No. 8.

"debt and caption were never discharged; therefore the Lords sustain the "reasons of the reduction of the deeds challenged as falling under the act 1696, "and remit to the Ordinary accordingly."

Lord Ordinary, *Auchinleck*.
Clerk, *Tait*.

For Macadam, *A. Lockhart*.
For Macilwraith, *G. Wallace*.

R. H.

Fac. Coll. No. 110. *p.* 331.

1798. *November* 17. JOHN SINCLAIR *against* ROBERT LOCHHEAD and Others.

No. 9.

The lessee of a small farm having, by desire of his creditors, sold his stock by auction, for their behoof, and indorsed the bills for the price to one of their number who was to hold them as trustee for the whole, it was found, that a non-acceding creditor could not obtain a preference by arresting in his hands.

THOMAS SHIELDS, the lessee of a small farm, having become embarrassed in his circumstances, his stock was sequestrated, and about to be sold by his landlord, when his neighbours, who were likewise creditors to him, named two of their number as cautioners for the rent.

In order to relieve the cautioners, and divide the residue equally among his creditors, Shields, at their desire, exposed his small stock to public sale. The whole was sold for little more than £50. Sterling.

By the articles of sale, which were subscribed by Shields, and attested by witnesses, it was declared, that the sale was "for behoof of his whole creditors only," and that the purchasers were to grant bills to Robert Lochhead, one of the creditors, or to Robert Gillies, the auctioneer, "who is to be the collector "thereof, for behoof of the said creditors."

The bills, however, were taken payable to Shields himself, but he immediately indorsed them to Lochhead, who gave them to Gillies to collect payment.

John Sinclair, the only creditor of Shields who had not taken a share in the previous measures, afterward arrested in the hands of Lochhead and Gillies, and brought a forthcoming; upon which they raised a multiplepoinding.

The Sheriff preferred Sinclair.

In an advocation, the creditors

Pleaded: A trust was here created, *bona fide*, for behoof of the whole creditors. It was not reducible on the act 1696; and the funds were transferred to a trustee for their behoof before the arrestment, which, therefore, can give no partial preference; 8th December 1791, Hutchison against the Creditors of Gibson, No. 256. p. 1221. A formal deed of transference was not necessary, as the funds were moveable; Dictionary, *voce* PRESUMPTION, more particularly as they were of small value, and the transaction took place *inter rusticos*.

Answered: As the sale was brought by Shields himself, and the bills taken payable to him, the mere indorsation of them to Lochhead could not create a trust sufficient to prevent a non-acceding creditor from obtaining a preference by diligence.

The Lord Ordinary repelled the reasons of advocation.

No. 9. But the Court, at advising a petition with answers, on the grounds stated for the creditors, preferred the trustee.

Lord Ordinary, *Craig*. For Sinclair, *Maxwell Morison*. Alt. *Ja. Ferguson*. Clerk, *Pringle*.

D. D. *Fac. Coll. No.* 88. *p.* 203.

1799. *November* 12. THOMAS MITCHELL *against* MARJORY FINLAY.

No. 10.

The act 1696, C 5. found not to apply to a wife's infeftment on an antenuptial marriage-contract, by which the husband had become bound to give her infeftment on a house and yard for her life-rent, in case of survivancy; although he was not himself infeft for two years after the date of the contract, and his own and his wife's infeftment, both taken on the same day, were within sixty days of his notour bankruptcy.

By an antenuptial marriage-contract, James Milne became bound to give Marjory Finlay infeftment on a house and yard belonging to him, but in which he was not infeft, for her liferent, in case of survivancy.

James Milne did not himself take infeftment for above two years after. His wife was infeft upon the clause in the contract, on the same day with himself. He became notour bankrupt within a month after the infeftments.

Thomas Mitchell, one of his creditors, brought a reduction of the obligation to infeft in the contract, and of the infeftment taken on it, founded on the act 1696, C. 5.

The Lord Ordinary assoilzied the defender.

In a petition, the pursuer admitted, that in the case Jan. 29, 1751, Johnston, No. 200. p. 1130. (contrary to the older case, June 19 1731, Creditors of Merchiston, No. 261. p. 1233.) it had been found, that infeftment on an heritable bond, granted for a *novum debitum*, though taken within sixty days of bankruptcy, does not fall under the act 1696. But, he contended, that in that case there had been no undue delay in taking infeftment; and, at least, much less than in the present, where there was reason to presume it had been postponed intentionally, till the husband was on the eve of bankruptcy.

The pursuer further contended, that Milne's own infeftment, which was necessary to support the defender's, being a voluntary act on his part, was struck at by the statute; June 5, 1793, Brough's Creditors against Sparkie and Jollie, No. 222. p. 1179.

Observed on the Bench: The defender was entitled to complete the security, by expeding infeftment in her husband's person as well as her own; and therefore this is not to be considered as the act of the husband.

The petition was refused without answers.

Lord Ordinary, *Craig*. For the Petitioner, *Gillies*. Clerk, *Home*.

D. D. *Fac. Coll. No.* 140. *p.* 315.

1800. *May* 21.

The TRUSTEE for the CREDITORS of ROBERT MACLAGAN, *against* DOCTOR MACLAGAN.

No. 11.

A person in apparency, having grant-

ROBERT MACLAGAN had right to the fee, and his mother to the liferent, of certain heritable subjects, to which they had not made up titles.