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Consistory of London

No 17.

Schaw Guardian of Schaw v. Schaw al. Page

Stevens — Prs Collyer & Wynn — Drs Smallbroke & Harris — Collins

Dr Smallbroke — I am Council for Mr Shaw, who has been cited into this Ct by the Father as Guardian to his Son, in a Cause of nullity of marriage, under 26 Geo. 2 by reason of minority, & being married without his the fathers Consent. Collins appears for Mrs Schaw under Protest, "that the Citation issued without Mr Schaws junior Consent." Tho, the father in the present Case brings the Suite, as the natural Guardian of his Son, & in Ld Courtneys Case it was brought by Ld Aylesford, as the Testamentary Guardian, I shall rest the objections upon other reasoning, exclusive too of the Objections stated in the Proctor's Act: After the Point has been so fully argued before you in Ld Courtneys Case, I do not think it decent to argue it again on the same grounds, but shall submit to your Judgement if there is any difference Ld Cs Case & the present, & shall rest any distinction possible to made, with the Ct. The Annulling a Marriage where the parties have cohabited, is a very serious Point; even the bringing the Suite for that purpose is a Slur upon both parties concerned, & is always attended with so many disagreable Circumstances, that the Ct will not suffer Citations to issue without proper grounds & I hope you will not think them sufficient in the present Case — One part of the Proceedings is gone into disuse, wch had been much better preserved, that is, a Petition of the Party praying a Citation, stating the nature of ye Suite & the grounds of bringing it; the Ct had hereby an Opportunity of forming a Judgement, as to the propriety & foundation of ye granting or refuseing such Citation; that being disused, nothing remains, but to stop the Suite at the return of the Citation, a Reparation very inadequate to the Injury: The Ct will judge wh: it shd not stop, upon the face of it: The Proctor has stated in his Act, that his Client was married by Licence, on Affidt of his being of full age; but the Father only avers, that his Son is under age, therefore from their own shewing there is a defect, viz. Only the averment agt a Affidavit. I will allow that in common Cases, the Father is more entitled than the Son, but not in Judicial Proceedings, & when there is only an averment agt an Affidt he might have stood upon an equal footing with his Son, but as he does not, the Ct will not prefer the Fathers bare Assertion to his Sons Oath

Dr Harris — I apprehend a Testamentary Guardian, is of a higher nature than a natural Guardian, by the Statute Car: 2. Upon this Ld Aylesford founded his right to institute the Suite in Ld Cs Case: they can't shew a Precedent where a Suite has been brought by a natural Guardian, assigned by the Ct, at the Election of the Minor. I do not say, a minor can chuse without the Approbation of the Ct; or the Ct appoint agt the Consent of the Minor. By the Stat: the Ct is discretionary —

Q. Butler & Dolben

By our Act we say Mr Schaw was a major: a Major can't bring a Suite by his Guardian; & tho, they might prove hereafter, that he was a minor, yet there ought to be an Affidt previous to the Suite — Whoever brings a Cause of nullity, must confess the marriage, else a Cause of Jactitation is the proper Suite. In Trent v Wilder the Woman did not swear falsely, the Man took out the Licence — The Minor is obliged to give his Answers, as well as the Guardian, you wd not allow him to prove himself perjured —

Dr Collyer — This Suite is brought by the Guardian, to answer in a Cause of nullity, & I hope you will think it well instituted: The Gentlemen chuse to wave the Protest, they set forth the Courtship, Consent of the Woman, licence, Consummation, & Cohabitation: they do not dispute the Juridiction: The Youth was inveigled to take a solemn Oath falsely, before a Surrogate; the Protest says, the Citation issued without the Consent of the Minor: can it be supposed that a Woman who had art enough to induce Mr Schaw to take a false Oath, wd not prevent the Citon issueing with his Consent? but the Consent I apprehend is immaterial: In Pudner & Jordan it was determined, that, the Father has a natural right: the Intent of the Statute, was to prevent the mixture of Noble & Plebeian blood, wch must be absolutely defeated, if the Minors Consent was necessary — Tho. this may be the first Instance of a Cause of Nullity, I do not know, but it is better brought than indirectly by a Jactitation, for if she has never jactitated, the Cause drops: As to the fathers right to bring a Suite, in a Cause of Jactitation, it has been determined on solemn Argument, by Sr George Lee in Butler v Dolben. that a Father, as the natural Guardian of his Child, was interested to institute such a Suite in his Childs name, & whether it be, a cause of Nullity or Jactitation, the reason & manner of his being interested, is the Same —

Dr Wynn — I do not know that a Person is obliged to bring Affidavits at the institution of a Cause, afterwards indeed they are, in the Proof, because no one can be a Witness in his own Cause: It is said, there is no Instance of a Suite of Nullity being brought by a natural Guardian, perhaps not, but it wd be very extraordinary, if a Father cd give a power by will, wch he had not himself; & tho Mr Schaw alledged himself to be a Major, in proper time, we shall produce better Evidence than Affidavits, viz. the Parish Registers, to prove he is a Minor: In respect to the Sort of Suite to be instituted, the very small number of Suites, since the Statute was made, whereon this is founded wd not be sufficient to establish a matter of Practice, wch being open, we were at liberty to chuse, wh: we proceed by a Suite of Nullity or Jactitation: the Method we have taken is surely the most proper, both as it is conformable to the Style of the Act (null & void) & it is more direct: for in Jactitation, the Ct in fact gives no Sentence of Nullity; it never regularly comes in question, so that it only declares it by Implication, by ordering the Party to jactitate no more: & tho in Ld Courtneys Case, the Suite of Jactitation was preferred, no Inference can from thence be drawn, that it was either the best or the most proper: It might be a Question wh: Marriages in Scotland are valid or not, therefore it cd not be brought in this manner: upon the whole, Sir, I hope, you will be of opinion, that there is not that weight in the Objections, as that Mrs Schaw shd not appear absolutely —

Judge. — The Question is, wh: Mrs Schaw shd be assigned to appear absolutely?

Dr Bettesworth — Besides the Protest, that the Citation issued without the Consent of the minor (wch I am of opinion dont affect it) there have been 3 principal Objections made by the Council. 1. That the Suite was not brought by a proper Person: 2. That it was not brought on proper ground. 3. That if it shd have been a Suite of a different nature: — I cannot think the first well founded, for the Father has the greatest Interest in his Sons Marriage, more than any testamentary Guardian, or addition, can have, therefore he must be a proper person to institute the Suite. If the distinction between a testamentary & natural Guardian, cannot be admitted, for it wd be extraordinary Doctrine, that the delegator shd have less power than the delegate — As to the 2d Obj: that there are not sufficient Grounds for the Citation, for want of the Fathers Affidt that his Son is a Minor; there is, in my opinion, no necessity for one, to enable the Father to take out the Citation; that must remain for the

Ex: shall Mrs Schaw be assigned to appear absolutely