MARCHIONESS-DOWAGER OF ANNANDALE, only Child and surviving Trustee and Executrix of John Vanden Bempde, Esq., deceased, ... } *Appellant;*

MARQUIS OF ANNANDALE; and RONALD CRAWFORD, Clerk to the Signet, . *Respondents.*

House of Lords, 18th February 1755.

TRUST USES—ACT OF PARLIAMENT—EXECUTION OF THE TRUST. —Held where the money, personal estate, rents, &c., belonging to a trust estate, were specially directed by the truster's will, to be laid out in the purchase of land in England, though by Act of Parliament, power had been given to appropriate certain accumulations of these rents, &c., in purchasing up debts affecting the Annandale estates in Scotland, to which the beneficiary had succeeded, yet that the trustees and executors under the will, were still entitled, on a favourable purchase of land offering in the counties named in the will, to recall the money so lent out, and to purchase the estates.

William, the late Marquis of Annandale, intermarried with the appellant, his second wife, and died leaving issue by her, the present Marquis, (George), and Lord John Johnston.

John Vanden Bempde, the appellant's father, by his will,

" devised all his real estate whatsoever in England, to John,
" Duke of Argyle and Greenwich, to the appellant, and
" Simon Mitchell, and Robert Holford, Esqrs., and their
" heirs, to the use of them and their heirs upon trust; in the
" first place, to pay the appellant an annuity of £300 for
" her life, and proper maintenance for her two sons, until
" their ages of twenty-three. And after either of them
" should attain that age, in trust, to settle and assure, as
" counsel should advise, his said real estate (except that in
" Berks), subject to the annuity, to and upon the said Marquis,
" for life, without impeachment of waste; with remainder
" to trustees to preserve contingent uses. After his decease,
" to the first and every other son of his body, lawfully issuing
" in tail male, with divers remainders over. And the said
" testator directed, that his personal estate should be sold
" and disposed of, and the money arising thereby, as well as
" what should be received by the rents of his real estate,

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" should be laid out in the purchase of lands of inheritance, " to be settled to the same uses. And that, until such pur- " chases should be had, all the income, increase and interest " of his personal estate, should be applied in the same manner " as the profits of the estate to be purchased therewith, ought " to go. And the said testator, by his said will, recommended " to his executors, the making purchases near to his York- " shire estates, or in any county leading to it; or else in Kent " and Berkshire, if fair opportunities offered. And that, in the " meantime, the money should be placed out at interest upon " securities, in the names of his executors; and appointed " the said John, Duke of Argyle, the appellant, Simon " Mitchell and Robert Holford, executors; and the appellant " and Simon Mitchell alone proved the will."

The said Lord George and Lord John, by their next friend, and the said late Duke, and Robert Holford, exhibited their bill in the Court of Chancery against the appellant and Simon Mitchell, for an account of the testator's personal estate, and for the rents of the real, and that the same might be laid out according to the directions of the will.

Upon hearing the said cause, it was decreed, "That it " should be referred to Mr John Bennett, then one of the " Masters of the said Court, to take an account of the said " testator's personal estate, and of the rents and profits of his " real estate, come to the hands or use of the appellant, and " the said Simon Mitchell. And it was thereby ordered that " the trusts in the said testator's will, should be performed; " and receivers were directed to be appointed by the said " Master, of all the said testator's real estates, who were " annually to account and pay the balances, as the Court " should direct; and what of the personal estate, and the " rents of the said real estates should appear to be received " by the appellant and Simon Mitchell, was directed to be " laid out in a purchase of lands, to be approved of by the said " Master, and taken in the names of the said trustees, and " settled according to the directions of the said testator's " will, and the surplus profits of the testator's real estates " were directed to be laid out and settled in the same manner. " And until such purchases could be found out, the personal " estate, and the profits of the real estate, were to be placed " out at interest on securities to be approved by the said " Master, and taken in the names of the said trustees; and " when either of the said testator's grandsons should attain " the ages of twenty-three years, they were to be at liberty

" to apply to the Court for conveyances of the said real " estates.

