son the pursuer's father, but likewise nominated tutrix to her and the rest of the children during her widowhood, and having confirmed the said testament as executor, and intromitted with the whole inventory, or else being obliged to intromit as tutor, she ought to be liable for the foresaid sum, which was the pursuer's portion, with annualrent after year and day, after which she ought to have done diligence. It was *alleged* for the defender, that she could only be liable as executrix to count and reckon, and to instruct diligence, but no ways as tutrix, seeing she never acted as tutrix, and a naked confirmation of the testament wherein she was executrix, could not oblige her to be liable as tutrix. THE LORDS did find that the defender having confirmed the testament wherein she was nominated tutrix without any protestation, that she should be free of the office of tutory, and should be accountable only as executrix to the creditors, that in law she was liable as tutrix, and she not having declared her mind, that there might have been a tutor dative, or a tutor of law served, she ought to compt for the said portion, with the annualrent of what she had intromitted with.

No 26.

Gosford, MS. No 756. p. 469.

1678. *July* 26. WEIR *against* The EARL of CALLENDER.

No 27.

THE EARL of CALLENDER having granted a pension to Mr William Weir, for services done and to be done, as the narrative bears, and the endurance being, during his life, whereupon the Earl being charged, suspends on these reasons; 1mo, That the pension being for the services to be done, which is *causa finalis*, importing a condition, which not being purified, the pension can have no effect; 2do, This pension being a *gratuitous* constitution, as all other donations are, it is revocable *propter ingratitudinem* which Mr William has incurred, 1mo, by defaming the Earl, 2do, by taking assignations against and charging him with horning, and pursuing him unjustly, where he was assoilzied.

THE LORDS found, that the pension granted for services done and to be done, during life, was valid, unless Mr William refused the service as an advocate, or had served against the Earl, but not upon processes or charges, at his own instance *ex justa*, or *probabili causa*, though the Earl was assoilzied; and for the defamation, they would not sustain it in general, but ordained the Earl to condescend. See No 22. p. 6355.

Fol. Dic. v. 1. p. 426. Stair, p. 643.

*** Fountainhall reports the same case:

MR WILLIAM WEIR, advocate, pursuing the Earl of Callender upon a letter of pension during his lifetime, the defence was, that Mr William *ex capite*

No 27.

ingratitudinis, (vide Tit. Cod. De revocandis donat. Massuerii Practic. Forens. Tit. De donat; et Nicol. Mozz. De contract eod. tit.) had lost it, because he had spoke opprobriously and contumeliously of him. THE LORDS before answer ordained the Earl to condescend upon the defamation and words of reproach.

Fountainhall, v. 1. p. 10.

1707. *July* 24.

JOHN RULE Son to JOHN RULE Apothecary in Dumfries, *against* The Children and Representatives of JOHN REID Merchant there.

No 28.
A party granted bond to three persons, narrating that at the granter's death they had accepted the oversight of his interment and curatory of his children, which would require trouble and expenses, and therefore obliged himself to pay a sum equally among the three. The bond was found to be effectual, *quoad* one of the grantees, who died a short time after he had been at the granter's burial.

THE deceast John Rule Apothecary in Dumfries, having, by his bond, dated a little before his death, narrating, that John Corbet, John Corsbie, and John Reid, had, at his desire, accepted the oversight of his interment, and Children, during their minority, which would require trouble and expenses, obliged himself to pay six hundred merks equally among them betwixt and Whitsunday thereafter, with annualrent and a penalty; and John Reid having died after he had overseen the interment of the granter of the bond, and the term of payment was elapsed; John Rule son to the granter, raised a process against the Representatives of Mr Reid, for declaring the bond null as to his part, in respect it was granted *ob causam quæ non est secuta;* John Reid having died without being at any trouble or expense in overseeing the defunct's children, which had been the main consideration for giving of the bond, since the going to his burial was a common neighbourly duty and work of humanity; so that the defenders could no more have benefit by the said bond, than if it had been granted to him for being advocate or agent, or factor to the granter's children, and he had died without performing any office of that nature, as a prentice-fee cannot be demanded when the master dies before the apprentice get any instruction.

Answered for the defender; The bond is a simple obligement, notwithstanding the narrative, which is neither quality nor condition thereof; for though that was the motive, it was to make no stop to the payment: And *de facto* John Reid survived the term of payment. Nor is the case of a bond for prentice-fee to the purpose; and as to a bond granted to an advocate for his service, the sum therein would be due, though the granter should have no business, and never employ the advocate.

Replied for the pursuer, whatever might have been pretended, if the money had been actually *bona fide* uplifted and spent, it cannot be demanded now when it is yet in the debtor's hand, and the cause of the bond never performed.