

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; likewise 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-

No 27.  
 position,  
 granted be-  
 fore dili-  
 gence, only  
 to the extent  
 of debts, ac-  
 tually and  
 previously  
 due to him-  
 self, or for  
 which he had  
 been bound.

and duties. Compearance is made for Mr John Prestoun, who produces a disposition from Craigmillar his brother, of the baronies of Craigmillar, Prestoun, and Whitehill: Which disposition relates this debt of Captain Newman's, and many other debts, and for satisfaction thereof disposes these lands to Mr John, reserving the disponent's and his lady's liferent, containing a reversion upon ten merks, and containing a provision that it should be leisom to Craigmillar during his life, and after his decease to Mr John, to pay any of the creditors contained in the disposition they pleased, without contributing the price proportionally to the rest of the creditors; and also produces a renunciation by Craigmillar, whereby he renounces the reversion and the liferents in favours of Mr John, and also his own power of preference of the creditors, and Mr John his investment upon the disposition, whereupon he *alleged*, that he ought to be preferred to the mails and duties, because he stands publicly invest, by virtue of the said disposition, before any investment in the person of the pursuer. It was *answered* for the pursuer, that the investment produced cannot exclude him, because it is expressly granted for satisfying of the sum whereupon his investment proceeds. It was *answered* for Mr John Prestoun, that he having a power to prefer any creditor he pleased, he paid other creditors to the value of the estate, whereby Newman is excluded. It was *answered* for Newman, that this disposition was fraudulent and simulate, in prejudice of lawful creditors, whereof he has reduction upon the act of Parliament 1621, as being granted by a brother to another, with a power of preference of creditors at the purchaser's option; which clause is altogether null, especially as to the preferences done, since lawful diligence was used by this pursuer, by horn-ing, inhibition, arrestment, and apprising; and as no debtor can so prefer himself, so neither can he give such a power to any other; and therefore the pursuer ought to be preferred to all the creditors, conform to his diligence. It was *answered* for Mr John Prestoun, that there being no diligences done before the disposition by any creditor, Craigmillar might dispoise, being for an onerous cause, as he pleased, and might prefer one creditor to another. *2dly*, Albeit this power of preference were not simply to be allowed after diligence done by creditors to prefer others to them; yet it ought to be sustained, in so far as Craigmillar might lawfully have done, viz. to prefer Mr John for the sums due to himself, and for his relief of such sums as he was cautioner in. The pursuer *answered*, that such a disposition was not made, nor doth this disposition any way relate to Mr John's sum, and his relief, but generally and equally to all, and there is no difference but the unwarrantable power of preference, which can have no effect after diligence done.

THE LORDS found the power of preference not to be sustained as to any other debts, than to such as were due to Mr John himself; and for which he was cautioner before the disposition; and found as to these, that the power of preference was lawful and valid, and was equivalent to this clause, with power to Mr John to satisfy himself and those to whom he was cautioner, *primo loco*. See No 2. p. 880.

*Stair, v. 1. p. 579.*