[1st *Sept.* 1835.]

HUGH ALLAN, Appellant.—*Sir Charles Wetherell—Pyper.*

The TRUSTEES of ROBERT GLASGOW, Esquire, of Montgreenan, Respondents.—*Lord Advocate (Murray)—Dr. Lushington.*

Testament—Trust—Clause.—A party, after having entailed his lands, conveyed to trustees, mortis causâ, all lands not entailed, and all future acquisitions, and his personal estate, for the purpose of applying the produce or proceeds to the purchase of lands to be entailed in the same way as he had entailed his other lands, but he gave no express power to sell, and did not specially include a property acquired prior to the date of his entail, and which it was admitted he did not intend to entail. Held (reversing the judgment of the Court of Session) in a question between the trustees, concluding for power to sell that property and apply the price in buying and entailing lands, and the heir at law, that they were not entitled to a decree to that effect.

1ST DIVISION.
Lord Corehouse.

THE late Robert Glasgow, Esq., who had realized a considerable fortune in the West Indies, returned to Scotland several years ago, and purchased the estate of Montgreenan. To this estate he continued from time to time to make additions by further purchases of land lying in its neighbourhood.

In 1815 he bought a small property in the neighbourhood of Ayr, called Seafield, consisting of a villa and offices, and some land, at the price of 4,000*l.*, in satisfac-

Allan
v.
Glasgow's
Trustees.
——
1st Sept. 1835.

tion of a debt due to him of that amount. In 1818 he executed a deed of entail, including all the landed property in Scotland which he at that time possessed, with the exception of Seafield. He was married but had no lawful children. The entail was made in favour of his natural daughter, Anne, spouse of Robert Robertson, Esq. of Prenderguest.

Posterior to 1818 he made further acquisitions of landed property; and on the 23d June 1821 he executed a supplementary deed of entail, including all his additional purchases (but still excepting the villa of Seafield), in favour of the same series of heirs. In regard to this property of Seafield, it was admitted that Mr. Glasgow had no intention whatever of entailing it.

Of the same date with the supplementary deed of entail, Mr. Glasgow executed a trust disposition and deed of settlement, which proceeds on the recital that he had settled his lands and estates of Montgreenan and others under the entails, and that it was his intention to enlarge his entailed estate "by further purchases, and " in particular, that whatever moneys, whether heritably " secured or otherwise, or other personal estate, may at " my death belong to me in Scotland (excepting as after " mentioned), shall be appropriated for the purchase of " lands or other hereditaments lying as near to my said " lands of Montgreenan as can be had, and that the said " lands and additional purchases shall be settled upon " the same series of heirs on which I have already " settled my said lands and estates of Montgreenan and " others, and under the same species of entail."

He therefore assigned, disponed, and made over to trustees, for the "ends, uses, and purposes, and with " and under the conditions and reservations herein-after

" specified, allenarly, and no otherwise, all and sundry " lands and estates, heritable bonds, adjudications, and " all other heritable subjects, of whatever kind or de- " nomination, pertaining and belonging to me, or which " shall pertain and belong to me at the time of my " decease, in Scotland, but excepting always herefrom " the foresaid lands and estate of Montgreenan and " others in Scotland contained in the foresaid deeds of " entail executed by me at the dates before mentioned, " and also such lands and estates to which I have suc- " ceeded or acquired right, and hold under settlements " of strict entail." He further assigned to his trustees all debts and sums of money, heritable and moveable, pertaining to him in Scotland at the time of his death, in the usual terms, and nominated his trustees to be his executors, with the usual powers, "giving, granting, and " committing to them or their quorum foresaid full " power and authority to enter into the possession of my " whole estate and effects hereby conveyed, to levy, sue " for, receive, and discharge the interest and produce " thereof, to pursue and defend in all actions and pro- " cesses thereanent, and to compound and settle by arbi- " tration or otherwise all disputes which may arise " relative to my real and personal estate hereby before " conveyed," all as more particularly mentioned in the said trust deed.

