" complained of in and by the said appeal be af-
" firmed, and the said appeal dismissed."

For Appellant, *C. Maitland, C. Erskine.*

For Lord Napier, (Respondent,) *William Grant, W. Murray, A. Hume Campbell.*

JAMES, Duke of HAMILTON, *et alii*, - *Appellants.*

THOMAS, Earl of HADDINGTON, *et alii*, CREDITORS of JAMES, Duke of HAMILTON, deceased, - - } *Respondents.*

16*th January* 1750.

TRUST.—JUS TERTII.—A trust for payment of such of the creditors of the granter's son, as the trustees should agree and compound with, and declaring that no action or diligence thereon should be competent to any of the creditors, but, on the contrary, that they should thereby forfeit all interest in the same; and the trustees having for a length of time taken no steps towards a distribution,—action was sustained at the instance of the whole creditors, for the purpose of calling the trustees to account for their intromissions with the trust estate. Action being raised against the representatives of the original trustees, without opposition from the substitute trustee, it was found to be *jus tertii* to the representatives to object the above forfeiting clause.

[Elchies *voce* Trust, No. 9 and 13.—Fal.—Mor. 16201.]

ANNE, Duchess of Hamilton, in her own right, had a claim upon the crown of France for 500,000 livres, as arrears of rent from the Duchy of Chatle- No. 85.

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herault, secured by the treaty of Utrecht. Her son, Duke James, having predeceased her, leaving large debts, she, in 1715, executed a trust-disposition of this sum in favour of Charles Earl of Selkirk, and Mr. Hamilton of Pencaitland, and the survivor of them, whom failing, James Duke of Hamilton, her grandson, and his heirs of tailzie, *first*, for paying her own debts; "in the *next* place, for payment of such of the "said deceased James Duke of Hamilton, his cre-"ditors, &c. as she should appoint by a writ under "her hand; and failing thereof, to such of the said "creditors as the said trustees should compound "and agree with; and with power to them to pre-"fer any one of the said creditors as they shall "think fit." "Providing always that the present "clause in favour of the said creditors shall afford "no right to them, or either of them, to affect the "subject hereby disponed, or to pursue any action "thereupon against the said trustees; and if any "such diligence be used, or action raised and pro-"secute upon the same, the foresaid diligence, and "also the foresaid provision, in so far as it was in fa-"vour of the said creditors so using diligence, are "hereby declared to be void and null." Further, "full power and liberty is reserved to the said "trustees to prefer any of the said" creditors, "and "they are not to be accountable" to the said creditors, "for what they shall act or do as to the "preference," &c.

By virtue of a reserved power to burden the entailed estate to the amount of L.20,000, she, at the same time, executed a conveyance of certain of the lands in security of that sum, in favour of the same trustees, for the same purposes, and under the same conditions as above recited.

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The Duchess died shortly after executing these deeds, and the original trustees likewise dying without having paid off any of the debts, the creditors of her son brought two actions, the one of count and reckoning against the representatives of these trustees, concluding for payment of their debts out of the trust estates; and the other against the Duke of Hamilton, as substitute trustee. The Duke judicially declared, "that he did not oppose "the creditors of the late Duke, his father, their "getting payment of their debts out of the subject "of the French estate."

The representatives of the trustees pleaded, 1. That the pursuers had no interest in the trust deeds, which were confined to such creditors as the Duchess should appoint, by a writing under her hand; and in default thereof, to such as the trustees should compound and agree with; under neither of which descriptions the pursuers could claim. 2. That even though the pursuers had an interest in the trust deeds, yet, by the above recited clause, they had forfeited that right by bringing the present action.

It was answered, 1. That the payment of her son's debts appeared, from the very words of the trust deeds, to have been the principal object of the Duchess in making them; but (not knowing the extent of these debts, or how much the French fund might produce) she had vested the trustees with discretionary powers to prevent the estate from being torn to pieces by legal diligences, and in case of a deficiency, to give a preference to such debts as might appear to them to merit it; but that it could never have been her intention to give the trustees a power of disappointing

