[18*th March* 1836.]

JAMES HAMILTON, Appellant.—*Attorney General* (*Campbell*).

Miss MARGARET LITTLEJOHN, Respondent.

*Trust—Personal Objection.*—Held ex parte (reversing the judgment of the Court of Session) that a voluntary trust acceded to by creditors, which gave them a power to elect a new trustee in the event of death or resignation, but in the execution of which the creditors had not proceeded for nine years after the death of the trustee, was still a subsisting trust, and effectual to bar an action of maills and duties against the truster by one in right of a creditor who had acceded to the trust.

DIVISION.

Lord Medwyn.

IN the year 1810 the appellant purchased the estate of Kames from the trustee for Lord Bannatyne and his creditors, and paid a half of the price; the other half remaining by agreement a burden upon the estate. Mr. Michael Linning, W. S., acquired right in 1815 to the sum of 2,500*l.*, part of the price forming a burden on the estate. In the same year the affairs of the appellant got into a state of embarrassment. Various meetings of creditors were held, by whom the execution of a trust deed by the appellant was unanimously resolved on. Mr. Linning took a principal and active part at those preparatory meetings, revised the trust deed and relative deed of accession, and was appointed a member of committee, with whom the trustee was to advise.

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Accordingly on the 16th October 1815 the appellant executed a trust deed of his estates in favour of John Campbell, 4tus, W. S., the objects of which were declared to be for payment, 1st, of the expense of management; 2ndly, of a preferable annuity to the appellant during his life; 3dly, of the creditors according to their respective rights and preferences; and there was a special stipulation to the following effect:—"That although "the trustee shall resign or shall die, yet the trust shall "noways cease or become void, but the trust right, and "the infeftment to be taken in virtue thereof, and all "that may follow thereon, shall stand and subsist as a "security to the whole just and lawful creditors preceding this date, as well those that may herein be omitted "as those that are herein stated." And in the event of the resignation or death of the trustee, provision was made for the appointment of a new trustee by the creditors in his stead.

This trust deed was intended to add to the security of the creditors, both heritable and personal, for besides a personal estate other properties were conveyed for their behoof; and a general meeting of the creditors unanimously recommended an accession.

A deed of accession was drawn out, and subscribed by nearly the whole body of the creditors, including Mr. Linning, who ratified, approved of, and confirmed the trust, in the whole heads, articles, and clauses thereof, and consented that the same should take effect; and "bind and oblige us, and those who may hereafter have "right to our respective debts, to conform thereto," "and to the proceedings to be had in pursuance thereof, "in every respect as we are severally concerned. And "further, we do hereby agree, covenant, and oblige

" ourselves, and those for whom we act respectively, " that we or our constituents shall not raise, commence, " or follow forth any action, suit, diligence, or execu- " tion" against the person or estate of the appellant.

Mr. Campbell, the trustee, assumed the management of the estate, and performed the duties of his office for a period of about two years; but at the recommendation of the creditors he resigned, and Mr. Thomas Wright was elected by the creditors in his stead, in terms of the powers contained in the trust deed.

Mr. Campbell accordingly denuded of the trust estate in favour of Mr. Wright, who was infeft, and immediately assumed the exclusive management of the whole property, uplifted the rents, and otherwise intromitted with the estate.

In 1818 Mr. Peter Littlejohn, the brother-in-law of Mr. Wright the trustee, acquired right to the debt of Mr. Linning to the extent of 677*l.* 10*s.* During the whole course of Mr. Wright's management, which lasted for a period of seven years, Mr. Littlejohn during his life regularly received half yearly the interest of this debt from Mr. Wright as trustee, and after his death the respondent did the same. The respondent Miss Littlejohn on the death of Mr. Littlejohn succeeded as heir portioner to one half of the debt so acquired by him.

Mr. Strachan, W. S., had been appointed agent for the trustee and creditors under the appellant's trust, and he was also the private agent of Mr. Wright. By a deed executed by Mr. Wright shortly before his death, he was appointed one of the trustees on his estate, and finally acted as agent for Mr. Wright's trustees under that trust. He was also agent for the respondent and several of the principal creditors.

