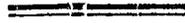


No. 43.

1758. January 22. DICK *against* FERGUSON.

The Lords found a trust lapsed by the non-acceptance of the trustee. As the deed conferred a discretionary power, the Lords refused to exercise it themselves.
Sel. Dec.

* * This case is No. 167. p. 7446. *vide* JURISDICTION.

1758. June 30. Mr. ANDREW DRUMMOND *against* M'KENZIE of Redcastle.

No. 44.

Where a trust is at an end, what is the form of establishing the subject in him for whom the trust was created.

Sir Robert Monro of Fowlis, May 1738, granted an heritable bond for £.4000 Sterling to Mr. Andrew Drummond, who, of the same date, granted a back-bond, acknowledging that he was creditor *proprio jure* in the sum only of £.2000 Sterling; and as to the remainder, that he was trustee for behoof of certain other persons therein named.

Sir Robert, in corroboration of the heritable bond, did, July 1738, assign to Mr. John Gordon, merchant, "in trust, and for the use of the said Mr. Andrew Drummond, and the other persons named in the heritable bond, their heirs, &c." certain subjects; and in particular, an adjudication deduced by him against the estate of M'Kenzie of Redcastle.

Mr. Gordon having died without drawing payment of the sum contained in the said adjudication, Mr. Andrew Drummond, upon the title of the adjudication, brought a process of mails and duties against the tenants of the estate of Redcastle.

M'Kenzie of Redcastle appeared for his interest, and objected, that as the adjudication was conveyed to Mr. Gordon, it descended to his heirs by his death; and therefore, that they only can insist in a process of mails and duties,—not the pursuer, who cannot effectually renounce or discharge the adjudication.

This case being reported to the Lords, they agreed upon the following propositions. *1mo*, That the trust being given to John Gordon only, and not to his heirs, was at an end by his death; for there cannot be a trust without a trustee. *2do*, That Sir Robert Monro being divested by the trust-deed, the adjudication does not return to him by the death of the trustee. *3tio*, That though the person for whose behoof the trust is created, may in his own name insist in every personal action that arises from the trust-deed, yet that none but the trustee can insist in any real action, or any action founded on a real right; because the trustee is vested in the property or real right, not the person for whose behoof the trust is created.

These points being settled, it followed, that there was a subject to which Mr. Drummond had the equitable title, but yet left *in medio* without a legal title, Mr. Gordon the proprietor and trustee being dead; and the important question was

in what manner this equitable right was to be made effectual? several methods were proposed that were found insufficient. But at last the Court judged, that the true method for making the equitable right effectual, was to conjoin with it the property by authorising Andrew Drummond to raise a declaratory adjudication, calling all parties that might appear to have interest, viz. the representatives of John Gordon and of Sir Robert Monro, and concluding that the trust subject thus left *in medio* should be adjudged to him in order to make effectual the purposes of the trust. This can be done by the Court of Session supplying the defects of common law; and that such a process is competent cannot be doubted, when it is considered, that an action was competent to Andrew Drummond against John Gordon himself, to denude of the trust subjects in his favour; and the declaratory adjudication comes in place of this process. In the mean time, the Court found it necessary to sustain Redcastle's objection.

No. 44.

Sel. Dec. No. 147. p. 203.

1766. February 12. JAMES HILL *against* MARGARET HUNTER.

In a contract of marriage, Charles Hill the bridegroom became bound to settle the sum of 3000 merks to himself and Margaret Hunter the bride in conjunct fee and liferent, and to the children of the marriage in fee, and trustees are named in the usual terms as follows, "And lastly, it is agreed, of consent of parties, that all execution necessary shall pass upon the present contract, at the instance of the said James Hunter and Charles Hunter his son, and James Hunter in Inchmichael, or any of them; and failing of them, at the instance of their heirs, or the heirs of any one of them, for seeing the provisions made effectual in favour of the said Margaret Hunter, and the children of the marriage."

No. 45.
Trustees in a contract of marriage. Does the office fall by the death of the husband?

Charles Hill by his industry increased his original stock; and without lending out the 3000 merks in terms of the marriage articles, he made a settlement of his whole means to his wife, and to Agnes Hill his only child, by which both of them got much more than was provided to them in the contract of marriage. Further, he nominated certain persons to be tutors and curators to his daughter during her pupilarity and minority.

The trustees named in the contract of marriage brought a process against the widow, as intromitter with her husband's effects, to lay out the said sum of 3000 merks in terms of the contract. The only point of the cause that deserves to be kept in memory concerns the pursuer's title, which was objected to upon the following ground. In ordinary contracts, each party is left to enforce execution for his own interest. A contract matrimonial is singular; for to leave upon the wife or upon the children the care of their own interest, would be a never failing seed of family discord. To prevent this evil, trustees are named, whose province it is to make effectual the interest of the wife and of the children. From the very nature of this office it can only subsist while the husband is alive; for by the husband's death