The purposes of the trust are declared to be, 1st, That the trustees " shall, out of the produce of my said " means and estate, pay all the just and lawful debts " which shall be due and owing by me at the time of " my death," together with her funeral expenses, and sundry legacies, annuities, and donations. 2dly, That the trustees may, as soon after his death as conveniently

ALLAN
v.
GLASGOW'S
TRUSTEES.
1st Sept. 1835.

may be, make up titles to the real and personal estate conveyed to them. 3dly, That the said trustees "shall, at the first term of Whitsunday or Martinmas "which shall ensue after expiry of twelve months from "the period of my death, cause make up a state of the "trust estate under their management, in order to show "as nearly as possible the free amount of my said "estate, after deduction of my said debts and allowance "for the expenses attending the execution of the "trust; and shall from and after such term of Whitsunday or Martinmas account for and pay over yearly "and proportionally to the heir of entail in possession "for the time of my said estate of Montgreenan and "others in Scotland, contained in the deeds of entail "executed by me of the dates before mentioned, such a "sum as shall be equal to the interest upon what shall so "appear to be the free residue and amount of my said "estate, and that until such residue to be accumulated "and made part of the stock shall be disposed of in "manner hereafter mentioned."

The fourth purpose of the trust was "To the end "and intent that my said trustees or trustee shall "as soon as they shall have it in their power, from "the state of the trust funds, and as they shall think "proper, appropriate and apply such produce or "proceeds of my real and personal estate hereby "conveyed to the purchasing of lands or other heritages in Scotland lying contiguous or as near as "may be to my said lands and estates of Montgreenan in Scotland, as such purchases can be met "with and most conveniently and advantageously "made, and take the rights of the lands and other sub-

" jects so to be purchased by them to and in favour of " themselves and the survivor of them as trustees, for the " ends, uses, and purposes particularly before and after " mentioned."

In the fifth place, " To the end that my said trustees " or trustee shall immediately upon making the said " purchases, and having their titles thereto completed, " or as soon thereafter as can be, make and execute a " deed of entail of the said lands and others so to be " purchased by them, settling and disponing the same to " and in favour of the said Robert Robertson, Esq., " whom failing, to the other heirs of entail and substi- " tutes named and appointed by me in the said deeds of " entail executed by me of my said lands and estate of " Montgreenan and others in Scotland, of the 10th day " of February 1818, and of the date hereof, and which " are here specially referred to."

Some farther directions are then given as to the manner of completing the entail, after which the trust deed proceeded as follows: " 6thly, After the residue or " free reversion of my said estate shall be so invested in " the purchase of lands and heritages, and the same set- " tled and secured in manner foresaid, I appoint my said " trustees to denude of this trust, and to pay over any ba- " lance in their hands, and deliver over to the said heir of " entail in possession for the time of the said estate of " Montgreenan and others in Scotland the whole title- " deeds of the lands so purchased by them, together with " vouchers and discharges of the debts and other obliga- " tions they may have paid in the execution of the " trust, and all other writings and papers connected " with the same; my said heir of entail being bound at

ALLAN v. GLASGOW'S TRUSTEES. — 1st Sept. 1835.

" his expense, upon delivery of the said accounts, titles, " and documents, to grant to the said trustees a full " legal discharge of their actings and intromissions."

Various other clauses, including a procuratory of resignation and a precept of sasine, were then introduced, but there was no express power to sell granted.

Mr. Glasgow subsequently entered into a transaction for the sale of Seafield, but before it was completed he was placed under curatory, and died in 1827.

The trustees under his trust deed, on the assumption that they had power to sell Seafield, made arrangements to that effect with a purchaser; but a doubt having been started as to their power, they brought an action of declarator before the Court of Session against the heirs of entail, and afterwards a supplementary action against the appellant Allan and others, the heirs of law of Mr. Glasgow, concluding that " it ought and should " be found, by decreet of our said Lords, that our said " lovites as trustees foresaid, after having made up suffi- " cient legal titles in their persons to the said property " of Seafield, in the due execution of the trust com- " mitted to them by the said deceased Robert Glasgow, " and in furtherance of his declared intention to dispose " of the said property (Seafield), are entitled to sell and " dispose of the same by public roup, at such a reason- " able price as can be obtained, and to grant a valid " and unexceptionable title to the purchaser, and, after " having completed the said sale and received payment of " the price, to appropriate and apply the same to the " purchasing of lands or other heritages in Scotland " lying contiguous or as near as may be to the said " lands and estate of Montgreenan, as such purchases " can be met with and most conveniently and advan-

