and the friends consented to the uplifting of 1000 merks of the 4000: and his wife, getting the annualrent of the 3000 merks paid her, she farther contracts for diet, clothes, and other necessaries, about 500 merks from Mrs Sarah Sinclair, and grants bond for the same; who arrests the like sum in Clarkington's hands, and pursues a forthcoming against him.

ALLEGED,—The bond is granted by one *vestita viro*, and so is null. ANSWERED, 1*mo*,—He is dead. 2*do*, I have a factory empowering me to intromit. REPLIED,—*Vita præsumitur*, unless death be proven. 2*do*, He could not give a factory for uplifting that which he could not uplift himself.

ALLEGED, 2*do*, for Clarkington,—That, by the express conception of the clause in the contract of marriage, it was burdened with the consent of some particular friends therein named, who refused their assent; 1*mo*, Because it may prejudge her children; 2*do*, In case of no bairns, 2000 merks of it is to return to the granter; and to allow its exhausting this way evacuates that clause. ANSWERED,—The requiring the consent of friends, was to prevent unnecessary squandering and dilapidating the money; but absolute necessity has no law; and there can be nothing more necessary than to furnish her the means of life; for the annualrent of 3000 merks can never maintain a gentleman: and if the friends be obstinate in denying their consent, then it devolves *in arbitrium boni viri*, and the Lords of Session come in the friends' place, to consider the equity of the demand, and to supply their default.

The Lords found the narrative of the bond bearing to be for aliment, with a special account of furnishing, signed also by the debtor, were not probative, being only her assertion; but that the absolute necessity behoved to be *aliunde* instructed by witnesses; especially seeing it was informed that she had taken on for aliment from others, as well as from Mrs Sinclair; by which exorbitancy, in a short time, the whole stock of the 3000 merks might come to be exhausted, after which she would have no fund for her maintenance. Which consideration moved the Lords to look the more narrowly to the necessity and rationality of the furnishing. *Vol. II. Page* 510.

1707 *and* 1709. JEAN SEATON and SIR ALEXANDER WEDDERBURN of BLACKNESS *against* LORD PITMEDDEN.

1707. *December* 4.—MRS Jean Seaton, daughter to Lord Pitmedden, and Sir Alexander Wedderburn of Blackness, who married his eldest daughter, raise a process against my Lord, founded on the contract of marriage passed betwixt him and Dame Margaret Lawder, daughter to Mr William Lawder, one of the clerks of the Session; ALLEGING, That he is bound to make an equal distribution and division of the considerable means and estate he got by the said Mr William; and, on this depending process, having raised inhibition against my Lord, he applied to have it stopped till the ground of it were tried and cognosced, it being an extraordinary thing for children to crave inhibition against their parents, unless, *causa cognita*, the reasons were found very good. On the other hand, it was contended, he acted partially amongst his children, and diminished their portion, to make his representation great, by his eldest son and heir.

It was reasoned on the other side, That none could be so fit a judge of the

merits or misdeservings of children as the parent: and here was no competition betwixt children of sundry marriages, but were all by one bed; and so partiality cannot be presumed to take place. And, by the Roman law, *l.* 4, *sect.* 1, *l.* 6, 7, 8, *D. de in jus vocando*, parents could not be so much as convened and cited by their children, till they had cleared and specified the reasonableness of it to the prætor, and obtained his licence. And if they were so nice and tender in granting a common citation, what would the Roman prætor have said, if a defamatory prohibition of the disposal of their own had been craved. And Dury has remarked, 18*th January* 1622, that *Hamilton, younger of Silvertonhill*, having craved the like against his father or his mother's contract of marriage, the Lords refused to grant inhibition, upon report of the Lord Justice-clerk.

The Lords stopped the inhibition till Blackness produced the grounds and warrants on which so extraordinary a thing was craved. *Vol. II. Page* 399.

1709. *July* 7.—Blackness and Pitmedden. By contract of marriage betwixt Sir Alexander Seton of Pitmedden, and Margaret Lauder, only daughter to Mr William Lauder, clerk of Session, he gives her 20,000 merks of tocher, and she accepts it in full contentation and satisfaction of all she can ask or crave by the decease of her father and mother, except what she may succeed to *jure sanguinis;* and which benefit of succession falling to her, either as heir, executor, or otherwise, is destinated and appointed for the use of, and declared to appertain and belong to, her children of the said marriage; which failing, to the said Margaret Lauder herself, and her other heirs and assignees whatsomever. Sir Alexander Wedderburn of Blackness, who married my Lord Pitmedden's eldest daughter, conceiving he had a good interest in a share of Mr William Lauder's estate, intromitted with by my Lord Pitmedden and his lady; he and Mrs Jean Seton, another of his daughters, raise a pursuit against my Lord and his lady, founded on the foresaid clause in the contract of marriage, for paying to them a share of Mr William Lauder's means; which is libelled to a vast sum, upwards of £14,000 or £15,000 sterling, whereof they claim a tenth share each of them, according to the number of my Lord's children, being ten in all, their two shares being about £40,000 Scots or thereby.