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On the death of Mr. Wright Mr. Strachan, on the 2d of July 1824, as agent for those creditors, as well as agent under the trust, called a meeting of the committee, in which " he stated to the meeting that he had thought " it necessary to call them together, to consider what " was proper to be done in the trust affairs in conse- " quence of the death of Mr. Wright the trustee, for " whom he formerly acted as agent. Upon referring to " the trust deed executed by Mr. Hamilton, it appears " that the trust was not at an end by the death of " Mr. Wright the trustee," &c. He then stated, that he had instructed the factor to continue his management and uplift the rents of the estate, upon which the committee came to this resolution:—" The committee ap- " proved of what Mr. Strachan had done in this respect, " and authorized Mr. M'Rae (the factor) to continue " his management accordingly until farther orders."

Another meeting of committee was called in the same manner, on the 4th of September 1824, when they instructed Mr. Strachan to call a general meeting of the creditors for the 10th of November following; " and in " the meantime directed Mr. Strachan to continue to " attend to the interests of the creditors, and correspond " with Mr. M'Rae at Rothsay, the factor employed to " receive the rents of Kames," &c.

In terms of this appointment a general meeting of the creditors was called by public advertisement, for the 10th of November 1824, which accordingly took place; and the preceding minutes of the committee having been laid before them, " they approve of the whole proceed- " ings of the committee, and confirm their appointment " of Mr. M'Rae as factor for uplifting the rents of " Kames, and direct Mr. Strachan to continue to cor-

" respond with him respecting his intromissions, and " report the state of his accounts to the next general " meeting," &c.—" The meeting in the meantime again " remit to the committee, &c.; and in general they in- " struct Mr. Strachan to attend to the interest of the " creditors, and from time to time to convene meetings " of the committee, for their instructions and assistance " in arranging the affairs of the trust."

Various other meetings of the committee and of the creditors accordingly took place from time to time, in all of which the respondent concurred, and Mr. M'Rae continued to act as factor for the creditors under the direction and control of the parties interested.

The appellant alleged that for several years before the death of Mr. Wright he had never received any part of the stipulated annuity under the trust deed.

Out of this contract betwixt the appellant and his creditors, arising from the trust deed and the deed of accession, several actions arose in the Court below, which it is unnecessary to state at any length. The respondent, founding on the heritable debt held by her, raised a process of maills and duties against the appellant and his tenants. He pleaded in defence that she was barred by the existence of the trust to which her author Mr. Linning had acceded from resorting to such a proceeding. He also alleged that she only held in trust for the representatives of Mr. Wright the late trustee.

On the 5th of March 1833 the Lord Ordinary pronounced the following interlocutor:—" Finds, that the " pursuer's right having been acquired by assignation to " a part of the bond originally in the person of Michael " Linning, writer to the signet, she would be bound by

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" Mr. Linning's accession to the trust deed granted by " the defender, Mr. Hamilton, in favour of his cre- " ditors; but finds that there is no subsisting trust or " trustee acting under the said trust deed; therefore " repels the defence founded on said trust: Further, " grants diligence at the defender's instance against " havers, for recovering the three first writs mentioned " in the foregoing specification, and also for recovering " the remaining writs therein referred to, in so far as " the latter, or any of them, tend to shew that Miss " Littlejohn has intromitted with the rents of the estate " of Kames, or that Miss Littlejohn holds in trust for " Mr. Wright or his representatives; grants also com- " mission to the Judge Ordinary of the bounds to take " the depositions of havers and their exhibits, and dis- " penses with the minute book."

Against this interlocutor both parties reclaimed to the Court; the respondent maintaining that she was not bound by the accession of her author Mr. Linning: the appellant, on the other hand, contending that the trust was a subsisting trust notwithstanding the death of the trustee, that the trust deed itself contained an express clause and stipulation to that effect, that the creditors were fully vested with the power of naming such trustee as they might think fit, and that if they did not do so it was their neglect, not the blame of the appellant: that by the deed of accession they ratified and confirmed the trust in the whole heads, articles, and clauses thereof, and became expressly bound to abstain from all action, both for themselves and for those who might come in right of their debts; and that the respondent was not only bound by the accession of her author Mr. Linning,

but by her taking under the trust, during the lifetime of her brother-in-law Mr. Wright, the late trustee.

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The Court pronounced the following judgment;— (11th January 1833.) "The Lords having advised the "case and heard counsel, alter the interlocutor sub- "mitted to review in so far as to delete therefrom the "words 'subsisting trust or,' and vary the same in so "far as now to find that there is no acting trustee; "but quoad ultra, adhere to that interlocutor, and re- "fuse the reclaiming notes, and decern; reserving all "claims to expenses of this appearance and procedure, "and of process generally, for the decision of the Lord "Ordinary, and with power to his lordship to determine "thereon as to his lordship shall seem just."[1]

The appellant applied for leave to appeal, which was refused, but he was afterwards advised that leave was not requisite.

