

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.

*Vol. I. Page 781.*

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.

*Vol. I. Page 783.*