

vaded; nor can the Dean of Guild or private persons, on such pretexts, throw down houses without the heritors' consent.

The Lords inclined to think what the defenders had done was unwarrantable; but, in regard it was no other ways now reparable, save by satisfying the pursuer, they ordained some of their number to adjust the price, and see the heritor satisfied for his interest to the full; but refused to allow him his *juramentum in litem* thereupon.

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1697. June 24. WILLIAM DUFF against The EARL of SEAFORTH.

WILLIAM Duff in Inverness, pursuing the Earl of Seaforth, on the passive titles, for payment of a debt due to him by his father; and, referring the same to his oath, one of the articles whereon he was craved to be interrogated was, whether he had not intromitted with and used his father's Parliament-ropes. This the Earl reclaimed against, as neither pertinent nor relevant to infer vitious intromission, seeing that was only in consequence of his assuming the title and dignity of Earl, which was never found to infer a passive title. Yet the Lords thought his using his father's Parliament-ropes, was all one as if he had intromitted with his hangings, his horses, arms, or any other moveable furniture, which has been sustained to infer a passive title, where they were of any value, and such a considerable heirship as might import a behaviour. Yet see Dury, 6th November 1622, *Laird of Dundass* against *Hamilton*.

The Lords ordained the Earl to depone anent the interrogatory, and reserved the consideration what it should import till the advising of his oath; for it was urged such ropes may be pointed as well as any other moveables; and so, being *in commercio*, why should not the apparent heir's meddling therewith infer a *gestio pro hærede*. See January 15, 1630, *Cleghorn* against *Fairley*.

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1697. July 1. ALEXANDER and JOHN CUTHBERTS against CHARLES ROSS.

I REPORTED Alexander and John Cuthberts against Mr Charles Ross, writer in Edinburgh, who had been agent in managing their law affairs for many years, and had their papers in his hands; and they craving the same to be delivered up, he contended for a *jus retentionis et hypothecæ* in the writs, till he were reimbursed not only of the expenses he had given out, but likewise of a yearly pension of £4 sterling *per annum*, settled upon him.

ANSWERED,—They acknowledged his right of retention *quoad* his account of debursements, and which they were willing to pay, though extravagant; but he could not extend that privilege to his bond of pension, which was now nine or ten years owing, and amounted to no less than £40 sterling; seeing the practice of that hypothec was only introduced by consuetude, and depended merely on this reason,—that they had no other way of proving their

debts and claims, and so were allowed retention; but here his claim was constituted *scripto* by a bond of pension. *2do*. Whatever might be pretended, by one receiving a bond of pension from a major, yet this was given by a tutor, where his pupil's means were all liferented, so that he was forced to seek an aliment; and was no legal act of administration, seeing tutors ought not to gift or lavish away their minor's estate. *3tio*. An agent not being *nomen juris*, being discharged by the Act of Regulations 1672, it was *donatio incapaci facta*. *4to*. By the 8th Act 1672, burghers cannot arrest men's persons, where they have innovated the security by taking a bond for the debt; *ergo a pari*; for the hypothec here ought to cease where his debt is constituted by writ; and though it may be alleged that the pupil is secure by recurring against his tutor, yet, both by the Roman law and our decisions, a minor has his election, either to pursue his tutors and curators or the party with whom they contract to his lesion; *2d July 1667, Lord Blantyre against Walkingshaw.*

REPLIED,—All this is only competent in a reduction of his bond of pension, where he shall instruct it was for services and other onerous causes: and, in the *Duke of Lennox's complaint against John Cunningham of Enterkin*, for getting up his charter-chest, the Lords refused it till his pension was paid him.

The Lords found, in this case of a pension given by a tutor, the agent had no retention of the pupil's writs; but that he might pursue for his pension, *via ordinaria*, as accords.

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1697. July 8. JAMES FORRESTER of LOGIE *against* ROBERT ROWAT.

RANKEILOR reported Mr James Forrester of Logie against Robert Rowat, sailor in Greenock. Rowat pursuing on an assignation from one who died in America for her share of an executry; Logie offered to improve the assignation as false. After extracting the Act for abiding by, and consigning, Logie propones sundry other defences, as that the executry is exhausted, and her proportion of 12,000 merks libelled is exorbitant, and he must prove the quantity.

ANSWERED,—*Exceptio falsi est omnium ultima*; and you, having betaken yourself to that, can never return to other defences; but the cause must stand or fall on the event of the trial of the falsehood; seeing I undergo the hazard of my life and reputation, and you venture nothing but £40, and so cannot be suffered to recur to other defences: and, for this, sundry decisions were alleged,—*July 3, 1662, Peacock; February 22, 1676, L. of Innes against Gordon of Buckie; January 22, 1666, Earl of Kinghorn; June 19, 1677, Murrays.*

REPLIED,—The proponing of falsehood does indeed debar the proponer from quarrelling, or objecting any nullity against the title or writ craved to be improved; but, *quoad alios effectus*, it can never cut off the defence of payment or the like.

The Lords sustained this reply, and found other defences receivable which did not concern the title.

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