Te-  
 nant or not, which some think to be hard.

In short, the Commonwealth has such Secu-  
 rity in the Estates of all Men for publick  
 Taxes \*, and the like; and the Exchequer has  
 \* C. 8. 15. such a Pledge in the Estate of all such as are  
 Officers accountable to it †, as Farmers and  
 † C. 8. 15. Collectors of the Revenue, &c. But Cities and  
 2. Corporations have not a tacit Hypotheque in  
 the Goods of the Citizens, unless it be of such  
 Persons

Persons as have the Direction and Management of their Affairs; or unless they have this Privi-

\* D. 50. 1. lege from the Grant of the Prince \* : Because they are in the Place of private Men †.

† D. 50. 16. There is, moreover, this difference between an *express* and a *tacit* Pledge, namely, that Things *expressly* impawned cannot be alienated, unless

|| C. 8. 28. it be with the Incumbrance charged on them || :

12. As a Pension or Annuity issuing out of such an Estate; for the Estate itself is a Security for the payment of such Pension or Annuity. But Things *tacitly* pledged may be freely alienated, before they are arrested, or an Equity of Re-

\* D. 20. 2. demption passes against them \* : For a *tacit*

9. Pledge is a general Thing, and comprehends all Things, yet the extant Fruits of a Thing impawned or mortgaged are, by a Covenant implied and understood, deemed to be incident to the Pledge, and to go along with it. As an *express* Pawn is not destroy'd or taken away by

† C. 8. 15. 3. a *tacit* Pledge; so on the other hand, neither is

|| Dd. in a *tacit* Pledge by an *express* one ||.

l. 11. c. 5. From the Obligation of a Pledge or Pawn, the Creditor has not only the Power of retain-

14. ing \*, but also the Power of alienating and selling the same †, if Payment be not made of

\* D. 20. 1. the principal Debt within a certain Time. But because the same Thing is sometimes plighted

17. and engaged unto several Persons, it often happens, that Controversies arise about the Prosecution and selling of Pledges, one of the Parties claiming a Preference of Right unto the other.

† D. 20. 5. In which case this general Rule is to be observed, *viz.* That he shall be preferr'd in point of

1. 1. Right, unto whom the Pledge was first engaged || :

|| D. 20. 4. And it matters not, whether it be a

8. & 10. *Conventional*, *Prætorian* or *Judicial* Pledge; or

c. 8. 18. 2. whether it be a *general* or a *special* Pawn.

Hence

Hence arose the Distinction between *simple* and *priviledged* Pledges; so that here may be an exception to the general Rule.

*Priviledged* Pledges are, where the Creditor has Preference before other Creditors : As when one lends Money to build a House, or to repair it (which is afterwards mortgaged) the Lender shall first of all be paid his Money, and the House shall stand Security for it. It is to be noted ; \* D. 20.

That we meet with three sort of Creditors in 2. 1.

our Law-Books, *viz.* *First*, Creditors upon *Promise* (in writing or without writing) and these have no concern in the priority of an Obligation.

*Secondly*, Creditors upon a *simple* Mortgage, amongst whom priority of Time regularly gives the Right. And *thirdly*, Creditors that are

*priviledged* Creditors. A *priviledged* Creditor may have Preference over the whole Estate before other Creditors (but not before Creditors upon Mortgage †) tho' prior in respect of Time. † C. 8. 18.

Such is a Debt for Funeral Charges ||, which

ought to be allow'd according to the Character || D. 11. 7.

and Condition of the Person deceased \* ; because

it is an Expence of Necessity, and for the Honour of a Nation. Also the Costs of administering the Estate of the deceased ; for that Expence is for the sake and benefit of all the Creditors. Or this Preference of Debt may regard

one particular Thing only; as when Money is lent to repair Houses; for it concerns the State to encourage beautiful Buildings. Architects and Workmen enjoy this Privilege upon the same Foundation, *viz.* on the score of their Materials and Workmanship. The Cause of the Debt here ought to be consider'd, not the Time of the Contract enter'd into. This Distinction, I think, is unknown unto the Laws of *England*. Proprietors also of a House or Land have this

Prese-

Preference over the Goods of their Tenants lying upon the Estate for their Rent: But those \*D. 20. 1. which are brought upon an Estate only \* for 32. some Time, by way of Trading, are not subject to such a Seizure.

The Exchequer has no Privilege of a Mortgage among Creditors †, but only claims in point of order, unless it be in Goods or an Estate acquired by the Debtor or Officer of the Exchequer after the Obligation was entred into. † C. 7. 73. 2.

Where there is no Mortgage, but only a simple Debt, the Exchequer is always to be preferred; For that has always a tacit Hypothecation, as before hinted. But tho' the Exchequer be preferred in respect of simple Debts, yet not on the Account of Pecuniary Fines and Mulcts. In Florence he that has a Pledge or Mortgage is not preferred before other Creditors by writing. See Ansaldo de Ansaldo touching Commerce †. A Pupil, though a latter Creditor, is sometimes in favour of his Person preferred unto prior Creditors ||; and so is a Woman in favour of her Dower \*. A Person that has lent Money for the Conservation of the Thing impawned, is also deemed a privileged Creditor, and shall have the Preference, because he has saved the whole Pawn †. † D. 20. 4. 5. & 6.

Among conventional Pledges there is one kind likewise, which is general; and another, which is special or particular. This last only affects certain Goods, and is confined to them: But the first extends itself to all the Goods, except those which probably a Person would not specially engage to his Creditors, either through Affection; as a Man's Hand-maid being his Concubine, or natural Children; or else on the score of his daily use, as his Household-stuff, wearing Apparel, &c. which ought to be entirely left

† Discurs. 13.  
|| D. 20. 4.  
\* Nov. 79. c. 3.

left to the Debtor \*. For it is a Loss to the Publick if any one be rendered useles by Beggary. Not only Goods in present Possession, but even Goods in reversion are comprehended under a general Pawn or Hypothecation; as Corn in the Ground, and anciently (before the Law was alter'd) the young in the Body of a Man's Cattle †, &c. Bonds, Debts and Actions are also by the civil Law included under a general Pledge. And the Essence of such a Pledge consists in the generality of the Words which includes all Things, not before excepted: But it is otherwise if the Words of the Pledge do not lie in the generality †. And a Pledge of all Goods shall thus extend to all future Acquisitions, tho' not mentioned by any distinct Agreement ||. Yet if one engages his Goods for Money which he shall borrow hereafter, the Obligation is void, as I shall note more largely by and by; for the Pledge is accessory to the Obligation. And if such Bargains were allow'd of, it would be easy to defraud Creditors by an Agreement of this Nature \*\*. \* D. 20. 1. 6. 7. & 8. † C. 8. 25. 1. 1. † D. 50. 17. 147. || C. 8. 17. 9.

If a particular Thing be pledged, every Thing that is the Product or Part of it is under the same Obligation, if it continues in the same State, and is of the same Nature ††. But if Wood be mortgaged, and the Debtor builds a Ship with the Timber of it, the Ship is not Part of the Pledge |||; for the Ship is one Thing, and the Timber is different from it: But a Clause may be inserted to comprehend it. And tho' Corn in the Ground, and the Profits of the Land mortgaged (as already remembred) are Part of the Pledge or Mortgage; yet other Lands purchased with the Money arising from those Profits are not under that

\*\* D. 20.  
†† D. 20.  
||| D. 13. 7.  
18. 3.

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‡ C. 8. 15. that Obligation: for those Lands are not Part  
3. of the Thing in Mortgage ‡.

