1695. *December* 13. The CREDITORS of JAMES HUNTER of MUIRHOUSE Competing.

[See the prior and posterior parts of the Report of this Case, Dictionary, page 1023.]

THE competition between the personal Creditors of Mr James Hunter of Muirhouse, and Mr Bruce and others, who stood infeft, was reported. The reason of reduction against the real rights was, That their seasines, being taken on heritable bonds, containing precepts of seasine, the infeftment was not taken till a few days before Mr James's death, when he was not only notourly bankrupt, and his debts had emerged, and he was charged with horning, but was after they knew he was broken, and so were *participes fraudis;* and after which knowledge they could do nothing to impede the personal creditors from coming in *pari passu* with them.

ANSWERED,—They did nothing but *sibi vigilare;* and his condition is not to be considered as it stood the time of taking the seasine, but *initium negotii est spectandum,* when I lent my money, and got his bond bearing infeftment; at which time, he being under no suspicion, I might perfect my security when I pleased, he being denuded *ab ante:* and I took no gratification or voluntary deed from him after his bankruptcy; seeing parties may *uti jure suo quandocunque;* and, though the Act of Parliament 1617 ordains seasines to be registrate within sixty days after their taking, yet it limits no time for taking seasine after the granting the precept.

The Lords would not proceed to determine this day, because, three of the Lords being creditors, there was not a sufficient *quorum;* yet they signified their judgment so far, that they did not think the reason of reduction relevant as our law yet stood; but that the real creditors behoved to be preferred: And it is obvious, in the case of an inhibition, that it cannot reduce anterior obligements, unless the *nexus* of the *actio Pauliana,* for rescinding fraudulent deeds, be stronger than it. *Vol. I. Page* 688.

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1695. *December* 4 *and* 19. JOHN BALLANTYNE *against* SIR ROBERT DALZIEL of GLENNAE.

*December* 4.—ARBRUCHEL reported John Ballantyne, late in the King's Guard, against Sir Robert Dalziel of Glennae, anent the granting certification *contra non producta* in an improbation. Glennae's tutors pretended they ought to be reponed against the act obliging him to take terms, because he was minor, and had omitted material defences.

The Lords found, Though it had been an act of litiscontestation, as it was only an act for production of the writs called for in the reduction and improbation, a minor is not to be precluded of his lawful defences.

Whereupon he ALLEGED, 1*mo.* That the pursuer, not being infeft, he could

force the defender to produce no real rights to him. ANSWERED,—I produce my author's seasine, which is sufficient to sustain the title. The Lords remembered what they had done in *Keith* and *Carbiston's* case, and therefore refused process; especially seeing his author was dead, and so he could not insist in his name.

The *second* defence was, on the common brocard of law, *minor non tenetur placitare super hæreditate paterna;* and he offered to prove his author died not only infeft in thir lands, but likewise in possession. ANSWERED,—This was good against taking a term in a reduction, but not in an improbation, where falsehood was concluded against the writs. REPLIED,—Whatever effect this may have against writs specially called for and libelled against, yet, *quoad* the general clause of all other writs called for, without specifying what they are, if certification could pass against minors for these, it would make them propale their whole charter-chests, the concealing whereof was the design of the law, and the brocard would stand them in no stead. See 31*st January* 1665, *Kello* against *Pringle*. The Lords, thinking it of importance, ordained it to be heard in presence, How far a general clause in an improbation could oblige a minor to produce, under the hazard of a certification *contra non producta*, to pass against him, if he did not. *Vol. I. Page* 682.

*December* 19.—In the action at the instance of John Ballantyne, against Sir Robert Dalziel of Glennae, mentioned 4th current, a new allegeance was proponed for the pursuer, *viz.* That the minor could not have the benefit of the brocard unless he were served heir and infeft; and for this he urged the original statute out of *Regiam Majestat. lib.* 3, *cap.* 32; and a recent decision, marked by President Falconer, 20*th November* 1683, *Fleming* against *Carstairs*, where the Lords found an apparent heir not served had no right to propone this; and that Hope, in his Large Practicks, *tit. de Minoribus*, observed, that process of reduction and improbation was sustained at the *Earl of Morton and Lord Dalkeith's instance* against *Queen Mary*, though then a minor. On the other side, the Lords called to mind that this privilege had been usually indulged to apparent heirs; and therefore deferred until they were more fully informed in the case.

*Vol. I. Page* 690.

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1695. *December* 20. JOHN ALEXANDER of DRUMOCHRIEN *against* The LORD BARGENY.

PHESDO reported John Alexander of Drumochrien against the Lord Bargeny, upon his father's back-bond, declaring he had received from him a precept of poinding of the lands of Girvan-Mains, and a blank assignation to the debt, to be consulted at Edinburgh with lawyers, and obliged him to return them back to him; which he keeping, for the space of twenty-five years and more, and never offering them back, but adjudging Girvan-Mains's estate for debts of his own, and wholly neglecting this, he ought, *nomine damni*, to pay the sum.

ANSWERED,—These bonds are strictly to be interpreted; and he, having under-