

[29th March 1841.]

Dame ANNE CAMPBELL BAIRD PRESTON of Valleyfield and Ferntower, Relict of the late General Sir David Baird, Baronet, K.C.B., Appellant.¹ (No. 3.)

[*Pemberton — Sir W. Follett — John Stuart — Deas.*]

ROBERT Viscount MELVILLE, JOHN JAMES HOPE JOHNSTONE, Esquire, of Annandale, and ADAM HAY, Esquire, Banker in Edinburgh, Trustees appointed for executing the Settlements of the deceased Sir Robert Preston of Valleyfield, Baronet, Respondents.

[*Knight Bruce — G. Graham Bell.*]

Entail — Trust — Investiture by Trustees — Power of Court to appoint Trustees. — A party executed a general disposition of his whole heritage to trustees; the deed contained no procuratory or precept, but it surrogated the trustees in the room of the grantor, and bound his heirs to make up titles and convey to the trustees: the same party also executed an entail of part of his lands in which he was infeft in fee simple, containing procuratory and precept; the entail was so conceived as to be a mere burden on the trust right, and was declared to be in abeyance during the trust, except to certain special effects, one of which was the entering of vassals; on the party's death the first heir of entail was regularly infeft as heir of entail, before the trustees made up any title:—Held, in an action of adjudication and implement at the instance of the trustees, and upon the objection of the aforesaid heir of entail, (affirming the judgment of the Court of

¹ 16 D., B., & M., 457.

Session,) (1.) that the trustees were entitled to make up a feudal title to the whole lands, including those contained in the entail, and to a decree of declarator that they were so entitled, and, if necessary, to adjudge in implementation of the trust disposition, and ordaining the heir-at-law of the trustor to make up titles and convey the whole lands to the trustees, in order that the full right of the same might be vested in them, according to the true meaning of the trust disposition, but without prejudice to the rights or interest of any party in the said lands: And, (2.) observed, per Lord Chancellor, “ That “ independently of there being a sufficient legal answer “ to the objection, the said heir of entail could not be “ permitted thus to frustrate the intentions of the trustor, “ and defeat the estate which he intended his trustees to “ hold for the benefit of the trust.”

Question? — The trustees named by the trustor refused to accept; on the application and with the express consent of parties interested in the succession, the Court appointed trustees, with the whole powers and privileges of those named by the trustor; one of the parties so consenting afterwards objected that the Court had no power to make such appointment: — Held unnecessary to be decided, as the appointment stood in full force, having been with the consent of the party objecting.

1ST DIVISION.

Lord Ordinary
Fullerton.

Statement.

SIR Robert Preston of Valleyfield and Culross, baronet, by trust disposition and settlement, dated 17th October 1832, narrated that he had “ resolved to vest “ his estate, real and personal, whether situated in Eng- “ land, Scotland, or elsewhere, in trustees, for the uses “ underwritten;” he conveyed to “ Sir Coutts Trotter, “ baronet, Edward Marjoribanks, esquire, and Sir Ed- “ mund Antrobus, baronet, all of the Strand, London, “ bankers, and to the survivors or survivor of them, “ and their assigns, and the assigns of the survivor, in

“ trust, for the uses, ends, and purposes herein-after
 “ declared, and with and under the conditions, reser-
 “ vations, and exceptions underwritten, all and sundry
 “ lands, heritages, teinds, fishings, tenements, or build-
 “ ings, and other heritable or real estate, of whatever
 “ description, and all property and estate whatsoever,
 “ or of whatever denomination, now belonging or that
 “ may belong to me at the time of my death, wherever
 “ situated, in Scotland, England, or elsewhere, and also
 “ all debts or sums of money due or belonging to me
 “ at my death, heritable or moveable, real or personal,
 “ wheresoever and in whatever way secured, by heritable
 “ bonds or mortgages, or by personal bonds invested
 “ in the public funds or banks, bills or other documents,
 “ as also all personal estates and effects, of whatever
 “ nature, quality, or denomination, with the whole writs
 “ and title deeds of the said heritable subjects, and the
 “ vouchers and instructions of the said debts; surro-
 “ gating, and by these presents substituting, the said
 “ trustees, and the survivors of them, in my full right
 “ and place of the premises, with power to them to do
 “ every thing that I could have done before granting
 “ hereof, and binding and obliging me and my heirs to
 “ make up complete titles to the said lands, heritages,
 “ and heritable debts above disposed, if necessary, and
 “ to convey the same in all form to the persons above
 “ mentioned, and their foresaids, for the purpose herein-
 “ after mentioned; and I name and appoint the said
 “ Sir Coutts Trotter, Edward Marjoribanks, and Sir
 “ Edmund Antrobus, and the survivors and survivor of
 “ them, to be sole and only executors or executor of
 “ this my will, and intromitters and intromitter with
 “ my estate and effects falling under executry, hereby

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“ empowering them to expedite confirmations and letters
 “ of administration in due and competent form, se-
 “ cluding from the said office all others my nearest
 “ in kin.”

The conveyance was declared to be under the con-
 ditions and for the “ ends, uses, trusts, and purposes
 “ herein underwritten; that is to say, providing and
 “ declaring, as it is hereby provided and declared, that
 “ these presents are granted by me upon trust: in the
 “ first place, that my trustees shall hold the lands and
 “ estates of Spencerfield, &c., and all other lands and
 “ heritages which shall belong to me in fee simple
 “ at my death, with the exception of the Abbey and
 “ estate of Culross,” and certain other lands specified,
 “ subject to the entail or entails thereof, to be executed
 “ by me subsequent to the date hereof, in favour of
 “ myself and the heirs whatsoever of my body; whom
 “ failing, in favour of Dame Anne Preston Campbell
 “ or Baird, my niece, eldest daughter of my brother
 “ Patrick Preston, &c., and the heirs of her body;
 “ whom failing, Catherine Preston, my niece, youngest
 “ daughter of the said Patrick Preston, and the heirs
 “ of her body; whom failing, Dame Anne Preston or
 “ Hay, my niece, daughter of my brother Colonel
 “ George Preston, and wife of Sir John Hay of Smith-
 “ field and Haystoun, baronet, and the heirs of her
 “ body; whom failing, Charles Dashwood Bruce,” &c.
 whom failing, other heirs substitute; “ whom all fail-
 “ ing, my own nearest heirs whatever or assignees,
 “ and subject to all the provisions, declarations, reserva-
 “ tions, limitations, burdens, clauses prohibitory, irritant,
 “ and resolute, powers, and faculties, to be contained
 “ in such deed or deeds of entail, which deed or deeds

“ of entail shall be held and taken to be a part hereof;
 “ and I not only reserve power and liberty to execute
 “ such deed or deeds of entail, any thing herein con-
 “ tained to the contrary notwithstanding, but I direct
 “ and appoint my trustees, in the event of my failing,
 “ to grant, and execute such deed or deeds of entail of
 “ my fee simple lands and heritages, excepting, as
 “ aforesaid, or that such entails shall be liable to any
 “ exception or nullity on any ground whatever, to settle
 “ and entail the said land and heritages to and upon
 “ the persons or heirs of entail herein-before mentioned,
 “ and under all the requisite provisions, declarations,
 “ reservations, limitations, burdens, clauses prohibitory,
 “ irritant, and resolute, powers and faculties of the
 “ strictest entail. In the second place, that my trustees
 “ shall hold the said abbey and estate of Culross,” and
 the other lands excepted from the first branch of the
 trust purposes, “ subject to the other entail or entails
 “ thereof to be executed by me subsequent to the date
 “ hereof, in favour of myself and the heirs whatsoever
 “ of my body, whom failing, in favour of the said Dame
 “ Anne Preston Campbell or Baird, for her life; whom
 “ failing, in favour of the said Catherine Preston, for
 “ her life; whom failing, in favour of the said Dame
 “ Anne Preston or Hay, for her life; whom failing, in
 “ favour of the said Charles D. Bruce, and the heirs male
 “ of his body; whom failing, to other substitute heirs;”
 whom failing, to the trustor’s heirs whatsoever, subject
 to all the provisions, &c. “ to be contained in such other
 “ deed or deeds of entail, which deed or deeds of entail
 “ shall be taken to be a part hereof.”

