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 PARLIAMENT, by JOHN AYLIFFE, Doctor of Laws.

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

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TO A

Worthy Member

OF THE

Honourable Houſe of COMMONS.

AT 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-*

pensation 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. Insomuch 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. in 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 shou'd 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.

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.

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 of Interest, before such Interest became due, it lessen'd the Principal* †; *because 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*

* C. 4. 32. 26. 1.

† C. 4. 32. 18.

Stipulation

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 limitted; 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,*

* C. 4 33. 1.

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 Bank-*

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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 would 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.*

* C. 4. 32. 20.

† C. 4. 32. 26.

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*

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* Caius'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 Depracers 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 the*

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, imitatentur. Imitari quàm invidere bonis malebant, & quod utique apud Socios vel hoſtes idoneum videbatur, cum ſummo ſtudio domi exequibantur. *Saluſt.* Hiſt.

(*b*) Καὶ μεταλαμβάνειν ἔθη, καὶ ζηλοῦσαι τὸ βέλτιον. *Polyb.*

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.*

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. 1. 5. 1.

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 *Hypotheque* 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 *Hypotheque* 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 *Pugnus* 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 Cuſtumary 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 *Pignus* anciently did not denote a Thing, but a Perſon being Surety for another, from the *French* Word *Pleiger*, and ſo it is uſed by *Glanvil* ‡. The Reader may make his Inferences from what I have here ſaid.

* C. p. 113.

† *Glanv.* lib. 10. cap. 6.

‡ Lib. 10. c. 5.

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 (*Hypotheque*) 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 ὑποθῆκα, 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 Hypotheque 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 *Hypotheque* 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. 5 †.

† D. 20. 3. r. r.

‡ D. 20. 5. t. t.

|| D. 44. 7. 1. 6. D. 20. 1. 4.

** D. 20. 1. 135.

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 ſatis-
*D. 20. 1. fy'd to the Creditor *; whereas otherwiſe the
11. 1. 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.

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*.

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 Antichreſeos* †. But more of this is in the Sequel of
† D. 20. 1. 11. 1. 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 *Hypotheque*, 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 diſtingniſhed 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* Hypotheque of all a Man's Goods and Eſtate, and a *ſpecial* Hypotheque 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.t.

* D. 13.7. 1.

† D. 10. 1.

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.

*I. 4. 6. 7.

† 29 *Car.* 2. cap. 3.

‡ 27 H. 8. cap. 16.

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 commiſſoriæ*, 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.

|| D. 20. 1. 6. 1.

** C. 8. 35. 3.

A *Prætorian* Pawn is that, which the Judge or *Prætor* 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

o an ancient Edict of the *Prætor* in the *Digests*, does by his first decree put the Plaintiff into the Possession of the Debtor's Goods †, as afore-† C. S. 21. t. 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 *Prætorian* 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 *Judi-* 15. *cial* 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 *Prætorian*, 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 *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 Creditor by a Delivery made; but it is other-
† D. 41. 2. 3. 23. wise 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 acccountable 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 *Hypothecarious* 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

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 preferr'd in reſpect of Right, unleſs there be a priviledged 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, 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 I ſhall hereafter remark.

* D. 20. 1. 9.

† C. 8. 17. 8.

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, which cannot be impawned or mortgaged, either 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. 4. 10. 14.

* D. 20. 1. 1. 2. † D. 20. 1. 1. fin. all thoſe Things, which are extra-commercial *, or which the Law forbids to be alienated †, are not the proper Object of a Gage or Pawn, as 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. 34. Conſent of the Kindred by the Father's Side ‡, 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 || D. 20. 1 1. pr. & 1 of his Maſter ||. But the Power of the Father ſo peculiar to the *Romans*, and the Obligation 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 * D. 49. 15. 15. Redemption by his Labour, or otherwiſe *.

