

though her father had made a disposition to her in his own lifetime of a tene-  
ment which was all the heritage he had, yet she cannot be conveyed for the  
whole *hoc nomine*, but for the third part, and as to the third part, she bruiks by  
her father's disposition as a stranger. To which it was *replied*, That the other  
two sisters had got no benefit by their father's heritage, and were content to  
renounce, so she bruiking the whole heritage by her father's disposition, must  
be liable for the debt. THE LORDS found that the defender was liable for the  
whole debt, *in solidum*, 15th February 1634. In the same action it was *ex-*  
*cepted*, That the said Elizabeth could not be pursued as successor *titulo lucra-*  
*tivo*, because the disposition made to her bore for sums of money. To which  
it was *replied*, that howsoever the disposition bore for sums of money, yet that  
general clause ought not to be respected, except the particular sums paid by  
her had been expressed, seeing she was not able to qualify any sums truly to  
to have been paid by her for the said disposition; and seeing the same was be-  
twixt the father and daughter, and for no sums truly paid, the same could not  
stand in prejudice of the creditors, conform to the act of Parliament. To which  
it was *answered*, That it ought to be repelled, except the reply were proved by  
writ or oath of party. THE LORDS ordained the defender to give her oath.

*Auchinleck, MS. p. 4.*

1636. March 23.

FORBES and FULLERTON *against* FULLERTON of Kinabar; and LIGHTON *against*  
L. KINABAR.

JOHN FULLERTON of Kinabar was bound, by contract of marriage, to provide  
the heirs-male, gotten between him and Janet Lindsay, his spouse, to 4000  
merks. Gideon Fullerton, heir-male, assigned this contract, and all right he  
had thereunto, to John Forbes of Balnagask, who pursued John Fullerton,  
elder of Kinabar, and John Fullerton his son, the one son, and the other grand-  
child to the said umquhile John Fullerton, party contractor, as successors *titulo*  
*lucrativo post contractum debitum* to the said umquhile John, to fulfil the said  
contract in this point. *Alleged* for John Fullerton elder, That he cannot be  
decerned as successor *titulo lucrativo*, because any infeftment he has (proceed-  
ing from his umquhile father) is only of liferent, the fee being provided to his  
son, grandchild to the defunct, and so he having no heritable right flowing  
from his umquhile father, cannot be esteemed successor to him.—THE LORDS  
repelled this allegiance, and found that he might be conveyed as successor to  
his father by virtue of that liferent infeftment and fee given to the grandchild  
together in the same contract, otherwise it were a certain way to defraud all  
creditors; for the defender being by this means freed, there can be no action  
upon this ground against his son who was in the fee, because he could not be  
thought successor to his grandfather, his father being between him and it, and  
so the creditors should be disappointed altogether.

*Fol. Dic. v. 2. p. 35. Spottiswood, (SUCCESSORS and SUCCESSION.) p. 316.*

No 105.

No 106.

A son was found to be lucrative successor, altho' the father had disposed to him only in liferent, and to a grandson in fee.

No 106.

\*\*\* Durie reports this case :

1636. *March 23.*—By contract of marriage betwixt Fullerton of Kinabar and Janet Lindsay his second spouse, the said L. Kinabar being obliged to do certain deeds in favours of the heirs to be procreated of that marriage, to which deeds the heir of that marriage having made John Forbes of Balnagask assignee, who convening the eldest son of the said L. Kinabar, procreated upon his first marriage, as successor to his said father, *post contractum debitum*, to fulfil these deeds; and for qualifying of the same, that he was so successor, he condescended, that his said father, since the contract, whereby he was debtor to this pursuer and his cedent, had, by contract, obliged him to infest the defender, his eldest son, in liferent of his lands of Kinabar, and the said defender's son, who was his oye, in fee thereof, conform whereto they were infest; in respect of the which liferent granted to him, who was his eldest son, and *alio-qui successurus*, he must be found liable to the debt, and to the fulfilling of the said contract of marriage: And the defender *alleging*, That this acquisition of the liferent to him from his father, could not be reputed such a right as might make him successor, seeing the succession must be in some heritable right, whereunto he might have succeeded in law, after his father's decease, which cannot be found to be in a naked liferent; for albeit that liferent might be found liable to the debt, or might be taken away and fall, in so far as the creditor, or any other, might be thereby prejudged, yet that thereby the defender should be found liable to pay all the defunct's debts, and thereby to lay a greater burden upon him than all the heritable right of that land, and thrice as much more is worth, it were unreasonable, and ought not to be sustained, and it were a novelty not heard of before by the Lords:—THE LORDS repelled the allegiance, and found this manner of qualification of succession by this liferent-right relevant to make the defender to be universal successor, and so to be liable to the defunct's whole debts, specially seeing, in that right of liferent granted to himself, the fee is granted to his son.