The deed then reserved power to the trustor to execute such entails; and if he failed to do so, or if the

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entail was liable to exception, it enjoined the trustees to execute a strict entail on the heirs last above mentioned, in the same terms as those which have been quoted as to the Spencerfield entail.

The trust deed then proceeded: “ All which deed or
 “ deeds of entail, to be executed by me or by my said
 “ trustees, I appoint my said trustees, as soon after my
 “ death as may be, to obtain to be recorded in the
 “ register of entails, and to make up and complete all
 “ necessary feudal titles to the lands and heritages in-
 “ cluded therein, so that the said entails may be ren-
 “ dered effectual in law, and for the expense of which
 “ proceedings they shall have credit in accounting for
 “ my trust means and estate; but declaring, that any
 “ entails of the said lands and others, whether executed
 “ by myself or my trustees, or titles completed thereto
 “ in the persons of any of my said heirs, shall not
 “ interfere with or come in competition with the ends
 “ and purposes declared in the present trust, of and
 “ concerning my said fee simple lands and heritages,
 “ during the survivance of my said three nieces first
 “ called to the succession thereof, but said entails shall,
 “ during the lives of my said three nieces, and survivors
 “ and survivor of them, continue suspended and in
 “ abeyance, so far as regards the rents and produce of
 “ my said lands and estates, which shall be received
 “ and applied by my trustees in the manner after
 “ declared.”

The third trust purpose was then declared to be, that the trustees should sell the heritage generally conveyed to them, and “ convert into money the whole of my
 “ said personal estate, wherever situated, as shall be
 “ necessary and proper and to their discretion shall

“ seem meet, excepting in so far as the said general
 “ direction and appointment to sell and dispose of the
 “ whole of my said real and personal estate is limited
 “ and restricted by the preceding instructions to my
 “ said trustees to entail, and also by what is herein-
 “ after specially contained.”

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The trustees were directed, fourthly, after paying debts and legacies, to “ invest from time to time the
 “ remaining price or proceeds to arise by sale of my
 “ real and personal estate as aforesaid in the public
 “ funds, or in real security, in England or Scotland, as
 “ they may think best.”

5thly and 6thly.—The trustees were directed to pay legacies and annuities to a large amount.

7thly.—They were directed to remove certain furniture from Valleyfield House to Culross Abbey, and to place there such plate as the trustor should insert in an inventory, failing which, such plate as the trustees, “ according to their discretion,” should set apart for the use of the Abbey, and cause to be removed thither. As to the furniture and effects already in the Abbey, it was directed that it should be possessed by the heirs in the entail of the Abbey, under all the provisions and conditions of the entail; and the trustor appointed his “ trustees executors to see the said destination and “ entail of said furniture and effects duly enforced.” The trustees were to allow the use of the furniture at Valleyfield, on certain conditions, to each of the trustor’s three nieces successively, for her life, beginning with Lady Baird Preston; and after the death of the last surviving niece, they were to sell that furniture, and hold the proceeds as part of the trust estate.

8thly.—The trustees were directed “ to hold the said

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“ Abbey and estate of Culross, and other lands belong-
 “ ing to me within the parish of Culross, and to be
 “ contained in the foresaid entail or entails, as a residence
 “ and possession common to my said three nieces and
 “ to the said Sir John Hay, during their several lives,
 “ hereby conferring on all of them jointly the right to
 “ live at and manage the said Abbey and estate accord-
 “ ing to their pleasure, but without prejudice to feudal
 “ titles being completed thereto under the said entail
 “ or entails, in the persons of my said nieces or other
 “ heirs of entail in succession, as formerly directed.”

The trustor also, in order to render the Abbey a comfortable residence, directed his trustees to hold a sum of 10,000*l.*, “ at the pleasure of my said three nieces and
 “ the said Sir John Hay, and the survivor of them, to
 “ be laid out in improvements on the said Abbey,” &c.

9thly.—The trustees were directed “ to pay and
 “ apply the free yearly produce of the rest, residue,
 “ and remainder of my means and estate, heritable and
 “ moveable, including the yearly rents and produce of
 “ all the lands and heritage to be entailed as aforesaid
 “ (excepting the said Abbey and lands within the parish
 “ of Culross), in manner following; that is to say, my
 “ said trustees shall once every year, upon any day to
 “ be fixed by themselves, make up and state an account
 “ of the whole yearly rents, dividends, interest, and
 “ profits of my lands (excepting as aforesaid), stocks,
 “ property, and effects, heritable and moveable, and
 “ after deducting therefrom the whole annual outgoings
 “ of every description, including the payments of an-
 “ nualities and others contained in my settlements already
 “ made or to be made, shall divide the balance into
 “ three equal parts, and shall pay over the same

“ annually, as soon after the date of making up said
 “ accounts as may be, as follows; viz. one third thereof
 “ to my said niece Lady Baird, one third thereof to my
 “ said niece Catherine Preston, and the remaining third
 “ thereof to my said niece Lady Hay and the said Sir
 “ John Hay, and the survivor of them, and that during
 “ the joint lives of the said Lady Baird, Catherine
 “ Preston, and of the said Sir John Hay or Lady Hay;
 “ it being my will and intention to confer on the said
 “ Sir John Hay, during his survivance of the said
 “ Dame Anne Hay his wife, the same right and interest
 “ in my succession, heritable and moveable, as I have
 “ conferred on his wife.”

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The deed then provided that on the death of any of the trustor's nieces her share should accrue to the survivors or survivor; providing always, that if Sir John Hay survived Lady Hay he should receive the interest which would have been received by her if alive.

The deed then proceeded, “ and in order that effect
 “ may be given to this direction and appointment, I
 “ hereby appoint and declare that the entail or entails
 “ to be granted by me or my trustees as aforesaid in
 “ favour of my said nieces, seriatim, shall stand sus-
 “ pended during their lives, except only that my said
 “ nieces in succession shall be allowed to exercise all
 “ rights of patronage which may belong to the said
 “ estates, and also to enter the vassals and feuars; for
 “ which purpose it shall be competent to my trustees,
 “ immediately after my death, to apply for the recording
 “ of all deeds of entail executed by me, and to com-
 “ plete, at the expense of the trust estate, proper
 “ feudal titles under the same to the lands and estates

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“ belonging to me in the persons of my said three
 “ nieces, according to their order of succession ; but
 “ declaring, that notwithstanding the completion of
 “ such feudal titles in the persons of my neices in
 “ succession, the whole rents and produce and casual-
 “ ties of superiority shall be receivable by my trustees
 “ for the purpose above expressed.”

