No. 35.

JOHN and WILLIAM DIXON, Appellants.—*The Lord Advocate (Jeffrey)—Mr. Sandford—Dr. Lushington.*

MONKLAND CANAL COMPANY, Respondents.—*Mr. John Campbell—Mr. Rutherford.*

Et contrà as to expences.

Acquiescence.—Circumstances under which (affirming the judgment of the Court of Session) a claim for repetition of money alleged to have been paid in ignorance, held to be barred.

Condictio indebiti.—Is there by the law of Scotland a condictio indebiti, where the ignorance is not facti but juris?

Sept. 17, 1831.

1st Division.
Ld. Corehouse.

See the case William Dixon v. Monkland Canal Company, 1 Wilson and Shaw, p. 636.*

It appears, that when the Monkland Canal Company, in August 1801, raised the tonnage from the original rate of 1*d.* per ton per mile to $1\frac{1}{4}$*d.* on all distances less than nine miles, William Dixon, the father of John and William, objected to the legality of this increase, obtained an interdict, and withheld payment of the dues. The Canal Company sued him before the Sheriff of Lanarkshire for the amount incurred up to the 28th March 1804. The Sheriff decerned for that amount. Dixon presented a bill of advocation, which the Lord Ordinary refused. Dixon acquiesced in this judgment, and paid up the arrears, and continued to pay the increased rate until the year 1815, when he instituted the proceedings, and brought them to the conclusion detailed in the report of the case above referred to.

Founding on the judgment thus obtained in the House of Lords, his sons, John and William Dixon, raised, in 1826, a new action of repetition against the Canal Company, concluding for 4,023*l.* as the excess of canal dues above 1*d.* per mile paid by them or their father since the year 1801, when the first increase on the rate had been made, down to 1815. Subsequently, how-

* In page 638 of the report of the case, delete from lines 12 and 13 the words, "which was not challenged or objected to, but," and introduce, "which were "challenged by Dixon, but without success. In 1815, however,"—and in the beginning of Lord Gifford's speech substitute "William Dixon" for "John Dixon."

Sept. 17, 1831.

ever, they restricted their claim to the excess levied after the 28th March 1804. The Canal Company pleaded homologation and acquiescence by the pursuers. The Lord Ordinary having reported the question on cases, the Court found, (May 27, 1830,) "That the pursuers, John and William Dixon Esquires *, have, "in their pleadings and at the bar, abandoned that part of their "claim which relates to the dues said to have been exacted "prior to the 20th March 1804, and therefore assoilzie the "defenders therefrom; and as to the claim for repetition of "the other sums concluded for, Find, that Mr. Dixon, having "voluntarily paid these duties, and having failed to put the "Monkland Canal Company on its guard by any requisition "or intimation that the Company should deepen the canal, or "that otherwise he did not consider himself liable for the duties, "the pursuers, post tantum temporis, are not entitled to repe-"tition of these duties, and therefore sustain the defences founded "on the above circumstances, assoilzie the defenders from the "conclusion of the action, and decern: Find no expences due "by either party."

Dixons appealed on the merits; the Canal Company as to the costs.

Dixons.—The duties in question were paid in error, and consequently the appellants are entitled to repetition. The present is precisely the case to which the condictio indebiti applies. The point is no longer open, as the right to recover has been settled by a judgment of the House of Lords, in a case between the same parties, and relating to the same matters. It is altogether out of the question now to enter on the inquiry whether the Company could increase the rates before deepening the canal. There never was any act of homologation by the appellants or their father; nor was there any voluntary acquiescence. Payment was refused, and ultimately was yielded to only under the pressure of a decree of Court; but the error of a court of justice should not prejudice the party paying on compulsion.

* 8 Shaw and Dunlop, p. 826.

Monkland Canal Company.—This is a very different question from the one carried to the House of Lords in 1825, and the judgment there pronounced cannot avail the appellants in the present claim. The decree of the sheriff, affirmed by the Lord Ordinary, creates a res judicata, which the appellants cannot overcome; besides, they are bound by acts of homologation and acquiescence on the part of their father. The doctrine of condictio indebiti, on which they rely, is inapplicable here; at the best it is founded on equity, and would be met by the equity of protecting present shareholders from making a restitution, which, if due at all, should have been exacted from the partners of the Company when the increased rates were levied. Besides, it is preposterous for representatives to bring forward a claim, which, in fact, was abandoned by the predecessor himself.