The end of a Pawn or Hypotheque is to se-  
cure Creditors on the Account of the Thing  
credited, as appears from the definition it self:  
it being for the Advantage of Creditors to  
have something besides the Person of their Deb-  
tors to depend on. I say, *besides the Person of*  
*a Debtor*; for his Person is not discharged by a  
Pledge given, if it does not answer the Debt.  
Hence it is: That a Debtor by delivering up the  
Pawn, according to the old way of holding it,  
to his Creditor, is not fully discharged \*;

\* C. 8. 14. because a Release does not ensue but by  
1. the Payment of what is due, *Cessio* not being  
in the Place of Payment; no, though a Man  
shou'd deliver up all his Effects. Moreover,  
it may happen; that then a Pawn is deliver'd  
up for a Debt, such Pawn does not amount to  
the Value of the Debt, as just now hinted:  
therefore, such Creditor is not forbidden to sue  
for the Remainder, or what is due, since one  
Thing cannot be given in Payment for another

† D. 12. 1. against the Will of the Creditor †. A Debtor  
2. 1. that gives a Pledge or Pawn to his Creditor as  
a Security, cannot be imprison'd, though he  
should be suspected of Flight as a Fugitive  
Debtor, unless the Creditor be immediately  
prepar'd to prove, that such Pledge or Pawn  
is not sufficient to answer his Debt. See *Peck*,  
*de Jure Sistenti*. Which leads me to speak of  
the Effect of a Pledge.

Now the Effect of a Pawn or Mortgage is,  
that the same should become the Goods of the  
Creditor; even without a Delivery after the  
Term of the Pledge is expired; and the Cre-

\* C. 8. 14. ditor may have an *Hypothecarious* Action \*,  
18. which

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which is a *real* Action for a recovery of the  
Thing itself, if he does not think fit to take  
Possession thereof, by his own private Autho-  
rity. For the Action does not arise from the  
Allegation, but from a Right of the Pledge  
vested in the Creditor, as the Pawn or Mort-  
gage is covenanted between the Parties: which  
Right is so annexed to the Thing pledged, that  
the Debtor cannot oust the Creditor of it by  
any Alienation, nor by any future Obligation  
unto another \*. Where a dispute arises about \* C. 8. 14.  
the Property of a Thing impawn'd with a 15.  
third Person, an Action or a Plea of *Defence* does  
in the first Place belong to the Debtor: For as  
the Property of that Thing belongs to him; so  
likewise does the Risque and Hazard thereof.  
And therefore, if the Thing be evicted, he  
shall be personally liable to the Creditor for  
Damages †, and the Creditor may have a † D. 12. 1.  
*Pignoratitious* Action against the Debtor for the 28.  
Value of the Pledge, since he cannot recover  
the Pledge itself. And hence it is reasonable,  
that the Debtor should have a Plea of *Defence*.

A *Pignoratitious* Action is a *Personal* Action,  
arising from the Contract itself, and upon a  
Delivery of the Thing pledged; and as such  
it is usually given to the Debtor either for the  
Thing plighted after Payment of the Debt, or  
else for Damages, against the Creditor \*\*: \*\* D. 12.  
But in some Cases it may lie for the Creditor. 7. 9. 1.  
But an *Hypothecarious* Action is a *real* Action D. 50. 16.  
accruing to the Creditor, whereby he may ob- 238. 2.  
tain the Right and Possession of the Pledge a-  
gainst any Possessor whatsoever: But this as a *real*  
Action does not give Damage, but only reco-  
vers the Thing itself. They are both Actions  
*bona fidei*, and not *stricti Juris*. But of these  
Actions hereafter.

D

A

A Creditor, that receives a *Conventional* Pledge, is obliged not only to answer for every kind of Fraud, but even for gross and light Negligence\*, but not for the lightest Fault. Wherefore, he who takes Books in Pawn ought not to make Use of them without the Consent of the Debtor, and (according to the *civil* Law) it is no less than Theft so to do; because they were not deliver'd to him for the sake of Use, but on the score of Security. And so of other Things of the like Nature: Because when a Pawn is deliver'd into the Hands of the Creditor, he shall be obliged to make it good, if he loses or endamages the same. But if it was not thus deliver'd to him, as sometimes it happen'd by the *Roman* way of holding Pawns, he was not liable, if the Pawn miscarry'd. But though a Creditor, being in Possession of a Pawn, must not only answer for all Losses and Damages, but even for those Things which happen by his neglect, as just now declared; yet he is not bound to answer for any inevitable Accident †; as Fire, Inundation of Water, Robbers, &c. unless occasioned by his Means. But this will be again remembered under the Paragraph of Actions.

Upon Payment of the Debt the Creditor and his Heirs are under a perpetual obligation to restore the Pledge, for the Creditor cannot acquire a Title by an *ordinary* Prescription or Limitation of Time ‡. But though an *ordinary* Prescription cannot be objected to extinguish the Property of a Pledge §: But yet by length of Time, a Prescription may be pleaded in Bar of an *Hypothecarius* Action. In an extraneous Possessor this Prescription is extended to thirty \*C. 7. 39. Years\*; and in the Debtor and his Successors

\*D. 50. 17. 23.

† I. 3. 15. 4.

‡ C. 4. 24. 10. & 12.

§ D. 44. 3. 12.

\*C. 7. 39. 4.

fors the Prescription is founded upon a forty Years *Ususaprio*\*. The Law introduced this Limitation of Time in Abatement of the afore said Action, in order to avoid remote and distant Law-Suits, not only in respect of an extraneous Possessor, who might perhaps come fairly and honestly by the Thing pledged, though not the lawful Owner thereof, but likewise in favour of Successors who otherwise would never be safe in their Administrations.

As the Creditor must render an Account of the Profits received on one hand; so must the Debtor, on the other, make an Allowance unto the Creditor for necessary Expences laid out upon the Mortgage, provided they are moderate, as for the Repairs of House, though afterwards burnt down by Accident †. But as for the Expences made on the Improvement of an Estate, it depends much upon the Circumstances of it, whether the Debtor ought to allow them. *Improvements* are said to be those Things, which render an Estate the better for them, and are so fix'd to the Estate that they cannot be separated. Among these Meliorations there are some owing to Nature, others to Industry, and others that are filed *civil* Improvements. There are some that are *necessary*, and if these are not made, the Estate will either come to nothing, or grow worse; as not to repair an old Building and the like: and here the Mortgagee or Creditor shall have his Expences allowed him. But Repairs generally come not under the Notion of Improvements. There are some Improvements filed *useful* and *convenient*, but not *necessary*; and these are such as make the Estate the better

\*C. 7. 39.

† D. 13. 7. 8.

‡ D. 25. 1.

§ 5. 3. & L.



better for a Sale. And if the Estate mortgaged yields a greater Price upon Sale, the Mortgagee shall also here be allowed for such Improvements, but then the Expences must not be immoderate. And there are Improvements made for delight and pleasure only, and as they are only for Ornament, they do not (perhaps) increase the Value of the Estate. For these the Creditor shall not be allowed. If a Debtor upon a Pledge does not pay the Debt within the Time limited, or be suspected of Flight and the like\*; the Creditor may by virtue of this Contract, which is a Contract *bonæ Fidei*, by an *Hypothecarius* Action prosecute the Pledge, and obtain the Possession thereof, if he has it not already; and after he has obtained such Possession, if the Debtor boggles or delays Payment, he may in this Case (and not before) sell the Pledge †, and satisfy himself out of the Price thereof. And though there be no such Covenant expressed between the Parties for selling the same; yet such Covenant is here implied †, as arising from the Nature of the Contract itself. Therefore, if a Covenant be expressly added, the Creditor may by virtue of such Convention sell it as from the Will of the Debtor †, after he has given the Debtor notice of his Design. For if he shall not give this Notice, he shall be liable to a *Pignoratitious* Action \*\*. But if there be no Intervention of a Covenant, the Creditor shall before Witnesses give the Debtor thrice Notice of his Intention of Selling the Pawn ††, unless Payment be made of the Debt; and then by a Law of *Justinian*, which is now out of use in some respects, the Creditor ought to wait two Years before

