

No 119.

person then called needed no service ; the fee of the subjects remained with Mr Mercer, and went to his heir, from whom the disponee behoved to claim them ; but there was no fee vested in him by the disposition, and there is nothing to hinder the *jus crediti* to remain *in pendent* ; and suppose a land estate to have been left in this manner, the procuratory of resignation would not have been carried by a service.

*Replied*, Mr Scotland is served heir to his uncle, and by that title has recovered one debt ; and it is impossible to say what more he may have intromitted with.

This service was the only proper title, since Mr Mercer never denuded himself of the subjects ; he calls his disponees institutes and substitutes, and reserves power to alter ; so that the fee remained in him.

THE LORDS, 11th December 1744, in respect of the general service, found the defender liable in the debt pursued for.

On a reclaiming bill and answers, 23d January 1745, they found him not universally liable, but only to the value of the subject disposed ; and 5th June, on bill and answers, adhered.—*See REPRESENTATION.*

*D. Falconer, v. i. p. 89.*

Act. *L. Craigie.*

Alt. *Da. Graham.*

Clerk, *Gibson.*

## SECTION II.

How far the Disposition must be onerous, to elide the Passive Title.

1637. January 14. COURT against WEMYSS.

No 120.

It was covenanted in an eldest son's contract of marriage, that the tocher should be applied for redeeming a wadset ; and that the lands wadset should be disposed by the father to the eldest son and his heirs.  
A disposition by the father,

ONE Mr David Courty, Minister, to whom umquhile Mr John Wemyss of Lothaker was addebted 1000 merks, pursuing Wemyss, his son, *hoc nomine*, as successor to him, *titulo lucrativo post contractum debitum*, to pay the debt foresaid ; and for instructing him to be successor, producing a sasine of the lands of Lothaker, proceeding upon his father's resignation ; and the defender *alleging*, That he could not be found successor by that sasine, because, the same was granted to him for satisfying of a contract of marriage, made betwixt the defender and his spouse, and the defender's father, and Ronald Murray, father to his said spouse, on the one and other parts, by the which contract it was appointed, that the sum of 8000 merks, contracted to be paid to him in tocher, should be paid to Mr James Wemyss, Commissary of St Andrews, for loosing from him of the lands of Lothaker, contained in the said sa-

sine, whereby he was alleged to be successor to his father, as said is; which lands were impignorated by his father to the said Mr James, redeemable upon the said sum; and which tocher being paid accordingly to the said Mr James, and he renouncing the lands, and the defender being thereafter infest therein, albeit the infestment proceeded upon his father's resignation, yet flowing from a cause onerous, he cannot be thereby found to be successor, to pay all his father's debts;—and the pursuer *replying*, That the defender being infest in the said lands upon his father's resignation, must be found successor, and cannot defend himself with Mr James Wemyss's wadset, seeing, by this infestment flowing upon resignation, he acquired more than the wadset, *viz.* both the superiority and the right of reversion, the lands being more worth than the wadset, and he, by the right produced, acquiring both the conjunct fee to his wife, and the heritable right of propriety to himself and his heirs;—and the defender *duplicating*, That he restricted his right only to the wadset, which was before competent to Mr James Wemyss, and which is now acquired by the defender, for the onerous cause, as said is; and he renounces all other right, which he may claim anyways by that infestment, or any other manner of way, to the said lands, except the said wadset, which he is content should be redeemable from him, by any of his father's creditors, by payment of that sum; and further, Mr David Primrose, in name of Ronald Murray, father to the defender's spouse, compeared, and *alleged*, That, seeing by the contract of marriage, the said lands were provided to her in conjunct fee, and that for the payment of the tocher-good, which was paid, as said is, of no reason ought she to be prejudged of that benefit of her contract of marriage; neither ought his son-in-law to be found successor to his father thereby, and burdened with the heavy and unsupportable burden of his father's debt, by that infestment; the preparative whereof was very dangerous to elude thereby conditions of contracts of marriage; specially seeing the defender, who is yet minor, *rebus integris*, renounces all benefit by the said infestment, except the said wadset, as said is, which he has acquired *ex causa maxime onerosa*:—THE LORDS, in respect of the foresaid exception and duply, which they found relevant, found, that the said infestment made not the defender to be holden as successor to his father, in respect that the defender retrenched the infestment to the said wadset, and that he had not made any other benefit thereby, but *rebus integris* renounced all further benefit thereof, and was content that the lands should be redeemable from him, and also from his wife, by the creditors, upon payment of 8000 merks; and which being paid, and the same secured to his wife during her lifetime, the LORDS found to be equivalent to that part of the contract, whereby she was appointed to be provided to her liferent of the said lands; and found, that the provision to her of the said liferent of 8000 merks, to be in satisfaction thereof to her *pro tanto*, and that she being secured of her liferent of the said sum, that she and her husband ought to grant the lands lawfully redeemed, and should renounce all right she or he could pretend

No 120.

in implement of this contract, though in part lucrative, because the lands were worth more than the wadset sum, was found not to infer a *præceptio*, the son offering to restrict himself to the wadset.

No 120.

thereto; and so the defender was not found successor by the said infestment, although it bore more nor the wadset, and that the heritable right of the lands, whereto he was provided by that sasine, was far more worth than the sum of the wadset.

Act. *Gilmour et Craig.*Alt. *Stuart et Primrose.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 36. Durie, p. 822.*1661. *November 22.*BOSWELL *against* BOSWELL

No 121.

Where it was alleged that the disposition was for onerous causes, nearly equivalent to the value of the lands, the Lords, before answer, ordered all instructions of the onerosity to be produced, in order to consider whether there was a considerable inequality.

JOHN BOSWELL pursues Boswell of Abden, as representing Henry Boswell his father, for payment of L. 1000, due to the pursuer by the said umquhile Henry, and insisted against the defender, as lucrative successor, by accepting a disposition of lands and heritage from the said umquhile Henry, whereunto he would have succeeded, and was therein his appearing heir. The defender *alleged*, He was not lucrative successor, because the disposition was for causes onerous. The pursuer *answered*, *Non relevat*, unless it were alleged for causes onerous, equivalent to the worth of the land; as was formerly found in the case of Elizabeth Sinclair against Elphingston of Cardon, *See APPENDIX.* The defender *answered*, *Maxime relevat* to purge this odious passive title of lucrative successor, which is no where sustained but in Scotland; specially seeing the pursuer hath a more favourable remedy, by reduction of the disposition, upon the act of Parliament 1621, if the price be not equivalent; and there it is sufficient to say, it was for a considerable sum, or, at least, it exceeded the half of the worth, for there is latitude in buying and selling; and, as an inconsiderable sum could not purge this title, so the want of an inconsiderable part of the full price could as little incur it.

THE LORDS, before answer, ordained the defender to produce his disposition, and all instructions of the cause onerous thereof, that they might consider if there was a considerable want of the equivalence of the price. Here the defender pleaded not, that he was not *alioqui successurus* the time of the disposition, being but cousin-german to the defunct, who might have had children.

*Fol. Dic. v. 2. p. 36. Stair, v. 1. p. 62.*

\* \* \* In conformity with the above case was decided Harper against Home,  
No . p.

1664. *June 17.* LYON of Muirask *against* LAIRD of ELSICK.

No 122.

A disposition of lands in an elder son's

LYON of Muirask pursues the Laird of Elsick upon a debt of his father's, as successor *titulo lucrativo*. The defender *alleged*, *Absolvitor*; because any dis-