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.

No. 11. ed to a creditor a disposition *ex facie* absolute, but qualified by a back-bond, upon which the disponee immediately took infeftment; and the disponer's own titles having been completed three years after, and within sixty days of his notour bankruptcy, the disponee's preference was found not to be affected by the act 1696, C. 5.

In February 1788, they owed Dr. Maclagan £800. In March 1794, he advanced them £400 more, on his receiving a disposition to the property, *ex facie* absolute, and for a certain sum of money paid as its price; in which they became bound * to make up complete titles in their persons, upon their own "proper charges, and to grant all necessary and proper deeds for procuring "themselves infeft."

Robert Maclagan at the same time addressed a letter to Dr. Maclagan's agents, authorising them to get him served and retoured heir in general or special to his predecessors.

Dr. Maclagan was immediately infeft, and his infeftment duly recorded.

In May 1794, the Doctor granted a back-bond, bearing that he held the disposition only in security of the £1200. with interest, and the expenses of completing his titles to the subject, to account of which he acknowledged having received £18. 18s. from the disponers.

From the state of the titles, a litigation in the Court of Session became necessary, before they could be completed, and it was not till the 16th December 1796, that Robert Maclagan (his mother being by this time dead) was infeft on them.

His estate was sequestrated on the 14th January 1797.

The Doctor having claimed a preference on the heritable property, the trustee, with concurrence of the creditors,

Objected: As Robert Maclagan and his mother were not infeft at the date of the disposition to the claimant, his right under it, though clothed with infeftment, flowing *a non habente*, remained personal. He had indeed a right of action against them to make up their titles, which, when completed, would, in a question with them, have, *jure accrescendi*, made his own infeftment effectual. But Robert Maclagan's bankruptcy, in terms of the act 1696, C. 5. as extended by 33d Geo. III. c. 74. before his infeftment, operated as a *medium impedimentum*, which prevented him from doing any voluntary act, by which the interest of his creditors could be affected.

The right of Dr. Maclagan, before his author's infeftment, resembled that of a purchaser on a minute of sale, without procuratory and precept, or a creditor in a personal bond, containing an obligation to grant an heritable security, and neither a disposition in the one case, nor an heritable security in the other, can be granted within sixty days of bankruptcy; Bankt. B. 1. Tit. 10. § 104; 5th June 1795, Creditors of Brough against Spankie and Jollie, No. 222. p. 1179.

Further, considering the disposition as a security for a debt, part of which was incurred a year before its date, as it derives its supposed effects, as a real right, entirely from Robert Maclagan's infeftment executed within sixty days

* It did not appear explicitly from the papers, whether the titles were made up by Dr. Maclagan's agents, in pursuance of the mandate addressed to them, or in consequence of subsequent authority from Mr. Maclagan.

No. 11. of bankruptcy, it is reducible so far as granted for a prior debt; 5th June 1793, Creditors of Brough against Duncan and Jollie, No. 216. p. 1160.

Answered: From Dr. Maclagan's disposition being *ex facie* absolute, and his infeftment being taken and recorded so long before Robert Maclagan's bankruptcy, his creditors cannot pretend that they were induced to trust him on the faith of his heritable property, or that the disposition was executed with an intention to defraud them. And when Robert Maclagan was infeft, the Doctor's infeftment, *jure accrescendi*, became necessarily effectual from its own date, on the same principle that, where a person in apparency has granted various rights, upon which infeftments have been taken, when his right is afterward completed, the first in date is preferred; 22d December 1738, Creditors of Gordon, No. 23. p. 7773; 10th December 1742, Paterson against Kelly, No. 24. p. 7775.

The sequestration cannot have the effect of a *medium impedimentum*, as it was posterior to both infeftments.

Further, the act 1696 strikes only against voluntary deeds executed by the bankrupt, in favour of one or more creditors to the prejudice of the rest, and does not apply to deeds done in his own favour, such as making up titles, for which he may have other reasons besides validating his prior deeds, though a consequential preference may arise from them; 31st July 1724, Creditors of Watson against Cramond, No. 223. p. 1180; February 1728, Creditors of Graitney, No. 195. p. 1127.

Indeed, the terms of the disposition, back-bond, and mandate, addressed to Dr. Maclagan's agents, shew, that it was meant that Robert Maclagan's titles should be made up by the claimant, and were a sufficient authority for doing so, without Robert's further interference.

Replied: The act 1696 applies to every deed of the bankrupt, by which the interest of his creditors may be directly or indirectly affected.

The titles of the bankrupt could not have been completed without either an action against him, or some voluntary act done by him within sixty days of his bankruptcy. The prior mandate was revocable; was confined to a particular purpose, and did not authorise the whole steps necessary for completing the titles.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: Robert Maclagan might have been compelled to make up his titles, and therefore his doing so cannot be considered voluntary.

Besides, the mandate or procuratory granted before the sixty days would have been a sufficient authority for the creditor doing so, even after the sequestration; 24th May 1797, Buchan against Farquharson, No. 106. p. 2905.

The Lords unanimously repelled the objection, and found the creditors liable in expenses.

Lord Ordinary, *Dunsinnan.* For the Trustee, *W. Robertson.* Alt. *Fletcher.*
Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 177. *p.* 400.