10thly. — The trustees were directed, immediately after the death of the last survivor of the trustor’s nieces and Sir John Hay, to invest the residue of the trustor’s estate, real and personal, in the purchase of lands in Scotland, and to entail these on the heirs of entail of Spencerfield, &c., to record such entails, and to complete feudal titles to the entailed lands in the person of the heir of entail ; and, “ on such steps being taken as are
 “ necessary to render the said entails valid in law, and
 “ the prior purposes of the present trust being duly
 “ accomplished, the heir entitled to succeed shall be
 “ thereupon let into possession of the rents and pro-
 “ duce of my whole lands and estate, as well as of
 “ those which may be entailed by myself, as of those
 “ which shall be settled and entailed by my said trus-
 “ tees, and this trust shall then be considered as at
 “ an end.”

The trust deed gave power to the “ trustees or
 “ trustee acting for the time to assume, and by a writing
 “ under their or his hands or hand to nominate and
 “ appoint any other person or persons to be a trustee
 “ or trustees along with them for the purposes afore-
 “ said ; and such trustee or trustees so assumed, &c.
 “ shall have the same powers and privileges, and be
 “ subject to the same condition with the aforesaid
 “ original trustees.” The deed then declared the trus-

tees, “whether original or assumed,” to be not liable for factors, &c., if habit and repute responsible when appointed; nor for “neglects or omissions of any kind in the execution of the trust, nor for the insolvency of debtors or others with whom they may transact, nor shall they be liable singuli in solidum, but each only for his own personal acts, deeds, and receipts.” The deed revoked all former wills, and reserved full power of alteration, but dispensed with delivery.

Sir Robert Preston, by an entail of the lands of Spencerfield, &c., dated 3d November 1832, granted and disposed, “as I do hereby, agreeably to and in terms of my trust disposition and deed of settlement, dated the 17th day of October in the present year 1832, and with and under the conditions, provisions, &c. after specified, give, grant, and dispo-
 “to and in favour of myself and the heirs of my body, whom failing,” to Lady Baird Preston, and the other heirs substitute mentioned in the first trust purpose of the trust disposition above quoted. Sir Robert bound himself and his heirs to infest the institute and heirs of entail, but under the conditions, provisions, &c. “herein-
 “after inserted.” It was declared that “the whole heirs and substitutes aforesaid shall be obliged to possess, hold, and enjoy the same upon this present deed of entail and the titles to be made up pursuant thereto, and by or upon no other title whatsoever.” It was also provided, “that the several heirs of tailzie and substitutes above specified, upon the succession opening to them, severally and respectively shall be obliged to procure and obtain themselves entered infest and seised in the said lands, estates, and others

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“ without delay, at any rate within two years after they
 “ have an opportunity so to do.” It was declared,
 “ that these presents shall stand good, and continue
 “ effectual and obligatory, not only as to the lands and
 “ others foresaid, whereto a sufficient title shall be
 “ made up and completed in my person before my
 “ decease, but also to compel my heirs-at-law and other
 “ heirs to complete and make up titles in their persons
 “ to any part of the said lands and others to which I
 “ shall not have completed and established my own
 “ titles, and then to resign the same into the hands
 “ of the respective superiors thereof, in favour of
 “ the heirs of tailzie herein-before specified, with and
 “ under the whole conditions, provisions, restrictions,
 “ limitations, exceptions, clauses irritant and resolute,
 “ and reservations before written.” The deed also
 purported to be granted under reservation of the
 grantor’s life-rent and power to alter, but dispensing
 with delivery. The deed also empowered the grantor’s
 procurator or any heir of entail to cause record the
 entail, and expedite charters, &c. in favour of the heirs
 of entail. The deed contained a precept for infesting
 the grantor and heirs of entail, under the conditions,
 provisions, &c. “ before written.”

On the same day, 3d November 1832, Sir Robert
 Preston executed an entail of the Abbey and estate of
 Culross, on the same heirs as were pointed out in
 the trust deed for that estate. This entail was similar
 to that of Spencerfield in all respects, and in particular
 it made the same reference in the dispositive clause to
 the trust deed which was made in the Spencerfield
 entail, and it did not make reference to the trust
 afterwards.

On 15th April 1833 Sir Robert Preston executed a probative writing, setting forth his desire that the Abbey should be called after the name of his deceased wife, Abbey Elizabeth, declaring that this name should be inserted by the heirs of entail in all retours, charters, &c., under pain of forfeiture of the estate; and that this writing should be held part of the entail, and recorded along with it; and adding, "I further authorize and
 " require my trustees to make and enforce all other
 " more formal deeds or clauses to give authority and
 " effect to my declared intentions of perpetuating the
 " said name and designation."

Sir Robert, by another probative writing, dated 17th April 1833, narrating that Charles Dashwood Bruce, the first heir called after the death of his three nieces, was engaged in trade, and therefore exposed to the risk of reverses; that Sir Robert wished to guard against the probability of the estates ever passing under the control of creditors, and, therefore, directed the trustees "to hold and possess the whole lands and
 " heritages already settled and entailed by me, or which
 " I have appointed to be settled and entailed by my
 " trustees, and to draw the whole rents and produce
 " thereof, till such time as the said Charles Dashwood
 " Bruce shall establish, to the satisfaction of my said
 " trustees, that he is relieved from business, and from
 " all debts and engagements attendant on his having
 " been engaged in business." The trustees in the interim were only to pay to him the "rents and pro-
 " duce as an alimentary allowance," and it was declared
 " that my entails shall during the space foresaid stand
 " suspended in the same manner as I have appointed
 " during the lives of my said nieces." On the same

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day Sir Robert signed a duplicate of the trust deed without varying it in any respect. In December 1833 he postponed Charles Dashwood Bruce in the order of succession. In other respects the trust deed and entails remained unaltered, except as to certain legacies, at the date of Sir Robert's death, which happened at Valleyfield in Scotland, on 7th May 1834. He left not only large heritable estates in Scotland, but also a great amount of personal property, situated partly in Scotland and partly in England.¹

The whole trustees named by Sir Robert refused to accept. Lady Baird Preston, the first heir called under the two entails, then expedite a service as heir of entail, and was infest. She also took out letters of administration in England for uplifting the moveable succession there, and Sir John Hay and Miss Preston became her sureties, and she expedite confirmation in Scotland as executor quà next of kin. Lady Hay, who was both heir of line and of conquest to Sir Robert Preston, made up titles to a heritable bond for 10,000*l.*, in which he had died infest. These steps were taken with concurrence of the other parties interested in the succession. The two entails were recorded on 20th May 1834 and 14th February 1835.

In July 1834 a petition was presented to the Court of Session by Charles Dashwood Bruce and two other parties interested in the heritable or moveable estate left by Sir Robert Preston, setting forth the trust settlement and the declinature of the trustees; and subsuming that as the deceased was a domiciled Scotchman, his whole moveable estate was subject to the laws

¹ See next Case, No. 4.

of Scotland; and therefore praying the Court to appoint a trustee for the purpose of executing the trust settlement.

In January 1835 another petition was presented by Sir John and Lady Hay, praying the Court to appoint Viscount Melville, John James Hope Johnstone of Annandale, and Adam Hay, banker in Edinburgh, and the survivors or survivor, to be trustees for executing the trust disposition and settlement in the room of the trustees named in the deed; and also praying the Court to ordain Lady Baird Preston and Lady Hay, being respectively executrix quà nearest in kin and heir-at-law of Sir Robert, to execute such conveyances of the trust property vested in them in favour of the trustees so to be named as would vest the whole estate, real and personal, in the trustees, and enable them to carry the trust into full execution.

