

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 hæreditas*, 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 *hæreditas 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