

constitutes him her factor for uplifting the said annuity, for the years 1657, 1658, 1659, 1660, &c. as the factory dated in 1663, and registrate at St. Androis, bears. Theodore, upon this right constituted in his person, pursues Anna Macmorran, Lady Newhall, and Anna Maxwell, Old Lady Newhall, with ———— Campbell of Cesnock, her spouse, for his interest, to make payment to him, as assignee foresaid, of L.9 Sterling, of all the years preceding, as the fourth part of the said annuity, for which they are liable in payment. For instructing the summons, there is produced the king's gift; Rossie's assignation of the same, with the king's confirmation thereto; Doctor Beaton's assignation thereto to Sadler and his spouse; the confirmed testament of his spouse, wherein she nominates her daughter, Margaret Lauder, her executrix; then the said Margaret her assignation, or letter of factory to this pursuer. ALLEGED for the defenders, that no process can be sustained against them, till the debt be confirmed in Scotland; and that the defender ought to find caution. To which it was ANSWERED, that the allegiance ought to be repelled, because of the administration in England. *2do*, The pursuer cannot find caution, because he found caution already, in loosing the arrestment.

The Lords ordain the defenders to make payment to the pursuer, conform to his rights, titles, and securities aforesaid, of the said L.9 Sterling, for all the years respectively above written.

Act. Mr. William Beaton, Mr. Alexander Spotswood. *Alt.* Mr. Jo. Cunyghame.

Signet MS. No. 66, fol. 21.

1664. *January 12.* SIR GILBERT MEINZIES of Pitfoddells *against* The CREDITORS of JOHN DONALDSONE.

JOHN DONALDSONE, merchant-burgess in Aberdein, loans to Sir Gilbert Meinzie of Pitfoddells, and William Meinzie, fiar thereof, his son, *in anno* 1649, the sum of L.16,000. They for his repayment and better security of the same, sell, dispone, wadset, and annailyie to him, his heirs, and assignees, all the town and lands of Gilcomstone, with the lands and mill of Ardo, and the salmon-fishing thereof in the water of Dee; lying within the parishes of St. Machar and of Bouchrie Devewinck, and the sheriffdoms of Aberdein and Kincardin: *item*, they set him in tack the teind sheaves of the lands above written: and all this during the not redemption thereof; which are declared redeemable by the said Sir Gilbert and his foresaids, by payment or consignation of the foresaid sum of L.16000, on requisition specified in the contract of wadset. Conform to this contract, he is immediately, in 1649, infest in all and whole the said lands. Then by virtue of a contract betwixt him and Andrew Raite in Mariecouller, as principal, and the said Sir Gilbert, as cautioner, the said John sets and assedates to the said Andrew Raite, his heirs, assignees, and subtenants, all and hail the lands above mentioned, wadset to him for five years to come; the entry of it to be at Whitsunday 1649; and that for the yearly payment to him of L.1040

of tack duty. After this, *in anno* 1652, the said John Donaldsone, by a declaration under his hand, relative to the two contracts above mentioned, declared, that (he now being bound for Camphire in Zealand,) though he had indeed a wadset on some of Pitfoddells' lands, redeemable for the sum of L.16,000; yet at that present instant, he found, after due counting, that there was only resting to him by Pitfoddells, the sum of L.15,245; so that he discharged Pitfoddells, and his son William, of the superplus of the said sum of L.15,245, for now, and for ever; howbeit the wadset bears the receipt of L.16,000 by the said Pitfoddells. *Item*, Declares that he had received from Andrew Raite, at Whitsunday 1651, L.800 in part of payment of his tack-duty for that year, whereof he discharged him for ever.

Jo. Donaldsone, by his bond, is indebted to George Cullen, merchant, and late Provost of Aberdeen, the sum of L.6000. *Item*, By contract of marriage betwixt Robert Ramsay, merchant there, and Bessy Donaldsone, his daughter, in 1650, he promises, in name of dot and tocher, 5000 merks to the said Robert, his son-in-law. For satisfaction of which two debts, he assigns the said George Cullen, and Robert Ramsay, his son-in-law, to as much of the said sum of L.15,245, (which he declared in the assignations to be the only sum addebted to him by Pitfoddells; albeit the contract of wadset betwixt them bore L.16,000,) as would pay them their respective debts above rehearsed; giving them also a letter of advice to the said Sir Gilbert, and in his absence to his son William, giving them full power, warrant, and order, to content and pay to the said his two assignees, their respective sums contained in their several bonds: *item*, To take up their said bonds, and to report their discharges as made to him; upon the sight whereof, he obliges him to allow to the said Sir Gilbert and his son, the said two sums paid out by them, in the first end of the L.15,245, due to him by the wadset foresaid; and declares that the said wadset lands shall be redeemable on payment of what shall be found remaining of the said principal sum of L.15,245, after he has obeyed the contents of this warrant. Thir assignations are duly intimated to Pitfoddells; who, conform thereto, pays to the said George Cullen and Robert Ramsay the said two sums of L.6000, and 5000 merks, by granting to each of them his own bond for the said respective sums, as for borrowed money; taking up their bonds that Jo. Donaldsone had granted them, together with a discharge of the same to and in favours of Donaldsone.

