

poned, that the letter was written at the desire of both parties, and read over before signing, and the suspender did not appear to him to be drunk.

No. 231.

The Lord Ordinary, 14th July, 1746, "Having advised the depositions of the suspender and John Hamilton, writer of the letter, repelled the reasons of suspension, and, 6th December, refused a representation, in so far as it reclaimed against the letter's being at all binding, in respect it was admitted there was a previous communing, and that a letter was drawn up and signed by the suspender, and the suspender owing his subscription to the letter produced."

Pleaded in a reclaiming bill: That writings not signed before witnesses subscribing bore no faith, except in cases of bills, receipts to tenants, and holograph writs; and it was found, that a letter not holograph, was not sufficient to infer an obligation on the subscriber, though it related to the tocher of a married child, and was insisted on as coming in place of a contract of marriage, which was favourable, 25th February, 1728, Strachan against Farquharson, No. 227. p. 16978; and in a late case, wherein Muir of Cassinuary was pursuer; it was found that a letter, the subscription whereof was acknowledged, but which was not holograph, could not produce action.

In the present case it was not admitted that the communing was agreeable to the conception of the letter, as it now appeared, or that there were orders to draw it up in these terms; so that the question came precisely to the point in law, Whether a letter not holograph were a binding obligation, when the subscription was owned.

The Lords refused the petition.

Pet. Boswell.

D. Falconer, No. 149. p. 187.

1748. June 28. NEILL against ANDREW.

The acknowledgment of the subscription to a missive letter renders the missive obligatory, though not holograph. *Vide PERSONAL AND TRANSMISSIBLE, eodem die inter eosdem, No. 84. p. 10406.*

No. 232.

Kilkerran, No. 15. p. 612.

1749. November 7.

ALISON against The REPRESENTATIVES of WILLIAMSON.

Williamson having in the year 1722 obtained a salt debenture from the custom-house at Kirkcaldy; indorsed the same blank to Henry Crawford, who transferred it as it stood to James Blair of Ardblair; and Blair having filled up his own name in the indorsation, transferred it to Alison in security of a debt.

No. 233.

Whether debentures, as they pass by blank indorsation, have

No. 233.
also the other
privileges of
bills?

When Alison came to demand payment of the debenture at the custom-house, the payment was for many years stopped on suspicion of fraud; and when at last an order was obtained for payment, he was obliged to submit to a deduction of about £100 Sterling, on account of some salt bonds due to the Crown by Williamson the creditor in the debenture.

Alison having recurred against the representatives of Williamson upon the warrantice implied in his indorsation, which *ex facie* appeared to have been by him made directly to Blair, it was for the defenders alleged, That notwithstanding of the indorsation being filled up as directly to Blair, yet, the true fact was, That Williamson had given the indorsation blank to Henry Crawford, who only transferred it to Blair; and as Henry Crawford was debtor to Williamson in a greater sum, instructed *scripto*, they pleaded compensation thereon against the pursuer, the assignee of Henry Crawford, by progress.

As the defenders had no other way to prove that Crawford had ever had any concern in the debenture but by the oath of Blair, Alison the pursuer would not have been obliged to admit the oath of Blair his cedent for an onerous cause; but it being discovered that Alison had got *aliunde* payment of the debt, in security whereof he had got the indorsation from Blair, and so was now but a name for Blair, the case came to stand as between Blair and the defenders.

And Blair having acknowledged the fact, that it was from Henry Crawford that he had got Williamson's blank indorsation, the Lord Ordinary found, "That he must submit to the same exception to the present action of recourse that would have been competent to Williamson against Crawford; and found it sufficiently instructed *scripto*, that Crawford was debtor to Williamson, and therefore sustained the compensation." Blair reclaimed, and the Lords adhered."

There were some of the Lords who inclined to think, that as debentures pass by a blank indorsation, it was a consequence that they could not be subject to compensation on the debt of the indorser, more than bills are. But the Court was of a very different opinion; they considered debentures as rather of the nature of blank bonds, while in use, than of bills. There is recourse on bills duly negotiated, when the *porteur* does not obtain payment through the insolvency of the person on whom they are drawn, because it is so provided by statute. But as there is no such provision by any statute with respect to the debentures, there is, properly speaking, no recourse at all against the indorser of a debenture. Suppose, for example, the Government should refuse to pay the indorsee, perhaps on account of deficiency in the fund allotted for the payment, or on surmises of fraud should defer the payment, and which was the very cause why the payment of the present debenture was so long postponed; no body will say that on such account there would lie any recourse against the indorser; though there was no occasion to give a particular judgment on that point, as it was not determined by the interlocutor.

