

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

though by the canon law no prescription can run *in decimis garbalibus*, yet *decimæ minores* may be prescribed.

The Lords found this allegiance relevant.

*Act.* Birny.

*Alt.* Cunyghame and Stewart.

*Advocates' MS. No. 96, folio 84.*

1670. *July 9, and 27.* The MAGISTRATES of Montrose *against* SCOTS.

*July 9.*—The magistrates having bysworn stent masters stented the whole town, and amongst other inhabitants thereof, having stented thir defenders, conform to their estate and the quality of their trade; and having charged them to pay their proportions, they suspend upon this reason, that there was a prior stent imposed upon the citizens of that burgh, and upon them amongst the rest, for this same very ground and cause for which this stent is again laid on; which first stent was accordingly levied and paid; and this they offered to prove by the stent rolls, and the treasurers their receipts of that stent. This was found relevant. A second reason was the inequality or partiality used in imposing the stent, in so far as thir suspenders are stented three times higher then they were four years ago.

ANSWERED,—*Non relevat* to infer any inequality, seeing the increase of their trade has given occasion to that, which trade is a thing uncertain, sometimes better, and sometimes worse. And where they REPLIED, that trade was universally now decayed and turned worse in the kingdom; it was DUPLIED, that *in toto jure generi derogatur per speciem*, and whatever general decay there may be of trade there or elsewhere, yet they offer them to prove, that their trade is far greater now than it was then, when they were stented at less. But *2do*, it ought not to be permitted to burghers, for a small inequality, to quarrel the stent imposed by sworn men, else all the magistrates of our royal burghs might be sore troubled, and the taxation should come but slowly in.

*Charger,* Lockhart.

*Alt.* Sinclair and Bailie.

*Advocates' MS. No. 70, folio 81.*

*July 27.*—In this cause, mentioned before, *9th of July 1670*, they having alleged on a former stent, and it being admitted to their probation this day, the term being craved to be circumduced against them, they produced a diligence against the keepers of the town books for proving it, and craved a farther diligence. ALLEGED, They could have no farther diligence, because they being in a suspension, could have no more terms for proving their reason save one. REPLIED, Ought to be repelled, because, *Imo*, it is but a charge on general letters; *2do*, offers to prove the chargers hindered the stent-masters from producing their books, and so it is through their own default that their reason is not proven.

The Lords granted a farther diligence. *Partibus ut supra.*

*Advocates' MS. No. 97, folio 85.*