Answers were lodged to these petitions for Lady Baird Preston and Miss Preston. An arrangement was afterwards made, in terms of which a joint minute was lodged for Sir John and Lady Hay, Lady Baird Preston and Miss Preston, and Charles Dashwood Bruce and one of his copetitioners, the other being now out of the field. The minute set forth that the petition of Sir John and Lady Hay had been presented, praying the Court, “with consent of all parties interested, to appoint
 “ the said Viscount Melville, John James Hope John-
 “ stone, and Adam Hay, and the survivors and survivor
 “ of them, to be trustees for executing the different
 “ powers and provisions contained in the trust disposi-
 “ tion and settlement therein mentioned executed by
 “ the deceased Sir Robert Preston, and that in the room
 “ of Sir Coutts Trotter, baronet, Edward Marjoribanks,

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“ esquire, and Sir Edmund Antrobus, baronet, trus-
 “ tees nominated by the said Sir Robert Preston, who
 “ declined to accept of the said trust,” or otherwise to
 “ appoint a judicial factor;” which petition was followed
 by answers for Lady Baird Preston and Miss Preston,
 but further consideration was, of this date, superseded
 of consent. The minute further bore, “ That the
 “ the whole parties are now agreed to concur in the
 “ prayer of the said petition for the nomination of the
 “ parties above named to be trustees for executing the
 “ trust created by the said Sir Robert Preston, and
 “ therefore now moved your Lordships to grant the
 “ prayer of the said petition to that extent.”

To this minute there was subjoined an express con-
 sent “ to what is above craved,” which was signed
 by the counsel for Lady Baird Preston and Miss
 Preston. A similar consent by the other parties was
 also subjoined.

The Court then pronounced an interlocutor, which,
 after narrating the petitions, answers, and minute, pro-
 ceeded: “ And further, of consent and as craved in
 “ the said minute, nominate and appoint the said
 “ Viscount Melville, John James Hope Johnstone, and
 “ Adam Hay, and the survivors and survivor of them,
 “ to be trustees for executing the different powers and
 “ carrying into effect the provisions contained in the
 “ trust disposition and deed of settlement and will
 “ dated 17th day of April 1833, executed by the de-
 “ ceased Sir Robert Preston of Valleyfield, baronet,
 “ and codicils thereto referred to in said petition,
 “ and that in room and place of the trustees named by
 “ the said Sir Robert Preston, who have declined to
 “ accept, and with all the powers and faculties conferred

“ upon the said original trustees by the said trust deed,
 “ and decern ; and grant warrant for extracting an act
 “ and decret accordingly in usual form, upon caution
 “ being found, before extract.”

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Caution was found for trustees so named, and, in particular, Lady Baird Preston became one of the cautioners for the said John James Hope Johnstone. This bond of caution proceeded upon the narrative that “ I the said John James Hope Johnstone, having
 “ consented to accept of the said nomination of trustee,
 “ in terms of and under the provisions and upon the
 “ footing expressed in the said deed of settlement of
 “ the said Sir Robert Preston, baronet, deceased, and
 “ under the conditions as if I had been one of the
 “ trustees nominated by the said settlement allenary,
 “ and that it is proper that I should find caution for my
 “ due discharge of the duty of trustee as aforesaid, to
 “ act in the same manner and in all respects as if I had
 “ been one of the trustees originally nominated in the
 “ foresaid trust deed and settlement, and no otherways ;
 “ therefore I the said John James Hope Johnstone as
 “ principal, and Dame Anne Campbell Baird Preston
 “ of Ferntower, Lochland, and Valleyfield, and Miss
 “ Catherine Preston, sister of the said Dame Anne
 “ Campbell Baird Preston, as cautioners, sureties, and
 “ full debtors for and with me, do hereby enact, bind,
 “ and oblige ourselves, conjunctly and severally, our
 “ heirs, executors, and successors whomsoever, that I
 “ the said John James Hope Johnstone shall duly, law-
 “ fully, and truly execute the office of trustee, &c., and
 “ with all the powers and penalties, and with the whole
 “ privileges and immunities conferred upon the said
 “ originally named trustees.”

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Under the above arrangement Lady Hay conveyed to the trustees the heritable bond for 10,000*l.* to which she had made up titles.

The trustees desired to obtain themselves fully vested in the whole heritage of Sir Robert, including the two entailed estates, and also in the whole moveable estate, considering that this was the most effectual method of executing the trust, and that the effect of the two entails stood suspended until the execution of the trust. The trustees therefore raised a summons of declarator and constitution against Lady Hay, setting forth the several deeds executed by Sir Robert, and the proceedings under which they had been appointed trustees; that they had right to complete titles to the whole heritable estate, so as to enable them to carry into full effect the purposes of the trust; that no special conveyance of any of the heritage existed in the trust dispositions; and they had therefore raised letters of general charge against Lady Hay as heiress of line and of conquest of Sir Robert, and charged her to enter heir; and that they had required Lady Hay to convey to them the heritable estate.

The summons concluded for decree, declaring “ that
 “ the whole rights, powers, faculties, privileges, and
 “ immunities vested in and bestowed by the before
 “ recited trust dispositions, deed of settlement, and will,
 “ in and upon the persons therein named as trustees,
 “ are now vested in and bestowed upon the pursuers as
 “ trustees nominated and appointed by our said Lords
 “ in room and place of the said Sir Coutts Trotter,
 “ Edward Marjoribanks, and Sir Edmund Antrobus;
 “ and that the pursuers have in consequence full power
 “ and right to make up and complete regular and valid

“ titles in due form of law to the whole of the lands
 “ and other heritable estate disposed by the said Sir
 “ Robert Preston by the deed before recited, and to
 “ obtain themselves duly vested and seized therein, so as
 “ they may be enabled to carry into full and proper
 “ effect the various trusts and purposes declared of and
 “ concerning the said lands and others, and may main-
 “ tain their rights and titles as trust disponees aforesaid,
 “ independently of acts, consent, interference, or con-
 “ currence of all or any of the parties interested in the
 “ subjects of the said trust deed, on a full and complete
 “ feudal title in the lands disposed in trust as aforesaid ;
 “ and, if necessary, to adjudge in implement of the
 “ said trust disposition, deed of settlement, and will :”
 further, that Lady Hay should be ordained to make up
 a title to the whole heritage left by Sir Robert, in-
 cluding the Spencerfield and Culross estates, and to
 obtain “ the full, heritable, and irredeemable right
 “ thereof established in her person,” and to convey the
 said lands and heritage “ to the pursuers, and to the
 “ survivors or survivor of them, as trustees aforesaid,
 “ and to their successors in office, for the uses, ends,
 “ and purposes specified in the foresaid trust disposi-
 “ tion, in order that the full and complete right of the
 “ same may be properly vested in the persons of the
 “ pursuers and trustees foresaid, and their foresaids,
 “ according to the true intent and meaning of the said
 “ trust disposition, deed of settlement, and will, and
 “ without prejudice to any right or interest which
 “ may belong to the said defenders or others in the said
 “ lands and estate, or the administration thereof, after
 “ being so vested in the pursuers as trustees foresaid.”

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Lady Baird Preston and Miss Preston were called as defenders for their respective interests.

Lady Baird Preston pleaded in defence, 1st, that even if the original trustees could pursue such an action, the appointment of the Court did not place the pursuers in their situation; 2d, any such proceeding, if competent, ought to have been by summary petition to the Court; 3d, as the defender duly completed her titles by infestment under the entail, and the fee is full in her person, there remained nothing in hereditate jacente of Sir Robert to be taken by his heir-at-law, and carried from that heir by adjudication in implement; 4th, the trustor did not contemplate a double set of titles in the trustees and in the heirs of entail, but that the title of the latter should form the sole feudal investiture of the estates.

