

No 122. only be liable to the creditors after count, but also for the annualrent thereof, after the intenting of the respective creditors their cause.

Gilmour, No 106. p. 79.

1671. November 22. BEATIE against ROXBURGH.

No 123.

BEATIE pursues Roxburgh as successor lucrative to his father, by a disposition produced, bearing for love and favour, and other good causes, redeemable by the father for forty shillings Scots. The defender *alleged*, That whatever was the tenor of the disposition, yet the true cause thereof was onerous, being granted for sums belonging to the son *aliunde*, intromitted with by the father, equivalent to the worth of the land, which uses always to purge this passive title, *quia debitor non præsumitur donare*.

THE LORDS found the defender lucrative successor by this disposition, the reversion making it evident to be a pure donation, and not given for any other cause.

Stair, v. 2. p. 8.

* * * Gosford reports this case :

ROXBURGH being pursued as successor *titulo lucrativo* to his father, in so far he had disposed to him a tenement, which did bear for love and favour, and wherein there was a reversion, bearing a power to redeem for payment of 20 shillings Scots, which tenement he yet possessed many years after his father's decease; it was *alleged*, That that disposition, albeit so conceived, could not make him successor *titulo lucrativo*, because he offered to instruct, that his father was debtor to him, by intromission with great sums of money left to him by his uncle on the mother's side, far exceeding the worth of the tenement, and the disposition being conceived in such terms as his father pleased, when he was minor, and *in familia*, it ought not to infer a passive title against him, which would make him liable to all his father's debts, he himself being a true creditor.—THE LORDS did find, that the disposition being conceived as said is, was a lucrative title, and made him liable to all his father's debts, which was very hard.

Gosford, MS. No 401. p. 202.

No 124.
Where there
is an onerous
cause, altho'
not fully equal

1676. February 15. HADDEN against HALIBURTON.

PATRICK HADDEN pursues George Haliburton as lucrative successor to his mother, by a disposition granted by her to him of lands wherein he was *alio-*

qui successurus, after contracting of the pursuer's debt, who *alleged* absolvitor, because the disposition bears to be for sums of money, and so is not lucrative but onerous. It was *answered*, That the narrative of the disposition proves not betwixt mother and son. Whereupon it was *alleged* by the defender, That any colourable title was sufficient to purge the passive universal title, but the pursuer might reduce upon the act of Parliament; *2do*, The cause onerous was offered to be proven.

THE LORDS found, that the disposition, with an onerous narrative betwixt mother and son, did not prove; but found, that if the cause onerous were proven, though not equal to the worth of the land, the defender should not be found simply liable, but *quoad valorem in quantum lucratus est*, without necessity of a reduction. See PROOF.

Fol. Dic. v. 2. p. 37. Stair, v. 2. p. 416.

1678. November 29. HIGGINS against MAXWELL.

JOHN HIGGINS having right to a bond, wherein umquhile ——— Maxwell of Munches was cautioner, pursues this Munches, as behaving as heir to his father, by intromission with the rents of the lands wherein his father died infest. The defender *alleged*, Absolvitor, because his father was denuded by a disposition in his favours. The pursuer *replied*, That, by the disposition, he was successor to his father *titulo lucrativo post contractum debitum*. The defender *duplicated, imo*, That, by his mother's contract of marriage, his father was obliged to infest the eldest son of the marriage in these lands, being the second marriage, and therefore the infestment was but in implement of that obligation, anterior to his debt; neither were the lands provided to him as heir of the marriage; *2do*, The disposition bears to be for onerous causes, and debts paid and undertaken, which the defender offers to instruct otherways than in the narrative of the disposition. The pursuer *triplicated* to the *1st*, That all obligations in favours of children are always understood to be in way of succession, whether it be to them as heirs, bairns, or as the eldest son or daughters, for thereupon the father could not be excluded from his liferent, seeing he might infest his son at any time in his life; and if such clauses were otherwise interpreted, no creditor would be secure, but such latent clauses might still exclude them by infestments granted thereupon after contracting other debts. To the *2d*, *Non relevat*, unless the cause onerous be proven equivalent to the worth of the land; for if it be not, it remains a lucrative title, and would give a rise to fraud, if a right onerous in some part would exclude this positive title, and put creditors to reduce.

THE LORDS found, that the infestment to the eldest son made him liable as lucrative successor, although there was an obligation in his mother's contract

No 124.
to the worth of the lands, the disponent is liable only *in valorem*.

See in the next case, that if the cause onerous be inconsiderable, a passive title will be incurred.

No 125.
An obligation in a contract of marriage, to provide the estate to the heir of the marriage, found not to be an onerous cause to protect the eldest son, to whom the estate is afterwards disposed, from being liable as lucrative successor.