signed his bond to his bairns, her own grand-children; and so he is not discharged of the debt. REPLIED,---Though the debt be not paid *in forma specifica*, and directly, yet it is implemented *per equipollens*; and what his children have got is materially as if it had been given to him, and, *fictione brevis manus*, secured by him to his bairns.

The Lords thought the process invidious; yet, in law, they found him the only creditor in the obligement; and the performance to the bairns did not exoner the mother: and therefore repelled the defences, and decerned.

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1698. *January* 26. SIR PATRICK HOME *against* The EARL of HOME.

THE Lords advised the famous cause between Sir Patrick Home, advocate, and the Earl of Home. Sir Patrick, as having right, by progress, from Francis Stuart of Coldingham, to the lands and teinds of that abbacy, pursues the Earl to count and reckon for his intromission since his predecessor's entry in 1631. The Earl ALLEGED,—The title of his intromission was such as could not subject him to any counting; for, by the contract in 1631, he was to have the full rents for (the annualrents of) his £1000 sterling then owing, and the other debt of £19,200 Scots, without ascribing any part of them in payment of his principal sum; and accordingly, in 1643, he obtained a decreet in the same terms, which were sufficient titles for an unaccountable intromission. ANSWERED, 1*mo*.---The possession being ceded to the Earl, not only for his £19,200, but also for the current annuity, that cause ceased and expired, in 1632, by the Earl's death; so that *res devenit in alium casum*, and the half of the onerous cause failed; and so he could never retain the possession of the whole for the remaining cause. 2*do*. The paction was most usurious and unwarrantable, it being a most unjust profit to possess lands of a great value for an inconsiderable sum, whereby they got more than twenty per cent yearly; expressly contrary to the many good and laudable Acts of Parliament against ocker and usury. REPLIED,---These acts against usury take only place *in mutuo*, where there is the lending of money; but *hoc non agebatur* in this case, for here was no proper debtor, no requisition, nor obligement to pay. DUPLIED,—If this were once allowed, inventions would be fallen upon to cover the grossest usury and oppression under other names than that of borrowed money, which the canonists call *usura palliata*.

The Lords found the Earl ought to count for the superplus rents more than paid the annualrent of his principal sums, notwithstanding of the contract and decreet bearing that clause, *fructibus in sortem non computandis*. Then the question was stated, *a quo tempore* he ought to count? Some said, From the date of the right, it being an illegal paction, *et privatorum pactis non derogatur juri publico*. Others argued, The title was colourable, and sufficient to liberate from counting till the same was quarrelled; and, by interlocutor, found the Earl was liable to count for his super-intromission above his annualrents. But this part was not decided at this time.

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