[*8th July* 1834.]

No. 19. JAMES HAMILTON, Appellant.—*Attorney General (Campbell)—Lord Advocate (Jeffrey).*

Miss MARGARET LITTLEJOHN, Respondent. —*Dr. Lushington—Murray.*

Trust—Right in Security—Competition.—A party granted heritable bonds over his estate, and thereafter executed a trust deed for behoof of his creditors, reserving to himself a certain annuity, and providing that the trust should not cease on the death or resignation of the trustee, and pointing out the manner in which a new one should be chosen; and the creditors acceded to it:—Held (reversing the judgment of the Court below), that, although the trustee was dead, an heritable creditor was barred from applying for sequestration of the rents.

2D DIVISION.

IN the year 1810 Hamilton (the appellant) purchased the estate of Kames from the trustees of the Honourable William Macleod Bannatyne. He paid a portion of the price, but allowed the remainder, viz. 20,000*l.*, to remain a real burden upon the lands; and, in security of that sum, granted certain bonds of corroboration in favour of the trustees. One of these bonds was for a sum of 10,000*l.*, of which, to the extent of 667*l.* 10*s.*, the trustees, in October 1815, granted an assignation to Mr. Michael Linning, writer to the signet, who was infeft in the lands, and who afterwards, on the 19th of

November 1818, transferred the debt and corresponding security to Mr. Peter Littlejohn, the respondent's brother, who also took infeftment. On Littlejohn's death, the right to one half of the debt thus vested in him opened to Miss Littlejohn (the respondent) as one of two heirs portioners; and she, having made up titles to the same, became an heritable creditor on the estate of Kames to that extent. Hamilton having afterwards become insolvent, it was arranged among his creditors that a trust should be executed by him, conveying his whole property to trustees for their behoof. A trust deed was accordingly executed in favour of Mr. John Campbell quartus, W. S., or such person as he might assume; whom failing, such person as the creditors might appoint. Its objects were declared to be, 1st, for payment of the expense of management and public burdens affecting the estate; 2dly, an annuity of 600*l.* to Hamilton during life; and, 3dly, for payment of the creditors according to their respective rights and preferences. It contained a clause, declaring that, notwithstanding the death or resignation of the trustee in possession before the purposes of the trust should have been fully executed, the trust should not become void, but should stand and subsist as a security to the creditors; to whom, notwithstanding such decease, a power was given, if they should think proper to execute it, of reviving and keeping alive the trust, by choosing, from time to time, such trustee or trustees as they should think proper. A deed of accession was soon thereafter executed by the creditors, and, among others, by Linning, in which they bound themselves, and those who might thereafter have right to their respective debts, to conform to the trust deed; and they cove-

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nanted not to raise or follow forth any separate action or execution for their debts during the subsistence of the trust. Mr. Campbell took infeftment under the trust deed, and entered upon the duties of the trust; but he soon after renounced the office, and was succeeded by Mr. Wright, who continued to act as trustee until May 1824, when he died without having assumed any person as his co-trustee. The estate remained unsold. No new trustee was elected in Mr. Wright's place; but, for some time after his death, Mr. M'Crae, who resided on the spot, was employed to uplift the rents for behoof of the creditors. This, however, it was alleged, was done very irregularly, and the affairs of the estate were in consequence in a ruinous condition.

In 1830 Mr. Smith, a creditor, raised an action of maills and duties, and applied for sequestration of the estate, which was opposed by Hamilton in respect of the trust; and the Court, on the 10th of July of that year, refused the petition.*

Thereafter, in 1832, Miss Littlejohn resolved to pursue a process of ranking and sale of the estate, and with that view raised an action of maills and duties against the tenants, and similar actions were raised by other creditors who had acceded to the trust. She thereupon presented a petition praying for sequestration of the estate, and the appointment of a judicial factor, with the usual powers. This application was resisted by Hamilton, principally on the grounds:—1st. That it was incompetent, in respect that the Court had refused a similar petition by Smith. 2d. That the trust created

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* See 8 S. & D., 1063.

by the deed of 1815 was still subsisting; that it had been expressly acceded to and confirmed by the respondent's author; that she herself had acted under that trust, and homologated it many times; and that, in virtue of that deed, there were certain persons in possession of the estate, whose rights could not be summarily superseded by a sequestration: 3d. That the application was barred by the terms of the deed of accession, under which the acceding creditors (among whom was the respondent's author) bound themselves not to follow forth any separate suit or diligence against the estate: 4th. That her author, and the respondent herself, were parties to the appointment of Mr. M'Crae as factor, and that she, therefore, had no right to defeat the arrangement then entered into by the heritable creditors for their general and joint benefit: And, 5th, That it was unjust that he should be deprived of his interest under the trust deed, viz. the stipulated annuity of 600*l.*, by a combination among the creditors to defeat the trust.

