

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.

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may be elided by a reply of interruption, which requires a course of probation, and puts the pursuer to the delay and expense of an act; but here it is *nullitas juris*, resulting from the writ, and all instantly verified. THE LORDS found Craigdarroch might propone it, without acknowledging the passive titles. Then he insisting on the nullity of the bond, for want of the writer's name, it was *alleged*, The same was sufficiently supplied, because of the several obligants and witnesses all signing, and that the filler up of the witnesses' names and date was mentioned and designed in the bond, and he could not, on his oath of calumny, deny but William Alves was the writer, who was ready to depone; and the design of the act was only to find out the writer, which is abundantly clear in this case. *Answered*, That the number of witnesses, how great soever, did not supply this nullity, which is a distinct and separate point; and the foresaid act of Parliament declares, where it is omitted, that it is un-suppliable; and to make it up, were to prove debts by the uncertain testimony of witnesses, or the fallacious conjecture of comparing hand-writs; and the condescending now on William Alves as the writer, is not sufficient; nor does offering to seek their oath of calumny on it satisfy the act of Parliament, which is most positive, and expressly calculated to obviate and debar all such condescendences now for supplying that defect. The Lords thought it, in a court of conscience, a good and sufficient bond; but, as our law stood, it was null; though it was both unmannerly and unneighbourly to propone this nullity, yet being proponed, the Lords behoved to sustain it, though hard, *quia ita lex scripta est*: And if this were dispensed with, then a great mean of improbation of writs as false would be cut off, viz. the writer of the body of the writ, that being the main reason of inserting his name: Some thought if the debtor Craigdarroch, who had subscribed it, had been in life, his oath might have supplied; but here it was his son, who knew nothing of it, being then an infant. Others said his oath could not have been required, unless the debt had been also referred to his oath. Then it was insinuated, That William Alves should be liable *ex delicto vel quasi*, for omitting to insert his own name as writer, especially the debt having come into his person, and he having assigned it with warrandice to Closeburn; but this was not debated at this time. See WRIT.

*Fol. Dic. v. 2. p. 187. Fountainball, v. 2. p. 240.*

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Where the libel was entirely informal, this dilatory defence was admitted, after peremptory defences had been made.

1709. November 10. EARL OF LAUDERDALE against LORD YESTER.

THE LORDS, in the process betwixt the Earl of Lauderdale and the Lord Yester, (See APPENDIX.) found the Lord Yester bound in regard of his mother's renunciation to the Duke of Lauderdale, her father, and as lawfully charged to enter heir to her, and otherwise representing her, to denude of Dunfermline's apprising in favours of the Earl. Yester now gives in a petition, representing, that the Lords' interlocutor went upon a mistake, as if he had