\* D. 20. 5. 9.  
† D. 20. 5. 4.  
‡ D. 13. 7. 4. D. 20. 5. 8.  
§ C. 8. 34. 3.  
\*\* C. 8. 28. 4. & 9.  
†† C. 8. 28. 4.

before he may sell it †. The Time for selling a Pawn at this Day, by the Judge, is generally speaking six Months after Notice given. See *Bugnon de Abrog. on the Code* \*. \* In Tit. 8. After a Sale is rightly made, the Creditor transfers that Right, which the Debtor had who gave the Pawn, unto the Purchaser, in such a manner that the Debtor or any other Person cannot re-call the Thing out of the Hands of the Purchaser †; for regularly a Pawn or Pledge is not of its own Nature a litigious Thing, and a Claim cannot be made on the Account of a bad Title †. The Judge transfers this Right by the very Act of selling the Pledge; for the Credit or Title cannot be shaken. If a Creditor has obtained his Debt from the Fruits and Profits of the Pledge, he cannot sell it †; and in some Cases Interest shall be allowed him, though not contracted for, as where the Creditor is a Sufferer by the Loan: For there must be either a Cessation of Gain, or emergent Damage to the Creditor thereby, since the *Romans* did not permit a *lucrative* Interest of Money \*\*. If a Creditor sold a Pledge *malâ fide*; yet if the Buyer did not participate of the Fraud, such Sale could not be rescinded, because he had no share in the Fraud: For in this Case the Creditor, and not the Buyer, shall be convened and impleaded in an Action of *Deceit*. A Pledge may be sold, though it be of less value than the Money due, and that too without any Prejudice to the Creditor: And also though it be agreed that it should not be sold; yet it may be sold after thrice Notice given thereof ††; for it is given in Satisfaction of the Creditor. Though a Creditor may in the Right of a Creditor sell a Pledge, and transfer

† C. 34. 3.  
† C. 8. 28. 18. D. 20.  
† C. 8. 27. 1.  
† C. ur Sup.  
\*\* C. 4. 32. 26.  
† D. 13. 7. 18.

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transfer the Right of Ownership or Property to such Pledge; yet a Creditor, who sells a Pledge, is obliged and may be compelled to restore the surplufage of the Price thereof to the Debtor, after his Debt is satisfied \*.

† C. 8. 28. 6. If the Fruits and Profits of a Pledge received shall be co-equal unto the Principal and Interest of a Debt, such Pledge shall not be sold for the Satisfaction of the Creditor, the Pledge being *ipfo Jure* discharged thereby † C. 8. 28. from the Obligation it lay under †: But if a Paſt intervenes, that the Creditor shall have the Profits in lieu of Interest, it is otherwise. A Tender of the Residue of a Debt hinders the Sale of a Pledge; and if there be any dispute about the Sum of such Residue, the † C. 8. 28. Judge shall determine the Matter †. And the whole Pawn must answer for such Residue, because a Pledge is an individual † D. 21. 2. 65. Thing †. So that a Creditor may sell a Pawn, though he has received the greater Part of his Debt. Yet in some Countries the Judge arbitrates this Matter; and that he may do, I think, according to the *civil Law*, in point of Equity, if there are several *Species* of Goods impawned for the same Debt †. If the Price of a Pledge when sold, be not sufficient to answer the Debt, the Creditor may petition for the Residue of his Debt to be made good by some other means. Things *ſpecially* impawned are to be sold in the first Place, that it may appear whether the Debt may be satisfied out of the Price of such special Pawn; and after them Things *generally* pledged may be sold \*.

\*\* C. 8. 28. 9.

I do not remember to have any where read of this Distinction between a *general* and a *ſpecial* Pledge in the Law.

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Laws of England (at least) in Respect to the Sale of a Pledge; nor is it much regarded now in other Countries.

Though a bare Tender of Money, which is made in a Court of Judicature, is sufficient to inhibit the Sale of a Pledge, so that it cannot be sold: Yet this Tender ought to be previous to the Sale thereof; for a Tender subsequent to such a Sale does not dissolve a Sale once made \*. But in a Judicial \* C. 8. 28. Tender the Debtor must deposit and lay down the Money on the Board, and tell it out to the Creditor †. So that if, upon such a † C. 4. 32. Judicial Tender of the whole Debt unto the Creditor, the Creditor shall afterwards presume to sell the Pledge, the Debtor may either recover Damages for the same by a *Pignoratitious* Action against the Creditor †, or the † D. 13. 7. Person in Possession may be convened in a *real* 20. 2. Action to recover the Thing itself. But this Law in respect of Actions to be thus brought against the Creditor and Possessor, is now out of Use in Countries where the Judge sells the Pledge.

A Pledge, which cannot be sold to another, is an ineffectual Pledge; and such Pledges are sometimes made: As when Lands and Houses are mortgaged, where the Mortgagor is only Tenant for his own Life, and the Reversion afterwards passes to another. But even in this Case the Fruits and Profits thereof may be pledged during the Tenant's Life. And it is the same Thing in a Feme-Covert, that by collusion impawns her Husband's Goods, which be sold with the connivance or dissimulation of the Husband †. A Deb- † C. 8. 28. tor cannot purchase a Pledge or Pawn, which he has given unto his Creditor, though he may redeem the same, because a Man cannot

not purchase what is his own already; and if he should do it, such Purchase is null and void. *Titius* mortgaged an Estate unto *Sicus* for a hundred Pounds: And afterwards *Titius* purchased the same. This Purchase, I say, is vain and fruitless; because *Titius* purchased what was his own. But if an Equity of Redemption be once expired, and the Estate be set to publick Sale, he may do it; lest the Estate should be under-fold, and himself become a Sufferer thereby. A Person, that has purchased of a Creditor a predial Estate mortgaged to him, ought to be inducted into the Possession of it; that is to say, he ought to have Livery and Seisin, otherwise he shall not have a *real Action*\*; for the Property is not transferred by Sale, but by the delivery of Possession. A Creditor upon a simple Note of Hand-writing cannot sell a Pledge in Prejudice of a Creditor upon a Mortgage. The last Will and Testament of a Debtor does not infringe the Right of a Creditor in point of selling a Pledge: For a Debtor cannot in his Will hinder a Creditor from selling an Estate, which is mortgaged to him, if such Sale be made according to Law †. *Titius* mortgaged an Estate unto me, and he not paying the Money according to the Day appointed by him, I was willing to sell the Estate thus mortgaged; but his Heir forbid me selling the same, shewing me *Titius's* Will, whereby it was provided, that such Estate should not be exposed to sale, for that he had devised it to another. And it was adjudged that I might sell it, notwithstanding the Testator's Prohibition. Nor can a Debtor hinder a Creditor from selling a Pledge by any Protestation whatsoever, unless he

\* C. 8. 28. 13.

† C. 8. 29. 1.

he pays or tenders the whole Debt: For unless he does this, the Creditor may sell the Pledge, though but a small Sum be in Arrears of Payment, as before shewn; because the Protestation of the Debtor does not infringe the Right of the Creditor\*. *Seius* † C. 8. 29. mortgaged the Ufusufruct of an Estate unto *Sempronius*. *Sempronius* mortgaged the Estate unto *Titius*, who sold the said Estate. And in this Case it was held not to be valid. For a nude Ufusufructuary of a Pledge, that has only the Ufusufruct and not the Property of it, cannot plight or alienate the Property thereof, but can only engage or alienate the Ufusufruct † † C. 8. 24. And thus the Ufusufruct of a Thing may be<sup>1</sup> impawned.

