

1672. December 17.

The Lady SPENCERFIELD against The Laird of KILBRACHMONT.

THE Lady Spencerfield pursues the Laird of Kilbrachmont as lucrative successor to his father's brother, for payment of a debt of the defunct's, as representing him, in so far as he accepted a disposition of the lands, in which he was then apparent heir, without an equivalent onerous cause. The defender *alleged*, That the libel and condescence were not relevant, because lucrative successor is never sustained as a general passive title, by accepting a disposition, unless it be granted to that person who is *alioqui successurus* by the necessary course of law, as being granted to the eldest son by the eldest son; but it was never sustained upon any disposition granted by a brother to a brother, or to a brother's son or other collateral; for, though dispositions to such may be reducible, as without a cause onerous, they cannot make the acceptor liable for all the disponent's debt, seeing there are still nearer successors *in spe*, viz. the defunct's children; and it cannot be supposed that the ground of this passive title for preventing of dispositions to children in prejudice of creditors can take place where the disposition is to a brother or nephew, the presumption there being nothing so strong that the defunct would exclude his own children. It was *answered*, That the defender was apparent heir for the time, and that the disponent was a very old man without hope of succession.

THE LORDS refused to sustain the summons upon the general passive title, but found the pursuer might, in this action, insist upon the act of Parliament 1621 against the defender, and in so far as he had benefit by disposition make him liable.

Fol. Dic. v. 2. p. 35. Stair, v. 2. p. 136.

* * * Gosford reports this case :

KILBRACHMONT being pursued as representing his brother upon the passive titles, that he was successor *titulo lucrativo post contractum debitum*, it was *alleged* for the defender, That he being only apparent heir to his brother by the collateral line, any right made by his brother to him, can only be reduced upon the act of Parliament as done *in fraudem creditorum*, but cannot be a passive title to make him liable to his brother's whole debt far exceeding the worth of the lands, seeing that is only sustained against the apparent heirs *in linea recta* where the father disposes the estate to his son or grand-child who of necessity must be heir if he die before them; whereas, a brother disposing to another brother, he may have children of his own, and so he is not necessarily to be his heir in case he survive him. It was *replied*, The defender the time of the disposition being only his apparent heir, it is sufficient to make him liable *passive* for his brother's whole debt. THE LORDS did sustain the defence and

No 113.
Found in conformity with
Scot against
Boswell, No
110. p. 9776.

No 113. found that dispositions made to a brother or one of the collateral line, could not infer a passive title, but they were only liable *in quantum lucrati sunt*, and their rights may be reduced upon the act of Parliament as done *in fraudem*.

Gosford, MS. No 545. p. 291.

** A similar decision was pronounced, 22d December 1674, Heirs Portioners of Seaton against Seaton, No 21. p. 5397, *voce* HEIRSHIP MOVEABLES.

No 114. 1676. July 8. JOHNSTON against ROME.

In a pursuit upon the passive title of *successor titulo lucrativo*, in so far as the defender had a disposition from his father, without an onerous cause, the LORDS sustained the pursuit, albeit it was *alleged* by the defender, he had made no use of the said disposition, and was content to renounce the same; which the LORDS found he could not do, being delivered to him. A concluded cause advised.

Clerk, Mr Thomas Hay.

Fol. Dic. v. 2. p. 38. Dirleton, No 377. p. 184.

No 115. 1679. February 7. HAMILTON of Pardowie against Mr ANDREW HAY.

THE LORDS found the son not liable for the father's debt, contracted after the son's fee by the contract of marriage, but found him liable *in quantum lucratus*.

Fol. Dic. v. 2. p. 36. Fountainball, MS.

** Stair reports this case :

Bonds dis-
poned to the
heir presum-
ed heritable,
in order to
infer the pas-
sive title.

JOHN HAMILTON of Bardowie pursues Mr Andrew Hay for relief of a sum, whereunto his father was conjunct cautioner with Bardowie's predecessor, and also for another sum due by his father to the pursuer, upon these passive titles, viz. That by his contract of marriage his father had contracted to him for several sums, and that after the cautionry foresaid, and after the other bond, the defender had bought a considerable bargain of land, which must be presumed to have been purchased by his father's means and money, especially seeing his father shortly before sold lands for 37,000 merks, and the defender was a person having no visible way to acquire so much land as he bought, by his own means; and therefore he must be liable for these debts, at least the lands acquired by the defender must be affected therewith, and he must be liable for the provisions in his contract *in quantum lucratus est*. The defender *alleged*, That neither of these grounds are relevant, for any lands he has acquired was after he was married, and had both gotten a provision from his father, and a tocher with his wife; and though the Lords have sustained the presumption, that lands ac-