

1697. July 8. Mr JAMES FORRESTER 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 L. 40, and so cannot be suffered to recur to other defences: And for this sundry decisions were alleged; 3d July 1662, Peacock, § 12. *h. t.*; 22d February 1676, L. of Innes *contra* Gordon of Buckie, No 143. p. 12056; 23d January 1666, Earl of Kinghorn, § 12, *h. t.*—*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.

*Fol. Dic. v. 2. p. 188. Fountainhall, v. 1. p. 783.*

1704. November 21.

KILPATRICK of Closeburn against FERGUSON of Craigdarroch.

My Lord Philiphaugh reported Kilpatrick of Closeburn *contra* Ferguson of Craigdarroch. These parties having borrowed 2800 merks from Mr John Richardson, by bond, in 1683, and Kilpatrick having paid the debt, he pursues Craigdarroch as representing his father, the other debtor in the bond, for repaying the equal half. He *alleged*, Absolvitor from the debt; for the bond was null by the 5th act, Parl. 1681, wanting the writer's name. *Answered, 1mo*, He cannot propone this, and deny the passive titles. *Replied*, If it were an allegiance of payment, compensation, or the like, it would certainly import an acknowledgment of the passive titles; but where a nullity of law is founded on, which arises from a plain act of Parliament, and is instantly verified by inspection of the writ produced, an apparent heir may propone that, and not homologate nor acknowledge the passive titles, and has been so decided, 10th December 1674, Auchintoul *contra* Innes, No 141. p. 12055; and 20th January 1675, Telfer, No 60. p. 9711; and though the Lords have demurred, if prescription can be proponed, denying the passive titles, the reason of that was, because it

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The proponing the defence of falsehood, debars from objecting to any nullity in the title of the pursuer, but does not preclude the defence of payment or the like.

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Found, that an apparent heir might propone the defence, that a bond pursued on was null, without incurring the passive title.