No 195. may any way be attended with a conſequential damage or benefit to ſome of the creditors.——THE LORDS preferred the annualrenters.

Fol. Dic. v. 1. *p.* 83.

1728. *July* 19. SMITH *againſt* TAYLOR.

No 196.

A DEBTOR, within 60 days of his bankruptcy, delivered to one of his creditors, lint, dales, &c. in payment and ſatisfaction *pro tanto*.—Againſt a reduction upon the act 1696 it was *pleaded*, That the act reaches not moveables, the commerce of which ought to be free.——THE LORDS found the reduction relevant to oblige the defender to reſtore the goods or the value.

Fol. Dic. v. 1. *p.* 83.

1729. *February* 4. ECCLES *againſt* CREDITORS of MERCHIESTON.

No 197.

THE narrative of an aſſignation by a bankrupt, bearing money inſtantly advanced; it was put to the aſſignee, whether it was not in ſecurity of a prior debt? He declared, that when he lent his money, it was covenanted that he ſhould have the aſſignation, as part of his ſecurity; but when the money was lent, and the bond written out, the aſſignation was not ready, but that it was delivered to him about a week thereafter.——THE LORDS found the aſſignation fell under the ſanction of the act of Parliament.

Fol. Dic. v. 1. *p.* 83.

1733. *January* 25. BUCHANAN *againſt* BAILIE ARBUTHNOT.

No 198.
Payment in caſh does not fall under the act 1696.

A NOTOUR bankrupt having a aſſigned a bond to a trading company for ready money, and having applied ſome part of the price for payment of a private debt due by him to one of the company; and it being *contended* that this was truly a voluntary aſſignation for ſatisfaction of a creditor; *answered*, The aſſignation was to the company for ready money, and not reducible; and payment thereafter out of the price to one of the company, was the ſame as made to a third party, and therefore effectual, unleſs it could be ſaid, that actual payment is reducible upon this act.—This caſe was found not to fall under the act 1696.

Fol. Dic. v. 1. *p.* 82.

No 199.
Payment in caſh cannot be reduced on either of the ſtatutes 1621 or 1696.

1751. *January* 26. FORBES *againſt* BREBNER and Others.

GEORGE FORBES being creditor to David Farquhar in L. 193 Sterling, arreſted in the hands of George Elmſlie, and obtained decree of furthcoming for L. 94,

the ſum he acknowledged due; and that ſum Elmſlie offered to pay, if Forbes would diſcharge him of all he owed to Farquhar; which Forbes refuſed to do, being ſuſpicious he owed him more; and proceeded to horning and caption, and impriſoned Elmſlie in the tolbooth of Aberdeen. While the days of the charge of the horning were running, Elmſlie had wrote a letter to Forbes, preſſing him to comply with his propoſal of diſcharging all he owed to Farquhar, and ſignifying he had the money ready to give him, and that if he would not take it in the terms offered, he would give it to other of his creditors; and he actually therewith paid Brebner and his other creditors. No 199.

Forbes coming to be informed of the payments made in theſe circumſtances, arreſted in their hands, and purſued a furthcoming before the ſheriff of Aberdeen; wherein, beſide libelling as in a common furthcoming, he inſiſted on this ground, That payments thus made were reducible upon the acts 1621 and 1696, and that therefore the ſums ſo unlawfully paid ſhould be made furthcoming to him; and the defenders having deponed in the furthcoming, that they owed nothing to Elmſlie at the time of the arreſtment, but acknowledged the payments made to them by him, during the currency of the purſuers diligence, agreeable to the information the purſuer had got; the ſheriff abſolzied the defenders.

The cauſe having been advocated, the Lord Ordinary, before whom it came to be diſcuſſed, after advocating the cauſe, appointed memorials to be given in; and upon adviſing thereof, 'ſuſtained the defence, as the ſheriff had done, and abſolzied the defenders.'

And the Lords 'refuſed the reclaiming petition without anſwers.'

The queſtion turned chiefly upon the conſtruction of the act 1621, which ſtatutes, 'That where a dyvor ſhall make any voluntary payment or right to any 'perſon, in defraud of the lawful and more timely diligence of another creditor 'having ſerved inhibition, or uſed horning, arreſtment, compriſing, or other law-'ful means, to affect the dyvor's lands or goods, or price thereof to his behoof, 'in that caſe the creditor ſhall have good action to recover that which was vo-'luntarily paid in defraud of his more timely diligence.'

