PRESIDENT. Any one may object: it is the fault of the freeholders if they do not join in the complaint. I doubt whether complaints have been reassumed after the death of the complainer. Many elections have intervened since Urquhart was put upon the roll: This objection ought to have been renewed at those elections.

Diss. Kaimes, Kennet, Stonefield. *Non liquet*, Coalston.

1766. *July* 25. JANET GIBB, Spouse of Andrew Glass, Merchant in St Andrew's, *against* ALEXANDER LIVINGSTONE, Merchant in Rotterdam.

BANKRUPT.

1. In a reduction of a bond upon the first branch of the Act 1621, competent to redargue by parole evidence the narrative of the bond, bearing to be for borrowed money. 2. Adjudgers from a conjunct and confident person are liable to a challenge on the Act 1621.

[*Faculty Collection, IV.* 78; *Dictionary*, 909.]

LAURENCE GIBB was proprietor of a tenement of houses in St Andrew's: he was bred a merchant, and kept a public-house in St Andrew's. Some time before 1747, he was appointed tide-surveyor at Dundee, which office yielded about L.30 sterling, besides perquisites. He had many children, particularly one married to Andrew Williamson, merchant in St Andrew's, and Janet, the pursuer, married to Andrew Glass. On the 23d November 1747, Laurence Gibb granted an heritable bond for L.50 sterling to Andrew Williamson, his son-in-law, upon the foresaid tenement. It bears this clause: "I, &c., grant and confess me, at the term of Whitsunday last past, notwithstanding the date hereof, to have borrowed and received," &c. The bond is made to bear interest from Whitsunday 1747. On the 3d February 1748, Andrew Williamson was infeft on this bond; his infeftment was immediately registered. In 1749, Williamson became debtor to Livingstone the defender, in certain considerable sums. On the 26th November 1755, after Williamson's death, Livingstone, having constituted his debts against Williamson's representatives, obtained an adjudication of his heritable subjects, and particularly of the heritable bond. On the 24th October 1756, this adjudication was completed by a charge against the superior. Livingstone, upon this, insisted in a ranking of Williamson's creditors, and sale of his subjects, comprehending the heritable bond for L.50 sterling. In 1748, Janet Gibb, as pretending to be creditor to her father Laurence in a legacy of 1000 merks, said to have been intromitted with by him, obtained decreet against him before the Commissary of St Andrew's. Upon this title, in 1748, she adjudged the tenement belonging to her father; so that her adjudication was posterior to Williamson's infeftment, dated 3d February 1748. Under this title, in 1760, she interrupted the proceedings in the ranking of Williamson's creditors, by a reduction of the heritable bond and infeftment, principally

upon this ground, That the bond was a gratuitous deed, granted by her father, when insolvent, to Williamson his son-in-law, to the prejudice of her prior debt, and therefore reducible on the first branch of the Act 1621. No appearance was made for Williamson's representatives; but Livingstone, as in right of the bond, pleaded defences.

The Lord Alemore, Ordinary, on the 20th July 1762, found, "that the bond, being *inter conjunctos*, is reducible upon the Act 1621, unless the defender shall astruct the onerous cause thereof."

The cause being afterwards remitted to Lord Barjarg, he, on the 12th July 1763, "adhered to Lord Alemore's interlocutor; and, in respect the defender did not offer to astruct the bond, reduced the same and infeftment following thereon."

Livingstone, in a reclaiming petition, craved the Court to find that the reduction on the first branch of the Act 1621, is not competent against him, an onerous creditor-adjudger of the bond; or at least, that he is not farther bound to instruct the onerous cause of the bond, but that the pursuer is bound, in support of her challenge, to prove that the granter of the bond was insolvent, and that the bond was gratuitous.

The Lords appointed a hearing upon the point, Whether this action was competent against an onerous creditor-adjudger?

On the 16th December 1763, after the hearing, they pronounced the following interlocutor: "Repel the defence, that adjudgers from a conjunct and confident person are not liable to the challenge arising from the Act of Parliament 1621; but, in respect of the particular circumstances of this case, find that the defender is not obliged to astruct the heritable bond in question; and remit to the Lord Ordinary to proceed accordingly."

Before the Ordinary the pursuer gave in her condescendence, and the defender made answers to it, wherein he pleaded that the facts condescended on were irrelevant, and also that the mean of proof by witnesses was incompetent.

