

1665. June 16. WILLIAM WRIGHT *against* GEORGE SHIEL.

WILLIAM WRIGHT as assignee by John Shiel in Carlowrie, obtained decret against George Shiel in Nortoun, as heir to John Shiel his brother, for payment of two bonds. George Shiel suspends upon this reason, that the assignation was gratuitous, without onerous cause, which he offered to prove by the assignee's oath, and offered to prove by the cedent's oath that the debt was satisfied.

THE LORDS having at length considered, and debated this case among themselves, whether the cedent's oath could prove against an assignee, when the assignation was gratuitous, some were of opinion that it could not, because nothing can prove but writ or two witnesses, or oath of party, and the cedent is not the party, but the assignee; and albeit the cedent could be a witness, he is but one; and because it is a rule with us, that the cedent cannot depone in prejudice of the assignee, unless the charge be to the cedent's behoof; and we have no exception, whether it be gratuitous or onerous; but the most part were of opinion, that in gratuitous assignations, the cedent's oath should prove; because an assignee is but procurator *in rem suam*, and doth not proceed upon his own right, but *utitur jure auctoris*; and therefore, albeit for commerce, our custom hath not allowed the oath of the cedent in prejudice of the assignee; yet the case in a gratuitous assignation hath neither been debated nor decided; and therefore in it, the cedent's should be sufficient, seeing it cannot be presumed that he who voluntarily gifted, will swear to his assignee's prejudice; and that truly the cedent is party, and the assignee pursues but as procurator *in rem suam*. And seeing we have no law regulating this case, equity and expedience ought to rule it; but in equity no man can put his debtor in a worse condition, without his consent, either as to the matter, or as to the manner of probation; and in expedience, the excluding of the cedent's oath in this case, opens a way for fraud, that after debts are paid, they may be assigned, even freely, and the debtor is excluded from his probation of the payment.

THE LORDS before answer, ordained the assignee's oath to be taken, whether the assignation was for a cause onerous or not.

Fol. Dic. v. 2. p. 236. Stair, v. 1. p. 282.

1665. November 30. WHITE *against* BROWN.

JOHN WHITE as having right from James White his father, charges Brown for 2000 merks, who suspends on this reason, that this translation being by a father to a son, in his family, at least having no visible estate to acquire it,

No 293.
In a question whether the oath of the cedent could prove against a gratuitous assignee, the assignee's oath was ordained to be taken before answer whether the assignation was onerous or not.

No 294.
A cedent was admitted to depone against an as-

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