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.

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.

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

No 11. with the principal debtor. It is an established point, that, where a person lies under an obligation, *jure naturali*, to pay, if the money is paid, no action for repetition lie ; *l.* 13. *et* 16. *De Cond. Ind.*; *Voet. de Pact.* § 2. *et* 4.; Ersk. B. 3. t. 3. § 54.; Bankt. B. 1. t. 8. § 27.

2*do*, Even where there is no obligation in equity, repetition of money paid from alleged ignorance of law in every case, or of fact, when gross and inexcusable, cannot be required, if payment was made to the proper debtor, *qui suum recepit*; *Voet. l.* 12. *t.* 6. § 7. *l.* 6. *ff. De juris et fact. ign.* The pursuer admits that he knew the law. As he read over the bond, it must be presumed he knew the fact, that seven years were elapsed from its date. At any rate, it is a fact of that kind, of which the law does not excuse the ignorance. And, therefore, the case is the same as if he had made payment, knowing that he could have got quit of the debt under the exception given by the act 1695, but not chusing to use it.—Action of repetition, therefore, does not lie.

Answered for the pursuer; 1*mo*, The principal debtor, who receives and has the benefit of the money, lies under a moral obligation, independent of his bond, to restore what he received. But the cautioner receives nothing, and lies under no other tie to the creditor, but the civil obligation which he comes under in the bond, the extent of which has been regulated by law.—The statute 1695 does not merely give an exception against payment to the cautioner, after lapse of the seven years, but declares him, '*eo ipso*, free;' so that the obligation is totally at an end, as much as if it had never existed. This is laid down, and the distinction betwixt this statutory liberation, and that of prescription, is illustrated by Bankton, B. 2. t. 12. § 38. and § 74.; Ersk. B. 3. t. 7. § 24.—It is therefore the same thing as if it had been expressly stipulated in the bond, that the cautioner was to remain bound for seven years, and then to be free.

2*do*, When there is no obligation in equity to pay, it makes no difference whether the mistake arises from ignorance of law or fact, of whatever species. Unless it appears that the money was given as a donation, it must be restored on the common principles of justice; for the receiver holds it *sine causa*, as he can derive no right from mere error; and the person who put the money into his hands continues in the just right to it, notwithstanding the mistake.

This is the received doctrine of our law; Stirling against Lauderdale, No 9. p. 2430.; Bank. B. 1. t. 8. § 27. and B. 1. t. 23. p. 467.; and it is agreeable to the principles of the civil law. That law distinguishes betwixt the case where the person who falls into an error is in *lucro faciendo*, and when he is only in *damno vitando*. In the former case, the civil law did not restore him against errors in law, or gross errors in fact, such as *error facti proprii*. But, in the latter, every species of error was excusable; *l.* 27. *de usu. et usurp.*; *l.* 15. § 2. *de contr. emp.*; *l.* 2. 3. 4. 7. *de jur. et fact. ignor. Vid. Vinn. Sel. Quæst. l.* 1. *c.* 47. In this instance the pursuer is clearly in *damno vitando*, seeking back what he had parted with only by mistake, and which, if not restored, he can never recover, as the debtor is bankrupt. The person who attempts to profit by this

mistake, *non suum recipit*, though a like sum is due him by another. It is only where there is no error, and the debt is paid by a *negotiorum gestor*, for the debtor, that the creditor is said, in the civil law, *suum recipere*, *l.* 2. 6. *de cond. ind.* But, when that does not appear, *alienum recipit:* For the debt due to him by one, can give him no title to the money of another.

No 11.

That no donation was meant in this case, is evident from the transaction, and the words used by the pursuer when the payment was made.

Observed on the Bench; It makes no difference 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 causa*, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made *sine causa;* for, after the lapse of seven years, there was no obligation, natural or civil, on the cautioner.

THE LORD ORDINARY 'found the defenders liable, conjunctly and severally, to repeat and pay back the sums libelled.'

THE COURT adhered to the Lord Ordinary's interlocutor, on advising a reclaiming petition and answers; and again adhered, on advising a second petition and answers.

Act. *Ilay Campbell.* Alt. *Rae, Rolland.*

Fol. Dic. v. 3. *p.* 157. *Fac. Col. No* 41. *p.* 70.

1792. *November* 14.
WILLIAM KEITH *against* CHARLES GRANT, RICHARD MOLESWORTH, and Others.

No 12.
Condictio indebiti takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt.

SIR ALEXANDER GRANT of Dalvey purchased the barony of Clava, and certain lands near the borough of Nairn, from James Rose. Sir Alexander took infeftment in the lands of Clava, but his right to the Nairn lands remained personal at his death.

In 1771, he granted an heritable bond for L. 10,000 over his whole purchase, to Archibald Grant of Pittencrieff, by whom it was disponed in trust to Colquhoun Grant, writer to the Signet.

Sir Alexander having died much in debt, his brother Sir Ludovick entered heir to him *cum beneficio inventarii*; and, in 1783, he disponed the whole of the said estate to Mr Keith, accountant, in trust for his brother's creditors.

The trustee, in 1786, sold the barony of Clava to Charles Gordon, at the price of L. 6800.

In 1787, he sold the Nairn lands for L. 5000 to David Davidson, who, with the approbation of Mr Keith, and in consequence of minutes of the creditors, paid the price to Colquhoun Grant, in part of the above heritable bond.

Mr Gordon, in 1788, again sold, for L. 5400, the barony of Clava, except the lands of Fleeness, to Mr Davidson, by whom L. 5000 of the price were paid to