

S E C T. IV.

Where the Heir Male or of Entail is bound primarily ;—or, bound to relieve the Heir of Line.

1663. February 18.

WILLIAM BLAIR *against* ANDERSON.

WILLIAM BLAIR as assignee by the wife and bairns of Mr David Anderson, by his second marriage, pursues his daughters, both of the first and second marriage, as heirs of line, for implement of the second contract of marriage, and the daughters of the second marriage offering to renounce to be heirs of line, but prejudice of their provision, by contract of marriage, as bairns of that marriage, the assignee insisted against the daughters of the first marriage, as lawfully charged, &c. Who *alleged* no process, because the provision, by the contract of marriage insisted on, runs thus, that Mr David obliged himself, and his heirs-male, successors to him in his estate, but did oblige no other heirs. *Ita est*, there is an heir-male. The pursuer *answered*, albeit heirs-male were only expressed, other heirs were not excluded; especially, seeing he bound himself, so that the effect thereof would only be, that the heir-male should be liable *primo loco*.

THE LORDS found the heir-male liable *primo loco*, and the heirs of line *secundo loco*, and found the heir-male sufficiently discussed, by an apprising of the clause of the contract of marriage, in favours of the heirs-male, they not being infest as yet, and having no other right.

Fol. Dic. v. 1. p. 247. Stair, v. 1. p. 182.

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One having bound himself and his heirs-male, the heir male was found liable *primo loco*, and the heirs of line *secundo loco*.

1665. November 22. LAURENCE SCOT *against* DAVID BOSWEL of Auchinleck.

UMQUHLE David Boswel of Auchinleck, being debtor to Laurence Scot in 1000 pounds, by bond; he pursues his daughters, as heirs of line, and David Boswel now of Auchinleck, his brother's son, as heir-male, or at least lucrative successor, by accepting a disposition of lands from the defunct, which were provided to heirs-male, and so being *alioqui successurus*. It was *alleged* for the said David, no process against him, till the heirs of line were first discussed. It was *replied*, and offered to be proven, that he was obliged to relieve the heirs of line.

Which THE LORDS found relevant.

It was further *alleged* for the defender, that he could not be convened as lucrative successor, by the foresaid disposition, because the time of the disposition he was not *alioqui successurus*, in respect that his father was living. It was *answered*, that albeit he was not immediate successor, yet being the mediate

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An heir-male who is obliged to relieve the heir of line, has not the benefit of discussion.

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successor, the disposition was *præceptio hæreditatis*, and THE LORDS had already found that a disposition to an oye made him lucrative successor, albeit his father who was immediate apparent heir, was living.

THE LORDS sustained not the libel upon that member, for they found it was not alike, to dispo to a brother, as to a son or a brother's son, as to an oye, because a brother is not apparent heir, nor *alioqui successurus*, seeing the dispoer has *hæredes propinquiores in spe*; and therefore cannot be presumed to have dispoed to his brother, or brother's son, in fraud of his creditors, seeing that by that disposition, he does also prejudge his own son, if he should have one; and this but prejudice to the pursuer, to reduce the disposition upon the act of Parliament, as accords.

Fol. Dic. v. I. p. 247. Stair, v. I. p. 310.

No 20.

In a process against an heir of entail, found that the heir of line was sufficiently discussed, by the obtaining a decree against him upon a renunciation.

1698. *January II.*

COLQUHOUNS of Kermuir and Craighton *against* STIRLING of Law.

CRAIGHTON and his assignee pursue Law for payment of 5000 merks of tocher, resting by Stirling of Law to him, by his contract of marriage with Law's daughter; *super hoc medio*, that you are his heir of tailzie, and expressly burdened with the payment of all his debts. *Alleged*, I have the benefit of discussion of the heirs of line, ere you can reach me, the heir of tailzie; and Craighton's Lady, and Law the defender's mother, being the debtor's two daughters, they must be first discussed. *Answered*, There is no need of insisting against the lineal heirs here, unless you can condescend on an estate belonging to them which I may discuss; for the heir of tailzie is expressly burdened with the whole debts, and so *in eventu* is bound to relieve the heirs of line. *Replied*, If Craighton will pass from his reduction quarrelling the tailzie, and will ratify the same, and assign me to the debt then the heir of tailzie is willing to pay it; but it is hard to leave him the power of quarrelling the tailzie, and yet cause the heir of tailzie to pay the whole. *2do*, There is not so much as a renunciation yet given in by the heirs of line, which is the least discussion that can be, before you come upon the heir of tailzie. THE LORDS found the heirs of line sufficiently discussed by obtaining a decreet *cognitionis causa* on their renunciation to be heir, and that the heir of tailzie could not be insisted against till that were done; and whereas the late case between Kennedy of Auchterfardel and Menzies of Raw was urged, where the heir-male was allowed to be discussed before the heir of line; THE LORDS remembered that was not in a process for payment of a sum, but for implement of a tailzie, where there is no order for discussing, but the heir of the investiture must fulfil. *See* TAILZIE.

Fol. Dic. v. I. p. 247. Fountainball, v. I. p. 811.