

tural obligation, which where it exists *impedit hanc conditionem*; and having a power of coercion, cannot but make the thing due: *L. 1 C. de conditione 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 condition, 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 Robertstone, 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 practise 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 coercion of so great a contempt done to authority at the discretion of the judge, to be intended and stretched further at his arbitrement 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.

They say the Lords found the libel relevant to fix the whole debt upon the deforcer, the deforcement being proven.

There is no doubt but if the moveables of the deforcer be of so much value as may satisfy the debt but this action is most just, seeing it is but just the same as if he were pursued to be punished by tinsel of his moveables; which, by the said act in 1581, are declared to be *primo loco* liable to the payment and satisfaction of the debt due to the creditor, according to that, *pœnis fiscalibus creditores præferri*: but where his moveables are not sufficient for paying the whole debt, but it exceeds the value of the moveables, in that case I can scarce see how the deforcer in justice can be decerned to pay the sum farther than *ad concurrentem quantitatem* with his moveables, *nam pœnæ non sunt ampliandæ*. I find it near decided in Dury, 25th July 1633, *Mitchell* against *Law*. *Vide infra*, in June 1677, No. 579, § 7, *anent a Messenger*. I find an action of the same nature was intended before English judges, by *Hary Hope* against *Clackmannan*; (see it beside me at the 6th of November 1658;) but they waved to determine it. But I think, in this case, where he pays the debt, he ought in equity to be free of all other punishment; seeing where a crime is punished by several pains set down in sundry Acts of Parliament, which acts do not derogate one from another expressly, it is in the option of the judge to punish the delinquent by either of them; *L. Quoties*, 41 *D. de obligationibus et actionibus: et in dubio mitior est imponenda*, and that which is most used, *l. 42 D. de Pœnis et l. 9 D. ad R. Juris, ibique Bronchorstius*; but then *una consumit alteram*; after election made he cannot recur to make use of any of the other: *L. Senatus*, 14 *D. De accusationibus*.—*Vide legem 53 Digestorum, De Obligationibus et Actionibus*.—*Vide Harprechtum ad par. 10 Inst. de injuriis, num. 5 et seq. item num. 59 et seq. Vide Hipolitum de Marsiliis, singulari 137, 366; item in tractatu suo de fidejussoribus, numero 16 et seq. Vide Vigelii methodum juris, libro 2, cap. 9, pag. 148.* But there may be some doubt here: because where the law hath introduced two sundry actions for one crime, whereof the one is civil and the other criminal; the one doth not exhaust nor extinguish the other, they being *genere* different, and not *ad idem*; but *ita est*, this action against the deforcer for payment is merely civil; *ergo*, I observe, *ex l. 3 C. de Exactoribus Tributorum, lib. 10.* that the deforcer of an apparitor, and he who exemes a debtor out of his hands, is made liable for the whole debt; only that law speaks in the case where the party exemed is debtor both to the fisk and to private persons; though I see no great cause of disparity why it may not hold true in the general, seeing it is like the Emperor by his pre-scrip determines only the particular case wherein he was then consulted. See M'Keinzie's Criminals, at the title Deforcement. *Vide l. 4 C. de custodia reorum.* The titles of the *ff. Ne quis eum qui in jus vocatus est vi eximat*, and *De eo per quem factum erit quominus quis in judicio se sistat*, seem to have some affinity with the matter of deforcements. *Vide statuta Willelmi, cap. 4. et statuta 2. Roberti I. cap. 20.*

*Advocates' MS. No. 386, folio 166.*