

# APPENDIX.

## PART I.

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### TRUST.

1756. February 28.

ROBERT DALZIEL *against* ALEXANDER DALZIEL of Glenae, and GEORGE HENDERSON.

By marriage-articles betwixt Robert *quondam* Earl of Carnwath, and Mrs. Margaret Vincent, daughter of Thomas Vincent, Esq. certain subjects belonging to her were vested in the persons therein named, and the survivors or survivor of them; and the heirs and assignees of the last survivor, as trustees for the ends, uses, and purposes mentioned in the contract, particularly for paying of the Earl's personal debts, whereupon he was to grant an heritable bond to the trustees to the amount of the debts so paid, for behoof of the children to be procreated of the marriage.

The lady's subjects were accordingly so applied by the trustees; but the Earl having died without giving any security for the same, Alexander Dalziel of Glenae, his eldest son and heir by a former marriage, granted heritable bond for the same to the trustees, and to the survivors or survivor of them, and the heirs and assignees of the last survivor, for the behoof of Robert Dalziel, the only surviving child of the said marriage; and upon this heritable bond the trustees were duly infest.

Of the trustees, John Henderson, younger of Broadholm, was the last survivor; and he also died, leaving one infant-child, a son.

The said Robert Dalziel wanting to have the trust-subject established in his own person, and to be under his own management, did, to that end, with consent of his curators, bring a process before the Court of Session, calling Alexander Dalziel, his brother, and the infant-son of John Henderson.

This process was thought to deserve the most serious deliberation. Trust-rights, copied from those of England, are turning daily more frequent in this

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Form of denuding trustees in favour of the person for whose behoof the trust was established.

No. 1. country; and the Court resolved to lay down such a method in this case as might be a pattern for others of the kind. In this view, the matter was put off for a short time, in order that the Judges might prepare themselves upon it; and when the cause was again taken up, the reasoning was as follows: By the common law of Scotland, a superior is not bound to change his vassal; and, therefore, is under no obligation to accept of a resignation *in favorem*. A trust-right is an exception; for the very granting of infeftment to one for behoof of another, infers, that when the truster chooses to resume his own subject, and take it in his own name, the superior must accept of him for his vassal as he was formerly. For that reason, when the trustee denudes of a trust-right in favour of the truster, the superior, if he refuse to grant infeftment, may be charged with horning to that effect. *2do*, If a trustee, contrary to his duty, refuse to denude, an action is undoubtedly competent to the truster to oblige him. The Court will decern him to denude. This decree coming in place of actual conveyance will be held equivalent to it, so as to be a good ground for applying to the superior for infeftment; and, upon his refusal, will be a good foundation for a charge of horning. *3tio*, In the present case, Robert Dalziel, the only child of the marriage, has a good claim against the trustees to vest the trust-subject in his person. By the death of all the other trustees, this claim is confined to the infant-son of John Henderson. It makes no difference, whether he is unable or unwilling to fulfil the trust by making a conveyance in favour of Robert Dalziel. If this be not done, the Court must interpose and decern him to denude; and Robert Dalziel, possessed of this decree, is entitled of course to demand infeftment from the superior.

With regard to matters of this kind, it was observed in general, that where the trust-infeftment is held of the king, the person for whose behoof the trust is established, must be infeft by a precept from the chancery, which the director must issue upon sight of the order or warrant of the Court; precisely as where a wadset held of the king is redeemed. See *Hope, Minor Practics*, § 169. But if the trust-subject be held of a private superior, a horning must be issued to compel him to grant infeftment. *Ibid*.

The Lords found, ‘ That John Henderson, younger of Broadholm, being ‘ the surviving trustee, the trust was vested in him, descendible to the defend- ‘ er, his only son; and that the defender ought to be denuded of the said trust ‘ in favour of the pursuer. And they declared, that the trust-subject be- ‘ longs to the pursuer; and decerned accordingly. And in order that the ‘ pursuer may be legally infeft, they decerned and ordained Alexander Dal- ‘ ziel of Glenae, the other defender, superior of the foresaid infeftment, to ‘ grant to the pursuer a proper charter, containing a precept of seisin for in- ‘ fefting the pursuer accordingly.’

*Sel. Dec. No. 103. p. 143.*