" tageously made, and to take the rights of the said
" lands or other heritages so to be purchased by them
" to and in favour of themselves and the survivor of
" them as trustees, for the ends, uses, and purposes
" particularly described in the said trust disposition.
" And further, that it ought and should be found by
" decreet of our said lords, that the said trustees or trus-
" tee shall, immediately upon making the said purchase
" or purchases, and having their titles completed thereto,
" or as soon thereafter as can be, make and execute a deed
" of entail of the said lands or other heritages so to be
" purchased by them, settling and disponing the same
" to and in favour of the said Robert Robertson, Esq.,
" now Robert Robertson Glasgow, Esq., of Mont-
" greenan; whom failing, to the other heirs of entail
" and substitutes named and appointed by the said
" deceased Robert Glasgow in the said deeds of entail
" executed by him of his said lands and estate of Mont-
" greenan and others in Scotland, of dates the 10th day
" of February 1818 and 23d day of June 1821," &c.
Appearance was made by the heirs of entail (with whom however the contest was of an amicable nature), and by the appellant, as one of the heirs at law.

In defence he pleaded, that, in order to entitle trustees to sell or entail lands, especially to the prejudice of the heir at law, it is not enough that the truster intimate or even express an intention to that effect; there must also be formal clauses in the deed, giving the trustees power to carry the intention into effect. But in the present case, the property of Seafield not having been conveyed specially to the trustees, and there being no evidence of an intention to entail the lands of Seafield, or of an intention that the trustees should have a power

ALLAN v. GLASGOW'S TRUSTEES.

1st Sept. 1835.

to sell these lands, and apply their price in the purchase of lands to be entailed; and all attempts to impose the fetters of an entail being strictissimi juris, and the provisions of the trust being, quoad Seafield, inextricable, unintelligible, or defective, that property to which the limitations have not been duly extended must, in dubio, be suffered to descend agreeably to the legal course of succession; nor in such circumstances can the authority of a court of law be interponed in aid of an unsuccessful attempt to impose unfavourable restraints upon or to defeat the rights of heir at law. A court of law could not competently supply this defect.

On the other hand, the trustees maintained that as the present question arose out of the construction of mortis causa deeds of settlement, it must be determined according to what may fairly be presumed to have been his intention; and as the terms of the various deeds demonstrate his intention that, after paying his debts and legacies, his whole property, of every description, land as well as money (other than the lands which he had himself entailed), should be realized and employed in the purchase of land contiguous to Montgreenan, and to be added to that entailed estate, decree should be pronounced in terms of the libel.

The Lord Ordinary ordered cases, which he reported to the Court, who, on 7th March 1832[1], pronounced this interlocutor:—" The Lords having advised the cases, " and heard counsel for the parties, find and declare, " that under the directions contained in the trust dispo- " sition and deed of settlement executed by the deceased " Robert Glasgow, Esq. the trustees have full power

[1] 10 S., D., & B., 438.

" and authority to sell and dispose of the lands of Sea-
" field within mentioned, for such price as can be ob-
" tained for the same, by public sale. Find and declare
" that the said trustees have full power to grant a valid
" and unexceptionable title to the purchaser of the said
" lands, and to apply the free proceeds of the said lands
" in purchasing lands to be settled and entailed in
" terms of the directions in the said trust disposition and
" deed of settlement. Farther find the trust funds in
" the hands of the said trustees chargeable with the
" whole expense of the process, and authorize the trus-
" tees to take credit for the same accordingly in account-
" ing for their intromissions under the trust, and decern.
" Find the trustees liable as such to Hugh Allan, called
" by supplementary summons as a defender, in the full
" expenses incurred by him in this litigation; and
" remit the account thereof to the auditor to tax the
" same as between client and agent, and to report."

Allan appealed against this interlocutor, except in so far as it found him entitled to expenses.

Appellant.—Viewing this merely as a question of intention, the trust deed affords no evidence of Mr. Glasgow's intention either to entail Seafield, or to convey it to the trustees in order that they might sell it, and with its price purchase lands to be entailed. The respondents admit that Mr. Glasgow never intended to entail Seafield. On the contrary, they themselves stated in their summons, that in 1824 he had concluded a bargain for the sale of that property.

