1712. *February* 18.

The LORD ELIBANK *against* ELIZABETH ADAMSON and EDWARD CALLENDER her Husband.

No 462.

IN the competition betwixt the Lord Elibank and Elizabeth Adamson, and her Husband, the LORDS found, that an uncle and nephew in law are not conjunct persons in the sense of the act of Parliament 1621, concerning bankrupts; because an uncle and nephew by affinity, are not hindered to judge in one another's cause, act 13. Parl. 3. Ch. II.

Fol. Dic. v. 2. p. 254. *Forbes*, p. 586.

1712. *June* 18. SCOT *against* KER.

No 463.

A DISPOSITION from one to his brother-in-law, bearing onerous causes, was found reducible at the instance of the disponer's creditors, unless the disponee would either instruct an antecedent onerous cause, or condescend upon an estate in the disponer's person, free of incumbrances, able to answer all the debts.

Fol. Dic. v. 2. p. 253. *Fountainhall.*

*** This case is No 34. p. 2715, *voce* COMPETENT.

1714. *June* 8.

PATRICK M'DOWAL of Freugh *against* WILLIAM FULLERTON of that Ilk and his Tutor.

No 464.
Found in a reduction upon the act 1621, that a cousin german was not a conjunct person.

ROBERT FULLERTON of Craighall, having granted an heritable bond for 2000 merks, in the year 1685, to William Fullerton his brother, upon which he was infeft in the year 1691, William, 4th February 1702, granted a bond for the like sum of 2000 merks, to Patrick M'Dowal of Freugh, containing an assignation and disposition to the foresaid heritable bond and infeftment, in security thereof, but without precept of sasine, and procuratory of resignation; and 1st June 1706, the said Patrick M'Dowal procured from the said William Fullerton, a new bond, corroborating the former bond and assignation, with a precept of sasine, whereupon he was infeft the 22d of the said month. Robert Fullerton disponed his lands of Craighall to the said William Fullerton, 3d June 1702, and the foresaid sum of 2000 merks was allowed out of the price, and expressly discharged.

William Fullerton of that ilk, acquired right by progress to two heritable bonds, granted by his authors to the said William Fullerton of Craighall, and clothed with infeftment *anno* 1704, whereof one was for 5700 merks, and the other for L. 1623 : 13 : 4d.

No 464.

In a ranking of the Creditors of Fullerton of Craighall, Freugh craved to be preferred to Fullerton of that ilk, upon his right by assignation to the old heritable bond, granted by Robert Fullerton to the said William Fullerton in the year 1685, completed by infeftment in the year 1691, several years prior to the contracting of his competitor's debt.

Answered for Fullerton of that ilk, That Freugh could never compete upon his assignation to that bond; because, 1*mo*, Though infeftment thereon followed in the person of William Fullerton, before the date of the bonds, whereupon Fullerton of that ilk doth compete, yet before Freugh was infeft upon his assignation thereto, or that assignation made public any manner of way, by intimation or possession, the debt was extinguished by payment, or, which is the same thing, by the lands being disponed by Robert Fullerton the debtor, to William Fullerton the creditor, and that sum allowed and discharged as part of the price. 2*do*, *Esto* the debt had afterwards subsisted in the person of William Fullerton, yet it would not not accrue to Fullerton of that ilk, and support his infeftments, which were complete long before any infeftment in the person of Freugh; it being a principle in law, that wherever any person grants an infeftment, whether of property, wadset, or annualrent, all the rights standing in the person of the granter, accrue to him, and may be made use of by the obtainer of the infeftment, for the support of his right.

Replied for Freugh, 1*mo*, Robert Fullerton's disponing the land to his brother in this manner, and giving allowance of the 2000 merks bond as a part of the price, was a fraudulent contrivance betwixt two brothers, which could not prejudice him a lawful creditor to whom the bond had before been assigned and delivered. 2*do*, Albeit his right was not completed in his own person by infeftment, yet William Fullerton becoming proprietor of the lands, could not hinder Freugh at any time after to infeft himself, and when ever he took infeftment, that infeftment behoved to be drawn back *ad suam causam*, viz. the old infeftment 1691; for the disposition of the infeftment to him, though without a precept, gave him *jus ad rem*, upon which he might adjudge the said infeftment from the disponer, or his heirs, at any time. Nay, William Fullerton's becoming proprietor, is so far from extinguishing his right, that it rather strengthens it as being *jus superveniens auctori*. 3*tio*, Freugh by William Fullerton's assignation to him, of Robert Fullerton's heritable bond in 1702, became creditor to Robert Fullerton, and so hath insterest upon the act of Parliament 1621, to reduce the disposition of the property granted by the said Robert to William, in June thereafter, as a fraudulent contrivance betwixt two brothers to his prejudice, the bond to which he was assigned being thereby extinguished. 4*to*, Fullerton of that ilk's authors to whom the bonds he founds upon were granted, being conjunct persons, viz. cousins germans to the common debtor, he ought to instruct the onerous cause of those bonds, otherwise Freugh as creditor to the granter can reduce them upon the act of Parliament 1621; for it is the opinion of Sir George M'Kenzie upon that act, that

such relations are comprehended under the general term of conjunct persons, and the narrative of the said statute bears, children, kinsmen, and allies. Now it cannot be denied, that cousin germans are near kinsmen, and our law doth not allow them to bear witness for one another.

