No 8. action cannot be taken from him, unless the assignee will qualify some fault, some negligence of the pursuer's, which yet cannot be done, by reason that the back-bond truly had fallen aside long before his time; and he was no way negligent as to that matter. And if they ascribe this effect to the pursuer's inculpable ignorance, then it must follow in general, 'That a debtor can never 'obtain a *condictio indebiti*, if the cedent became insolvent any time after the 'payment, of which repetition is sought;' a position that is apprehended to be without any foundation in law: For, as inculpable ignorance is never reckoned sufficient to bear out an action of damages for reparation; as little to bear out an exception of damages, in order to take away an action that is otherwise competent.

Replied to this *last;* It is sufficient to qualify that the loss happened through the ignorance and error of this pursuer: For, since one of them must bear the loss, it is more equitable that it fall upon the pursuer, who was in an error, than the defender who was in none; and no body ought to be prejudged by another's errors.

THE LORDS sustained the defence, That after the assignation to the Lord Halcraig, the late Duke of Argyle did corroborate the bond assigned in the person of the said Lord Halcraig, relevant to assoilzie the defender from any repetition or extinction.

Fol. Dic. v. 1. *p.* 187. *Rem. Dec. v.* 1. *No* 39. *p.* 78.

No 9. 1733. *July* 26. STIRLING of Northwoodside *against* EARL of LAUDERDALE.

Condictio indebiti sustained to one who had paid *errore juris.*

Fol. Dic. v. 1. *p.* 187.

*** *See* The particulars of this case in the APPENDIX.

No 10.
A sum due by a writer's account, was paid after his death to the husband of his daughter, his executrix. Afterwards a receipt for part of the sum was found. The daughter pleaded against repe-

1745. *June* 24. The EARL of PETERBOROUGH *against* MRS MURRAY.

UPON the death of Hugh Sommervile, writer to the signet, who had been doer for the Lord Mordaunt, now Earl of Peterborough, there was a sum, as the balance due to him upon his accounts paid in to Mr James Geddes, and Mr Hugh Murray, his daughters' husbands, without this particular being confirmed; but after their confirmation as nearest of kin, which the Lords have since found determined the interest of parties with regard to the whole executry.

Afterwards there was found a receipt of Mr Sommervile's for L. 50 Sterling from my Lord's factor, to be employed for his Lordship's law affairs, in so far as not already employed, and for this receipt no credit had been given in the account.

My Lord Peterborough pursued Mrs Murray, one of the daughters, for L. 25, being her share of the L. 50, as representing her father, who *pleaded*, That the sum was *indebite solutum* to her husband now dead, and ought to be made good by his executors.

No 10. tition, that her husband, to whom it was paid, was dead, and she did not represent him. She was found liable as representing her father, reserving action against her husband's executors.

Pleaded for the pursuer; That there was no undue payment; for that Mr Sommervile's claim on the balance of his accounts, and his Lordship's claim upon the receipt, were separate debts, and there was no necessity of making use of the one of them to compense the other; for a person may chuse whether to propone compensation, or to pay his own debt, and afterwards insist for the one due to him.

Pleaded for the defender; That no more was due to Mr Sommervile than the balance of his account, wherein he ought to have been charged with the sum in this receipt, which the pursuer had in his hands; and he having made an undue payment to Mr Murray, whom the defender does not represent, she cannot be liable for it.

THE LORDS repelled the defence, reserving action against the executors of Mr Murray.

Reporter, *Lord Justice Clerk.* Act. *A. Pringle.* Alt. *W. Grant.* Clerk, *Kilpatrick.*
Fol. Dic. v. 3. p. 156. D. Falconer, v. 1. p. 107.

1778. *August* 5. ROBERT CARRICK *against* JOHN CARSE.

No 11. 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.

IN 1768, Carrick became bound as cautioner for Robert Robb to Carse and others, in a bond for L. 100, payable at Whitsunday, and containing a clause of relief in favour of Carrick. No demand was made for this money till November 1776, when Robb having become bankrupt, Carse required payment from the cautioner, Carrick, of the principal sum, and half a year's interest then due. Carrick, after looking at the bond, said, 'there was no help for it,' and paid the money.

Next day he required of Carse to repeat the money, on this ground, that he had paid it by mistake, when not bound, seven years having elapsed from the date of the bond. Carse refusing to comply with the demand, Carrick brought an action for repetition against him and the other creditors. The pursuer admitted that he was in the knowledge of the law at the time he made the payment, but *alleged*, that he was ignorant of the fact that the seven years were elapsed.

Peaded in defence; The money paid was due at the time by the pursuer to the defender, *jure naturali*.—The statute 1695, c. 5. gives the cautioner an exception, after the lapse of the seven years, on which, if sued in a court of law, he may refuse payment: But it does not take away the obligation in equity on the cautioner, to indemnify the creditor, who, on his faith, trusted his property