

thing being first acknowledged or proved by the Creditor's Oath 22 June 1624  
 Lermonth contra Alexander 5 March 1624 Kay contra Wright Stair Jrid. The  
 tacit and presumed Terms of depositing are, ~~that~~ that the Depository shall  
 restore the Thing to the Depositor if he in his Lifetime require it, and if not to  
 deliver it after his Death to the Person in whose Favour it is conceived 25 January  
 1677 Ker contra Kers.

From this Contract there ariseth a twofold Action, viz. Actio depositi directa  
 et contraria.

Actio depositi directa (called in the English Law an Action of Detinue) is a  
 personal Action competent to him who deposited a Thing, against the Depository  
 thro' his Fraud or gross Negligence. This Action lies to him who deposited, tho'  
 he not the true Proprietor, but a Thief or a Robber, if the Depository do not know  
 who is the real Proprietor l. 5. §. 3. l. 5. ff. depositi. Where the Proprietor appears  
 and pleads his Interest, he ought to be preferred: Honesty obliges the Depository  
 to refuse to give such a stolen Thing deposited to the Thief who intrusted it  
 with him, and to restore it to the Person who appears to be the true Owner  
 l. 36. §. 5. ff. eod. Because Honesty necessary in Contracts is not confined to what  
 concerns the Contracters themselves, but also extended to all those who may have  
 Interest in what is transacted betwixt them; If the Thing deposited belong to some  
 real Persons and be indivisible, they must all concur in the Action and meet  
 together to receive it. But if it can be divided, each one may receive his Part of  
 the Receipt is not obliged to divide the same in common among the rest l. 12  
 C. 200. For jura subveniunt vigilantibus, every one ought to have the Benefit of  
 his Care and Diligence. This Action is competent against the Depository, tho' two  
 or more Persons are become Depositors of one and the same Thing, each of the  
 are bound for Restitution of the whole. l. 5. §. 43. ff. depositi. Stair Lib. 5. Tit. 1.  
 eod. Because the Depositum is not restored, unless it be restored intire l. 22. ff.  
 eod. The Peril of the Thing deposited lies upon the Depository, if he was in mora  
 or delayed to restore it after Sentence l. 52. §. 3. ff. eod. and the Owner had an of-  
 ficial Occasion to put it off his Hand before it perish Stair Jrid. §. 2. Ver. Hene  
 it follows &c.

Actio depositi contraria, <sup>or this cross Action,</sup> is that which lies in Favour of the Depository,  
 against him who deposited, for recovering any Damage he hath sustained by  
 keeping the Thing deposited, or the necessary Expence therein bestowed l. 5. pr.  
 l. 52. pr. l. 23. ff. de pos. l. 6. §. 5. ff. de furt. Because a gratuitous Office ought  
 to be prejudicial to no Man. The Purposer of this Action must prove his Likel  
 no Breach of Faith or Trust in Question; but only Reparation of Damage and In-  
 terest.

2.

Depositum miserabile.

Depositum miserabile, called also a necessary Depositum, is where Men  
 are

are under a Necessity, in the Case of War, falling of Houses, or Shipwreck,  
 Incurtion of Robbers, a Tumult or any other sudden or accidental Occasion,  
 to put what they can save of their Goods into the Hands of the first Persons  
 they meet with, whether it be Neighbours or others. Such a Depository, by the  
 Civil Law, pays Double, if he fail to restore the Thing deposited, or must have  
 in his Trust l. 5. §. 5. l. 50. ff. depositi. This is called Depositum miserabile,  
 because he who deposits is miserably afflicted for Want of Time to consider  
 of a fit Place and proper Depository, and therefore an Object of Pity and  
 Compassion. But this Law for a Remedy of the Double, against Unfaith-  
 fulness in such a deplorable Case, however laudable and necessary, has not as  
 yet been naturalized in Scotland Stair Lib. 5. Tit. 5. §. 9.

3.

### Of Sequestration.

Sequestration is the depositing a Thing whereof the Property  
 or Possession is disputed by two or more pretensions to it, in the Hands of a  
 third Person to keep till the Controversy be decided, and to restore it to him  
 who shall be acknowledged or declared the true Owner. The Person who doth  
 sequestrate is called a Sequestrator, and he in whose Hands the Sequestration is  
 made is termed Sequester, as some say a sequestrator, because he doth as it were di-  
 vide and separate the contending Parties, or according to others, a sequestrator,  
 either because they do follow his Faith, or for that he goes into their Inclinations.

Sequestration is either Voluntary or Necessary. Voluntary Sequestration  
 is that which is made by the Agreement or Consent of Parties. Thus Factors  
 for managing Bankrupt Estates are sometimes chosen privately by the Credi-  
 tors themselves, for avoiding unnecessary Charges, and accountable to such Credi-  
 tors in the Terms of the Faculty.

Necessary Sequestration (which is directed by Authority, and therefore called  
 a judicial Sequestration) is a committing the Custody and Management of  
 a Thing contravened in Judgement by several Pretenders, to some indifferent  
 Person, by an Act and Commission of the Lords of Session, to be made forth-  
 coming to those found to have best Right. The Lords do make a Sequestra-  
 tion of this Kind in Virtue of their pretorial Power, and officium mobile,  
 but only upon necessary and weighty Considerations. For that it is a Sort of  
 Execution with which a Suit regularly ought not to begin cum oportet  
 ante delictorem convinci, et tunc ad solutionem compelli l. 5. C. de exec.  
 rei jud. l. un. C. de prohib. Sequest. Such a Trustee, called curator bonis l. 6.  
 §. ult. ff. de Tut. l. 22. §. 5. ff. de reb. put. jud. po. §. A Factor upon an Es-  
 tate, is sometimes named by the Kings Gift. So curator bonis to manage  
 an Estate as a Tutor, after the Proprietors Death, till a controverted  
 Right