The Lord Ordinary appointed Williamson's account-book to be produced; and it was accordingly recovered in a mangled condition, as having been used for waste paper. On the 18th January 1766, the Lord Barjarg, Ordinary, pronounced the following interlocutor: "In regard that the Lords have found the bond in question reducible upon the Act 1621, but, in respect of the particular circumstances of the case, have found that the creditors were not obliged to astruct the said bond; therefore finds that it is competent to the pursuer, Janet Gibb, to astruct, by facts and circumstances, the grounds of her reduction: and allow her to prove, both by witnesses and writings, the several facts mentioned in her condescendence; as also the particular facts contained in her memorial relative to the account-book produced: allows the defender a conjunct proof," &c.

On the 26th February 1766, the Lord Ordinary adhered to this interlocutor.

The defender gave in a reclaiming petition.

ARGUMENT FOR THE DEFENDER:—

The Lord Ordinary seems to have allowed a proof by witnesses, in regard the Court had found that the defender was not obliged to astruct the onerous cause of the bond; but this consequence does not follow: in the former proceedings the nature of the proof was never the subject of consideration. By the judgment of the Court the defender was relieved of the *onus probandi*; and it became

incumbent on the pursuer either to give up her objection or to prove it in a habile manner. What that manner is shall now be stated. Anciently, when writing was little used, most points were probable by witnesses, but this was altered when writing came to be generally used. It is now a rule, that, in all contracts where writing is either essential to their constitution, as in the transference of land rights, or usually adhibited, as in the borrowing of money, there the testimony of witnesses is rejected. It is also a rule that no debt or right once constituted by writing can be taken away by witnesses. This rule, however, admits of an exception. A written obligation may be taken away by witnesses, upon proof of circumstances inferring fraud or circumvention used against the granter of the obligation. This is from the necessity of the thing, and because a deed so obtained does truly want consent on the part of the granter. See Dictionary, vol. 2, p. 219-220. Thus the Lords refused to examine, *ex officio*, the writer and subscribing witnesses, touching the true cause of a bond, that, this being proved, the bond might be declared null, *causa data causa non secuta ;* for they considered that, whatever might be the case where the writing bore onerous causes in general, yet, when it bears borrowed money, it cannot be set aside save only *scripto vel juramento* of the creditor;—Fountainhall, 19*th June* 1696, *Bruce* against *Murray*. And the same was also found, 2*d January* 1760, *Hart* against *Pringle*. It remains now to consider whether the nature of the present challenge on the Act, 1621, makes any variation as to the mean of proof. By that Act the mean of proof is pointed out to be by writ or by oath of the party receiver of any security, &c. And indeed this is agreeable not only to the principles of law, but to the reason of the thing; for, when a bond bears to be for money, it is scarcely possible that the negative, of the money not being received, can be proved otherwise than by writing or oath of party. The Court, indeed, has so far departed from the strict rule of the statute, as to lay the proof of astructing the onerosity upon the conjunct or confident person, especially where the cause of granting is expressed in general terms for onerous causes. That however does not infer an alteration in the statute as to the mean of proof, when the *onus probandi* is found, as here, to lie upon the objector. Neither will it vary the case, that the Court has found the bond reducible upon the Act 1621, whereby the common rules of law, with respect to the evidence for setting aside written obligations, may be supposed to go for nothing, and the narrative as *inter conjunctos* may be supposed not to prove; for that the interlocutor does not relate to this particular bond, but to the general abstract qnestion; and the subsequent part of the interlocutor limits the effect of the challenge by declaring the adjudger not liable to astruct the bond. The supposed circumstances of the granter's insolvency, and of the bonds being *inter conjunctos*, have consequently no more effect than to afford a ground of reduction upon the pursuer's proving the bond gratuitous, which would not otherwise be relevant for setting it aside. But still the common rule of law, and the words of the statute, must determine what evidence is to be admitted for proving that objection. Were the narrative to go for nothing, then the defender would have no benefit by the latter part of the interlocutor, and the pursuer would have no occasion for proving any thing in order to redargue the narrative: this is a proposition which cannot be maintained. The nature of the evidence competent to the creditor for astructing the onerous cause can be no rule

for what is competent to the challenger for disproving it. Adminicles may support a deed, but full evidence is required to overturn it. That Williamson is dead, whereby the benefit of his oath is lost, cannot vary the case. The pursuer has herself to blame for not bringing the challenge till after his death.