Lord Chancellor.—My Lords, I am not impressed sufficiently with the danger of appearing to sanction the introduction of any thing novel in the law of Scotland, and thereby to unsettle the fixed principles of jurisprudence of that country, to induce me to abstain from delivering to your Lordships the opinion I have formed upon this case, even though I am perfectly sensible, that to one or two of your Lordships I may appear to run counter to some of the authorities which have been cited at the Bar. I do not think that it is necessary, in order to dispose of this case, to raise the general question, Whether a party can recover money paid under a mistake of law, or without due knowledge of all the facts, and (for this qualification must be added, even in an English Court,) where there is nothing against good conscience in retaining the money; that is to say, where the payor has not been induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid, or any other fraudulent interposition, which would make it contrary to good conscience for him to retain it. I hold it neither to be a wise nor a convenient course for Courts of Justice to go out of their way to moot general propositions; yet, on the other hand, we ought not to feel too great an indisposition to advert to them, when the natural course of a case, upon its own merits and facts, leads us very near any important principle; because, although the settlement of the point is not of the first necessity, it is very proper that the law should be so settled. My Lords, if all the things which are now reckoned obiter dicta—that is to say, all matters which are not of the first necessity to the question before the Court—were struck out of some of our old reports, (I particularly refer to the most celebrated of these reports, namely, Lord Coke's,) a very great part of the "Corpus

Sept. 17, 1831. Juris Anglicani" would not have existed, because many of the resolutions of the Judges in the Courts are not of the first necessity to the decision of the cases upon which they were come to. I could mention various instances to which this observation applies. Those resolutions of the Courts are not, however, wide of the point; they are germain to the matter in issue, and they are reckoned, at this day, of as much authority in settling the law as if they were express decisions upon the points in issue. Now I think the present case comes so very near the question I have mentioned as to make it rather convenient I should say a word upon it.

No doubt there was a great difference of opinion among the Roman lawyers, as to the limits of the proposition, how far ignorantia juris, or ignorantia facti might be held to give a title to the protection of a condictio indebiti, and as to how far the doctrine relating to indebiti solutio was confined to cases where the fact was unknown or mistaken, or extended also to cases where the law was unknown or mistaken. A great distinction was taken between a volunteer payment and one where the party was in damno vitando; and we may say there is authority in the civil law which carries the proposition to the length of putting a party who is the payor of an indebitum in the situation of the party who has made an indebiti solutio, and therefore entitled to a condictio indebiti. But whoever has attended to this subject will be satisfied, that it is hardly possible to conceive a question which raises more difficulties, and which, in explicating it, and following it into its consequences, would, in practice, be attended with more interminable mischief. Now I will not go widely into this field, but I will just stay to comment a little upon a case which raises this point at once, and in very lively colours; I mean the case of Carrick. It is needless to say that this is the only decision where you have all the facts which are relied upon, either by the counsel at the Bar or referred to by the text-writers, as authorizing the general proposition, that it makes no difference whether the ignorantia is ignorantia juris or ignorantia facti; and when we come to look at it, we find that the proposition is at all events obiter dictum in that case, because it is clear there was ignorantia facti there; for the party alleged that he was ignorant that the seven years had elapsed, although in fact there had been a lapse of eight years. It is in the course of the argument that the observation comes from the Bench, which alone, and not the principal point of the case, is the ground of this case being cited in the question before us. "It makes no difference," the Bench say, "whether the payment was "made from error of law or of fact; it is sufficient that it proceeded "from mistake; and when payment is made sine causâ, it will be "presumed to have proceeded from error, and not donation,

Sept. 17, 1831.

