

No 127. it liquidates the decret of removing. THE LORDS would not sustain the allegiance as it was proponed, except he would say as in the reply.

*Fol. Dic. v. 2. p. 37. Spottiswood, (SUCCESSORS and SUCCESSION), p. 315.*

\* \* \* Auchinleck reports this case :

THE Laird of Carnossie pursued Alexander Fraser, as successor to umquhile Alexander Fraser of Mensir his father *titulo lucrativo*, for making payment to him of the violent profits contained in a decret obtained by Carnossie's father against the defender's father. It was excepted by Alexander Fraser, that he cannot be convened as successor to his father in the land of Mensir, because he was infest by his father therein upon his contract of marriage, which contract was made before any decret of violent profits was obtained. To which it was *replied*, That the exception ought to be repelled, except it were *alleged*, that the contract of marriage was before the decret of removing, whereupon the decret of violence followed ; for by the decret of removing, his father was constituted debtor, and the decret of violence was only a liquidation of the debt which depended upon the decret of removing. Which reply the LORDS found relevant.

*Auchinleck, MS. p. 4.*

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1637. February 23. LIGHTON against L. KINABER.

If a disposition be before the existence of the debt though infestment be after, there is no room for the passive title.

\* \* \* See this case, No 106. p. 9772.

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A son as lucrative successor *post contractum de bitum*, was found obliged to enter heir to his father the wadsetter, in order to resign in favour of the reverser, because there was an obligation in the wadset to resign upon payment, which was before the

1668. January 14.

EARL of KINGHORN against The LAIRD of UDNEY.

THE Earl of Kinghorn did wadset to the deceast Laird of Udney the barony of Balhaves, and the sum due upon the wadset being paid to Udney, he did by his letter to the said Earl, promise a renunciation of the said wadset to be granted by him. The Earl of Kinghorn as heir to his father, having pursued the now Laird of Udney as representing his father upon the passive titles, and especially upon that, as successor *titulo lucrativo*, in so far as he was infest in the lands condescended upon acquired by his father to himself in liferent, and to the defender in fee, with power to the father or his assignee to redeem the same upon payment of three pounds, and to set, wadset, and dispone without his consent ; it was *alleged*, the sons right was prior to the said letter, and that the father did not make use of the said power. It was *replied*, That the wad-

set was prior to the defender's right yet, this right being qualified (as said is) the father might have contracted debts, and granted obligations after the said right, and the defender would be liable to the same, seeing the lands and the father's interest in the same being upon the matter a fee and power to redeem and dispo, might have been comprised for his debt contracted after the said right.

There being two questions in the case, *viz.* Whether the defender be liable as successor *titulo lucrativo*, if it should be found that the wadset was anterior to the son's right? *2dly*, If the obligation shall be found to be after the defender's right, whether he would be notwithstanding successor *titulo lucrativo*, in respect of the quality and condition foresaid of the said right;

THE LORDS repelled the allegiance, and found the defender would be liable as successor, the pursuer proving that the wadset was anterior: As to the second question, THE LORDS thought it not necessary to decide, being of very great consequence, and deserving hearing *in praesentia*, seeing it was notour that the wadset was before the defender's right; yet we inclined for the most part to think, that when such rights are granted or purchased by parents to their apparent heirs, they should be liable to all the debts due and contracted thereafter, at least *secundum vires et in quantum lucrantur*. And beside the above-mentioned reasons, these may be urged, *imo*, The father having by such a reservation, not only a reversion, but in effect a right of property, in so far as he has power to dispo and wadset as if he were fiar, if he should discharge the said reservation, his discharge would infer against his son the passive title of successor *titulo lucrativo*, having gotten thereby an absolute and irredeemable right which he had not before; and therefore, he not using the power competent to him by the said reservation, being equivalent as if he had discharged the same, ought to operate the same effect. *2do*, Such a right is in effect *praecipio hereditatis cum effectu* only the time of the father's decease, seeing before that time it is in his power to evacuate the same; and therefore the time of the father's decease is to be considered so as the son cannot be said to have right or to succeed effectually before that time, and so ought likewise to be liable to the debts contracted at any time before his father's decease.

*Fol. Dic. v. 2. p. 37. Dirleton, No 130. p. 53.*

\* \* Stair reports this case:

1668. *January 15.* THE Earl of Kinghorn pursues the Laird of Udney, as representing his father, to denude himself of a wadset right, granted by the late Earl to the defender's father, conform to the defunct's missive letter, acknowledging the receipt of the sums of the wadset, and obliging himself, all written with his own hand; and craved that the defender might enter and infest himself in the wadset, and resign in favours of the pursuer, that the lands might be purged thereof; and insisted against the defender, *imo*, as lawfully charged to

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son's disposition, though the order of redemption and repayment of the wadset sum to the father was after it.

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enter heir, who offered to renounce to be heir. The pursuer *answered*, He would not suffer him to renounce, because he offered him to prove that he was lucrative successor by the disposition of the lands of Udney, whereunto there is an express reservation in favours of his father, to dispone, wadset, and grant tacks, and therefore any deed done by his father, behoved to affect him, at least the fee of the estate; so that, albeit this letter be posterior to the disposition of the estate it must burden the same, and the defender *quoad valorem*. *2do*, The letter produced, acknowledges a wadset, and payment made, and it is offered to be proven, that the letter was anterior to the disposition of Udney; so that by the receipt of the wadset sums, the defunct was (by the nature, and tenor of the rights of wadset) obliged to resign in favour of the pursuer, and therefore the defender succeeding to him by this disposition, after that obligation to denude himself upon payment, is obliged, as successor *titulo lucrativo post contractum debitum*, to denude himself; and that the wadset was prior to the disposition of Udney, was offered to be proven. The defender *answered*, That the provisions in his infestment could never affect him nor the estate, because there was nothing in the provision, that the estate should be liable to the debts contracted by the defunct thereafter, but only that he might dispone, or wadset, or redeem for an angel; and it cannot be subsumed, that the letter produced doth import any of these, but at most a personal obligation. *2do*, Albeit it were notour, that there had been such a wadset before the defender's disposition of his proper estate, yet it behoved to be also instructed, that it was paid before that disposition; but his father's missive after his disposition, could never instruct that it was paid, or paid before, and yet the defender offered to renounce all right he had to the wadset lands, or to suffer a certification and improbation to pass against the same, seeing they are not extant or produced; or to consent that the LORDS would declare upon the letter, that the wadset thereby was redeemed and extinct; which last the pursuer would have accepted, providing the defender would give a bond of warrandice for his father's deed and his own, which the defender refused.

THE LORDS proceeded to determine the point *in jure*; and as to that point anent the provision in the defender's infestment, some were of opinion, that any debt contracted by the father would affect the estate, others thought not, there being no provision to contract debt, but to wadset or dispone, which was not done; and all agreed, that the case being new, and now very frequent, required a more accurate debate; but the LORDS found that the defender's father, having by his letter acknowledged the wadset, and the payment thereof, to which wadset the defender had no right, that any grant of redemption by the father (after his disposition to his son) was probative against the son, and that the letter being proven holograph, did instruct the wadset to be paid; and therefore found it relevant to the pursuer, to prove that the wadset was before the defender's disposition, and that it did import a conditional obligation, that the father should resign upon payment, and that the son's disposition being after

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

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*Stair, v. 1. p. 506.*

1674. June 7.

— against HEPBURN.

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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

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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.