" The Master made his report, certifying that the personal " estate, with the produce thereof, and rents of the real " estate, amounted to £27,124, 18s. 9d.

" The present Marquis, by the death of James, his father's " eldest son, by his first wife, succeeded to the honours and " estate of Annandale, which then stood charged with debts, " secured by adjudication and infeftments to a considerable " amount, which carried interest at the rate of 5 per cent. " per annum; and as the present Marquis was greatly dis- " tressed thereby, and no convenient purchases had offered, " an Act of Parliament was obtained, whereby it was enacted " That such person or persons as were enabled, by the said " testator's will, to act in the trusts, should and might, with " the direction and approbation of the said Court of Chancery, " pay and apply any part of the said testator's personal " estate, or the produce thereof, or the rents and profits of " his real estate, or the increase thereof from time to time, " until either of the said testator's grandsons should attain " the age of twenty-three years, to and for the purchase of " adjudications obtained and to be obtained against the said " Marquis' estate in Scotland, or of other securities covering " the said estate, and carrying interest at the rate of 5 per " cent. per annum, upon such assignments or dispositions of " such adjudications and securities, to and for the same uses " and trusts, as by the said will are declared of, and concerning " the said trust estate as should be directed or approved by " the said Court of Chancery, and that the same should " remain with the said trust estate, or with those to whom " the same should thereafter be conveyed, as a security only " for the principal sums, interests, and costs, paid out of the " said trust estate, for the assignments of such adjudications " or securities, and should not remain absolute rights, though " not redeemed in due time. And it was provided, That the " said provision should cease, after the said trust estate should " come into, or be vested in a different person from him or " her, who should enjoy the said estate of Annandale, and " the legal of such adjudications should commence to run " according to the rules of law in Scotland, and expire agree- " ably to the same, in ten years thereafter, if not redeemed " by payment of the principal, interest, and costs, as afore- " said, and no sooner."

Pursuant to this Act, the appellant and Simon Mitchell,

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before the Marquis attained his age of twenty-three years, with the approbation of the Court of Chancery, applied part of the testator's trust money to purchase debts, secured by adjudications and infeftments, on the estate of Annandale, and took assignments thereof in their own names, as trustees for the purposes, and to the uses mentioned in the said testator's will, concerning his personal estate and the interest thereof; which, with the sum of £2500, advanced before the Act was obtained, and the interest thereof, to the 26th May 1743, amounted to the sum of £20,403.

The Marquis of Annandale attained his age of twenty-three years, before which time his brother, Lord John, had died unmarried and without issue.

The Marquis applied by petition to the Court of Chancery, whereupon an order was made to the effect of letting him into the possession and enjoyment of those estates; and the receivers of those estates were discharged from receiving any rents, since 29th May 1743.

The Marquis granted a bond of corroboration for the above sum of £20,403, and interest, being the debt on the estate of Annandale, whereby he bound and obliged himself and his heirs to content and pay to the appellant and Simon Mitchell, the said sum, and bound himself to infeft them in the estate of Annandale, in security, but redeemable on payment of the said sum. The trustees were infeft accordingly.

An order was further obtained, on report of the Master, for the trustees to lend of the trust funds £16,000, 15s. 3d. more, for the purchase of the debts, which was done accordingly, and which debts were assigned to them as trustees, as in the former case, the debts then amounting to £36,503, 15s. 3d.

Dec. 5, 1744. A charter was obtained under the Great Seal of Scotland, upon the conveyance, to one of the said adjudications in favour of the appellant and the said Mr Mitchell, who were again infeft in the whole estate of Annandale, according to the law of Scotland, 6th December 1744. The object of this was to exclude the Marquis' posterior creditors.

The Marquis, whose ordinary residence was in England, unfortunately falling into a state of lunacy, and so continuing, a commission under the Great Seal of England was issued, and by an inquisition taken thereon, he was found a lunatic,

Mar. 5, 1747. and that he had been so for some time past, whereupon the custody of his person was soon after given to the appellant.