ALLEGED for Pitmedden, 1*mo*,—As to Blackness, No process; because your lady, who had the right, is dead *pendente lite*, and disowned it by letters before her death. ANSWERED, 1*mo*,—The bygone annualrents are mine *jure mariti*, and the stock is my children's, whom I shall confirm executors for the moveable debts, and serve heirs *quoad* the heritable rights which belonged to Mr William Lauder their grandfather; so any of them is a sufficient interest and title to sustain this process.

Pitmedden ALLEGED, 2*do*,—That, *esto* Blackness and his children had right to a share, yet he behoved to collate the tocher of 15,000 merks he received from Mr William Lauder, and 2500 merks farther, as the expense of the marriage clothes, rings, and other ornaments, and the wedding feast. ANSWERED, 1*mo*,—It is *jus tertii* to Pitmedden, that tocher not having come from him; 2*do*, Collation takes only place in provisions flowing from a father to his children *in familia;* but this she had by the free donation of her grandfather. 3*tio*, Blackness got not the tocher, but his father; so he can never be obliged to collate the thing he got not.

REPLIED,—Blackness's claim being for a share of Mr William Lauder's means, can there be any thing more reasonable than that the 15,000 merks,

received from Mr William, should come *in computo*, and be conferred with the rest of his heritage, and deduced out of any share you will have right to? And collation takes place amongst all ascendants and descendants, as well as betwixt father and children. And the 18th *Novell. cap.* 6, is full upon this head, introducing parity among children and grandchildren, that peace and unity may be entertained amongst them, and all provocation to discord, by an unequal division, may be removed. As to the 2500 merks on the wedding, it is more difficult to bring it under collation, seeing, by the same rule, all sums expended by parents on their children's education, and their travelling abroad, and studies, might be brought in; which the lawyers have ever refused.

ALLEGED for Pitmedden, *3tio*,—That the clause of the contract founded on made the Lady Pitmedden fiar, and the children only to come after her, *titulo successionis;* at least she has the liferent of the whole during her lifetime, and they are only substitute fiars to her; and he, by his paternal power, has the faculty of dividing it amongst his children, according to their merits and deservings. ANSWERED for Blackness and Mrs Jean,—They opponed the clause, which neither gave fee nor liferent to the lady, but made her only the canal for conveying the right to her children, declaring the residue of his goods above the 20,000 merks of tocher, shall pertain and belong to the children: *et in claris non est ullus relictus locus conjecturis.* And as to his power of division, that only takes place in estates coming from the father himself, but not where it falls to his bairns *aliunde;* and the clause substitutes her to her children, so they are called *primo loco* to the succession.

Some thought the design of the clause was, that the lady's children by my Lord Pitmedden, should be preferred in Mr William Lauder's means to any children she might have by the second marriage, if she chanced to outlive my Lord Pitmedden.

The Lords thought the clause very extraordinary, and therefore ordained it to be farther heard. *Vol. II. Page* 511.

1709. *July* 13. JAMES DRUMMOND'S HEIR *against* JAMES SMITH.

LORD Minto reported Drummond against Smith. James Smith, in Lundy, sells a bargain of bear, belonging to Mr James Drummond, minister of Kinneuchar, to one Meikle, a brewer in Leith, and takes the obligement in the contract for the price in his own name. Meikle having paid a part of it, breaks; and Drummond's heir pursues Smith for payment of the remainder. And he alleging, that he was but a factor for Mr Drummond, what he did *factorio nomine* cannot bind the price on him, to make up what Meikle, the bankrupt, has fallen short in: And there being a decreet *in foro* obtained against him, he suspends on thir reasons, That, since the extracting of that decreet, he has recovered papers which clearly instruct his allegeance, that he was only acting as a friend to serve Mr Drummond, the minister, and ought not to suffer for his kindness; seeing *officium nemini debet esse damnosum;* and he produces a receipt of Mr Drummond's, to the said Meikle, for £68, as a part of the price of the said victual, and a letter giving him a supersedere on his paying £30 sterling presently;