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the whole effect of the deeds, by denying payment to all the creditors. That the very forfeiting clause on which the defenders relied, proved plainly that the whole body of the creditors had an interest in the provision, since it would have been absurd to make any one, or a number of them, forfeit that which they never had. At all events, the creditors had a right to be compounded and agreed with, which had not been done with any one of them. 2. That the import of the forfeiting clause was entirely mistaken. It prohibits "diligence affecting "the subject of the trust, and action upon such "diligence," which was a proper caution to prevent the creditors from attaching the estate by real execution, and thus dispossessing the trustees, or embarrassing the object of the trust. But this very caution supposed steps to be taken by the trustees for the execution of the trust, and never meant to exclude all action at the creditors' instance against the trustees, if they acted contrary to its very essence, and put the trust money in their pockets. It must have been an extraordinary deed to let in such contradictory consequences. At the creation of these trust rights, the extent both of the funds and of the debts was uncertain. With a view to these uncertainties the power of compounding with the creditors was given to the trustees; which power, as it might have been frustrated by some of the creditors obtaining preference by legal diligence, was secured by the clause in question, which is merely executory of the former; and if even applicable to the case of creditors attacking with process the trustees, while endeavouring to convert the funds for the creditors' satisfaction, could not apply to that of the whole body of creditors seek-

ing, after 30 years' patience, an account of the trust funds. In short, the question was, whether the trustees under the deeds are bound to account for their intromissions, or whether the disposition was made to them, not as trustees, but for their own use and behoof.

The case being reported, the Court (19 Nov. 1740) "having considered the disposition, &c. "and compearance made for the Duke, whereby "he declared, that he did not oppose the creditors "their getting payment of their debts out of the "subject of the French estate; find that the action "is competent to the pursuers against the defen- "ders, and sustain the pursuers' title accordingly."

The Duke having died, the trust devolved upon the appellant, (his successor,) whereupon the defenders pleaded, in a reclaiming petition, that the late Duke's consent, on which the above interlocutor had been mainly pleaded, died with him, and could not bind the present Duke, from whom no consent to the action had been obtained.

Answered, That as the present Duke was a party to, and did not oppose, the action, it was *jus tertii* for these representatives to plead upon the forfeiting clause. The Lord Ordinary (10 July 1745) "In respect the present Duke, who is called "in the process, did not appear to oppose the pur- "suers, calling the representatives of the trustees "to account for their intromissions; and that the "Lords have found action competent to the pur- "suers: found that it was *jus tertii* to the repre- "sentatives of the trustees to found upon the irri- "tant clause in the said disposition, and therefore "repelled the defence founded thereon," &c.

The pursuers then insisted in their action against

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the Duke, and craved that the execution of the trust having now devolved upon him, he might, as substitute trustee and possessor of the estate of Avondale, be ordained to account for the L.20,000 with which that estate was burdened by the second disposition above narrated. To which it was answered, (in addition to the plea founded on the forfeiting clause in the deed,) that neither the original nor the substitute trustees were bound to accept of, or after their acceptance, to proceed further than they should think fit in the execution of the trust, being by the deed expressly liable for intromissions only; that the Duke had not accepted of the trust deed, neither had he intromitted with the subject by virtue thereof; but that his father having died in possession of those subjects as heir of entail, he himself had taken them as heir of his father, and not as trustee of Duchess Ann, and that he was under no obligation to give up this title and take under the trust deed, seeing the trustees were left at full liberty to proceed in the prosecution of the trust so far only as they should think fit.

The Lord Ordinary (Drummore) having reported the case upon informations, the Court (25 Nov. 1747) "Find that action is competent at the in-"stance of the creditors against the present Duke "of Hamilton, the defender, and remit to the Lord "Ordinary to proceed accordingly." And, on the same day, upon advising a petition in the other action, they found, "that action is competent at the "instance of the creditors against the representa-"tives of the original trustees, and remit," &c.

Entered, 13 March 1749.

The appeal was brought from "certain inter-"locutors, or parts thereof, the last dated 22d "Feb. 1749."

After hearing counsel, "It is ordered and adjudged, &c. that in the first interlocutor pronounced the 25 Nov. 1747 complained of, after the word ['trustees'], and before the words ['and remit'], these words be there inserted; *videlicet*, ['and sustain the pursuers' title, according to the terms and effect of the respective dispositions executed by the late Duchess of Hamilton']; and that, in the other interlocutor of the said 25 Nov. 1747, after the word ['defender'], and before the words ['and remit'], the above mentioned words be there likewise inserted, *videlicet*, ['and sustain the pursuers' title, according to the terms and effect of the respective dispositions executed by the late Duchess of Hamilton']; and it is hereby further ordered and adjudged, that with these additions the said several interlocutors complained of be, and the same are hereby affirmed."

For Duke of Hamilton (Appellant), *W. Murray, C. Yorke.*

For Countess of Cassilis, &c. (Appellants), *William Grant, Paul Jodrell.*

For Respondents, *A. Hume Campbell, Al. Forester.*