The appellant applied to the Court of Chancery, "That

"it might be referred to the Master to appoint a receiver or "receivers, of the arrears of rents and growing rents, of the "testator's trust estates, which was ordered, and receivers "were soon after appointed accordingly."

And upon the receivers applying to the said Ronald Crawford, the respondent (who, during the Marquis' insanity, had been by him appointed the principal factor or receiver of his whole estate in Scotland, and the manager of it), to receive the interest of the said sum of £36,503, 15s. 3½d., that had accrued due, since the inquisition finding the Marquis a lunatic, he refused to pay it, or to apply any part of the money in his hands or the growing rents, which now amount to a very large sum, towards the Marquis' maintenance, which refusal had been owing to a claim made by the then Countess Dowager of Hopetoun, the sister of Marquis William, who claimed to be entitled to all the present Marquis' personal estate in Scotland, if she survived him, to the exclusion of the appellant, his mother, and of Richard Bempde Johnston, and Charles Johnston, his two brothers, and of Charlotte Henrietta Johnston, his sister, her children by her second husband; and insisted that the interest in arrear since the suing out of the said commission, and thereafter the interest to grow due upon the said sum of £36,503, 15s. 3d., together with the surplus rents and profits of the said Marquis' real estate in Scotland, should be retained and accumulated there, and go to his representatives, according to the law of that part of this kingdom, in case the said Marquis should die without recovering his mind.

Thereupon the appellant laid the whole matter before the Lord Chancellor, who has the care of both the person and estate of lunatics, stating, that opportunity having occurred of purchasing estates in England, in terms of the will, whether it might not be advisable to call up the principal sum and interest of the said money, so lent out, and invest the same in the purchases.

The matter came to be heard before the Lord Chancellor, and, upon hearing counsel for the appellant, and for the said Lady Hopetoun, and for the said Richard Bempde Johnston, Charles Johnston, and Charlotte Henrietta Johnston, and for the receiver, and all the other parties interested in the cause, his Lordship was pleased to refer to the Master to inquire if it was for the benefit of the trust to call in the trust money in Scotland. The Master having reported that it would be beneficial, the Lord Chancellor ordered the trustees to proceed

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in Scotland to call in the trust money there, in order to be laid out in England, pursuant to the testator's will.

Soon after this order Mr Simon Mitchell died, but the appellant, the surviving trustee, instituted an action in the Court of Session in Scotland, against the respondents, in order to recover possession of the said estate in Scotland, and to receive and uplift the rents and profits thereof towards satisfaction of the said principal sum of £36,503, 15s. 3d., and growing interest thereof, and to compel the said Robert Crawford to pay and apply the said Marquis' money in his hands to discharge the arrears of interest due for the same.

In bar of this action the respondents pleaded, That it appeared from the face of the title upon which the appellant founded her action, that the estate was only a trust in her for the benefit of the respondent during his life; and the respondent being for his life both *debtor* and *creditor* in the securities which the appellant claimed, no action could be maintained by the law of Scotland for calling in these securities, while the respondent lived; that as it was stated in the said Act of Parliament, the application of the said trust estate, in purchasing assignments of adjudication and other incumbrances on the Marquis' Scots estates, would be highly *beneficial* to the said Marquis, and would not only be an increase of the said trust estate, by gaining an interest of 5 per cent. for the money laid out, but would also be agreeable to the intention of the testator, who, in his said will, expressed a great desire to support the honour of Annandale, while it should be enjoyed by his descendants; therefore no evidence could be admitted to show that such application was not *beneficial* to the trust estate, or was disagreeable to the testator's will, and ought not to continue while the honours and estate of Annandale were enjoyed by the present Marquis, a descendant of the testator; that the calling in the said trust money lent to the Scots estate, was, at this time, inconsistent with the directions of the Act of Parliment, for the Act provided that the adjudications conveyed to the trustees should only subsist as securities for the principal sums, interest and costs actually paid, and should not become *absolute rights* by the non-redemption, as long as the trust estate, and the estate of Annandale should be possessed by the same person; and that only after the separation of these estates the legal of the said adjudications should begin to run; but though both estates did not belong to the respond-