The same Jo. being also by his bond, addebted to Mr. Alexander Davidsonsone, advocate in Aberdein, the sum of 3500 merks; as also to Ja. Cumming, Chamberlain of Slaines, for the Earl of Erroll, by another bond, in the sum of 6000 merks; at this same time, in February, 1652, for their satisfaction, he grants them assignation to as much of the foresaid sum of L.15,245 he had in Pitfoddells' hands, as was yet resting unexhausted by the foresaid two assignations; with a letter of advice to Pitfoddells, beseeching him to obey the said two assignations, by making payment of the sums contained therein; with full power and commission, as was in the former warrant. Which assignations were also duly intimated. And Mr. Alex. Davidsonsone giving up his bond, with a sufficient discharge of the same, is paid, by getting a new bond of borrowed money, containing the sum of 3500 merks, from Pitfoddells. Ja. Cumyng choosing rather to have his by a decret, he summons Pitfoddells before the late pretended Commissioners for, &c. to hear and see himself decerned to make payment to him of the said 6000 merks, contained in

the assignation. They, by their decret, ordained him to pay the same, and that out of the said £15,245 addebted by him to John Donaldson. In obedience whereof, Pitfoddells grants him his bond for the said 6000 merks, [and] takes up John Donaldson's bond and assignation; together with a discharge, discharging the said John Donaldson of the said bond, and sums therein contained; as also discharging Pitfoddells of the decret obtained against him, with all that had followed or might follow thereupon.

John Donaldson being also addebted to Alexander Galloway, merchant-burgess in Aberdeen, the sum of 4800 merks, (the 800 merks Alexander had right by assignation granted him by Jean Boaddie, relict of William Middleton, burgess in Aberdeen, who had a bond from John Donaldson for the same,) he assigns him also to what was resting in the said Pitfoddells' hands of the £15,245; to wit, to so much thereof as would completely pay him of the above-mentioned sums of 4800 merks; with warrant to the said Pitfoddells as formerly. This assignation is also intimated and obeyed in the same manner as the former.

By payment thus made (to wit, in granting them his own bonds for their respective sums,) by Pitfoddells to the forementioned assignees, that is, George Cullen, Robert Ramsay, Mr Alexander Davidson, James Cuming, and Alexander Galloway, the sum of £15,245, contained in the said contract of wadset, is almost all satisfied and paid by the said Sir Gilbert to the fore-mentioned creditors of John Donaldson, and that before the said John was disenabled, by any legal diligence led against him, in any way to dispose or assign the said sum contained in the foresaid contract of wadset, in whole or in part; yea, before there was so much as an arrestment or inhibition against him. Notwithstanding whereof, George Morison, late provost of Aberdeen, Alexander Thomson, advocate there, George Summer, in Balnagask, Mr Alexander Skene, merchant in Aberdeen, William Innes of Tippertie, and his sons and brother, Andrew Rait, brother to the Laird of Halgreine, Janet Ramsay, Lady Wattertone, and others, all creditors of the said John Donaldson, hearing that he was bankrupt, and no more *solvendo*, led comprisings against the said John, comprising from him his wadset-right of the said lands of Gilcomston and Ardoe, redeemable on payment of L.15,245; as also his right to the back-tack duty contained in the second contract, in payment and satisfaction to them of their several sums of money; whereupon they obtain themselves infest: they also arrest the said sum of L.15,245 in Pitfoddells' hands, to be made forthcoming to them, whom they also trouble in the peaceable enjoying and possessing of his lands, daily calling and pursuing for the mails and duties of the same, or else for the said sum of L. 15,245, whereupon they are redeemable. Whereupon Pitfoddells raises a summons of multiple-pounding, wherein he makes mention that he has made payment to some five of the lawful creditors of the said John Donaldson (who had rights and assignation thereto, made by the said John, all lawfully intimated to him,) of the said sum of L.15,245, except only L.1373; which sum the said Sir Gilbert was most willing to pay to any of the said John Donaldson's creditors that have comprised or arrested, who shall be found to have best right thereto. *Item*, He summons the said whole creditors, comprisers or arresters, with the forenamed whole creditors-assignees, as also John Donaldson, for his interest, to the effect it may be decerned which of them has best right to the said sum contained in the contract of wadset.

This action being often called, and long disputed, at last, in July 1656, the said Commissioners preferred the forenamed creditors-comprisers to the creditors-assignees as to their right of the said sum of L.15,245, for which the lands were wadset to John Donaldson; and therefore ordained the comprisers, only according to their respective rights, to be answered, obeyed, and paid of the said back-tack duty; as also of the foresaid sum wherein they were wadset. *Item*, They liberated Pitfoddells from the said creditors-assignees; and ordain them to grant sufficient discharges to the said Pitfoddells of whatever decreets they have obtained against him for the sums contained in the said wadset; with discharges of all bonds granted by him to them by reason of their assignations, if the bonds be registered; or then to redeliver the very bonds themselves, if not registered. *Item*, To refund him what annualrents he has already paid any of them since the dates of the said bonds. *Item*, Grants them to November next, 1656, to exhibit and refund as aforesaid; with certification, and they failie, they should be holden as confessed.

Notwithstanding of this decret, the said creditors-assignees, upon alleged iniquity thereof, postponed and delayed to obey the same; which Pitfoddells, suspecting that it might tend to his prejudice, he summoned them all again of new, in 1663, to hear and see themselves decerned to obey the said decret, in 1656, in all the heads thereof; with certification, and they compeared not, they should never be heard, in time coming, to propone any objections in law against the said decret pronounced in favours of Pitfoddells.

At the sametime, the creditors-assignees of the said John Donaldson, (George Cullen being dead, his three daughters, as heirs and executors to him, pursue; *item*, Alexander Galloway constitutes William Strauchan of Glenkindie, younger, assignee to his son,) raises a summons of review conform to, upon the 12th Act of the Parliament in 1661; and the Lords of Session their act of sederunt in pursuance thereof, wherein the said Pitfoddells and his son, the said creditors-comprisers; *item*, John Donaldson, for his interest,—are summoned to hear and see the said pretended decret, in 1656, revised and recognosced by the said Lords; and such effectual course taken for restoring the said creditors-assignees against the said decret, as if the same had never been pronounced, as the Lords shall think expedient; and that because the said Judges repelled most relevant and unanswerable defences alleged for the creditors-assignees, pursuers in this review: as, *1mo*. That they ought to have been preferred to the comprisers, because they had used the first diligence against the said John Donaldson, in obtaining from him assignations of that money that was upon the wadset-right of Pitfoddells' lands, the said John being then in trust and credit, and not having so much as an arrestment or inhibition against him; whereas they did not comprise, &c. till the said John was bankrupt. *2do*. It was farther urged, that *esto*, let the Judges find the comprisers to have better right to the said right of wadset, and sums wherein it is redeemable, than they; yet Pitfoddells must stand liable to them for their respective debts owing to them by John Donaldson; because, *1mo*. Pitfoddells retired from them their bonds they had of the said John Donaldson; and, in lieu thereof, granted them his own proper bonds for borrowed money. *2do*. The assignations granted to these pursuers by the said John, to the sum he had then lying on Pitfoddells' lands, were only in corroboration of their bonds they had of him before: yet Pitfoddells took from them discharges of the said bonds from their own proper facts and

