

1678. January 18.

KINLOCH *against* BLAIR.

KINLOCH of Gourdie pursues reduction of all rights granted to Mr George Blair by James Strachan of Kirkcubright of Lethindie, on this reason, that Mr George being uncle to the common debtor's heir, a minor, had acted for him, and retarded the pursuer's diligence, and after the pursuer had obtained decret *cognitionis causa*, Mr George bought in rights from other creditors, and took a disposition from the common debtor of this land, which was his whole estate, and being superior to him, granted to him a precept of *clare constat*, and accepted from him a resignation *ad remanentiam*, though he knew that he had no other estate; and albeit it was notour to him that he was bankrupt, his debt far exceeding his estate. The defender *answered*, That the reason is not relevant, seeing he, as assignee, was creditor, and was prior in diligence, and therefore might lawfully take satisfaction from his debtor by a disposition for causes onerous, against which there was no ground from the act of Parliament 1621, which excludes no preference, but that which is in prejudice of creditors, having done diligence lawfully, affecting the debtor's estate, as by horning, inhibition, arrestment, or apprising; and though it has been found, that, after denunciation of lands to be apprifed, or execution of an inhibition against the party inhibit personally, that dispositions in favours of other creditors, by the common debtor, granted before the apprifing, or publication at the cross where the lands lie, might reduce the intervening dispositions as fraudulent by gratification; yet it was never found that the beginning of a pursuit, or obtaining a personal decret, could impede another creditor to take a disposition for his satisfaction, seeing the pursuer had an ordinary and obvious remeedy by an inhibition. *2do*, Diligence operates nothing, when it is not punctually insisted in: but here four months intervened betwixt the decret *cognitionis causa*, and the adjudication.

THE LORDS found not that member relevant upon anticipation, the diligence being but personal; but found the other members relevant, as grounds of fraud, though not founded upon the act of Parliament; especially, the taking a disposition of the whole estate, from a person notourly insolvent; not being by an interested person, by way of commerce, buying the land, but by a creditor obtaining preference; but declared the reduction to be only to this effect, that both parties might come in proportionally effecting to their sums, as if both had obtained decreets within year and day.

*Fol. Dic. v. 1. p. 67. Stair, v. 2. p. 595.*

1678. June 29.

CRANSTON *against* WILKIE.

JAMES CRANSTON having charged Mr John Wilkie upon his bond, he suspends upon compensation, that this charger being assignee by his father, the charge was compensable by the debt due by the cedent, who, before this assignation, intro-

No 14.

An uncle took a disposition from his nephew of his whole estate, in satisfaction of anterior debts. By this the nephew became utterly insolvent. The transaction was reduced as fraudulent, to the effect of bringing in the other creditors for their proportion.

No 15.

A father granted an assignation *omnium bono-*

## 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