Act. Nicolson.

Alt. Falconer.

Clerk, Scot.

1637. *February 23.*—Old Kinabar, the goodsir, having given a bond to one Graham in Monross, to pay certain barrels of salmon, whereto Graham having made this Lighton, pursuer, assignee, who pursuing this old Kinabar, now living, and his son as successor, *titulo lucrativo post contractum debitum* to the granter of the bond, who was father to this old Kinabar, and goodsir to his son, now defenders, for registration of the bond; and the defenders *alleging*, That they could not be convened as successors *titulo lucrativo post contractum debitum*, in the lands and barony of Kinabar, which were the lands whereupon the pursuer had condescended that they had succeeded; because, by a minute

of contract made before the contracting of this debt libelled, and by a decreet arbitral following on the minute, and whereupon inhibition was served against old Kinabar, and by a posterior contract, enlarged upon the said contract and minute, and for fulfilling thereof, all which (viz. minute, decreet arbitral, inhibition, and extended contract) did precede the date of this obligation libelled; in which writs the goodsir was obliged to infest his son, (now old Laird of Kinabar) in liferent, and his oye, the other defender, in fee, in the said lands of Kinabar; in which contract there is contained a procuratory of resignation, in respect of which procuratory and writs, all preceding this bond libelled, and depending upon a preceding onerous cause of a minute of a contract of marriage, and whereupon inhibition was served, as said is, albeit the sasine, which followed after the said procuratory and writs, be after the date of the bond libelled; yet thereby, viz. by the posterior sasine, he cannot be found successor *titulo lucrativo*, the said sasine depending upon a preceding cause, necessary and onerous, and the said sasine must be drawn back *ad suam causam*, which preceded, as said is.—THE LORDS found this exception relevant to purge that member, whereby the defenders were convened as successors *titulo lucrativo*, and had no respect to that; whereby the pursuer *replied*, that the sasine was after his debt, and consequently that they were thereby successors; for nothing could elide the same but a preceding sasine before the debt, which not being taken till after the debt, as a sasine before only, would have purged this member; so the sasine after the debt must make him successor, the other rights being only personal, and the writs a year before the debt, and the sasine after the debt. And it being further *alleged*, That the constitution of a liferent by the goodsir to his own son, father to the young Laird, could not make him convenable as successor, seeing that right was transmissible by assignation, and needed no sasine, and consequently could not prove him successor; the LORDS repelled this exception, in respect, by the writs produced by the excipient's self, to instruct the foresaid other exception, the goodsir had not disposed his liferent to his son that way, in manner of assignation, but, in a body of a writ, obliged himself to infest his son in liferent, and his oye in fee, of the laids lands, and had subscribed a procuratory of resignation of that tenor, whereupon infestment followed, as said is; which writ, containing the liferent to himself, and the fee to his son, so constituted by infestment, made the father to be reputed also successor, who had contented himself with the liferent, having acquired the heritable fee to his own son, oye to the goodsir, granter of the bond, as said is; but this was elided by the foresaid other exception, admitted as said is. This cause was thereafter disputed over again, and stands yet in suspense undecided.

Act. Nicolson, Baird, et Alex. Nicolson. Alt. Advocatus et Stuart. Clerk, Scot.

Fol. Dic. v. 2. p. 35. Durie, p. 807, & 828.