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to infest him, not having a determinate time, in his father's life, before contracting of this debt; but found the duply of the cause onerous relevant, reserving to the Lords, after probation, to determine as to the equivalency of the cause onerous to the worth of the land; for the Lords thought, that if the cause onerous was short of the worth considerably, as within the half or the like, that it would infer the passive title, but if it were near the worth, it would not, though there might be place for reduction to reach the excrecence.

Fol. Dic. v. 2. p. 36, & 37. Stair, v. 2. p. 648.

* * * Fountainhall reports this case :

HIGGINS against Maxwell of Munshes, for a debt of his father's, as successor *titulo lucrativo, p. c. d. Alleged*, He had the disposition for implement of his mother's contract-matrimonial, providing the estate to the eldest son.—THE LORDS repelled this. Then he *alleged*, He had it for onerous and adequate causes.—THE LORDS ordained, before answer, the pursuer to prove the worth of the lands, and the defender the causes; and declared, if they amounted to nine parts of the true price, dividing the price in twelve parts, they would not find it a passive title, but only decern him to pay the superplus. Some thought the contract being to the bairns of the marriage, his accepting a posterior disposition was not a passive title, and that he might retour his blood as bairn.

Fountainhall, MS.

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An obligation in a contract of marriage to provide the conquest to the heirs of the marriage, is not an onerous cause to protect the heir to whom the estate is afterwards disposed, from being liable as lucrative successor.

1705. November 21.

HENRY GILLESPIE, son to the deceast EDWARD GILLESPIE Merchant in Edinburgh, and RACHEL WATSON his spouse, *against* PATRICK GILLESPIE and his Spouse, and MARK and JAMES CARSES.

THE deceast Edward Gillespie, merchant in Edinburgh having, after disposing some tenements there to Mark, James, and Janet Carse his grand-children, disposed the same to Henry Gillespie, his eldest son and apparent heir, who obtained himself infest, and thereafter granted a new corroborative disposition to his said grand-children, who were thereupon infest, in regard, the first disposition in their favours wanted a procuratory of resignation and precept of sasine; a competition for mails and duties arose betwixt Henry Gillespie and Patrick Gillespie, who married the said Janet, and her two brethren.

Henry craved preference upon this ground, That although the disposition in favours of the Carse be anterior to his, his infestment was prior to theirs.

Answered for Patrick Gillespie and the Carse; 1. Edward Gillespie being first denuded by a disposition in their favours, he could not afterwards, in prejudice thereof, grant another right to his apparent heir; which second disposi-

tion is reducible as merely gratuitous, without any onerous cause, and cannot hinder their posterior infeftment on the corroborative disposition to be drawn back to the date of the first; 2. Henry, as successor *titulo lucrativo post contractum debitum* to Edward by his foresaid disposition and infeftment, is obliged to warrant their prior disposition, and therefore cannot impugn it.

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Replied for Henry; That in all competitions of real rights, the first infeftment is still preferred; and the date of the posterior sasine cannot be brought back to the date of the first disposition, which contained no precept of sasine or warrant for infeftment: Nor was Henry's disposition gratuitous, since Edward could have been compelled to grant the same in implement of his contract of marriage with Henry's mother, whereby the whole conquest was provided to the heirs of that marriage, and consequently to him: 2. He could not be liable to warrant his father's disposition as *successor titulo lucrativo*, in so far as the posterior disposition to him had such an antecedent onerous cause as his mother's contract of marriage.

Duplied; However onerous a contract of marriage may be in favours of the wife, it is always gratuitous as to provisions in favours of heirs and bairns, and can never be opposed even to posterior creditors. Nor can it excecun an apparent heir from the passive title of lucrative successor; November 29. 1678, Higgins *contra* Maxwell; No 125. p. 9795.; February 22. 1681, More *contra* Fergusson; No 116. p. 9781. Dirleton in his questions, title *successor titulo lucrativo*, is also of this opinion. 2. Though the disposition to the Carse were gratuitous, yet they are *in pari casu* with Henry, his disposition being also gratuitous: And in a competition betwixt two gratuitous assignees, the last assignation, though first intimated, is reducible upon the implied warrandice of the first, against future facts and deeds of the same nature; July 15. 1675, Alexander *contra* Lundy; No 64. p. 940.

THE LORDS found the disposition made by Edward Gillespie to Henry, in his contract of marriage, was not onerous as to his interest therein, and could not prejudice the anterior disposition granted by the same Edward in favours of his grand-children the Carse; though Henry's right was first perfected by infeftment; in regard, he as heir or lucrative successor, could not quarrel or impugn his father's deed in their favours, but was liable to warrant the same; reserving to Henry's wife and children after his decease, to debate their interests in the said contract as onerous *quoad* them.

Fol. Dic. v. 2. p. 36. Forbes, p. 43.

