1677. *November* 21. HAY *against* LEONARD and Others.

No 98.
Spuilzie is a *vitium reale* as well as theft, and equally competent against singular successors.

JAMES HAY pursues John Leonard for spuilzieing from him a pearl worth 9000 merks, and David Carnegy and others, as havers thereof, for restitution. It was *alleged* for Leonard, Absolvitor; because he offers him to prove, that the pursuer and he entered into a co-partnery for getting of pearls in the water of Southesk, and that they got several pearls, which were all in the pursuer's custody, and having shewn the defender the pearl in question, and given him it to see, and demanding it back, he refused, as having equal interest in it, until a division of the whole pearls were taken. It was *answered*, That this defence is contrary to the libel, expressing violence. THE LORDS sustained the defence, unless the pursuer be special in the violence. It was *alleged* for Carnegy, That he had bought this pearl as a merchant, and had no accession to any violence, and therefore cannot be obliged to restore, even though it had been violently spuilzied; for though theft be *labes realis*, that is effectual against every singular successor, yet that hath never been extended to spuilzie, and it is of public interest to secure commerce, in purchasing of moveables, which neither hath nor requireth writ, and therefore no person can be obliged to dispute the seller's right. The pursuer *answered*, 1*mo*, That whatever the law extendeth as to theft, must much more be extended to spuilzie, which is robbery. 2*do*, Albeit the law hath allowed the purchase of moveables for an onerous cause to be valid, without necessity to prove the purchaser's author's right, which is presumed from lawful possession, so that it will not be sufficient to procure restitution, to libel that the goods in question belonged to the pursuer, and were in his possession as his proper goods, unless the pursuer do also condescend, that the goods could not pass from him by sale, or any other title of commerce, but that they were stollen, strayed, given in grasing, or custody, or that they were in a defunct's possession the time of his death; all these take off the presumption of right by possession, and much more when the pursuer condescends that the goods in question were violently taken from him.

THE LORDS sustained the first reply, and found that spuilzie was *vitium inhærens* as well as theft; but found, that if no spuilzie were proved, but that a co-partnery were proved, the buying from one co-partner did secure the buyer against the other, and left him to pursue his co-partner *actione pro socio*.

Fol. Dic. v. 2. *p.* 69. *Stair, v.* 2. *p.* 561.

1683. *November.* ANDERSON *against* SPENCE.

No 99.
In a pursuit against a minor upon his bond, the defender having founded upon

IN a pursuit against a minor upon his bond, the defender having founded upon minority and lesion,

It was *alleged* for the pursuer; That though the benefit of restitution might take place in things disponed, whereof a minor might have *rei vindicationem*, as goods, lands, &c. yet it cannot be effectual against successors to *nomina de-*

bitorum for onerous causes, as the pursuer is, because that would make a great interruption in commerce. 2*do*, The minor being a merchant, and the bond granted in relation to trade and merchandise, he cannot be restored.

No 99. minority and lesion; the Lords found, that the qualification of circumvention was only personal.

Answered for the defender; Minority is *exceptio realis* competent to heirs against singular successors; for otherwise, the creditor would always assign, and so disappoint the benefit of restitution in the case of the cedent's insolvency. Nor is the argument from the favour of commerce of any weight, seeing assignees rest secure upon the cedent's warrandice; and the same objection might be made if the cedent had discharged the bond before assignation; which discharge would certainly meet the assignee. 2*do*, The defender was circumvened by the pursuer's (cedent) in the stating of their own accompts. 3*tio*, The bond was extorted by force, the pursuer's (cedent) having threatened to put the defender in the correction-house, unless he signed it.

Replied for the pursuer; That the personal qualification of circumvention used by the cedent cannot be obtruded against the pursuer, who is a singular successor for onerous causes. 2*do*, The reason of *metus*, as it is qualified, is not relevant: For as the cedent might have used legal execution against the defender, he might have threatened him with it. And though deeds done under the terror of legal diligence do not infer homologation, so as to cut off the granter from his defences against the debt, such securities are not null, nor infer *justum metum*; and consequently labour under no *vitium reale*, which can overtake singular successors for onerous causes.

THE LORDS found, That the qualification of circumvention was only personal; and also repelled the defence of *metus* as qualified, in so far as concerned the pursuer a singular successor; and the father, because the cedent was sufficiently solvent, against whom the defender might have recourse.

Fol. Dic. v. 2. p. 70. Harcarse, (MINORITY.) *No* 707. *p.* 199.

1697. *December* 18. LIVISTON *against* BURN and LIVISTON.

No 100. The Lords reduced a disposition done *in lecto*, as being *labes realis*, though the defender was a singular successor, ignorant of the circumstance.

IN the reduction of a disposition pursued by Michael Liviston of Bantaskin against Burn and Liviston, *ex capite lecti*; it was *alleged*, That the defender was not the immediate receiver of the disposition, but a singular successor for onerous causes, having purchased it from him to whom the same was made, and so was not bound to enquire whether it was *in lecto* or not; and so, though the deed might be quarrellable and reducible *quoad* the receiver, yet not against him, a third party, who knew nothing of its defects: And urged the parallel of the act of Parliament 1621, that singular successors obtaining rights from bankrupts for onerous causes, and not being *participes fraudis*, were only liable in the price. *Answered*, This was never contraverted but a right made on deathbed might be reduced, though it passed through twenty hands, because it was *labes realis*, like extortion *per vim et metum*; but the exception on the act of Parl. 1621 was personal. And the LORDS found it so in this case, and reduced