

1632. *January 17.*Mr ANDREW SKEEN *against* BETSON.

No 25.

A disposition to a son-in-law, where there had been no previous diligence, supported only in so far as proven to be onerous.

ONE Betson being tenant to Mr Andrew Skeen, and having granted to him an obligation for some money, as the price of certain farms, which he was unable to pay to him; and having thereafter left his ground, the said Betson thereafter falling heir to a burghers of Burntisland, who had both moveable heirship, and tenements pertaining to him heritably in Burntisland; he dispones all his right, both of the lands and moveables, to his son-in-law, whereby he was unable to pay the said Mr Andrew Skeen's debt, having no other goods nor gear, but that which fell to him that way: And the said Mr Andrew having arrested the said heirship, in the hands of the relict of the said person, to whom he was become heir, and desiring the same to be made furthcoming to him for his said debt; and the other party assignee claiming the same, by virtue of his said disposition, which preceded the arrestment, which he alleged was lawful to give him right thereto, seeing the cedent was never bankrupt; neither had the said other creditor done any diligence, to recover payment from him, whereby he might not lawfully take the said disposition, albeit it had been granted to him *ex donatione*, and without causes onerous; whereas the same bore to be for sums of money; for the maker was neither bankrupt, nor at the horn, nor ever charged to make payment, so that the act of dyvoury could not be obtruded conveniently in this case; and the other party obtruded competently the said act of dyvoury, which he alleged to militate for him against this party; seeing the disponent, albeit he was not at the horn, yet he, by making of the said disposition, was become in effect a bankrupt, for thereby he had denuded himself of all which he had; for he had neither goods nor gear whatsoever, but only that which he had fallen to as heir, and which fell under the said disposition, and which was made by him to his own son-in-law, and so *inter conjunctas personas*, and without any cause onerous; at least, if any cause onerous was, it was not equivalent to that which was disposed; and therefore it could not agree with conscience that he should bruik that which was disposed (except in so far as might proportion his debt, if any truly might be qualified) and that the other party should want all.—THE LORDS found, albeit the debtor was not rebel, nor yet that the creditor Mr Andrew Skeen had used any diligence against him before this disposition, yet seeing the disposition extended to all the goods he had, and that the other party, to whom the disposition was made, could not allege nor qualify that the said debtor was answerable in goods or lands to pay the other party's debt, beside the gear disposed, that they would only sustain the said disposition, to give the acquirer thereof preference *pro tanto*, in so far as he should shew the same to be acquired for a just and onerous cause; according whereto it was found, that he should be preferred to the other creditor, and not for any further; seeing in the overplus the LORDS found, That the other creditor ought to be answered, and the said disposition ought not to prejudice him therein; seeing the same in the overplus was to be reputed as a donation, or a deed done without competency of a just price, which in

reason ought not to be permitted as lawfully done in prejudice of a lawful creditor, by the debtor, who was otherwise unable to pay his debt; in prejudice whereof he could not gift his goods *in toto*, and thereby become irresponsal in hurt of other creditors, albeit not doing diligence before that donation:—And the LORDS found, the onerous cause for which the disposition foresaid was made, might be proven by the acquirer's own oath; which the Lords found enough to prove, seeing the disposition itself reported to be made for sums of money. (*See PROOF.*)

Act, Baird.

Alt. Burnet.

Clerk, Scott.

*Fol. Dic. v. I. p. 67. Durie, p. 611.*

No 25.

1632. February 2.

JACK against GRAY.

ONE Gray having comprised James Liddel's house in Leith, and being infest thereupon, and Jack, son-in-law to the said James, having received a disposition of that house from him, for satisfying of his tocher, owing by his contract of marriage, and being also infest conform thereto; they contending for the mails of the house, Jack was preferred, albeit the disposition made to him, was alleged to be made by a bankrupt, *et inter conjunctas personas*, and *in meditatione fuga, et in momento fuga*, the maker having fled to Berwick on the morrow after the making thereof: And Gray had denounced the land to be comprised, before he was infest on his disposition; likeas he had served inhibition, and was infest, and had arrested the duties of the house, which diligence, so done, ought to give him preference; at least to make him equal with the other party, who is a conjunct person, and has only acquired a voluntary right, without doing of any diligence at all, and was conscious of the bankrupt's flight; and there being also but a few days betwixt his infestment, acquired on diligence, and the other parties, voluntarily purchased, as said is: notwithstanding whereof Jack was preferred, in respect of his infestment; depending on an disposition, made for a preceeding lawful onerous cause; seeing the said disposition preceeded any diligence done against the common author by Gray; for the LORDS found, it was lawful to a just creditor, to take either payment, or lawful security, in place of payment of his true debt, from any person, albeit becoming bankrupt, *etiam in ipsa fuga*; where there was no preceeding inhibition, nor diligence before the doing thereof used by any creditor; and therefore Gray's allegiance was repelled.

*Fol. Dic. v. I. p. 67. Durie, p. 618.*

No 26.

A disposition to a son-in-law is supported, although granted *in momento fuga*. There was no previous diligence, and the disposition was granted in satisfaction of tocher, for which the father was bound in his son's contract of marriage.

1669. January 8.

•CAPTAIN NEWMAN against TENANTS of WHITEHILL, and Mr JOHN PRESTON.

CAPTAIN NEWMAN having apprised the lands of Whitehill from Prestoun of Craigmillar his debtor, and being thereupon infest, pursues the tenants for mails

No 27.

A conjunct person preferred on his dis-