quired in name of children unforisfamiliated, are purchased by the father's means, and liable to his debt, unless the contrary were instructed, yet there is no ground to extend that to a person married, and forisfamiliated, who not only had means, but might have contracted debts for the lands acquired.—THE LORDS found the defender's land not liable upon this presumption, but that it might be proved by his oath or writ, that these lands were acquired by his father's means, after contracting of these debts.—And as to the second ground the defender *alleged*, That suitable portions by parents to children were never found quarrelable by reduction, at the instance of prior creditors, if the father then had a sufficient visible estate to pay his debt, attour the portions, as was found in the case of the Children of Mouswell, No 60. p. 934. much less can the children be liable personally.—The pursuer *answered*, That whatever might be alleged as to tochers of daughters, or the provisions of younger sons, yet provisions to the eldest son and apparent heir, being in effect *præceptio hæreditatis*, it must must make him liable *in quantum lucratus*.—It was *replied* for the defender, That the provision might be out of the father's moveables, for unless it were proved to be out of his heritable rights it could not import. No 115.

THE LORDS found, That the apparent heir being provided to sums by his father, was liable for his father's anterior debts *in quantum lucratus*; and would not put the creditors to prove, that the same was made out of heritable sums, unless the contract of marriage did expressly bear assignations to moveable sums.

Stair, *v.* 2. *p.* 688.

1681. *February* 22. MORE *against* FERGUSON.

No 116.
A younger son was found lucrative successor, accepting and using a disposition of his father's lands, wherein he would have succeeded as heir of a marriage.

GRISSEL MORE, as executrix confirmed to John Chalmers her husband, pursues Ferguson as successor *titulo lucrativo* to his father the debitor.—The defender *alleged* no process, because he hath an elder brother who is heir of line, and is not discust; 2*do*, Though he were discust, the defender is not liable by any disposition made by his father, and albeit the disposition may be reduced, yet he is not personally liable.—The pursuer *answered* to the first, That the eldest son being weak, is past by, and all is disponed to this defender, who thereby is universal successor, and nothing can be shown of the father's succession, to which the eldest son could succeed.—The defender *replied*, That our law hath no such passive title as universal successor by disposition, though it were of the disponer's whole estate and means, but the passive title is successor lucrative by disposition in that right in which the party would have succeeded; so that the disposition is *præceptio hæreditatis*, which is equivalent, he being entered heir *passive*, whether the disposition be of all or of a part of that wherein he would have succeeded; and therefore *præceptio hæreditatis* is a relevant passive title against the heir of line, and if he be discust, against the heir-male, and these being discust, against the heir of tailzie or provision, such as the defender, who

No 116. is heir of a marriage.—It was *duplied*, That *præceptio hæreditatis* cannot be extended to the heir of a marriage, who is in some sort a creditor by the contract of marriage, and therefore at most can be liable *in quantum est lucratus*.—It was *triplied*, That though the heir of the marriage be a creditor as to the heir of line, yet not as to his father's creditors, but as to them, he represents his father as debtor, if he immix himself in his father's heritage, by accepting dispositions of his land or annualrents; though assignations to bonds taken to the heirs of the marriage being liquid might only import *quoad valorem* as to any heir, yet accepting and using a disposition as to lands and annualrents, that is an universal passive title.

The Lords found it a relevant passive title, that the defender had accepted and used a disposition of his father's lands and annualrents, wherein he would have succeeded as heir of the marriage; and repelled the exception of the order of discussing, seeing the eldest son was neither entered heir nor had any thing to enter heir to.

Fol. Dic. v. 2. p. 35. Stair, v. 2. p. 863.

No 117. Found in conformity with More against Ferguson, *supra*.

1698. *November* 16. Elliot of Swineside *against* Elliot of Meikledale.

Simeon Elliot of Swineside, as assignee to the sum of 2000 merks, being the remainder of a tocher of 8000 merks, contracted by the deceased Adam Elliot of Meikledale with his daughter, pursues William Elliot, now of Meikledale, as representing his father upon the passive titles.

For proving the defender's representation, the pursuer produced a charter of the lands of Meikledale, in favours of the defender's father in liferent, and his eldest son of a second marriage to whom the defender is heir in fee, with a faculty to the father to burden the lands, not exceeding the third part of the value; and insisted to make the defender liable as successor to his father by the foresaid disposition after contracting of the pursuer's debt.

The defender *alleged*, That his father having a sufficient estate beside the lands of Meikledale, he might lawfully provide the fee thereof to a younger son, who was not *alioqui successurus*, without subjecting that son to any debt; and, for instructing that the father had a sufficient estate, repeated the inventory of the confirmed testament lying in process.

The pursuer *answered*, That the defender being executor confirmed, and having repudiated and reduced the testament, he cannot found upon it to prove a separate estate; " which answer the Lords sustained."

The defender further *alleged*, That, albeit the testament was not probative, yet the defence of a separate right being relevant, he offered to prove his allegeance by the pursuer's oath of knowledge.

The pursuer *answered*, That the allegeance of a separate estate existing, that might now be affected for payment of the pursuer's debt, was relevant; but