deeds allenarly, as also took up their assignations; and so they accepted of Pitfoddells his bond for their only and full security, and denuded themselves of all action that might have been competent to them against John Donaldson, who then was in credit. Now, if Pitfoddells (who thus acquired right to all those actions against John Donaldson,) did not use timeous diligence for his relief, but was *in mora*, it must prejudice himself, and not the creditors-assignees, who, being denuded of all right of action against John Donaldson in favour of Pitfoddells, they were not able to use any diligence against him. Which defences the said Judges most unjustly repelled; and refused to hear the creditors-assignees, their procurators, debate some other things, and particularly anent the not registration of renunciations mentioned in the dispute foresaid, but gave forth their decret in manner above written. By this summons of review, therefore, they crave either to be preferred to the said comprisers as to the sums above mentioned; or else (if the said creditors should be preferred by the Lords,) that Pitfoddells may be decerned to pay them conform to his bonds granted by him to them.

This is the second action in this cause.

About this same time, 1663, Pitfoddells, upon his decret obtained in 1656, charges Mr Alexander Donaldson and Robert Ramsay with horning, to obey the contents of the said decret, by delivering to him again his bonds, or else discharges of the same, &c. as at more length contained in the decret.

This charge they suspend; because, (1^{mo.}) the same is altogether general, not condescending what bonds or what decreets the suspenders should discharge to the chargers; neither what annualrents they should repay: and therefore, till such time that Pitfoddells condescend in particular, they know not what obedience to give. 2^{do.} The said charge is most wrongously given, seeing the suspenders claim no right, by decreets or otherwise, to the sums of money addebted to them, but only by Pitfoddells' own bonds, which he granted them in manner and on terms before deduced. 3^{tio.} As to the decret charged on, the same is null of the law; because several relevant defences proponed therein, till through the ignorance of the then English Judges, are repelled: *Item*, There is a summons of review of the same intented at the suspenders' instance; wherefore no charge can be sustained thereon till such time the said summons be determined. 4^{to.} The very charger himself, finding the said decret charged on very confused, has intented new summons of declarator, for his own liberation from the said bonds, against the suspenders, whereby he has clearly passed from the said decret; and, therefore, no charge at his instance can be sustained thereon.

About this time, also, Pitfoddells, on his decret 1656, (this is the fourth action in this cause,) charges James Cuming to obey the same, by exhibiting and producing to him the writs Pitfoddells had granted him.

This charge he suspends, 1^{mo.} Because the same is general, groundless, and informal, not condescending on the grounds nor warrants thereof; as if it be a decret, nor on the name of the court or judge where the same was obtained, nor on the bonds or other rights, nor on the matter of fact; for here is a charge ordaining him to discharge what decreets the suspender had obtained against the charger: *Item*, To deliver him back such bonds as the charger had granted to the suspender, neither condescending on the decreets, their dates or tenors, he craves to be discharged; nor on the bonds, their dates, nor the

quantity of the annualrent to be restored ; nor upon any decret decerning him to do the same. In respect whereof, the letters ought to be suspended, and the messenger, executor thereof, to be punished for his informality.

But, *2do*. Granting the said decret were formal and special, as it is not, yet the said suspender cannot be obliged to grant to the charger a discharge of the said bond ; because he offers him to prove, that when the suspender, in 1652, had obtained decret against Pitfoddells, as John Donaldson's debtor, and, by virtue of his assignation from the said John, he promised faithfully he should straight pay the said suspender, which, though he did not, and caused him take a bond, which promise he is content to refer to the charger's oath, if need be. And, therefore, seeing the said decret stands yet unreduced, and no payment has followed thereupon, the suspender cannot be bound to grant the discharge craved.

But, *3tio*. *Esto* the said decret were reduced, (as it is not,) yet the suspender can never be obliged to reponne the said charger to his place he was in before the pronouncing of the said decret, till such time as the charger reponne him to his place as he was, *ab initio*, when John Donaldson was his debtor : for the restitution must be reciprocal ; especially considering that the suspender, James Cuming, gave up his whole writs he had of the said John Donaldson to Pitfoddells, which he has kept now these thirteen years. But so it is now, that the suspender cannot be so reponed, (he not having his writs whereon to lead apprising,) the legal of the said comprising being long since expired. *Ergo*, The letters ought to be suspended.

4to. The suspender, *brevitatis causa*, repeats the whole reasons of review before adduced ; as also the reasons in Davidson and Ramsay's suspension.

Pitfoddells, pursuer in the first action of declarator, defender in the second of review, and charger in the two last, being suspensions, compearing by his procurators, there is produced for him, the two contracts passed betwixt him and John Donaldson, both registrated ; then a charter, granted by Pitfoddells to the said John, in implement of the said contract ; then John his declaration ; then his assignation made to his creditors, with their bonds and discharges they gave up to Pitfoddells, all registrated ; which would be tedious to report, having touched them all already in the deduction of the matter of fact. In the said action of declarator, compearance being made for the creditors-assignees, who, to their former reasons of review, add the following ones :—

1mo. That the said creditors, being assigned to sums due by Pitfoddells to Donaldson, and having granted discharges thereof, for which they received bonds of borrowed money, the said discharges of the said sum did wholly take away the right of the wadset, which was only accessory and for the security ; and so the said creditors-comprisers had no right or wadset, competent to the said John Donaldson to comprise, unless it may be for the sum of £1373, which remained with Pitfoddells unassigned.