In the narrative of the trust deed, when giving a general description of the trust estate, and of that part of it which he meant the trustees to apply to the pur-

Allan
v.
Glasgow's
Trustees.
——
1st Sept. 1835.

chase of lands to be entailed, he uses the expression, "whatever monies, whether heritably secured or other-"wise, or other personal estate, may at my death "belong to me in Scotland;" and it is with reference to this general description, that, in the dispositive clause of the deed, he afterwards conveys all his heritable and moveable estate to the trustees.

It is therefore demonstrated by the trust deed itself, that, so far as regarded landed property, it was future acquisitions alone,—that is, acquisitions posterior to the year 1821, (when the supplementary entail was executed,) that Mr. Glasgow contemplated as additions to the entailed estate of Montgreenan, and that the proper subject of the trust and relative entail was the "monies" which the trustees might realize from the heritable and personal debts due to the truster.

But even if Seafield were included under the general description contained in the dispositive clause of the trust deed, this would not entitle the trustees to decree in terms of the summons. It is further incumbent on them to show that the deed contains an express power, or a positive injunction, to sell this property, and appropriate its price to the purchase of lands to be entailed. This is not like the case of a trust for the payment of debts, where, without a power of sale, the debts could not be paid; and where, ex equitate, the Court might interpose to supply an obvious defect. The object here is gratuitously to defeat the rights of the heir-at-law; and, on an allegation of a defect of powers for that purpose, to obtain the interposition of the Court in implement of the alleged intention so to disappoint the heir.

But it has been said that the appellant has on the above supposition no interest to maintain this plea; for if

Seafield be included under the general conveyance to the trustees the appellant is excluded, and it can therefore be of no consequence to him what becomes of the trust estate. But this is a total mistake. The trustees have no beneficial interest in the trust estate. The parties beneficially interested, and for whose behoof alone this action is insisted in, are the heirs under the proposed entail. Unless, therefore, the trustees can show, that without the power which they now ask they have the means, under the trust deed, of converting Seafield to the use of the heirs of entail, the heirs-at-law are the parties beneficially interested in that portion of the trust estate; and if it be vested in the trustees, the appellant, as one of the heirs, is entitled to insist on their denuding in his favour.

Had the defect occurred in Mr. Glasgow's deed of entail itself, or had any particular portion of what now forms the entailed estate of Montgreenan been even accidentally omitted in the entail, the Court could not have interposed, however clear the entailer's intention, and however anxious his apparent wish might have been to include that portion under the entail. In like manner, however clear and unequivocal the intention of the entailer might have been to prohibit sales, alterations in the order of succession, and the contraction of debt, yet, if he had omitted, or had not duly fenced any one of these prohibitions, the entail would have been to that extent inoperative.[1]

The real, and in fact the avowed object of the trustees in the present action, is, by means of a decree in terms of the libel, to create a limitation, and to extend fetters by

[1] Ersk. b. iii. tit. 8. sect. 29; Dow's Reports, vol. ii. p. 210.

Allan
v.
Glasgow's
Trustees.

1st Sept. 1835.

implication from cases expressed to a case not expressed; or, in other words, to bring within the fetters of an entail a portion of the truster's property, which, whether per incuriam or not, he has not included under his entail, and has not vested in his trustees in such a manner as to enable them, without the aid of a court, to include under the entail, or to make available to the heirs of entail.

It is no answer to say, as Lord Balgray did in delivering his opinion in the Court of Session, that the trust deed contains words tantamount to a power of sale. If the deed contain such words, the action was useless and unnecessary; for the very ground of it was, that the deed contained no power of sale; and the reason assigned for that was, that Mr. Glasgow never contemplated a special conveyance of Seafield to his trustees; and that with respect to all the rest of his real and personal estate, conveyed by that deed, the powers of the trustees to realize and apply the proceeds were ample. As to Seafield, therefore, by the respondents' own admission, the matter was left in dubio; and all the judges concurred in holding that where any doubt exists as to the intention of the truster, or as to the powers which he confers, the heir-at-law, in competition with a stranger, is entitled to the benefit of that doubt. In the present case the power of sale was confessedly not given by the truster, but was asked from the Court of Session, in the exercise of their equitable powers, to enable the trustees to exclude the heir-at-law.

