[*29th March* 1841.]

(No. 4.) Lady Baird Preston, Appellant.[1]

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

Viscount Melville and others, Respondents.

[*Knight Bruce — G. Graham Bell.*]

Moveable Succession, Administration of — Jurisdiction. — Certain parties named trustees as well as executors of the will of a domiciled Scotchman, having declined to accept, the Court of Session, with consent of parties next of kin, appointed other trustees with all the powers given or competent to the original trustees. Previous to such appointment, one of the next of kin, a domiciled Scotchwoman, obtained letters of administration of the moveable estate in England from the Prerogative Court of Canterbury, and found caution there for the due execution of the office. She filed a bill in Chancery in England, praying to have the usual decree for taking the accounts, and administration of the personal estate, and that the residue might be secured for the benefit of the parties interested. The trustees then raised an action against this administratrix before the Court of Session in Scotland, concluding for declarator that all the property and estate which belonged to the testator at his death, wherever situated, in Scotland, England, or elsewhere, and in particular the funds and effects held by the administratrix under the foresaid letters of administration, now pertain and belong to and ought to be vested in and transferred to them as trustees aforesaid; and the Court having decerned to that effect, judgment of the Court of Session reversed, and cause remitted back with a declaration,—

[1] 16 D., B., & M., 472.

that the property of the trustor in England ought to be administered by the said administratrix by virtue of the letters of administration granted by the Prerogative Court of Canterbury.

Observed, per Lord Chancellor, "The domicile of a deceased "party regulates the right of succession to his moveable "property; but the administration must be in the country "in which possession of his property is taken and held "under lawful authority."

(*See the Statement of Facts in the preceding Report.*)

1st Division.

Lord Ordinary Fullerton.

Statement.

THE trustees and executors named by the testator Sir Robert Preston declined to act; whereupon, by consent of several of the parties chiefly interested, including Lady Baird Preston,—Lord Melville, Mr. Hope Johnstone, and Mr. Adam Hay were appointed by the Court trustees to execute the trusts of the settlement of Sir Robert Preston, in the room of the trustees and executors named by him, and with the whole powers and privileges of these trustees. They prepared to vest themselves fully with the whole heritage, and also with the whole moveable estate left by Sir Robert, and conveyed by him to his trustees. They accordingly raised the action of declarator and constitution against Lady Hay, the heir-at-law, mentioned in the preceding report.

Previously to the respondents appointment by the Court the appellant had been confirmed executrix quà next of kin in Scotland. Her Ladyship had also taken out letters of administration in England. The respondents applied to the appellant to convey to them the moveable estate in her hands; and as she had paid a considerable number of legacies, &c. the respondents offered to discharge her and her cautioners in the Eng-

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lish and Scottish courts of her intromissions, upon obtaining delivery of the residue of the estate, and of the vouchers of her disbursements. She thereupon conveyed to them the moveable estate in Scotland, which she held as executrix quà next of kin; but she refused to convey to them the moveable estate to which she had administered in England, stating that, as she had found caution in the courts of England for the due execution of the office of administratrix, she and her cautioners, Sir John Hay and Miss Preston, could only be safe by obtaining a judicial discharge in the English courts.

The respondents, in January 1836, filed a bill against the appellant, first in Exchequer, and afterwards in Chancery, which prayed that she should be ordained to produce accounts of her intromissions as administratrix; that the Court should take an account of the estate left by Sir Robert Preston in England, and of Lady Baird Preston's intromissions; and that the residue of the estate, so far as extant, should be paid over to them for the trust purposes, on due provision being made for such debts and legacies as might still remain unpaid.

On the 1st February 1836, the appellant, as administratrix, filed a bill in Chancery against the respondents, praying that an account might be taken under the direction of the Court of the moveable estate of Sir Robert Preston, that the same might be applied in a due course of administration, under direction of the Court, that the clear residue should be ascertained and secured for behoof of the parties interested, and that she might be discharged of her office as administratrix. She afterwards added a prayer for an injunction against the trustees proceeding in Scotland to defeat her right.

