

1778. *January 28.*

Dame ROBINA POLLOCK, Spouse to Sir HUGH CRAWFORD, and Sir Hugh, for his Interest, *against* MARY PORTERFIELD, Widow of JOHN LOCKHART of Lee.

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A person appointed trustee for uses, in a deed after the English form, transferred the trust funds to the person first favoured in the deed, and obtained from him a discharge. More than 40 years afterwards, one of the persons favoured in the trust, having brought an action for ascertaining his right, the Lords found it cut off by the negative prescription.

WINIFRED and Dorothy Luckens were seised to them and their heirs, in certain lands in the county of Essex. Dorothy was married to James Lockhart, a younger brother of Mr Lockhart of Lee; and, by a postnuptial settlement, her moiety of these lands stood limited to the use of James Lockhart, during his life, without impeachment of waste; after his death, to Dorothy his wife, in name of jointure; after her decease, to the sons of the marriage, in the order of their birth, and the heirs-male of their bodies; and, for default of such issue, to the daughters of the marriage, and the heirs of their bodies; and, for default of such issue, to the said James and Dorothy, and the heirs of the survivor of them, for ever.

A partition was afterwards made of the lands betwixt the two sisters. Dorothy and her husband having in view to dispose of their part of the lands, revoked and made void the uses of the former deed, with consent of the parties to it. This they were empowered to do, by a clause in the deed itself. A new deed was then executed by the husband and wife, vesting the lands in trustees, with power to sell the premisses, and apply the price, in the first place, to extinction of debts to a certain amount, chargeable on them; the remainder to be "disposed of in the purchase of other lands, tenements, or hereditaments, within the kingdoms of England or Scotland." And it is provided, that the lands so to be purchased, are to be settled, and the rents and issues of the subject, until such purchase is made, are to be disposed of to the same uses and purposes as were limited and declared by the former deed.

In order the more effectually to carry this sale into execution, an act of Parliament was obtained, (4th Queen Anne,) which likewise directs the trustees to lay out the residue of the price on the purchase of some other "lands, tenements and hereditaments," to be settled to the same uses, and on the same series of heirs specified in the former deeds. But the act of Parliament, in requiring the lands to be settled, in the first place, to the life-tenure of James Lockhart, does not add, without impeachment of waste, as in the former deed. The lands were sold by the trustees, and the residue of the price soon after vested in South-Sea stock, in the name of Sir John Stanley, survivor of the trustees.

James Lockhart succeeded to the entailed estate of Lee, encumbered with debts contracted by the entailer. He survived his wife Dorothy, and died in the 1715, leaving issue by her one son John, and two daughters.

In 1721, a bill was filed in Chancery, at the suit of the infant John Lockhart, by the Countess of Forfar, his next friend, in which it was *inter alia* proposed, that the trust-fund should be applied to pay off the debts on the estate

of Lee. By decree of the master of the rolls, it was referred to a master in Chancery, to enquire into the propriety of this measure, and to carry it into execution, if beneficial to the infant; but, in that case, it was ordered, that the assignations from the creditors of their securities to the trustee should be taken upon the trust, and to the uses limited by the acts of Parliament. It was likewise referred to the Master in Chancery, to appoint a new trustee in place of Sir John Stanley, who desired to be discharged of the trust.

The Master reported, that he had approved of the Countess of Forfar as trustee, and had appointed Sir John to assign his trust, and to pay over the monies to her, 'subject to the said trusts and uses, as in the said act of Parliament are mentioned, touching the said trust-estate.' But the report takes no notice of the reference relative to the payment of the debts on the estate of Lee.

This report was affirmed by decree of the Lord Chancellor, and, in consequence thereof, the funds were made over to the Countess of Forfar, and continued with her till John Lockhart came of age. In the 1728, an account was settled between the Countess and him, of her intromissions with the trust-funds; and the Countess having transferred the whole of the funds in her hands to John Lockhart, obtained a discharge from him of all intromissions, 'and of the said assignment of trust itself, and all that hath followed, or may follow thereupon, for now and ever.'

Lady Forfar died in the 1741. Anne and Dorothy Lockharts both predeceased their brother; Dorothy unmarried, and Anne Lockhart leaving an only child, Robina Pollock, since married to Sir Hugh Crawford.

