1625. *July* 13. WILLIAM GRAY *against* WILLIAM ——. No 103.

THE LORDS found, That an universal successor *post contractum debitum* is obliged *in solidum* for the debts contracted before, and may not renounce; the LORDS disponed to him to liberate himself.

Found the contrary, Mr David Curtie against John Weems, No 120. p. 9790.

Kerse, MS. fol. 142.

1628. *July* 8. DUNBAR *against* LESLIE. No 104.

THE LORDS found, That a charter granted to an heir of the lands of which his father was heritor before, the said charter flowing from no deed done by the father to the son, but proceeding upon another party's resignation in favour of the son, having no dependence or relation to the father's right, made not the son to be lucrative successor to the father in these lands.

Fol. Dic. v. 2. *p.* 35. *Durie.*

*** This case is No 15. p. 5392, *voce* HEIRSHIP MOVEABLES.

No 105.
One of three heirs portioners by accepting a gratuitous disposition from her father, of his whole estate exclusive of her other two sisters, was found liable *in solidum* for her father's debts without necessity of discussing the other sisters. But action of relief was reserved to her against the other two sisters who, she alleged, had got provisions from their father equivalent to the estate disponed to the defender.

1634. *February* 14. ORR *against* WATSON.

BY contract of marriage betwixt Peter Orr and Elizabeth Watson, John Watson, father to the said Elizabeth, is obliged to pay a sum in tocher with her to the said Peter Orr. Janet Orr, daughter of this marriage, being executrix confirmed to the said Peter, pursues the said Elizabeth, her own mother, as successor to the said John Watson, her father, *post contractum debitum*, to pay the said sum to the pursuer; for after the contract of marriage, the said John Watson, who was obliged in the tocher, having no bairns but this Elizabeth Watson, who was defender, and other two daughters who were begotten by him of a prior marriage, whereof the one compeared in this process, and renounced to be heir to her father, and the other daughter was dead, leaving some bairns behind her, who were not convened to pay, but were beggars, and had nothing by their father, the said John Watson having disponed all his means, lands, and goods, to this daughter begotten in the second marriage; and she being convened to pay solely, as successor to her father, as said is, *post contractum debitum*; it being questioned if she could be craved to be decerned *in solidum* for the whole debt, seeing there were other two sisters who might be *co-hæredes*, and who ought to be decerned for their parts, and therefore that this defender could not be decerned as liable for the whole *in solidum*; for

No 105. none could be convened as successor *post contractum debitum*, but such a person as might totally represent the defunct, and be heir to him; and true it is, that the defender alleged, that she could not be heir to him, but only one of three heirs, there being three daughters, as said is; therefore she could not be convened, as successor to her father, to whom she could not in law totally succeed; and albeit it was true, that she were infeft in all her father's means, and that the other two sisters had nothing by their father, yet they ought to be legally convened and discussed; after which discussing, the pursuer might use any other remedy of law, to make this defender liable *actione in rem*, for repeating of the umquhile father's goods and lands from her, upon the act of dyvoury, or otherwise, as she best might, but not by this pursuit to convene her, as successor to her father *in toto*, to whom she could not succeed totally, but as one of the three;—this allegeance was repelled, for the Lords sustained the action against her *in solidum* for the whole debt, albeit the other two sisters were not convened as heirs or successors; (and yet they were also convened as heirs and successors in the same process,) seeing the one sister compeared by her procurator, and renounced to be heir, and the other was poor, and had nothing; neither could the defender qualify, that the other two sisters had succeeded, or might have succeeded to any thing by the father's decease; and this defender was not convened *hoc nomine* as heir, but as she who had acquired all her father's lands and estate *post contractum debitum*, so that there would never be any other heir-portioner, who might be convened as heir or successor.

Act. *Gibson.* Alt. *Maxwell.* Clerk, *Gibson.*

1634. *March* 21.—In this cause, whereof mention is made 15th February 1634, it being there *alleged*, That the one sister convened as successor could not alone be found liable in the whole debt acclaimed, because the other two sisters had every one of them received from the father in money, satisfaction of as much as near equivalent to the land wherein the defender was infeft, so that of reason they ought proportionally to bear their part of the burden; this allegeance was repelled, seeing the payment of the monies by the father to his daughter, in his own lifetime, was no relevant cause *in jure*, whereupon any ground of action might be moved by the creditor against them, for thereby they could not be reputed successors, as this defender, against whom, as succeeding to her father's heritage *post contractum debitum*, she had in law and practick a competent action *hoc nomine*, which was not competent against the others, and therefore the action was sustained *in solidum* against her; but the Lords reserved to her action of relief against the other sisters upon that ground, for the satisfaction received by them from their father proportionally, as accords of the law. *Item*, It being thereafter *alleged* by the defender, that she could not be convened as successor *titulo lucrativo* to her father, because she was infeft in the lands libelled, whereto she was alleged to have succeeded *ex*

