lic station for the good of the country, it ought to be made and declared one now.

After Mr. Robert Weimys had got this stroke, Sir George M'Keinzie came in with two wild notions, and whereof he was so pleased and confident, that he declared they had been blind or mad who had not discovered them till now. The first was, that the forty years' prescription of heritable rights and servitudes not being known nor received in Scotland till the Parliament 1617, Fordell behoved to begin his computation from that year, and prove forty years' peaceable possession after the same; which he neither had done nor could do, seeing interruptions by casting off of loads was proven in 1652, so that he had only proven thirty-five years' possession. But he never considered that the said 12th Act of Parliament 1617, made the years run before the date of the act, profitable for the prescription, unless within thirteen years after the date of it the parties concerned should use due interruptions; and which Mr. Robert cannot say was done. Likeas, in 1623, *G. Neilsone of Kirkcaffy* pursued the *Sheriff of Galloway* (see it in Dury, 27th June 1623,) for the servitude of a way through his land, and which he founded on immemorial possession of forty years, which years were almost all run before the said act of prescription, and yet the Lords sustained the declarator; which seemed more strange, seeing the thirteen years which were allowed to interrupt were not here expired; unless you will say the same was founded upon the 28th act James III, in 1496, ordaining all writs to prescribe not being followed within forty years; but I think that statute no good ground whereon to have founded that action.

His second fancy and chimera was, that Fordell had not proven his libel; in so far as he offered to prove immemorial possession, and had only proven forty years; whereas there was a great difference betwixt *possessio quadraginta annorum et possessio cujus initii memoria non extat*, this being much longer. I find, indeed the civilians put some difference; see Cæpolla, *tractatu de servitutibus, cap.* 19. *Quomodo constituatur servitus.* And our Craig, p. 68, speaking *de feudo burgagio apud Anglos*, calls immemorial possession *sexaginta annorum.* But as to the point of prescriptions, I observe our law makes no difference at all. Yet he so valued himself upon thir light imaginations, that he would have wagered upon their solidity against any, till he saw the Lords reject them with pity and disdain. Yet in the foresaid decision out of Dury, between Kirkcaffie and the Sheriff of Galloway, the Lords seem to require more than forty years' possession only, for constituting of a servitude of a gait to the kirk, and to call immemorial some different thing.

Advocates' MS. No. 384, *folio* 163.

1673. *February.* SIR JAMES RAMSAY of Whithill, *against* JO. ROBERTSONE.

IN February 1673, the following case fell to be debated and decided, remarkable for its singularity and rarity. Jo. Ramsay having been debtor to the Laird of Airdrie Preston, in 900 merks, he paid the same, and obtains his discharge. Both parties deceasing, one Jo. Robertsone in Craill confirms himself executor-creditor to Airdrie, who was his debtor in the like sum, and presses Sir Ja. Ram-

say of Whythill, as heir to his brother Jo., to pay the said sum to him; who (his brother's papers being then in Holland, and knowing nothing it was paid and discharged already,) accordingly pays it, and takes an assignation thereto: so that the double payment is instructed by writ. At last Sir Ja. discovering his error, did intent an action for condiction and repetition of the said money, both against Robertsone and his cautioner in the testament, and against the representatives of Airdrie, as *indebite solutum* by him.

It was ALLEGED for Robertsone, he could never be liable to refund that money, because *condictio indebiti* was only allowed against him who had got payment where nothing was due to him; but so it is, he was a true and lawful creditor, *et qui suum tantum recepit;* and whoever paid him, *non refert*, seeing he is not in *lucro captando:* and it is certain, that a creditor getting payment even from him who was not his debtor *non tenetur hac condictione indebiti.*

ANSWERED,—It is confessed, that a creditor getting payment from that same person who formerly had paid him that same very sum *non tenetur* to restore it, because it is the payer's fault to forget what he had formerly done, and so ensnare the creditor; as also, for the same reason, a creditor will not be liable if he follow the faith of the payer, and become creditor of new to that person to whom the payment is first made in contemplation of that right which was promised by him who paid it: but here Sir Ja., the second payer, was in no fault, but in invincible ignorance; and it is against reason and the principles of law, *bona fides non patitur ut bis idem exigatur*, that he should not have repayment of his own. *L.* 57 *D. de R. juris, l.* 54 *et* 120 *D. eodem; l.* 59, 62, *et* 153 *D. de Regulis Juris. Quod ipsis qui contraxerunt obstat, et successoribus eorum obstabit. Nemo melioris conditionis esse debet quam author. 2do,* The payment was made to Robertsone mainly as executor-creditor, and which is a successorial and representative title: and so being *hæres quoad* that particular, he can have no other right to retain it than what the defunct had, (this being the definition of *hæreditas,* that it is *successio in universum jus quod habuit defunctus tempore mortis;* neither can it be otherwise transmitted than it was in the defunct's person;) but here the defunct had no title at all, his right being utterly extinguished by payment.