If a Creditor sells a Pledge *malâ fide*, or contrary to Law, such Creditor is liable to a *Pignoratitious* Action for Damages, and not the Buyer to restore the Possession of it, unless two Things concur, *viz.* That the Creditor is insolvent, and the Buyer participates of the Fraud: For then the Debtor on a Tender of the Price with Interest, though after Sale, shall recover the Thing pawned † † C. 8. 30. A Debtor may sell a Pledge against the Will<sup>1</sup> of the Creditor, with a *salvo jure Creditoris*: For the Sale of an Estate made by a Debtor shall not prejudice the Creditor or Mortgagee in his Mortgage †. If a Thing be † C. 8. 28. pledged for a Debt, and such Debt be only<sup>12</sup> discharged in Part of the whole, this does not release or dissolve the Pledge, but that the whole of the Pawn may be sold for the Remainder of the Sum due or promised; because the Right of a Pawn is an individual Thing, as before intimated. *Titius* owed a hundred Pounds under the Obligation of a Pledge, whereof he paid ninety-nine Pounds,

so that only one Pound remained due: And the *Quære* was, whether I might sell the Pledge for the Non-Payment of that one Pound? And it was resolved, that I might \*.  
 \*C. 8. 28. 5. But if there are several Things or Effects pawned to him, and the Creditor would sell a Thing of a very great value for the satisfying of a very small Debt, when he might obtain his Debt by selling a Thing of lesser Value, he does not seem to act the Part of an honest Man, and may therefore be prohibited †.

† Arg. D. 27. 9.

Heretofore, by the *civil* Law, Creditors could not by way of Purchase acquire to themselves such Goods as were impawned or mortgaged to them, lest they should by this Means oppress and injure their poor Debtors †. And hence it sometimes happened, that when their Debtor's Goods were set up to Sale or Auction, they remained a long Time *sub Hastâ*, and could not find a Purchaser. But to remedy this Inconvenience, they at this Day are publickly and in a solemn manner exposed to Sale, not by the Creditor himself in virtue of his own Right, and by his own private Authority as formerly †, but by a Decree of the Judge, by the Means of an Apparitor, or some other publick Officer of the Court. And, therefore, now Persons cannot be relieved against Sales, as Minors anciently might against all private Kinds of Sales, as well as against other Sales, if they were greatly injured thereby \*\*. By the ancient Custom of *England*, we read, that a Creditor could not sell a Pledge by his own private Authority, either without the Consent of the Party, or the Decree of the Judge, which was commonly had in the inferior Courts, as the

† C. 8. 28. 19.

‡ C. 8. 28. 4.

\*\* D. 4. 4. t. t.

the Sheriffs-Turn, the Hundred-Court, and sometimes in Court-Baron. And so it is now in *France*, according to *Domat*, in his Treatise of the *civil* Law as practised there \*.  
 \* Tom. 2. By the Usage of *Holland*, *Genoa*, *Florence*, *Venice* and *Rome*, a conventional Pledge is sold with the same solemnity as a *Preterian* Pawn is, and by the Authority of the Judge *sub Hastâ*; namely, by Cant or Auction. Therefore, this Law of the *Code* †, which gives Relief unto Minors against private Sales of Pledges, does not now obtain in those Places. For, the private Sale of a Pawn being out of Use, it must be sold by the Authority of the Judge, and the Sale can only be rescinded by an Appeal †, since the Credit of the Fiscal Spear is of great Authority. † C. 8. 28. † Groenw. lib. 3. tit. 1. & 3. † de Abrog.

By the *civil* Law also, if a Creditor could not find a Person to purchase the Pledge on its being exposed to sale, he might upon Application made to the Prince obtain a Grant of the Property of it, paying the Debtor the Surplusage in value of any Due †. † C. 8. 34. But this Method is now out of Use, as I shall farther observe hereafter. The Creditor and Debtor may agree, That if the Money be not paid at a certain Time limited, the Creditor shall possess the Thing pawned by way of Sale at a just and certain Price \*\*. \*\* C. 8. 34. and this shall not come under the odious Name of a *commissory* Pact. When the Estate is to be sold, and the other Creditors have Notice of the Sale (as they ought to have) and being present do not make their Claims upon the Overplus, they seem to have lost their Right of Mortgage upon it ††. †† C. 8. 26. If a Thing pledged be evicted by a third Person in respect of the Right of Property, the  
 E 2 Creditor

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Creditor who sold it, is not liable on the score of such Eviotion: For he did not sell it on his own Assurance of the Title, but on the faith, credit and honesty of the Debtor; and, therefore, let the Purchaser look to himself.

If a Creditor avers, that he has lent Money on the Settlement of a Pawn or Mortgage assured to him, he ought to prove the actual Payment of the Money lent on the Score of such Pledge, if he would have an *Hypothecarius* Action, or an Action on the Pledge against the Debtor, that is in Possession of such Pawn or Mortgage: because though the Debtor be *civilly* obliged according to the Form and Tenor of such Mortgage; yet an Exception *de non numeratâ Pecuniâ* lies. For a Creditor is not in this Case presumed to have actually paid the Money pretended to be lent, unless he proves the same, whether he be convened in a *Pignoratitious* or any other Action\*.

\* C. 4. 30.  
1. And the Reason of this, is, to prevent Fraud in such Persons as might otherwise pretend a Pawn or Mortgage to cover the Debtor's Goods against other Creditors, whereas in Truth there was no real Pawn or Mortgage made. For a Pawn or Mortgage was sometimes wont to be made (in Fraud of Creditors) for Money to be paid hereafter; and the Law which gives this Exception, was made to obviate this Cheat. But if the Creditor be in possession of the Pawn or Mortgage, then this Exception *pecuniæ non numeratæ* does not lie, unless some Fraud be proved between the Mortgagee and Mortgagor in order to deceive and cozen Creditors: For it is a strong Presumption in Law, That the Debtor would not part with the Thing pawned or mortgaged out of his possession

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session without having the Money first paid down to him.

But Money, received on the account of a Pledge or Pawn, whether it be *really*, or only by a Fiction of Law received by the Creditor, discharges the Debtor, unless the Sale of such Pledge be rescinded\*. *Titius*\* D. 46. 3. lent five Hundred Pounds, for which I mortgaged an Estate to him, and covenanted with him that if I did not pay the Money by the Time agreed on, he might sell the Estate. The Term came, and the Money was not paid; whereupon my Creditor sold the Estate, and received the Purchase-Money. In this Case I am discharged, if the Sale be not rescinded for a just Cause. Such Estates mortgaged with us are wont to be sold by a Decree of the Court of *Chancery*, and by a Master of that Court.

A Thing purchased with another's Money, which is borrowed of him, is not liable as a Pawn or Security unto the Person who lends the Money, unless this be either generally or specially agreed upon by or between the Persons†: As when *Titius* buys an Estate with the Money which I lent him. Such Estate, I say, is not subject as a Mortgage for the Money which I lent him, unless it was thus covenanted between us. If a Creditor purchases a Pawn, it ceases to be a Pawn, unless the Purchase be what the *Civilians* stile *emptio simulata*, or a Purchase in Disguise, by some called a *Sham-Purchase*: But there ought to be a *Constat* of such Disguise by some sure and certain Presumptions, or Conjectures. If a prior Creditor shall sell a Pledge, that is impawned or mortgaged to himself in the first place, and afterwards to me,

me, which we call a *riding* Mortgage, the second Creditor cannot have an *Hypothecarius* Action against the Purchaser: But if the Debtor shall by Way of Payment give it to the first Creditor, that Right of a Pawn or Mortgage still remains with me the second Creditor; and thus I may sue for the Thing pawned, if I will pay off the first Creditor

\* C. 8. 20. his Debt \*

1. The Tye or Obligation of a Pledge is dissolved several Ways. As *first* by an actual

† D. 20. 6. Payment of that which is due †; for every  
1 & L. 5. 2. Obligation may be dissolved after the same

manner, or by the same means it was established. *Secondly*, by a feigned or imaginary Pay-

‡ D. 20. 6. ment: As when the Creditor makes a cession  
1. 1. unto the Debtor of that which is due to him \*,

(for here a Payment is made without Money) or when the Creditor covenants with

the Debtor not to demand or sue for the

‡ D. 20. 6. Pledge †; or else transfers the first Obliga-  
5. tion of a Pledge into a new or another kind

of Obligation, by the *civil* Law called a *No-*  
\*\* D. 46. 2. *vation* \*\*. A Pledge is also released or dis-  
18. solved, either by the *express* or *tacit* Will of

the Creditor. By the *tacit* Will of the Credi-  
tor, when he consents to an Alienation ††,

†† D. 20. or to a new Obligation of the Pledge ††.  
6. 4. 1.

