

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

No 4.

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.

No 5. Sir James Ramsay against Robertson, No 3. p. 2924. where the LORDS 'decerned Robertson to repeat what he, as executor-creditor, had recovered 'from Ramsay, upon finding of a discharge of the debt;' and here the payment was not made by the Earl or by his warrant, but by the error of his chamberlains. It was *replied*, That what was paid by Ramsay to Robertson was not voluntary, but by a transaction upon a depending process; but voluntary payment, of what was due to a creditor, though the payer was not debtor, can never be repeated, whether it were paid by the Earl, or by his chamberlains, or any other.

THE LORDS found Callander obliged to repeat, if he had acquired the assignation, for payment of a sum whereby he was in the same case as his cedent, and was not a creditor as to what was paid before his assignation, but found it relevant, 'That his assignation was in satisfaction of a debt due to him by Gloret before the assignation, equivalent to the sum assigned;' so that he got no more from Mar and his chamberlains, but what was to him by Gloret.

*Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 866.*

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1684. *March.* ANDREW KER in Chatto, *against* WALTER RUTHERFORD.

No 6.

A DEBTOR, who had paid to the obtainer of a decret of furthcoming, and got his discharge, being thereafter decerned at the instance of an assignee, whose assignation had been intimated before the arrestment, pursued the arrester upon the warrandice in his discharge.

*Alleged* for the defender; He could not be liable, seeing *sum receptit*, and the pursuer had not obtruded, as he ought, the anterior intimation of the assignation, during the process of furthcoming; which, if he had done, the arrester would have secured himself against the other estate of the common debtor, who is now become bankrupt.

THE LORDS sustained the allegiance, and assoilzied.

*Fol. Dic. v. 1. p. 186. Harcarse, (ARRESTMENT.) No 81. p. 15.*

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1713. *July 12.* CREDITORS of MUIRHEAD *against* HAMILTON.

No 7.

A SCOTSMAN, who died a soldier in Flanders, having left a sum of money in the hands of his Colonel, which a creditor of his uplifted from the Colonel, by virtue of an administration in the Prerogative Court of Canterbury; the LORDS found it relevant to assoilzie the creditor from repeating the money from executors *qua* creditors, confirmed before the Commissaries of Edinburgh, that he had got *bona fide* payment before any process or confirmation in Scotland.

*Fol. Dic. v. 1. p. 187.*

\* \* \* See The particulars of this case No 26. p. 1796.