The respondents have cited certain cases, but which do not touch the principle contended for by the appellant. The first is that of Skene v. Skene[1], which related

---

[1] 31 July, 1755, Mor. p. 1135.

to the presumed revocation of a deed of entail, and where the only point determined was, that where a party had executed a regular deed of entail, and assigned an unexecuted procuratory of resignation in favour of the institute and heirs of entail, on which procuratory the entailer himself afterwards expede a charter of resignation on which he was infeft, such infeftment did not import a revocation of the previous entail. But the difficulty which the respondents have to surmount here is, that the lands of Seafield never were included in Mr. Glasgow's entail, and that they have admitted that Mr. Glasgow never had any intention to entail these lands; while they have totally failed to prove any intention on the part of Mr. Glasgow to include the surrogatum of these lands either under the trust-deed or within the fetters of an entail.

In another case referred to that of Robson v. Robson[1], a father disponed to his second son the whole heritable and moveable property which might belong to him at the time of his death, and afterwards bought an acre of land, and took the disposition, in the usual terms, to himself and his heirs and assignees. After his death the eldest son, as heir in heritage, claimed this acre. The second son also claimed it, under the general disposition in his favour of all the heritage which might belong to his father at the time of his death: and the court preferred him, on the ground that he "had a right, by his "father's settlement, to the acre in question." But the main question here is, not whether or not the lands of Seafield are included under the general description in the trust deed, but whether there are termini habiles under

[1] 18 Feb. 1794, Mor. p. 1495.

that deed for selling these lands, and applying their price in the purchase of other lands, to be entailed in fraudem of the heir-at-law. Neither has the case of Erskine v. Wemyss[1] any application, for there the sale of the property was necessary and was authorized in order to pay debts.

Respondents.—The general view which may safely be taken of any such case as the present is this:—The subjects have been conveyed by the truster for certain purposes; these purposes must necessarily ascertain and regulate the powers of the trustees; if powers are required, they must be derived from and arise out of the purposes stated by the truster as the object of the conveyance.

The trustees are vested in the right of the truster by his own act:—The question is, To what effect are they so vested? Now the intention of the truster must decide this point. The title is given to the trustees. No feudal right is left, which the heir can take up. Hence the lands are conveyed to the trustees. Then the only question is,—the subjects being so conveyed away from the heir, and the power to do so being thus exercised, the subjects being thus vested in the trustees, and vested for purposes in which the heir has no interest, is the power of dealing with these subjects in such a way as to fulfil the purposes of the trust deed not to belong to the trustees as a necessary result of the conveyance? And further, can it be said that the heir has any interest to interfere in such a case, when a conveyance has been effectually made, which leaves in him no right or title whatever.

[1] 13 May, 1829, 7 S., D., & B., 594.

In the trust deed there is a clear and explicit general conveyance of all lands and heritable subjects, with the exception of particular lands previously entailed. The property of Seafield belonged to the truster at the time of the trust deed, and the conveyance is made expressly of all lands which might belong to him at the time of his death.

The effect of such a general trust deed is to give the trustees right to make up titles in the ordinary way to all the heritable property, by an adjudication in implement.

The heir-at-law has no right to object to such a course, and cannot prevent the trustees completing their title to particular properties, in pursuance and in virtue of the general conveyance.

Such being the case, it is important to consider on what ground the plea of the heir can be founded.

The only consistent foundation of it must be, that though the lands have been conveyed to the trustees, yet the trust cannot be explicated, because certain powers requisite for the fulfilment of the purposes have not been expressed, and hence that the property ought to fall to the heir. This point is a very different question from the inquiry, whether the lands are included in an effectual conveyance to trustees? Upon that point the intention of the truster is of no moment. If the words employed are not in law sufficient to carry the lands, the heir-at-law of necessity will take, however clear may be the intention of the truster; for, in such a case, intention cannot aid the deed, if it is not a sufficient conveyance.

But in the other question, (viz. whether the trustees necessarily have not all the powers required for the ex-

ecution of the purposes,) the intention of the truster is all-important.

In deciding such a question the Court has not to supply any defect in the title of and conveyance to the trustees; it has only fairly to construe a deed which excludes any claim by the heir-at-law; and the principle of construction in such a case is so to construe the deed as to effectuate the intention of the granter.

But when the conveyance to the trustees is complete, they are in the full right of the granter of the trust deed; they have all the powers and all the rights which he possessed, in consequence of his conveyance to them, in so far as these powers are necessary for the object of that conveyance.

The trustees are also necessarily under certain obligations. The duty of fulfilling the purposes is one of the first objects of the trust; and the duty therefore arising out of the conveyance to them must import the possession of all the powers of the truster, in so far as necessary to fulfil the duties so imposed.