The words are ſtrong, and at the firſt view would appear to comprehend payments made *in pecunia numerata*; and no caſe can occur more favourable for this conſtruction than the preſent, where the payment was maliciouſly made. Nevertheleſs, as there is no inſtance where a payment *in pecunia numerata* has been found to be affected by any of the ſtatutes concerning bankrupts, nor has any of our lawyers ever ſaid ſo; ſo theſe words in the ſtatute, *having ſerved inhibition, &c.* or uſed other lawful means to *affect* the dyvor's lands, &c. were thought to limit the ſtatute, ſo as only to concern conveyances of ſubjects which may be affected by ſuch diligences; notwithſtanding of the reply, that even taking the ſtatute in the ſtricteſt ſenſe, a debtor's ready money as well as his other affects, is affected by horning and denunciation, as at the date of the ſtatute it fell under his eſcheat, which is burdened with the debt in the horning; as properly the eſcheat affected nothing to the creditor, although the Crown was, by ſpecial

No 199. ſtatute, ſubjected to the debt; and that the ſubjects, which the ſtatute ſuppoſes to be affected, are only the debtor's lands, or his goods, or the price thereof, none of which comprehended his ready money; and as none of the ſtatutes do reſtrain him from ſpending or ſquandering his ready money, it would have been ſtrange to have reſtrained him from giving it to his creditors.

There was no occaſion in this caſe to determine, what the caſe would be of payment made by delivery of moveables; though it was mentioned in the reaſoning as a thing not to be doubted, that ſuch payment would fall under the ſtatute. (*See* No 131. p. 1042.)

Kilkerran, (BANKRUPT.) *No* 15. *p.* 62.

No 200.
A perſon became bound as cautioner in a bond of relief. He diſponed, in ſecurity of this obligation, an heritable ſubject. Before infeftment was taken, he became bankrupt. The caſe found not to fall under either of the acts 1621 or 1696. The act 1696 held not to extend to *nova debita*.

1751. *January* 29. ANDREW JOHNSTON *againſt* HOME of Manderſton.

ALEXANDER HOME of Manderſton, having become bound as cautioner with and for Hugh Thomſon to the Britiſh Linen Company for L. 100 Sterling, by bond dated the 20th July 1747, got, of the ſame date with the principal bond, a bond of relief by Hugh Thomſon, and George Burnet, his brother-in-law, in which a brewery and certain houſes in Edinburgh are made over to him for the ſecurity of his relief by Burnet, who himſelf had right to the ſame by a diſpoſition without infeftment. In April 1748, Manderſton finding that Burnet was become bankrupt, took infeftment, by executing the procuratory contained in the diſpoſition by Burnet's author to him. And Thomſon having alſo failed, Manderſton paid the debt to the Britiſh Linen Company, and took an aſſignment.

Andrew Johnſton, creditor to Burnet in the ſum of L. 55 Sterling, by bill dated January 1747, inſiſted in a reduction, upon the act 1696, of the ſaid real ſecurity granted by Burnet to Manderſton. And the reaſon of reduction was, that the defender having taken infeftment after Burnet's notour bankruptcy, the diſpoſition in his favours, by a clauſe in the act 1696, muſt be conſidered as of the date of the ſaſine, and conſequently null and void upon another clauſe in the act, as being *fictione juris* a ſecurity granted to a prior creditor within threeſcore days of notour bankruptcy. Two anſwers were made to this reaſon of reduction, 1*mo*, That the clauſe declaring diſpoſitions, &c. granted by bankrupts, to be reckoned as of the date of the ſaſines lawfully taken thereon, does not concern *nova debita*, ſuch as the preſent is, but only ſecurities granted to prior creditors. 2*do*, That the clauſe does not, at any rate, relate to the preſent caſe, which is a conveyance of a diſpoſition upon which the bankrupt himſelf never was infeft: whereas the words, as well as the ſpirit of the clauſe, regard only ſubjects in which the bankrupts are infeft.

With reſpect to the firſt point, the defender, becauſe of the diſcrepancy among the deciſions of this Court, ſtated at great length the argument for evincing that the clauſe does not relate to *nova debita*. It is obvious in the *firſt* place, that the