* * * Fountainhall reports this case :

EDWARD GILLESPIE merchant, having two children, Henry, and Marion who was married to Captain Carse brother to Cockpen, and had by him Mark, James, and Janet Carse; and Janet being married to Patrick Gillespie; Edward the grandfather, disposes to the said three Carse, his grand-children, in 1686,

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some houses in Edinburgh; and thereafter he makes a right of the same houses to his son Harry, who is thereupon infeft in 1699; but the said Edward being induced to adhere to his first deed, which wanted a procuratory or precept of sasine, he renews the same, and grants a disposition in corroboration in 1702, whereupon the Carses, his grandchildren, are infeft; whereon they and Harry Gillespie their uncle, falling to compete for the mails and duties, it was contended for Harry, That though his disposition was posterior to theirs, yet it was first completed by infeftment, three or four years before theirs; and so, as having the first consummate real right, he was clearly preferable, by the 13th act, Parl. 1693. *Answered*, That Edward being denuded of the fee in favour of the Carses, his grandchildren, he could do no voluntary posterior gratuitous deed in prejudice thereof, especially to his apparent heir, without an onerous cause, and who as heir becomes liable to warrant the first disposition, being *successor titulo lucrativo post contractum debitum*. *Replied*, Heritable rights of lands are not validly transmitted by dispositions, till infeftment be taken thereon; and though the Carses had a naked personal right before him, yet he had the first infeftment, which must by all the rules of law give him preference; and the pretence that his right is gratuitous is false, because it depends upon Janet Nisbet his mother's contract of marriage with the said Edward, where the whole conquest *stante matrimonio* is provided to the heir of the said marriage, which he is; and his father could by no voluntary deed derogate from that clause of conquest, which makes the said Harry's right onerous, and to depend on that antecedent cause; whereas their right is uncontrovertedly gratuitous. *Duplied*, That Harry's right is still gratuitous; for the conception of the clause of conquest is not to the heir of the marriage, but expressly provided to the bairns to be procreate of that marriage, whereof the Carses' mother was one; and so she and her children *jure representationis* had as good right to the heritable conquest (though not so of moveables) as he had, and were *in pari casu quoad* that; and even in such provisions, the LORDS have found the parent had the power to arbitrate dispose and distribute the conquest among his children, as they deserved. Thus the LORDS decided lately, in Thomas Wylie's children's pursuit against their father, (See APPENDIX); and such obligations do not exclaim the apparent heir from implementing his father's deeds, nor purge the passive title of successor *titulo lucrativo*, 8th July 1625, Gray*; so that *esto* the disposition to the Carses be lucrative, so is yours; you Harry having got a considerable patrimony beside this; and wherever a competition occurs betwixt two gratuitous assignees, the last assignation, though first complete, is always reducible upon the implied warrandice of the first, against all future facts and deeds, as was found 15th July 1675, Alexander, No 64. p. 940.; and much more where the second right is to the apparent heir, who is liable in his predecessor's obligation for warrandice contained in the first deed, though incomplete; and though provisions in contracts matrimonial conceived in favour of wives may be

* Gray against Burgh, Durie p. 176, in the Appendix to this Title.

onerous, yet destinations to heirs or bairns are not so, and do not hinder but a disposition to an eldest son makes him successor *titulo lucrativo*. *Vid.* 29th November 1678, Higgens, No 125. p. 9795. ; and 22d February 1681, More, No 116. p. 9781. ; and Dirleton, *voce Successor titulo lucrativo*. THE LORDS found though Harry had the first complete right, yet seeing he was thereby heir and successor, he became liable to warrant his father's deed, in favour of the Carses, and so could not quarrel nor impugn the same ; and therefore reduced his right, and preferred the first disposition made by Edward to the Carses, his grandchildren, before Harry's subsequent right, though first perfected by infestment.

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Fountainball, v. 2. p. 292.

S E C T. III.

The Debt must be anterior to the Disposition.—What understood to be an Anterior Debt.

1634. *January 14.*

OGILVIE against LD MENSIR.

SIR GEORGE OGILVIE of Carnossie, as executor dative *ad omnia* confirmed to his father, sought a decret of violent profits obtained by his father against umquhile Alexander Fraser of Mensir, to be transferred in himself *active* as executor foresaid, and *passive* in Alexander Fraser, son to the said umquhile Alexander, to whom he was successor *titulo lucrativo* in the said lands of Mensir. *Alleged*, No transferring against the defender as successor, &c. because offered to be proven, that if any way he succeeded to the said lands of Mensir, it was by virtue of his contract of marriage, whereby his father was bound to infest him in the same ; which contract was long before the decret of violence, and so he cannot be convened as successor *titulo lucrativo post contractum debitum*, seeing the decret of violence is the only ground whereupon he is pursued. *Replied*, That ought to be repelled, except he would allege that the contract was before the decret of removing and warning, whereupon the decret of violence followed, and to which warning and decret of removing following on it, the said decret of violence ought to be drawn back ; for the defender was constituted debtor by the said decret of removing. *Duplied*, The decret of violence is the only ground that makes the defender debtor to the pursuer, because

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A decret of violent profits against a father, after the disposition by him to his eldest son, was drawn back to a decret of removing, which was before the disposition, in order to be the foundation of a passive title ; because the decret of violent profits was a consequence of the other.