2do. Not only did they give him discharges of the sums, but a grant of redemption, which, being delivered to him, did sufficiently extinguish the right of the wadset ; at least it was Pitfoddells' fault if it did not, seeing he might have registrated the same *debito tempore*.

3tio. Albeit there had been no grant of redemption, but only most invalid discharge, yet seeing Pitfoddells accepted the same, and transacted, by granting them new bonds, he can never be heard to quarrel this transaction.

4to. Pitfoddells is not able to put the assignees in that case wherein they were before transaction, and, therefore, cannot be restored himself; seeing the restitution must be reciprocal.

5to. The creditors-assignees had assignations, not only to the sums due upon the wadset, but also to all other right due to their cedent, John Donaldson, by Pitfoddells or his son; and yet, upon John Donaldson's naked declaration, after he was bankrupt, at least after he was denuded by these assignations, the then English Judges did find, that several bonds (for which no real right was granted,) might be preferred to the said sums of money on the wadset.

6to. The creditors-assignees infallibly must have right to all the back-tack duties preceding the comprisings; notwithstanding of all which, they most unjustly give forth decret, that Pitfoddells was not debtor to them by his bonds.

But 1mo. The same decret, preferring the apprisers to the assignees, was most unjust; because the right of wadset, by the discharges, prior to the comprisings, was extinguished, seeing the principal, which was the sums of money, was thereby discharged; and the wadset, which was the real right, did fall in consequence, being but an accessory.

2do. There was a grant of redemption, and albeit it was not registrated *debito tempore*, yet that being occasioned not by the assignees their negligence, but in respect of supervenient change of government, discharging the king's authority and his registers, the not-registration thereof could be no just ground whereon to prefer the comprisers to them.

3tio. It is offered to be proven, that the Lady Waterton, by intromission with moveables and otherwise, is satisfied of the most part of the sum for which she comprised; and yet she, with the rest, is unjustly preferred to the creditors-assignees.—

All which allegeances, together with the reasons of review and suspension before set down, being well and ripely considered by the Lords, together with the writs produced to Pitfoddells, they adhered to the said decret in 1656, in all the points thereof;—they found the creditors-assignees had not obeyed the same;—they ordain them to obey it: and so, 1mo. prefer the comprisers to them, as to the said sum of £15,245, that was on Pitfoddells' lands;—they ordain Pitfoddells' bonds to be delivered him up again, if not registered; if registered, then an extract, with a sufficient discharge;—ordain them to refund and repay to Pitfoddells what annualrents they had received from him upon his said bond, with the annualrent of the same since its delivery to them;—ordain execution to pass on such bonds as any of the said creditors-assignees had granted to Pitfoddells at the paying them the annualrent;—declare that they will never hear the said creditors-assignees oppone against the said decret in no time coming;—assoilyie, *simpliciter*, Pitfoddells from the action of review intended at their instance against him;—declare him quit and free thereof, and that notwithstanding of the reasons of review above mentioned, both principal and eiked. Finally, find the two charges at Pitfoddells' instance against the said creditors-assignees, for implement to him of his decret in 1656, orderly proceeded against them;—find, therefore, the suspensions abusive.

And thus the Lords decerned, notwithstanding that the procurators for the creditors-assignees, pursuers in the said summons of review, and defenders in the said action of declarator, suspenders of the foresaid charges, AL-

LEGED, That they ought to be assoilyied from the said action of declarator : *Item*, That the said decret, in 1656, and charges thereon, ought to be reviewed, reduced, and *simpliciter* suspended ; because, whenever there is a person accepting delegation of another debtor, and thereupon getting new bond in place of his former, whatever might have been alleged against the old debt, the same can never be a ground whereupon to quarrel the new : so that the said John Donaldson having assigned the creditors to sums addebted to him by Pitfoddells, Pitfoddells accepting the assignations, and retiring the bonds they had of the said John, and willingly granting them new ones in the place of the old, Pitfoddells can never quarrel their old right : and, for proving thereof, did adduce several laws, (*de novationibus et delegationibus* ;) and instanced in the case of a preceptor bill of exchange.

But *2do*. The said creditors-assignees, having given up all their whole rights they had from John Donaldson, only in contemplation of the new bonds Pitfoddells was to grant them, they being denuded, could do no diligence against him, by comprising or otherwise : but if Pitfoddells was *in culpa et in mora* not to secure himself, seeing he had both *actionem mandati et actionem negotiorum gestorum* competent to him, seeing he might have apprised on the bonds delivered to him, at least in the assignees' names,—it's more reasonable that Pitfoddells suffer than poor Alexander Galloway and the rest of the creditors-assignees ; especially considering that Pitfoddells' prejudice, and distress he sustains thereby, arises not from any fact or deed of the said assignees.

3tio. The assignees cannot be obliged to redeliver Pitfoddells his bonds, seeing in law he has neither *actionem* nor *condictionem indebiti* for the same ; for that is only competent where persons have paid that which was *indebitum*, or paid it *non vero creditori* : but neither of these is here, seeing the assignees only got bonds for what was really due to them.

4to. It is evident Pitfoddells took the hazard of their rights upon him, by the very discharges he accepted off them, which bear only warrandice from their own proper fact and deed allenarly.

To this it was ANSWERED for Pitfoddells :—*1mo*. That the reason of review is now not competent, being omitted in the *prima instantia*, and that not only by Alexander Galloway, the cedent, but also by Glenkindie, his assignee ; and, therefore, he cannot now be heard.