Against these interlocutors Mr. Hamilton appealed.

1. The trust deed and deed of accession form a covenant or contract, not only between the respondent and his creditors, parties thereto, but between the creditors themselves, which cannot be departed from or defeated without the consent of all parties interested.

The trust deed was the deliberate act of the creditors themselves, and particularly of the respondent's author; and after many preparatory meetings and consultations it was forced by the creditors upon the appellant. By its execution the appellant was denuded of his whole property in favour of a trustee named by the creditors them-

[1] 11 S., D., & B., 701.

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selves, and an important addition of other means and estates was made to the security previously held by them over the estate of Kames, by means of which addition these trust creditors through their trustee have actually drawn and participated in at least 10,000*l.* of personal funds, to which they had otherwise no preferable right, while all future creditors of the appellant were expressly excluded from any part thereof. These advantages were derived by the creditors, and on the other hand the deed secured an annuity to the appellant out of the trust estate during his life; and the creditors expressly bound themselves not to raise, commence, or follow forth any action, suit, diligence, or execution against the appellant or the estate during the subsistence of the trust.

The deed expressly shows that the trust executed by the appellant, and acceded to by the respondent's author and the other creditors, is still a subsisting trust.

By the terms of it the permanency thereof is inferred, even although it had not been so declared, for there is a permanent burden at least during the lifetime of the appellant, viz. the appellant's annuity; and provision is made for such permanency by the power that is given to the creditors to "choose from time to time such trus-" tee or trustees for executing the trust before men-" tioned as they shall think proper." It is not said that the other purposes of the trust have been fulfilled, nor, supposing that the creditors could put an end to the trust without the appellant's consent, have they taken any steps for that purpose. They have not brought any action of reduction of the trust or any declarator of its extinction, nor has a meeting of the creditors even been called to ascertain their sentiments regarding it.

The Court below has altered the finding of the Lord Ordinary,—that there is no "subsisting trust;" and it was observed on the bench that "a regular process "may be necessary to put an end to the trust:" and in a subsequent case that has since occurred between the same parties, relative to the sequestration of the estate of Kames, their lordships refused to do so expressly on the ground "of the subsisting trust." At the advising of that case it was observed from the bench, that "we have done nothing to overturn the trust;" and another of their lordships remarked that "there "being a subsisting trust we cannot sequestrate the "estate, and this being an outrageous proceeding "Mr. Hamilton should have his expenses."

2. The accession of her author to the trust and the terms of the deed of accession completely bar the respondent from raising or following forth the present action of maills and duties during the subsistence of the trust; and it affords no ground of removal of such bar that there is at present no acting trustee.

By mere accession to a trust, even if such accession be only rebus et factis, without any written consent, the acceder, and those in his right, are barred from taking separate measures against the trust estate, and can only act in common with all the other trust creditors, and through the instrumentality of the trustee. If therefore Mr. Linning had merely simply acceded, the respondent would have been barred from bringing the present action for seizing on the rents of the estate during the subsistence of the trust; but the present is a much stronger case. The terms of the deed of accession subscribed by Mr. Linning, which both the Lord

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Ordinary and the Court have found to be binding on the respondent, are as strong as it was possible for words to make them. After reciting the trust deed, they are as follow: "We do therefore accede and agree, ratify and "approve of the foresaid trust-right and disposition "granted by the said James Hamilton, and whole powers "hereby committed to the said trustees, in whole arti-"cles, heads, and clauses therein contained, and consent "that the same take effect to all intents and purposes; "and hereby bind and oblige us, and those who may "hereafter have right to our respective debts, to con-"form thereto and to the proceedings to be had in "pursuance thereof in every respect, as we are severally "concerned. And further, we hereby agree, covenant, "and oblige ourselves, and those for whom we act "respectively, that we or our constituents shall not "raise, commence, or follow forth any action, suit, "diligence, or execution 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 subsistence of the trust."

But it is entirely the fault of the creditors themselves, and of the respondent as one of those creditors, that there is at present no acting trustee under the original trust deed. By the terms of the trust deed the power of nomination of new trustees is not reserved to the appellant, but is given to the creditors; the appellant has not even a vote in such nomination, and the power is expressly conferred upon the creditors to appoint whomsoever they may think fit.[1]

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[1] *Appellant's Authorities.*—Heriot v. Farquharson, 27th June 1766; Brown v. Gardener, 10th Jan. 1739; Croll's Trustees v. Robertson, 7th May 1790; Bell, vol. ii. p. 595, now 4th edition.

