[HEARD 11*th June*.—JUDGMENT 14*th August*, 1846.]

DAVID ALLAN and JOHN SMITH, heirs-at-law of ROBERT GLASGOW, of Mountgreenan, deceased, *Appellants*.

ANNE ROBERTSON GLASGOW, and others, *Respondents*.

Revocation.—Trust.—A trust settlement conveyed the whole of the granter's estates to trustees for specified purposes. A posterior settlement likewise conveyed the whole estates to a different set of trustees and for different purposes, but omitted, in regard to a particular estate, to give a power of sale, which was necessary for carrying the trusts into effect; and revoked all prior deeds "in so far as the same may be inconsistent with these presents." A former judgment of the House having declared that the trustees of the second deed had not power to sell the particular estate, or perform the trusts in regard to it, *held* that, the first deed was not revoked as to this estate by the second deed, but subsisted to the exclusion of the heirs-at-law of the granter claiming the estate in that character as undisposed of.

ROBERT GLASGOW, by deed bearing date the 30th day of April, 1802, conveyed to trustees all the lands and real estate in Great Britain then belonging to him, or which should belong to him at the time of his death; also his whole lands and plantations in the West Indies; and, generally, his whole estate, real or personal, heritable and moveable, wheresoever situate, then pertaining, or which at the time of his death should pertain to him, and particularly without prejudice to this generality, his lands of Mountgreenan. The parts of this deed which it is necessary to notice, were expressed in these terms: "the said trustees or their quorum, as hereafter appointed, "or the survivor of them, are hereby fully authorized and "empowered, after my death, to sue for, recover, receive and "discharge all the outstanding debts which may be due to me,

" and to wind up, manage and settle all my concerns in trade, " or business of every kind, whether in Great Britain, the " West Indies, or elsewhere, in such manner as they shall " judge most advantageous, and to sell, dispose of, and convert " into money, if they see necessary, my said real and personal, " heritable and moveable subjects and estates, in whole or in " part; and that either by public or private sale, at such prices " and on such conditions as they shall judge adequate, the pur- " chaser or purchasers being noways concerned with the appli- " cation of the prices. Declaring always, that the above " written disposition of my lands and estate of Mountgreenan " is granted without prejudice to the settlement and destination " thereof in favour of the heirs of provision specified in the " contract of marriage between me and the said Mrs. Rachel " Dunlop, dated the 6th of February last, it being my meaning " and intention, that the above written trust-disposition, so far " as respects or may be extended to my said estate of Mount- " greenan, shall take effect only in the event of the failure of " the heirs of provision of my own body therein specified; and " further providing, as it is hereby specially provided and " declared, that the said trustees shall be bound, as by accepta- " tion hereof they become bound and obliged, to apply and " appropriate the prices and produce of my said estates, real " and personal, heritable and moveable, above conveyed, and " whole profits and produce which may arise therefrom, and " which may be recovered and intromitted with by them as " follows:—In the *first* place, for paying all my just and lawful " debts, including the provisions contained in the foresaid " marriage-contract entered into between me and the said Mrs. " Rachel Dunlop; together with my funeral expenses, and the " whole charges which may attend the execution of this trust, " as the same shall be ascertained by the subscribed account of " the disburser: In the *second* place, for payment of the " respective sums of money and annuities aftermentioned,

