

Quadrupled for the pursuer ; That that is not the reason of discussing ; the true reason lying in the prerogative of the heir-male, tailzies being understood to be made for the preservation of families, and they are accounted as creditors, with regard to the heir of line : And as, when the heir of line had renounced all, and that there was a total and universal tailzie, he is not presumed to have the keeping of the writs, so this is always supplied by a diligence of exhibition, the heir-male think fit to seek it ; and the benefit of discussing competent to a cautioner is not founded upon this, That the principal is presumed to be master of the instructions of payment, and to know best the defences against the debt ; but is founded upon the nature of a cautioner's stipulation, *qui pro alio fide-jubet* ; and so is only subsidiarily liable, and he may renounce the benefit.

THE LORDS sustained the condescence of an estate to which the heir of line may succeed.

Act. Sir Wal. Pringle.

Alt. Ro. Dundas.

Clerk, Mackenzie.

Fol. Dic. v. 1. p. 246. Bruce, No 40. p. 50.

1773. January 13.

WILLIAM INNES of Sandside, and Others, Creditors on the Estate of Stircock,
against ALEXANDER SINCLAIR of Barrock.

IN the ranking of the Creditors of Stircock, Sinclair of Barrock founding upon a bond of provision granted by Francis Sinclair of Stircock to Katharine Sinclair, his sister, for 2000 merks, with the decree of adjudication, and other diligence following thereon, conveyed in his favour, the other Creditors proposed objections to this interest ; in particular, that the action of constitution upon which the adjudication proceeded, having been brought both against the heir-male and the heirs of line, was improperly carried on against the heir-male only, without any discussion of the heir of line ; and that the procedure in it was erroneous and inept.

The Lord Coalston Ordinary 'sustained the objection to the decree of constitution, as relevant to restrict the adjudication to a security for the principal sum, annualrents, and necessary expenses accumulated at the date of the decree of adjudication.'

Pleaded by Barrock in a reclaiming petition ; The decree of constitution upon which the adjudication afterwards followed, is well founded ; and there is nothing solid in the objection moved against it.

George Sinclair was brother-german and heir-male and successor of Francis Sinclair, the granter of the bond, and lawfully charged to enter heir to him ; and, as he did not renounce, this was a sufficient passive title for founding a decree against him. The only defence that was insisted upon by him, was, that the heir of line ought to be first discussed ; and, to remove that defence, it was

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A decree of constitution taken against the heir-male singly, in an action for the predecessor's debt, wherein the heirs of line had been also called, and offered to renounce, but did not, found liable to challenge for want of discussion, and as being in other respects irregular ; and the objection sustained as relevant to restrict the adjudication led thereon to a security.

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replied on the part of the pursuer, that the heir-male was bound to relieve the heirs of line ; and, of this fact, the pursuer was allowed a proof ; but which proof does not appear to have been taken.

If that proof had been absolutely necessary to support a decree against the heir-male, there might be some room for alleging, that the decree against George Sinclair was not strictly regular. But the proof there allowed was, in no respect, necessary for supporting the decree. The decree was extremely well founded without it ; and, of consequence, it can afford no objection to the decree that such proof was not taken.

And, in order to explain what is thereby intended, the petitioner apprehends, the benefit of discussion is not a good defence to the heir-male, when convened for payment of the debts of his predecessor, unless he, at the same time, points out an estate that can be taken up by the heir of line : And so it was determined by the Court, February 1662, Floyd *contra* Duke of Lennox, No 5. p. 3561. ; where, in a process against an heir-male, the LORDS found no necessity to discuss the heir of line, unless he had a visible estate that could be affected. In the present case, no estate was condescended upon which the heir of line was entitled to take up ; nor, in fact, were the heirs of line entitled to any part of their father's estate ; the whole devolved upon George the brother, and heir-male of Francis, who was then in possession of all his brother's estate ; and, it is in the right of the apparent heir of George that the foresaid objection is now stated.

But, *2do*, Supposing, for argument's sake, that it had been necessary to discuss the heirs of line, they were sufficiently discussed by their offering to renounce to be heirs to their father ; after which, it became altogether unnecessary to prove, that the heir-male was bound to relieve the heirs of line of the debts, in order to found a decree against the heir-male. After the heirs of line had taken a day to renounce, and no subject was condescended upon as belonging to them, a decree against George Sinclair, the heir-male, was, unquestionably, well founded, independently of any such proof.

That the renunciation of the heir of line is a sufficient discussion to found an action against the other heirs of the debtor, is a proposition that cannot admit of dispute. At the same time, whether the heirs of line renounced or not, as they offered to renounce, and a day was assigned to them to produce a renunciation ; and, as Stircock, the heir-male, did not deny the passive titles, or condescend upon any subject belonging to the heirs of line, there was clearly no necessity of farther discussing the heir of line ; and the decree obtained against Stircock, is a good, effectual, and regular decree. It was incumbent on Stircock to have renounced, or denied the passive titles ; but, as he did neither, the pursuer was entitled to have decree against him, without bringing any proof of the transaction between him and the heirs of line ; though, at the same time, there was a decreet-arbitral on record, by which George Sinclair was expressly ordained to relieve the heir of line of all debts and deeds con-

tracted and resting by the said Francis Sinclair preceding his death, and especially of the debt in question.

