1728. *July.* SMITH *against* TAYLOR.

No 228.
Found in conformity with the above.

IN this caſe, mentioned formerly, No 196. p. 1128. the creditor who had received *goods* from the bankrupt had done no diligence; and therefore, in conformity with the deciſion immediately above, while he, (the defender in a reduction,) had to reſtore the goods, he was not allowed to come in *pari paſſu* with creditors who had done diligence.

Fol. Dic. v. 1. *p.* 84.

*** IN ſupport of this reduction, it was *pleaded*, that the intention of the act 1696, was, to put it out of the power of a debtor, in a ſtate of bankruptcy, to prefer favourite creditors, by transferring his effects to them; and to leave every thing for the operation of diligence. If the transfer of moveables be not included in this proviſion, the law is imperfect. But, as the remedy of the law ought to be univerſal, ſo the terms of the ſtatute bear, 'All and whatſoever diſpoſi-'tions, aſſignations, and other deeds,' &c. *i. e.* diſpoſitions to lands; aſſignations to bonds and perſonal rights; and other deeds whatſoever. This ſeems intended to comprehend all the indefinite ways of transferring moveables, the only kind of alienation not included under the other two; and this view of the law, is ſupported by the caſe of Forbes againſt Forbes, No 193. p. 1124.

Answered, *Deeds* can ſignify only *written conveyances*; and, a general expreſſion, ſubjoined to particulars, muſt be regulated in its interpretation from thoſe particulars: It never could be the intention of the law, to include the delivery of moveables. This would render trade unſafe, and ſtop the commerce of moveables. Moveables paſs from hand to hand; and no man need inquire further, than, whether he obtained them in a fair way of delivery: In other caſes, a man muſt know the condition of the perſon he contracts with. The preſent caſe is preciſely ſimilar to that of a purchaſe fairly made from a bankrupt by a creditor, for money paid over, and that money immediately returned, in payment of a prior debt. Neither the ſale, nor the payment, in ſuch a caſe, would be objectionable. If there were a fraudulent deſign, it would be eaſy to make a third party purchaſe. If the creditor ſhould act entirely *bona fide*, it would be impoſſible to ſuppoſe the act ſhould annul a ſale, to reach ſuch a creditor. Both the Roman law and ours agree in reducing fraudulent tranſactions: But the preſumptive fraud, extended by ſtatute to *written* deeds, as being deeds of importance, is not applicable to the tranſmiſſion of moveables, meant to paſs freely from hand to hand. The deciſion, Forbes againſt Forbes, alluded to, is, indeed, unfavourable to this argument; but it is ſingle, and againſt the ſpirit of that of Tweedie, No 129. p. 1037. If, at any rate, the act be thought to apply; it ought certainly only to introduce an equality; that the creditor, who receives the goods, may be ranked *pari paſſu* with the creditor who challenges.

No 228.

Replied, In our law, *facts* and *deeds* are reciprocal terms: The transference here objected to is an alienation, and a fact or deed, whether reduced to writing or not. No injury can happen to commerce; a fair purchaſer, for a price, cannot be affected by the ſtatute. Indorſations to bills are moſt of all favoured by commerce; yet they fall under the law, when granted for a prior debt. A ſale, ſuch as figured, intended to pay the creditor's debt, would be reducible as ſimulate. If the partial deed of the bankrupt be ſet aſide, there is no foundation upon which the receiver of the goods can ſtand, in oppoſition to the purſuer, who has done legal diligence. The goods muſt be underſtood to remain *in bonis* of the bankrupt, ſubject to ſuch diligence as has been led againſt them.

See Seſſion-papers in Advocates' Library.

No 229.

1743. *February* 9. CREDITORS of HAMILTON *againſt* HENRY.

THIS act reſpects only preferences granted *to creditors of the bankrupt*.

See The particulars *No* 173. *p.* 1092.

1750. *November* 9.

The EARL of HOPETOUN, and other Creditors of JOHNSTON, *againſt* NISBET of Dirleton, and INNES.

No 230.
A caſe, in which is admirably ſtated, the conſtruction of the act 1696, in general; and in particular with regard to the *criteria* of bankruptcy.

ALEXANDER INNES being creditor to James Johnſton in L. 159 Sterling by bill, uſed diligence againſt him by horning and caption in June 1746; and Johnſton being unable to pay, gave an heritable bond of corroboration, on the 17th July 1746, upon his houſes in Edinburgh, upon which infeftment was taken, 4th December 1746.

William Niſbet of Dirleton, being creditor to the ſaid Johnſton in L. 163 Sterling by bill, uſed horning and caption thereon, and impriſoned Johnſton in the tolbooth of Edinburgh upon the 16th Auguſt 1746; but he having agreed to grant heritable bond to Dirleton on the ſaid houſes in Edinburgh, he was liberated upon the 20th or 21ſt of Auguſt, and immediately thereafter granted the heritable bond, whereupon infeftment was taken on the ſaid 4th December 1746. This heritable bond bore to be in corroboration of the debt and diligence, and by it Johnſton became bound to pay the debt againſt the 20th September 1746. And it further bore this ſpecial *proviſo*, That the granting the ſaid ſecurity ſhould not hinder Dirleton from uſing the foreſaid diligence by horning and caption againſt Johnſton, between and the ſaid 20th of September, or at any time thereafter.

Theſe ſecurities remained a ſecret to the Earl of Hopetoun, who was a conſiderable creditor, till the infeftments were taken; at which he being alarmed, certain treaties enſued; which proving ineffectual, the Earl, for himſelf, and others