

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.*