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.

quirers ſhould have ſeen the onerous cauſe inſtructed; but they contended, they needed not look further back than Sir Alexander Dick's right, which bore as heritable proprietor, and related neither to Naſmith's nor to Rutherford's right, to put them in *mala fide*:—This point the Lords thought deſerved farther conſideration; but, in the general, fraud is only perſonal, and not *vitium reale* affecting ſingular ſucceſſors, as appears by Stair, 9th February 1670, Scot againſt Chiefly and Thomſon, Stair v. 1. p. 669, *voce* FRAUD; but there ſeems to be as great reaſon that fraud ſhould vitiate the act, as well as *vis et metus*. Only there is more of conſent in the firſt than the laſt; but a forced will is a will ſtill. No 119.

December 23. The Lords adviſed the cauſe purſued by Elizabeth Spence, and Andrew Martin, her huſband, againſt the contract-creditors of Sir William, and Sir Andrew Dicks, mentioned 2d curt.——THE LORDS abſtracted from the point of preſcription, though the interruption ſeemed very ſlender and defective, the ſummons produced either wanting executions, or not being reductions of this right of Craighouſe, or raiſed only againſt parties after they were denuded, and others publicly infeft; and conſidered only that point, if ſingular ſucceſſors after ſo long a time were bound to inſtruct that he was ſolvent, when he made the diſpoſition to Rutherford his ſon-in-law, and had another ſeparate eſtate beſides Craighouſe: And found they were not now obliged to inſtruct his ſolvency at that time, nor even ſo much as that he was then holden and repute ſolvent. Then the purſuers offered to prove, that Naſmith's diſpoſition to Rutherford, his ſon-in-law, of the lands of Craighouſe was a mere donation, without any onerous cauſe at all, merely to prefer his goodſon to his creditors:—THE LORDS repelled this; becauſe law preſumed it gratuitous *inter conjunctas perſonas*, and ſo it needed no probation; though ſome of the Lords would have gone upon that ground that, *post tanti temporis intervallum*, they were not bound to inſtruct it had an onerous cauſe. But this was thought unneceſſary here.

November 28. 1693.—THE LORDS adviſed the reduction on the act of Parliament 1621, purſued by Elizabeth Spence and Andrew Martin, her huſband, againſt the contract-creditors of Sir William and Sir Andrew Dicks. The Lords were clear that the two diſpoſitions granted by James Naſmith, in 1641, to Rutherford, his ſon-in-law, under that deſignation of Craighouſe, though bearing onerous cauſes, did not inſtruct nor prove their own narrative, if it had been *de recenti* quarrelled: But it ſtuck with ſome of the Lords, that it was hard for ſingular ſucceſſors *post tanti temporis intervallum*, to be put to prove the oneroſity of their author's right, as they had found *ſupra* 23d December 1692. But they determined this day, that it was not relevant to reduce a ſingular ſucceſſor's right, that he ſaw by the tenor and progreſs of the writs, that his author was a conjunct perſon to the firſt diſponer, unleſs he alſo knew or might have known, that the firſt diſponer was at the time a bankrupt; and though he acquires for onerous cauſes, yet he is *particeps fraudis*, if he knew the diſponer without an onerous cauſe, was bankrupt at the time he made the ſaid diſpoſition; and that partici-

