

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