2do. When Pitfoddells granted new bonds to the said creditors-assignees, it was *intuitu* of their rights and assignations, which he conceived to be good and valid ; but it being now found that their right was nought, and the sum foresaid is only due to the comprisers, Pitfoddells, in all law and equity, has *condictionem indebiti et condictionem sine causa* of the said bonds.

3tio. Pitfoddells is not in the case of delegation ; because, in law, *delegatio tollit priorem obligationem* ; so that *delegatus* becomes *debitor ei cui fit delegatio* ; not upon the account of any right in the person of him that is delegated, but upon the desire *delegantis, cujus fidem sequitur* as to his security or repayment. But Pitfoddells is in the case of *cessio*, which does not take away *primariam obligationem*, but conveys only the same in the person of the assignee ; and, therefore, Pitfoddells having paid an assignee *intuitu* of his right,—which right is after found to be no right,—undoubtedly Pitfoddells is in the case of *condictio indebiti* ; especially considering, that though Pitfoddells were in the case of *delegatio*, as he is not, yet that would only debar him from personal exceptions,

arising *ex persona delegantis*, as, *vis, metus, fraudis*, and such like, and not as to other exceptions that are real, *et contra ipsam delegationem*, as appears by the laws cited by the contrary advocates; and may be sustained in the case of one who is debtor to a minor, having curators; for, if the minor's debtor should pay the debts to a person having a precept or assignation from the minor, without consent of his curators, and thereafter should be forced to pay the same to another, who has right by assignation from the minor, with consent of his curators, the debtor would undoubtedly have *condictionem indebiti* against the first assignee: *Ergo, multo magis* must Pitfoddells have *condictionem indebiti*, because he is in the case of *cessio*, and not of *delegatio*. Neither is Pitfoddells in the case of a precept or bill of exchange; because, where a precept is given, the person in whose favour it is drawn gets no right nor assignation to the debt due by the person upon whom it is drawn; and, if the debtor make payment, it is not *intuitu ullius juris*, standing in the person of the party who gets payment, but upon the account of the drawer of the bill, *cujus fidem sequitur*, and who must be his paymaster. But here Pitfoddells made payment *intuitu* of a right in the person of the assignees, which he thought valid, and yet is found invalid through the assignees their fault, who might and ought to have perfected their rights for their own security, and Pitfoddells his liberation. And, where it is alleged that thir assignees *receperunt suum*;—

It is ANSWERED, That, it being now found that the foresaid sum was not theirs, but the comprisers', they cannot be said *quod receperunt suum sed alienum*; the same sums for which they got bonds not being theirs, but the apprisers', whom Pitfoddells is only ordained to answer, as having only right thereto. As to that, that Pitfoddells seemed to take his hazard of the said right, because of the warrandice from fact and deed allenary;—

It is ANSWERED, *1mo.* That Pitfoddells is not pursuing now upon the warrandice, but upon that undoubted ground in law, whereby one having paid any thing *indebite* to a person who is found to have had no right, has *condictionem indebiti*; which is clear in law, when discharges or rights are granted for onerous causes, then though the warrandice be conceived in these terms, from fact and deed, yet it doth not debar those who have acquired these rights to suit any other remedy in law, especially *condictionem indebiti*, and to repeat what was *indebite* paid for such rights; as is clear *per L. 11. § 18. De Actionibus Empti*; ubi, *Si aperte in venditione comprehendatur, nihil evictionis nomine præstatum iri, pretium quidem deberi re evicta, utilitatem non deberi. Neque enim bonæ fidei contractus hac patitur conventionem, ut emptor rem amitteret, et pretium venditor retineret.* As this is clear in law, so the same may be evinced from several cases, as if payment be made to an heir of a moveable sum that was due to his predecessor, and the executor should force him to pay the same to him, as falling under executry, the heir may be compelled to repay it to him, though the warrandice be but from fact and deed: *Item,* If a second brother, on report of his elder brother's death, should be served heir to his father, and so his father's debtors pay debts to him on his discharge, containing warrandice from his own deed; and, thereafter, his elder brother, who was out of the country, returns home, and reduces his brother's retour, and force the debtors to pay over again the sums that were due to his father, the debtors may repeat the money they paid to the second brother from him, notwithstanding that the warrandice was only from his own fact and deed.

3tio. If a debtor should make payment to an apparent heir, upon his discharge, with warrandice from his own deed, and the apparent heir, to whom he paid, die before he be served heir, and the debtor so be forced to pay again to another, who is served heir, he will have *condictionem indebiti* against those who represent the apparent heir, to whom he had made payment, notwithstanding of the said warrandice.

From these instances, and many others that might be adduced, it is evident that the warrandice of discharges, though conceived in the terms foresaid, from fact and deed; yet, if they be for onerous causes, those who have *indebite* paid any thing, may legally repeat the same, if, afterwards, they chance to be forced to pay to others found to have better right; seeing, *eodem errore*, and on the same mistake that they were induced to pay *indebite*, it may be thought they have been induced to accept of the warrandice foresaid.

In law, also, warrandice, from the fact of the granter thereof, doth import that he has a valid right, and *jus quo*, though not *jus quod*; and, therefore, if the granter of the said discharge have no valid right established in his person *habili modo*, and if the receiver of the discharge be forced to pay the same again to another having a better right established in his person *habili modo*, the law doth interpret the eviction to be on the granter's fact and deed; seeing it was his *culpa* that he did not perfect his right, as shall be made clear by the cases following, *viz.* In the case of an executor-creditor confirming an heritable sum, and so getting payment thereof from the debtor, upon his discharge, with warrandice from fact and deed, if that debtor should be forced to pay again the same sum to another creditor who had apprised the same, he may repeat it from the executor-creditor; and the eviction would be thought to be the fact and deed of the said executor, because he had not settled the right of the said sum in his person *habili modo*: *Item*, In the case of a compriser disposing his right, with warrandice from his own fact and deed, if a posterior compriser be preferred, because it may be the disponder's apprising is null, not being on fifteen days' warning, or because his seisine is not registrate, the eviction will certainly be upon the fact or deed, or *culpa* of the disponder, who ought to have perfected and completed his right, and did it not. From all which it is evident that Pitfoddells, notwithstanding of the said warrandice, ought to be free of the said bonds, being *indebite* given; especially considering that the said bonds were granted for their whole respective sums, without defalcation; and, therefore, they should have granted him also complete warrandice from all hands, and not from fact and deed, which is not usual in discharges of that kind.

