

1639. *January 29.*LA. SMEITON *against* L. SMEITON.

No 107.

In a case similar to Forbes *against* Fullerton, No 106. p. 9771. the grandson *fiar*, after the death of his father, the liferenter, was found lucrative successor.

THE Lady Smeiton pursues registration of a contract of marriage, made betwixt umquhile James Richardson of Smeiton her son, and Rachel Wardlaw his spouse, whereby her umquhile husband, father to the said umquhile James their son, provided the pursuer to her liferent of the lands of Smeiton, in recompence of the lands of Wallieford, which she being provided unto, renounced in favours of her said son; for registration whereof she pursues James Richardson, now of Smeiton, oye to her umquhile husband, as successor to his goodsir *post contractum debitum*. And it being *alleged*, That he could not be convened as universal successor to his goodsir, because the time of the acquiring of that right from his goodsir, his father was then living, who was then apparent heir to the defender's goodsir, and so he can never be reputed, nor convened as universal successor, his father being on life; the LORDS repelled this exceptton, in respect of the infestment of the lands, granted after the contract of marriage, whereby this pursuer was provided to her liferent, as said is, and was given by the goodsir to the defender his oye, with reservation of the liferent to the defender's father, so that the goodsir and the father contracting together to infest the oye in fee, and providing the father to the liferent, the LORDS found this sufficient to make the oye successor to his goodsir, albeit then the oye had his father on life, who was *in linea recta* apparent heir before the oye, which was found no impediment to exclude this pursuit; but that the same should be sustained against the oye as universal successor, otherways all just creditors might be fraudulently elided.

Act. ———.

Alt. *Nicolson*, younger.Clerk, *Scot.**Fol. Dic. v. 2. p. 35. Durie, p. 870.*1662. *January 14.*NICOL HARPER *against* HOME of Plandergaist.

No 108.

One granted a disposition in trust for behoof of his apparent heir, which was afterwards conveyed to the heir. He was found liable only *in valorem* on the act 1621.

NICOL HARPER pursues Colonel John Home of Plandergaist, for payment of a debt of umquhile Home of Plandergaist his brother, and condescends, that the defender hath behaved himself as heir, at least successor lucrative to his brother, in so far as his brother disposed the lands of Plandergaist to William Home of Linthil, to the behoof of the defender, then his apparent heir, whereupon the defender is now in possession. The defender *alleged, Non relevat*, to infer this passive title, unless the disposition had been to the defender himself, or that he had thereupon been infest; but a third party only being in the real right, and the defunct denuded before his death, albeit there was a personal obligation of trust in favours of the apparent heir, if that cannot make him lucrative successor, but the pursuer may reduce the same, if it was without cause onerous.

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. 1. 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. 1. 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

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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*.