

No 2.  
the payment,  
by a bond and  
sentence of a  
court; but  
the bond was  
obtained by  
improper  
means, and  
the court was  
not duly con-  
stituted.

books of Edinburgh. Jack gave in a bill to the Parliament, which was remitted to the Session, desiring repetition of the sum. It was *alleged*, There could be no *indictio indebiti*, where there was *obligatio naturalis* or *civilis* preceding: *Ita est*, there was not only a civil obligation by the sentence recovered, but by the new bond granted to the assignee, who was not obliged to know, how, or what way the sentence was obtained: And Jack having transacted therefor, he could not now be heard to quarrel the transaction against the assignee, or to crave repetition. It was *answered*, That the officers' sentence was most unjust, both in the matter and in the manner, they having no civil jurisdiction: And the same defender was assistant to the cedent in recovering of the sentence, as he will not deny. Likeas, the pursuer was forced to grant the new bond to him as assignee, and pay the new bond to free himself of prison; there being no civil judicatory, where he could have any remedy; the English Judges for administration of justice not being then established, who sat not till June 1652. And though it had been sitting, it could not have been expected that Jack could have helped himself, by any course they would have taken, for annulling the sentence of the English officers. Likeas, by an act of the late Parliament, all sentences pronounced by the Englishes, since their in-coming, are appointed to be reviewed.

THE LORDS repelled the allegiance, and sustained repetition.

*In præsentia.*  
*Gilmour, No 4. p. 4.*

No 3.  
A person who  
has received  
payment of  
what is due  
to him, is not  
bound to re-  
fund, altho'  
received from  
another per-  
son than the  
proper debtor.  
But an execu-  
tor-creditor  
confirmed,  
having ob-  
tained pay-  
ment from the  
debtor's heir,  
was obliged  
to refund, it  
having been  
discovered  
that the debt  
had been paid  
to the original  
creditor.  
Here neither  
was the one  
party creditor

1673. January 10.

RAMSAY against ROBERTSON.

THERE being a sum of 900 merks due by Mr Simon Ramsay to Sir John Prestoun, he obtained decret against John Ramsay as heir to his father for payment, and did obtain payment, and granted a discharge; but John Ramsay having died out of the country, Sir James Ramsay who succeeded to him, did not for a long time fall upon the discharge, but after Sir John Prestoun's death, Robertson was confirmed executor-creditor to him, and did confirm this sum due by the decret against John Ramsay, and thereupon a pursuit was raised against Sir James Ramsay; but before sentence Sir James paid the whole sum; and now having the discharge, pursues Robertson the executor-creditor for repetition; and likewise the heir of Prestoun of Airdrie for repetition of the sum, as *indebite solutum*; and insisted, *primo loco*, against Robertson; who alleged absolutor, because *indebite solutum* takes only place where neither the payer was debtor, nor the receiver was creditor; but if the receiver got no more than his own, albeit it was not from the true debtor, there is no competent *condictio indebiti*, as is clear, *l. 44. ff. de condictione indebiti, repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est*, and *l. 5. cod. de repetitione hæreditatis*: And it is beyond question, that *l. 2. cod. de condictione in-*

*debiti*, that *indebitum per errorem solutum ex delegatione repetitur adversus delegantem, sed non adversus eum, cui fit solutio*; which is most consonant to our custom, whereby if a creditor get payment of his true debt against the debtor of his debtor, he is for ever secured; and albeit the payer may have repetition against his own creditor, yet never against a third party who receives no more than his own, which is a common and public interest in favours of creditors; and so if a debtor draw a precept upon any person in favours of his creditor, if that person pay, he can never recover from the creditor whom he paid, albeit by the clearest evidence he should show he paid him by error, not being really debtor, but can only repeat against him who drew the precept: Or if a creditor arrest, and obtain sentence for making furthcoming, and obtain payment, albeit thereafter it should be found that the payer was not truly debtor, yet the arrester is secure; and it must also be so in the case of an assignee, taking assignation of an anterior debt, and recovering payment thereby; much more in the case of an executor-creditor, who cannot arrest, and hath no other way to recover his debt, but by confirmation; so that Robertson, being executor-creditor, and getting payment from Ramsay of his just debt, who accepted from him an assignation, with warrandice *from his own deed only*, he is not liable to repeat, as *indebite solutum*, but Prestoun only, to whose behoof the payment was made, and who thereupon was liberate. *2do*, It is offered to be proven by the pursuer's oath, that he did not make payment to the executor, but that Prestoun confirmed Robertson executor-creditor, that he might satisfy his debt without his knowledge; and the pursuer did transact with Prestoun, and paid to Prestoun the money, which Prestoun paid to Robertson, and got his discharge, with an assignation blank in the name by Robertson, which assignation he filled up in the name of Ramsay. *3tio*, This being a transaction *lite pendente*, cannot be recalled upon pretence of the finding of any new instrument, which is an uncontroverted principle in law, without which no plea could be ended, and the payment made *pendente processu*, which hindered the decret, must be as effectual, as if payment had been recovered upon a decret. It was *answered* for the pursuer, That the defences ought to be repelled, and his pursuit is very ill founded *ex condictione indebiti*; for it imports not whether the party to whom he paid was creditor to another, but whether the pursuer paid to him *debite* or not; so if the pursuer was not debtor, it is *indebite solutum*; and albeit if the pursuer had paid upon a decret *in foro*, he might be excluded upon any new writ as *noviter veniens ad notitiam*; it being *in arbitrio judicis* to admit or reject such writs; which though they ordinarily admit against the principal party, yet it might be more doubtful, whether they would admit it to reduce a decret to make a creditor repeat; or if there had been a transaction diminishing a part of the right, for shunning the uncertainty of a plea; but there is neither decret nor transaction, although *pendente processu*: And albeit in the case of a precept or delegation, there could be no repetition from the creditor, yet that cannot be drawn into the case of an executor-creditor, or to the case of an assignee,

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nor the other debtor; for, though the executor-creditor was creditor in the debt upon which his confirmation proceeded, he was not creditor in the debt in question, which was extinguished by payment before his confirmation; as to which he could be in no better case than his own debtor.