Judgment of
 Court,
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The Lord Ordinary, after closing the record, ordered cases with which avizandum was made to the Court, when their Lordships pronounced the following interlocutor:—“ 8th February 1838. The Lords having
 “ considered the revised cases, record, and whole cause,
 “ and heard counsel for the parties, repel the defenders
 “ and decern in terms of the libel; find the defender,
 “ Lady Baird Preston, liable to the pursuers in the
 “ expenses of process.”

Lady Baird Preston appealed.

Appellant's
 Argument.

Appellant.—The Court of Session, by the act and decret of their appointment, did not confer on the respondents any right to make up titles to the entailed estates vested in the appellant, nor did it place the

respondents in the same situation in this respect with the original trustees named by Sir Robert Preston.

It was ultra vires of the Court of Session to appoint the respondents to be trustees, or at least to be testamentary trustees, of Sir Robert Preston, and to confer on them the whole rights, powers, faculties, privileges, and immunities of the original trustees. The appointment of the respondents is therefore invalid, and they have therefore no title to pursue the action of declarator and constitution brought by them against the appellant; and in the circumstances of this case, the appellant cannot be held legally barred, either by her consent to the respondents appointment, or otherwise, from pleading this objection against the respondents title to pursue the said action.

Had the appellant been the sole party beneficially interested in the trust estates, her consent, given under misapprehension as to the competency and consequences of the proposed nomination, never could confer on the Court any greater or broader judicial functions than the laws of the land had bestowed upon them, and never could bar the appellant from retracting that consent or stopping short in the dangerous path into which she had been led, the moment she discovered that she had gone wrong. But the appellant is not the only party beneficially interested in the trust estates. She represents, and is bound to maintain the rights and defend the interests of the whole substitute heirs of entail. The appellant is, in fact, expressly bound by the deeds of entail, under the pain of forfeiture, not to allow the lands to be adjudged, either in implement, as proposed by the respondents, or in any other manner, nor to

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allow any other infestment than that passed upon the entail to be expedie, and least of all to allow a fee simple title (as the respondents conclude for) to be completed in the person of the trustor's heir at law. From these obligations no such personal exception as that attempted to be taken against the appellant can relieve her, and while she is thus called upon to maintain the interests of parties who are deeply interested in the respondents nomination as trustees, and who are in no shape bound to recognise it, she does not see how she can be barred from objecting to that nomination, which ought either to be binding upon all concerned or binding upon none.

Even if the respondents could be held to have been validly appointed trustees by the Court of Session, they must still be regarded as judicial trustees, in so far at least as to render the only competent method in which they can apply for power to make up titles to be by summary petition to the Court of Session, to explain the present powers of the respondents, or to confer on them new powers, and not in the form of an ordinary action.

But even if the respondents could be viewed as in all respects in the same situation with the original trustees, they would not be entitled to make up feudal titles in their persons to the entailed estates, both because it does not appear from Sir Robert Preston's deeds that it was his intention, in the event which has happened, of his executing the entails which he contemplated in his own lifetime, that titles should be so completed in the persons of the trustees; and also because, upon feudal principles, it is incompetent, seeing

that the fee is full in the appellant's person, for the respondents to complete titles to the entailed estates through the medium of Lady Hay, the heiress-at-law.

Sir Robert Preston executed deeds of entail, which must be admitted to be in all respects full and perfect dispositions of the lands, containing procuratory of resignation and precept of sasine, and all other usual clauses by which he conveyed the lands to himself and the heirs of his body, whom failing, to the appellant, and a certain series of substitutes. Sir Robert died the institute under these entails, and the appellant has been served and retoured as heiress of tailzie and provision to him, and now stands validly infest in the estates. The appellant's infestment, so far from being unduly or surreptitiously obtained, has been expedite in compliance with the express injunctions of Sir Robert, both in the trust deed and entails, under the latter of which it would have inferred a forfeiture not to have so completed it. The fee is thus full in the appellant's person, and the question is, can Sir Robert Preston's heiress-at-law, notwithstanding, complete fee simple titles to the entailed estates, as she is called upon by the conclusions of the respondents summons now to do? The leading conclusion of the summons bears that Lady Hay, the heiress-at-law of Sir Robert Preston, should be ordained to procure herself "served and retoured as heiress of "line and of conquest to the said deceased Sir Robert "Preston, under the proper character or characters "required by the investitures or writs of and connected "with the lands and other heritable estate after de- "scribed, which pertained to the said Sir Robert "Preston at the time of his death, or by other legal "method to obtain the full heritable and irredeemable

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“right thereof established in her person.” Then follows a description of the entailed estates, being those in which the appellant stands infeft, and it is added, “in which whole lands and others above mentioned, the said deceased Sir Robert Preston died last vest and seised as of fee, and the said Dame Anne Preston, otherwise Hay, defender, may purchase and procure herself duly and lawfully served and retoured and entered as heir aforesaid.” Now, how can Lady Hay expedite a service as heiress of line and of conquest to Sir Robert Preston in these lands? The brieve of service must¹ bear that the inquest are to inquire whether Sir Robert died last vest and seised as of fee in the lands? “In whose hands the fee is now and has been since the death of the ancestor? And whether Lady Hay be the heiress entitled to succeed to him in the lands?” The heads of this brieve could not be answered in the affirmative in favour of Lady Hay. Sir Robert Preston did not die last vest and seised in fee simple in the lands. He died the institute under the entails, as is evident from the circumstance that the appellant did not and could not make up a title as the institute, but was served and retoured as the substitute heiress of tailzie and provision to Sir Robert Preston. The brieve sent to the inquest on the occasion of the appellant’s service necessarily directed them to inquire whether Sir Robert died vested as the institute under the entails, which the inquest found that he did, and the inquest on Lady Hay’s service cannot therefore consistently find that he died vested in fee simple. Again, under the brieve to be issued for serving Lady Hay, must

¹ Ersk. 3. 8. 67.

not the inquest necessarily find that the fee is now in the hands of the appellant, and has been so since Sir Robert's death? And how, therefore, can it be found that Lady Hay is entitled to succeed to Sir Robert as his heiress of line and of conquest in these very lands? If, however, these things be as the appellant has now stated them, it cannot be disputed that no charge to Lady Hay to enter herself heiress of line and of conquest to Sir Robert Preston can be of any avail, or be made the foundation of an adjudication in implement, because no party can be effectually charged to do that which it is incompetent to do; nor can an adjudication in implement be led unless the heir be in a situation to make up a title and grant a conveyance for which such an adjudication in implement is only a substitute. If, indeed, the respondents or Lady Hay can take the appellant's service and infestment out of the way by a reduction, that may be a different matter; but, in the mean time, so long as the appellant's title stands unchallenged, there is, it is submitted, no room for a service and infestment in favour of any other party, especially in favour of Lady Hay, who is herself a substitute heiress of entail, and bound under the pain of irritancy to complete no fee simple title to the lands.

It is incompetent, on feudal principles, for the respondents to get infestment, as the deeds and title stand, at least in the way they contend for.

While Sir Robert stood the fiar of estates he might have granted warrant to infest the trustees, and also the heirs of tailzie¹, by declaring and creating the trust infestment a real burden on the tailzie; or he might

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¹ Stair, 2. 3. 53.