The Court, on the 15th of December 1832, pronounced this interlocutor:—

"The Lords having resumed consideration of this "petition, and heard counsel, sequestrate the rents of "the estate of Kames, as craved in the prayer of the "petition; appoint Robert Thom, cotton spinner at "Rothsay, to be factor under the sequestration, with "the usual powers, and with power to receive the by-"gone rents of the estate; he finding security in terms "of the act of sederunt."

Hamilton appealed.

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* 11 S. & D., 217.

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Appellant.—The trust deed, and the deed of accession form a contract, not only between the appellant and his creditors, but between the creditors themselves, from which none of the parties are entitled to resile. There is at this moment a subsisting trust, and a subsisting accession to that trust; and the obligation incumbent on the respondent to conform thereto is established by many acts of homologation. Much slighter acts of homologation than those of the respondent are sufficient to constitute a constructive accession.* Were this one of those constructive cases, the respondent would be bound by the acts and deeds of her author, as well as her own acts and deeds, to conform to this trust. She and her author have both taken under it, and derived large benefits from it. They exercised the powers of electing trustees under it. They, as well as the whole other creditors, acted under this trust till recently; and it is only now, with a view of defeating the appellant's preferable annuity, that they attempt to set it at defiance. But, further than this, the respondent is expressly barred by positive obligation from instituting any "action, suit, "diligence, or execution" whatever against the appellant or his estate.

Besides, the application was not made under such circumstances as can alone legally warrant sequestration of a landed estate or the rents thereof. Sequestration is a severe and oppressive diligence, and will not be permitted to be resorted to by creditors, or granted by a court of law, but under very special cir-

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* M'Vicar against Creditors of Baillie, 18th Feb. 1762 (2 Bell Com., 499); Heriot against Farquharson, 27th June 1766, Mor. 12404; Trustees of Croll against Robertson, 7th May 1791, Mor. 12404; Borthwick against Shepherd, 13th Nov. 1832, 11 S. & D., 1.

cumstances. It is a judicial transmission of property from the existing owner to the creditors; and it is incompetent to award it, without descending into an inquiry as to the foundation of the debt, and without the subject being brought before the Court by the perfected diligence of creditors.* Here no inquiry whatever has been made concerning the foundation and extent of the claims, nor is the estate attached by the diligence of any creditor, so as to have warranted such a proceeding; for the only action in Court is a petitory action by the respondent, whose claim of debt is denied, and that action resisted; and the defences for the appellant being not yet either finally sustained or repelled, it remains yet to be seen whether the respondent is well founded or not.

There is nothing, therefore, in this case to found a jurisdiction in the Court of Session to interfere in the management of the estate, or make a judicial appointment for that purpose. The estate is at this moment in the creditors, by special conveyance for special purposes. They are infeft in the property, under the conditions of the trust; and they have not only the power, but it is their duty, upon the resignation or death of any trustee, to appoint another to carry into effect the purposes for which the trust was created. Their not choosing to do so can neither give them the right to call upon the Court to do so for them, nor render it competent for the Court to interfere.†

Respondent.—The estate being insolvent, and the subject of the competing diligences of real creditors, it was competent for the Court of Session to award the

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* Erskine, b. ii. tit. 12. sec. 56. † Erskine, b. ii. tit. 12. sec. 55.

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sequestration, and appoint a judicial factor for collecting the rents and managing the property, and under existing circumstances, was not only expedient for the interests of all concerned, but absolutely necessary for the preservation of the rents, there being no one in possession of the estate, or legally entitled to collect the rents.*

It does not prejudice or affect the rights of the appellant, or of any other parties to these rents, whether under the trust deed, or any other titles or securities. It merely preserves the rents for the benefit of those who ultimately may be found to have the best right to them.

