

No. 34. diate intromission against the debtors, the preferable debts in the first gift being once satisfied; and even against the first donatar, if he had extended his intromissions beyond his title: But no action could be competent against the donatar himself, and far less now against his representatives, to compel them to continue their intromission beyond their own interest. Answered to the *second*, Since there is no title, there is no presumption that the donatar or his representatives would continue their intromission farther than in satisfaction of their gift: The creditors then had no reason to trust to this; and if they neglected to take out a second gift, the pursuers have their own argument to retort against them, That they alone ought to suffer thereby.

“ The Lords found the representatives not liable in diligence.”

*Rem. Dec. v. 1. p. 91.*

1729. February.

OGILVIE against LYON.

No. 35.

A debt was assigned in trust, in order to lead an adjudication. The adjudication was led upon the trust-debt, and several others belonging to the trustee; but there being many preferable diligences, the trustee bought in one of them, and by virtue thereof got into possession. In a process at the cedent's instance against his trustee, to account for his intromissions, it was found, That the apprising purchased in by the trustee could not expire in his person in prejudice of the apprising led at his instance as trustee for the pursuer, but that the same must be understood as purchased in for their common behoof, the pursuer always being liable for his proportion of the money paid for the purchase.—See APPENDIX.

*Ed. Dic. v. 2. p. 477.*

1737. June 21.

BEATON of Kilconquhar against M<sup>c</sup>KENZIE of Fraserdale.

No. 36.

One purchased an estate, and took a conveyance to his author's disposition with procuratory and precept.

While a prisoner, in consequence of being engaged in the Rebellion 1715, his friends, in order to protect his estate, infest his author.

Having returned home unattainted, he contracted debts, and conveyed to certain creditors the precept in security, ignorant that it had been exhausted. He died bankrupt; and these creditors applied to his author, from whom they obtained infestment.

Other creditors brought a reduction, on the act 1696, of this act of the author, as a trustee who had alienated after his constituent had become bankrupt. The defence was, that the author was no trustee. The conveyance did not denude him of his personal right. He might have infest himself, and made a second convey-

ance in favour of another. He was entitled to exercise his power in favour of certain creditors of the bankrupt. It does not alter the case, that infestment was taken in his name, without his knowledge. This does not constitute him a trustee for the common debtor. He cannot be put in a worse situation without his consent, therefore might lawfully use the infestment taken in his own name, as if taken by himself for his own behoof.

The Lords found the infestments granted by the author not reducible upon the act 1696.—See No. 207. p. 1150. See APPENDIX.

No. 36.

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1741. July 16. SPRUEL against SPRUEL CRAWFURD.

Found, That where a trust does not arise from any deed or disposition of the truster, but from the voluntary interposition of the trustee, as *negotiorum gestor*, the act of Parliament 1696, declaring trust no otherwise proveable than by oath or writ, takes not place.

*Kilkerran, No. 1. p. 581.*

No. 37.

In what cases the act 1696 takes place.

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1741. November 24. RANKINE and Others, against GAIRDNER.

Found, That where a disposition was granted to a trustee, with power to dispose of the subject, and to apply the price to the disponent's creditors, such trustee may lawfully pay *primo venienti*, the same being done *bona fide*.

*Kilkerran, No. 2. p. 581.*

No. 38.

Powers of a trustee for selling an estate, and paying creditors.

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1747. November 24.

The DUKE of HAMILTON'S CREDITORS against The TRUSTEES of the DUCHESS.

Charles Earl of Selkirk, in virtue of a commission from Anne Duchess of Hamilton, compounded with certain commissioners appointed by the French King, in consequence of the treaty of Utrecht, the right competent to the family of Hamilton upon the duchy of Chatelherault, for 500,000 livres, to be secured upon the Town-house of Paris at 4 per cent.

James Duke of Hamilton, son to the Duchess, having died indebted, she disposed to the Earl of Selkirk and Lord Pencaitland, jointly, and failing either of them, to the survivor, and failing both, to the heirs of tailzie in the estate of Hamilton, "as trustees for such of the said creditors as they should agree with, in manner and in the terms after-mentioned, the yearly rent and principal sums contained in the said contract, under the provisions and conditions after inserted;" which were, that they should apply what they recovered to payment of her own

No. 39.

A disposition to trustees for the use of the creditors of another than the disponent, with power to them to prefer such as they pleased, provided that none of the creditors should have right to affect the subject disposed, or