ent, yet, if the trustees should be authorised to assign to strangers, once the right was vested in them, the *legal* would begin to run, and the adjudications might become *absolute rights of property* to the estate of Annandale, even while that estate, and the trust estate were possessed by the present Marquis, contrary to the intention of the testator and to the intention of the said Act of Parliament; that if the appellant prevailed in her present suit, that expedient, which the legislature intended for the present Marquis' family and paternal estate, must inevitably turn out to be the certain destruction of both, for the appellant's claim amounted to near £60,000, which, by an adjudication, might be immediately converted into a new capital, bearing interest, and in a few years carry off an estate which produced only £2000 per annum.

The respondents further pleaded, That even supposing the action was, in the present case, maintainable at the instance of the appellant, yet, as the present Marquis was clearly entitled under the will of the testator, under the Act of Parliament, and under the said order of the Court of Chancery in England, 1st August 1743, to retain to his own use the interest of the said £36,503, the appellant could have no right to recover any interest, far less the interest become due before bringing the said action.

The Lord Ordinary reported the case to the Court. The Court pronounced this interlocutor: "The Lords, on the "report of Lord Woodhall, Ordinary, find, that there lies no "action at the instance of the pursuer (appellant) against "the defenders, either for the principal sum or annual rents "in question, during the life of the Marquis of Annandale; "and remitted to the Lord Ordinary to proceed accordingly." Aug. 1, 1754.

In pursuance to this remit, the Lord Ordinary pronounced this interlocutor: "Assoilzie the said George, "Marquis of Annandale, and Ronald Crawford, his factor, "and the whole other before-named persons, defenders, from "the foresaid summons and action so raised and pursued "against them, at the instance of the said Charlotte, Marchioness-Dowager of Annandale, and John Dick, her factor, "and from the whole articles and conclusions thereof; and "decern and declare them, the said George Marquis of Annandale, Ronald Crawford, and the whole other before "named persons, defenders, to be free thereof, and quit "therefrom, now, and in all time coming." Aug. 2, 1754.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The testator, by his will, directed, that his executors and trustees should dispose of his personal estate, and the rents and profits of his real estate, to be laid out in the purchase of lands in English counties, and settled to the same uses with his other real estate; that the income and interest of the trust money, should be applied in like manner as the profits of the lands to be purchased; and that, in the meantime, the money should be placed out upon securities, in the name of his executors; and, therefore, the appellant, as surviving trustee, has a clear right to call in the trust money, and purchase lands, especially when acting under the direction and by the authority of the Court of Chancery, which has the sole jurisdiction in all cases of trust, relative either to real or personal estates in England.

2. The Act of 7 Geo. II. was not intended to alter, but effectuate the will of the testator. It was doubted whether the Court of Chancery could order, or would approve of any part of the trust money being applied to purchase in the incumbrances upon the Annandale estate in Scotland. At the same time, it was thought most beneficial for the Marquis, and agreeable to the will of the testator, who had declared his intention that his estate should go with the honour (whilst the honour continued in his family), to place it out for some time on the Marquis' estate in Scotland. To that end, the Act has empowered the trustees to apply the trust money in purchasing such securities affecting the Annandale estate, as carried an interest of 5 per cent., and to take such assignments of these securities as the Court of Chancery should approve. But, neither by the words nor the intention of the Act, are the trustees deprived of the discretion which the will of the testator gives them, to purchase lands at any time, even during the life of the Marquis, when it might be convenient. And after the Marquis had fallen into his present unhappy condition, the trustee, who petitioned the Court of Chancery for directions, and the Court which made the order, 29th July 1751, judged it most proper to call in the money, and lay it out in the purchase of land.