ARGUMENT FOR THE PURSUER:

If a proof by witnesses be not allowed, the consequence will be, that, in a case such as this, no proof can be given of the gratuitousness of the transaction. Williamson, the receiver of the bond, is dead, so no proof can be had by his oath; and, had he been alive, the defender might, in the character of an onerous assignee, have objected to his oath. As to a proof by writing, that is not to be expected when parties make a transaction like the present one, for disappointing just creditors. When the Court found that the reduction was competent against the adjudger, it meant to find something in favour of the pursuer. The meaning of the latter part of the interlocutor was to transfer the *onus probandi* from the defender to the pursuer; but the Court did not mean to make that *onus* heavier on the pursuer than it would have been on the defender; and, therefore, as the defender might have proved onerous by witnesses, so may the pursuer gratuitous. The decisions for proving that writing may not be taken away by witnesses do not apply. The rule applies not to fraud, which, being of a criminal nature, must be proved by witnesses. Had the granter been induced through fraud to grant the bond, it might have been set aside; why not, when, as it is contended, the bond was fraudulently granted. It matters not whether Gibb was deceived or meant to deceive: the proof in both cases must be of the same nature. The words of the statute 1621, do not mean that only writing or oath of party shall be admitted as evidence; it does no more than point out those as means of proof, without excluding others. Besides, there is in this case some evidence in writing, viz. Williamson's account book, in which he states himself as creditor to Gibb for some small sums, amounting to L.8 sterling, but says nothing of his being any further a creditor to him. So that the pursuer may be considered as seeking to complete her evidence by witnesses, which is begun by writing.

On the 25th July "the Lords adhered."

The Court was much divided, but I omitted to take down the names of the *dissentients.*

OPINIONS.

COALSTON. In reductions on the Act 1621 practice has made a distinction between deeds granted to strangers and to conjunct and confident persons. In the *last* the onerous cause must be astructed: but here the question is not with Williamson, the confident person, but with an adjudger,—and he has been found not obliged to astruct the onerous cause. The pursuer then must disprove the narrative of the deed, as with a stranger,—he must therefore disprove it by writ, or oath of party.

KAIMES. Livingston is as a stranger; but, if a bankrupt grants a bond of all that he has to a stranger, and this must be proved by writ, adieu to the bankrupt Acts.

KENNET. Purchasers nowise partakers of the fraud are safe; but Livingston is not a purchaser. The *onus probandi* on the objector, and he may cut down the bond by the same evidence that might have been used to astruct it.

1766. *July* 30. JAMES MACKELL in Trochiehouse *against* The OTHER CREDITORS of ANTHONY M'LURG in Craignell.

BANKRUPT.

Where the case of an Insolvent Debtor does not fall under the Acts 1621 or 1696, a trust-disposition granted by him for behoof of his whole creditors, found effectual.

[*Sel. Dec. No.* 249; *Dictionary*, 894.]

IN December 1762, Anthony M'Lurg in Craignell became bankrupt. Most of his creditors granted him a *supersedere*, on a narrative that they and he had chosen certain trustees for the management and disposal of his stock, tack, and other moveables. To this deed M'Kell, a creditor of M'Clurg in L.51, is no party. On the 8th February 1763, the bankrupt, in prosecution of this plan, granted a trust-disposition to the foresaid trustees. M'Kell obtained decreet against M'Lurg for the L.51 sterling, and arrested in the hands of one M'Clamerock: he also obtained decreet of forthcoming against M'Clamerock, as debtor to M'Clurg. M'Clamerock suspended, and pleaded that he owed nothing to M'Clurg, but that he had bought goods from the trustees of M'Clurg, which had belonged to him, and, on delivery, became bound to pay the price to them. M'Clamerock also raised a multiplepoinding, wherein he called both M'Kell and the trustees, to dispute their preferences.

ARGUMENT FOR M'KELL, THE CHARGER:—

The validity of trust-dispositions, like the present, has been often under consideration of the Court. In the case of *Snee* against *The Trustees of Anderson*, *12th July* ——, the Court set aside a trust-disposition from a bankrupt—and found "that no disposition by a bankrupt debtor can disable creditors from doing diligence." See *Dictionary*, *Vol. I. p.* 85. The like judgment was pronounced *Earl of Aberdeen* against *The Trustees of Blair; 3d February* 1736. The general point was again solemnly decided in 1765, *Moodie* against *The Trustees of Strachan*. This decision proceeded not on the specialty that Strachan was bankrupt in terms of the Act 1696, but was pronounced upon the general principles established in the case of *Snee*. As, therefore, the charger did not accede to the trust-disposition, he cannot be thereby precluded from doing diligence and effectuating payment.

ARGUMENT FOR THE TRUSTEES OF M'CLURG, appearing in the multiplepoinding:—

The disposition in question is not liable to any challenge, either at common law or upon statute. At common law, total alienations made to particular creditors, in prejudice of others, are reducible; but here the alienation is made