## *CONDICTIO INDEBITI.*

### No. 1. 1735, Feb. 14. THOMAS ROSS *against* M'CULLOCH.

THE Lords sustained the *condictio indebiti* against Ross, notwithstanding he was an assignee and had obtained two decreets, in respect of the reservation in the discharge,—and adhered to the Ordinary's interlocutor. Found the defender not liable in annualrent in respect of his *bona fides*.—22d February Adhered.

### No. 2. 1745, June 25. EARL of PETERBORROW *against* MRS MURRAY.

WE generally agreed that if this receipt and obligement had only borne a discharge, no action or condiction would have lain against Mrs Murray, and even as the case stood, had Earl Peterborrow knowingly omitted to found upon it to extinguish the account; but as his only fault was that he trusted Mr Somervell's account to be full and fair, and as the writing contained also an obligement on Mr Somervell to account,—therefore sustained process, and found the defender his daughter liable, as the payment was made only to her husband as having right *jure mariti*.

## CONDITION.

### No. 1. 1733, Nov. 17. CAPTAIN HALKETT *against* SIR G. WARDLAW.

FOUND the condition did not exist, and the portions not due.

### No. 2. 1738, July 7. DRUMMOND *against* DRUMMOND.

A PROVISION in a contract of marriage to daughters "in case after my decease there shall be no heirs-male in life of this marriage,"—the Lords found, that (a son of the marriage) an heir of the marriage, having survived the father, no provisions were due.

### No. 3. 1744, Nov. 20. JAMIESON *against* TELFER.

THOMAS TELFER, younger of Townhead, granted to his younger brother William a bond of provision of 2500 merks, payable after the death of the longest liver of both father and mother, bearing to be granted at the father's desire in satisfaction to William of all bairns part of gear, portion, executry, or any thing else he could claim through the death of father or mother, of all which of the same date William gave him a discharge,—as the bond also bore. William a travelling chapman died in England, and named Jamieson his executor for behoof of his brother. Jamieson who administered was himself a creditor and paid his other debts and funeral charges, and thereby a balance was due to him

of L.68, for which he sued Thomas the debtor in the bond. It appeared that William died before either father or mother, and the mother died before the father, and both are now dead. Therefore the defence was, That the bond being for a provision and payable after the father's death, implied a condition of William surviving his father, like a bond payable to a child at a certain age, and quoted a decision in 1730, Bell against Davidson, where a bond by a father to his son for his aliment payable after his own death was found null, the son having died before the father. This point I reported, and Arniston and President both agreed that we could not determine any general rule, that a father granting such a bond of provision to an infant child, and that child dying in infancy and before him, that might void the bond;—but in the present case all agreed that the bond implied no condition of William surviving his father or mother.

## No. 4. 1746, July 4. CAIRMONT *against* GORDON.

A CHILD's provision, payable after the granter's death or marriage, which should first happens,—she died before either of these events, and Kilkerran found the bond vacated. But upon a petition he altered his opinion; but was not present this day when we advised, altered the interlocutor, and sustained the bond,—*renit.* the President.

## No. 5. 1749, Feb. 1. MASON *against* EXECUTORS of GEORGE BELL.

IN a contract between Mason and his son-in-law, after his daughter's death, reciting that Mason had only given 400 merks in part of what he intended to give, therefore the father obliges him to pay the 400 merks to the son of the marriage, and Mason, the grandfather, obliged him to aliment his grandson till he be 16 years of age, which will happen, (says the contract) 7th May 1747 and obliged him to pay the grandson 600 merks at the term of Whitsunday 1747, which, (says the contract) will be the first term after the age foresaid;—the grandson died before that age, and the father confirmed the 600 merks, and sued Mason for payment. The defence was, that it was *dies incertus*, the first term after the child's age of 16, and he died before that time. I found that the term being Whitsunday 1747, was *dies certus*, and therefore found the sum due. But on a reclaiming bill the Lords altered, and thought it the same as if the year 1747 had not been mentioned.

## No. 6. 1752, Jan. 25, Feb. 7. JANET MAXWELL, &c. *against* MAXWELL.

THE defender, in his contract of marriage, provided his then stock, with his wife's tocher, to himself and his wife, and to the heirs-male and female to be procreated of the marriage; and by a subsequent clause, in case there be no heirs-male procreated of the marriage attaining to majority or marriage, he provides the daughters attaining to majority or marriage to certain definite portions, if one to 5000 merks, if two 8000 merks, if three or more 10,000 merks, which he obliges him and his heirs-male, &c. to pay at their marriages, in full of all executry, legacy, portion natural, bairns' part of gear, or whatever they might seek through his death. Janet Maxwell, a daughter of this marriage, was married in 1727, when there was a son living, and got 3000 merks of portion,