

THE LORDS found the defence relevant to liberate the defender from this passive title, but would not put the pursuer to reduction, but admitted it by reply, *ad hunc effectum*, that the defender should be countable according to his intromission, and that the pursuer, as a lawful creditor, should be preferred upon his legal diligence to the said disposition.

But the question arising, whether the disposition, if in trust, was lucrative or not? and what to be lucrative imported, whether without any price, or within the half or third of the just price?

THE LORDS, before answer, ordained the disposition to be produced, and such adminicles, for instructing of the onerous cause, as the defender would make use of, reserving to themselves what the same should work.

*Fol. Dic. v. 2. p. 36. Stair, v. I. p. 80.*

1662. February 28. WILLIAM HAMILTON against M'FARLANE of Kirkton.

WILLIAM HAMILTON pursues James M'Farlane of Kirkton, as successor *titulo lucrativo* to his father, to pay his debt, who *alleged* absolutor, because he was not *alioqui successurus*, in respect that, at the time of the disposition, he had, and hath, an elder brother, who went out of the country, and must be presumed on life, unless the pursuer will offer to prove that he was dead before this disposition; so that, at the time thereof, the defender was not apparent heir *et alioqui successurus*, because *vita presumitur*. The pursuer *answered*, The defence was not relevant, unless the defender would be positive, that the time of the disposition his elder brother was on life; especially seeing he had been out of the country twenty years, and was commonly holden and reputed to be dead.

THE LORDS sustained the defence, that the elder brother was on life the time of the disposition, and reserved to their own consideration the probation; in which, if the defender proved simply that his brother was actually living the time of the disposition, there would remain no question; and, if he proved that he was living about that time, they would consider, whether, in this case, the presumption of his being yet living should be probative.

*Fol. Dic. v. 2. p. 35. Stair, v. I. p. 110.*

1665. November. SCOT against BOSWELL.

LAWRENCE SCOT merchant, pursues David Boswell, brother's son to the deceased David Boswell of Affleck, as successor *titulo lucrativo* to his uncle for payment of a debt. It was *alleged*, Absolutor, because brother's son is not *nomen juris* to make him represent his uncle, not being *alioqui successurus*; seeing his uncle might have had heirs-male of his own body to succeed to his

No 108.

No 109.

A disposition to a younger son makes him not lucrative successor, because he is not *alioqui successurus*.

No 110.

A disposition from one brother to another, makes not the donee lucrative successor, seeing the donor has *heredes propinquiores in spe*.

No 110.

tailzied estate, and that the defender's father was next to him, failing of children; so that, in effect, by the disposition, he was but as a stranger, not being apparent heir, nor otherwise to succeed, if the disposition had not been made. It was *answered*, That the estate being tailzied, and provided to the defender, who was eldest son of the brother, the only then next apparent heir of tailzie; it was equivalent and alike as if it had been disposed to the brother himself; and it was found in a case of the Lady Smeiton against her son this Laird of Smeiton, No 107. p. 9774, "That a disposition of the estate made to him by his grand-father (his father who was *successurus* for the time being on life,) made nevertheless the oye liable as successor." *Replied*, That the case adduced was *in linea recta*, where none should succeed but the son or oye, which is not in this case, for Affleck might have had sons of his own body; so that neither brother nor brother's son could be said to be *alioqui successuri*.

THE LORDS found the brother's son not to be convenable as successor, in respect the disponent might have had succession of his own body; but prejudice to the pursuer to impugn the disposition as being made to a conjunct person in prejudice of creditors.

*Fol. Dic. v. 2. p. 35. Gilmour, No 168. p. 119.*

\*.\* Newbyth reports this case:

DAVID SCOT being a creditor to David Boswell of Auchinleck, after his decease pursues the three daughters of the first marriage for the sum of L. 1000 Scots and annualrents thereof, and their husbands for their interest, as representing their father David Boswell. The three daughters offering to renounce, it was *alleged* for the pursuer, They cannot renounce, because they behaved themselves as heirs to their umquhile father, in so far as, by their mother's contract of marriage with their father, it is provided, That in case there be no heirs-male procreate of that marriage, but only female, that then and in that case, the heirs-female should have no right to the said lands and barony of Auchinleck, nor to other lands which should happen to pertain to him the time of his decease, *et ita est*, they have renounced the estate in favours of the apparent heir-male or his son, and have received good deed therefor; and craved that they and the apparent heir may exhibit the contract of marriage, being in their own hands; and thereby the estate is fraudulently conveyed in prejudice of lawful creditors. In this pursuit, David Boswell, now of Auchinleck, who was apparent heir to James Boswell, brother to umquhile David Boswell, is likewise convened in this process. THE LORDS found that heirs-female renouncing their right to tailzied lands in favours of the apparent heir-male or his son, albeit they got good deed therefor, could not be pursued for their father's debt; and also, that a disposition of land made to the son of the apparent heir, the

apparent heir being alive, could not, be such a title against the person, receiver of the disposition, as to make him liable *passive* for payment of the debt. No 110.

*Newbyth, MS. p. 40.*

\* \* Stair's report of this case is No 19. p. 3571, *voce* DISCUSSION.

1665. December 2. EDWARD EDGAR *against* COLVIL.

EDWARD EDGAR pursues ——— Colvil, successor lucrative to his father, Mr Alexander Colvil, in so far as he accepted an assignation of an heritable bond, unto which bond he would have succeeded as heir. It was *answered*, That this passive title was never extended to bonds of provision granted by a father to his eldest son; and if in security and satisfaction of such a bond of provision, an assignation of a debt due to the father and his heirs were granted, it could not infer an universal title to make the acceptor liable to his predecessor's whole debt, so neither can an assignation to a bond, which is no more in effect, and such odious passive titles are not to be extended, but the pursuer may reduce upon the act of Parliament 1621, or at the farthest, may crave by this process the simple avail of what the defender hath intromitted with by virtue of the assignation.

THE LORDS found the condescendence relevant, as being *præceptio hæreditatis*; and as an assignation to a tack or a small annualrent, hath been found sufficient, so there is like or more reason for assignations to heritable bonds, which may be more easily conveyed away from creditors; but they found it not alike as to bonds of provision whereby the father became debtor, and in satisfaction and security whereof he might assign, and would only import single payment, but not an universal passive title.

*Fol. Dic. v. 2. p. 36. Stair, v. 1. p. 319.*

\* \* Newbyth reports this case :

EDWARD EDGAR being a creditor to umquhile Mr Alexander Colvil of Blair in the sum of 3000 merks, pursues the relict as vitious intromissatrix with the defunct's goods and gear, and his bairns upon the passive titles *alternative* libelled, and insisted upon that passive title against the apparent heir as successor *titulo lucrativo post contractum debitum* by his acceptation of rights, not only of lands, but of heritable bonds and sums of money thereby due, which ought to infer that passive title against him who is *alioqui successurus*. THE LORDS found a disposition or assignation to be an heritable debt granted by the father to the son, sufficient to make the son liable as successor *titulo lucrativo post con-*

No 111.  
Lucrative  
succession in-  
ferred by an  
assignation of  
an heritable  
bond by a fa-  
ther to his  
eldest son who  
would have  
succeeded him  
as heir there-  
in.