On the 25th February 1836 the respondents raised an action of declarator and payment against the appellant before the Court of Session, narrating the deeds and proceedings in Scotland above detailed, and concluding for declarator that the whole property and effects of Sir Robert Preston, of every denomination and wherever situated, especially all moveable estate and effects, and "in particular the whole funds and effects of the "said deceased Sir Robert Preston, held by the said "Dame Anne Campbell Baird Preston, defender, under "the foresaid letters of administration granted and "issued in her favour by the foresaid Prerogative Court "of the Archbishop of Canterbury, now pertain and "belong, and should be vested and transferred to the "pursuers, and survivors or survivor of them, as trus-"tees nominated and appointed by our said Lords for "executing the settlements of the said deceased Sir "Robert Preston, in room and place of the said Sir "Coutts Trotter, &c., but in trust always for the uses, "ends, and purposes specified and contained in the "foresaid trust disposition, deed of settlement, and will; "and that the whole rights, powers, faculties, privileges, "and immunities, vested in and bestowed by before-"recited trust disposition, deed of settlement, and will "in and upon the persons therein named, are now "vested in and bestowed upon the pursuers as trustees "nominated and appointed by our said Lords; and in "particular, that the receipt or receipts, discharge or "discharges of the pursuers are good and effectual to "all concerned, transacting with, purchasing from, and "paying to the pursuers as trustees foresaid, so that the "receipts and discharges to be granted by the pursuers "to the said defender, on her paying and transferring

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"the foresaid funds and effects, will be a valid and "and sufficient discharge and exoneration to her of her "whole intromissions with the same, so as to relieve her "of all claims on the part of the said trust estate, for or "anent her said intromissions with any part of the "funds so intromitted with by her, and to be transferred "as aforesaid."

Then there follows a conclusion for decree ordaining the defender (appellant) forthwith to pay and transfer the moveable estate there specified, and all other moveable estate which she held or might hold as administratrix. There was also a conclusion that she ought to be ordained to deliver over the vouchers of payments by her as administratrix, "to the end the pursuers may "be enabled to exoner and discharge her of her intro-"missions." Sir John Hay and Miss Preston, as cautioners for the defender, were called, for their interest.

Among other defences the appellant pleaded, 1st, that being subject to the jurisdiction and control of the Prerogative Court, in which she had found caution for the due performance of the office of administratrix, she was not amenable to the Scotch courts in any question as to the funds so administered by her in England; 2d, that neither the respondents nor the Scotch courts could discharge or release her from the obligations and duties of the office of administratrix.

The Lord Ordinary, after hearing parties on a closed record, ordered cases, with which avizandum was made to the Court. The Lords pronounced the following interlocutor:—"8th February 1838. The Lords having "considered the revised cases, record, and whole cause, "and heard counsel for the parties, find and declare

Judgment of Court, 8th Feb. 1838.

" in terms of the first conclusion of the libel, and " decern, and to this extent allow an interim extract to " go out: Quoad ultra, supersede consideration of the " other conclusions of the libel, as also of the question " of expenses."

Judgment of Court.

Lady Baird Preston appealed.

Appellant.—The question raised by the action of declarator and payment at the respondents instance against the appellant, being substantially an inquiry as to the title to administer the funds in England, such a question falls under the exclusive jurisdiction of the courts in England, these funds being now legally vested in the appellant as administratrix with the will annexed, under a title and in a character conferred by the proper ecclesiastical court in England, the validity of which title cannot be tried in the Scotch court, nor can her duties and liabilities, in her character of administratrix, be determined or released by the decree of the Court of Session.

Appellant's Argument.

