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extend the disposition, with procuratories and precepts to complete the infeftments.

THE LORDS found the defence relevant, that the same lands were disposed by contract of marriage, before contracting the pursuer's debt, though this disposition and infeftment thereon was posterior to the debt.

*Fol. Dic. v. 2. p. 37. Stair, v. 2. p. 639.*

1714. July 22.

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A party being held as confessed upon an account referred to his oath, the Lords found his eldest son liable to pay the debt as lucrative successor, by a disposition posterior to the account, though prior to the decree.

JOHN DOUGLAS, Taylor in Edinburgh, against WILLIAM COCHRAN of Ochiltree.

IN a process at the instance of John Douglas, as having right from William Douglas his father, against William Cochran of Ochiltree, as lucrative successor to the deceased Sir John Cochran his father, for payment of L. 1315 Scots due by Sir John to the said William Douglas by an unsubscribed taylor-accompt about the year 1679, and contained in a decret obtained against him, for not compearing to depone in July 1713 upon the said accompt, that it was resting owing ;

*Answered* for the defender; Seeing the passive title of lucrative successor makes the heir liable only for such debts as were contracted before the date of the disposition in his favour, he cannot be liable to pay the debt pursued for; because, *imo*, The disposition, though posterior to the said accompt, is prior to the constitution of the debt by the said decret against Sir John, which only made him debtor, and cannot operate *retro* to make the father as debtor before, for by the decret he is not held as confessed upon the time of furnishing the articles of the accompt, but only that he was really owing the same; and the obligation arising *a re judicata jurata*, or from the parties being held as confessed, is considered as a transaction or original obligation or contract betwixt the parties; so that it cannot be drawn back, l. 26. D. De jurejur; *2do*, *Esto* the decret were probative of the time of furnishing, it cannot be probative against the defender, to whom Sir John was denuded by an anterior disposition, and as to whom it was *res inter alios*: For though he had granted bond to any creditor, declaring it to be for a debt due to him before the disposition to the defender, that would not have been respected as lawful probation to subject him to the debt; else it were easy for a father, having disposed his estate in his son's contract of marriage, to make the disposition elusory at his pleasure, by granting bonds under his hand, declaring himself to have been debtor some time before the right granted to his son: And a decret, holding Sir John as confessed, upon a presumption of law, cannot have greater effect against the defender, than if his father had owned it under his hand.

*Replied* for the pursuer; *imo*, As the furnishing was before the disposition to the defender, so the obligation to pay was also before, arising from the time of

completing the contract, which must be distinguished by suing implement thereof by process. It is true, were the competition with a lawful creditor before obtaining of the decret, something might be said; but, when the debate is with a lucrative successor, who is considered as *eadem persona* with his predecessor, *tempus contractus* is only regarded. And if Sir John had been liable only in a conditional obligation, during the pendency whereof he had disposed his estate to his son, it will not be disputed but that *existente conditione* the son would be liable; since, in that event, *retro pura censetur obligatio*. How much rather is he liable in the present case, where the obligation was simple from the time of the furnishing.

THE LORDS found the defender liable for the debt pursued for.

*Fol. Dic. v. 2. p. 38. Forbes, MS. p. 95.*

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SECT. IV.

How the Passive Title of Lucrative Succession is purged. What sort of Creditors have the Benefit of this Passive Title.

1633. January 15. Mr ALEXANDER KINNEIR against L. EASTNISEET.

IN an action for registration of a bond granted to Mr. Alexander Kinneir, by the defender's father, the defender being convened as lawfully charged to enter heir, for eliding whereof he renounced; and being convened as successor to his father *post contractum debitum*, for verifying whereof two infestments being produced, viz. the father's right, and the infestment given to the defender by his father's disposition; and the defender excepting, that this disposition could not make him liable as successor to pay the debt of his father, because that right made to him is reduced; and the pursuer replying, That that reduction is for non-production only, the defender being absent, whereby he may reduce when he pleases that decret reductive, and therefore he ought either to pay the debt libelled, or else to renounce all right which he can pretend to the lands by virtue of that right, that the pursuer may otherwise thereupon either seek adjudication or comprising of these lands contained in his rights alleged reduced; the LORDS found that the defender's infestment produced, being standing reduced, (albeit for non-production) could not prove him successor; neither found they it necessary to compel the defender to renounce all right as the pursuer desired, for the right standing reduced made to the defender, then the rest subsisted in the person of the granter thereof who was the

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It was sustained as a defence in a pursuit upon this passive title, that the disposition in the defender's favour stood reduced, though the reduction was in absence.