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 Par- * D. 20. 1. 4. ties *; 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. 1. Magiſtrate †, and then it is ſtiled a *Sequeſtration* or *Pretorian* Pledge, of which before. A *voluntary* Pledge was often performed without writing || C. 8. 18. 11. in the Preſence of three honeſt Witneſſes ||, and 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 Implication 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 *. And in the ſame way a Pupil has a *tacit* Hypotheque or Mortgage on the Eſtate and Goods of his Guardian, to anſwer all Accounts and Damages †; and a Wife on the *Allodial*, but not on the *Feudal* Goods of her Husband, which kind of Hypotheque is not only underſtood to be contracted on the Account of her Dowry, according to the Gloſs and Doctors on the Law here cited ||, but likewiſe on the ſcore of Alimony and her *Paraphernalia*, as *Jaſon* obſerves *. 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 not on the Goods of an Under-Tenant ||; becauſe there is no Contract between him and the Proprietor.

* D. 20. 2. 1.
D. 42. 6. 8. 1.
† C. 8. 15. 5.
|| D. 24. 3. 22 8.
* In l. 21. c. 2. 13.
† C. 8. 15. 7.
|| D. 13. 7. 11. 5.

In *England* the Goods upon the Eſtate are liable to a diſtreſs for Arrears of Rent, whether they belong to the Tenant or not, which ſome think to be hard.

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

* C. 8. 15. 1.
† C. 8. 15. 2.

Perſons as have the Direction and Management of their Affairs; or unleſs they have this Privi-
* D. 50. 1. 10. lege from the Grant of the Prince *: Becauſe they are in the Place of private Men †.
† D. 50. 16. 15. There is, moreover, this difference between an *expreſs* and a *tacit* Pledge, namely, that Things *expreſsly* impawned cannot be alienated, unleſs
‖ C. 8. 25. 12. it be with the Incumbrance charged on them ‖: 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. 9. demption paſſes againſt them *: For a *tacit* 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 *ex-*
† C. 8. 17. 3. *preſs* Pawn is not deſtroy'd or taken away by a *tacit* Pledge; ſo on the other hand, neither is
‖ D. 20. 1. 11. c. 5. 14. a *tacit* Pledge by an *expreſs* one ‖. From the Obligation of a Pledge or Pawn,
* D. 20. 1. 17. the Creditor has not only the Power of retaining *, but alſo the Power of alienating and
† D. 20. 5. 1. ſelling the ſame †, if Payment be not made of the principal Debt within a certain Time. But becauſe the ſame Thing is ſometimes plighted 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. In which caſe this general Rule is to be obſerved, viz. That he ſhall be preferr'd in point of
‡ D. 20. 4. Right, unto whom the Pledge was firſt engaged ‡: And it matters not, whether it be a
& 5. 13. C. 8. 18. 2. & 7. *Conventional*, *Prætorian* or *Judicial* Pledge; or 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. 2. 1. That we meet with three sort of Creditors in 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. 9. Such is a Debt for Funeral Charges ‖, which ought to be allow'd according to the Character and Condition of the Person deceased *; because it is an Expence of Necessity, and for the Honour of a Nation. Also the Costs of administring 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

‖ D. 11. 7. 45. * D. 35. 2. 72.

Prefe-

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

The Exchequer has no Privilege of a Mort-
† C. 7. 73. 2. gage among Creditors †, but only claims in point of order, unleſs it be in Goods or an Eſtate acquir'd by the Debtor or Officer of the Ex-
‖ D. 49. 14. 28. chequer after the Obligation was entred into. Where there is no Mortgage, but only a ſimple Debt, the Exchequer is always to be preferred; For that has always a *tacit* Hypo-
* D. 42. 5. 36. 1. theque *, as before hinted. But tho' the Exchequer be preferr'd 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 preferr'd before other Creditors by writing. See *Anſardus de Anſardis* touching
† Diſcurſ. 13. Commerce †. A Pupil, though a latter Creditor, is ſometimes in favour of his Perſon pre-
‖ D. 20. 4. 7. ferr'd unto prior Creditors ‖; and ſo is a Wo-
* Nov. 79. c. 3. man in favour of her Dower *. A Perſon that has lent Money for the Conſervation of the Thing impawned, is alſo deemed a *priviledged* Creditor, and ſhall have the Preference, be-
÷ D. 20. 4. 5. cauſe he has ſaved the whole Pawn †.

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 wou'd 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 Houſhold-ſtuff wearing Apparel, &c. which ought to be entirely

left to the Debtor *. For it is a Loſs to the Publick if any one be rendred uſeleſs by Beggary. Not only Goods in preſent Poſſeſſion, but even Goods in reverſion are comprehended under a general Pawn or Hypotheque; 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 acceſſary to the Obligation. And if ſuch Bargains were allow'd of, it wou'd be eaſy to defraud Creditors by an Agreement of this Nature **.

