

ance in favour of another. He was entitled to exercise his power in favour of certain creditors of the bankrupt. It does not alter the case, that infestment was taken in his name, without his knowledge. This does not constitute him a trustee for the common debtor. He cannot be put in a worse situation without his consent, therefore might lawfully use the infestment taken in his own name, as if taken by himself for his own behoof.

The Lords found the infestments granted by the author not reducible upon the act 1696.—See No. 207. p. 1150. See APPENDIX.

No. 36.

1741. July 16. SPRUEL *against* SPRUEL CRAWFURD.

Found, That where a trust does not arise from any deed or disposition of the truster, but from the voluntary interposition of the trustee, as *negotiorum gestor*, the act of Parliament 1696, declaring trust no otherwise proveable than by oath or writ, takes not place.

Kilkerran, No. 1. p. 581.

No. 37.

In what cases the act 1696 takes place.

1741. November 24. RANKINE and Others, *against* GAIRDNER.

Found, That where a disposition was granted to a trustee, with power to dispose of the subject, and to apply the price to the disponent's creditors, such trustee may lawfully pay *primo venienti*, the same being done *bona fide*.

Kilkerran, No. 2. p. 581.

No. 38.

Powers of a trustee for selling an estate, and paying creditors.

1747. November 24.

The DUKE of HAMILTON'S CREDITORS *against* The TRUSTEES of the DUCHESS.

Charles Earl of Selkirk, in virtue of a commission from Anne Duchess of Hamilton, compounded with certain commissioners appointed by the French King, in consequence of the treaty of Utrecht, the right competent to the family of Hamilton upon the duchy of Chatelherault, for 500,000 livres, to be secured upon the Town-house of Paris at 4 per cent.

James Duke of Hamilton, son to the Duchess, having died indebted, she disposed to the Earl of Selkirk and Lord Pencaitland, jointly, and failing either of them, to the survivor, and failing both, to the heirs of tailzie in the estate of Hamilton, "as trustees for such of the said creditors as they should agree with, in manner and in the terms after-mentioned, the yearly rent and principal sums contained in the said contract, under the provisions and conditions after inserted;" which were, that they should apply what they recovered to payment of her own

No. 39.

A disposition to trustees for the use of the creditors of another than the disponent, with power to them to prefer such as they pleased, provided that none of the creditors should have right to affect the subject disposed, or

No. 39.
pursue any
action there-
upon, was
found not to
hinder the
whole credi-
tors jointly to
insist person-
ally against
the trustees.

creditors, or of debts due by her or her son to either of the trustees ; and, in the next place, to payment of the Duke's debts contracted in Scotland, or originally due to Scotsmen residing there, in the order and preference she should assign, by a writ under her hand ; and failing thereof, to " such of the creditors as the trustees should compeone and agree with ;" with power to them to prefer any one of the creditors, they being accountable for the surplus of their intronmissions to her representatives : Providing " that the present clause in favour of the said creditors should afford no right to them, or any of them, to affect the subject thereby disposed, or to pursue any action thereupon against her said trustees ; and if any such diligence were used, or action raised or prosecuted, upon the same, the fore-said diligence and the foresaid provision, in so far as it was in favour of the said creditors so using diligence, was thereby declared to be void and null ; and there was thereby full power and liberty reserved to the said trustees, to prefer any of the said creditors to the subject above-mentioned as they should think fit ; and they were not to be accountable to any of the said Duke's other creditors for what they should act or do as to the said preferences ;" and they were only made liable for intronmissions.

The creditors pursued the representatives of the original trustees to account ; and in this process the Duke of Hamilton, son of him whose creditors the pursuers were, appeared, and declared, "*Quod non faciebat vim*, he did not oppose their getting payment out of the subject of the French estate."

The Lords, 19th November, 1740, " having considered the disposition by the Duchess of Hamilton, with the clauses therein contained, and the compearance made for the Duke of Hamilton, whereby he declared that he did not oppose the creditors of the late Duke his father their getting payment of their debts out of subject of the French estate, Found action was competent to the pursuers against the defenders."

The Duchess had, besides this French fund, a faculty competent to her to charge the entailed estate with £.20,000 Sterling, which she exercised, by disposing the baronies of Evandale and Cambuslang to the trustees for the same purposes.

These baronies continued to be possessed by the heirs of tailzie, whereupon the creditors pursued also the present Duke of Hamilton, grandson of their debtor, as succeeding in the trust, to apply to the uses thereof the said £.20,000.

The cause was reported ; and a bill being preferred against the above interlocutor, and answered, both causes were determined together.

Pleaded for the defenders : The creditors have no title to pursue. The Duchess had reserved to herself a power of preferring any of them, and had committed the like to her trustees, with an express declaration, that they should be liable to no pursuit ; which was made an irritancy of any title the pursuer had to his payment.

For the pursuers : They are only excluded from affecting the subject by diligence, and thereon pursuing the trustees, but not of convening them personally.

For the defenders: This interpretation might have some appearance, if the right were given to the whole under this irritancy; but the trust is only in favour of such as the trustees should compound with. There was no intention of paying the whole creditors, or their whole debts; but the trustees were, upon consideration of their several cases, to make the distribution; and none could complain of being paid too little, but behaved to take what was given him.

For the pursuers: The power of compounding was only in the view of there not being sufficient funds to answer all the creditors; but if there were, they were to pay the whole. This appears from their being liable for the residue to the executors of the Duchess, who could not claim it till all were paid. The present pursuit was not by any creditor seeking to establish himself a preference, but by the whole jointly, demanding an account of the trust-subjects.

The Lords found the action was competent.

Act. *H. Home & Lockhart.*

Alt. *R. Craigie & Ferguson.*

Clerk, *Kirkpatrick.*

D. Falconer, No. 211. p. 291.

1748, June 8, & July 6. GORDON against ANDERSON.

An assignee in trust, in order to adjudge, having, after the sale of the lands, got partial payments from the purchaser, and, because the scheme of division was not then made, granted his bills for the money; in a process against the purchaser, at the instance of the persons for whose use the adjudication was led, the Lords "Found the purchaser could have no allowance of those payments;" although it was evident, from the circumstances of the case, that between the trustee and purchaser these bills were intended as no other than an interim instruction of so much of the price of the lands; and *that* notwithstanding a former decision in the case of the Creditors of Pittedie, where, in the like case, such bills had been sustained as payments to the purchaser.

Kilkerran, No. 3. p. 582.

1752. December.

ARCHIBALD CAMPBELL against CAMPBELL of Monzie and CAMPBELL of Achalader.

Mr. Archibald Campbell, Minister at Weem, made a deed of mortification, in which he settled his funds upon five trustees, and their successors, for the use of the schoolmaster of Weem, and of other schoolmasters to be settled in the parish at the places therein named, the sums to be secured and employed in name and for the use of the schoolmasters; and the major part of the trustees are declared a *quorum*. Two of the trustees only having accepted and intromitted, the sums

No. 39.

No. 40.

Bills granted to a purchaser, by a trustee, for the purpose of adjudging, not sustained as proof of partial payments against his constituents.

No. 41.

A deed of mortification for the use of the schoolmaster of a parish, stands good though none of the trustees accept.