

CONDICTIO INDEBITI.

1629. *January 13.*FINLAYSON *against* KINLOCH.

KINLOCH being made assignee by Robert Finlayson, to the mails of a house pertaining to him, and the assignation being intimate to the possessor, and another creditor to Robert Finlayson having arrested the said mails, after the said intimation, for satisfying a preceding debt, decerned against the said Robert, and upon the arrestment recovering sentence, and upon the sentence going to point, for eschewing thereof the possessor having payed; the LORDS, notwithstanding of the said sentence and payment, found that the assignee, who first intimate before the arrestment, ought to be preferred; albeit the arrester *alleged*, that nothing had followed upon the said intimation, nor no diligence done thereupon by the assignee, while this present pursuit moved by him against the said possessor, which was not intended until after his sentence and payment, so that his prior diligence *qui sibi vigilavit*, was *alleged*, ought to be preferred to the assignee, who did nothing by the space of a year, or little less, after his intimation; even as when many arrestments are made by sundry creditors, not the first arrester, but the first doer of diligence upon his arrestment, is to be preferred; so not the first intimation, which is of no greater force than an arrestment, but the diligence ought to be repelled; notwithstanding whereof the first intimation was preferred.

*Act. Lermonth.**Alt. Mowat.**Clerk, Scot.**Fol. Dic. v. 1. p. 186. Durie, p. 413.*1661. *July.*JACK *against* FIDDES.

THERE being a decret recovered by another Fiddes against Jack, before the English officers at Leith, in the beginning of the year 1652, for a sum of money; whereupon Jack being incarcerate, he was forced to give a bond to this defender, who was assignee constitute by this Fiddes, and to give his brother cautioner therein. Upon which new bond Jack was also charged, and an act of warding followed thereupon; the bond being registrate in the town court-

16 Z 2

No 1.

Action of repetition found competent to an assignee against an arrester, whose arrestment was posterior to the intimation of the assignation, but who had obtained payment on a decree of forthcoming.

No 2.

Condictio indebiti was sustained, although it was pleaded, that there existed, an *obligatio naturalis vel civilis*, prior to

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-*