Neither is the respondent barred from applying for a sequestration by the trust deed, or the deed of accession. Though the trust deed may still exist, the trust itself does not; for there has been no trustee since 1824, and, confessedly, there is now no person in possession of the estate. Again, the obligation entered into by the creditors in the deed of accession, not to follow forth any separate suit or diligence against the estate, is expressly limited by the words, "during the "subsistence of the trust." As the trust does not subsist, this obligation is of course annulled.†

LORD CHANCELLOR.—My Lords, in considering this case I feel myself under considerable difficulty in coming to the same conclusion that the Court has done,

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* 48 G. 3. cap. 151. Erskine, b. ii. tit. 12. sec. 56; Graham v. Fraser, 13th Feb. 1745, Mor. 14345; Smith v. Hamilton, 10th July 1830, 8 S., D., & B., p. 1063.

† Stair, b. iv. tit. 1. sec. 27; Ersk. b. ii. tit. 12. sec. 55; Dict. voce Sequestr. passim; Paterson v. Anderson, 16th Nov. 1764, Mor. 14346; Bank of Scotland v. Ogilvie's Trustees, 13th Feb. 1829; 7 S. & D., p. 412.

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in ordering the sequestration; and the difficulty is not merely that which arises out of the situation in which the parties have voluntarily placed themselves, for I regard Miss Littlejohn, who has obtained the sequestration, to be the same as Mr. Linning, one of the parties to the trust deed; but that difficulty is not in a small degree, but materially, increased in my mind by the course adopted by the Court of Session almost upon the same claim, brought forward by another party, but bottomed upon the same security, namely, the deed assigned by Mr. Linning, first to Mr. Smith, who was the party thus applying, and now assigned to Miss Littlejohn, who upon that did make an application, and which application, in the second instance, succeeded—that event being contrary to the first. This difficulty compels me to look, in the first place, at the situation in which the parties placed themselves by the trust deed of 1815, and, in the next place, to look at the circumstances that may be supposed to distinguish these two cases that were attended by such opposite results. Now, not to go through the details which have already occupied your Lordships consideration, given by one of the parties, namely, the present appellant, it is sufficient to look at the obligations incurred by the opposite contracting parties to the trust deed. During the whole of the trust deed its aspect is that of a substitution of a trust management and administration for a judicial factor, management, and administration,—the preference to the former over the latter being clear, and, no doubt, being open to the parties. It is a common preference given by both parties, the debtor and creditor, to the one over the other mode of management, and an exclusion, I

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should say by that preference, acted upon and agreed to by the parties pro tanto of the other mode of management or administration. Is there any thing unintelligible in parties having both courses open to them, taking the one rather than the other? Are they of the same nature? No. Are they attended with similar incidents? Certainly not. Do they, above all, impose the same burthens upon the parties, or rather upon the estate? For that must be taken to be the common object of care to both parties, — first with the creditors, to co-operate their security, and for the debtor, with the same common interest as the others, charged with the same trust as the creditors, and interested in the surplus, if any, and in the meantime in his allowance out of the rents and profits. It is most material to consider, with a view to those interests, the reduction of price in managing the estate; for as to the management of an estate, I take it to be quite clear that a trust is preferable to a judicial administration, as being, upon the whole, more economical. Every body must have known cases where this comparison fails,—where the advantage was equal; or cases may occur where the balance was in favour of the judicial over private management,—where, as in England, the receiver has a poundage, and a trustee is not allowed any thing. In Scotland the case is different. Consequently the comparison is not so absolutely and necessarily in favour, in point of economy, of a trust management, as compared with a judicial, in Scotland, that it would be in England. But still, in the majority of cases, I apprehend it may be safely said that that circumstance exists, to give a preference to the one

over the other. But that is not necessary to my argument; for I may be said to be arguing it when I am exposing the difficulties. It is not necessary to say that the one mode of management is of necessity cheaper or preferable to the other: suffice it to say, that the parties have agreed upon one mode, and have chosen it; for what reason I care not,—it is quite immaterial. I can see why they should do so, which is quite enough, though Mr. Murray argued, — and his authority is very great upon any such question certainly, — that even if it were not more advantageous, as he said, to the estate, the judicial course should be taken in preference to the private management. But says Mr. Hamilton, you are the parties contracting with me; the question is, how have we bound ourselves? what have I given up? and what obligation have you incurred towards me? That is the question; and then will arise the next question: has the proceeding taken violated those obligations on the part of the creditors, and frustrated that stipulation that Mr. Hamilton had agreed for? It seems to me unnecessary to go much further, to satisfy your Lordships that there is ground for any great doubt and difficulty. And further, "We "do hereby agree, covenant, and oblige ourselves," say the creditors, says Mr. Linning, says Miss Littlejohn, —I am bound to read it so in this instance;—I bind and oblige myself that I shall not "raise, commence, "or follow forth any action, suit, diligence, or execu- "tion for arresting, attaching, or seizing the person of "the said James Hamilton, or the estate, subjects, sums, "debts, and effects belonging to him, during the sub- "sistence of the trust:" Suppose the words were, whereby the estate may be affected,—or some such

