

1711. July 6.

MARY CLERK, Relict of Nicol Hardie, Writer to the Signet, *against*
MR WILLIAM DALLAS, Writer to the Signet.

No 21.

IN a pursuit at the instance of Mary Clerk against Mr William Dallas, for a year's rent of a house and writing-chamber possessed by him as tenant to her a matter of 19 years ago, prescribed *quoad modum probandi*, and referred to the defender's oath, he deponed, that he is not resting the rent libelled, but that 18 years ago payment was made thereof to the pursuer, by William Cockburn merchant in Edinburgh, his giving her allowance of the like sum upon that account, which the deponent allowed to William Cockburn in part of payment of a greater sum owing by him to the deponent.

Alleged for the pursuer; Since the defender doth not depone, that he paid the debt to William Cockburn by her order, or paid it to herself, his oath cannot be sustained to prove a debt betwixt Mr Cockburn and her; nor could Mr Cockburn's allowing the debt to the pursuer entitle him to uplift it from the defender, without a conveyance from the pursuer. And in a parallel case, 9th December 1664, *Lemmonth contra Russel*, No R. p. 13201. one having adjected a quality to his oath, that the debt pursued for was compensated by a debt due to himself, the Lords refused to sustain the quality as intrinsic, but found it behoved to be proved by the deponent.

Answered for the defender; *imo*, *Perinde est*, whether he made payment to the pursuer, or William Cockburn his debtor, and her creditor gave her allowance of the sum in the first end of what she owed him, seeing *quod quis facit per alium ipse facere videtur*. The practice betwixt Lemmonth and Russel is nothing to the purpose, for there the defender adjected to his oath this quality, that the debt pursued for was compensated by another debt owing by the pursuer to him by bonds and decreets, which quality was most extrinsic, and could not be sustained as proved by the oath, since that would have made the deponent judge of the validity of his own ground of compensation; whereas here the defender hath deponed, that the debt pursued was not resting, but actually paid; *2do*, The pursuer must prove the rent libelled to be resting owing by the defender's oath; and therefore, though it did not prove payment (as it does), it certainly proves not resting owing, which is a sufficient ground to assoilzie the defender, without necessity to dispute here the import of intrinsic or extrinsic qualities.

THE LORDS found the quality, that the defender paid the rent libelled to the pursuer by her delegation of that debt to William Cockburn, intrinsic, and therefore assoilzied the defender.

Fol. Dic. v. 2. p. 297. Forbes, p. 519.