Lastly, For Alexander Galloway, and Glenkindie, his assignee, they can never be heard to review the said decret; because they have homologated the same, in so far as they have granted Pitfoddells bonds of borrowed money for the annualrents he paid them.

As to that which they say,—that Pitfoddells either knew, or at least should have known, the assignees' rights, and secured himself, seeing he had their bonds in his hands, it is ANSWERED, That, in law, *error etiam juris et facti proprie non obstant*, to take away the remeid *condictionis indebiti*; especially in this case, where Pitfoddells seeks nothing but to be free of bonds *indebite* given, *et certat de damno vitando*. And as to that,—that he might have comprised, that is false; for he had no assignations to comprise on, but only discharges of their

bonds, so that the creditors should have secured themselves, seeing he could not. *Item*, It were most absurd to cause Pitfoddells pay a debt twice; who has spent as much in pleas thereanent as the sums come to. To which it was replied by the procurators for the creditors assignees, that their debts being lawful debts, and *sponte* paid, neither *metus, vis* nor *fraus* inducing Pitfoddells thereunto, they needed not inquire if *delegans* was a lawful debtor, or if *delegatus* had a discharge: it is sufficient to them that he accepted Jo. Donaldson's letter of advice; took a discharge of the old bond; and gave a new one, which is a clear delegation. Nor were thir assignees so much as obliged to know that Jo. Donaldson was debtor to Pitfoddells, *T. C. de delegationibus*. To that part of the answer, that its here *cessio* an assignation, and no *delegatio*, its replied, there is here more nor *cessio, videlicet cessio, intimatio, acceptatio, et solutio*, which are all the requisite solemnities of *delegatio*. To all the grounds and instances to infer that *condictio indebiti* must have place, here its replied, that *condictio indebiti* imports two things; first, that it be *indebite solutum*; next, that it be *solutum non vero creditori*. Now, here it cannot be said *indebite solutum*, for they were true and real debts, as cannot be denied. To that anent *ignorantia juris in damno vitando et lucro captando*, its replied, that the parties are here *in pari casu*. Either the said Alexander Galloway, with the rest, must lose at Pitfoddells' hands; or Pitfoddells must lose at John Donaldson's hands. But now Alexander's case is by much the more favourable, since, having a right, Pitfoddells paid him willingly, without compulsion, *fraus* or *metus*, on his discharge. If Pitfoddells say, there ought to have been a renunciation or grant of the redemption, its replied, that Pitfoddells should have sought that before John Donaldson broke; and not kept up their bonds, and yet do no diligence thereupon, whereby the [said] Alexander, and the rest, were prejudged, who might otherwise have come in *pari passu* with the apprisers; all which makes Pitfoddells' case most unfavourable. To the answer anent the warrantice frae fact and deed, its replied, that its neither his ignorance nor knowledge that occasioned the conception of the discharge in these terms; but express paction betwixt them, which, by the laws of nature and nations, ought to be most religiously and righteously observed. To that, that it was competent, *in prima instantia*, and omitted, its replied, that in 1656, such was the iniquity of the English Judges, that when they were petitioned to hear further defences, (among which this was one,) they had, they refused the same. As to the pretended homologation of Alexander Galloway's, its replied, that the cause of these bonds granted by him to Pitfoddells is not of the annual-rent. Why may it not be for other sums borrowed by him from Pitfoddells? So then the homologation says nothing.

Notwithstanding of all which, the Lords, by the interlocutor, again adhered to their former decret pronounced by them. Whereupon Pitfoddells and his son, urging to get furth the extract of their decret, the same was opposed by the assignees their procurators, who desired yet to be heard, *in presentia*, anent some other defences against the said decret of declarator: which favour being granted them, they alleged, *Imo*, That the reason, (as they conceived,) wherefore the Lords had repelled all their former reason, with the debate following thereupon, was merely in consideration that the money wherefore Pitfoddells gave bonds was a part of the sum of L.15,245 contained in the contract of wadset. But now they allege that the bonds given by Pitfoddells to the said creditors assignees, was because of their letters of advice they had from the said John Donaldson to Pitfoddells, entreating him to pay to the assignees that money which he owed them, on

personal bonds. The letters of advice Pitfoddells accepts, and grants them bonds for their several sums ; so that Alexander Gallowaye, and the rest, ascribe their payment to John Donaldson's letters of advice, and their own personal bonds, and not to the said wadset ; and therefore it cannot be said that the said bonds were granted by Pitfoddells *indebite*. *Item*, Craves that the discharges granted by thir assignees to Pitfoddells may be read and considered. Whereto it was answered for Pitfoddells, that they opposed the discharges and assignations, by which it was evident that Pitfoddells granted his bonds only in part of the said L.15,245 contained in the said contract of wadset ; and that it was merely the ground and rise thereof.