From the terms of the trust deed it will be observed that the debts of the truster are laid equally upon all the trust estate; and it is clear, therefore, that the heir of entail, in a competition with the trustees, could not be subjected in any debts until the whole trust funds should be exhausted.

But a trust for the payment of debts of itself necessarily implies a power to sell; for one of the objects of the trust is to prevent the more expensive proceedings of creditors who can force a sale.

The second purpose of the trust deed enables the trustees to make up, as trustees, such titles as may be necessary to the real estate.

This of itself gives the power to sell, and shows that it was not intended to limit their title, but, on the contrary, to adapt the title to the execution of the purposes of the trust.

The third purpose directs them to make up a state of the trust estate under their management at a specified period, so as to show the clear amount of such trust estate after deduction of debts. This is not the value of the yearly produce, but the total value of the whole property conveyed to the trustees, which proves that the whole property was to be equally dealt with as trust estate.

Again, the close of the third purpose says, that that residue is to be disposed of in the manner after mentioned. That residue was the whole trust estate, deducting debts; and hence the lands in question were conveyed for the purpose of being disposed of as the trust deed directs under the fourth purpose.

This third purpose also gives the heir of the estate of Montgreenan an unquestionable right to the annual produce of the lands in question, and the right is given to the heir of entail in possession for the time.

The fourth purpose directs that the trustees shall apply the produce or proceeds of the real and personal estate hereby conveyed in purchasing lands contiguous to Montgreenan.

This is applicable to the whole real estate conveyed, and the words "apply the produce or proceeds of real estate" in purchasing lands clearly import the price of the real estate. The trustees can only get the price of the real estate, in order to purchase other lands, by selling the real estate. And hence, where lands and personal estate are conveyed to trustees, and they are

ALLAN v. GLASGOW'S TRUSTEES. — 1st Sept. 1835.

directed to apply the produce or proceeds of the real estate in the purchase of other lands contiguous to the residence, that is just a short way of bestowing the power to sell the whole trust estate, for in no other way could the purpose and direction be executed.

These principles are supported by various decisions in the Courts of Scotland.[1]

LORD BROUGHAM.—My Lords, the question in this case was very fully argued by the learned counsel at the bar, both on the part of the appellant and on the part of the respondents. I thought at the time that it would not be possible to support the decision, the effect of which is to clothe the heir of entail with authority to sell a landed estate, which power is not conveyed by the instrument; and that there was the further and insuperable objection, that giving the power of entailing by implication an unentailed estate,—an estate held in fee-simple,—is contrary to every principle of the law of Scotland. My Lords, the question then is, does the deed afford the power of sale? In the first place, if it affords the power of sale, then follows the power of entailing, because the trustees are directed to lay out the proceeds and produce in their hands in land, and to entail that land contiguous to the Montgreenan estate. The only question is the first, for the other follows,—Is there a power of sale given? The law of Scotland is the same with the law of England. The heir-at-law cannot be excluded or displaced by impli-

---

[1] Drummond v. Drummond, 17 July 1782 (2313); Skene v. Skene, 31 July 1725 (11,354); Robson v. Robson, 18 Feb. 1794 (14,958); Moore's Trustees v. Wilson, 25 June 1814 (Fac. Coll.); Erskine's Trustees v. Wemyss, 13 May, 1829; 7 S., D., & B., 594.

cation; it must either be by plain terms or necessary implication. Now I think in this case he is not excluded. There is a grant to the trustees of all the lands and tenements; there is then the grant of all and sundry the debts and sums of money, heritable and moveable; then there is the declaration of the trusts; and the trust is for the payment of the debts and legacies and funeral expenses, and they are directed to make up the titles. Now, that may apply both to the land and the other heritable property. The third clause is, - directing that an account shall be made out of the free residue of the funds for the heir of entail of the Montgreenan estate. Then comes the fourth and the material clause. The fifth clause settles the same on Robert Robertson, and the sixth directs that the residue shall be invested, and the same settled; and they were to denude and divest themselves in favour of the heir-at-law. Now, the fourth is the clause in question; and the whole question is, does it displace the heir-at-law, and intend that the trustees shall have the power of sale? The words are, that they, "shall, as soon as they shall "have it in their power, apply such produce or pro-"ceeds of my real and personal estate to the pur-"chasing of lands or other heritages in Scotland, "lying contiguous to my estate at Montgreenan." Now, this is not, in my opinion, a power of sale, or a direction to sell, or an authority to sell, or any thing like such a power, direction, or authority. It seems to imply, that the person making it thought that he had given that power of sale; because, if I say that my trustees shall lay out in the purchase of lands the produce and proceeds in their hands, it looks as if I had given them previously a power to obtain that produce and those

