No 116. tal, or price, but allowed either party to adduce witneſſes what the land was worth, and might pay as at a conſtant rent, and what it was worth in buying and ſelling in that place of the country. *See* No 41. p. 911.

Stair, v. 2. p. 494.

1679. *December* 23. GORDON *against* FERGUSON.

No 117. A conveyance from a conjunct perſon to a ſingular ſucceſſor, who could not plead *bona fides*, ſuſtained only to the extent of the ſums actually paid.

GORDON of Troquhen purſues a reduction of an infeftment granted by Cannon of Blackmark to Cannon of Marrogat, his brother, bearing, for undertaking all his debts, and for love and favour; and of a diſpoſition granted by Marrogat to Ferguſon of Keiroch; the reaſon of reduction was upon the act of Parliament 1621. The defender *alleged* abſolvitor, becauſe he was no conjunct perſon, nor partaker of the fraud betwixt the two brothers, but paid a competent price; and by the foreſaid act, third parties not partaking in the fraud are ſecure.—The purſuer *answered*, That Ferguſon was neceſſarily partaker of the fraud, it being in the body of his author's right, that albeit it bore *for undertaking the disponer's debt*, yet there was only 600l. mentioned in a blank, which is ſcored, and which could not be an adequate price.—THE LORDS found, That Ferguſon could not be free of the participation of the fraud in his author's right.—It was further *alleged* by Ferguſon, That the ſum expreſſed in Blackmark's diſpoſition to his brother, was due to him, and therefore he might lawfully take a diſpoſition from Blackmark, or from Marrogat his brother, which behoved to be effectual, as to his own ſum, which was Blackmark's anterior debt.

THE LORDS ſuſtained the diſpoſition, in ſo far as concerned Ferguſon's own ſum due by Blackmark, but declared the right might be affected by the purſuer *quoad reliquum*, that he might redeem upon payment of Ferguſon's ſum, unleſs it were proven that Blackmark was a notour bankrupt, when he diſponed to his brother; and ſo could not diſpone to one creditor in prejudice of another.

Stair, v. 2. p. 726.

No 118. A diſpoſition by a man to his brother-in-law was found null, unleſs the cauſe onerous were inſtructed; and in a reduction againſt an onerous purchaſer from the brother-in-law, the

1680. *January* 24. CRAWFORD *against* KER.

ANDREW CRAWFORD having appriſed ſome tenements in Glaſgow from Mungo Matthie, purſues the tenants for their duties. Compearance is made for James Ker, who produceth an anterior diſpoſition by Mungo Matthie to James Wilſon, and by James Wilſon to Ker, with infeftment conform, and *alleged* that he had the prior and better right.—The purſuer *answered*, That the right by Matthie the common author did bear Wilſon to be Mathie's good-brother, ſo that the narrative in the diſpoſition proves not the onerous cauſe; and therefore law eſteems it as a gratuitous deed between conjunct perſons, and ſo is null by the act of Parliament 1621.—It was *replied* for Ker, That by that ſame act of Parliament, rights

No 118.
purchaſer found obliged to inſtruct the onerous cauſe, it appearing from his own rights that his author was a conjunct perſon.

acquired for a juſt price from the conjunct or confident perſon, are valid to a ſingular ſucceſſor not partaking of the fraud; and therefore Ker's right from Wilſon bearing an equivalent price paid, which the narrative of Ker's diſpoſition ſufficiently proves, Ker is ſecure, and needs not prove the onerous cauſe of Wilſon's diſpoſition, which he cannot do, it having been more than 20 years ſince that diſpoſition.—It was *duplied* for Crawford, That the clauſe founded upon doth not bear, that third parties acquiring from conjunct perſons ſhould be ſecure; for though in the firſt clauſe, rights granted to conjunct or confident perſons without a cauſe onerous, are declared null as to anterior creditors, yet the ſubſequent clauſe doth not bear, that purchaſers from conjunct perſons ſhall be ſecured, but only that purchaſers from the interpoſed perſon ſhall be ſecure, not being partakers of the fraud, which indeed was a juſt and neceſſary exception; but purchaſers from conjunct perſons cannot be free of partaking of the fraud, unleſs they know and can inſtruct the cauſe onerous betwixt the conjunct perſons, ſeeing the law allows not, that the narratives betwixt conjunct perſons ſhould inſtruct the cauſe onerous narrated, but it muſt be inſtructed *aliunde*; which conjunct perſons the Lords have never extended further than to parents and children, brothers and good-brothers, uncles and nephews; and in this caſe the very diſpoſition purchaſed by Ker, bears Wilſon his author to be good-brother to Matthie the diſponer; ſo that Ker could not be ignorant of their near conjunction, and ſo could be in no better caſe than Wilſon his author, ſeeing his right acquired put him in *mala fide* to purchaſe from a good-brother, ſo deſigned in the diſpoſition, without taking with the diſpoſition, the inſtructions of the cauſe onerous.

