

No 18.

A party against whom no diligence had been done, granted a disposition *omnium bonorum* to two of his creditors. Found, that by such a disposition he became bankrupt, and a third creditor brought in *pari passu*.

1685. February 10. BROWN against WATSON and DRUMMOND.

MARGARET BROWN being a creditor to \_\_\_\_\_, pursues Watson and Drummond, as vicious intromitters with her debtor's goods and gear, for payment of her debt.—In this process it was *alleged*, That he could not be liable as a vicious intromitter, because any intromission he had, was by virtue of a disposition from the common debtor, for payment of the debts resting to him.—It was *answered*, That notwithstanding of the disposition, the pursuer ought to come in *pari passu* with the debtor as to the goods contained in the disposition effecting to his debt, in respect it was a general disposition *omnium bonorum*, of all debts, sums of money, goods and gear in general, without condescending upon any particular; and bore in the narrative, 'That for as much as the disponent was not able to go about his own affairs, and that he knowing the diligence and activity of the defender, wherefore, and for sums of money, and other onerous causes, and good considerations he disposed, &c.;' because the said disposition was granted on death-bed, and was by a bankrupt, seeing the disposition being so general, 'without condescending upon any particular,' he could have nothing remaining.—It was *replied*, That the disposition, though *omnium bonorum*, ought to be sustained in *quantum*, the defender shall prove, that he was creditor *ab ante*; and the presumption that it was fraudulent, as being *omnium bonorum*, is sufficiently taken off by the defender's proving, that antecedent to the disposition he was creditor.—It was *duplicated* for the pursuer, That a disposition from a notour bankrupt could not be sustained to the prejudice of other creditors, and that the Lords have decided in the like case, where diligence was done by neither of the creditors, that the creditors should come in *pari passu*, notwithstanding of a disposition of that nature.—THE LORDS found, That diligence being done by neither pursuer nor defender, and that by the disposition he was notour bankrupt, nothing remaining that was not comprehended in the general clause of the disposition, that therefore the pursuer and defender ought to come in *pari passu*, effecting to their debts, notwithstanding of the disposition.

*Fol. Dic. v. i. p. 67. President Falconer, No 98. p. 68.*

\* \* Sir Patrick Home reports the same case thus:

*March 1685.*—MARGARET BROWN having pursued Watson and Drummond for payment of a debt due by \_\_\_\_\_ her debtor, as vicious intromitter with his goods, *alleged* for the defenders, That they could not be liable as vicious intromitters, because any intromission they had was by virtue of a disposition from the common debtor, for payment of the debt.—*Answered*, That notwithstanding of the disposition, the pursuer ought to come in *pari passu* with the defenders, in respect it was a disposition *omnium bonorum* of all debts, sums of money, goods and gear belonging to him; by the granting of which disposition, *ipso facto*, he became bankrupt, and so must be presumed to have been granted in defraud of the pursuer's debt.—*Replied*, That albeit the disposition be *omnium bonorum*, yet it ought to be

sustained in so far as the defender can instruct that he was a lawful creditor, prior to the disposition, which takes off the presumption of fraud; and that it was lawful for him to take a disposition from his debtor for payment of his lawful debt, seeing there was no diligence done against him.—THE LORDS found, That there being no diligence done by either of the parties against the common debtor, and by the general disposition he became bankrupt; therefore the pursuer and defenders ought to come in *pari passu* effecting to their debts.

*Sir P. Home, v. 2. No 715.*

1728. December.

DUCHESS OF BUCCLEUGH against SIR JAMES SINCLAIR, and MR PATRICK DOUL.

WILLIAM INNES, factor for the Duchess of Buccleugh, having fallen in considerable arrear, granted a disposition to her Grace of particular subjects, for her security and payment of the balance. It was objected against this disposition, by the grantor's other creditors, that it was virtually a disposition *omnium bonorum*, though it contained no general clause of *all goods and gear*; because the debtor's whole effects were therein comprehended. Answered, there is a great difference betwixt dispositions bearing to be *omnium bonorum*, and a disposition to any particular subject, supposing the grantor should not be found to have any other estate; the grantor of an universal disposition makes and declares himself bankrupt by the very tenor of the deed, which has the same effect in law *quoad* the acceptor, as if the grantor had been judicially declared bankrupt before, or notouirly made so by a course of diligence, whereas every true creditor is in *bona fide* to accept from his debtor, against whom no diligence is done, any of his effects either in security or payment.

This objection was repelled.

*Fol. Dic. v. 1. p. 67.*

1737. February 25. CRAMOND against BRUCE and HENRY.

A debtor, against whom no diligence was done, having granted a disposition *omnium bonorum*, to one of his creditors in security and payment, and another creditor having arrested in the disponee's hands, and in a furthcoming insisted that the disposition was null, and that he was preferable by virtue of his diligence; the LORDS reduced *ad hunc effectum*, to bring him in *pari passu*; and repelled the *jus retentionis* pleaded for the disponee; for, if the disposition was unlawful, the disponee could have no just title to retain possession. *Fol. Dic. v. 1. p. 67.*

\* \* The terms of the disposition were, 'of the corn crop upon his possession, and all and hail his horse, nolt, sheep, and other goods and gear pertaining and belonging to him.' This was interpreted to be a disposition *omnium bonorum*; no other funds being condescended on.

No 19.

A disposition of particular subjects, which in fact comprehended the grantor's whole effects, was found effectual to the creditor, as it did not expressly bear, or appear, to be *omnium bonorum*.

No 20.

One creditor arrested in the hands of another who had obtained a disposition *omnium bonorum*. They were ranked *pari passu* on the fund.