The distinction between questions relative to the beneficial interests of parties in a moveable succession situated in a foreign country, and questions relative to the title to administer that succession, or as to the mode of taking it up and making the rights of parties thereto effectual, is a plain one, and fully recognised by the law of Scotland. The former class of cases is regulated by the lex domicilii testatoris. The latter class of cases is regulated by the lex rei sitæ. The present is a question solely as to the title to administer, the mode and manner in which the succession is to be realised, so that the rights of parties therein may be rendered effectual.

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Appellant's Argument.

It is not a question as to the beneficial rights of the parties themselves, which rights are not here challenged, and about which there is no dispute. It is, therefore, a question which must (even apart from all specialties) be regulated by the lex rei sitæ, and not by the law of the deceased's domicile.

The present action, in whatever way decided, cannot affect the rights of any of the parties interested in Sir Robert Preston's succession. These rights and interests will remain the same whoever shall possess the title to administer the estates. The question here is a pure question as to the title of administration,—whether that title stands now in the persons of the respondents, or in the person of the appellant; and how the appellant is to denude of, and be discharged of, her actings in the character of administratrix, after the primary purposes for which she obtained that office are accomplished? It is, therefore, a question which falls entirely to be regulated by the law of England, and to be disposed of by the judges of that country, under whose jurisdiction the moveables are situated, from whom the appellant obtained her office, and by whom alone she can be validly discharged. The principles for which the appellant here contends are very strongly illustrated by the case of Egerton against Forbes, 27th November 1812[1], the rubric of which is, "Moveable property in England, to "which the wife succeeded during the subsistence of the "marriage, but which was not confirmed during the "husband's life, found to have fallen under the jus "mariti." See the law as there laid down by the late Lord Meadowbank.

[1] Egerton v. Forbes, 27th Nov. 1812, Fac. Coll.

Neither can the appellant discover how the Court below got over the difficulty which so prominently presents itself, from the important specialty that the appellant has been lawfully invested with the office of administratrix of the English funds by the English courts, to which she has found caution, and to which she is amenable and bound to account for her whole intromissions and management. The receipt and discharge of the respondents could not be a sufficient discharge and exoneration to the appellant. Will the appellant's statement to the English courts, from which she holds her office, that she has accounted to and been discharged by the respondents, supersede the necessity of her accounting to and being discharged by these courts? The Court of Session has found that the English funds, and the whole vouchers thereof, belong to and are vested in the respondents; but if the appellant, in deference to the judgment of that Court, should pay over these funds, and deliver these vouchers to the respondents, will this relieve her from again making payment of these funds into or under the orders of the English courts, and from there exhibiting the very vouchers and documents which she had previously placed in the possession of the respondents, and without production of which to the competent court she could not be relieved of her office, or get the account of her intromissions audited and discharged?

Lord Gillies observed[1], that "it makes no difference "whether that personal property be situated in France "or in Turkey, for it is just as if it were in Scotland." This, with deference, might be very true, if the present were a question as to the nature or relative amount of

[1] See Rep.

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Appellant's Argument.

the rights of the parties beneficially interested in the estate,—as to the proportions in which they were entitled to share the residue,—as to the vesting or lapsing of the legacies bequeathed by the testator, or any other matters of that description. But the question raised in the present case is not of that sort at all; it is not even a question between the appellant as administratrix, on the one hand, and any of the legatees, or others interested under the settlement, suing for payment of their legacies or shares of the funds, on the other. In such questions, it might fairly be contended that the appellant was liable to be sued either in Scotland or England, so long as she was personally subject to the jurisdiction of the courts of both these countries; and the nature and extent of the beneficial interests of the parties must of course be regulated by the law of the testator's domicile. But the present is a question as to parting with the whole funds, property, vouchers, and documents belonging to the estate; as to the title to manage, administer, and distribute it; as to the liberation and discharge of the appellant from her office of administratrix; and as to the conferring of the powers, privileges, and duties of that office on the respondents. In such a question, it is humbly submitted to be a very different matter, "whether the personal property be situated in "France or in Turkey," and that it is very far from being to be considered "just as if it were in Scotland."