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Duplied for Fullerton of that ilk, *1mo*, It is not here the question, whether William Fullerton acted fraudulently with regard to Freugh or not, in first assigning him to the heritable bond, and then extinguishing it by receiving payment, or which is the same thing, getting to sum allowed to him by the debtor, as a part of the price of the lands; Freugh may recur against William Fullerton upon the warrandice, in the manner he thinks proper. But this is certain, that Freugh having only a personal right to the heritable bond and infeftment, William Fullerton was not thereby denuded, and so the bond was extinguishable by payment made to him, the only person standing infeft, which is agreeable to the nature of redeemable rights; 4th February 1671, Wishart *contra* Arthur, No 3. p 9978. It is true, if the question were betwixt Freugh and Fullerton, his cedent, William Fullerton might be debarred *personali objectione* from founding upon this extinction; but that says nothing as to Fullerton of that ilk, a singular successor noways answerable for William Fullerton's deeds, who cannot be prejudged by his granting a bond of corroboration to Freugh, as if the old infeftment had been extinguished four years after the rights in favour of Fullerton of that ilk were completed; so that, *2do*, Seeing payment made to, and a discharge by the cedent, before the assignee is infeft, doth extinguish that right, any infeftment taken, or title made up by the assignee thereafter, is but a null extinguished right, that can have no effect against singular successors, and creditors whose rights are lawfully completed by infeftment. *3tio*, Freugh did not become creditor to Robert Fullerton by the assignation, the same having never been intimated or completed by infeftment before granting the disposition; for, until infeftment, the right, as hath been noticed, stood in the person of William Fullerton, who being therefore creditor the time of the disposition, granted by Robert to him, that disposition is not reducible upon the act of Parliament 1621, it being a deed in favour of the creditor, and not to his prejudice. *4to*, Cousins german are not reckoned in law conjunct and confident persons, and it is a mistake to say our practice doth not allow such to be witnesses; nor doth Sir George M'Kenzie rank them in the numbers of conjunct and confident persons; he indeed states the question as debateable, and sets down some arguments that might be used for their being reputed conjunct persons, as he frequently does in other cases, contrary to his own opinion, but does not give it as his judgment, that the statute should be so far extended; and my Lord Stair, Instit. tit. REPARATION, § 15. is plainly of opinion that it should not, where he says the act has been extended to uncles and nephews, where other circumstances concurred. Now if other circumstances be necessary to make it extend to uncles and nephews, how

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much less can it be extended to cousins german without any such concurring circumstances, or the least suspicion, except what arises from the relation.

The Lords preferred William Fullerton of that ilk, according to the dates of his sasines, and repelled the grounds of preference pleaded for M'Dowal of Freugh.

Fol. Dic. v. 2. *p.* 254. *Forbes, MS. p.* 45.

No 465.

Where a deed has been granted betwixt conjunct and confident persons, how far a proof is necessary of the onerous cause, otherwise than from the deed itself?

1728. *February* 15. Skene of Pitlour *against* Forbes of Kincardine.

John Forbes, a merchant of considerable stock and credit, obtained a disposition of the lands of Kincardine from his brother Sir Robert Forbes, bearing to be for a price truly paid; and he got possession and infeftment above four years before Sir Robert's circumstances came any way to be suspected. Skene of Pitlour, who had an heritable bond from Sir Robert upon the same lands, anterior to the disposition, after Sir Robert's bankruptcy, in a competition with John Forbes the disponee, who had the first infeftment, *objected* against the disposition, "That it was granted to a conjunct and confident person, the debtor's own brother, in prejudice of an anterior lawful creditor, and therefore void, unless the onerous cause be proved otherwise than by the narrative." And he *pleaded* it as a now established law, "That the narrative of a writing, in favour of a conjunct person, does not prove the onerous cause, but that the receiver must instruct it otherwise;" and that notwithstanding the words of the statute, laying the proof upon the creditors, which in so far is altered by practice. The disponee produced a retired cancelled bond, of the same date with the disposition for 23,000 merks, granted by John Forbes to Sir Robert, bearing to be for the price of the lands; and *contended*, That Sir Robert his brother being a man in good credit at the time, an advocate well employed, and possessed of beneficial offices, the cancelled bond subscribed by many famous witnesses, was a sufficient evidence of the onerous cause of the disposition.

Against this it was *pleaded*, That the cancelled bond is no manner of proof that any money was paid; for how does it appear, that the bond was not entirely simulate, signed with this very view, to give evidence of the onerosity of the disposition, and retired two hours thereafter? Nay, how does it appear, that ever it was out of the granter's hand, or ever a delivered evident? There would indeed be a presumption in an ordinary case, from the bond's being cancelled, and in the debtor's own hand; but this makes no presumption betwixt conjunct and confident persons, more than the narrative of the disposition does; and were this sustained, there would be an end of the act of Parliament, because every disponer to a conjunct person will take his bond bearing a price, give up the bond the next minute; and the disposition is thereby supported above objection, equally as granted to an utter stranger.

In *answer* to this, Mr Forbes distinguished the case where the fraud is simply and allenarly founded upon the conjunction and relation betwixt the parties,