All which the Lords having considered, they adhered still to their former interlocutor ; and ordained the decret to be extracted, and given forth. Whereupon Alexander Galloway gives in a supplication to the Lords, shewing that Pitfoddells having granted him a bond in payment of a just debt, resting to him by John Donaldsone by his order, the said Pitfoddells now repeats the same, *condictione indebiti*, contrary to all law and reason ; for in law its uncontroverted that *condictio indebiti* is not competent to him who pays me a sum in name of him who is my debtor, *per C. 8va. et 44, D. de condictione indebiti*. In reason he cannot repeat, because now John Donaldsone is not *solvendo*, and Pitfoddells, the time of the granting the bond, made the supplicant discharge John Donaldsone, *per expressum*, so that all action the supplicant might have had against John Donaldsone was *funditus* taken away : but Pitfoddells might have intended action for his relief against the said Jo. who then was in great trust and credit, and no diligence done against him. As to the strongest reasons adduced for Pitfoddells, they are neither grounded in law nor reason. Amongst many instances proposed for him, this was one, (the rest are of the same nature,) that if a debtor upon an heritable bond pay the same to the executor, if the heir pursue, he will get repetition thereof from the executor. To the which it is answered, that the supplicant, with the rest of the creditors assignees, are not in that case, nor the like, in respect that a debtor on an heritable bond was neither resting the same to the executor, nor paid he it in name of any other who was resting the same. But so it is, that Pitfoddells granted the supplicant his bond for payment of a true and just debt ; and that by John Donaldson's order and in his name. As to L.11. p. 18. *D. de actionibus empti*, cited for him, where its said that he who buys a thing that is evicted, will get repetition of the price ; to that it is answered, that the creditors' assignees are not here in the like case, in respect that he who buys a thing (the same being evicted) was not obliged to pay the price to the seller, neither did he pay it in name of any other who was resting the same, which is the condition of the supplicant. *2do*, The two cases adduced are most different from the present case, to which they are applied ; in respect a debtor upon an heritable bond, and he who buys a thing afterwards evicted, can have no action of relief but only against the executor and seller ; whereas Pitfoddells had action of relief against John Donaldsone. It is added for the supplicant, that he is a man of eighty years ; a father of many motherless children ; must turn beggar if this be taken off him ; that he hath not so much in the world as this sum comes to ; that he is so weak that he cannot now be present to wait upon the Lords, when his whole fortune lays at the stake ; and therefore craves that Pitfoddells' decret may be stopped as to him. This bill the Lords having considered, they refused the desire thereof.

Then Pitfoddells craving the extract of his decret against Cuming, David-

sone, and the others, the same was opposed by their procurators, who alleged that for his debt he had obtained decret, *parte comparente* (for Cuming) in 1652; which decret stood yet unreduced, though the same English Judges that had pronounced it gave out decret in the contrary in 1656, which he craved to be reduced. To this it was replied by Pitfoddells' procurators, that the apprisers, who were now found to have only right to the said sum, were neither called nor compeared (which should have been) in Cuming's decret in 1652. *2do*, The apprisers' right to the sum on wadset is emergent since the said decret; as also their decret of preference, wherein the English Judges did most justly, because these assignations given by John Donaldsone to the creditors assignees were not *habilis modus*, to transfer the right of wadset to them; and the comprisers, though posterior, must be allowed as having the undoubted and only best right. To which it was duplied, that their allegeance, notwithstanding of this reply, stands relevant, because they lay this down for a ground and maxim, that the English Judges in 1656, *super iisdem deductis*, took away their own decret in 1652, which they could not do no more, nor the Lords of Session can now; and craved the said Lords their answer, thereupon. The Lords repelled the allegeance, and duply, in respect of the reply made thereto, and decerned, *ut supra*.

Upon pronouncing whereof, it was further alleged for the said creditors assignees, that the decret preferring to them, the comprisers, ought to be reviewed, because unjust, seeing they offer them to prove that their discharges granted to Pitfoddells bore a most sufficient renunciation of the wadset; and craved that they might be read in *presentia*, which was accordingly done. *2do*, Though the said assignations and discharges had not borne a renunciation, yet they might have been a sufficient exoneration to the said Pitfoddells; because a great part of the said principal sum of L.15,245, wherefore the lands were wadset, being paid, any infetment following thereupon being but *accessorium*, must be presumed to be extinguished *pro tanto*. *3tio*, The least that the then English Judges could have done, would have been to bring in the apprisers and assignees *pari passu*, as is ordinary when persons have to do with bankrupts; which, nevertheless, they did not. To this it was replied in behalf of Pitfoddells and the comprisers, that an assignation and renunciation in one right are *asystata* and incompatible, and opponed the assignations. To the other; its not the sum that is the principal, but the heritable right; and the sum whereupon it is redeemable is only the *accessorium*. Now its notour, that *jus reale*, whether redeemable or not redeemable, can only be taken away in as solemn a way as it is constituted by. And about there coming in *pari passu*, its replied, that the then judges in equity could do no otherwise than they did; that is to say, prefer these who had the real and undoubted right, to those that had no right at all. Whereunto it was duplied, *Imo*, That its no ways inconsistent to have an assignation, and for the debtor's greater security, a discharge or renunciation, which is the innovation of the reversion; and oppones the last clause thereof, which is a clear renunciation and grant of redemption, *pro tanto*; and if it had been registered *debito tempore*, the same would have securd Pitfoddells for ever. To the other, that an heritable right cannot be taken away, but by a renunciation or resignation; it is duplied that the same may be, because a wadset is but *pignus* for security of a sum; and the sum being paid, the *pignus* should be restored. *Item*, Intromission, with as much of the maills and duties of lands as will satisfy a compriser within the legal, is as sufficient to extinguish the apprising, as if the party compriser had renounced the same. *Item*, In a wadset if there be used requisition or a charge of horning; then payment

and a discharge without a renunciation is sufficient; or where a wadset is only granted for security of a sum, with possession of lands while by the rents thereof the sum be paid, there is no need then of a renunciation: for though by our law of Scotland, registration is well prescribed to extinguish wadsets; yet that is not the only solemn way to take them or comprisings away. And, therefore, if payment in the cases adduced, would be sufficient with a discharge, and without a renunciation; so must it also be in this present case. And to enforce the last about *pari passu*, they instanced the practise betwixt Brown and the Laird of Westnisbet, and many others, where creditors of bankrupts came in *pari passu*. Farther, they added that the principal contract of wadset, passed betwixt Pitfoddells and John Donaldsone, was given up in 1652 by Alexander Galloway to Pitfoddells, and that there was no seasine then thereupon, which was a most evident renunciation; which if Pitfoddells had then destroyed it had secured him and them for ever. But afterwards they know not how it was unjustly registrate by one Forbes, (who never was a clerk in the world,) the truth of the delivery whereof they are content to refer to Pitfoddells his oath.

