

the taking of bonds of corroboration during the minority did not alter the substitution and first destination. No. 29.

Fol. Dic. v. 2. p. 400. Fountainhall, v. 2. p. 61.

1706. January 2. DUNDAS against DUNDAS.

No. 30.

A proprietor in his contract of marriage having bound himself to tailzie his estate, failing heirs-male of the marriage, to certain persons therein named; it was found, That this implied no obligation to provide the estate in favour of heirs-male, *quia positus in conditione non censetur positus in institutione.*

Fol. Dic. v. 2. p. 400. Fountainhall. Forbes.

* * This case is No. 5. p. 4083. *voce* FACULTY.

1706. January 15.

JOHN WAT, Writer in Edinburgh, against DAVID FORREST, Baillie.

No. 31.

John Wat, as creditor to the deceased Major Lauder, having pursued David Forrest, as heir to his daughter Helen of a first marriage, who was heir to the Major, for payment of his debt; the defender alledged he could not be liable *passive*, because his cognition as heir to his daughter Helen was null, in so far as she had a sister of a second marriage *in utero* at the time, who *pro nata habetur*, and as *propinquior* excluded the father, and at the time of that second daughter's decease there was a brother George *in utero*, who now lives.

A service as heir sustained to make one *passive* liable for the defunct's debts, who had a nearer heir *in utero* at the time of the service.

Replied for the pursuer: The defender's service as heir to his daughter, who had a sister *in utero*, was not null *ipso jure*, but only *ope exceptionis*, and reducible at the instance of that child when born, if she thought fit to use her privilege, and object the nullity. So that the defender in the mean time stands liable to the debts; for the said daughter *in utero* the time of his service died without being entered heir to her sister; and the brother, yet an infant, was served heir by the defender his father only as a blind to evade the passive title himself, who had possessed these ten years by-gone under the colour of heir to his daughter whom he served heir to the Major. Nor could the defender's service be nullified by the son, who was neither gotten nor born at the time; and when he comes to be a man, will certainly *ex capite fraudis* & *minorennitatis* reduce his service to such a *damnosa hereditas*, whereby the creditors will be baulked of their expectation from him.

Duplied for the defender: The service of a father to a child while another exists is certainly null *ipso jure*, as contrary to law; seeing there cannot be an heir where there is no *hereditas delata*, more than a sister or younger brother's service to a father upon an absent elder brother's being reputed dead, would have any effect

in law when he returns ; or than there could be any obligation arising from marriage with a woman, who, though reputed free at the time, is thereafter discovered to stand married to another ; or that a man, corroborating his predecessor's debt, would be excluded from founding on a discharge thereof afterwards found out. For the service of a remoter, while a nearer, though not known at the time, exists, is *ipso jure* null; see No. 185. p. 10984. & No. 13. p. 2704. which is founded in the very nature of the thing, and style of our briefs, that run in the present tense, *Quis est propinquior*, &c. the time of the service, which the defender was not. It imports not that the second daughter died afterwards unentered, and the son was not born at the time ; for the service being originally null by her existence *in utero*, the nullity is kept up by the superveniency of the brother, who still hindered the case to exist where the father might be heir. For *quod initio non valet tractu temporis non conualescit* ; especially *cum non devenit in casum a quo incipere potuit*. By the civil law a person, who, thinking himself true heir by mistake, acquires the heritage, and subjects himself to *onera hæreditaria, nec hæres erit, nec obligatur hæreditati*, L. 22. D. De acquirenda vel amitt. hæred. Nor doth L. 12. C. De Petit. hæred. advance any thing to the contrary : For where two are pretending to the heritage, and behaving as heirs, a creditor, during the depending competition, may pursue either. But here the party served, discovering his error, disclaims the being heir when there can be no inheritance, and is content to count for his intromissions *in valorem* as administrator of law to his son, who existed before intending of this action ; which ought to be taken off his hand as sufficient, as well as a vitious intromitter becomes only liable *in valorem* by a confirmation before any creditor's pursuit. *2do, et separatim*, whether the defender's service as heir to his daughter be null *ipso jure*, or reducible, it hath the same effect ; for reductions are declaratory actions operating *retro* as far as the reasons founded on.

Duplied for the pursuer : That the defender's service was not *ipso jure* null ; for the daughter *in utero* might have miscarried and not been born, or born a monster ; in either of which cases the maxim, *non esse & non apparere sunt paria*, would have taken place. And this point may be further cleared by the similitude of a testament *ruptum agnatione posthumi*, which continues valid, and the testamentary heir liable *passive*, unless quarrelled by the *posthumus agnatus*. The L. 22. D. De acquirend. vel amittend. hæred. is nothing to the purpose, for it says only that the wrong heir cannot retain the heritage ; and *esto* the defender might be brought to an account and dispossessed by his son, he is still liable to the creditors as once being heir ; and as *possessor hæreditatis*, L. 12. § 1. C. De petit. hæred. Albeit if afterwards called to account for the rents by his son insisting in *petitorio*, he may claim allowance of all the debt he pays. *Ibidem*.

The Lords sustained the defender's service as heir to his daughter to make him *passive* liable for Major Lauder's debt.

Fol. Dic. v. 2. p. 399. Forbes, p. 66.

* * * Fountainhall's report of this case is No. 15. p. 2954. *voce* CONDITION.