No counsel appeared for the respondent.

LORD CHANCELLOR.—My Lords, when this case of Hamilton v. Littlejohn came before your Lordships the respondent did not appear; the counsel for the appellant rested his case on the judgment of this House, in the last session, in a case arising between the same parties, and raising a question considered to be decisive of the present case. My Lords, the contest between the parties arises out of their rights as creditors. As creditors they had all become parties to a trust, but subsequently the respondent had assumed to take proceedings as if there had been no trust deed at all, and she proceeded against the property of the debtor. That suit having been instituted, an application was made by petition to the Court of Session for a sequestration, founded on a strict legal right, and accordingly the sequestration was ordered which formed the subject of an appeal to this House, upon the ground that the creditors having become parties to the trust deed had not only impliedly by so doing, but expressly, according to the terms of the deed, waived all their legal rights, and consented to abide by the result of the trust; and this House was of opinion that the order for sequestration had been unduly issued, and they reversed that order. The suit proceeded, and the present appeal is against the order in that suit, by which effect is given to the legal claim of the creditors. The terms of the order of the Lord Ordinary are as follow: "The Lord "Ordinary, having heard parties procurators on the "closed record and whole process, finds that the pur-"suer's right having been acquired by assignation to a "part of the bond originally in the person of Michael

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" Linning, writer to the signet, she would be bound by " Mr. Linning's accession to the trust deed, granted by " the defender Mr. Hamilton in favour of his creditors. " but finds that there is no subsisting trust or trustee " acting under the said trust deed;" that is the ground stated of the order of the Lord Ordinary. Then the judgment of the Court of Session proceeds upon this ground: " The Lords having advised the case and " heard counsel, alter the interlocutor submitted to " review in so far as to delete therefrom the words " 'subsisting trust or,' and vary the same in so far as " now to find that there is no acting trustee." The effect of that alteration was to make it more correct in point of form, but, as your Lordships will see, more untenable in point of principle; because, if there had been a failure of the trust altogether, there might have been some ground for the creditors resorting to their legal rights, but as mere failure of the trustee (there being a power to substitute a new trustee) could not possibly, as upon the face of that judgment, be sufficient to enable the creditors to resort to their legal rights, upon that ground it is that the present appeal is presented to your Lordships; and there is no doubt that the same principle which was applied by this House in the former case must be applied to this. Your Lordships reversed the interlocutor in the former appeal, and the same principle being involved in this, your Lordships will have no difficulty in reversing the order of the Court of Session—the effect of which will be to dismiss the suit which has been brought by the respondent. All that remains to be considered is, what is to be done with respect to the costs? It has been contended on the part of the appellant that, though this is an appeal

to reverse a judgment below, the course pursued by the respondent was such that the costs ought to be given, notwithstanding she is in possession of the judgment from which the appeal is brought. That depends in some degree upon the dates. It appears that the order of this House reversing the interlocutor of the Court of Session was not pronounced until the month of July 1834; it appears that the order now appealed from was of the year 1833. At the time therefore, that the order was pronounced by this House in 1834, the suit was instituted, the order which was the subject of appeal in 1834 having preceded the institution of that suit; but at the time the suit was instituted there was no opinion expressed by this House on the legal operation of the deed, or the interlocutor which gave rise to the judgment appealed from. It may be fairly supposed there was at that time existing in Scotland, and established by the order of the Court itself, an impression that that which they had laid down in the interlocutor first appealed from was the law, there being nothing from this House controlling the opinion till the year 1834. It is true an appeal had been presented against the first order, but that had not been brought to a hearing or any judgment pronounced upon it until after the time at which this order was pronounced. The party, therefore, who had obtained the order below was in possession of the judgment of the Court of Session, that such was the rule at law and that such was her legal right; and a person in possession of the judgment of the Court below cannot be considered so far to have misconducted herself as to be subject to punishment by way of costs, if she retains that judgment till it is reversed by the Court of Appeal. Under these circumstances I

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advise your Lordships to reverse the interlocutor of the Court below; the effect of which will be, to dismiss the suit instituted there, but to do that without costs.

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

VIZARD and LEMAN,—Solicitors.