" unless the contrary can be proved." Now, observe what the consequence of that proposition would be, if, as the Judges say, it makes no difference whatever as to the indebiti solutio, and the condictio following upon it, whether the indebitum was paid from error of fact or from error of law. Then it is clear, that if a person makes an error with respect to the law touching the period of limitation, in law he was not bound to pay; there was no law to make him pay, except the natural duty to pay his debt, but that was all. It was not like the natural duty of a man to provide for his child. He, from ignorance of the law, paid; but if he had known the law, he would not have paid. Then, what a door does that open? It opens, at all events, an inquiry in each particular case. I cannot withdraw from that proposition, nor can I allow counsel to withdraw from it, unless he will provide a shelter from its scope, by showing some restriction of it which shall be consistent with principle. Now see the sort of inquiries to which this would lead. A man alleges, that he would not have paid if he had known the law. " I was bound for a friend," says he, " but if I had known that " thereby I was not jointly and severally liable, I should have " taken care not to have paid till the principal was discussed; for " that is the Scotch law. But I have paid. I knew all the facts— " I knew that he had not been discussed, but I did not know " the law; I did not know that this was a bond which made me a " cautioner, and therefore that I was entitled to discussion. And " having taken the opinion of counsel, who tell me, that in a case " lately in the Court of Session, it was held that if A. becomes " bound jointly and severally with B. for sums of money lent to B., " that is not a cautionary bond; therefore I did not think I was " a cautioner, and therefore I paid the money under ignorance. It " is very true, I took the opinion of counsel, and he referred me to " the book, and I saw as plainly as possible what you now explain " to me, that by the terms of my bond I was a cautioner; but I am " a very stupid sort of a man. I had got, it is true, a very learned " opinion, and I had access to all that you have access to, plus the " opinion of counsel which you never saw; but I am very stupid, and I " did not understand the legal phrases, and therefore I did not know " what discussing means, or that I was entitled to it. Discussing " means a very different thing among different classes of people, and " I did not know the meaning of the words, and therefore I paid in " entire ignorance of the law. I knew all the facts, and there " was no fraud practised upon me. I was told I paid at my " peril; but I thought I ran no risk in paying, and I thought I " was bound to pay, having set my name to the paper." Such would be the defence always set up. Then are we in each par-

Sept. 17, 1831. ticular instance to measure and gauge the knowledge of law which an individual has? and having got at that knowledge are we to gauge his capacity to make the law apply to facts? because you must consider each person, under this doctrine, as you would a lawyer, and you must consider how far he has that which was said to be the talent of a lawyer by civilians; practicus habitus applicandi leges casibus obvenientibus. He says, " I know the law, " but I could not apply the law to the facts in my own case, and " therefore I made the same mistake which many a lawyer had " done before me; and though I knew the law, yet not having " the faculty of applying it to the facts of my own case, I paid the " money, which you now clearly show me that I ought not to have " paid; therefore I am entitled to condictio indebiti, for the Judges " have said, in Carrick's case, that it is quite immaterial whether it is " ignorance of the law or of the fact." Now these absurdities are so gross that it forces the admission that there must be some qualification, but I have not been able to ascertain what that is. Is it to be communis error; that is to say, that all mankind thought the law to be so till it was set right by subsequent decision, or a declaratory Act of Parliament, and that whatever is done under that impression is to be considered invalid? But that clearly will not cover this case; for there was here no common error. There was a decision in the Court below, and that was afterwards reversed here; but it cannot be said to be a case of universal error, nor is it a case in which the law was changed by a declaratory act, or by what has been called judge-made law, that is to say, a judicial interpretation, affixed either to a part of the common law or to a part of the statute law. That cannot be said to be the limit of the proposition, because a thousand cases may be put, and among others this very case of Carrick, in which it was said, that even though he had known that the time had elapsed, still, if he was ignorant of the law, he was entitled to the condictio, it being immaterial whether it was the fact he did not know, or the law he knew not. Now I apprehend it is from a view of all these inconveniences, and the interminable mischief that would arise from allowing that defence to be set up, and the impossibility of affixing such a qualification to the proposition of ignorance of the law being a sufficient objection, that our Courts here have uniformly laid down the rule, according to the case which has been referred to of Bilbie v. Lumley, and that case in 2d East which I have referred to since the argument began. The old case of Lowrie v. Bowdieu is the main case; but it appears never, in Westminster Hall, to have undergone any great contention. Though it was at one time rather doubted, it never was denied, nor is there any good decision, except a dictum which has been referred to at nisi prius, that can be said to

Sept. 17, 1831.