The respondents contend that the decree has a more limited effect than the appellant asserts, and that it merely contains a finding, in Scotch law, of what is the legal right of the respondents, but ordains nothing to be done; it is plain, however, that it strikes at the appellant, in so far as that if such decree were well

founded, her actings as administratrix must cease, and the whole property now in a course of administration in the English court must be paid over to the trustees. The question of domicile so much argued has really nothing to do with the matter.

Appellant's Argument.

[*Lord Chancellor.*—Assuming that the respondents were properly appointed, the Court of Session might perhaps be entitled to declare that they should be trustees as to the residue.] There would have been no objection to that.

Respondents Argument.

Respondents.—The plea of the appellant, that as she holds a title to the English funds from the English ecclesiastical court, her right and title thereto cannot be interfered with by the Scotch court, she being alone answerable to the courts in England, is founded upon a double misconception of the nature of the defender's title, and of the object of the pursuers' present action.

Sir Robert Preston having been a domiciled Scotchman at the period of his death, his whole personal succession, wherever situated, must be regulated and distributed according to the law of Scotland.[1] As personal property has no locality, the law holds that it is all situated within the territory of the defunct's domicile, or, as it has been expressed, gathered round his person or in his pocket at the time of his death. This is precisely the import of the case of Egerton, quoted by the appellant.

[1] Selkrig v. David, 1 Rose's Rep. 478; Anstruther v. Chalmers, 2 Sim. 1; 2 My. & Cr. 513; Yeats v. Thomson, 1 Sh. & M'L. 795; Breadalbane v. Chandos, 2 My. & Cr. 739; Warrender, 2 Sh. & M'L. 154; Stanley v. Birnie, 3 Hagg. 373; ex parte Geddes, 1 Gl. & Jam. 432; Male v. Roberts, 3 Esp. N. P. 103.

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According to this principle, the Scotch court is the natural and competent court for determining all questions in regard to the right to or distribution of this succession, and all or every part thereof, without distinction as to where the funds or property may be situated. Being a Scotch succession it must be regulated by Scotch law; and that law, provided there be jurisdiction over the parties requiring to be called, falls to be determined by the Scotch court. If any party has got possession of or pretends right to any part of the succession, it is quite competent for the true owners, whether under intestacy or by will, to vindicate the property or seek declarator of their right thereto, before the Scotch court, as the competent and natural tribunal.

It may no doubt happen, in consequence of the parties wrongfully detaining or erroneously claiming right to the property being beyond the jurisdiction of the Scotch court, that the true owner cannot institute any competent process against these parties before the Scotch court. But such a case does not take from the general principle; that principle not being altered, but merely incapable of being applied, in consequence of the absence of the parties, or want of jurisdiction over them.

Now here the appellant has got a certain title in a portion of Sir Robert Preston's Scotch succession, under pretence of which she claims right to that portion of the succession, and disputes the right of the pursuers, who claim the whole succession as the general disponees and executors of the testator. The appellant is confessedly within the jurisdiction of the Scotch court; and the respondents have brought this action in order to try the question of right with her.

The general principle alluded to being, it is submitted, quite sufficient to support the competency of the pursuers action, it is almost unnecessary to aid their argument. But there are other peculiarities in this case, all tending to show the competency of the action before the Scotch court, and proving the propriety and expediency of having the question determined there, and not in England. Because the succession was a Scotch succession, and the parties interested in it resident in Scotland, the application for the appointment of the pursuers over the succession was made to the Scotch and not to the English court. The parties selected, and that by the appellant herself, to administer the succession as new trustees, were Scotch and not English. The pursuers are now administering the succession under a Scotch title, being amenable in a certain degree to the Scotch court for their whole administration. They undertook the trusteeship relying upon their acquaintance with Scotch law, and believing that their rights and duties would all be regulated by that law. They have no knowledge of English proceedings, save that they understand them to be of such a nature that it is their duty to prevent any part of this succession getting connected with English forms or proceedings, either by the funds being cast into Chancery, or otherwise.

