

1679. February 25. STEIL against The LAIRD of Orbiston.

PATRICK STEIL, as assignee by John Hamilton, writer, to the sum of 1000 merks, adjudged for as due by unquhile Orbiston, to whom this Orbiston is heir, he pursues him for payment. The defender *alleged*, That Hamilton's assignation to Steil was without a cause onerous, at least the cause onerous was not adequate, and therefore the cedent's oath was receivable against the assignee, and offered to prove by the oath of Hamilton, the cedent, that he had transacted with him to accept of L. 40 Sterling for all. It was *answered*, that though the cedent's oath be receivable against the assignee, where there is no cause onerous, yet that was never extended to an adequate cause. It was *replied*, that though there was some part of a cause onerous, yet the same not being adequate, the superplus is gratuitous, and as to it, the cedent's oath must be taken. The defender further *alleged*, that the transaction alleged upon is not relevant, because, before writ is adhibited, there is *locus poenitentiae*. It was *answered*, That *locus poenitentiae* is only where *res est integra*; but here the greatest part of the transaction was satisfied.

THE LORDS found it relevant to be proved by the assignee's oath, that his assignation was not for an equivalent cause onerous, and in so far as he acknowledged the same to exceed the cause onerous, found the cedent's oath relevant for proving the transaction, and that it could not be resiled from, seeing a considerable part thereof was satisfied. See PROOF.

Fol. Dic. v. 1. p. 564. Stair, v. 2. p. 703.

* * * Fountainhall mentions this case.

THE cedent's oath may be taken in prejudice of the assignee, where the assignation is lucrative, though at least such an assignation should have the force of a donation.

Fountainhall, MS.

1687. February. Sir WILLIAM MAXWELL against Mr GEORGE NORWAL.

FOUND, in a competition of adjudications, That a prior adjudger, who had verbally preferred the posterior, might thereafter resile, the preference not being for an onerous cause.

Fol. Dic. v. 1. p. 564. Harcarse, (LOCUS POENITENTIAE.) No 675. p. 192.

No 56.

Found in conformity with Hepburn against Hamilton, No 53. p. 8465.

No 57.