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

* D. 20. 1. 6. 7. & 8.

† C. 8. 25. 1. 1.

‡ D. 50. 17. 147.

|| C. 8. 17. 9.

** D. 20.

†† D. 20. 1. 13.

||| D. 13. 7. 18. 3.

that

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

The end of a Pawn or Hypotheque is to ſecure 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 Debtors 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. 1. becauſe a Releaſe does not enſue but by the Payment of what is due, *Ceſſion* 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. 2. 1. againſt the Will of the Creditor †. A Debtor 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 Siſtendi*. 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 Creditor may have an *Hypothecarious* Action *, * C. 8. 14. 18. which

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 Authority. For the Action does not ariſe from the Allegation, but from a Right of the Pledge veſted in the Creditor, as the Pawn or Mortgage 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 the Property of a Thing impawn'd with a 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 *Pignoratitious* Action againſt the Debtor for the 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*.

* C. 8. 14. 15.

† D. 12. 1. 28.

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 **. But in ſome Caſes it may lie for the Creditor.

** D. 13. 7. 9. 1.

But an *Hypothecarious* Action is a *real* Action accruing to the Creditor, whereby he may obtain the Right and Poſſeſſion of the Pledge againſt any Poſſeſſor whatſoever: But this as a *real* Action does not give Damage, but only recovers the Thing itſelf. They are both Actions *bonæ fidei*, and not *ſtricti Juris*. But of theſe Actions hereafter.

D. 50. 16. 238. 2.

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 remembred under the Paragraph of Actions.

* D. 13. 7. 24.

† L. 3. 15. 4

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 *Hypothecarious* Action. In an extraneous Possessor this Prescription is extended to thirty Years *; and in the Debtor and his Successors

‡ C. 4. 24. 10. & 12.

|| D. 44. 3. 12.

* C. 7. 39. 4.

fors the Prescription is founded upon a forty Years *Usucapion* *. The Law introduced this Limitation of Time in Abatement of the aforesaid 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.

* C. 7. 39.

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 stiled *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 stiled *useful* and *convenient*, but not *necessary*; and these are such as make the Estate the

† D. 13. 7. 8.

‡ D. 25. 1. 5. 3. & L. 6.

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 *Hypothecarious* 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 nötice 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 reſpect, the Creditor ought to wait two Years before

* D. 20. 5. 5.
+ 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 *Bugnion* de Abrog. on the *Code* *.

† C. 34. 3.

* 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

† C. 8. 28. 18. D. 20. 5. 4.

‡ C. 8. 27. 1.

|| C. ut Sup.

** C. 4. 32. 26.

†† D. 13. 7. 18.

transfer

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 surplusage of the Price thereof
*C. 8. 28. to the Debtor, after his Debt is satisfied *.
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 *ipso Jure* discharged thereby
† C. 8. 28. from the Obligation it lay under †: But if a Pact 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
5. 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
§ Arg. D. 27. 9. 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
** C. 8. 28. 9. may be sold *.

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

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 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 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 Perſon in Poſſeſſion may be convened in a *real* 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.

* C. 8. 28. 8.

† C. 4. 32. 19.

‡ D. 13. 7 20. 2.

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 Debtor cannot purchaſe a Pledge or Pawn, which he has given unto his Creditor, though he may redeem the ſame, becauſe a Man can-

‡ C. 8. 28. 11.

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-ſold, 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 forbad 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

* 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* mortgaged the Uſufruct 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 Uſufructuary of a Pledge, that has only the Uſufruct and not the Property of it, cannot plight or alienate the Property thereof, but can only engage or alienate the Uſufruct †. And thus the Uſufruct of a Thing may be impawned.

* C. 8. 29. 2.

† C. 8. 24. 1.

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 ‡. A Debtor may ſell a Pledge againſt the Will 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 pledged for a Debt, and ſuch Debt be only 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,

‡ C. 8. 28. 12.