causa onerosa, for the time of the acquiring thereof she was widow, and was twice married before the same, whereby it was lawful and probable that she did so acquire the heritable right of the land from her father, for causes onerous; and thereby it appeared that she acquired not the same upon any favour flowing from her father; likeas the disposition made to her, and whereupon the infeftment proceeded, bears, To be done for causes onerous, viz. for sums of money really paid, and confessed to be received from her; and it being *replied*, That the narration contained in the disposition cannot make the same to cease to be a mere donation, except the defender will otherways lawfully instruct the real payment of the monies therefor, especially where this confession is emitted betwixt father and daughter, to the prejudice of an anterior creditor, especially seeing the same is done after the pursuer had recovered sentence against the defender, and her father also, for production and delivery of the said contract to her, by the which contract she was constituted the pursuer's debtor, wherethrough it may appear, that the disposition truly is but a donation, whatever the conception of the words, and tenor thereof otherways proports: This allegeance was found relevant, notwithstanding of the answer, which was repelled; for the disposition of the foresaid tenor was found sufficient to elide that ground, whereby the defender was convened as successor *titulo lucrativo*, seeing it bore to be done for sums of money received; and the LORDS found it not necessary to prove the payment of the sums otherways than by the writ itself, and by her own oath upon the verity thereof; and found it not necessary that she should prove it otherways; and yet nevertheless the LORDS found, that they would take the declaration of the notaries, subscribers of the disposition, and of the witnesses inserted therein (without swearing and taking their oaths thereon) anent the verity of the said payment, and what they know therein; which declaration unsworn, they would take in presence of the defender, and before that she would depone thereon, and granted letters to the pursuer to summon them for that effect. See PROOF. No 105.

Act. *Nicolson & Gibson.* Alt. *Stuart & Mowat.* Clerk, *Gibson.*

Fol. Dic. v. 2. p. 35. Durie, p. 704. and 714.

*** Kerse reports this case.

THE LORDS found process against one of the daughters of the defunct, as successor *titulo lucrativo, in solidum*, albeit it was *alleged*, that the defunct had two daughters of the first marriage.

Kerse, MS. fol. 142.

*** This case is also reported by Spottiswood.

No 105.

1634. *February* 15.—By contract of marriage between Peter Orr and John Watson, taking the burden for Elizabeth Watson his daughter, the said John was obliged to give Peter in tocher with his daughter 2000 merks. Peter dying, leaveth by his wife Elizabeth a daughter named Janet, who being confirmed executrix dative to her father, pursued her mother to hear and see the foresaid contract of marriage registered against her as successor to her father, after the date of the said contract. *Alleged*, The contract could not be decerned to be registered against her *hoc nomine* as successor to her father, *post contractum debitum*, because she is but only one of three daughters of the said umquhile John Watson, and so one of three heirs portioners, so that no process could be sustained against her to make her heir *in solidum*, except the pursuer did insist against the whole three, who all together represented the defunct in succession. *Replied*, No necessity to insist against the other two sisters as successors to their father, because the defender had only succeeded *hoc nomine*, and her other two sisters had no benefit at all of their father; likeas, they offered to renounce, whereby they being discussed that way by renouncing, the only succession remained with the defender, and she should be holden *in solidum*. *Duplied*, None can be convened as successor, but such a person as is *hæres alioqui successurus*, and may be heir to a defunct; but by law, where there are only heirs female, they are all alike heirs portioners to the defunct, and not one of them, but all together do represent the defunct and must be convened together, and sentence must pass against them all alike; and where it is offered that the other two sisters shall renounce; 1*mo*, They are not lawfully charged to enter heirs, and so cannot renounce; 2*do*, Albeit they might in this pursuit be heard to renounce, yet that cannot prejudge the third sister, against whom the pursuer only insists, to compell her to represent the defunct *in solidum*, she being only one of three heirs portioners. The Lords repelled the exception, in respect of the reply.

Spottiswood, (Successors and Succession.) *p.* 315.

*** The same case is also reported by Auchinleck.

1634. *March* 21.—Janet Orr, executrix-dative confirmed to Peter Orr, her father, pursues Elizabeth Watson, her mother, to hear and see a contract of marriage past betwixt her umquhile father and mother, registered against her mother as successor to John Watson her father, grandfather to the pursuer *titulo lucrativo* after the said contract of marriage, for payment of the tocher promised in the said contract of marriage. It was *alleged* for the defender, That she could not be convened *hoc nomine* as successor, because she was but one of the three sisters who were, or might have been, portioners, so that al-

No 105.

though her father had made a disposition to her in his own lifetime of a tenement which was all the heritage he had, yet she cannot be convened 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 *excepted*, That the said Elizabeth could not be pursued as successor *titulo lucrativo*, 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 betwixt 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.

No 106.

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

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 grandchild 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 (proceeding 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 allegeance, and found that he might be convened 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.