

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

- No. 45. the widow can prosecute her own interest without the least restraint; and so can the children with the assistance of the tutors and curators if they be under age, and without any assistance if they be of perfect age. It carried however by a narrow plurality, to sustain the pursuer's title.

Sel. Dec. No. 240. R. 314.

1767. March 6. EARL OF CRAWFORD *against* HEPBURN.

No. 46.
A trustee is bound to communicate easements.

The Earl of Crawford, being debtor in sums beyond the value of his effects, did in the year 1678, dispose to Thomas Moncrieff, for the Earl's own behoof, and for behoof of his creditors, contained in a list referred to, for their security and payment, his whole lands and other funds therein mentioned; empowering him with advice of the creditors, to sell the said whole lands, superiorities, teinds, offices, &c. to transact the debts disposed to them, to appoint factors, &c. Though this deed was conceived in form of a disposition in security only, yet as the debts far exceeded the subjects, according to the value at that period, the Earl abandoned all thoughts of redeeming his estate, and left the creditors or their trustee to manage as they thought proper. After some years experience, the creditors being dissatisfied with the management of Thomas Moncrieff, compelled him in a process to convey the subjects to other trustees named by them, who chose Robert Hepburn, writer to the Signet, their cashier, for receiving the rents from the factors, and distributing the same among the creditors. Robert Hepburn acquired some of the debts from Robert Cleland, one of the trustees who had transacted the same with the creditors, and other debts Robert himself transacted with the creditors. In process of time the value of the lands rose so high as to give the Earl a prospect of a reversion; and he having brought a process for redeeming the lands, the question occurred, Whether Robert Hepburn was bound to communicate the easements of the debts acquired by him? The Lord Ordinary, "In respect that the Earl of Crawford claiming easements of the debts acquired by Hepburn, does not undertake to prove that these debts were purchased by commission from the creditors, nor that any share of the common fund or annual produce of the estate was applied for purchasing them, finds Mr. Hepburn not liable to account for the easements." In reviewing this interlocutor, the Court thought the case worthy of a hearing in presence, which led them to alter the interlocutor of the Ordinary, and to pronounce, "That Mr. Hepburn is obliged to communicate to the Earl of Crawford the easements which the deceased Mr. Robert Hepburn his grandfather got in compounding the debts acquired by him."

This judgment is perfectly agreeable to equity and expediency, which did appear as follows. The trustees first named by the Earl, and those afterward by the creditors, were bound to direct their conduct for the common benefit of both, as both were equally interested in performance of the trust. They were bound first to make effectual the funds conveyed along with the lands, and to transact