

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