The case is now put by the appellant on new grounds. The question of domicile is held as of no importance; the existence of the English suit, and the liability of the appellant to account under it, being treated as the decisive matter in hand. Thus then the administration of an estate would be regulated by the law of the state where the property happens to be; although formerly it was considered, not merely as matter of

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comity, but as matter of right, that each state was bound to respect the law of the country of the domicile. Is every foreign litigation thus to impede the administration by the proper executors in the land of the domicile?

The respondents say that they are amenable for their administration to the Scotch courts, and they submit to these courts alone. Any person having a demand against them connected with Sir Robert Preston's trust or funds, whether these funds be situated in Scotland or in England, would be entitled to bring their action against the pursuers before the Scotch court. Suppose any party to pretend right to part of the English personalty which would go to exclude the right and title of the pursuers, the competent and proper court for trying the question of right between such claimants and the pursuers would be the Scotch court. Just suppose that the appellant had there moved as pursuer in her claim of right in competition with the pursuers, founding upon her right in the English funds, or any other ground, can it be doubted that her Ladyship might competently have raised against the pursuers in the Scotch court, either a counter action of declarator or any other process? Such an action would be not merely competent and regular because the pursuers are resident in Scotland: the main foundation of the action would lie in the fact that it was to try a question of right in regard to the succession of a domiciled Scotchman.

Again, if the general principle founded on be sound in itself, it matters not what is the foundation of the appellant's claim or pretence to that part of the succession, as to which the pursuers are now seeking to have their right declared. If a question of right has actually

arisen, that falls to be determined by the Scotch court. That Court will, of course, judge of the question according to the merits of the respective claims. The mere circumstance of the appellant's ascribing her claim to a certain title issuing from the English court, or to any proceeding taken in England, cannot affect the competency of the action, or interfere with the radical jurisdiction belonging to the Scotch court. It will, of course, be open to Lady Baird, as the defender in this action, to show that her English title and administration is sufficient in law to exclude the claim or right of the respondents. But the appellant has not instructed, or even averred, a relevant case upon this point. The interlocutor merely adopts the conclusion of the summons, which contains a declaration of right.

[*Lord Chancellor.*— Look to the next conclusion: that assumes that payment to the trustees would be an effectual discharge. Would that be so?]

It is thought it would; but the question here is, whether it is a correct declaration of the law of Scotland. Suppose the appellant to have acted on this declaration of right, and a creditor to sue her, she would plead plene administravit. Handing over the funds to the Scotch executors would completely discharge her.

The ecclesiastical court merely bestows administration on the party having the apparent right, or asking the letters of administration. But the ecclesiastical court has no jurisdiction to compel the administrator to execute the settlement, or administer the succession according to the will of the testator. If legatees, creditors, or others want remedy against the administrator, they must resort to the common law or equity

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courts, generally of the country where the administrator is resident. The administrator cannot get exoneration from the ecclesiastical court. That must be sought from the ordinary courts. But these courts, when disposing of the reversion of the funds in the hands of the administrator, will of course do so according to the settlement of the testator, or according to the legal rights of the parties having a claim on that reversion. Where the succession is Scotch, the rights of the parties claiming it must depend upon the law of Scotland as arising under the will or by intestacy, while the Scotch court may competently declare or adjudicate upon any such question of right, equally after the administrator has brought his action for exoneration in the English court, as before the institution of that action. The English court will not keep a Scotch succession in England, or put it permanently under the charge of the Accountant General in England, merely because administration had been taken out in England, and a suit to have the estate administered brought in the English court.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, by the interlocutor appealed from in this case the Court of Session found and declared in terms of the first conclusion of the libel. Some question was made as to what came within the description of the first conclusion of the libel; but it is clear that it embraces so much as prayed that it might be found and declared, that all property and estate whatsoever which belonged to Sir Robert Preston in Scotland, England, or elsewhere, all debts, sums of

money due and belonging to him at his death, and all personal estate and effects of whatsoever nature, and in particular the whole funds and effects held by the appellant under the letters of administration, pertain and belong and are vested in and transferred to the pursuers, in trust for the purposes of Sir Robert Preston's settlement; and that his whole rights, powers, faculties, privileges, and immunities vested by his trust disposition and settlement upon the trustees therein named are vested in and bestowed upon the pursuers.

