

No 294.  
signee, who  
was the ce-  
dent's son.

the suspender cannot be prejudged, as to the manner of probation, by the fathers oath, by which he offered him to prove, that the father was debtor in a greater sum. It was *answered*, That the cedent's oath could not be taken in prejudice of the assignee.

THE LORDS found, That in this case the reason was probable by the cedent's oath.

*Fol. Dic. v. 2. p. 236. Stair, v. 1. p. 318.*

1666. June 13.

JACK *against* MOWAT.

No 295.

THE LORDS found, that Jack having obtained decret, as assignee by his father, it was relevant for the debtor to allege and prove by the assignee's oath, that the assignation was without a cause onerous, and by the cedent's oath, that the debt was paid before intimation.

*Stair, v. 1. p. 376.*

1671. July 11.

JAMES WARDLAW *against* Mr ROBERT PETILLO.

No 296.  
A brother being assigned to a bond or decree for no onerous cause, and so a donation, the Lords sustained compensation to be proved by the cedent's oath, without the necessity of reduction upon act 1621.

WARDLAW being charged at the instance of Mr Robert Petillo, as assignee constituted by George Petillo his brother, in and to the sum of 420 merks, contained in a decree-arbitral, decerned in favours of the said George; did suspend upon this reason, that he offered him to prove by the cedent's oath that he was debtor to him in as much for goods received, whereupon he gave in a condescence. It was *answered* for the charger, That the cedent's oath could not be taken to the prejudice of the assignee, for an onerous cause. It was *replied*, That they offered to prove by the assignee's oath, that his assignation was for no onerous cause, but a mere donation by one brother to another, which could not hinder compensation to be proved by the cedent's oath, as was found in a case betwixt Forbes *against* Forbes, where a bond was assigned by a father to a second son. THE LORDS did sustain the reason of suspension, and found it probable by the cedent's oath, to take away the assignation, it being but a mere donation, and that there was no necessity to reduce upon the act of Parliament, as being done *in fraudem*.

*Fol. Dic. v. 2. p. 231. Gosford, MS. No. 376, p. 185.*

1674. November 7.

BOYD *against* STORIE.

No 297.  
A cedent's oath is not good against an onerous

JOHN BOYD late Bailie of Edinburgh, as assignee by Mr James Logan and Mary Cave his mother for sums received by them, to the duties of a tenement in Leith, and certain acres near thereto for the crop 1666, pursues Storie the

tenant for payment, who *alleged* compensation upon a bond of 500 merks due to him by the cedent, before the assignation, It was *replied*, That the tenant having been tenant for several years before, had enough of these years in his hand to satisfy the sum of 500 merks wherewith he would now compensate. It was *duplicated*, That these former years were paid and discharged, which being found relevant, the defender produced several discharges, one by Mary Cave and Mr James Logan, of a part of one year's rent; against which it was *objected*, That Mary Cave the liferenter having the right, had not written that discharge, and it wanted witnesses, and so is null. It was *answered*, That discharges by masters to their tenants use commonly to be written by servants, and subscribed by the masters without witnesses; and as custom allows bills of exchange, orders, and receipts of merchants, though neither holograph, nor having witnesses, so much more receipts and discharges by masters to their tenants which are of less moment, and if the contrary were sustained, all tenants might be ruined by their masters' heirs, or executors, or singular successors; and though after arrestments or diligence, such discharges might be quarrelled, yet these discharges were granted before any assignation or arrestment, and Logan the fiar was writer of this discharge.

THE LORDS, in respect of the custom between master and tenant, sustained the discharge, the tenant making faith that he received the same from his master before the assignation.

There was another discharge produced, granted by a malt-man, bearing, that he had received a part of the farms by warrant of Mr. James Logan, and another granted by Mr James Logan, as having warrant and right from the said Mary Cave liferenter. It was *objected* against these discharges, that there was nothing produced to instruct Mary Cave's warrant to the malt-man and her son. It was *answered*, That the same was offered to be proved by Mary Cave's oath. It was *replied*, That the oath of Mary Cave the cedent could not be made use of against this pursuer her assignee. It was *duplicated*, That albeit a cedent's oath cannot prove against an assignee, as to the right assigned, to take it away by payment, compensation, &c. which is not the case here, the tenant having instructed compensation by writ;—against which the assignee having *tripled* upon rents of former years not assigned, *utitur jure auctoris*, and can be in no better case than Mary Cave his cedent; who, if she were pursuing for these former years, the tenant would get her oath, that he had paid the same by her warrant;

THE LORDS found that the warrant might be proved by Mary Cave the cedent's oath.

*Fol. Dic. v. 2. p. 235. Stair, v. 2. p. 282.*

\*.\* Dirleton reports this case:

THE LORDS sustained a discharge granted by a master to his tenant upon payment of his duty, though it was neither holograph, nor subscribed before wit-

No 297.  
assignee, to prove payment, compensation, or any direct exception against the debt; but where compensation was proved *scripto*, and the assignee pleaded re-compensation, the cedent's oath was sustained to take off this plea.

No 297.

nesses, but pretended to be subscribed by the granter, which the LORDS did in respect of the custom, and that masters and tenants are in use to give and take discharges without witnesses; and that in the case of writs, letters, and bills betwixt merchants, the Lords are in use to sustain them, though they want witnesses; and there is the same, if not more reason in the case of tenants, by reason of the great and exuberant confidence betwixt them and their masters. Some of the LORDS thought it hard to recede from the law, there being no limitation or exception in behalf of tenants; *et ubi lex non distinguit nec nos*; and that there is a great disparity betwixt merchants and tenants; counts, letters, and bills of exchange, and other writs of that nature, being secret transactions betwixt merchants and their correspondents, whereunto witnesses and other persons, neither are in use to be, nor is it fit they should be privy; whereas discharges by masters to tenants are in use to be, and there is no inconvenience that they should be subscribed before witnesses; and there is no difficulty to get witnesses to them; and if they want witnesses, and be not holograph, masters may be prejudged, it being easy to imitate and forge a single subscription; and there being no means of improbation of the same. See WRIT.

*Dirleton, No 179. p. 76.*

1675. December 14.

CRAWFURD against M'CARTER.

No 298.

Found in conformity with Boyd against Story, *supra*.

CRAWFURD, as assignee by George Hamilton to a bond of 800 merks granted by M'Carter, chargeth him thereupon. He suspends upon a reason of payment, and produceth several discharges, bearing receipts in part of a greater sum. The charger *answered*, That he offered him to prove, that there was another bond due to the cedent besides this, to which the receipts are ascribable, and produceth the extract of a bond of a greater sum anterior to this bond. It was *replied*, That the prior bond was cancelled, because, by inspection of the principal, it is evident that the name of one of the cautioners is torn from it, and the witness to his subscription, to hide which it is lately registrated; and it is offered to be proved by the oath of George Hamilton, to whom the prior bond was granted, that it was paid to him otherwise than by the receipts produced. It was *duplicated* for the charger, That the oath of George Hamilton his cedent could not prove against him. It was *triplicated*, That seeing the assignee founds upon another bond to which he is not assigned, whatsoever may take away that bond is competent against him by the creditor's oath.

Which the LORDS found relevant.

*Fol. Dic. v. 2. p. 235. Stair, v. 2. p. 380.*