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have attained the same purpose by simply declaring, in the dispositive clause of the entail, that the trust was to be a real burden on the infestment under the entail, which would have been sufficient without any trust infestment. But in either case there must have been express clauses for the purpose, both in the trust deed and in the entails. As to the mode of constituting such burdens, the following authorities are referred to.¹

Before, however, any warrant (i. e. procuratory or precept) was granted for infesting the trustees, Sir Robert had denuded himself, and consequently his heirs, of the fee of the estate, and all right, title, and interest he had thereto. Neither he nor his heirs (i. e. of line and conquest) were any longer in a situation to fulfil any obligation to infest the trustees.

The general disposition to the trustees did not convey the fee; it was not properly a conveyance, but only an obligation to convey.² They have only by the general disposition *jus ad rem*, which makes them mere personal creditors.³ Now, before this personal obligation was attempted to be made effectual, the fee was full in the person of Lady Baird Preston by her infestment.⁴

If then the heir of entail be *fiar*, the fee was clearly full, and any special service or second infestment was excluded.⁵

¹ 1 Bell's Com. p. 686, 688, 689; Ersk. 2. 3. 49, 50, 51; Bell's Principles, § 919, 920, 921.

² 1 Jurid. Styl. 265.

³ 1 Bell's Com. p. 750.

⁴ Bell's Principles, § 1720; President Campbell's Opinion, 5 W. & S., p. 189, note; Ersk. 3. 8. 23.

⁵ Per Lord President Hope, quoted by Sandford, p. 338, 339; Killerran, quoted *Ib.* p. 341; Bell's Principles, § 1829, 1834, 1843, 1845, 1851.

The effect of Lady Baird Preston's sasine is very important. Dispositions never become a real right till they be completed by sasine.¹ The instrument of sasine is now "accounted a necessary solemnity for perfecting " the feudal right, and hence the maxim 'Nulla sasina, " nulla terra;' without it the grantor cannot be " divested." It is "never renewed except upon the " change of a vassal."²

The feudal right continues in the disponent, till infeftment is taken by the disponent.³ "By the seisin the fee is full."⁴ There can be no such action as the present, except against a party who is served in special and infeft, or is in a situation to be so. The form of proceedings is; 1st, general charge to Lady Hay, which is held to supply place of general service; 2d, decree of constitution against her, finding that she is bound to implement the obligation to convey, come under by her ancestor, by making up titles and disponing; 3d, special charge, which was held to supply the place of special service⁵, and must be to the person last infeft in lands⁶; 4th, decree of adjudication in implement, which is held as a judicial disposition by Lady Hay to the trustees, and which will enable them to go to the superior and get charter and sasine.⁷ The action now opposed is the second of the above steps. If successful in it, the trustees will be entitled to proceed with the remaining steps without possibility of objection.

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¹ Stair, 2. 3. 16.

² Ersk. 2. 3. 34.

³ Ersk. 2. 3. 48.

⁴ Ersk. 2. 5. 46.

⁵ 1 Bell's Com. p. 709, 710.

⁶ 1 Bell's Com. p. 743; Illustrations, vol. 2. p. 423; Principles, § 1857 (1.); Ersk. 2. 12. 48; Brodie's Stair, notes to p. 462.

⁷ 1 Bell's Com. p. 748, 749.

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It is said the appellant, as a gratuitous disponee, is bound to implement Sir Robert's obligation to grant a title to the trustees; but the appellant is no more bound by Sir Robert's incompleted intentions than any other substitute heiress of entail. Supposing, however, she were so, there are no conclusions against her to convey to the trustees for completing a title through her. She is called only to defend herself against the conclusions for a title through Lady Hay.

It would be a very different thing for Lady Baird Preston to grant a title subordinate to her own, and to allow the respondents to get (what they ask) a paramount title through Lady Hay, on which the entails are to be merely a burden. It is said the summons reserves the effect of the entails, but it merely says, without prejudice to any right or interest belonging to the defenders or others in the lands, "after being so vested in the pursuers," i. e. in so far as consistent with the pursuers right and title, which is avowedly intended to be paramount and superior.

The title of the trustees is to come in by displacing the title of the appellant. If so, how can the old title under the entails be, as it was said it was, reserved?

It was suggested, however, that Lady Hay could serve in special, because Sir Robert created two fees, — a trust fee and an entail fee. But it has already been shown that the general disposition does not create a fee, but merely a personal obligation; it is not even made a real burden: there cannot be two co-existing fees.¹

¹ Ker v. Howison, 11th Feb. 1708, Mor. 14,357; 2 Bell's Illustrat. p. 424.

The only instances attempted to be given of co-existing fees were life-rents, heritable securities, and infestments in real warrandice. But none of these are fees: they are mere burdens on the fee; and the reference to them only serves to bring out the principle.¹

As to an heritable security, the infestment upon it is; in its very terms, and avowedly, a mere burden on the fee; in so much so that if the infestment of the party who granted the securities were to be reduced or set aside, the infestment on the heritable security would fall along with it. The same thing holds as to an infestment in real warrandice. It is a mere burden upon the right of the party, which operates as a security to the person to whom it is granted, in case his own lands shall be evicted from him.² The infestment which the respondents seek is of a totally different nature; not a burden on the appellant's infestment, but a paramount, superior, and independent infestment, which shall subsist, although the tailzied infestment should be altogether set aside,—not a burden, but a fee.

Suppose this were an adjudication for a debt contracted by Sir Robert the entailer, could they adjudge through Lady Hay in place of through the appellant? Clearly not. They say a trust infestment does not so far denude the grantor as to prevent an adjudication against his heir-at-law, and that this has been settled ever since the case of Campbell of Edderline, 14th Jan. 1801.³ But on looking at this case, it will be seen that it was a trust to take effect in the grantor's lifetime for payment of his debts, and that the trustees might entail

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Argument.¹ 1 Bell's Com. p. 54, 756.² Ersk. 2. 3. 28.³ M. Appendix, voce Adjudication, No. 11.

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the remainder of his lands. The trustees neither paid the debts nor executed the entails, and after his death an adjudication by one of his creditors against his heir was sustained, but solely on the principle that the reversionary right was in the trustor and his heirs. All the subsequent cases are of the same sort.¹

It thus appears that a trust infestment such as the respondents are now seeking under a family settlement, with no reversionary interest, would be an infestment in the fee of the estate, unless it had been bestowed by the trustor in the form of a real burden on the tailzied fee. Even although the infestment in favour of trustees under a family settlement would not have excluded the heiress-at-law from serving (which it would), it does not follow that infestment on the entail would not so exclude her.

It was said that a fee may be given on condition of a man returning within a certain time from Rome, &c. This, by the law of Scotland, is impossible, unless by giving it to trustees for him, and failing him for others, which would make the trustees fiars in the meantime.

The fee must be in some body²; and here it is in Lady Baird; and from her only (if at all) can a title be got. “In all attempts to adjudge a tailzied estate, the charge must be directed against the heir of tailzie, not the heir-at-law.” (Gairns, March 1682.)³

All the forms and rules of procedure applicable to adjudications for debt are equally applicable to adjudications in implement, which differ only in the particulars

¹ See Brodie's Stair, p. 558, 559 notes; Bell's Principles, § 1715.

² Bell's Principles, § 779.