REPLIED,—That double payment made by one and the self same man *nulla causa parit condictionem;* and if Robertsone had obtained a sentence against Sir Ja. he could never have been now questioned; and he would have got a sentence, had not he voluntarily paid him; and in effect what was paid was given by way of transaction, which stops all condiction, *L.* 65, *par.* 1*mo, D. de condictione indebiti.*

DUPLIED,—That the law is better grounded upon natural equity than to deny condiction to any who by omission hath paid one sum twice. *2do,* Even where a sum is paid in obedience to a sentence, if he be the heir of the first payer it cannot prejudge him of repetition, nor alter the nature of the thing, to make it *de indebito debitum;* but, on the contrary, the payer should rather have condiction, because his second payment was forced and not voluntary. And that a sentence hinders not *condictio indebiti,* was decided in the case *Pitfoddells* contra *Waterton and other creditors of Jo. Donaldsone;* which see beside me, at the 12th of January 1664, in my register of decreets, it is No. 68. But, whatever the Lords found there, it is contrary to the common law, which hath veneration for a sentence. That *habetur pro veritate,* and at least cannot be refused the force of a na-

tural obligation, which where it exists *impedit hanc condictionem ;* and having a power of coaction, cannot but make the thing due: *L.* 1 *C. de condictione indebiti ; l.* 6, *p. ult. D. de re judicata ; l.* 8 *C. de rebus creditis ; l.* 108 *D. de v. significatione.* (*Vide infra, No.* 422, [*Pallat, Stewart, &c. November* 1673;] *and* 508, § 4, [*November* 1676;] *and in June* 1677, *No.* 585.

But we need not jangle any more about this, seeing there is an express text that voids our controversy, viz. *L.* 19, *p.* 1, joined *cum l.* 65, *par. ult. D. d. t. de C. I.* where repetition is competent, albeit the receiver got nothing but what was owing him, if so be it was paid to him upon mistake by one who was not owing it; only there is distinction made by the doctors whether the payer pays it in his own name, thinking himself debtor in it, or in name of another, to wit, of the true debtor; and in the first case allow condiction, and in the last not, *ob l.* 44 *D. hoc t. de C. I.* See the *DD.* upon *Condictio indebiti ;* as also Harprecht, *ad* p. 1. *Institut. quibus modis re contrahitur obligatio. Vide l.* 53 *D. de R. juris.*

But whatever be in this, the Lords found the pursuer's action just and well founded in law; and therefore decerned the defender Robertsone, though executor-creditor, *condictione indebiti,* to refund what he had so got.

I believe it would also carry all the intermediate annualrents.

Advocates' MS. No. 385, *folio* 165.

1673. *February.*

IN the same month of February 1673, another extraordinary practique was passed, viz. One who deforced and impeded a messenger in the execution either of a caption or a poinding, is convened by the party employer of the messenger to pay the debt owing to him by his debtor, whom either he rescued, or stopped, without any just ground, his goods from being poinded.

It was ALLEGED, the pursuit was a novelty neither founded upon law nor reason, seeing by our Acts of Parliament, Act 117th in 1581, Act 84th in 1587, and Act 150th in 1592, the pain of deforcement is defined to be the tinsel and escheat of their moveables, and punishment of their person by imprisonment; and penal statutes and actions founded thereupon, cannot be extended to any other punishment than what is expressly determined in the said acts, such as this is.

REPLIED,—The Acts of Parliament, beside the specific pains mentioned, leave the coercition of so great a contempt done to authority at the discretion of the judge, to be intended and stretched further at his arbitriment as he shall see cause. That magistrates are liable for the debt, if rebels once incarcerated escape out of their prisons, though by connivance or negligence; *ergo,* much more ought he who *manu forti* exemes him from lawful authority, or stops the free current of law in executing sentences, wherein there is *dolus et lata culpa,* be liable.

DUPLIED,—That the pain is arbitrary is denied. That magistrates become debtors by the escape arises from an incontroverted custom, *quæ legem imitatur ;* but there is no such thing can be subsumed against deforcers. *Erubescimus sine lege loqui.* And the inconvenients are desired to be pondered, if deforcers be made liable, for it may be L. 100,000.