John Lockhart died in the 1775, without issue; and by his settlements, his whole personal estate, and all his real estates not entailed, were conveyed to his wife, or to trustees for her behoof.

Upon the death of John Lockhart, Lady Crawford and her Husband brought an action, in which they called the widow and other disponees of John, and the legatees of the Countess of Forfar, concluding to have it found, That the pursuer Lady Crawford is now entitled to the benefit of the said trust, and that the defenders ought to be decerned to pay over the capital of the trust-funds to such persons as the Court shall name, to be laid out in the purchase of lands, to be settled upon the said pursuer, and the heirs of her body, whom failing, to her heirs whatsoever.

A preliminary objection made to the competency of the Court by the defender, that the question could only be tried in the Court of Chancery, was repelled by the Lord Ordinary, and his judgment was acquiesced in.

On the merits of the cause, the plea maintained by the pursuer was, that the trust funds, which were, by the transaction 1728, transferred to John Lockhart by the Countess of Forfar, came into his hands subject to the uses of the trust; that, by the act of Parliament, the funds were settled in such manner, that the entail of the money itself, and the lands to be purchased with it, could not be defeated, nor the remainder, upon which the pursuer

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claims, barred, without making a purchase of lands in England, and the tenant in tail suffering a recovery, according to the form of that law. But as no purchase was made, nor recovery suffered, John Lockhart had no more in him but an estate tail; and the right of the pursuer remains.

*Pleaded* in defence against this claim; *imo*, By the transaction in the 1728, Lady Forfar was discharged of the trust, and the money paid over by her to the heir of the marriage. The funds transferred to John Lockhart became his property, and as much at his disposal as any other part of his effects, the whole of which were conveyed by his settlements to his wife.

A fine and recovery was not necessary to vest the fee-simple of these funds in him. The contrary doctrine supposes, that the money of this fund could only be laid out on lands in England, to be settled under an English entail. But, by the original deed of trust, the trustees are empowered to lay out the money on lands either in Scotland or England. The act of Parliament was no more than a ratification of that trust.

Suppose the money had been employed by the trustee in purchasing lands in Scotland, a fine and recovery, in the Court of Chancery, would have been entirely nugatory; and, if the heir had been under any fetters, could have had no effect to relieve him, as the jurisdiction of that court does not reach to this country.—But, if a purchase in Scotland had been made, and the lands settled in a manner agreeable to the trust, the unlimited property of the lands would have vested in Mr Lockhart of course. The trustee, in following out the purposes of the trust, must have put these lands under such a settlement as is usual in Scotland, for securing an estate on the heirs of the marriage. For that is the settlement in this country, which corresponds to the English entail, under which, lands purchased with this money in England must, in terms of the trust, have been settled. The only difference is, that, in England, a piece of form is necessary to vest the fee-simple of the subject in the heir. In Scotland, it follows from the nature of the right. The father is fettered; but, when the heir succeeds, the marriage-contract is implemented, and the substitutes have only a hope of succession, which may be defeated at the pleasure of the heir.—As, therefore, John Lockhart, the heir of the marriage, would have taken the subject in fee-simple, if the money had been laid out on land in Scotland, it can make no difference, that the money itself was paid over to him, instead of being so laid out. The trust, by allowing the fund to be brought into Scotland, and employed for purposes there, did, of consequence, relieve the heir from the necessity of using a fine and recovery; and the trust received its full effect when the funds were delivered up to the heir of the marriage.

*2do*, The right of the pursuer to insist in this action is cut off by the negative prescription, whatever title the substitute heirs might have had in the 1728, or within 40 years of that period, to insist upon a strict execution of the trust. It is of no consequence, in this question of prescription, how far the transaction betwixt the trustee and John Lockhart was regular, or whether a fine and

recovery would not have been advisable.—It is sufficient that the trust was then *de facto* given up and discharged; and, as no challenge was brought of that transaction for the years of prescription, nor action to implement the trust, the pursuers, by neglecting to prosecute their right, have lost it; for an action to implement a trust may be cut off by the negative prescription, as much as any other.

