1778. *February* 10. ROBERT CARRICK *against* JOHN CARSE.

CONDICTIO INDEBITI.

A Cautioner paid a Debt, and next day demanded repetition, as he found he was free, by the expiry of the septennial limitation. *Answered*,—He was liable *jure naturali*.—Repetition was ordered.

[*Fac. Coll. VII.* 70; *Dict.*, 2931.]

COVINGTON. If a debt is paid which is not due, or against which there lies an *exceptio perpetua*, there is *condictio indebiti*, supposing the person paying to be ignorant of the debt not being due, or of the *exceptio perpetua*. Here the question is, Whether payment was made by mistake or not; and on whom does the burden of the proof lie? Either Mr Carrick did not know the date of his own bond, or he did not know the law: this is his plea. But how can we suppose *either? He* must show his *ignorantia juris* or *facti*.

KAIMES. If a man pay a debt when there is no claim of debt, *there* there is *condictio indebiti*; for he who gets the money gets it *sine causa*. But when there is a debt, though liable to exception, the debtor paying has no *condictio indebiti*. The Act 1695 piously meant to save cautioners. It is not well framed; for it is contrary to the dispositions of men in society. Advantages may be taken of the exception, but few men of candour will take the advantage. The act does not declare the bond of cautionry void and null,—it only gives an exception. If we were to enter into the question of ignorance in law, matters would be endless and inextricable.

GARDENSTON. When a man pays a debt, known to be prescribed, the payment is good, for the Act of payment is equal to an antecedent obligation to pay. In this case I cannot believe that Carrick would have paid had he known that he was not bound to pay. There was neither a civil nor a natural obligation on him to pay. In applying the principles of the civil law, I am afraid that we depart from the sense of the civil law. It would be strange in any law, if a man, by paying inadvertently, without being bound, should not have repetition. A man bound as a cautioner for seven years, is not bound in conscience after seven years.

BRAXFIELD. On the first hearing, I recollected the case in the civil law, where the distinction is made between a payment made *errore juris et errore facti*; and observing that Carrick had had the bond in his hands when presented by Carse, I supposed that he had paid *errore juris*, and I therefore thought that there was no *condictio indebiti*. On farther deliberation, and on the principles expressed by Lord Gardenston, I changed my opinion. I can see neither equity nor justice in taking a sum of money out of Mr Carrick's pocket, through whatever sort of ignorance it was paid. A donation is never presumed; and, besides, Mr Carrick showed that he intended no donation, for,

immediately on discovery of his error, he re-demanded the money. The subtilties of the civil law have not been received among us, and I observe a case in 1733, *Stirling* against *Earl of Lauderdale*, where *condictio indebiti* was allowed when one paid *errore juris*. The civil law puts the case of one having a perpetual exception: if that exception is *in favorem accipientis*, the *condictio indebiti* takes place. This is like the case of the Act 1695. When there is a natural obligation, but cut off by lapse of time, payment, if made, will not be forced back; so the case is both by the civil law and by our law. But *this* applies not to the present case; for, after the lapse of seven years, there was no obligation on Mr Carrick to pay the money. The obligation was merely civil, and limited by statute. The Act 1695 is not of the nature of a prescription, and there is not a word about prescription in it. Action brought against the principal debtor will not operate against the cautioner, by the Act 1695. If it was of the nature of a prescription, such an action would be an interruption. Had the creditor made his demand *tempestive*, the cautioner might have operated his relief against the debtor, who at that time was solvent.

JUSTICE-CLERK. Had there been any evidence of Mr Carrick having been deceived, I admit that the fraud would have been sufficient to relieve him; but it is impossible to suppose that Carse could have imposed on Carrick, either in fact or in law. I lay it down as certain, that Carrick perused the bond. If seeing the bond once, or twice, was not sufficient to inform a person of its date and contents, Where are we to stop? Carrick, *sciens*, *prudens*, paid the money. I do not say that he had the statute present in his memory, but that was his fault. He cannot have the *condictio indebiti*. If there is a solid foundation for the judgment of the Ordinary, the same plea might have been made after a year, or after seven years. I suppose both parties to have been ignorant of the law. They entered into the obligation without any view to the cautionry being limited by statute. If I should become cautioner, as Carrick did, I should think myself bound, in morals, to make the debt good. If payment should be made by a cautioner in a bond, and that bond should be discovered to be null by the Act 1681, repetition would not be competent to the cautioner.

BRAXFIELD. The statute 1681 goes on the supposition that a bond not regularly tested was not truly subscribed. If the cautioner pays, he acknowledges that he subscribed, and such acknowledgment is good all the world over, notwithstanding the statute 1681.

On the 10th February 1778, "The Lords found the defender liable to repeat and pay back to the pursuer the sum of L.102: 18s. sterling, with interest thereof, as libelled;" adhering to Lord Braxfield's interlocutor.

Act. J. Morthland. *Alt.* A. Rolland.

Diss. Kaimes, Kennet, Covington, Elliock, Stonefield, Justice-Clerk, [in the Chair.]