The appellant is the administratrix of Sir Robert Preston in England, by virtue of letters of administration from the Prerogative Court. The pursuers have been appointed trustees by the Court of Session in the place of certain persons who were named as trustees and executors by Sir Robert Preston, but who declined to act. This appointment took place with the consent of the appellant. The act of appointment is dated 19th May 1835, and is expressed to be by such consent; and it nominates and appoints the pursuers to be trustees for executing the different powers, and carrying into effect the provisions contained in the trust disposition, deed of settlement, and will of Sir Robert Preston, and that in the room and place of the trustees named by him, who had declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust deed.

In January 1836 the respondents filed a bill in the Exchequer in England, praying that the whole of the personal estate in the hands of the administratrix might be paid to them, they undertaking to pay the debts; or if the Court should be of opinion that such personal estate ought to be administered in this country, then

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that such estate might be administered accordingly, and the residue paid to the plaintiffs (respondents) upon the trusts of the settlement.

In February 1836, the appellant, the administratrix, filed a bill in the Court of Chancery in England, praying the usual decree for the accounts and administration of the personal estate, and that the residue might be secured for the benefit of the parties interested; and that the respondents, the trustees, might be restrained from proceeding in Scotland to compel the appellant, the administratrix, to pay over the personal estate to them.

In March 1836, the respondents, the trustees, abandoned their suit in the Exchequer, and filed a bill in the Court of Chancery for the same purposes.

The effect of the interlocutor appealed from is to declare that all the funds and personal estate in the hands of the appellant, or administratrix, belong and ought to be transferred to the pursuers as trustees; that is to say, that the personal estate in this country at the time of the death of Sir Robert Preston, and now in the hands of his administratrix under letters of administration from the Prerogative Court, ought not to be administered in this country, but ought to be paid and transferred to the trustees in Scotland appointed by the Court of Session, and who are not the personal representatives of the deceased.

By the law of England, the person to whom administration is granted by the ecclesiastical court is by statute bound to administer the estate and to pay the debts of the deceased. The letters of administration under which he acts direct him so to do, and he takes an oath that he will well and truly administer all and

every the goods of the deceased, and pay his debts, so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased. The interlocutor appealed from assumes that this is not so, and that all the property in the hands of the administratrix, though unadministered, ought to be transferred to the trustees; leaving the creditors of the deceased in this country, if any such there be, and others having claims upon his property, to follow it to Scotland. It is true that so long as the appellant remains in England this declaration will be inoperative; but, as the interlocutor stands, if if she should happen to come within the jurisdiction of the Court of Session she would be liable, upon the footing of such declaration, to transfer the property to the trustees, and by so doing to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country. It is not possible this could have been intended. The pursuers, as trustees appointed by the Court of Session,—assuming that to have been properly done,—have no right to administer the estate in England as against the administratrix appointed for that purpose by the proper ecclesiastical court; and of this the courts in Scotland are bound to take notice. The confusion seems to have arisen from Sir Robert Preston having