be an authority against the doctrine. It is in the nature of what you would call an exception of estoppel, that a man shall not be heard to say he does not know the law, inasmuch as if you allow him to say he does not know the law you have no certain rule whereby to ascertain whether he knows it or not; you have no means of knowing whether it is a bonâ fide defence, or a defence in pessimâ fide; and you have no such hold over persons as you have where the only question is as to their ignorance of the fact. It is subject to this important qualification no doubt, that if I allow a man to pay me money, I, knowing that he is ignorant of the law, and knowing that he would not pay the money if he were not ignorant of the law, and I myself knowing the law, and being accessary to getting him to pay, or getting some person to misinform him of the law, and then getting payment from him under that superinduced ignorance—it is clear in that case it would not avail me, and that the money may be taken back by an action for money had and received. It has been doubted whether in that case a bill in equity would not lie. There is a case in 1st Peere Williams which has been much discussed lately in the Court of Chancery, in which a suit of that sort was brought for the repayment of the money; but Courts of Equity are justly inclined against the doctrine. However, it is clear the money which is so obtained by fraud may be recovered back at law; but that is quite a different case. Now is there any great hardship in this conclusion? Is it not the same principle upon which the whole doctrine respecting ignorantia juris in criminal cases is founded? Can it be said to be a much harder case for a party to be bound by what he does quoad civilem effectum, that is, to lose his money, than it is that he should be bound quoad criminalem effectum, that is, to lose his liberty and his life? And yet no man can be allowed, in answer to a criminal charge, to get up and say, I did not know the law. You are bound to know it, or, which is the same thing, you shall be treated as if you did know it. Cases no doubt might be enumerated in which the most grievous hardship may have arisen, such as to give the party a claim to the mercy of the Crown; for example, Lord Ellenborough's act, by which what had before been a misdemeanor was made a capital felony, was to take effect within a week, and therefore before it would be known in the county of Kerry, a part of the kingdom where perhaps it was very likely to be wanted; and yet under those circumstances a man might indeed have said, I live in the county of Kerry, and I did not know that the act had passed, but he would notwithstanding have been liable to be convicted, and he would not have been heard to say that he did not know the law. Many laws are not known to the persons who are most the subjects of criminal jurisprudence, namely, the

Sept. 17, 1831.

inferior classes of the community; they are the least likely to know of a law that has been passed, but they are never allowed to say that they did not know it. Now why is this? Not that there is not a great hardship; not that there is not a manifest natural equity in allowing them to urge this plea; but it is not even allowed to be urged in mitigation of punishment, much less as a defence to the prosecution, on account of the interminable confusion and the innumerable mischiefs that would arise if you opened the door to any such defence. But are there not mischiefs of the same kind applicable to civil jurisprudence, similar and parallel to the mischiefs in criminal jurisprudence? There are the mischiefs that have been pointed out, and with reference to which our Courts have held, that the same principle applies, not, as Mr. Justice Chambre argues, in the last case on the point, upon the ground that ignorantia juris non excusat, which is the principle as applied to criminal cases, but it is this, that nobody shall be allowed to say he does not know the law, because the lawgiver can only proceed and judge upon one assumption, that the law is known to the community, and that he is dealing with persons in every case who are cognizant of the law; that the law *may* be known to every person, and that, therefore, it is not unreasonable to presume that it *is* known to every person. But he cannot presume the fact to be known to every person. On the contrary, ignorance of the fact is almost a necessary occurrence in many cases; and therefore, though the law may be presumed to be known, the fact cannot be presumed to be known. Upon these grounds, I cannot conceive how, in any country where many transactions and dealings are carried on between man and man, and where many law suits arise, any system of law can exist or can be conveniently administered if it is not to be maintained in this way. My Lords, I have disposed of the case of Carrick; but there is also the case of Stirling, of which the whole report is "condictio indebiti sustained to "one who had paid errore juris." Now this is certainly as meagre a case as I ever heard cited, and for aught I know, if the facts came to be looked into, it might not bear out this conclusion attempted to be drawn from it. It is a case which has very little weight with me. As to the authority of Erskine, when a principle is manifestly dangerous, and one which cannot be followed without grievous abuses, which no limitations that can be assigned to it are in the least likely to prevent, it would require even stronger authority than his to induce me to follow such a principle. But truly, if what is contended for be the undoubted law, it is a marvellous thing that there should be no other cases in support of it. If our forefathers had considered it the law, it is odd that it should never be distinctly set up; because ignorance of law is much more common than igno-

