

to take Care of it with all the Exactness that is usually observed by the most diligent Persons l. 18. pr. ff. Commod. But in a Precarious Loan, he who possesses precariously the Thing belonging to another, is accountable only for what may happen thro' his Deceit, or gross Fault which comes near to Fraud, and not for slender Faults l. 2. p. 3. ff. de precen. whose Condition as to the Care of the Thing lent is thus distinguished, perhaps because he to whom a Thing is lent for a certain Time ought to be more careful in preserving the Thing than he to whom it is lent indefinitely, who knows not how long the Lender may be pleased to let him have the Use of it.

The Precarium is often mentioned in the Civil Law, we make little Use of the Word Precarious except in Immovables, as in a Sale or other Alienation when he who alienates an Estate acknowledges, that if he remains in Possession of it it shall only be precariously.

### Sect. 3. of Depositum.

A Depositum in general, is the committing of any Thing to the Custody of another in Trust; called in the Law of England Bailment, from the French Bailleur & bailler. Depositum (to which we have no corresponding Term in our Law) is so called according to some quasi deorsum position, or *deu positum*; or rather a *ponendo*, where the *depositione de auct positum*, signifies an entire Trust of the Custody of a Thing l. 1. p. ff. de depositi. For he who Deposits a Thing conveys a Confidence in the Depository, or him who takes the Charge of it, that he will honestly keep and restore it to him at his Desire.

Depositum is taken in different Senses by the Authors of the Civil Law: Sometimes for the Thing deposited d. l. 1. p. Sometimes for the Contract made about it §. 2. ff. de J. N. G. & C. l. 7. §. 1. ff. de pactis. In which last and more usual Sense it is threefold, viz. Depositum in Specie or proprietas, or called, *Depositum miserabile*, and *Sequestration*.

1.

#### Of Depositum properly so called.

Depositum properly so called, is a Contract by which one Person gives to another something to keep without Reward, on Condition, that he restore it whenever demanded by him who deposited the same. He who deposits is termed the Depositor, and the other the Depository. This Contract is very necessary, because it happens often that the Owners or Possessors of Things

Things are obliged to intrust them to the keeping of others, either when they themselves happen to be in such Circumstances that they cannot keep them themselves, or when the Things would not be safe in their Custody or for other Causes. And as it is mostly made in private without Writing, and the Safety of the Thing deposited depends on the Honesty of the Person into whose Hands it is put, There is no Engagement which requires more particular Fidelity than that of a Depository.

If the Depository suffer the Thing deposited to be lost, he is liable to answer thro' his Fraud or gross Fault, or inexcusable Negligence, or neglect taking the same Care of it as of his own; Conscience or failing to use such Precautions as no other Person would admit, such as keeping Money under Lock and Key l. 223. ff. de verb. signifi. he is bound to make it good. But if such Loss or Damage happen by Accident, or thro' some small Neglect, or for Want of that Care which another prudent Man probably would have used; the Depository is not accountable for it l. 1. §. 1. ff. de depositi l. 1. §. 5. ff. de obligat. act. §. 3. ff. de re contrah. And the Depositor ought to blame himself for being exposed to such a Depository, who proves it so circumstanced as he could have wished, that one who had Money deposited in his Hand, having sent his whole Means to Dunee for Safety in the Time of the War betwixt Scotland and England thro' Cromwells Disruption where all was lost at the storming of that Town, was free from Restitution of the deposited Sum, altho' the Owner had verbatim demanded his Money from the Depository at Dunee before the Blunder of Dunee; and the Witnesses did not depone particularly that such Money was lost there. In Regard the Depository declared, when so required, that the Money was sent with his own to Dunee where the Owner might have it by sending for it same, and gave his Oath in Supplement that it was lost there. For Money being a Fungible it was *res ex natura rei*, to prove that such individual Money was lost in Dunee, and it behoved to be presumed so from the Owners losing all his Means which were considerable in that Summity, and his being poor ever since 19 July 1662 *Fides contra factum*. Again a Horse sent to graze in a Park being lost, the Keeper was found free, because there was a Placae at the Time affixed upon the Entry of the Park, notifying, that he would not answer for the Loss of any Horses put in there: And the Horse a missing being put in by the Owner without any express Paction, he was understood to have acquiesced to the Terms published in the Placae 16 Novemb. 1667 *Whitehead contra Breinton*. But a Depository is liable to any accidental Harm happening to the Thing deposited thro' his gross Fault: Thus a Stable being put to