ſo that only one Pound remained due: And the *Quære* was, whether I might ſell the Pledge for the Non-Payment of that one
* C. 8. 25. Pound? And it was reſolved, that I might *.
6. 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 pro-
† Arg. D. hibited †.
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
‡ C. 8. 28. Debtors ‡. And hence it ſometimes happen-
10. ed, 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
‖ C. 8. 28. private Authority as formerly ‖, but by a De-
4. cree 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,
** D. 4. 4. as well as againſt other Sales, if they were
t. t. 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

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 *. By the Uſage of *Holland*, *Genoa*, *Florence*, *Venice* and *Rome*, a *conventional* Pledge is ſold with the ſame ſolemnity as a *Pretorian* 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.

* Tom. 2. lib. 3. tit. 1, & 3.

† C. 8. 28. 4.

‡ *Groenv.* 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 ||. 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 **; 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 ††. If a Thing pledged be evicted by a third Perſon in reſpect of the Right of Property, the

|| C. 8. 34. 3.

** C. 8. 34. 3. 1.

†† C. 8. 26. 6.

Creditor who ſold it, is not liable on the ſcore of ſuch Eviction : 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 *Hypothecarious* 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 conve-
* C. 4. 30. ned in a *Pignoratitious* or any other Action *.
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 poſ-

ſeſſion

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* 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.

* D. 46. 3. 26.

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

† C. 8. 14. 17.

me,

me, which we call a *riding* Mortgage, the ſecond Creditor cannot have an *Hypothecarious* 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 his Debt *.

* C. 8. 20.

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 Payment: As when the Creditor makes a ceſſion
‡ D. 20. 6. unto the Debtor of that which is due to him *,
1. 1. (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-
†† D. 20. tor, when he conſents to an Alienation ††,
6. 4. 1. or to a new Obligation of the Pledge ‡‡.
‡‡ 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
‖‖ C. 8. and Knowledge ‖‖; yet if the Creditor has
26. 4. 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*, a Creditor is not underſtood to have conſented 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 †.

* D. 20. 6. 8. 11.

† C. 8. 26. 7.

Again, a Pledge is determined, if the 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 the quality of the Thing is only changed, the Hypotheque or Mortgage ſtill continues ||. A Pledge is alſo extinguiſhed either by the Sentence of the Judge, or by the Oath of 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 either of theſe Things, it is incumbent on the Creditor to prove his Right. *Laſtly*, a Pledge is alſo extinguiſhed by a Change of the Perſon of the Debtor ‡; and likewiſe ſometimes by a change of the Thing itſelf paſſing *in materiatum*, as a golden Cup into an Ingot of Gold: But it is always merged, whenever

‡ D. 13. 7. 21. D. 20. 1. 29. 2.

|| D. 20. 1. 16. 2.

** D. 20. 6. 5. & 13.

‡ D. 20. 6. 1.

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 *Hypothecarious* Action to recover the ſame again. As a Pawn is preſumed to be contracted by a nude Pact, or
*D. 20. 4. without writing *; ſo it may alſo be releaſed in that ſame manner before a competent Number of Witneſſes.

Though the Fruits and Profits, which are received from a Pawn or Mortgage by the Creditor do *ipſo Jure* extenuate the Debt,
†C. 4. 24. 1. 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
‡D. 13. 7. 18. dd. ib. 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. 35. Principal only, and not of Intereſt ‖. This Intereſt among the ancient *Romans* was twelve *per Cent.* which was called *lawful* Intereſt; and for more than this none could ſtipulate, unleſs it was in the Caſe of Maritime Uſury: 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 Highwaymen,

* D. 13. 7. 8.

† C. 4. 24. 1. & 2.

‡ C. 4. 24. 5.

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 Proprietor †. 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 *Hypothecarious* Action, according to *Bartolus* ‡. Thoſe Things, which may be expreſsly ſold and alienated, 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 impawn'd *.

* C. S. 16. 2.

† D. 20. 1. 16. 1.

‡ In l. 1. D. 20. 1.

|| C. 4. 53. l. ult.

* D. 20. 3. l. 2.

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

† D. 20. 1. 16. 1.

or

or impawned ſhall afterwards be changed into another *Species*, as when a Houſe is pulled down, and laid into a Garden, *&c.* an *Hypothecarious* Action accrues in the ſame Manner, as if it had been a Houſe ſtill *: And, therefore, 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.