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appointed the same persons trustees and executors; and if they had proved the will in England, and taken upon themselves the execution of the trusts, the duties of administering the property, and of carrying into effect the trusts declared, would have been united in the same persons. It may be assumed, for the present purpose, that upon their refusal the Court of Session properly appointed the pursuers as trustees in their place, but that Court had not any jurisdiction to appoint persons to exercise the duty of recovering or administering the property which happened to be in England; that power, by the law of England, is vested exclusively in the ecclesiastical courts in this country, and can only be exercised by executors or administrators acting under their authority, and in that situation the appellant now is. Sir Robert Preston might indeed have appointed whom he pleased to administer his property in England, by naming them as executors, but he had no power to authorize or enable any persons to act in such administration otherwise than under the authority of the ecclesiastical courts. The pursuers, the trustees, have no such authority, nor has the Court of Session any jurisdiction or power to confer it. The administration of the personal estate in England rests therefore and must remain with the appellant. If after such administration shall have been completed any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers, for the purpose of being applied in the performance of such trusts; and in considering that question every attention ought to be paid to the authority under

which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being at present unascertained whether there is any surplus of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Session would be binding upon the Court of Chancery, under whose jurisdiction the property in England is placed by the suits which have been instituted. But although the transfer of the surplus of the property in England, if any, must depend upon the judgment of the Court of Chancery, it may be very competent for the Court of Session, at the proper time, to declare the rights and duties of the trustees appointed under its authority. But if such trustees have not any right or title to the funds in England until the administration shall have been completed in England and the surplus ascertained, it does not appear that any benefit can arise from any declaration of such rights and duties before it has been ascertained that there will be any surplus to which such rights and duties will attach. This, however, may be left to the discretion of the Court of Session.

The interlocutor, proceeding upon the ground that the trustees are entitled to have transferred to them the property in England before the administration has been completed, must, I think, be reversed; but as the pursuers may be entitled to some declaration of right and to some decree of the Court of Session, so far as the Court of Session has jurisdiction over the property, I think the better and safer course will be to declare that the property of Sir Robert Preston in England ought to be administered by the appellant, by virtue of the

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letters of administration granted by the Prerogative Court of Canterbury, and with this declaration reverse the interlocutor appealed from, and remit it to the Court of Session to consider and adjudicate upon the first conclusion of the libel, either separately or together with the other conclusions of the libel, as such Court shall think fit, in conformity with the above declaration.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed: And it is declared, That the property of Sir Robert Preston, baronet, (mentioned in the appeal,) in England, ought to be administered by the appellant by virtue of the letters of administration granted to her by the Prerogative Court of Canterbury: And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to consider and adjudicate upon the first conclusion of the libel, either separately, or together with the other conclusions of the libel (mentioned in the appeal), as such Court shall think fit, in conformity with the said declaration.

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

[1st *April* 1841.]

JOHN Marquess of BREADALBANE and others, (No. 5.)
Appellants.[1]

[*Lord Advocate (Rutherfurd) — John Stuart.*]

CHARLES CAMPBELL of Combie, Respondent.

[*Pemberton — James Anderson.*]

Entail — Institute — Irritant Clause. — The prohibitory and resolutive clauses of a deed of entail were directed against the institute nominatim and the heirs succeeding to the lands. The resolutive clause was thus introduced: "And "with and under this irritancy," &c.; and the irritant clause which followed, and was alleged by the party supporting the entail to form part of, the resolutive, was thus expressed: "And upon every contravention which may "happen by and through any of the heirs succeeding to "the said lands, their failing to perform all or each of the "conditions," &c., "or acting contrary to all or any of "the limitations," &c., "it is expressly provided not only "that the lands shall not be burdened with or liable to "the debts and deeds, crimes and acts of the heirs con-"travening," &c., "but also all debts contracted, deeds "granted, and acts done contrary to the conditions here-"of," &c. "shall be of no force, strength, or effect, and "uneffectual and unavailable against the other heirs:"— Held (affirming the judgment of the Court of Session), that the irritant clause did not apply to or fetter the institute, and that a sale of the lands by him was effectual.

A provision in an entail, declaring that the estate should not be affected, &c. by the debts or deeds, legal or voluntary, of the institute or heirs of entail, held, with reference to the context, not to import an effectual irritancy of sales.

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[1] 1 D., B., & M. (N. C.)