

1677. July 27. WILLIAM HAY of DRUMMELZIAR *against* The EARL of TWEDDALL.

IN an action, pursued at Drummelziar's instance, for fulfilling the contract of marriage betwixt his father and his second lady, mother to the pursuer, whereby he was obliged to provide the heirs of the marriage to the lands of Drummelziar, and to warrant the same; as likewise, to employ upon land the sum of £60,000:—In which action, the Lords having found, That Drummelziar could have no title to pursue; unless he were served heir of the second marriage betwixt the late Earl of Tweddall, his father, and Dame Margaret Montgomerie, daughter to the Earl of Eglinton; he finding, that, being served heir, he would be liable to his father's whole creditors for payment of their debts contracted during his lifetime; did thereupon insist against this Earl of Tweddall, as heir of the first marriage, or as representing his father *nominibus passivis*, for freeing him of all his father's debts: and did insist upon these two grounds; 1st. That, when his father did provide him to the fee of his estate, he did grant bond to fulfil this contract, as if he had been cautioner with his father. 2^d. That the Earl, being successor to his father, and infest in the fee of his whole estate provided to him as heir of the first marriage; he was thereby, in law, obliged to free the lands, and provision made to the heir of the second marriage; who, as to the father, and to his heirs and successors, was a true and lawful creditor.

It was ALLEGED for the Earl of Tweddall, That he ought to be assoilyied from the first ground, as having granted a bond, as cautioner for his father, to fulfil: because the father did actually fulfil the said obligation, by infesting himself and the pursuer's mother in liferent of the lands of Drummelziar, and the heirs of the marriage in fee; as likewise, by employing the sum of £60,000, upon a purchase of the lands of Herries and Rodon, in favour of the pursuer, wherein he was infest: and so, the principal having fulfilled, it ought to free Tweddall; albeit he had been cautioner in the contract of marriage, wherein he could be no farther obliged but to fulfil; and, in case of *defectum juris*, the rights of the lands were not valid.

It was ALLEGED against the second, That this Earl, not being served heir to his father, but being infest by him in his own time, and that, upon his undertaking to pay his whole debts then contracted; which did make his condition no better than the pursuer's, who was only a son of a second marriage; albeit, as to all debts before his fee, he was liable to satisfy the creditors, in the first place, as successor *titulo lucrativo post contractum debitum*, and so to relieve the heir of the second marriage; yet, as to all debts contracted after his fee, as the creditors could never affect him upon any ground of law, far less could the pursuer seek any relief, albeit he were distressed; he never having granted any bonds for that effect; and the law not making him liable, in that case, as to posterior debts; which was never controverted: and, if it were otherwise, it would destroy that clear and undoubted principle of our law, to make successors *titulo lucrativo*, in no better case than general heirs served and retoured: and, farther, these absurdities would undoubtedly follow, that heirs of the first marriage could never be secured, albeit they are to represent their father, and succeed to

their estate and family; which is of a general concernment. Upon which account, when fathers are to enter upon second marriages, they infest their apparent heirs of the first marriage in so much of the fee of the estate as may pay their debts, and maintain the dignity of their family and estate, which is in his person; and only gives to heirs of a second marriage such reasonable provisions as the estate can bear, and may answer to the tocher gotten by the mother: which settlement hath been always looked upon as a full security to the heir of the first marriage; so that, by no deed of the father's, or contracting of debts thereafter, the fee of the estate can be affected, or he himself made personally liable. Whereas, if Tweddall were made liable upon this ground, it were still in the father's power, by posterior bonds and deeds, to ruin his eldest son and family, in providing an estate to the heir of the second marriage; who, being liable, *secundario*, to all debts contracted by the father during lifetime, if he should have relief of all debts posterior to the right granted to the eldest son of the first marriage, it were alike as if he were liable for all these debts to the creditors; and so overturn our constant law and practick. *2d.* If this were granted, it were impossible that any thing could be settled, according to the true meaning of the parties, upon the representatives of families; but by the instigation of second wives to contract debts, or grant bonds in favour of them and their children, the father may be induced to do deeds tending to the inevitable ruin of their eldest sons and families.

It was REPLIED for Drumelziar to the first allegiance against that title, That he was bound as cautioner for his father; that they ought to be repelled; and notwithstanding he ought to be liable for the whole debts contracted after his fee: because, in law, whatsoever the principal is liable to, the cautioner is likewise liable in that same manner. And if the father, after contracting of all these debts, had been charged to fulfil, and for that effect to purge, there is no doubt but it would not be received as relevant, that he had disposed lands, which, in law, could not be quarrelled *ob defectum tituli*; but he would be farther obliged to warrant from his own fact and deed, and so against all debts contracted by him: and if, the father dying and leaving no estate, the heir of the second marriage should thereby be frustrated of relief, by dispositions of lands made to his eldest son and apparent heir general, he being cautioner, and obliged as if he had been so in the contract of marriage, he must be liable, in place of his father, for his facts and deeds; the obligations of principals and cautioners being alike, and equally strong and large, *in omnibus punctis juris*: and, if it were otherwise, the inconvenience and absurdities would be far greater than is supposed, and adduced for the Earl of Tweddall; for all trust and security, contrary to the express meaning of parties, should be destroyed; and no heirs or bairns of second marriages could be secured of their provisions, by voluntary deeds of a father, who is expressly bound; seeing he may infest his apparent heir, after contracting in a second marriage, and yet he should not represent him as successor *post contractum debitum*; which is expressly contrary to our law. And, therefore, it was REPLIED to the second part of the ANSWER, That it was a most groundless assertion, that, the debts craved to be purged being posterior to the fee of the estate granted to the eldest son and apparent heir, he could in no case be liable, seeing the creditors could not overtake him; for albeit the pursuer was not a creditor for lent money upon bond, yet for a true and opulent

tocher, paid to the father ; who became obliged to employ, upon sufficient security, provisions for the heir of a second marriage, before ever infesting of the eldest son ; it is unquestionable that he must be liable, after the father's death, to the heir of the second marriage, as a just and privileged creditor : otherwise all faith and principles of law should be overturned.

The Lords, when they were considering this debate, as being a new case, not before decided and of great difficulty, the reasons alleged for both parties being strong ; it being moved, that the case being betwixt two brothers, and that already there had been meetings and submissions to friends to compose the same ; therefore, before a legal decision, some should be appointed. This motion was agreed to ; and took effect, by appointing a decret to be extracted, of consent of the Earl of Tweddall, for relieving Drummelziar of all their father's debts, whensoever contracted during his lifetime. But if there had been a legal decision, as there may be in other cases, it is thought that Drummelziar, albeit he was heir of a second marriage, and after discussing of the general heir, would be liable to all the father's debts, *secundario*. Yet, in so far as the payment of these debts might evict his estate, and take it wholly from him ; he was well founded in law, as a true creditor, to seek his relief off the Earl of Tweddall, who was infest in the fee of his father's estate, after the second contract of marriage to employ ; albeit the debts which was the cause of the distress were posterior : seeing the father, being so obliged, could not, by a voluntary deed, take away the benefit thereof, and make it void and null ; and give his estate to one, who, if he had been served heir, would, in law, undoubtedly have been liable ; and, besides, was bound as if he had been cautioner.

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