†† D. 20. For though a first Creditor does not lose his  
6. 12. Right unto a Pawn or Mortgage, though the

same be bound to another by his Sufferance, if it be not done with his *express* Consent

and Knowledge †††; yet if the Creditor has given his full and *express* Consent, he seems

to have remitted such Pawn or Mortgage: And it is the same Thing, if the Creditor

\* C. *ibid.* be privy thereunto by any act of his \*; for this is a kind of Alienation in him. But if he  
only

only so far consents to such Alienation, that the Cause or Reason of the Pledge should still be preserved to him, or gives leave for the Sale thereof that he may be satisfied out of the Purchase-Money, the Incumbrance still remains on such Pledge, and he retains the Right thereof, if Payment of his Debt does not follow on such Sale \*. *Note*, \* D. 20. 6.

a Creditor is not understood to have con- 8. 11. sented to the Sale of a Pawn, though he has

knowledge of such Sale, unless it appears that he granted leave thereunto, either by

*express* Words, or by subscribing himself to the Contract, or gives up the Specialty or

Mortgage-Deed †. † C. 8. 26.

Again, a Pledge is determined, if the 7. whole Substance of the Thing impawned

perishes or be destroyed, as Land by an Inundation of the Sea, a House by Fire, &c.

But if only a Part of the Thing perishes, it is otherwise; for if a House be burnt

down, yet the Ground-Plot still remains engaged to the Mortgagee, and whatsoever

is afterwards built thereon †. For when † D. 13. 7. the quality of the Thing is only changed,  
21. D. 20. the Hypotheque or Mortgage still continues †.

A Pledge is also extinguished either by the † D. 20. 1. Sentence of the Judge, or by the Oath of  
16. 2. the Party, *viz.* when it is adjudged or sworn,

that nothing is due, or that such Pledge is not engaged \*\*. For if the Party swears to \*\* D. 20.

either of these Things, it is incumbent on 6. 5. & 13. the Creditor to prove his Right. *Lastly*,

a Pledge is also extinguished by a Change of the Person of the Debtor †; and like- † D. 20.

wise sometimes by a change of the Thing it 6. 1. self passing *in materiaturum*, as a golden Cup into

an Ingot of Gold: But it is always merged, whenever

whenever the Thing impawned becomes the Property of the Creditor. If a Creditor has restored a Pawn with an Expectation, or on a Promise of suddenly receiving the Money for which such Pawn was given or laid down, and yet fails in the Receipt of it, he is not in this Case thereby deemed or reputed to have remitted his Right to such Pawn, but may have an *Hypothecarius* Action to recover the same again. As a Pawn is presumed to be contracted by a nude Pact, or without writing \*; so it may also be released in that same manner before a competent Number of Witnesses.

\* D. 20. 4.

Though the Fruits and Profits, which are received from a Pawn or Mortgage by the Creditor do *ipso Jure* extenuate the Debt, and are reckoned as Principal †; yet they do not lessen or compensate the Debt, if they are spent or consumed on the Premises, as in the Repair of Buildings, &c. The Fruits and Profits being in such a Case impawned

† C. 4. 24. 1.

or mortgaged as the Estate is †. The first Money that is paid to a Creditor, shall be interpreted in discharge of *Use* and *Interest* for the Money lent; for it is reasonable, that the Creditor should be first paid his Damages for delay of Payment: And, therefore, the last Money paid is in discharge of the

† D. 13. 7. 18. dd. ib.

Principal only, and not of Interest †. This Interest among the ancient *Romans* was twelve

|| D. 13. 7. 35.

*per Cent.* which was called *lawful* Interest; and for more than this none could stipulate, unless it was in the Case of Maritime *Ufury*: for such was the Standard of lawful Interest, according to the *Gabinian Law*, as

\*\* Ep. 5. *Cicero* assures us in an Epistle to *Atticus* \*\*. But when Trade increased, and had brought into

into the State a greater Plenty of Money, the Measure of Interest was for the Benefit of Commerce gradually reduced at several Times, 'till at length it came to four *per Cent.* in *Justinian's* Time (as I shall more fully evince in my Work at large under the Title of Interest, when published) and no Banker or Usurer could take more than this Sum upon any Pretence whatsoever, unless on the Account of *Bottomry* or nautick Interest.

If a Creditor shall do any Damage to a Thing pawn'd or mortgag'd, such Damage shall be reckon'd into the Principal, as I shall note hereafter: But the Creditor shall recover all necessary Charges, which he has disbursed on the same, and likewise such moderate Expences as he has been at for proper Improvements thereof \*, as before related. But tho' the Creditor, if the Pledge be made worse in his Hands by Dissipation or Waste †, yet it has been at a Question, whether he be bound to preserve the Fruits, and to sell them in some Time of Scarcity? To which I answer, that there are some Fruits which ought to be sold out of hand, because they are immediately spoiled, or grow worse by keeping; and these ought not to be preserved. A Creditor is not liable on the Account of a Pawn lost, if it be lost without his Fault or Means. Fortuitous Cases, which cannot be foreseen by human Prudence, are within the Verge of Contracts both *stricti Juris* and *bonæ Fidei*: And, therefore, a Creditor is not liable on the score of a fortuitous Case happening to a Pledge, unless it be so covenanted, *viz.* That if a Thing be lost by such a Case or otherwise, the Debtor shall not be obliged to pay the Debt †. And the being robbed by High-

\* D. 13. 7. 8.

† C. 4. 24. 1. & 2.

‡ C. 4. 24. 5.

F waymen, 5.

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waymen, and the like, is deemed a fortuitous Case.

A Thing, which belongs to another Person, may be pawn'd and mortgag'd by the Consent of the Proprietor, and not otherwise \*, unless it be as hereafter excepted; nor is such a Pledge valid, tho' the Property of the Pledge should afterwards by Accident supervene unto the Debtor: Because he had no present Right, or Right in Reversion thereunto. But if a Thing be given as a Pledge without the Privity of the Owner, and the Proprietor shall afterwards ratify the Act of the Debtor, such Pledge shall be valid: And thus that which was invalid *ab initio* is afterwards confirmed and made good; for such Ratification declares the Will and Consent of the Pro-

† D. 20. 1. 16. 1. prietor †. A Person, who knows the Thing pawned to belong to another, is not deceived by the Debtor, but deceives himself; and, therefore, he shall not have an *Hypothecarius*

‡ In l. 1. 1. D. 20. 1. Action, according to *Bartolus* ‡. Those Things, which may be expressly sold and alienated, || C. 4. 53. 1. un. may also be impawn'd and mortgag'd ||, as before hinted: And, on the contrary, those Things, which cannot consist in Commerce, as Things sacred, religious, the Right to an Hospital, Things subject to Restitution, a *Feudal* Estate without the Lord's Consent, the Goods of Minors without the Decree of the Judge, Things *litigious*, Castles, publick Theatres, the Sea, publick Rivers, and the like, these Things (I say) cannot be im-

\* D. 20. 3. 1. 2. pawn'd\*.