* D. 20. 1. 16. 2.

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 ‡.

† D. 20. 1. 16. 3.

‡ C. 8. 15.

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 expreſs 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,

* C. 8. 24. 1. & 2.

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

† D. 18. 4. 6.

‡ D. 20. 3. 3.

|| C. 8. 22. 1.

C. 7. 73. 7

* D. 20. 6. 12.

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 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 †: 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.

* D. 20. 6. 8. 15.

† D. 20. 6. 9. 1.

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 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 †.

* 4 & 5 W. & M. cap. 16.

† 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

‡ D. 13. 7. 8. 1.

founded upon Equity *. Nor does a Creditor loſe an *Hypothecarious* Action, even though he 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 ‡: Otherwiſe this Notice is not preciſely requir'd (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, 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 *; and this he may do by an Action at Law. 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

* D. 13. 7. 24. 1.

† D. 20. 1. 13. 4.

‡ D. 26. 7. 17. fin.

|| I. 3. 15. 4.

* C. 8. 14. 15.

Pignoratitious, and not an *Hypothecarious* Action: Becauſe it does not lie to recover a Pledge in the Poſſeſſion of the Debtor, as an *Hypothecarious* 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* ſtiled *Serviana*, and *quaſi Serviana*; meaning, an *Hypothecarious* 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.

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

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 *Hypothecarious* 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

† 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 uncontroulable 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 ||.

* D. 3. 5. 32.
† D. 13. 7. 27.
|| Cap. *cum conſtet.* 25. C. 4. 24. 11.
* D. 13. 7. 22. 2. C. 8. 28. 9.
† D. 13. 7. 25. C. 4. 24. 11.
|| D. 13. 7. 25.
* D. 19. 1. 31.
† D. 13. 7. 30. C. 4. 24. 9.
|| D. 13. 7.

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. 13. 7. 42. 16. 1.
† D. 13. 7.

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

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 Relief 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 *Accurſius*
* I. 4. 6. 7. on the Inſtitutes *. But becauſe it is a difficult 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-
† In B. 7. I. 4. 6. cording to the Gloſs †, which he has Poſſeſſion of, &c. And the Creditor may likewiſe ſubjoin, that the Debtor was the reputed Proprietor thereof. An Action of Theft accrues to a Creditor on the Account of a Pawn
‖ D. 13. 7. 22. ſtolen, or privily taken away from him ‖;

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 *, or a criminal Action to punish the Offender by 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 obscure 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.

* I. 4. 6. 16. 17. &c.

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 obsolete or abolished by the subsequent municipal 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 of the Wife is not obliged in *Holland* and *France* to pay such Money borrow'd, unless it be apply'd to the Advantage of her Family. In *Holland* and other Countries, by Custom, both the moveable and immoveable Effects of the marry'd Couple, though in the distinct Property of each of them before Marriage, yet by Intermarriage become common both as to the Possession 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 restrain'd by some ante-nuptial Covenants, publickly taken from the Husband on the score of ill Manners. See *Groenwegen de Ll. abrog.* on the Institutes ||.

† C. 8. 14. 12.

Secondly, || I. 2. 8. pr.

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 *Bugnion de Ll. abrog* †. And this is now the common Practice in *Spain* *Brabant*, and other States, as well as *England*. See *Gutierez*'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 *Bourdeaux* 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

* C. 8. 17. 8. *Agricultores.*

† L. 1. Sat. 242 L. 2. 31. 58.

‖ C. 8. 26. 6.

* D. 26. 7. 17.

† 18 Art. 6.

were liable to anſwer for it *. But at this Day Pledges in moveable Goods are actually 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 Hypotheque we way 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*, *Prætorian* or *Judicial*) is conſidered by that Law even to an Hour and a Moment, though we are not ſo nice here in *England*.

* Nov. 4. C. 2.

† C. 8. 17. 9.

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 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 *Pecuniæ non numeratæ*

‡ C. 4. 30. 13.

ratæ 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 Plaint or Exception *Pecuniæ non numeratæ* 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 diſuſe ||.

† *Groenv.* de ll. Ab. C. 4. 30.

‡ C. 8. 18. 8.

|| Autumn. 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:

* C. 8. Tit. 22. defin. 1.

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 Rictous 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

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.