

*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

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to the worth of the lands, the dispoonee 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.

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to infest him, not having a determinate time, in his father's life, before contracting of this debt; but found the duply of the cause onerous relevant, reserving to the Lords, after probation, to determine as to the equivalency of the cause onerous to the worth of the land; for the Lords thought, that if the cause onerous was short of the worth considerably, as within the half or the like, that it would infer the passive title, but if it were near the worth, it would not, though there might be place for reduction to reach the excrecence.

*Fol. Dic. v. 2. p. 36, & 37. Stair, v. 2. p. 648.*

\* \* \* Fountainhall reports this case :

HIGGINS against Maxwell of Munshes, for a debt of his father's, as successor *titulo lucrativo, p. c. d. Alleged*, He had the disposition for implement of his mother's contract-matrimonial, providing the estate to the eldest son.—THE LORDS repelled this. Then he *alleged*, He had it for onerous and adequate causes.—THE LORDS ordained, before answer, the pursuer to prove the worth of the lands, and the defender the causes; and declared, if they amounted to nine parts of the true price, dividing the price in twelve parts, they would not find it a passive title, but only decern him to pay the superplus. Some thought the contract being to the bairns of the marriage, his accepting a posterior disposition was not a passive title, and that he might retour his blood as bairn.

*Fountainhall, MS.*

No 126.

An obligation in a contract of marriage to provide the conquest to the heirs of the marriage, is not an onerous cause to protect the heir to whom the estate is afterwards disposed, from being liable as lucrative successor.

1705. November 21.

HENRY GILLESPIE, son to the deceast EDWARD GILLESPIE Merchant in Edinburgh, and RACHEL WATSON his spouse, *against* PATRICK GILLESPIE and his Spouse, and MARK and JAMES CARSES.

THE deceast Edward Gillespie, merchant in Edinburgh having, after disposing some tenements there to Mark, James, and Janet Carse his grand-children, disposed the same to Henry Gillespie, his eldest son and apparent heir, who obtained himself infest, and thereafter granted a new corroborative disposition to his said grand-children, who were thereupon infest, in regard, the first disposition in their favours wanted a procuratory of resignation and precept of sasine; a competition for mails and duties arose betwixt Henry Gillespie and Patrick Gillespie, who married the said Janet, and her two brethren.

Henry craved preference upon this ground, That although the disposition in favours of the Carse be anterior to his, his infestment was prior to theirs.

*Answered* for Patrick Gillespie and the Carse; 1. Edward Gillespie being first denuded by a disposition in their favours, he could not afterwards, in prejudice thereof, grant another right to his apparent heir; which second disposi-