It was a different question, Whether, where the indorser of a debenture has himself recovered payment of a part, or where, as the case here was, there is a

deduction made from the debenture on account of other debts due to the Crown by the original creditor, there does not an action lie upon the implied warrandice. And such action was thought to lie, just as in the case of blank bonds; where no recourse was competent to the *porteur*, when the debtor was unable to pay, yet, if any of the intermediate *porteurs* had got payment, action lay against them upon the implied warrandice; or as in common assignations for an onerous cause; for in gratuitous assignations there is no implied warrandice, nor any warrandice without an express clause to that purpose. But then compensation is a competent defence against such action, as the interlocutor finds, and that upon the debt of any of the intermediate *porteurs*; for even a bill when it had lain long over, as this debenture has done, has been found liable to be compensated on the debt of the original creditor in it, or if any of the intermediate *porteurs* through whose hands it may have come, although the name of such *porteur* did not appear upon the face of the bill, it being habilely proved that he was once possessed of it, and thereby creditor in it.

So it was adjudged in summer-session 1733. The case was, Dawson of Hemp-rigs accepted a bill to Ross, which Ross some years thereafter indorsed blank to Urquhart, and Urquhart transferred it to Baillie his creditor, who filled up his own name in the blank indorsation. Baillie having pursued Dawson the acceptor, he pleaded compensation upon a debt due to him by Urquhart; and Baillie having acknowledged the fact, that he had got the bill from Urquhart, the Lords sustained the compensation, although Urquhart's name no where appeared on the face of the bill.

Kilkerran, No. 2. p. 93.

D. Falconer reports this case :

1750. January 12.

A debenture for £260 Sterling as the duty of foreign salt employed in curing fish, was made out at the port of Anstruther, 1722, in the name of Alexander Williamson Provost of Kirkaldy; and by him delivered blank indorsed to Henry Crawford; and after filled up with the name of James Blair merchant in Edinburgh; who indorsed it to Colin Alison.

Payment was not obtained till 1744, by reason of suspicion of fraud; when it was made, with deduction of £119 of debt to the Crown by Provost Williamson; for which Alexander Alison, son to Colin, pursued his representatives; and having acknowledged he was satisfied by Blair, of a debt in security whereof he got the indorsation, it was found and allowed, that all objections were competent that might be proponed against Blair.

Answered, Compensation on the debts of Henry Crawford.

The Lord Ordinary, 3d February 1749, " Found that Mr. Blair behoved to submit to the same exception to the present action of recourse that would have been competent to Williamson against Crawford."

No. 233.

Pleaded in a reclaiming bill : Blair having purchased the debenture from Crawford in the way of trade, is not concerned with any demands the indorser might have upon him.

Answered, Blair got the debenture, as he has declared, in security of a debt, and was only to give credit for it when recovered ; so considering it as a bill of exchange, he is not entitled to take it free of objections that might lie against his author ; neither is this privilege competent upon bills that have lain over without negotiation ; but indeed this matter ought not to be judged by the rules which apply to indorsations of bills, but those of assignations of debts, whereby the assignee is subject to all objections lying against the cedent.

The Lords, 7th November 1749, adhered.

On another bill and answers, observed, Recourse was not due as on a bill of exchange, but the claim was as it would lie against a cedent, who had himself received part of the debt assigned ; which would not lie unless the assignation were onerous, and there was no presumption Crawford was here an onerous assignee.

The Lords again adhered.

Act. *Wedderburn, et Lockhart.*

Alt. *R. Craigie et D. Græme.*

D. Facloner, v. 2. p. 136.

1752. November 15.

DUNCAN against BARRON.

No. 234.

A location of land for five years was executed by mutual missives, and possession followed. These missives, though not holograph, were found sufficient to protect the tenant in his possession.

A location of land for five years was executed by mutual missives signed by the parties, but not holograph. The tacksman was put in possession. But after possessing a year, he was turned out by decret of the Sheriff, upon this ground, that a missive letter not holograph, cannot support a tack longer than one year.

In the reduction of this decret, *Elchies* observed, That missive letters are established by custom, and are not subjected to the regulations of the act 1681 ; that holograph letters are good by custom only ; and that a letter, of which the subscription is acknowledged, affords legal evidence equal to a holograph writing. It was *Drummore's* opinion, That possession upon a tack null upon the act 1681, is a homologation which secures the tacksman in his possession. And accordingly the Lords sustained the reasons of reduction, and found " That the pursuer ought to be reponed to his possession ; and expenses were found due."

Writ is an essential solemnity in transferring land-property ; and wherever writ is necessary as a solemnity, it must be formal, according to the law of the place. But a man may become bound to dispoñe land, or to grant a tack, without a formal writing, and indeed without any writing at all. It is true, that till a writing be executed, there is *locus pœnitentiæ*. But any probative writing is sufficient to bar repentance. A missive letter, though not holograph, is good evidence of the promise, where the subscription is acknowledged. The action to dispoñe or to grant a tack is founded on the promise : The letter is good evidence of the promise ; and has the effect to bar repentance.