

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 negligentiae*, 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, *18th July, Janet Watson against Bruce.* Vol. I. Page 690.

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

PESDO 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.