prout de jure. There was no doubt but the delivery of victual was probable by witnesses, but the receipt of money-rent was all the scruple.

Bowman CONTENDED,—That though the delivery of money falls under the sense of witnesses, as well as that of any other species and fungible, yet *quo animo*, and for what intent it is given, may be altogether unknown to them; and therefore it is an uncontroverted rule in our law, that the receipt of money can only be proven *scripto vel juramento;* especially where it is to take away and extinguish writ; as here it is to prove payment of a bond by witnesses, which was never allowed in Scotland. See Dury, *25th November* 1624, *Bisset* against *Bisset*, and the citations there referred to, especially that of Job.

ANSWERED for Littledean,—Though, *regulariter*, writ can only be taken away by writ, or the party's oath, yet, in sundry circumstantiate cases, the Lords have allowed intromission with money-rent to be proven by witnesses, though it was to extinguish an infeftment of annualrent constituted by writ; as was found, *4th February* 1671, *Wisheart* against *Arthur*, and *2d December* 1665, *Thomson* against *Moubray;* likeas, the extinction and satisfaction of comprisings has been sustained by witnesses.

The Lords shunned the general case here; but finding that sundry receipts of Cranston's were produced, which presumed, that what he received he had given discharges for, therefore they refused to sustain his intromission with money to be proven by witnesses after so long a time, who might now forget or mistake the quantity or cause, especially against a singular successor for onerous causes.

Then Littledean's procurators ALLEGED,—That Cranston, having entered to possess by virtue of that assignation, should have continued to intromit and uplift the whole, unless he subsume he was debarred *via facti et juris*, and show, at least condescend, who got the rents.

ANSWERED,—He was not tied to diligence, being a voluntary assignee, whatever may be the case of apprisers once entering into possession.

The Lords did not decide this point, how far he was liable in diligence, at this time. *Vol. I. Page* 796.

1697. *November* 25. WILLIAM SOMMERVELL *against* ROBERTSON.

THE Lords advised the cause between William Sommervell, merchant in Edinburgh, and Robertson in Glasgow. Sommervell being debtor to Robertson in a sum, he gave him, for security, a bond granted to himself and the said Robertson, by one Skails, a merchant, for the equivalent sum, together with a declaration,—that if Robertson did not recover payment from Skails, after due and legal diligence, then Sommervell should pay him the debt, Robertson always restoring the bond and putting him in his own place. Robertson takes out caption against Skails; but, he breaking and flying to the Abbey, Robertson delivers back Skails's bond, with the horning and caption, to Sommervell, and now contends he must be liable to him for the debt. The question was,—On whose peril Skails broke?

Robertson ALLEGED,—He had done sufficient diligence, and that Sommervell

had rendered his case worse by subscribing a *supersedere* to the common debtor, Skails.

Sommervell ANSWERED,—The restoring the bond was not sufficient; for though it was also in my name, and so I had *jus exigendi*, being *correus credendi*, as well as Robertson, yet, the horning and caption being in your name, I behoved to have a retrocession, which you never offered me; and, as to the *supersedere* of personal diligence, it was for other debts, and not for this.

REPLIED for Robertson,—You was *in mora*, in not seeking an assignation, which I would never have denied; and, as to the *supersedere*, it must only be ascribed to this debt, because your other debts were but *debita constituenda*, and not liquid at that time, as this was.

The Lords found Robertson liable in diligence; and that he had not implemented the trust, in regard he did not offer a retrocession; and that the *supersedere* did not exoner him; and therefore found he behoved to rest content with Skails's debt, and could not now offer it back to Sommervell, who was not obliged to accept of it. *Vol. I. Page* 797.

1697. *November* 12 *and* 26. DUNBAR of WESTFIELD *against* LUDOWICK GRANT of FREUCHY, or that ilk.

November 12.—DUNBAR of Westfield, as heritable sheriff of Murray, pursues Ludowick Grant of Freuchy, or that ilk, for reduction of a regality-right he had obtained to be erected within his heritable sheriffship, to the prejudice and diminution thereof; so that, the King's predecessors being long ago denuded of this jurisdiction, he could not, without his consent, erect a new one privative of the old, by that famous rule, *Quod meum est sine facto meo auferri non potest*,---*l.* 11. *D. de Reg. Jur.*

Grant ALLEGED,—The pursuer had not produced a sufficient active title to sustain his reduction; for the regality quarrelled flowed originally and immediately from the King, and he produced his charter and infeftment thereon; whereas all given out for the pursuer was only his retour as heir to his father, and seasine following thereon, so that nothing appeared of an original grant from the King; especially seeing his father's right was by an apprising; which are often led at random, and carry no more right than what is instructed to have been in the debtor's person, against whom the apprising is led.

ANSWERED,---It was notour that Westfield was heritable sheriff there; and a retour out of the Chancery was as good as a charter under the Great Seal; and, if need be, shall produce his author's right *cum processu*.

The Lords thought this dilator was not of that moment to stop process, but allowed the debate to go on, they producing, *medio tempore*, a right from the King, bearing the heritable sheriffship.

Then the pursuer repeated his former reason of reduction, and added farther, ---That, by the 44th Act 1455, all regalities, as prejudicial both to the people and crown, are discharged, unless granted by deliverance of Parliament; and whatever might have been pretended after the Act of Parliament 1681, asserting the King's accumulative jurisdiction with the ordinary ones already erected,