

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

No 108.

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*.