If an Estate be mortgaged, and afterwards such Estate shall be enlarged or encreased by Alluvion, the whole Estate shall be bound by such Mortgage †. If a Thing mortgag'd

† D. 20. 1. 16. 1.

or

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or impawned shall afterwards be changed into another *Species*, as when a House is pulled down, and laid into a Garden, &c. an *Hypothecarius* Action accrues in the same Manner, as if it had been a House still \*: And, there-fore, a Pledge is not always extinguished by a Change of the Thing itself into another Form, though sometimes it is, as before intimated, but still continues a Pledge. Thus if Corn or Pasture-Land be converted into a Vineyard, the Obligation of a Pledge still remains to the Creditor.

In the Claim of a Pledge, the Question sometimes is, whether the Person, with whom the Controversy is, be in Possession of the Thing in Controversy. For if he be not in Possession of it, nor has not quitted the Possession by any fraudulent Declaration of Trust, in order to deceive the Creditor, he ought to be acquitted; for a Creditor may claim the Pledge. But if he be in Possession of it, and will either pay the Money lent thereupon, or restore the Thing pledged, he shall equally be acquitted: But if he will do neither of these Things, he shall be condemned by the Judge's Sentence to give up his Possession to the Creditor †. And the Possessor shall, according to the Award of the Judge, be obliged to restore all the Fruits of the Pledge received after Contestation of Suit, or Issue join'd in the Cause, if the Estate be of lesser value than the Debt due to the Creditor: But if greater, he shall be obliged to restore the Fruits or Issues received before Contestation of Suit, unless they are extant, and the Thing impawn'd be not sufficient to satisfy the Creditor in his just Debt ‡.

F 2

Though 3.

‡ C. 8. 15.



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Though properly speaking a Thing already pledged cannot be impawned by the Creditor unto another\*, because the Creditor has not the full and absolute Property thereof, yet it may be pledged, either under an exprefs or tacit Condition, viz. That if the first Debtor shall redeem it, it shall be released. *Mævius* gave a Pledge unto *Titius* for a hundred Pounds; *Titius* afterwards impawned the same Pledge unto *Caius*. *Mævius* may in this Case discharge the Pledge, which he gave unto *Titius*, by a hundred Pounds paid unto *Caius*, by the Consent of *Titius*; and if *Titius* will not give his Consent, the Court will compel him hereunto. Which brings me to speak of the *Subrogation* of Pledges. For,

In Pawns and Mortgages we have such a Thing as *Subrogation* or Cession of Right, which is the putting of another Person in the Place and Right of the Creditor. It may be done either *gratis* or for Money. And the *Cessionary* or Assignee shall succeed in the room of the Creditor, and exercise all manner of Right in relation to the Mortgage, or the Privilege of the Mortgagee †. Thus a Debtor may borrow Money to pay the Creditor or Mortgagee, and by Consent that the Creditor shou'd assign over the Mortgage, as a Security borrow'd, unto the Lender ‡; reciting that the Money was paid by him. This is no Prejudice to the other Creditors, for their Condition is neither worse nor better by means of such a Change and Assignment. These Assignments and Subrogations may also be made by the Authority of the Judge || without the Consent of the Creditor. If the Creditor consents that his Pledge shall be assigned to another, he has remitted his Right\*: But bare Notice

\*C.8. 24.  
1. & 2.†D.18. 4.  
6.‡D.20. 3.  
3.||C.8. 22.  
1.C.7. 73.  
7.\*D.20. 6.  
12.

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Notice and Silence cannot amount unto a Consent, as before declared; as when he knows that his Debtor is selling Land that was mortgaged to him, and says nothing to the contrary, or against the Sale\*. For this Consent† ought to appear by some external Act, as †D.20. 6. 8. 15. one mortgages Land a second Time, and declares that it is free from all Incumbrances, and the first Mortgagee or Creditor signs the Deed, either as a Party, or as a Witness † †D.20. 6. 9. 1. Here he is an Accomplice in the Fraud, and the Circumstances are so gross, that it must be esteemed to be done with his Consent.

Where a special Pledge was not deliver'd to the Creditor, to prevent second Mortgages, and other Frauds and Abuses committed by Debtors, the *Romans* introduced a general Hypotheque of all the Debtor's Goods to answer for any Fraud committed by him, and such general Hypotheque was registred before the President of the Province, or some other proper Magistrate, that all Persons may apply and see in what Condition the Debtor stood: But this way of coming at the Truth of the Debtor's Circumstances having been since either found inconvenient, or (at least) insufficient, this Method is now alter'd in many Countries, and the Goods, if moveable, must either be put into the Creditor's Hands, or else into some publick Lumber-House, and enter'd there in the Debtor's and Creditor's Names, and kept distinct from other Goods. If the Pledge consists in Immoveables, and not deliver'd, then a bare Register before a proper Officer for that purpose is sufficient. By the *English* Law, if the Debtor does not give Notice in Writing of the first Mortgage to the second Mortgagee or Creditor, he shall have

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have no Equity of Redemption against the second Mortgage, but shall lose the whole\*. But this Law has not been found sufficient to hinder fraudulent Mortgages with us; which nothing will prevent but a general Mortgage, or Register, as it is fear'd; or a sanguinary Punishment, which some may think carries too much Cruelty with it. By the Civil Law, if a Man pawns a Thing, which is already impawn'd to another, or which belongs to the State, and the like, he is guilty of the Crime of *Stellionate*, or of a high Crime and Misdemeanor; and may be punish'd arbitrarily for such Fraud, according to the Discretion of the Court: But if he does not know it to belong to another, his Ignorance shall in this Case excuse him from the Guilt and Punishment of this Crime †.

† D. 13. 7.  
16. 1.

Suppose I pawn or mortgage a House to you for a hundred Pounds, and cease to pay Interest for the said Sum of Money for so long a Time, that the Debt comes to more than the House is really worth: *Quære*, Whether I am discharged of the Debt by a Surrender made to you of the said House? And it is held, that I am not: because *Cession* is not a full Satisfaction of the Debt, as before related.

A Creditor may retain a Pledge, not only on the Account of Expences laid out thereon, but likewise on the Score of any future imminent Danger of having such Pledge evicted in his Hands ‡. He that has a Pledge assigned to him by way of satisfying a Judgment, is in the Place of a Purchaser: And, therefore, if such Pledge be evicted against the Debtor, the Party shall not recover it by a *Pignoratitious* Action, but by an Action *ex empto*, founded

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founded upon Equity\*. Nor does a Creditor † D. 13. 7. lose an *Hypothecarious* Action, even though he † D. 24. 1. has a Judgment against his Debtor: For a Creditor does not seem to be satisfy'd in point of his Debt, though he has such a Judgment, unless he receives his Money by Vertue thereof †.

If a Pledge be in the Hands of a Creditor, and it be agreed between him and the Debtor, that the same should not be sold, and the Debtor is in perpetual Delay of paying the Sum lent thereon, the Creditor ought in this Case to give solemn Notice before Witnesses unto the Debtor, that he designs to sell the Pledge at such a Time; and then if the Debtor be guilty of Delay in Payment, it may be sold by the Order of the Judge †: † D. 26. 7. Otherwise this Notice is not precisely requir'd † D. 17. fin. (as some think, tho' without any Foundation of Law.) He, that accepts of a Pledge, is not only obliged to restore the same to the Debtor, but even to the Debtor's Heirs, in case of his Decease, even tho' no mention be made thereof in the Deed of Pledge; for that is understood to be a tacit Agreement between Debtor and Creditor, on Payment of the Debt †; for if the Creditor receives his Debt, † I. 3. 15. 4. he loses the Right of a Pledge. A Debtor does not make the Cause of the Creditor the worse, either by the Sale, Donation, or Bequest of a Pledge; for the Creditor may follow and recover it, to whomsoever it passes\*; \* C. 8. 14. and this he may do by an Action at Law. † 15. And this almost necessarily obliges me to say something of such Actions, as relate to Pledges.

