

reason,) was lesion by granting that bond. ANSWERED, He can never pretend lesion, because it is offered to be proven that this debt was a debt owing by his father, (to whom he was heir,) and that there was a decret recovered against him at the cedent's instance, for payment of that debt as representing his father. REPLIED, That decret can prove nothing, because discharged by the cedent. DUPLIED, Cannot be heard, because if any such discharge be, the same was granted in contemplation of this bond now charged upon; and this I offer me to prove by the suspender, and those who were at that time his curators, their oaths. TRIPLIED, *Nulla modo relevat* by his curators' oaths to his prejudice; neither will he suffer them to depone.

They were to have the Lords' answer upon this if his curators should depone, yea or no.

*Act. Dewar.*

*Alt. Suspender, Spotswood.*

*Advocates' MS. No. 91, folio 84.*

1670. *July 23.*

MR. JAMES M'GILL *against* WATSONE.

THIS M'Gill having been minister at Largo in 1655, and having waired L.700 upon the reparation of his manse, there was a stent imposed, for reimbursement of thir expenses, upon the hail heritors of the parish, conform to the act of Parliament; and this defender refusing to pay his proportion thereof, viz. L.19, he was convened before the Sheriff of Fife to pay it, and decret was there recovered against him; which decret was suspended on this reason, that though the acts of Parliament allowed only a manse worth L.1000, yet that this charger had repaired and made the manse worth L.2000; and that the suspender was not cited to the imposing of that stent, as he should have been; and that neither at that time, nor for many years thereafter, he had no interest in that parish; and so this stent not being *debitum fundi* can never be sought of him, but the minister must have his relief of the then possessors of the land.

Thir reasons were repelled, because there was no reduction of the decret; neither would they supersede extract till the reduction should be ready, but reserved it as accords.

*Act. Suspender, Trotter.*

*Alt. ———.*

*Advocates' MS. No. 93, folio 84.*

1670. *July 23.*

ALEXANDER HAY *against* ALEXANDER HOME, Tailor.

HOME and his spouse having granted bond to Janet Geddes, kail-seller in Edinburgh; Home, two days before Janet her decease, *viis et modis* gets the bond; and being now pursued by Hay, who, as sister-son to Janet, is her executor, to pay that sum contained in the bond; he defends, that though he was once debtro to Janet in that sum, and for that effect granted this bond; yet the same being

now in his possession and custody, *de jure* the same is reputed retired and satisfied. To which it was ANSWERED, That the rule of law *instrumentum apud debitorem repertum inducit liberationem debiti*, at the most infers only presumptive payment, and being but *presumptio juris*, may be elided and taken away by contrary and more pregnant presumptions, such as they have here, viz. that it was seen two days before Janet's death in her own custody; that it is not presumable it was given up upon payment made to herself, she lying then on her death-bed, and having no use for money; as also *donatio non presumitur*; and they offer them to prove by the defender's oath, that though he have now his own bond, yet that he paid no sums of money therefore, but that since he got it he offered to treat and pay a part of it, if the pursuer would be content. REPLIED, *Nulla modo relevat* that he paid nothing for it, for he might have had it *ex donatione*, and as for his offer that was only *litis redimendæ causa*.

They were to have the Lords' answer on it whether or no the defender would be holden to depone in the manner the pursuer craved.

*Act.* M'Kenzie and Seaton.

*Alt.* Lockhart, Eleis, Murray, &c.  
*Advocates' MS. No. 94, folio 84.*

1670. July 23.

WALTER EWING *against* SIR WALTER SEATON.

THE letters being found orderly proceeded in a suspension, and the charger seeking the penalty of the bond in respect he had got two decreets in the matter, and was forced to come from London to prosecute it. ANSWERED, There is no penalty incurred but where the debtor is *in mora* to pay; but here there was no *mora*, seeing the suspender had a good reason of suspension, viz. that he being only a cautioner he was *in bona fide* to suspend, in regard the principal had suspended for that same debt; and so he was not *in tuto* to pay.

They were to have the Lords' answer on this.

*Act.* Suspender Cunyghame.

*Alt.* Lermonth.

*Advocates' MS. No. 95, folio 84.*

1670. July 26. LADY BUCHANAN *against* The LAIRD of ROSSYTH.

THIS was an action for payment of *ipsa corpora*, of the teinds intromitted with by him, and those whom he represents, during the space of sundry years libelled; AGAINST which it was ALLEGED, That thir teinds acclaimed, being only *decimæ minores*, viz. vicarage teinds, the same must be regulated *secundum consuetudinem et usum loci*; but they offer them to prove that they have been in possession of thir teinds, free of tacks, past memory of man, for payment of 40 merks by year, as the rental taxation of the said vicarage, and therefore *ipsa corpora et species* cannot be now sought, seeing they have prescribed *immunitus* therefrom; for