

*versum.* DUPLIED,—It is *pactum merè personale*, and so *non egreditur personam* of Sir James, *per l. 7, § 8. D. de Pact.*; and the son John being then an infant *in familia*, no father would grant a security for what debts the child should then contract, seeing he knew not but he might be riotous; and the *ratio S. C. Macedoniani* obviates this: and, *esto* it had been for a debt of Sir James's, yet, that being innovated and extinct by this new bond, it cannot be a security for it; and if it should be a security for Forrester's cautionries for the son, why not for the grandchild also, *et sic in infinitum?*

The Lords found the back-bond taxative only for Forrester's cautionries for Sir James the father; and therefore preferred the other creditors to Cokburn in this sum. *Vol. I. Page 493.*

1688. *January 25.* The EARL of BREADALBINE, and JOHN CAMPBELL, his Son, *against* SINCLAIR of DUNBAITH and DUMBAR of HEMPRIGS.

See the prior part of the Report of this case, Dictionary, p. 10,522.

SINCLAIR of Dunbaith and Dumbar of Hemprigs being, on the 22d July last, found liable in a spuilie of some horses, pursued by Mr John Campbell; Dunbaith gives in a bill, signifying that these horses were pointed on Hemprigs' horning; and that, on his own horning, some cows were only pointed. Which was sustained, because they were not proven to have belonged to Mr John, as the horses were; nor had Mr John offered to depone thereanent at the market-cross, as he did for the horses; and therefore craving he may be assoilyied from the spuilie, and the same *in solidum* decerned against Hemprigs. ANSWERED,—*Quoad* Mr John, they must be both liable; because, he having convened both, they did not propone partial defences, but each *suscepit in se litem*, and stated himself contradictory; and an act of litiscontestation is a judicial novation and transaction. And, *quoad* Hemprigs, Dunbaith must also be liable, for he assisted him in the pointing of these horses, the illegality whereof consisted in thir two:—*1mo*, That it was done in the night, or in the morning early, before sun-rising, with violent breaking up of the stable-doors. *2do*, They refused to take Mr John's oath at the market-cross, and Dunbaith was present, and accessory to both, and got the best of the horses.

The Lords found them both liable to Mr John. *Vol. I. Page 494.*

1687 and 1688. JOHN HAY *against* The COUNTESS of HOME.

1687. *December 14.*—JOHN Hay, son to Mr Thomas Hay Clerk, having an infetment from the late Earl of Home upon the Hirsle, craved, by a bill, that the Lords would appoint padlocks to be put upon the barns and barn-yards, that the corns might not be removed and embezzled. The Countess, his relict,