I have before observ'd, that an Action, which lies for the Recovery of a Pledge out of the Hands of the Creditor, is called a

*Pignora-*

*Pignoratitious*, and not an *Hypothecarius* Action: Because it does not lie to recover a Pledge in the Possession of the Debtor, as an *Hypothecarius* Action does, but to repossess a Pawn, which is in the Hands of the Creditor\*. There are some Actions given during the Time that the Contract has a Continuance or Subsistence: And others, after a Dissolution of the Contract. During the Time of its Subsistence we have an Action in *Latin* styled *Serviana*, and *quasi Serviana*; meaning, an *Hypothecarius* Action, whereby the Creditor claims and sues to have the Possession of the Pledge deliver'd to him: And after a Dissolution of the Contract, a *direct Pignoratitious* Action lies for the Debtor; and a contrary *Pignoratitious* Action lies for the Creditor. I shall discourse of these Actions in the two following Paragraphs.

Now a *direct Pignoratitious* Action is a civil Personal † Action, whereby the Debtor who has pawn'd or mortgag'd a Thing, though it be another's Goods ||, on payment of the Debt may implead the Creditor, and compel him to redeliver the Pledge; and likewise oblige him to repair the Damage, if any has happen'd to it through his Fault or Knavery\*: and this is a *dividual*, as an *Hypothecarius* is an *individual* Action. Though a Person cannot rightly have this Action before payment of the Debt; yet if he makes a lawful Tender thereof in Court, he shall have it (as already shewn,) and recover the Thing itself or Damages\*. And if the Creditor should (perchance) injure the Pledge by using it, the Debtor shall also recover Damages †; because he used it contrary to his Trust. And it is the same Thing if he hinders the Debtor from making use of his own Right therein ‡. Not only the Person

\*D. 50.  
16. 238.  
D. 13. 7.  
9. 1.

†C. 8. 28.  
20.  
||D. 13. 7.  
9. 4.

\*D. 13. 7.  
9. 3.  
C. 4. 24. 7.

\*D. 13. 7.  
9. 5.

†D. 13. 7.  
9. fin.

‡D. 13. 7.  
43.

son, with whom the Contract is made, but even he who has a Right of possessing the Pledge, may have this Action against the Creditor\*, and also against his Heir (for it is a transitory Action) but not against any other Possessor of the Thing pledged according to the Civil Law †: But by the Canon Law it lies against a third Possessor. See *Gregory's Decretals* ||, and *Innocentius* thereon. The Suit in this Action is for Restitution of the Thing pledged, together with the Fruits and Profits thereof (which the Creditor does not make his own, unless it be in an *Antichresis*, as aforesaid, but shall be compelled to restore them, if the Debtor pleases, or to convert them into Principal\*; and likewise to make good the Damage done by the Fraud or Negligence of the Creditor unto the thing pledged †. For a Creditor ought not only to avoid Fraud and Deceit, but ought to shew the Care of a prudent Master of a Family, because a Pledge is chiefly given for his Sake and Security ||. But he shall not be liable to an uncontrollable Force, or a fortuitous Case; because no Care or Custody is a sufficient Defence against such Accidents\*. Therefore, the Owner of the Thing pledged must run the Risque of it, unless he can prove that it perish'd thro' the Fault of the Creditor †. But if a Pledge be sold (as it may be on the Debtor's Non-payment of the Money borrow'd thereon) an Action will lie for the Overplus of the Price, which the Creditor shall be obliged to refund ||.

A *contrary Pignoratitious* Action is given to the Creditor against the Debtor\* to indemnify him in Case he should (peradventure) suffer any Damage by the means of such Pledge given †; or if he has been cheated therein,

\*D. 3. 5.  
32.  
†D. 13. 7.  
27.  
||Cap. cum  
constet.

\*D. 13. 7.  
22. 2.  
C. 8. 28. 9.  
†D. 13. 7.  
25.  
C. 4. 24.  
||D. 13. 7.  
25.

\*D. 19. 1.  
31.  
†D. 13. 7.  
30.  
C. 4. 24. 9.  
||D. 13. 7.  
42.

\*D. 13. 7.  
16. 1.  
†D. 13. 7.  
31.

as (for Instance) in receiving Brafs for Gold, &c. or if he has been at any necessary Expence  
 \* D. 13. 7. on the Pledge\* ; or even if he has been at any  
 36. Charge for the Improvement thereof †; or if  
 † D. 13. 7. the Debtor has regain'd the Pledge out of his  
 8. Hands by a false View of being paid his  
 Money ||, and so in the like Cafes\* : Wherein  
 || D. 13. 7. it is reasonable, that the Creditor shou'd be  
 3. indemnify'd †. A *contrary Pignoratitious* Action  
 \* D. 13. 7. founded on Equity is also given to the Cre-  
 22. ditor against the Debtor's Heir, in order to  
 † D. 13. 7. compel him to suffer the Thing pledged to  
 31. continue as a Pledge, in as much as the Heir  
 of the Deceas'd is bound to ratify and make  
 || D. 13. 7. good the Debtor's Act ||.

22. A Creditor, that brings an *Hypothecarious*  
 Action, or an Action on a Mortgage, is bound  
 to prove the Mortgager to be the Proprietor  
 of that Estate, touching which he seeks Re-  
 lief in virtue of such Mortgage: And it is  
 enough for him to prove, that the said Estate  
 was the Estate of the said Mortgager at the  
 Time of the Obligation made. See *Accursus*  
 \* I. 4. 6. 7. on the Institutes\*. But because it is a diffi-  
 cult Matter to prove another to be the true  
 Proprietor of a Thing, or such an Estate; it  
 is therefore adjudg'd sufficient Evidence, if  
 it be proved that the Estate mortgag'd was  
 then in the Mortgager's Possession, and that  
 he received the Profits of it, when the Debt  
 and Mortgage were contracted; because those  
 Things seem to be in a Man's Property, ac-  
 cording to the Gloss †, which he has Pos-  
 † In B. 7. session of, &c. And the Creditor may like-  
 I. 4. 6. wise subjoin, that the Debtor was the repu-  
 ted Proprietor thereof. An Action of Theft  
 accrues to a Creditor on the Account of a Pawn  
 || D. 13. 7. stolen, or privily taken away from him || ;  
 22. for

for by the *Civil Law*, Theft was not a capital  
 Offence or Felony, as with us; but a civil  
 Action might be commenced for Damages\*, \* I. 4. 6.  
 or a criminal Action to punish the Offender by 16. 17. &c.  
 a pecuniary Mulct or Fine to the Exchequer.  
 And thus much of Actions for Pawns and  
 Mortgages; wherein I have been obliged to  
 mention some Things before hinted at, because  
 the Business would otherwise have been ob-  
 scure to the Reader. But I cannot take my  
 Leave of this Treatise on Pledges, without  
 making some few general Remarks on the  
 whole, touching the present State of Pledges  
 in all Trading Countries almost.

For there are several Laws, which were in  
 force among the *Romans*, and well enough  
 adapted then to the State of Things as they  
 stood at that Time, which are since grown ob-  
 solete or abolished by the subsequent municip-  
 al Laws of divers Nations. As for Instance,  
 a Wife can neither borrow Money, nor impawn  
 her Effects, as she might have done by the  
 Roman Law †: For the Husband and the Heir † C. 8. 14.  
 of the Wife is not obliged in *Holland* and *France* 12.  
 to pay such Money borrow'd, unless it be ap-  
 ply'd to the Advantage of her Family. In *Hol-  
 land* and other Countries, by Custom, both the  
 moveable and immoveable Effects of the mar-  
 ry'd Couple, though in the distinct Property  
 of each of them before Marriage, yet by Inter-  
 marriage become common both as to the Pos-  
 session and Property of such Goods without any  
 Delivery, unless they are *Feudal* Estates, which  
 do not come under this Community; or unless  
 this Community of Goods be expressly re-  
 strain'd by some ante-nuptial Covenants, pub-  
 lically taken from the Husband on the score of  
 ill Manners. See *Groenwegen de Ll. abrog.* on the  
 Institutes ||. G 2 Secondly, || I. 2. 8. pr.

