

the wadset, he was lucrative successor, after that obligation contracted by the wadset.

No 129.

Stair, v. 1. p. 506.

1674. June 7.

— against HEPBURN.

No 130.

THE apothecary Patrick Hepburn's son, being pursued as successor *titulo lucrativo*, for a debt of his father's, upon that ground, that though the right of lands granted to him by his father was before the debt, yet it was revocable, and under reversion to the father, upon a rose noble, when he contracted the debt libelled;

THE LORDS assolizied from the passive title foresaid, but reserved reduction. It appears that the case was not without difficulty; and that albeit future creditors in some cases may reduce anterior rights *ex capite fraudis*, yet this is difficult and unusual; and therefore it had been fit to determine that point, viz. Whether an apparent heir, getting a right revocable, and of the nature foresaid, should be liable at the least *in quantum*; seeing if the father had discharged the reversion, he would have been successor, in respect of the discharge after the debt; and the son was a child, and the father reserved and retained possession, and upon the matter, the father's not redeeming was a discharge of the reversion.

Act. ———.

Alt. Hog.

Fol. Dic. v. 2. p. 37. Dirleton, No 184. p. 74.

1678. July 23.

FERGUSON against LINDSAY.

THOMAS FERGUSON pursues William Lindsay, as representing his father, for payment of his father's bond of 1600 merks, and insists against him as successor lucrative *post contractum debitum*, by an infeftment in lands upon his father's disposition; which infeftment is posterior to this debt, and therefore he is successor after this debt, and *ex causa lucrativa*. The defender answered, *non relevat*, unless the debt had been anterior to the disposition; for that passive title is always understood of a successor *ex causa lucrativa, quæ causa est post contractum debitum*; for the infeftment is but in implement of the disposition *et necessitatis*, though the disposition be *voluntatis*. The pursuer replied, That his debt is both anterior to the infeftment, and the disposition upon which it proceeds. The defender replied, That the disposition is not the cause of the infeftment, but a contract of marriage, disposing the same lands; and though this disposition doth not relate to the contract, yet it is presumed to be in implement thereof, and the father might have been compelled upon the contract to

No 131.
Succession lucrative was found not to be inferred by an infeftment posterior to the pursuer's debt, it being on a contract of marriage anterior to the debt.

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extend the disposition, with procuratories and precepts to complete the infeftments.

THE LORDS found the defence relevant, that the same lands were disposed by contract of marriage, before contracting the pursuer's debt, though this disposition and infeftment thereon was posterior to the debt.

Fol. Dic. v. 2. p. 37. Stair, v. 2. p. 639.

1714. July 22.

No 132.

A party being held as confessed upon an account referred to his oath, the Lords found his eldest son liable to pay the debt as lucrative successor, by a disposition posterior to the account, though prior to the decree.

JOHN DOUGLAS, Taylor in Edinburgh, against WILLIAM COCHRAN of Ochiltree.

IN a process at the instance of John Douglas, as having right from William Douglas his father, against William Cochran of Ochiltree, as lucrative successor to the deceased Sir John Cochran his father, for payment of L. 1315 Scots due by Sir John to the said William Douglas by an unsubscribed taylor-accompt about the year 1679, and contained in a decret obtained against him, for not compearing to depone in July 1713 upon the said accompt, that it was resting owing ;

Answered for the defender ; Seeing the passive title of lucrative successor makes the heir liable only for such debts as were contracted before the date of the disposition in his favour, he cannot be liable to pay the debt pursued for ; because, *imo*, The disposition, though posterior to the said accompt, is prior to the constitution of the debt by the said decret against Sir John, which only made him debtor, and cannot operate *retro* to make the father as debtor before, for by the decret he is not held as confessed upon the time of furnishing the articles of the accompt, but only that he was really owing the same ; and the obligation arising *a re judicata jurata*, or from the parties being held as confessed, is considered as a transaction or original obligation or contract betwixt the parties ; so that it cannot be drawn back, l. 26. D. De jurejur ; *2do*, *Esto* the decret were probative of the time of furnishing, it cannot be probative against the defender, to whom Sir John was denuded by an anterior disposition, and as to whom it was *res inter alios* : For though he had granted bond to any creditor, declaring it to be for a debt due to him before the disposition to the defender, that would not have been respected as lawful probation to subject him to the debt ; else it were easy for a father, having disposed his estate in his son's contract of marriage, to make the disposition elusory at his pleasure, by granting bonds under his hand, declaring himself to have been debtor some time before the right granted to his son : And a decret, holding Sir John as confessed, upon a presumption of law, cannot have greater effect against the defender, than if his father had owned it under his hand.

Replied for the pursuer ; *imo*, As the furnishing was before the disposition to the defender, so the obligation to pay was also before, arising from the time of