at the instance of the heir, it was urged, 1*mo*, 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, 2*do*, That its clauses were absurd, irrational, and in certain events would come to be utterly inextricable. Urged in defence, 1*mo*, 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; 2*do*, 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.

No. 50.
The trustees in a family-settlement may pay to the creditor *primo venienti*, till interpelled by legal diligence, and need not bring a multiplepoinding.

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 infeftment 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 multiplepoinding, and he cannot prefer one creditor to another, his appointment creating a strong presumption that the truster is insolvent.

No. 50. But the trustee in a family-settlement is in a different situation. It is his duty to manage the affairs of his deceased friend *bona fide*, and in a rational manner; like him, while not interpelled by legal diligence, he may reduce effects into money, and discharge demands as they occur. Were it otherwise, no person would undertake an office of that nature; 8th February, 1710, Rankine against Johnston, *voce* TUTOR AND PUPIL.

The trustees in the present case acted *optima fide*; and as they might have sold the subjects to make the payments objected to, they must be indemnified for the obligations undertaken to prevent a sale at a disadvantage, nor are they obliged to denude till they are so.

Answered: When the trustees borrowed the money for which they are now demanding a preference, they were not ignorant of the existence of this debt, and that payment of it had been demanded. The trust gives them no powers, nor were they in *bona fide* to prefer one creditor to another. They can be in no better situation than the creditors to whom they have made payment; and having done no diligence, they must be postponed.

The Lord Ordinary had preferred the trustees only for payments made in discharging interest upon the whole debts prior to the sequestration, to the extent of the rents, and in discharging certain privileged debts, but not for the money expended in extinguishing the personal debts of the Earl. But, upon advising a reclaiming petition, with answers, the Court (5th December, 1792) approved of the order of ranking produced by the common agent, according to which they were preferred even for the latter.

And upon advising a second reclaiming petition and answers, it was

Observed on the Bench: The trustees in a family-settlement need not raise a multiplepoinding, but, like the heir, may pay *primo venienti*, until legally interpelled.

The Lords "adhered."

Lord Ordinary, *Monboddo.*
For Mr. Alison, *G. Buchan Hepburn.*
For the Trustees, *George Fergusson.*
Clerk, *Menzies.*

D. D.

Fac. Coll. No. 17. *p.* 35.

1793. *March* 8. YORK-BUILDINGS COMPANY *against* MACKENZIE.

No. 51.

The Lords found, That a trustee for creditors was under no disability to purchase the debtor's lands at a judicial sale.

But this decision was reversed on appeal.

*** This case is No. 54. p. 13367. *voce* RANKING AND SALE.