

No 15.

rum to his son. The son charged the debtor in a bond. The debtor allowed to plead compensation against the father, notwithstanding the assignation.

mitted with the annualrents of a sum due by the Lord Cranston to the suspender his brethren and sisters from whom he had assignation. The charger *answered*, That the suspender's assignation was not intimate before the intimation of the charger's assignation. The suspender *replied*, That the charger's assignation being by a father to his eldest son, and being *omnium bonorum*, it was fraudulent, and any debt of the father's is sufficient to be preferred thereto; neither was there any onerous or just cause to accept such a disposition, bearing expressly, to be of his father's whole means and estate; and though it bear, the undertaking of the father's debts, yet it is limited conform to an inventory, in which this debt craved to compensate, is not included; and albeit it could be instructed, that the debts in the inventory were equivalent to the father's whole estate, yet it was most fraudulent, the father becoming thereby a most notorious bankrupt, fraudulently preferring some creditors to others, without prior diligence; and therefore this compensation, as it would have been sufficient against the father, so it must be sufficient against the son accepting this fraudulent disposition, though without intimation.

THE LORDS sustained the compensation upon the suspender's assignation, though not intimate before the charger's assignation, because the charger's assignation was fraudulent *omnium bonorum*, preferring one creditor to another, without anterior right or diligence.

Fol. Dic. v. 1. p. 67. Stair, v. 2. p. 625.

1679. November 14.

JAMES POLLOCK *against* The KIRK-SESSION of LEITH.

No 16.

Where no diligence had been done, a disposition *omnium bonorum* found to be ineffectual in competition with an arrestment.

HUGH WALLACE, writer to the signet, being charged to make payment of the sum of 500 pounds due by his bond to James Haliburton in Leith, and assigned to James Pollock, he gave in a bill of suspension upon double-pounding, wherein comparance was made for the Kirk-session of Leith, to whom John Haliburton was debtor, as cautioner for Bailie M'Dowgal, for the sum of 1000 merks. The assignee craved preference, because the assignation was intimate before the arrestment. The arrester *answered*, That the assignation was *omnium bonorum*, whereby the cedent disposed certain tenements, and all his plenishing and moveables, and all his bonds in general, and bore expressly, that it was to prevent his creditors, to whom he was cautioner, and to prefer his proper creditors; and therefore it was fraudulent: And, by the act of Parliament against bankrupts, whoever is known to be bankrupt, or makes disposition, by which he becomes insolvent, and unable to pay all his debt; such dispositions and assignations, whereby an insolvent debtor gratifies some creditors and prejudices others, are declared fraudulent and annulable. It was *answered*, That Haliburton was not bankrupt, nor any diligence done against him before this right to Pollock; but this arrestment was posterior, and could not hinder creditors to secure themselves before it was laid on. But, by the said act, gratification is only excluded in prejudice of

creditors, who have done prior and better diligence, and it was very allowable for a debtor to prefer his proper creditors, to them to whom he was only cautioner. It was *replied* for the arrester, That that clause in the act, in favours of creditors doing prior diligence, would take effect, though the common debtor were neither bankrupt nor insolvent: But, by the first part of the act, bankrupts are disabled to grant any voluntary or unnecessary right, and so can prefer no creditor to another, though neither of them have done diligence, especially by a general disposition and assignation, such as this is; for though a particular right might be taken by a creditor from an insolvent debtor, for his security or payment, the creditor not being thereby *particeps fraudis*, might be secure; but where the creditor is *particeps fraudis*, either when the debtor is a notour bankrupt, or where the right granted to the creditor is *omnium bonorum*, and that thereby he knoweth the other creditors to be cut off, the same is fraudulent on his part and null.

THE LORDS found the arresters allegiance relevant, that by this disposition, Halyburton the common debtor became insolvent, and that his estate was not sufficient to pay his proper debts and his cautionry, over and above what his relief could free him of, it bearing to be *omnium bonorum*.

Fol. Dic. v. 1. p. 67. Stair, v. 2. p. 707.

1685. February. BROWN against JOHN DRUMMOND.

ONE Trinch having granted to John Drummond a factory *in rem suam omnium bonorum*, for sums of money, and other good causes and considerations, narrating that he was indisposed to go about his own affairs: Against this disposition, it was *alleged*, by a competing creditor of the granter's, That the disponer was thereby reduced to the state of a notour bankrupt; so as he could not gratify the receiver, though no diligence had been done him by his creditors.

Answered: Though a bankrupt cannot gratify, he may dispone by way of commerce; and the factory bears onerous causes, and sums of money then received; and Drummond being no conjunct person, is not under any necessity to instruct the onerous cause otherwise.

THE LORDS found, That, *in quantum*, the onerous cause was antecedent to the factory *in rem suam*, which, in effect is a disposition; Trinch, by the disposing his whole goods and debts, was in the state of a bankrupt, unless a farther estate could be condescended on; and decerned the pursuer and defender to come in *pari passu* as creditors: And it was acknowledged that the debts due by Trinch, before the factory, were the onerous cause of it.

Harcarse, (ALIENATION.) No 133. p. 27.