Answered; From the procedure in the action of constitution, it appears, in the *first* place, that, by a final interlocutor pronounced by the Lord Ordinary, and acquiesced in by the parties, it was necessary, before decree could be obtained against the heir-male, that the alleged obligation upon him, to relieve the heirs of line, should be proven *scripto*; and a day was assigned to the pursuer for bringing this proof, and diligence granted. *2dly*, That no such proof was ever brought, or attempted, nor any thing done, in compliance with the Lord Ordinary's interlocutor; but the cause having slept, and having been afterwards wakened, the pursuer craved, and obtained decree, in absence, against George Sinclair, the heir-male, without any further discussion of the heirs of line, without any renunciation being given in by them, and without inquiring whether the heir-male was bound to relieve them or not. *3dly*, That this wakening was not so much as executed against the heirs of line, but only against George Sinclair, the heir-male; nor is any interlocutor pronounced, either of assolzieing the heirs of line or otherwise. And, *lastly*, It does not appear that, when the process was wakened, and given out to see, and returned, it was enrolled before the same Ordinary before whom the original process depended. It would rather seem to have been called in the outer-house before the Ordinary of the week, from whom decree in absence was obtained.

The whole of this procedure was most inept; and Barroek does not attend to the nature of the objection, when he argues, that, as the heirs of line had succeeded to nothing, therefore it was not necessary to discuss them. In the *first* place, it was not pretended, by either of the parties in this case, that the heirs of line had taken nothing; on the contrary, it was well known to all of them, that, by a decreet-arbitral pronounced between the heir-male and heirs of line, the succession had been divided, the bulk of the estate of Stircoek had been given to the former, and the lands of Bilbster, with L. 10,000 Scots of money, to the latter, for which the heir-male was decerned to grant an heritable bond. Had it been pleaded, therefore, that no estate could be pointed out, to which the heirs of line had succeeded, it would immediately have been answered, that there was such an estate which could be pointed out; and therefore the decision, in the case of Floyd against the Duke of Lennox, does not in the smallest degree apply.

But, *2dly*, The procedure must be taken as it stands, and not what it might have been, had the cause been pleaded in a different way, and had other defences and answers, &c. been stated. The pursuer of the constitution did not dispute that it was incumbent on him to discuss the heirs of line, or, at least, to show that the heir-male was primarily liable, in consequence of an obligation upon him to relieve the heirs of line. It was pleaded for the heirs of line, that they were willing to renounce; but, in fact, they gave in no renunciation; nor would it have been proper for them to do so; and the other parties, viz. the

No 17. pursuers, and George Sinclair, the heir-male, joined issue upon the proof of a fact which was admitted to the pursuer's probation, viz. that George had obliged himself to relieve the heirs of line.

In these circumstances, how is it possible to maintain that the pursuer could proceed, without so much as extracting his diligence, or making the least attempt to establish that proposition, which he had undertaken to prove, as a necessary step for subjecting the heir-male? Had the proof been incumbent on the other party, he might have got the term circumduced against him for not proving, and might thereupon have obtained an effectual decree. But he himself was the party who made the allegation, and upon whom the proof lay; and it is clear that he could not stir one inch against the heir-male, without doing what he had thus undertaken, and what was indeed fixed by a final interlocutor of the Court, acquiesced in by all parties.

Neither would it avail him, though he should now be able to prove the averment in his petition, that George Sinclair was bound by the decret-arbitral to relieve the heirs of line of this and other debts. In fact, he was only bound, in a qualified manner, upon getting assignations, to operate his relief against the executors and moveable estate of Francis Sinclair, the predecessor, or against any other estate, personal or real, that belonged to him; which action of relief was reserved unhurt by the decret-arbitral, together with all objections and defences against such debts. These reservations gave him an interest to insist that any decree or adjudication for these debts should be regularly led, by calling and discussing the heirs of line; as, upon payment, he was entitled to hold these decrees and adjudications as collateral rights to his estate, and as a ground of being relieved out of any separate estate belonging to the predecessor.

But, as already noticed, the objection does not lie upon the truth or falsehood of the allegation, which was admitted to proof in the action of constitution; nor is it in the least material to inquire whether it can now be proved or not; the objection lies upon the irregularity of the proceedings, which cannot now, after an extracted decree, be supplied, by any proof, in the present competition. The decree must be taken as it is; and it is submitted if a more inept proceeding can be figured.

' THE LORDS adhered.'

Act. Hay Campbell.

Alt. Sol. Dundas.

Clerk, Gibson.

Fol. Dic. v. 3. p. 183. Fac. Col. No 43. p. 114.