

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, *Stio*,—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 opposed 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 obligation 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 decret *in foro* obtained against him, he suspends on thir reasons, That, since the extracting of that decret, he has recovered papers which clearly instruct his allegiance, 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;

by which it now appears it was the minister's victual, and he betook himself singly to Meikle, and did not look on Mr Smith as his debtor; and that thir were writs newly come to his knowledge, which sufficiently took off the defence of Competent and Omitted. And they alleging he knew of these papers at the time of the first decret, he has deponed *negativè*.

ANSWERED,—They opponed their decret *in foro*, which was plainly *res judicata*; and there is no decret safe, if the pretence of new-found-out writs be received to open the same; for as *L. 19 and 20 Cod. de Transact.* refuses to annul transactions *sub prætextu instrumentorum nuper repertorum*, so the same must extend to sentences, which are judicial transactions. And his oath was not *parte deferente*, but taken *ex officio judicis*: And the writs produced, though they were competent here, as they are not, yet are not relevant to infer Mr Smith was factor. For what hinders me to lift my debtor's money in Meikle's hand, if he take his hazard to rely on my warrandice?

The Lords thought it dangerous to loose decreets *in foro* on the pretence of writs *noviter venientes ad notitiam*, though offered upon oath; yet here they were not straitened to decide that point, but found the new writs founded on not relevant, though they had been proponed before sentence; and therefore sustained the *res judicata*: but appointed the partial payments Drummond had received from Meikle to be deducted and allowed; and found Smith only liable for the remainder of the price of the victual. *Vol. II. Page 513.*

1709. *July 15.* JAMES VALLANCE of POSSILLS *against* MACDOWALL of FREUGH.

[See the Report of this Case, Dictionary, page 5840.]

VALLANCE of Possills, having sent a letter of solicitation, in his action mentioned 14th current, to one of the Lords; and the same being produced to the Lords, as contrary to their acts and resolve, they sent him to prison, and had fined him, if he had not been very poor. *Vol. II. Page 516.*

1709. *July 15.* LESLIE and OGILVIE of NEWRAINE *against* LEITH of BELSHIRRY.

LEITH of Belshirry, supposing himself lesed by the interlocutors in the cause pursued against him by Leslie and Ogilvie of Newraine, obliging him to condescend and prove how he paid the price of that land, gave in his appeal and protestation for remeid of law to the Parliament. *Vol. II. Page 516.*

1709. *July 15.* The LAIRD of GRANT and CAPTAIN BRODY *against* JEAN M'LELLAN of BOUDEN.

I REPORTED Grant and Brody against Jean M'Lellan, relict of Bailie Bouden.