

THE COURT having unanimously acquiesced in this opinion, the above mentioned intimation was accordingly ordered.

No 174.

For the Petitioner, *Dickson*.

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*Fol. Dic. v. 3. p. 348. Fac. Col. No 16. p. 28.*

1789. November 20.

JAMES-ANNE MACDOWALL and Others, *against* ARCHIBALD MACDOWALL and Others.

THE grandfather of James Anne-Macdowall executed a deed, conveying his landed property to certain persons, and to one or more of them as trustees, and to their assignees and disponees, excluding their heirs and executors; whom failing, by death or non-acceptance, to his only son James Macdowall, his heirs and assignees.

The purposes of the trust were,—the payment of the granter's debts, which were considerable;—the settlement of a suitable annuity on his son;—the sale of so much of the lands as might be necessary; and the borrowing of money.

And it was declared, ' That after payment and extinction of the debts and obligations owing and prestable by the granter, and after deduction of all necessary charges laid out in the execution of the trust, the trustees, or a quorum of them accepting, or the last survivor of them, should be obliged to denude of the lands, &c. to and in favour of James Macdowall the granter's son, and the heirs whatsoever to be procreated of his body; whom failing, to Elisabeth Macdowall the granter's daughter, and the heirs whatsoever of her body; whom failing, to the heirs named in a separate deed executed by the granter.'

Of the trustees thus named, only two undertook the management; one of these afterwards died, and the other, who was a merchant, having become bankrupt, an action was brought after the death of James Macdowall, the granter's son, who had left one daughter James-Anne Macdowall, for obliging the surviving trustee, on account of his insolvency, to convey the subjects to James-Anne Macdowall, or to any other person to be named trustee by the Court. At this time the trust-estate was very much encumbered, so that the same extensive powers which had been given to the trustees, seemed to be necessary for its management. James-Anne Macdowall was an infant, and her mother had been appointed factrix *loco tutoris* to her, in virtue of the act of sederunt in 1756.

Some of the Judges were of opinion, that bankruptcy, unless attended with circumstances of fraud, did not incapacitate a trustee, although it might au-

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An only surviving trustee having become bankrupt, the court declared the trust at an end, and appointed the trustee to denude in favour of the heir.

No 175. thorise those interested in the management to require some security from him ; but the majority seemed to be of a different opinion. As, however, the trustee was desirous of giving up the office, the determination of the Court in this case cannot be considered as entirely decisive on this point.

As to the nomination of a new trustee, it was observed, that at an early period, the Judges in the Court of Session had exercised very extensive powers, in supplying the defects of family-settlements and trust-rights, as well as by giving particular instructions to those who had been named by them for managing the estates of persons under age, or labouring under other temporary disabilities. But of late much more caution had been used ; and now it was only in the case of trusts created by statute, or where, as in estates destined to charitable uses, no person had any immediate interest in the management, that the Court would interpose in this manner ; 24th July 1785, Paton, No 29. p. 4071.

The interlocutor was in these terms :

“ THE LORDS having advised the mutual informations for the parties, find the trust-right in question at an end by the bankruptcy of the surviving trustee, and the death and non-acceptance of the other trustees, and decern and declare accordingly ; and find the surviving trustee bound to denude of the trust-funds vested in his person, in favour of the pursuer James-Anne Macdowall ; and decern.”—See TRUST.

Reporter, Lord Justice-Clerk. Act. Wight. Alt. George Fergusson. Clerk, Home.  
C. Fol. Dic. v. 3. p. 349. Fac. Col. No 91. p. 165.

No 176. 1790. February 13. & March 2. GRANT, &c. Petitioners.

IN a case where the trustee appointed by a family-settlement had failed, the Court refused to name another trustee ; but, upon application from the parties, they named a *curator bonis* with the usual powers.

Fol. Dic. v. 3. p. 349.

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## S E C T. VIII.

### Power in the Court of Session to name Factors.

No 177. 1790. July 12. CARMICHAEL, Petitioner.

SIR GEORGE LAUDER of Iddington being deceased, and his immediate younger brother Robert, and apparent heir, being abroad as chirurgion to a ship in the