3d, The money laid out in purchasing the securities affecting the Annandale estate, is still as much a part of the trust estate in England, as if it had been placed out upon mortgage of lands in any of the counties mentioned in the testator's will, or elsewhere in England. And the Act is so carefully

framed to prevent the possibility of any other construction, as that (contrary to the rule of law of Scotland), it has indicated the adjudications obtained and assigned upon the Annandale estate, to be a security only for the principal sums, interest and costs, paid out of the trust estate, and not to become absolute rights, *though not redeemed in due time* (so long as the estate of Annandale, and the trust estate, shall continue in the same person). This provision was made in order to enable the trustees to call the trust money, when it might be best to do so. It is therefore evident, that the placing out the money upon the Annandale estate, according to the Act, was not intended to make any alteration on the rights of persons, who might be entitled to it on the death of the Marquis. And the Court of Chancery, considering a thing directed to be done as done, and money devised in trust to be laid out in land as land, has declared the principal money invested in those securities to be part of the Marquis' real estate in England; in like manner as it would have considered the profits of the land itself.

4th, As the power over the *trust money* is given by the testator's will, to his trustees and executors, not diminished or varied by the Act of Parliament, so, likewise, the assignments of all securities on the Annandale estate are made to them. The surviving trustee is, therefore, the only party to put those securities in suit, and the motives to it are just and reasonable. The testator had directed the trust money to be laid out in lands *in England* when convenient purchases should offer. Such purchases did offer, which led to the order obtained in Chancery, to call in the trust money, for which purpose this suit is raised.

Pleaded for the Respondents.—They pleaded precisely as set forth in this case, *ante*, p. 702.

After hearing counsel,

It was ordered and adjudged by the Lords, that so much of the said interlocutors of the 1st and 2d August 1754, as relates to the principal sum, £36,503, 15s. 3½d., in question in this cause be, and the same is hereby reversed: And it is further ordered, that the action at the instance of the appellant for the said principal money be sustained: And it is hereby further ordered and adjudged, that the rest of the said interlocutors be affirmed without prejudice to the respondent, the Marquis,

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or any person lawfully authorized on his behalf, to bring such action, or take such remedy for obtaining satisfaction out of the rents and profits of the estate in question, for such annual rent or interest of the said principal sum as hath accrued since the said Marquis attained his age of twenty-three years, or any part thereof, as shall be competent in that respect and as they shall be advised; and that the said cause be remitted back to the Court of Session to proceed therein, pursuant to this order, and according to law and justice.

For the Appellant, *Wm. Murray, C. York.*

For the Respondents, *Robt. Dundas, A. Hume Campbell.*

NOTE.—Unreported in the Court of Session.

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THE DUKE OF DOUGLAS *v.* LOCKHART, &c.

[Mor. 7638, et Kames' Sel. Dec. p. 42.]

The DUKE OF DOUGLAS, . . *Appellant;*

JOHN LOCKHART of Lee, and JAMES SOMERVEL of Corehouse, . . *Respondents.*

Et e Contra.

House of Lords, 27th March 1755.

ACT 24 GEO. II., c. 44—JUSTICES OF PEACE.—An action was raised against Justices of Peace for neglect and failure in the performance of their duty. They pleaded the Act 24 Geo. II., c. 44, as protecting them in the execution of their office. Held that this Act applied to Scotland. Reversed in the House of Lords.

This was an action founded on certain Acts of Parliament inflicting penalties upon the justices of the peace for the breach or neglect of their duty as justices, besides being bound to indemnify the private party. These Acts were 54 James I., c. 2; 12 and 16 James II.; 2 James III.; and 104 James V., c. 7.

It arose from the depredations of James Hodgeson, a poacher, who, in defiance of the law, had been in the practice of entering on the appellant's grounds, hunting with guns, and dogs, and nets, at all seasons, in violation of the laws for preservation of the game, and the Act of Queen Anne, 1707, c. 13.