No 3. who both to take right to, and found upon their author's right, and therefore must run the hazard thereof, if it be reduced, and so must repeat; but he who gets payment without taking assignation or any right, *non utitur jure auctoris, sed suo*, and so can never repeat, which is all that the law saith, viz. if any man pay another man's debt in name of that other, whereby he liberates him, albeit the payer was not débtor, he cannot recover it; and so in the case of *delegation*; but by that same title it is clear, that he who supposing himself heir, paid as heir, if he were not found to be heir, he might repeat likewise.

THE LORDS found that member of the defence relevant, that payment was made by the pursuer, not to the executor-creditor, but to Prestoun, or some having warrant from him, and that he paid to the executor-creditor, and got an assignation from him blank in the name, which is filled up by him or the pursuer in his name; and the pursuer having upon his oath denied the same, the LORDS proceeded to determine the remaining points, and found there was here no transaction nor abatement, and that seeing the executor-creditor had gotten payment without sentence, he was liable to repeat, the pursuer always assigning to him this action against Prestoun, that he might recover payment of his first debt which he had discharged; but the LORDS refused to decern annual-rent, or any thing in name of expense, seeing the double payment was not taken by that same person *mala fide*, but by an executor-creditor *bona fide*,

*Fol. Dic. v. 1. p. 186. Stair, v. 2. p. 146.*

\* \* \* Gosford reports the same case.

ROBERTSON being confirmed executor-creditor to Sir John Prestoun of Airdrie, and having given up a debt due by Sir James Ramsay's brother, to whom Sir James was heir, did intent action against him for payment of the debt, whereof he made payment to, and recovered a discharge from Robertson; but thereafter, finding that the debt was paid to Sir John Prestoun, who had granted a discharge thereof in his own time, he did pursue Robertson for repayment, as being *indebite solutum*. It was *alleged* for the defender, That he ought to be assoilzied, because his name was only borrowed by James Prestoun who had caused confirm him executor-creditor to his father; and thereafter having obtained a discharge from him, did transact with the pursuer, and did receive payment of the debt, so that he could not be liable to re-fund the money *condictione indebiti*, not having received the same as having a title established in his person. It was *replied*, That Robertson having granted the discharge upon payment, he was liable *condictione indebiti* to the pursuer, who paid the same; and, as to any trust or delivery of the discharge to James Prestoun, that he might receive the money, it did not concern the pursuer, but Robertson might recover the same of James Prestoun. THE LORDS having examined the pursuer upon oath, who declared, that he had only transacted with Robertson and

paid him the money, did sustain the pursuit against him for repetition; but ordained the pursuer to assign to him his right, that he might recover the same off James Prestoun; but if his legal title of executor-creditor had been good, or if he had been a true creditor, they did not decide, albeit it be most probable, that where assignees or arresters, or comprisers recover payment upon their titles and diligence, of those who only represent the debtors, or know nothing of the discharges of the debt until thereafter they recover the same, that in law they have *condictio indebiti*, which would not be allowed to the debtor himself, who had formerly paid the debt; for, in that case, they would only have action against the creditor himself, who had received the first payment.

*Fol. Dic. v. 1. p. 186. Gosford, MS. p. 297.*

No 3.

1681. February 23. The E. of MAR against The E. of CALLANDER.

THE Earl of Mar pursues the Earl of Callander to repeat a part of the sum of 6000 merks paid by him and his chamberlains to Callander, more than was due, in so far as he having been due to the Laird of Gloret by bond 6000 merks of principal, one of his chamberlains had paid 1000 merks thereof to Gloret, and a subsequent chamberlain, not knowing of the former, paid to Callander, as assignee by Gloret, the whole sum, principal and annual, so that the 1000 merks was twice paid, and was *indebite solutum* to Callander, it having been paid before to his cedent. It was answered for Callander, That Gloret being debtor to him in the like sum, he had, for his satisfaction, assigned him his bond, so that he having received no more from Mar, than what was due to him by Gloret, he was not obliged to repeat what he had received, in solution of a just debt, for 'repetitio nulla est ab eo, qui suum recepit, tametst ab alio quam vero debitore solutum est; L. 44. ff. de conditione indebiti; and L. 2. Cod eodem, soluti ex delegatione repetitio nulla est. contra delegatum, sed contra delegantem, licet sit ex errore solutum,' so that Callander's assignation from Gloret to Mar's bond, in satisfaction of a debt due by Gloret, is a delegation of Mar, Gloret's debtor, in place of Gloret himself, and therefore there can be no repetition of what was paid by Mar through error against Callander, though it may justly be against Gloret; seeing Callander has received nothing but the payment of his true debt; which is according to our ordinary custom, that if any make payment of another man's debt, upon that debtor's precept, he can never repeat it, upon pretence that it was *indebite solutum*, and that he paid by error, when he was not due; and an assignation being but a procuratory *in rem suam* is in the like case. It was answered, That as the Earl of Mar might have excluded Callander before he got payment, as to this 1000 merks paid to his cedent before his assignation, so having paid what was not due, he may justly repeat it, as it was found in the case of

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A creditor having assigned the whole sum, after getting payment of a part, and the assignee getting payment of the whole, it was found relevant against a *condictio indebiti*, pursued against him, that his assignation was in satisfaction of a debt due to him by the cedent, equivalent to the sum assigned; so that he got no more from the debtor what was due to him by the cedent.