³ 2 Brown's Sup. 21; Bell's Principles, § 1658; 2 Bell's Com. p. 435.

stated.¹ A party bringing an adjudication in implement is just viewed as a personal creditor; so much so, that on bankruptcy no distinction is recognized between his rights and the rights of other personal creditors²; and the same general or special charge, decree of constitution, &c. is required as in case of debt. Therefore if the present action would be inept with a view of adjudging for Sir Robert's, the entailer, debt, it must be equally inept for the purpose of adjudging in implement.

The case of Lord Selkirk³ is important, as showing, first, that if the estates could be adjudged at all by the trustees, it could only be through the appellant; and, second, that it is no answer to her objection to say (as was there pleaded ineffectually), "that were there any thing in the objection, the only effect of it would be to cast the diligence, and put him (the pursuer) to the expense of a new adjudication against the defender."

In another case⁴ it was held, that a party being in possession under an entail, another party could not make up a title to the same estate (which he claimed as the heir of a former investiture) by granting a disposition to be followed by adjudication in implement; although it was strongly pleaded (as it is here) that if the right of the new claimant was good, he was entitled to the remedy he sought, and that if his right was bad, it could do the party in possession no harm.

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¹ 1 Bell's Com. p. 748.

² Ib. p. 750.

³ Earl of Selkirk v. Dalrymple of Stair, 3d March 1756, M. App. voce Adjudication, Nos. 1 & 5; Brown's Sup. p. 314.

⁴ Dunlop (Ramsay's Trustee) v. Cochrane, 31st March 1824, 2 Shaw's Appeals, p. 115.

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Respondents.—It is incompetent for any party, ope exceptionis, and by way of defence, to object to the title of a party duly vested in an office or right by a decree of the Court.

No objection in any form can be received from the appellant, who was a party to and concurred in the appointment of the respondents, along with all others having interest, and at whose instance the decrees appointing them were in truth obtained.

No application to the Court for authority to raise this action was necessary. The authority to do so is the decree of nomination and appointment.

The appellant has neither title nor interest to object to the conclusions of this action. The first conclusion is, in terms of the decree, that all the rights and powers vested by the trust disposition in the persons therein named, being vested by the decree in the respondents, they have full power and right to make up titles in the ordinary form of law to all heritable property disposed by the trust deed, so that they may be enabled to administer the trust estate, and manage and defend the same upon a complete feudal title, and where that is necessary, to adjudge from another party, the heir-at-law, Lady Hay, in implement of the general conveyance in the trust deed.

Now what title or legal interest can the appellant, who is not the heir-at-law, exhibit as giving her a right to oppose this conclusion? She has concurred in the application to the Court, and in the decree nominating the respondents to be trustees in the room and with full powers of those named in the deed. She is also a party obtaining benefit under that trust deed. The decree of nomination then is her own act. She has

herself invested the respondents with the powers, and charged them with the duties of the original trustees. The decree of nomination must now be acted upon. The purposes of the trust must be executed by those charged with that duty by the appellant herself. The trust can only be executed in the ordinary process of law, and in the manner obligatory upon the original trustees. Now their duty was to make up titles to the trust property. Trustees must do so in order to vest the trust estate in themselves for preservation, protection, management, and administration. Where there is a special conveyance, they are then the disponees with a full and adequate title. Where there is a general conveyance of all lands belonging to the trustor, the mode of making up titles is by adjudging the lands not specially enumerated from the heir-at-law in implement of the general conveyance, and the heir-at-law cannot oppose this, if the general conveyance is unimpeachable.

The appellant is not the heir-at-law in any of the properties, either generally or specially conveyed. How can she be entitled to resist the conclusions for adjudging in implement from the heir-at-law the property conveyed in general terms to the trustees, but not by special description? Such adjudication in implement is necessary, whether for the purpose of executing the trust in favour of the appellant herself, or of defending that property against the appellant if she brings forward any competing title.

In either view, she cannot object to this conclusion of the summons. So far as the title is necessary for administering and executing the trust for the benefit of the parties interested, including the appellant, she is barred from objecting by being a party to the decree of

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nomination. So far as this measure of making up titles is necessary in order to protect the estate against any competing title founded upon by the appellant herself, it is quite plain that she cannot for an instant be listened to in resisting the conclusion now adverted to. In that case she is an adverse party against whom the trust estate is to be protected and defended. She has no right to appear in order to prevent their putting themselves in the situation of defending the estate. On the contrary, her very adverse interest requires that her objection should be over-ruled. For having concurred in giving the respondents the title and power of trustees, she has neither title nor interest to object to a conclusion necessary for the performance of the duty with which she has charged the trustees.

There is no inconsistency whatever between the title in the person of the heiress of entail, and of the trustees.

The competency of completing the respondents title under the trust deed, notwithstanding the completion of the tailzied title by Lady Baird, might be illustrated in different ways. First, suppose that the appellant had not yet expedie a service and infest herself in the lands quà heiress of entail, it cannot be disputed that it would then have been quite competent for the pursuers to complete their title by adjudication in implement. The completion of such a title by the trustees would not, so far as they can discover, have prevented the appellant from subsequently serving heiress of entail and infesting herself quà heiress of entail in the entailed lands. A trust infestment and a tailzied infestment could in such a case have been both competently expedie, and might have subsisted together. If so, it is not very obvious, either upon feudal principle or other-

wise, why the mere circumstance of the appellant having been permitted or having contrived to complete her title first should exclude or render incompetent the completion of the trustees title. This view demonstrates that the appellant did not, by her service and sasine as heiress of entail, take up the plenum jus or entire right to the lands which was bestowed by Sir Robert Preston's deed of settlement. She only took up the tailzied right. Had the trustees gained the priority of completion, they would have taken up an estate in the lands by feudal title, and which was quite capable of being feudalized in their persons. They would, however, have left another and separate estate or right in the lands, likewise capable of being feudalized in the person of the heir of entail. If there were thus created by Sir Robert's deeds two separate estates or rights in the lands, both capable of being feudalized, where, the pursuers would just ask, is the estate or right which they would have taken up in the case supposed? Or what is now to prevent them from feudalizing that right equally as if the appellant had not served heiress of entail? Her Ladyship cannot pretend that she has acquired the fiduciary right or estate; and as little can it be maintained that it became extinguished or sopited by the mere completion of the appellant's separate and subsidiary right as heiress of entail. Secondly, suppose again that Sir Robert Preston had not executed the entails during his own lifetime. According to the express declarations and instructions of the trust deed, the execution of the entails would in that case have been incumbent upon the pursuers as trustees. The trust deed not only contains a disposition to the trustees of the entailed lands, but it is thought that the trustees in

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the case supposed would have completed feudal titles to the whole estate before making the entail of the lands which were ordered to be entailed. Having completed their title and feudalized their general right, the trustees would then have disposed the lands to the appellant and the other heiresses of entail. This conveyance would have had the effect of separating the tailzied right from the fiduciary right, or of creating or rather explicating the two separate rights or estates in the lands intended and made by the testator. The appellant, as the institute in the entail, would and might competently have taken infestment in the lands during the subsistence of the trust; but would the disposition of entail, or sasine thereon, have in that case had the effect of totally denuding the trustees of all right or feudal title in the lands contained in the entails? Would not the title then have stood precisely in the situation in which the pursuers now seek to place it? They would have been infest quâ trustees in the lands, while the appellant would have been also infest in them quâ heiress of entail. Both rights and both sasines would have been quite compatible; the appellant's right, however, being inferior to, and being suspended in operation during the subsistence of the trust.

Judgment deferred.

