1783. *November* 19.

MRS RACHAEL SPOTTISWOODE *against* JAMES ROBERTSON-BARCLAY.

No 221.
A precept of ſaſine granted by a bankrupt, in implement of marriage-articles long prior to the bankruptcy, found not to fall under the ſanction of the ſtatute 1696.

IN 1772, by marriage articles entered into between Archibald Roberton of Bedlay and Miſs Spottiſwoode, he obliged himſelf to infeft and ſeiſe her 'in an 'annuity or jointure of L. 150;' but for ſeveral years he delayed to fulfil that obligation. On 9th July 1779 he became bankrupt, according to the deſcription of the ſtatute of 1696, c. 5.; and it was not until the 24th day of the ſame month, that in impliment of the marriage articles, he executed a bond of annuity, containing procuratory of reſignation and precept of ſaſine. Still, however, failing to deliver, or to exhibit this bond, diligence by horning and inhibition was uſed, and a proceſs of adjudication in implement inſtituted againſt him, in which a decree would have been obtained, had he not at length made delivery of the bond; upon which, immediately after, (on 31ſt January 1780) Mrs Roberton was infeft.

In the ranking of Mr Roberton's creditors, Mrs Roberton claimed a preference under thoſe titles; but the other creditors *objected*, That, by the operation of the above-mentioned ſtatute, they were rendered void and null; and in ſupport of the objection,

Pleaded: The bond in queſtion, to uſe the very terms of the ſtatute, having been 'granted by the bankrupt, at or after his becoming ſuch, in favour of (Mrs 'Roberton) a creditor (by the marriage articles) either for her ſatisfaction or '*further security*, in preference to other creditors, is void and null.' For it is of no conſequence, that by this bond a ſpecific obligation has been implemented; agreeably to the deciſion in the caſe of Beg *contra* Peat, in the ranking of Clyde's Creditors, in 1769, Fac. Col. No 95. p. 175. *voce* RANKING and SALE; and to the argument of Lord Bankton, (b. 1. tit. 10. § 104.) relative to the act of Parliament of 1621. Were the oppoſite principle to prevail, it would in a great meaſure fruſtrate a ſtatute, hitherto eſteemed ſo beneficial. One object of it was, to hinder debtors, on the eve of bankruptcy, or after it, from withdrawing from their creditors, by partial deeds of preference, thoſe eſtates, the unincumbered appearance of which had allured them. But this object could never be obtained, if the production of an anterior latent obligation were ſufficient to give validity to ſuch preferences. Indeed, the ſtatute has ſpecially guarded againſt that device, by enacting, that in this matter the date of infeftment is to be held as that of its warrant; than which, ſurely, no obligation can be more ſpecifical.

Answered: The ſpirit of the ſtatute in queſtion, apparent on compariſon with the prior enactment in 1621, unites with its words to ſhew, that it was framed to prevent undue preferences among ſuch creditors only as ſtand in the ſame ſituation. But the fulfilling of a preciſe obligation, *ad factum præstandum*, does not produce an undue preference over a creditor in whoſe favour no ſuch right has been granted. Nor is the creditor really hurt by that voluntary act; ſince ad-

No 221. judications in implement, with which other adjudications cannot be ranked *pari passu*, would unavoidably have the ſame effect.

Were the intendment of this ſtatute leſs conſonant to its terms, the ſtrict interpretation due to corrective enactments would confine itſelf to the latter; of which the ſtrongeſt poſſible inſtance occurs in the caſe of payments made by bankrupts to favourite creditors; which, though clearly reprobated by the ſpirit of a law directed againſt fraud, is conſtrued as not falling under the expreſſion of that enactment.

The object mentioned on the other ſide ſeems erroneouſly aſſigned to the ſtatute of 1696. Had it been a true one, the antecedent period defined for the benefit of creditors would have been computed, not from the date of the infeftment, but from that of its regiſtration, which only, of the two, is an act of a public nature, or calculated for the information of creditors; whereas, ſince regiſtration may, as was ſtrongly exemplified in the late caſe of Douglas, Heron, and Co. againſt Maxwell, (*infra*, *h. t.*) be poſtponed till the *fifty-ninth* day after ſaſine, the *ſixty days* ſubſequent to infeftment may very readily elapſe before it is poſſible for a creditor to avail himſelf of the ſtatute. An effect which it has ſo little tendency to produce, ſhould not be ſuppoſed to have been intended by an enactment. The regulation on the other hand, reſpecting the conſtructive date of the warrant of ſaſine, probably originated from a ſuſpicion of fraudulent antedating. This doctrine is confirmed by the deciſion in the caſe of Houſton and Company *contra* Stewarts, 20th February 1772, No. 220. p. 1170. That of Beg againſt Peat was determined on a ſpecialty reſulting from fraud; for which reaſon it had no influence on the ſucceeding judgment now quoted.

It is moreover to be remarked, that Mrs Roberton not only might have ſecured herſelf by adjudging in implement of her marriage articles, but that her huſband's ultimately complying with her legal demand, was the only thing which prevented the completion of that legal ſecurity already begun. If, then, her preſent plea ſhould not be admitted, the loſs of her jointure would be a truly ſingular effect of obſtinacy ceaſing on the one hand, and a litigation on the other terminating when it had become uſeleſs.

The Lord Ordinary reported the cauſe to the Court; when it was

Obſerved on the Bench: An action of reduction founded on the ſtatute of 1696, can extend no further than the like action inſtituted *ex capite lecti*, or *ex capite inhibitionis*; in neither of which caſes could the deed in queſtion have been challenged.

'The Lords repelled the objection ſtated to the intereſt produced for Mrs Rachael Spottiſwoode.'

The Creditors reclaimed, the Court being divided in opinion; and anſwers to their petition having been put in, a hearing in preſence was appointed. But in the meantime the matter in diſpute was compromiſed by the parties.

Reporter, *Lord Ankerville.* For Mrs Roberton, *Solicitor General* (*Wight*) *Ilay Campbell.* Alt. *G. Hay.* Clerk, *Home.*

Stewart. *Fol. Dic. v. 3. p. 61. Fac. Col. No 122. p. 193.*