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words. Now, Miss Littlejohn, after having contracted such an obligation, with her eyes open, towards Mr. Hamilton, and Mr. Hamilton acting under it; for it is quite consideration enough to bind her, that Mr. Hamilton executed this deed, and gave up the estate that would not otherwise have been subject to his diligence, or not in that form; certainly he gave up these estates, over which there was no heritable security riding, and then executed the instrument I have read to your Lordships. Now, is it or is it not consistent with the obligation she incurred, that she should proceed by the way of this summary petition, before the Court of Session, for a sequestration and the appointment of a judicial factor? My Lords, in the first place, can it be denied that it is a suit? It is a short and summary suit; but it is a suit upon which execution follows, and confiscation; and it proceeds immediately to change the possession. It takes the possession out of the trustee who was in it by the deed, and clothed with the legal estate by that deed, and transfers it to the officer of the Court. That is all done. Mr. Thom may be a very excellent factor to manage the estate, and, for aught I know, it may be better for Mr. Hamilton and the estate, rather than a successor should be named to Mr. Wright;—but that is not what we are upon. The question is, whether a party, appointed in the way marked out by the instrument, shall be named? and it is in vain to tell Mr. Hamilton it is better for him. He says, I stand upon my own rights; you bargain not to sue me, and I insist upon this being a suit, and that argument is all but irresistible,—I should say irresistible, but for the authority of the Court below; and; as I said in the course of the argument, supposing

an undertaking is given by a party not to sue another, and he brings his action, there is not a Court in this country, or in Scotland, that will not make him pay all the costs in that action, brought in the teeth of the undertaking, and stay the proceedings. It is not sufficient to say that Miss Littlejohn cannot get the benefit of the trust deed; that is not the fault of Mr. Hamilton, it is the fault of her co-trustees, who do not revive the trust in a person appointed according to the provisions of the trust deed. Has not Mr. Hamilton a right to say that they first bound themselves not to sue; that is enough. What has occurred since he has had no concern in. He must not be damnified by any thing that they have done, or omitted to do, for their own benefit, letting the trust expire, or letting the machinery go out of use, when they would have put it in repair, unless you show that he has done something by which he has broken the bargain that would put it upon a different footing. It is said this is a summary proceeding, and little evidence is required. That is no reason for going without evidence; it is a petition with answers, upon which the Court makes a deliverance; but it is material as to the rights of the parties. It begins with what the Court looks to mainly: it changes the possession from the trustee to the factor. It is then said, that the trust may go on notwithstanding this. I confess myself not to be very well able to understand that; for if a factor is appointed under the Court, cadit questio, the trustee is displaced, and a new mode of administration is substituted by a judicial factor under the Court of Session, and that Court of Session might be an object of terror to the parties,—the terror of whose interposition might

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be the ground for joining in this trust deed; and then that Court is let in, against whose intervention I am entitled to say that the trust deed was mainly framed. Now, some such reasons as these must, I should apprehend, have mainly influenced the Court of Session in the other case; and I can well understand why that other case was disposed of in an opposite manner to this, and in the way we know it to have been. That case forms the second ground of my objection to the present proceeding, and I see not how it is possible for the two deliverances of the Court upon these two petitions to stand; but I wish to see more of the proceedings in that case, in order that I may be able to trace the differences between the two, and whether they can stand together. I should like to be furnished with the particulars of Smith and Hamilton. I know there were actions of maills and duties, and a petition similar to the present; but I wish to see the statement in that petition, and the answers, and I shall beg permission of your Lordships to let this case stand over, that I may see those petitions and answers. It appears to me that the present case was hastily or rapidly disposed of. I see no great traces of consideration; and it was probably thought, being in the simple and summary form of a petition, that the parties had no great interest either way, and it was thought that the Court might prevent the wasting of the assets, by appointing a judicial factor. I apprehend that will be found to be the case. I wish this case to stand over till I see those documents; but if I should find that those documents make a little difference between the two, I shall still feel pressed by the ground of objection, that this is a bargain and stipulation made. And how is a party to be secured by

