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.

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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-

taken to do no diligence, and not having received the bond itself, (which the pursuer always retained in his own hands,) he might have done what diligence he pleased on the same.

REPLIED,—That, in such trusts, there is great exuberance of faith, *et plus actum inter partes sæpe quam est scriptum;* and, *in odium negligentiæ,* Bargeny should be liable.

The Lords found, A back-bond of the foresaid tenor did not oblige to diligence; and therefore assoilyied Bargeny. See the like, 18*th July, Janet Watson* against *Bruce.* *Vol. I. Page* 690.

1695. *December* 20. DAVID FOULIS and GEORGE CLERK *against* SIR JOHN DALMAHOY of that ilk.

PHESDO reported Mr David Foulis, factor at London, and George Clerk, his attorney, against Sir John Dalmahoy of that ilk, on a bond of relief given by Sir John to Mr Foulis.

ALLEGED,—He had omitted defences, which might have assoilyied him, both at the hands of Thomas Dalmahoy's creditors and Sir George Woodriff, the co-executor, and which he suggested to him;—such as, that the debt was prescribed; that Woodriff had intromitted with more effects than he had counted for, and so *intus habebat.*

ANSWERED,—That Sir John, being the universal legatar, (called by the English law the residuary,) Sir George Woodriff having only a small legacy, it was but reasonable he should be secured and indemnified, which Mr Foulis did at Sir John's desire; and, whatever advice he sent him anent these defences, yet he transmitted him nothing for proving the same: and the truth is, they are not receivable by the English law, in which it is a maxim that compensation (called by them stoppage,) is not payment, but only reserved by them to be pursued *via ordinaria;* and judgments being gone forth against him at common law, he brought the matter to the Chancery, and there got his bond penalty restricted, by equity, to what Sir George Woodriff was truly forced to pay; and it is not to be presumed that Mariot and his other lawyers would omit any valid relevant defence competent by their law; and Sir John, knowing of these intromissions, should have pursued Sir George for the same in his own lifetime, or may yet convene his executors; and Mr Foulis never undertook to be his agent in the case, or to pursue his actions: Likeas, Sir George could never have been liable for the money of Thomas Dalmahoy he uplifted from Sir Josias Child Goldsmith in the said Thomas's lifetime, because, by the English law, the nominating any person as executor is an exoneration and discharge to them of all they owed to the defunct, or their intromissions with his estate prior to his decease, like a *legatum liberationis.*

The Lords repelled Sir John's defences, and decerned for the principal sum and its annualrents from the payment, because a bond of relief includes indemnity *cum omni causa;* as also, sustained Mariot the counsellor's declaration, that £25 sterling was expended in the process, (whose receipt on the foot of their accounts is a sufficient instruction there;) and decerned Sir John Dalmahoy to pay the same. *Vol. I. Page* 690.