rance of fact. A poor man is more likely to pay money under an ignorance of the law than under ignorance of the fact, inasmuch as a common man is likely to know the facts of his case, but he may easily not know the law. Such a person might very likely pay money under ignorance of the law, and he would very naturally say to his attorney, I have paid the money to such a person, and his attorney would say, You were not bound to pay it, and you have only to bring an action to recover it back. Therefore it is extraordinary that no actions have been founded upon that state of facts, which is much more likely to have given rise to such payments, and therefore to have given rise to these actions, than the other case, the only one in which actions have arisen, namely, ignorance of the fact. It is very marvellous that there is hardly any such thing to be found as an action founded upon a payment made under a mistake of law, and it tends to make me greatly question its being the law of Scotland, as it is now contended to be. No doubt one feels a great disinclination to state any opinion which goes against a high authority; but it is a great comfort to find, that when I look at the facts of this case there are so many specialties in it as make it possible to dispose of it without distinctly and specially deciding this point. As to the plea of res judicata, that is not tenable. As to homologation, there is no pretence for talking of it, because homologation is by a person who does one act which recognizes the validity of another act, and in doing which he makes use of the other act. Here there is nothing like that. There is no homologation of the act of payment in question. But as to acquiescence the case is very strong. Now, with reference to the question between these parties before this House upon a former occasion, though I am bound to entertain great respect for your Lordships judgments, I might entertain some doubts about that case if it were now here for decision, and I think at least it will be admitted that it goes very far—as far as Mr. Dixon had any title to claim upon the facts of the case. He brought his action for monies paid by him between 1815 and 1819, and the Court ordered those monies to be paid back. Why did he not, at the same time that he set up the liability of the other party to pay from 1814 to 1819, go from 1815 backwards to 1804, and ask for those eleven years as well as the four years which he did claim? Is not the present in the nature of a stale demand? Is not this one of those demands which are exceedingly discouraged, even in a Court of law, but which in a Court of equity lie under the greatest discredit, and are received with the utmost difficulty? Is not this lying-by injurious to the other party? Is it not preventing him, by giving him no notice, from doing that which if he had had notice in all probability he would have

Sept. 17, 1831. done? Therefore, independently of the proposition that there was here a perfect knowledge of the fact, and that ignorance of the law is all that can be pleaded, are not these special circumstances sufficient of themselves to make the ground, as they were made the ground, of the decision, and the final decision which was pronounced below? Upon the whole, I cannot advise your Lordships to carry the judgment in the former case between Dixon and the Company one whole or one half year further back than the year 1815. It is true there is no statute of limitations relied upon; it is true there is no rule of limitation to exclude the claim; and it is true, undeniably, that by the law of Scotland a man may come at the end of forty years, as if it were only forty days, for the repayment of money paid under ignorance. At the same time the Court will always be very astute to take hold of any means of defeating stale claims, when they can do it without violating any established principles of law. Upon these grounds I shall submit to your Lordships that this decree should be affirmed, and, under the peculiar circumstances of this case, I feel no disposition to affirm this decision with costs, or to give the costs in the Court below. With respect to the cross appeal, there may be some doubt as to costs. If there ought to have been no cross appeal, it may be a question whether the present appellants and respondents in the cross appeal ought not to have their costs in the cross appeal. But on the whole, in moving your Lordships to affirm the decree, I shall not move your Lordships that costs shall be given in either case.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—3 Ersk. 3, 93; 1 Bank. 8, 23, 28; Stirling, 26th July 1733 (M. 2930); Carrick, 5th Aug. 1778 (Mor. 2931); Act 1790; Bone Weavers of Ayr, Digest L. 12. to Sect. 1; 1 Stair, 7. 9; 3 Ersk. 3, 54.

Respondents' Authorities.—Haldane, 11th Dec. 1814 (Mor. Ap. 1, B. and Mal. Fides No. 3); Jackson, 5th July 1811 (F. C. xvi. 318, No. 94); Duke of Roxburghe, 17th Feb. 1815 (F. C. xviii. 227, No. 59); Turner, 3d March 1820 (Fac. Coll. xx. 118, No. 31); Vans Agnew, 19th May 1826 (4 S. D. 604); Bilbie, 2 East, 469; Farmer, 2 Black. Rep. 824; Mann, 4 Term Rep. 561; Lothian, 3 Bos. and Puller, 520; Jerny, 3 Maule and Selw. 378; Stevens, 12 East, 38; Brisbane, 5 Taunton, 143; Shyrink, 4 Barn. & Cress. 281; Act 1790 and 1770; Wilson, 7th Dec. 1830 (4 W. S. 398); Smyth v. Pentland, 20th May 1809; Buller's Nisi Prius, p. 236; Gregory, 3 Espinasse, p. 113.

SPOTTISWOODE and ROBERTSON, — RICHARDSON and CONNELL, — Solicitors.