

1688. *January 19.*—Yester's case against Lauderdale, about the L.10,000 sterling bond, mentioned 4th March 1685, is again debated. It was ALLEGED for Yester, that *L. ult. C. de Dot. Prom.* was most just; and that Minzinger tells it was so decided in the Imperial Chamber of Spira; and that her renunciation of her bairns' part of gear and others extended not to this bond; for Gifanius, *de Renunciat.* tells they are *strictissimi juris*, and gives 25 cases where they are to be interpreted and restricted, even against the propriety of words.

The Lords being to advise this cause upon the 26th of January, Yester craved a farther hearing to delay it, apprehending the event; and ALLEGED,—That this L.10,000 bond had an onerous cause to make it subsist, over and above what he got with her in tocher, *viz.* her mother's contract of marriage; and L.8000 sterling which Lauderdale got *stante matrimonio* by way of composition with her, as one of the heirs of line of the Earl of Home.

The Lords, before answer, granted Yester a diligence, to the 19th of February, to recover these papers. And having resumed the case, upon the 21st of February, and advised the whole debate, the Lords repelled the first defence against this bond, upon the not delivery: but sustained the second and third upon the contract of marriage and renunciation: and found, that the L.12,000 sterling of tocher, in the contract matrimonial, fulfilled and took away the said prior bond, notwithstanding of all the adminicles Yester produced to instruct the onerous cause of the bond; such as the adventitious fortune which the Duke of Lauderdale got with her mother, as one of the two heirs of line of Home, &c.; reserving to Yester to insist for these debts as accords.

On the 28th of February, Yester gave in a bill, offering to prove the renunciation was extorted from him and his Lady, by the Duke of Lauderdale's power and concussion. But the Lords refused his bill. *Vol. I. Page 492.*

See the other parts of the Report of this case, pointed out in the Index to the Decisions, under *Yester* against *Lauderdale*, and *Tweeddale* against *Lauderdale*.

1688. *January 20.* SIR JAMES COCKBURN *against* ALEXANDER MILN, LORD ROSS, &c., Creditors of Hamilton of Grange.

See the prior part of the Report of this case, Dictionary, page 1046. See Harcarse's Report, Dictionary, page 1051.

IN the competition between the Creditors of Hamilton of Grange, debated this day *in præsentia*; it was contended for Sir James Cockburn against Lord Ross, Bonhard, Alexander Miln, and others, that, *quoad* a 4000 merks' bond, he ought to be preferred; because it was granted by John Hamilton of Grange as principal and the Lord Forrester as cautioner; and Sir James, father to the said John, had disposed the estate to the Lord Forrester, under a back-bond that it should subsist for relief of his cautionries. ANSWERED,—The back-bond says only for relief of what he should be engaged in for Sir James.

REPLIED,—It bears, in the narrative, "for the well of the family;" *ergo*, It must extend to his cautionries for John the son, this being profitable *et in rem*

*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,