

DIVISION IV.

Disposition by a Bankrupt in favour of his whole
Creditors.

1669. July 24.

CRAWFORD against ANDERSON.

No 234.
A debtor having disposed his estate in trust, for payment of his creditors, it was found, that the trustee must make payment *legitimo modo*, and not to those who had done no diligence, in prejudice of the diligence of others.

JOHN FLEMING having made a disposition of his lands to William Anderson Provoost of Glasgow; some time thereafter William grants a back-bond, declaring the disposition was upon trust, to the behoof of Fleming's Creditors. Alexander Young being one of the creditors, uses inhibition and horning against Fleming, and is thereupon publicly infest; after which William Anderson makes payment to the other of the creditors; the said Alexander Young, and Crawford his spouse, *insist* for mails and duties of the apprised lands.—Anderson *excepts* upon his prior infestment from Fleming, the common author, upon the said disposition.—Crawford *replies* upon the back-bond, that the said infestment is in trust to the behoof of Fleming.—Anderson *duplicates*, That it is a qualified trust to the behoof of Anderson himself, in so far as any debt was due to him, and next, to the behoof of Fleming's creditors; and condescends and instructs that he has made payment to several of these creditors; so that payment made by him *bona fide* must give him right to the trust *pro tanto*, and any inhibition or infestment at Young's instance, was only against Fleming, and not against Anderson, against whom there was never any action.—It was *answered*, That the trust being for payment of Fleming's creditors, cannot be interpreted at the option of Anderson; which would be a most fraudulent conveyance to exclude the more timeous diligence of Fleming's other creditors; but it must be understood to pay the creditors *legitimo modo*, and not to make voluntary payment to those who had done no diligence, and prefer them to those who had done diligence; and albeit the inhibition and public infestment upon the apprising be only against Fleming; yet Anderson, who was intrusted for Fleming, might and ought to have known the same by searching of the registers, appointed for publication of rights; and if he had neglected the same *sibi imputet*, for he being trustee for Fleming, could no more prefer Fleming's creditors, than Fleming himself could do.

THE LORDS repelled the defence and duply, and found, That voluntary payment made by Anderson to Fleming's creditors, after the inhibition or public infestment of other creditors, did not give him any right by his infestment in trust, to exclude the more timeous diligence of the other creditors.

Ed. Dic. v. 1. p. 84. Stair, v. 1. p. 645.