

1671. July 20. LAIRD OF BIRKINBOG against JOHN GRAHAME of Craigie.

IN a competition among the creditors of umquhile Sir Robert Douglas of Tilliquibilly, a disposition granted by Sir Robert to Grahame of Craigie, was called for to be reduced upon this reason, that it was granted by Sir Robert when he was a notorious and known bankrupt, and fled, and was latent; so that by the act of Parliament 1621, he could not prefer one creditor to another, being in that condition, for that act annuls all dispositions made by bankrupts, without a just and necessary cause; and there was no necessity nor justice for the bankrupt to prefer one creditor to another.—It was answered, That unless there had been legal diligence at the pursuer's instance, or that the defender's disposition had been without a cause onerous, there is no ground for that act to hinder any debtor, though bankrupt, to prefer one creditor to another; for if he had had the money, he might have paid any he pleased; and the cause is both just and necessary, because he might have been compelled by law to have done the same, and there was nothing to hinder the creditor; but, that as he might have first apprised, so he might have taken the first disposition from his debtor. 2do, The pursuer's debt was for a bargain of victual fold and delivered to the common debtor, but a month before the disposition in question, when he was alleged to be bankrupt.

THE LORDS found the last allegiance relevant, and assoltized from the reduction, but did not decide upon the former allegiance.

*Fal. Dic. v. 1. p. 66. Stair, v. 1. p. 762.*

1672. February 3. HOME against MR. ANDREW BRYSON.

BARBARA HOME pursues Mr Andrew Bryson for implement of a part of her contract of marriage with his father, and for declaring that the lands disposed by his father to him after the contract, being in prejudice of her, a creditor, ought to be burdened with her debt; and particularly a house at the West port, whereof his father had right by apprising. It was alleged for the defender, that albeit his disposition had been without a cause onerous; yet by the act of Parliament 1621, whereupon the pursuer founds, all sums paid by confident or interposed persons to the interposer's creditors, are allowed; and it is offered to be proven, that the defender disposed the right of apprising of the house in question to John Johnston, for satisfying a bond granted by his father as principal, and himself as cautioner, which he might lawfully do, the pursuer at that time having done no diligence, and he himself being cautioner. It was answered, that in this case the defender could not prefer John Johnston; because the bond granted to him by the defunct, if it had competed with this pursuer, albeit prior in diligence, yet she would have been preferred; because it was granted *in lecto*, which was very well known to the defender, having subscribed the bond with his father three or four days before his

### No 3.

A disposition granted by a notour bankrupt was not reduced upon the act 1621, at the instance of the other creditors, who had done no diligence; the disposition being in satisfaction of a bargain of victual, fold and delivered to the bankrupt about a month before the disposition.

### No 4.

A confident person being pursued upon the act 1621, by an onerous creditor, whose debt was prior to the disposition granted to the confident person; it was not found a good defence, that the disposition was applied to satisfy a debt of the bankrupt's; the bond for the debt being granted *in lecto*, which

No 4.  
was known to  
the defender,  
and therefore  
presumed  
gratuitous.

death, and so he could not prefer such a debt, which he knew was invalid, to the pursuer's contract of marriage, whereof he could not be ignorant, she being then his father's wife, and he in the family; for defuncts on death-bed can neither prejudge their heirs, nor creditors who may come in place of the heir by diligence. It was *replied*, That there is here no reduction *ex capite lecti*, and the defender being cautioner for his father, he might justly satisfy the debt out of the right disposed to him by his father, albeit his father subscribed *in lecto*.

THE LORDS found, that the defender could not prefer this bond subscribed by the father *in lecto*, to an anterior creditor of the father's; and the defender's oath of calumny being taken, whether he had reason to deny that his father was *in lecto*, when he subscribed this bond, and he having acknowledged the same; THE LORDS found him liable for the sum contained in the apprising; but he offering to prove, that the bond subscribed *in lecto*, was for an anterior necessary cause,

THE LORDS superded extract till he should produce evidences for instructing thereof.

*Fol. Dic. v. 1. p. 66. Durie, p. 60.*

1681. February 1.

FRAZER *against* MACKIE.

No 5.  
Found, that  
a party hold-  
ing an assign-  
ation bear-  
ing to be for  
causes oner-  
ous, was  
bound to ex-  
plain the  
cause parti-  
cularly, that  
it might be  
known whe-  
ther it was  
adequate.

WILLIAM FYFE having given an assignation to a sum of 5000 merks, due to him by Inchbrakie, first to George Mackie, and thereafter to Frazer of Balbedie; it was *alleged* for Frazer, that albeit Mackie's assignation was prior, yet it was without a cause onerous by a bankrupt, in defraud of him and others the bankrupt's creditors, for whose use he had obtained assignation; which being found relevant, Mackie deponed that the assignation was for causes onerous; but refused to depone what the cause was, or whether it was equivalent; and *alleged* that his assignation does bear causes onerous as well as Frazer's; and it being referred to his oath, that it was without a cause onerous; and not in these terms, 'that it was without an *equivalent* cause onerous,' he was obliged to depone no further than to deny the allegiance referred to his oath.—It was *answered*, That the reason of preference for Frazer being, that the cedent was bankrupt, and had no other means but this sum assigned to him, whereby he became wholly insolvent, and therefore could not without a cause onerous, and legal diligence, assign the bond to Mackie, therefore he ought to depone what was the cause of the disposition particularly, that the Lords may determine, whether it was equivalent, or whether the assignation was fraudulent.—It was *replied*, That this was no way competent to Frazer, till he had first instructed his posterior assignation to be for debts prior to Mackie's assignation, otherwise if Mackie's assignation were in whole or in part gratuitous, it is not fraudulent, but preferable to any posterior assignation.

THE LORDS found, That if Frazer instructed the cause of his assignation to be the common author's debts, anterior to Mackie's assignation, that Mackie should