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Secondly, The Tools of Husbandry, and other mechanical Implements enumerated in the *Authentick* here cited\*, heretofore were not subject to an Hypotheque: But at this Day, in Aid and Defect of other Goods, it is otherwise, as appears from *Bugnon de Ll. abrog* †. And this is now the common Practice in *Spain*, *Brabant*, and other States, as well as *England*. See *Gutierrez's* practical Questions of the Laws in *Spain*, and *Anselm's Belgick* Code of Laws. Again, it is lawful for the Creditor, or any one that personates him, to purchase the Pledge; because they are now in most Places sold by publick Authority, as before related. By the Usage of *Holland*, and the Laws of other Countries where Pledges are sold by the Judge's Decree, which obtains the Force of a Sentence demanded to Execution, Creditors, how ancient soever, and tho' they be *priviledg'd*, cannot have an Action against the Buyer of a Pledge, or the lawful Possessor thereof by this Means: For if Creditors being admonish'd by a *Programma* or Bill publickly set up in Writing, for their Appearance, when the Pledge is sold *sub Hastâ*, viz. by publick Cant or Auction, do attend and are silent in their Claim of Right, they seem to have remitted their Right to such Pledge †. But if a Creditor be absent, he may be relieved, especially if he was absent on the account of the State, or be a Pupil\*; and so it has been adjudged by the Parliament of *Bordeaux* in *France*. See *Paponius de Arrestis* †.

Thirdly, By the *Roman* Law all the Goods of a Person pledging a particular Effect were put under a general Hypotheque, if the Pledge was not actually deliver'd to the Creditor; and therefore if such Pledge was alienated without the Creditor's Consent, all the Debtor's Goods were

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were liable to answer for it\*. But at this\* Nov. 4. Day Pledges in moveable Goods are actual- C. 2. ly delivered; and, therefore, this *Novel* is entirely antiquated, or repealed by contrary Usage. A general Hypotheque of Goods is not only extended to such as a Man has at present, but even to such as he shall acquire hereafter †: So that under such an Hypo- † C. 8. 17. theque we may reckon all Debtors Bonds, Obligations, and other Specialties in Writing, according to the *Civil* Law: though it be otherwise (I think) according to the *English* Law, because these Things *in Action* are not transferrable. *Sed Quære*. But there was no distinction by the *Roman* Law between a general and a particular Hypotheque in point of Right or Precedency by way of *Privilege*, though there was in point of *Time*: For a general Hypotheque is only preferred in point of *Time* to a particular one, which comes after it in Respect of *Time*, if it be sued. The Prerogative of *Time* in Respect of Pledges (whether *Conventional*, *Pratorian* or *Judicial*) is considered by that Law even to an Hour and a Moment, though we are not so nice here in *England*.

By the Laws and Custom of *Holland* likewise the bare Averment of a Debtor is not sufficient to avoid the Obligation of a Pledge, if the Money for which it is engaged be not actually paid, as by the *Civil* Law †; but a † C. 4. 30. Proof of such Non-Payment ought to be made † within two Years from the Time the Pledge engaged: And if the Debtor be not able to prove his Exception, he may require the Plaintiff, &c. or Creditor, to declare the Truth upon Oath, or to give the Oath back to the Debtor. But this Exception *Pecunia non numerata*

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*rata* is observed in *Friesland* according to the Term of the *Civil Law* †. By the Law of *England* (I think) the Debtor may have Relief in a Court of Equity, though not of Law. A Pleint or Exception *Pecunia non numerata* ought no more to be made in writing at this Day than other Exceptions, in Imitation of which it is drawn, as the Law is practised in *Holland*: But in *England* it must be framed in Writing. Again, by the *Roman Law*, a second or latter Creditor could not sell a Pledge, unless he paid or tendered the Debt unto a former Creditor †. But now he may, by saving the Right of a third Person, because it is sold by the Authority of the Judge; and therefore these Tenders of a Debt are at this Day grown into dif-

|| Autumn. use ||.

in l. 1. C. 8. 18.

The last principal Difference between the *civil Law* and the Practice of Modern Times, which I shall here mention in relation to Pledges, though there be others of less Consequence, is, That in case no one will purchase the same, the Creditor need not now apply himself to the Prince for the Right of Property therein: For if there be no Bidder or Purchaser to be found, the Judge may ascertain the Price thereof to the Creditor, and by paying the just Value of it (as settled by the Court) unto the Debtor, he shall acquire the full Property. See *Faber's Definition on the Justinian Code* \*. What I farther add hereunto, is, that when the same Debtor has several Creditors, each Possessor convened in an *Hypothecarious Action*, may tender his Debt, and by a lawful Tender or Payment of the Thing hypothecated, it may be retained, and bar the Creditor from selling the Pledge:

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Pledge: Provided always that he tenders the whole Debt, because a Tender in Part can be of no Advantage to the Possessor against the Creditor. And this Power of Tendering accrues not only to the Possessor of a Pledge, but to every Creditor of the same Debtor.

And thus I have gone through with the Business of Pledges, as designed, within the compass of a Pamphlet, (though I shall treat more largely of them in my Work at large;) and shewn how a Pawn may be distinguished from other Contracts which arise from a Thing done; and is, therefore, what we call a *real Contract*. For a *Mutuum* and *Commodatum* suppose the Use of the Thing, and are for the Sake of the Receiver only. A *Depositum* is for *Custody*, and for the Advantage of the Person that deposites the Thing. And a Pledge is only for the *Security* of a Debt for the Advantage both of the Creditor and the Debtor, as it serves to establish Credit among a Trading People, and to relieve the Necessities of poor and honest Men upon extraordinary Occasions, who (perhaps) cannot otherwise come at the Necessities of Life.

But if this laudable Method of securing an honest Credit shall be made use of to infamous Purposes; if the Riotous and Profuse, who know no Bounds of the Expences, shall hereby be encouraged to plunge themselves into Debts and difficult Ways of Life: if the cunning and subtle Usurer, imbibing bad Notions of an honest Gain, shall grow more griping and oppressive to the needy Borrower; if a little Sett of Robbers, that are in no wise formidable to the Laws, shall by Pilfering and Breach of Trust be able to

give

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give a Shock unto publick Faith among Men: and lastly, if the Craft and Wickedness of a few Pawn-Brokers shall put the prodigal Squanderer of his own Fortune upon the knavish and little Shifts of taking up Goods on Credit of the fair Shop-Keeper and honest Trader, in order to bring them to the Ware-House of Sin; Then is the vile Mystery of Pawn-Broking (as now carried on) to be entirely discouraged by Law, or to be set upon a better Footing in point of Honesty. But this Matter (with humble Submission) I leave to the Wisdom of a National Council, now framing Enquiries into the dark Recesses and Male-Practices of Pawn-Brokers and their Accomplices in Iniquity, and shall not take upon me to prescribe Rules unto my Superiors, who have nothing more at Heart (I am fully persuaded) in all their Actions, than the Good and Well-fare of all their Fellow-Subjects. And, therefore to the Providence of God, which guideth the Heart of Man in all its good Undertakings, and to the Wisdom of this Grand Assembly, whose Actions are (it is to be hoped) directed and assisted by that Providence, be all the Glory of this Event: For the Punishing of such high Offenders against publick Honesty, is but a Restoration of Publick Justice.

F I N I S.