becoming a party to a trust deed, if it is to be thus set aside? Trust deeds are to be encouraged, and not discouraged; they have been too much discouraged in England. These obligations have not sufficient force and effect, just as arbitrations have not had their full force and effect, either in equity or in law, in this country; but in Scotland it is not the same. They have not such a dread of ousting the jurisdiction of the Court, as it is called, that we have; but we have gone to a greater extent, and say that no man with his eyes open shall make a deed whereby he may submit to arbitration, and thereby oust the jurisdiction of a court of law; for no penalty shall be enforced at law, or enforced at all, however deliberately they may have bound themselves. To that extent, I would almost say excess, of nicety in Scotland they have not gone. These trust deeds are to be encouraged—they are the objects of favour—they are cheap and beneficial in many instances to the parties—they tend towards the saving of expense to the estate; and I do not see how, if this decision stands, that any person will be able, with confidence in the result of its operation, to bind himself and take an obligation from others, in the manner of the trust deed of 1815; because it may then be said, the instant any one chooses to change his mind, he is not only to do it when the object of the trust allows you to go to the Court of Session, but the Court will proceed upon the supposition there is an end of the obligation. Last of all, it is said, Oh, there is a competition of creditors in the actions for maills and duties; and I find the actions for maills and duties stated in the petition, and not stringently denied in the answers, and I must assume, upon this summary proceeding, the

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fact is so. That being the case, that leads me to observe that these actions of maills and duties are brought by persons who stand in pari causâ with Miss Littlejohn, —they are creditors; they are brought against Mr. Hamilton or his estate, but it turns out they are brought against both; they are nominally against Mr. Hamilton, which the parties are bound not to do, though they are really brought against the tenants of the estate, and the rents and profits, which the parties are also bound not to do. They themselves undertook not to bring actions; and then they go into court and bring actions of maills and duties. And what do they do upon that? They claim to have the power to set aside the private, and substitute for it the judicial management; that is to say, four or five of the creditors break their bargain with Mr. Hamilton,—they ride through the obligation in the bond of 1815, by bringing actions, after binding themselves to bring no actions; and then, they having committed one breach of the obligation, Miss Littlejohn and Mr. Smith commit a number of others; and their argument for their sequestration, which is contrary to their obligation incurred in 1815, is, True it is I have done so, and true it is that the Court of Session, when this very bond of mine, in Mr. Smith's case, was held not to be a ground for granting a sequestration in the case of Mr. Hamilton, nevertheless held I had a right to it, because at that time I was the only person who had violated the obligation; but now five others have violated it. Was any thing ever heard more contrary to all principle, and inconsistent with itself? And this last answer of mine gets rid of the repeated question put, whether there was an essential difference in Smith v. Hamilton, and

Littlejohn v. Hamilton. The answer was, there were actions for mails and duties,—that is saying there was a breach of the obligation; and now there are five other breaches of the obligation. As at present advised, I cannot recommend your Lordships to allow that this interlocutor should stand. Further consideration may throw new light upon the subject. I shall give it my best attention; and if the result of it should be, that I am impressed with a different view of the case, I shall state it to your Lordships. It will be unnecessary that I should trouble your Lordships any further, in any view of it. If I should be in favour of a reversal, I have given my reasons for it; and if I should be of opinion to affirm the interlocutor, the usage of your Lordships House dispenses with the necessity of giving any reasons, unless I should be able to answer the arguments I have advanced; and unless I can find that answer, I do not think that the judgment below can stand.

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Adjourned.

LORD CHANCELLOR.—My Lords, I stated at great length, when this cause was before your Lordships, the reasons why I could not agree with the decision of the Court of Session. I entered at length upon those grounds; I have since reconsidered it, and have had the communication from Scotland, which I promised to have, for the purpose of enabling me to alter my opinion, if it was unfounded, or to confirm it, if it was well grounded. The result of the inquiry is entirely in favour of that opinion; and upon the grounds, and for the reasons which were then taken down in writing in the usual way, and which, if looked to, will be

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found fully to support the judgment that was then suggested. This is a case in which, of course, no costs can be given, except if there have been costs in the Court below, those costs must be provided for.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said appeal be and the same are hereby reversed.

VIZARD and LEMAN—RICHARDSON and CONNELL, Solicitors.