No 119. pation of fraud in ſingular acquirers, was not ſo ſtrictly to be underſtood, as to be reſtricted only to him who was upon the contrivance and deſign of defrauding the creditors, but alſo ought to be extended to any who knew him then to be bankrupt; ſeeing that knowledge was ſufficient to put him in *mala fide:* For the Lords thought it not enough that the right was granted to a ſon, or other conjunct perſon; and though it bore to be for onerous cauſes, yet law juſtly preſumed it to be gratuitous, unleſs the conjunct perſon, the receiver of it, inſtructed its cauſe *aliunde* than by its own narrative: But further required a ſecond qualification, againſt the ſingular ſucceſſor acquiring from that conjunct perſon, that he knew him to be then broke. And becauſe private knowledge cannot be well proved, eſpecially where the parties are dead, it muſt be elicit from circumſtances, or witneſſes deponing that he was then generally holden and reputed a notour bankrupt by all; for it is not yet clearly decided, what makes one a bankrupt; whether diligences againſt him, or that he is *obæratus* above his eſtate, or that *ceſſit foro*, and has fled; for the Lords did not incline to reduce all gratuitous diſpoſitions by fathers to their children, unleſs it was inſtructed that the father was before, or by the making thereof, rendered bankrupt; for many eſtates were bruiked by extraneous perſons who bought from ſons having right by ſuch diſpoſitions; and donations are not quarrellable, unleſs the donor was thereby rendered inſolvent: So that if a conjunct perſon be denuded, and receive a price, the buyer from him is ſecure, unleſs they prove the conjunct perſon's author was then bankrupt, when he diſponed to his relation, as well as that it was gratuitous, and without any onerous adequate cauſe. The purſuers of the reduction cited ſeveral deciſions in their favours, *viz.* Stair, 6th February 1672, Dr Hay againſt Jamieſon, No 114. p. 1009.; 23d Dec. 1679, Gordon againſt Ferguſon, No 117. p. 1012.; and 24th January 1680, Crawford againſt Ker, No 118. p. 1012.; where the Lords found, that the clauſe of the act of Parliament 1621, in favours of ſingular ſucceſſors, did not extend to ſuch as knew their authors were conjunct perſons to the firſt diſponer, or where his right bore to be for love and favour only: But the Lords did not take any notice of the diſtinction which was urged betwixt a conjunct and a confident perſon; as if when it was to a conjunct, that it made a *vitium reale* againſt the ſingular ſucceſſors, though tranſmitted through never ſo many hands; but that there was no ſuch real vice, when it was not to a blood-relation, but only a confident interpoſed perſon. For the Lords did not incline to ſuſtain a *vitium reale* in either caſe; though the conjunction may be ſooner diſcovered than the confidence.

The next point decided was, though the act of Parliament has a clauſe in favours of ſingular ſucceſſors acquiring *bona fide*, yet it has alſo an exception ſubjoined, unleſs there was diligence done againſt them by horning, inhibition, compriſing, or otherwiſe; and that here, before Rutherford diſponed to Mr Alexander Dick in 1645, (from whom the contract-creditors derive right,) Spence, now purſuer, had done diligence againſt Naſmith, the bankrupt, her debtor; after which Rutherford, the bankrupt's truſtee, could make no voluntary right to Dick

in prejudice of her debt.—The defenders *alleged*, the diligence behoved to be againſt the interpoſed perſon, elſe he could not be put in *mala fide* by it: And it being urged, that there was no obligation, on which a diligence could be founded; and it being anſwered, that on a depending declarator, or reduction againſt him, an inhibition might be ſerved; ſome contended, that the ground of an inhibition behoved to be ſome preſtation, or deed to be performed, which was not in this caſe; the Lords inclined to think that the diligence meant in the act of Parliament, was what was done againſt the bankrupt, and not that which was againſt the interpoſed perſon: And then, by a vote, found the diligence done againſt Naſmith, the bankrupt, by Spence, though it was after Naſmith had diſponed to Rutherford, his ſon-in-law; yet it incapacitated Rutherford from tranſmitting it to Mr Alexander Dick, ſeeing it was before his diſpoſition to him. Five of the Lords were of opinion, that this diligence did not prejudge the ſingular ſucceſſor's right, whatever it might operate againſt Rutherford the truſtee. No 118.

January 10. 1694.—The Lords adviſed ſome other points of the debate, mentioned 28th November 1693, betwixt Elizabeth Spence and the contract-creditors of Sir William and Sir Alexander Dicks, and found, unleſs it were inſtructed that Rutherford was Naſmith's Truſtee, it would not be ſufficient to prove that Naſmith was bankrupt at the time when Rutherford diſponed to Mr Alexander Dick, but they behoved alſo to prove that Naſmith was holden and repute bankrupt in 1641, when he made the firſt diſpoſition to Rutherford, at leaſt, that by that diſpoſition he rendered himſelf and became bankrupt: And as to the interruption of the forty years preſcription by Elizabeth Spence's minority, the Lords found the minority ſtopt the preſcription, though it was not of the author's minority, but of a concreditor, or one having a collateral intereſt; and that in ſo far as extended to preſerve their right from preſcription, and no further. *See* Prescription.

