

1796. February 2.

The CREDITORS of WALTER FERGUSSON against Mrs CATHARINE SWINTON.

IN 1782, Walter Fergusson, writer in Edinburgh, married Mrs Catharine Swinton, a lady of a respectable family, by whom he got a fortune of about L. 1600 Sterling, besides a yearly revenue of L. 84 : 12 : 6, arising from property not falling under the *jus mariti*.

No contract was entered into at the time of the marriage, but by a postnuptial one in 1789, Walter Fergusson, after he had become insolvent, settled a jointure of L. 160 upon his wife, together with L. 150 to purchase furniture. On this contract she was infeft in certain subjects belonging to him, a few days after its date.

A ranking and sale of Walter Fergusson's heritable property was afterwards brought, in which Mrs Fergusson having produced this contract and infeftment as her interest, the other creditors

Objected: The provision to Mrs Fergusson cannot be considered as onerous, because her husband received and spent her fortune before the date of the contract, which he had come under no previous obligation to execute. It therefore falls under the act 1621, as a gratuitous deed, executed by him after insolvency; and there are no grounds for supporting it to the extent of an aliment, as Mrs Fergusson will have, after her husband's death, L. 84 : 12 : 6 yearly, arising from property not falling under the *jus mariti*.

Answered: Settlements made by a husband on a wife, even after insolvency, are reducible only in so far as they are exorbitant; 11th January 1738, Robertson, No 75. p. 957.; 19th June 1635, Walker, No 72. p. 953.; 19th January 1676, Brown, No 73. p. 954.; 17th February 1738, M'Kenzie, No 76. p. 958.; 26th July 1744, Campbell, No 103. p. 988. But the provision in question, considering Mrs Fergusson's station in life, and the fortune brought by her, is moderate and reasonable.

The Lord Ordinary took the cause to report.

The Court were unanimous in thinking, that the contract should neither be supported nor set aside *in toto*. Some of the Judges thought that Mrs Fergusson should be allowed 10 per cent. yearly of the fortune brought by her. The prevailing opinion, however, was, that, in cases of this sort, the extent of the widow's provision ought not to depend so much upon what her husband received by her, as upon the rank and situation of the parties.

THE LORDS, in respect both parties are agreed that Mrs Fergusson has the property of a house in Tiviot Row, and the fee of two sums of L. 700 and L. 282 : 9s. Sterling, due by bonds bearing interest, restrict her provisions, granted by Mr Fergusson out of his estate, to an annuity of L. 80 Sterling, in the event of her surviving her husband; and in so far repel the objections made to

No 109.

An annuity granted by a husband to his wife after insolvency, and by a postnuptial contract of marriage, reduced in so far as it exceeded a reasonable provision.

No 109. said provisions, and to the heritable security granted for the same, in virtue of the postnuptial contract.'

Lord Ordinary, *Monboddo.*

For the Creditors, *Macnochie, Rae.*

Alt. *Honyman, Cathcart, Arch. Campbell, junior.*

Clerk, *Colquhoun.*

R. Davidson,

Fac. Col. No. 198. p. 476.

S E C T. XIV.

Who are to be accounted Prior Creditors.

1669. *January 21.*

The CREDITORS of JOHN POLLOCK *against* JAMES POLLOCK, his Son.

No 110.

Debts constituted by witnesses, as bargains, furnishings, &c. found effectual, from the time of contracting, not from the time of decree only, to frustrate posterior gratuitous deeds of a bankrupt.

THE creditors of John Pollock having adjudged his tenement for their debt, and James Pollock having gotten a bond of 5000 merks from his father, payable after his father's death, which was granted after he was married, he did also apprise thereupon, within year and day of the adjudication. The adjudgers raise a reduction of this bond, and the apprising following thereupon, upon these reasons; *first*, Because the bond was granted for love and favour, and albeit it bear borrowed money, yet the said James has acknowledged by his oath, that it was for love and favour; and so, being granted betwixt most conjunct persons, after the contracting of their debts, it is null by the act of Parliament 1621.—The defender *alleged*, That the reason was not relevant as to such debts as were not constituted by writ, anterior to the defender's bond; and as to any constituted by probation of witnesses, for proving bargains, merchant accounts, and furnishings, wherein the probation and decret are both after the bond, they cannot be said to be anterior debts, because they are not constituted till sentence; and albeit the sentence bear the debt to have been contracted before this bond, yet that cannot make them anterior debts; because writ cannot be taken away by witnesses, proving an anterior debt, which would be as effectual against the writ, as if the payment thereof had been proven by witnesses; and the time of bargaining or furnishing, being a point in the memory, and not falling under the sense, nobody would be secure who had writ, but that bargains and *furniture* might be proven anterior thereto.—The pursuer *answered*, That his reason was most relevant, and the constitution of the debt is not by the decret or probation, but by the bargain, and receipt of the goods or furniture, after which, no posterior deed of the debtor can prejudice the creditors furnishers; and albeit in many cases witnesses prove not, and witnesses are not admitted to prove, where writ may, and uses to be interposed, yet where the probation is competent, the debt is as well proven