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LORD CHANCELLOR.—In this case the interlocutor appealed from repelled the defences, and decerned in terms of the libel. (His Lordship read the first conclusion of the summons.)

The judgment of the court giving to the pursuers what they so asked has decided that the pursuers are

entitled to the feudal title or the legal estate in the lands comprised in the testamentary dispositions executed by Sir Robert Preston, and to the assistance of the Court to complete such titles. This the appellant, who completed her title by infeftment under the deeds of entail, disputes; and contends, first, that the title claimed by the pursuers is inconsistent with that given to her, and that her's ought to prevail; and, secondly, that there was no intention expressed by Sir Robert Preston that the pursuers should have the feudal or legal title in the lands.

With respect to the first, it is, I think, sufficiently shown that there is not that inconsistency in the titles claimed by the pursuers, and possessed by the defender, which can impeach the interlocutor appealed from, if it shall appear that the titles claimed by the pursuers were intended to be given to them by Sir Robert Preston, and are necessary for the due execution of the trust disposition. The real question, therefore, is, whether such intention is to be collected from those dispositions, and whether such necessity exists?

I think it quite unnecessary to consider one point, which is the subject of much argument in the papers; namely, whether the Court of Session have the power of appointing new trustees, where the trustees named by the authors of a trust disposition fail or decline to act, because, in this case, the pursuers were, on the 19th of May 1835, appointed trustees for executing the different powers and carrying into effect the provisions contained in the trust disposition and deed of settlement and will of Sir Robert Preston, in room and place of the trustees named by him, who had

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declined to accept, with all the powers and faculties conferred upon the said original trustees, and this with the consent of the appellant. This appointment stands in full force; and whilst it so stands, the title of the pursuers under it cannot be disputed by the appellant.

I proceed, therefore, to examine the trust disposition and will creating the entail, for the purpose of ascertaining whether they contain satisfactory proof of Sir Robert Preston's intentions, as to whether the feudal or legal title should, during the continuance of the trust, vest in the trustees or in the appellant the heiress of entail.

The trust disposition, which is dated 17th October 1832, commences by stating that the author, Sir Robert Preston, had resolved to vest all his estate in trustees, and bound himself and his heirs to make up complete titles to the lands, if necessary, and to convey the same in due form to the trustees; but he declares that the trustees shall hold such lands subject to the entail or entails thereof, the provisions and declarations of which are then specified, and under which the appellant claims, which deed or deeds of entail were to be taken as part of the deed, and reserved to himself the power of executing such deed or deeds of entail; and in the event of his failing so to do, he directed his trustees to execute such deed or deeds of entail, so as to settle the lands upon the persons therein mentioned, of which the appellant was the first named after failure of issue of the settlor, and he appointed his trustees, as soon after his death as might be, to obtain the same to be recorded in the register of entails, and to make up and complete all

necessary feudal titles to the lands included therein, so that the said entails might be rendered effectual in law; but he declared that any entails of the said lands, whether executed by him or his trustees, or titles completed thereto in the persons of any of his heirs, should not interfere with or come in competition with the ends and purposes declared in the trust during the survivorship of his three nieces first called to the succession thereof (of whom the appellant is the first), but that such entails should, during the lives of his said three nieces, and the survivor or survivors of them, continue suspended and in abeyance, so far as regards the rents and produce of his said lands, which were to be received and applied by his trustees in the manner after declared; he then gives to his trustees a power of selling his estates, and, after payment of his debts, directs them to invest what shall remain of the produce of such sale and of his personal estate in the public funds or real securities; he then, after giving many annuities and legacies, directs his trustees to hold the Abbey and estate at Culross, contained in the foresaid entail, as a residence and possession common for his three nieces during their lives, conferring on all of them jointly the right to live at and manage the same, but without prejudice to feudal titles being completed thereto under the entails in the person of his nieces, or other heirs of entail in succession, as before directed.

He then, in the ninth place, directed his trustees to pay and apply the free and yearly produce of his property in three equal parts to his three nieces, with survivorship; and in order to give effect to that direction he declared that the entails to be granted by him

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or his trustees in favour of his said nieces should stand suspended during their lives, except that his nieces in succession should exercise all rights of patronage belonging to his estates, and enter vassals and feuars, for which purpose it should be competent for his trustees immediately after his death to apply for the recording of all deeds of entail executed by him, and to complete, at the expense of the trust estate, proper feudal titles under the same to the said lands in the persons of his said three nieces, according to their order of succession; but declaring that notwithstanding the completion of such feudal titles in the persons of his said nieces, the whole rents and produce and casualties of superiority should be receivable by his trustees for the purposes expressed.

He then directed his trustees, upon the death of the survivor of his nieces, to lay out the residue of his personalty in the purchase of lands in Scotland, and to execute and grant deeds of entail thereof, according to the declaration before directed of his estates, and to cause such deeds of entail to be recorded, and to make up and complete feudal titles to the lands therein contained in the person of the heir having right thereto; and on such steps being taken as were necessary to render the said entails valid in law, and the prior purposes of the present trust being duly accomplished, the heir entitled to succeed should thereupon be let into possession, and that the trust should then be considered at an end.

He then declared, that the receipts and conveyances by his trustees should be available to all purchasing from or assigning to them, and directed his trustees

not to sell any part of his property during the lives of his nieces, but to sell it after their deaths, declaring that such parts and other lands specified were included in the present conveyance to his trustees.

By two dispositions or deeds of entail, both dated 3d November 1832, he created entails of the different parts of his estate, under which the appellant claims. Those deeds are in the usual form, but both commence by reciting that the same were made for the preservation of the estate in the line of succession thereby pointed out, and agreeably to and in terms of his trust disposition and deed of settlement. When the provisions of this trust deed are considered, there does not appear to be room for doubting that the author of it intended that his trustees, during the continuance of the trust, should have the complete dominion over the property, and all estate, power, and interest in it which could be necessary to carry his objects into effect, which indeed, if it were necessary, will be found further confirmed by the codicil of 17th April 1833, being after the date of the deeds of entail. That these trusts and these objects of the testator could not be carried into effect without the feudal or legal title to the estate seems to be equally free from doubt; but as the trust deed did not contain any precept of sasine (or covenant for infestment) in favour of the trustees, it was found necessary for them to complete their feudal title by constitution and adjudication in implement, which was therefore the object of the suit, and is the substance of the interlocutor appealed from. But the appellant contends that she has made up her feudal titles as heiress of entail, and that such title existing is incon-

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sistent with any feudal title to be made in favour of the trustees.

There seems to be a sufficient answer to that proposition in law, but it does not appear to me to be necessary to enter into that point, because the interlocutor deals only with the heiress of line, and not with the appellant as heiress of entail. It only directs the heiress of line to do what the testator by his trust deed undertook she should do, namely, if necessary, to make up and complete titles to the lands, and, if necessary, to convey them to the trustees. If under this trust deed the trustees are entitled to have such titles made up, how can the appellant, claiming as a gratuitous disponee (or purchaser) under the author of this deed, and under an instrument declared to be agreeable to and in terms of the trust deed,—by having made up her titles under the entail, which is directed to be suspended during the trust,—be permitted to frustrate the intentions of the donor under whom she claims, and defeat the estate which he intended his trustees should hold for the purposes of the trust?

For these reasons, I move your Lordships that the interlocutor appealed from be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certi-

fied as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such statutory process or diligence for the recovery of such costs as shall be lawful and necessary.

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SPOTTISWOODE and ROBERTSON — MEGGISON,
 PRINGLE, and MANISTY, Solicitors.