*Answered* for the pursuers, to the 1st defence; Lady Forfar received this fund under the authority of the Court of Chancery, as a trustee, for the purpose of employing it in terms of the act of Parliament; that is, in the purchase of lands to be settled by an English entail to certain uses. This could only have been done by a purchase of lands in England.—Lands purchased in Scotland could not have been settled under an English entail, and the trustee had no power to substitute any kind of settlement in place of the English entail. Every other way, in which the funds might be disposed of, could only be considered as an interim employment of the money by the trustee, until the precise terms of the act were complied with.

But as, in fact, no purchase of lands was made by Lady Forfar, the trust-monies remained in her hands under the English entail, to which they were subjected by the act of Parliament. This entail the trustee had no powers to disappoint, nor to apply the capital of these monies in any other manner, except to the single purpose of purchasing lands, to be settled as the act requires.—It was, therefore, *ultra vires* of the trustee to convey the unlimited property of these funds to John Lockhart, and could confer no right on him, nor operate as a discharge of the trust. She remained, notwithstanding thereof, obliged to employ the funds in the manner directed by the act; and John Lockhart could in no other way acquire the fee-simple of the subject, but by a fine and recovery.

To the 2d defence; The argument of the defenders rests on the hypothesis, that, by the transaction in 1728, the trust-money was discharged of the entail, and was in the hands of John Lockhart, in fee-simple.

That transaction cannot have this effect. It will not be presumed to have been the intention of parties that it should; because such a purpose would imply a tortious act, and a breach of trust.—But, whatever their intention was, John Lockhart could not, by any discharge in favour of the trustee, remove the entail attached to the trust-fund by the act of Parliament, which the trustee had no power to give up. Having right to the interest of the funds, he might discharge the trustee of these; but, as to the capital, his discharge can have no other operation, but, upon the warranty of it, to fix the money upon him, and oblige his representatives to relieve Lady Forfar, and her heirs.—He was merely custodiar of the money for his own use during his life, and then to be made furthcoming to those in remainder.—In this question of prescription, the capital must be held as in Lady Forfar's hands; the trust continued with her, and the substitute heirs had no interest to insist that the fund should be

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laid on land, as their rights in it were equally well secured while it remained in money.—Prescription, therefore, cannot run sooner than from the death of Lady Forfar in 1741.

But the substitute heirs had not the beneficial right or interest in this money even at that time, nor until the death of John Lockhart, without issue, which opened the succession, in this trust-fund, to the pursuers. It was only on his death, that they came to have any right to demand either capital or interest. Previous thereto, though it had been competent for them to have insisted for a literal compliance with the trust, and that the money should be laid out, in terms of it, they could have had no benefit from such action; as, immediately after a purchase made, John Lockhart, by using fine and recovery, could have cut off their right as heirs in remainder.

The prescription, therefore, runs only from the death of John Lockhart; for, until that time, the pursuers were *non valentes agere cum effectu*.

*Replied* for the defenders; The plea of *non valens agere* does not apply.—The pursuers in this case, as creditors under a trust-right, had a *jus quasitum* to make it effectual from the beginning—And they had a right to challenge every deed of the trustee in contravention of the trust.—It is of no consequence in this argument, that, if the action had been brought against John Lockhart, the pursuers, though successful, might have been deprived of any benefit from it, by his using a fine and recovery. The chance of this was a prudential reason for risking the prescription of the right, rather than bring an action during his life. But, as there was no defect of title in the pursuers, and the *jus exigendi* was clear, there is no room for the plea *non valens agere*.

This cause was advised upon informations, and a hearing in presence. The Court were of opinion, that both defences were well founded. The judgment was, ‘Sustain the defences to the action, and assoilzie the defenders.’

Act. Advocate, Solicitor-General.

Alt. Hay Campbell, Craig.

Fac. Col. No 7. p. 14.

\* \* \* This case was appealed:

10th March 1779.—The HOUSE of LORDS ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of affirmed.

1781. July 3. YORK-BUILDINGS COMPANY against WAUCHOPE.

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The negative prescription cannot be

JAMES WAUCHOPE acquired right to an old debt upon the estate of Earl Marischal, which had been ascertained by decree of the commissioners, and