THE LORDS found the diſpoſition by Mathie, to Wilſon his good-brother, null by the act of Parliament, unleſs the cauſe onerous were inſtructed; and that Ker, by the tenor of Wilſon's diſpoſition, purchaſed by him, behoved to inſtruct the cauſe onerous of Wilſon's diſpoſition, and was not ſecured by the clauſe in the act of Parliament, in favours of purchaſers *bona fide* from intruſted perſons, which doth not extend to purchaſers knowing their author to be conjunct to the diſponer in the degrees of conjunction aforeſaid.

Fol. Dic. v. 1. *p.* 74. *Stair, v.* 2. *p.* 747.

*** Fountainhall remarks the ſame caſe:

THERE was a difficult point decided betwixt Ker, Matthie, and Crawford. One diſpones lands to his brother-in-law, who had married his ſiſter, whereon he is infeft publicly, and in poſſeſſion: A creditor of the diſponee appriſes theſe lands from him, and is infeft; and betwixt him and his author there is 28 years peaceable poſſeſſion. Long after this appriſing, a creditor to him who had diſponed the lands appriſes them, and in a competition betwixt theſe two appriſers, (Pitmedden having reported) 'the LORDS preferred the poſterior appriſer, becauſe he 'had appriſed from the diſponer; unleſs the appriſer from him who got the diſ-'poſition will inſtruct the onerous cauſe of his author's rights, otherwiſe than by 'the narrative of his diſpoſition: becauſe, being *inter conjunctas personas*, law

No 118.

'presumes it simulate, unless the onerous cause be instructed.' This interlocutor offended many, and the LORDS resolved to re-consider it: For, *1mo*, What if he had paid him money for it over the table? or, *2do*, That they had retired and cancelled the accounts, (they being both merchants), how could the preceding onerous cause be proven? *3tio*, An appriser, who is a singular successor, cannot be master of the writs by which the onerosity of his author's disposition can be instructed, especially now after 28 years, and that they have peaceably possest during all that time. *4to*, Some thought brethren-in-law not so near conjunct persons; yet they were found even before this conjunct as to the design of the act of Parliament 1621 against bankrupts. *See* M'Kenzie's Observ. on the said act.

THE LORDS afterwards mitigated this interlocutor.

Fountainhall, v. 1. p. 76.

1692. *December* 2. SPENCE *against* CREDITORS of DICK.*

No 119.
Not only the immediate contriver of fraud against creditors, but singular successors, purchasing from conjunct and confident persons, are affected by the act 1621; only they must be so far *participes fraudis*, as, from the circumstances, not to be entitled to plead *bona fides*.

In this case, a singular successor, whose right flowed from a person, *ex facie* of the deed, conjunct, was not bound, after 40 years, to prove either the actual solvency of his author, or even that he was habit and repute solvent.

THE LORDS advised the reduction on the act 1621, pursued by Elizabeth Spence and Andrew Martin, writer to the signet, her husband, against Skirling, Mr James Nasmith, and the other contract-creditors of Sir William and Sir Alexander Dicks, of their right to the lands of Craighouse.—THE LORDS found a disposition of these lands by James Nasmith to James Rutherfurd, his son in-law, fell under the precise terms of the said act of Parliament; and though it bore to be for his tocher, and relief of cautionry wherein he stood engaged, yet that the said narrative did not prove the onerous cause of the disposition, unless it were *aliunde* instructed: But withall found, a father-in-law not being bankrupt, nor under diligence at his creditors instance, might dispone lands to his goodson as well as to any other person; but in that case, that the receiver behoved to prove the disponer had another visible estate; for though in law every man is presumed solvent, and not bankrupt, yet when a man disponed his lands to a near relation, it is presumed that it is *omnium bonorum*, unless it be instructed, that he had a farther estate beyond that which is disponed; and that the granter's assertion, in the writs, is not sufficient to verify that. But if it be in a writ produced and used by the pursuer, he cannot object; *nam qui approbat reprobare nequit*. But the difficulty occurring here was, that the right was now out of the person of the conjunct, and come in the hands of singular successors and strangers, who could not instruct, after so long an interval as forty years, what was the onerous cause of their author's right; and yet if they be *participes fraudis* it is redeemable as well against them as their author. And here it was alleged sufficient to put them in *mala fide*, that Nasmith's right to Rutherford, and his to Mr Alexander Dick, expressly bore his interest and relation as son-in-law, and so the subsequent ac-

* In this case, the degrees of participation in the fraud of conjunct and confident persons, which ought to affect singular successors; the consequences of their knowledge that the party who conveyed to the interposed person, with whom they ranfact, was bankrupt or insolvent at the time; and the evidence requisite of such knowledge, are minutely treated of; also the distinction between conjunct and confident persons.