ALLAN v. GLASGOW'S TRUSTEES.
1st Sept. 1835.

proceeds by sale. If he says, they are to apply the produce and proceeds of my real estate in the purchase of other lands, that assumes that he has given the power to sell, otherwise there would be no produce or proceeds of the real estate for them to apply; but it does not follow that there are lands at all; it may be heritable bonds; and that they were to apply the produce and proceeds of the heritable bonds and the personalty in the purchase of land near to the other estate. That is, in my opinion, an important observation, because it does away with the necessary implication which is required to displace the heir-at-law. But, in the next place, a person may think and may assume that he had given a power of sale, and may deal with the proceeds of a supposed sale under such supposed power when he had not given any power. If the power of sale is not to be supported on one of those grounds, I am of opinion that the words cannot be held sufficient to displace the heir-at-law. I now come to the cases, those of Sir William Erskine's Trustees v. Wemyss, and Moore's Mortification. I have examined them carefully, and the result of that examination I shall state to your Lordships. In Sir William Erskine's Trustees v. Wemyss the question related to the liability of one of the two estates to the disponer's or entailer's debts, and the Court said that it was better for all concerned to have that estate sold than have it entailed and afterwards adjudged by the creditors. Whether or not this view of the subject, taken by the majority of the Court (for my Lord Craigie differed) was correct, or whether Lord Craigie's opinion was correct, who held that something more was necessary to give the power of sale, which did not exist in the deeds, we need not stop to inquire; for

the Court acted with a dispensing power, and not with the design of construing the deed, as other courts of law do, giving the construction to the instrument and carrying into fulfilment according to law the intention ascertained by that construction. The language of their Lordships is, that the Court have this power, and that they may order a sale in respect of its being so beneficial for the parties; they do not at all proceed upon the assumption that the deed gives the power, which is the argument in the present case, but rather that it has not given the power, and that because the deed does not give such power the Court are called upon to supply it themselves ex mero motu. In that case, the Court recited among other things the liability of the lands ordered to be entailed to the debts of the disponer; and also recited the report of a Mr. Miller, to whom it had been referred to see whether the lands to be sold for the payment of the debts were sufficient or insufficient for that purpose; and then it was declared, upon the report of Mr. Miller, that those lands were insufficient, and that therefore the trustees are entitled to sell in discharge of their duty as trustees. Here, in the present case, the Court, upon the construction of the deed, and upon that alone, found that the trustees had the power of sale, and might make the sale. In the one case the Court found that there was no power of sale, and supplied it; in the present case the Court, construing the deed, find that the trustees had the power of sale, and do not supply it ex mero motu, but call upon the trustees to execute the power which they were found to have. The two cases are perfectly different. Then, my Lords, the case of Moore is of the same description. The temptation was to sell, because they could get a large

ALLAN
v.
GLASGOW'S
TRUSTEES.
——
1st Sept. 1835.

price for a freehold property, when a vote was sold for 1,200*l.* in that county; and the Court said, How do you know that, in a few years, there may not be a fall? Therefore they say, We will supply the power, and give a power which is not in the deed, because we think it for the benefit of the estate. Neither of these cases is like the present, and neither of them is an authority for this case; and my opinion is, upon the whole, that the heir-at-law is not displaced by either plain words or necessary implication, and that the decree cannot stand. The Court ought to have found against the obligation of the trustees to sell. No instance has been shown in any decision either of words being implied to make an entail, which did not impart the necessary clauses; or of a power being implied to entail a fee-simple estate when that power was not given in express and direct terms. If there had been no question of entail, I should have held that the heir-at law was not displaced; but as there is a question of entail, it becomes the more clear, upon the principles of Scotch law, that this decree cannot be supported without a departure from those principles.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said appeal be, and the same are hereby reversed.

JOHN BUTT—RICHARDSON and CONNELL, Solicitors.