November 9. 1694.—The Lords having found, that the creditors, who were ſigular ſucceſſors, were not obliged, *post tanti temporis intervallum*, of forty years and more, to prove the onerous cauſes of their rights, or to inſtruct that their debtor had a ſeparate eſtate beſide that diſponed, eſpecially ſeeing they had not proven him bankrupt at that time; for if they had been quarrelled upon the act 1621, they would have inſtructed both the onerous cauſe, and an eſtate *aliunde*; Andrew Martin gave in a bill reclaiming againſt this interlocutor, that the taciturnity was ſufficiently taken off by a ſummons raiſed in 1642 on the ſaid act 1621, both againſt Naſmith the bankrupt, Rutherford the ſon-in-law, and Mr Andrew Dick.—*Answered*, This was but a declarator for affecting ſums, and making them furthcoming, and ſo was no reduction, nor had a ſpecial relation to the lands of Craighouſe. 2*do*, There was no execution for the firſt diet, but only upon the act and letters.——The Lords found this was no nullity, ſeeing any execution was good for an interruption, *talis qualis insinuatio sufficit*: But the Lords found it did not take off the taciturnity, ſeeing it was not a real action a-

No 119. gainſt the creditors, whereby they could be obliged to inſtruct either his ſolvency, or the oneroſity of their ſeveral rights; and therefore adhered to their former interlocutor. *See* PRESCRIPTION.

November 28. 1694.—In the cauſe mentioned 9th current, between Elizabeth Spence and Andrew Martin her huſband, *contra* the Heirs of Sir Andrew Dick of Craighouſe, and his Creditors; it was now *alleged* that Martin had a decreet of certification againſt ſeverals of the writs now founded on, and ſo they could not be made uſe of.—*Answered*, The creditors ſtood publicly infeft under the Great Seal before the raiſing of the improbation; and yet they are not called, and ſo it is null *quoad* them.—*Replied*, Theſe creditors are now dead, and their ſucceſſors are not infeft, and ſo cannot propone this.——THE LORDS found apparent heirs could defend themſelves on their author's infeftment; and that ſtanding, then the certification could not meet them, becauſe neither their predeceſſor laſt infeft, nor they, are called thereto. *See* HEIR APPARENT.

Fol. Dic. v. 1. *p.* 75. 76. *Fountainhall, v.* 1. *p.* 526. 537. 572. 590. 641. 645.

1710. *June* 15.

CATHARINE LESLIE, Daughter to the deceaſed JAMES LESLIE, Younger of Tarrie, *againſt* the CREDITORS of LAUCHLAN LESLIE.

No 120.
A diſpoſition by one to a perſon, deſcribed in it his brother-in law, and bearing to be for onerous cauſes, was found not to inſtruct its onerous cauſe; and the receiver's creditors having adjudged it, were found to be in no better condition than the receiver himſelf; the conjunction being expreſſed in the diſpoſition.

OLD Robert Leſlie of Tarrie, in his ſon James's contract of marriage with Mrs Jean Ramſay, daughter to the Laird of Balmain, obliged himſelf to pay 8500 merks to James and his ſpouſe, in conjunct-fee and liferent, and to the heirs and bairns to be procreated of the marriage, in fee; which failing, to the ſaid James, his heirs and aſſignees whatſoever: And in ſecurity thereof, did infeft them in his lands. James Leſlie having, after his wife's deceaſe, diſponed the ſum aforeſaid to Lauchlan Leſlie, (who married his ſiſter,) deſigned in the diſpoſition his brother-in-law: And the ſaid right being adjudged by Lauchlan's creditors, Catharine Leſlie, only child of the marriage, raiſed reduction thereof upon the act of Parliament 1621, as being preſumed a gratuitous deed in favours of a conjunct perſon, to the prejudice of her, a creditor to the granter, by the proviſion in her mother's contract of marriage.

Alleged for Lauchlan Leſlie's Creditors, 1*mo*, As James Leſlie, being undoubtedly fiar, could have uplifted the money and diſcharged his father, without re-employing, (the contract containing no clauſe to re-employ,) ſo he could freely diſpone the ſame; for Catharine is to be conſidered only as a ſubſtitute to her father, and not as his creditor or heir of proviſion; the grand-father, and not the father, being obliged to pay the money. Yea, ſuppoſe her faint intereſt by the ſubſtitution might have hindered the father to provide the ſame to children of a poſterior marriage, it could never hinder or tie up his hands from diſpoſing on it to others. The act of Parliament was not intended to reſtrain all commerce be-