

1784. *August 4.*MRS. JACINTHA DALRYMPLE *against* JOHN MURRAY and Others.

No. 47.

Trustees liable for factors, by the conception of the trust, removed a factor for mismanagement. The second factor also acted improperly. A legatee, who had been dilatory in demanding payment, and to whom no fund now remained, was found not entitled to payment from the trustees, on the footing of their liability for their factors.

*Fac. Coll.** * This case is No. 67. p. 3534. *voce* DILIGENCE.1789. *November 20.* M'DOWAL *against* M'DOWAL.

No. 48.

The Lords found, That a trust-deed fell by the bankruptcy of a surviving trustee.

*Fac. Coll.** * This case is No. 175. p. 7453. *voce* JURISDICTION.1791. *May 18.* MACNAIR *against* MACNAIR.

No. 49.

Trust containing whimsical clauses.

Macnair, proprietor of some houses in Glasgow, conveyed the subjects, and his whole goods and gear, to his eldest son, as trustee for the truster's spouse and children after named; and failing him to his eldest heirs-male; and failing heirs-male, the truster's eldest heir-female for the time, and so on through his whole heirs-male and female, the eldest heir-female always succeeding without division; failing all of whom, his nearest heirs and assignees whatsoever. The deeds makes no provision for the minority or incapacity of any trustee, nor for his refusing to act; and its purposes are declared to be, 1^{mo}, To pay 4s. a-day to his widow; 6s. to his eldest son; 4s. each to a younger son and the eldest daughter; and 3s. each to three younger daughters, *per diem*. Certain sums are likewise directed to be paid to the descendants of the testator, in all time coming, on their attaining the age of twenty-five; and in case any of these descendants shall be in indigent circumstances, they shall receive 1s. weekly, from the age of eight to fourteen, and £.5 of apprentice-fee. And the deed provides, That the trustee shall draw 5 *per cent.* on all the rents and debts he shall uplift. In a reduction of this deed

at the instance of the heir, it was urged, *1mo*, That it was *ultra vires* of the granter, the effect of it being to sink the property of the subjects, and put them in trust to perpetuity; and, *2do*, That its clauses were absurd, irrational, and in certain events would come to be utterly inextricable. Urged in defence, *1mo*, That the testator, being absolute proprietor, might fetter his property in any manner he pleased, which was not contrary to law; and that the purposes of the trust were benevolent; *2do*, That there was nothing irrational or inextricable at present, in the circumstances attending this trust; and if a situation should eventually occur, where the trust should become inextricable, it would then be time enough to declare it void. The Lords repelled the reasons of reduction.—See *Dick contra Fergusson*, No. 43. p. 16206.

No. 49.

Fol. Dic. v. 4. p. 382.

1793. January 22.

ALEXANDER ALISON *against* The TRUSTEES of the EARL of DUNDONALD.

Thomas Earl of Dundonald conveyed his whole estate, real and personal, to trustees, for the purpose of paying his debts, and providing for his family.

The Earl died in 1778. The trustees some time after took infestment on the deed, and acted under the belief that his subjects, if sold to advantage, would be sufficient for fulfilling all the purposes of the trust.

In order to pay the interest of the debts, and extinguish those which were most pressing, they borrowed near £.3000, on their own personal security. Of that sum, only £.325 was borrowed after February 1782.

Among other debts, the Earl owed £.1000 to a society called the Excise Corporation, for which Mr. Alison is cashier.

During the years 1779, 1780, and 1781, (and even before the trustees borrowed any money), Mr. Alison repeatedly demanded, not only the arrears of interest, which the trustees paid, but the principal sum, unless some additional security were given; but he did not constitute the debt against them till February 1782. And in December, 1782, he led an adjudication against the estate, in which the trustees were called as defenders, and afterwards brought a process of ranking and sale.

The lands were sold, and, contrary to expectation, the funds turned out to be insufficient to pay the debts of the Earl.

In the ranking, the trustees claimed to be preferred to Mr. Alison, for the sums they had borrowed, and applied to extinction of the Earl's debts, and

Pleaded: It is the duty of a trustee for creditors to bring them all into the field, by a multiplepounding, and he cannot prefer one creditor to another, his appointment creating a strong presumption that the truster is insolvent.

No. 50.

The trustees in a family-settlement may pay to the creditor *primovenienti*, till interpellated by legal diligence, and need not bring a multiple-pounding.