1723. *July* 24.

DUKE of ARGYLE *against* REPRESENTATIVES of the LORD HALCRAIG.

No 8.
An heir having ignorantly paid a debt over again to an assignee, which his predecessor had before paid the cedent, was found to have no repetition off the assignee, the cedent becoming bankrupt after the second payment.

ARCHIBALD EARL of ARGYLE, *anno* 1672, granted bond to Mr John Ellies for 5000 merks; who, of the same date, gave a back-bond, declaring, 'That he 'had a bond from Donald and Ronald Campbells, for L. 2250 Scots, whereof 'if he received any part, he obliged him, his heirs, &c. to allow the same in 'payment of the 5000 merks.' This bond of 5000 merks, coming by progress into the person of the Lord Halcraig, the late Duke of Argyle granted corroboration thereof, narrating, 'That in regard this sum was by progress in the 'person of the Lord Halcraig, therefore he obliges himself to pay the same.' All this while, the back-bond was entirely unknown, either to the late or present Duke, till July 1715; at which time, by payment made, and imputing the sums contained in Donald and Ronald Campbell's bond, the 5000 merks bond was not only extinguished, but a considerable sum over *indebite* paid; whereupon a process was intented against the Representatives of the late Lord Halcraig, concluding an extinction of the bond, and repetition of L. 1277 Scots, paid over and above what was really due.

It was *pleaded* for the defenders, 1*mo*, That the Duke corroborating the bond in the Lord Halcraig's person, and expressly obliging himself to pay, was bound to the assignee by his own contract; after which the assignee needed not be concerned, whether any part was paid to his cedent or not; 2*do*, If the debtor was ignorant of the back-bond, and of any payments made to the cedent, *sibi imputet;* it is more just, the original creditor's representatives being now bankrupt, that the debtor, whose business it was to know, should suffer by his ignorance, than the assignee: The assignee, in taking the corroboration, took all reasonable precaution for his security; and he had thereby reason to rely upon his assignation, as absolutely good, and free of all exception.

Answered to the *first;* It is in vain to plead upon the corroboration, which in no view can import a more express acknowledgment of the assignee's title, than the actual payment that was made to him; and therefore, since a *condictio indebiti* is competent, when payment is made *indebite, errore facti*, which was truly the case here, the Duke not having known of the back-bond, it will not be the less competent that a corroboration intervened: And the reason of both is the same, corroboration and payment are neither of them absolute unqualified acknowledgments of the creditor's title; they go upon the supposition, that the title is otherwise well-founded; if which prove false, whatever is built thereupon must fall to the ground. To the *second answered*, If the original creditor's representatives are bankrupt, that naturally falls upon the assignee, whose faith he followed, and not the debtor. The debtor truly made twice payment, and has a *condictio indebiti*, well-founded thereby against the assignee; which

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.