Compear the procurators for the comprisers, and allege that Pitfoddells could not depone to their prejudice, who by the foresaid decreets are preferred. But whenever the creditors assignees pursue an action of improbation of their comprisings, or of the said seasine, they shall then get an answer; but its not competent *hoc loco*.

All thir being ripely considered by the Lords, they, notwithstanding of all that was alleged, adhered to the former decret pronounced in all the points thereof; only they reserved to the said Alexander Galloway, and the rest of the creditors assignees, action of reduction or improbation of the seasine above mentioned against Pitfoddells, and the others.

Immediately after the pronouncing of which decret, it was further alleged by the said creditors assignees, that there was a transaction and agreement betwixt Pitfoddells and the said apprisers, whereby they were to give down to Pitfoddells the half of their sums; the benefit of which defalcation in all conscience and reason, they allege should accresce to them, and not to Pitfoddells himself; the verity of this transaction they referred to Pitfoddells his oath. To which it was answered, that the foresaid allegiance was no ways relevant, because competent and omitted in the prior decret. *2do*, Its neither libelled, nor eiked; neither in the review nor the two suspensions. *3tio*, There was never such an agreement concluded and ended. Like as Pitfoddells being personally present at the bar, made faith that there was no such agreement concluded, neither papers interchanged; because the raising the foresaid two suspensions or summons of review marred all. In respect of which answer and deposition, the Lords repelled the allegiance aforesaid.

Then it was farther alleged by the procurators of the said creditors assignees, that in all equity they must be preferred to the tack-duty of the lands wadset, that were owing preceding the said apprisers their decreets of apprising; *igitur*, &c. Whereunto it was answered that there was no byruns owing, all before the said apprisings having been paid to John Donaldsone, the cedent himself. In respect of which answer, the Lords repelled and repel the foresaid allegiance; yet before extracting of the said decret, the Lords remitted to Sir David Nephoy of Reddie, to clear, if there were any byruns of the back tack-duty resting before the leading the apprisers their several apprisings.

After which reference, the parties compearing by their procurators before the said Lord Reddie, it was alleged for the creditors assignees, that notwithstanding of John Donaldsone's declaration in 1652, whereby he declared that the only sum he had on

Pitfoddells' lands was but L.15,245, and not L.16,000; yet Pitfoddells must be liable for the whole back tack-duty of L.1040, contained in the said second contract betwixt them; and that in regard that the said declaration is but the declaration of a bankrupt. *2do*, Offers him to prove that Pitfoddells was indebted to John Donaldsone in several other sums of money, besides that contained in the said contract; which the said creditors assignees crave may be made forthcoming to them. Whereunto it was answered for Pitfoddells, that the allegiance foresaid was competent and omitted. *2do*, That the creditors' assignees cannot quarrel the foresaid declaration, because their assignments and this declaration are of one and the same date, yea, *laborant eodem vitio*, for they bear that he was then going out of the country. As for the personal debts alleged due by Pitfoddells to John, he denies there were any; and if there were, let the creditors assignees pursue against him, *via ordinaria*, for the same, and they shall get an answer.

Which allegiances and answer thereto being reported by the said Lord Reddie to the whole Lords, they repelled and repel the allegiance in respect of the answer thereto; and find only half a year's tack-duty of the said sum of L.15,245 resting owing before the said comprisings; which the Lords ordain to be consigned in Robert Hamilton, clerk to the process, his hands to be made forthcoming to such of the creditors assignees of the said John Donaldsone, as shall be found to have best right thereto. *Item*, The Lords reserve action for any other debt due by Pitfoddells to John Donaldsone, by and attour the sum foresaid contained in the wadset, at the creditors assignees their instance. Finally, ordain letters of horn-ing on a simple charge of fifteen days, and other executorials needful to be directed thereupon, in form as effeirs. According to which ordinance of the Lords, immediately after the same, Pitfoddells consigned L.457 as the said half-year's tack-duty to be made forthcoming as is aforesaid.

Pitfoddells compears by Sir Jo. Fletcher, King's Advocate, for the King's interest; Sir John Nisbett, Sir Thomas Wallace, and Patrick Fraser. The creditors assignees compear by Sir Peter Wedderburne, James Brown, Mr. David Thoirs, Mr. William Strachan, and Mr. Alexander Seaton.

Signet MS. No. 68, folio 21.

1664. *January 14.* THOMAS MONCUR *against* JAMES DOUGLAS of Inchmarto.

MR. JAMES DOUGLAS of Inchmarto, in 1660, by his bond obliges him to pay to James Petrie, and Janet Findlay his spouse, indwellers in the Wood-End of Glencomon, the sum of 400 merks, with L.100 of expenses. James Petrie, again, by his back-bond granted to Inchmarto, obliges him, that if Sir William Douglas of Glenbervie, and James Douglas of Stampeth, his father-in-law, obtain decret against him for the said sum of 400 merks, grounded upon a tack; that then, and in that case, James Petrie shall suit no payment upon this bond of Inchmarto's; but re-deliver him it. Whereupon Inchmarto granted Glenbervie his bond for the said sum of 400 merks, in case he should be found to have best right thereto. Glenbervie thereupon raises a summons against Inchmarto and James Petrie for payment making to him of the said sum of 400 merks. While this is depending, James Petrie assigns the bond he had from Inchmarto for the said 400 merks, to Thomas Moncur, son natural to Thomas Moncur, goldsmith in Aberdeen. He