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" which I hereby leave and bequeath, and bind and oblige me, " my heirs and executors, to pay to the persons after named, as " follows, viz.: In the *first* place to Miss Anne Glasgow, my " reputed natural daughter by Mrs. Anne Swan, and who has " generally resided with me, and is now boarded at Mrs. " Hope's house in Edinburgh, and to the lawful heirs of her " body, the sum of ten thousand pounds sterling, and that at " her marriage or majority, whichever of these events shall first " happen, with two thousand pounds sterling of liquidate " penalty in case of failure, and the legal interest of the said " principal sum of ten thousand pounds yearly from and after " my decease, until the foresaid term of payment, and there- " after until payment of the same." Then followed a variety of other legacies " and it is hereby provided and declared, " that after answering and fulfilling the before-mentioned " preferable uses and purposes of this trust, the whole " free residue of my said estates, real and personal, heri- " table and moveable, shall fall, accresce and belong, and the " same is hereby destinated to, and the said trustees are " appointed to denude themselves thereof, and to convey and " make over the same, to and in favour of the heirs to be pro- " created of my body, and succeeding or having right to succeed " to me in my lands and heritable estate, in terms of the desti- " nation contained in the foresaid marriage-contract entered " into between me and the said Mrs. Rachel Dunlop, my wife; " whom failing, to and in favour of the heirs whatsoever to be " lawfully procreated of my body; whom failing, to and in " favour of the said Anne Glasgow, my reputed natural " daughter, and the heirs whatsoever of her body; whom " failing, to and in favour of the said William Cochrane, " younger of Ladyland, my nephew, and the heirs whatsoever of " his body; whom failing, to John Cochrane, my nephew, " younger brother of the said William Cochrane, and the heirs " whatsoever of his body; whom failing, to be divided equally

" among all my lawful nephews and nieces, and the lawful heirs " of their bodies, share and share alike, and that *per stirpes*, the " child or children of such of my nephews and nieces who may " have died, succeeding only to the share which would have " belonged to their respective parents, if still alive." This deed contained an obligation to infeft and precept of sasine in ordinary form.

In the year 1818, Glasgow executed an entail of his lands of Mountgreenan, and on the 23rd June, 1821, he executed four several deeds. The first was a supplementary entail of the lands of Mountgreenan. Neither in this entail nor in that of 1818, was Anne Glasgow called, though her husband, Mr. Robertson Glasgow, and the issue of their marriage, were heirs substitute.

Another of the deeds was a trust-disposition and settlement, which after referring to the entail, continued thus: " And " whereas it is my intention to enlarge the said estate by " further purchases, and in particular, that whatever monies, " 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 Mountgreenan as can be had; and that the said lands and " additional purchases shall be settled upon the same series of " heirs upon which I have already settled my said lands and " estate of Mountgreenan and others, and under the same species " of entail."

By this deed the granter conveyed to a set of trustees entirely different from that contained in the deed of 1802, " all " and sundry lands and estate, heritable bonds, adjudications, " and all other heritable subjects of whatever kind or denomi- " nation 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

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" Mountgreenan and others in Scotland, contained in the fore-
" said deeds of entail executed by me of the dates before men-
" tioned); and also such lands and estates to which I have
" succeeded or acquired right, and hold under settlements of
" strict entail: And further, I do hereby assign, convey, and
" make over, to and in favour of my said trustees, or to such of
" them as shall accept of the present trust, and the survivors or
" survivor of them, and such other person or persons as I shall
" appoint, or as they shall assume into the said trust as afore-
" said, all and sundry debts and sums of money, both heritable
" and moveable, presently pertaining and belonging, and due
" and owing, or which shall pertain and belong, and be due and
" owing to me in Scotland at the time of my death, by bond,
" bill, contract, decreet, account, or in any other manner of
" way whatever, and also all goods, gear, corns, cattle, and
" every other subject of personal estate, of whatever nature or
" denomination, pertaining now, or which shall happen to per-
" tain and belong to me at my death, wherever, or in whose
" custody soever, the same may be in Scotland, (excepting in
" so far as the same is hereinafter specially conveyed,) with the
" whole vouchers, instructions, and conveyances thereof, writs
" and deeds granted, and diligence and execution used and
" obtained for payment or security of the same:" and for making his conveyance more effectual, he appointed the trustees to be his executors.

The purposes of this trust necessary to be noticed, were " *First*, to the end that my said 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 my funeral expenses, and shall " also pay and discharge all such legacies, donations, annuities, " and provisions which I have already left and bequeathed, or " become bound for, or shall hereafter leave, bequeath, or " become bound for, to and in favour of any person or persons

" whatever:" then followed three legacies. " *Secondly*, To " the end that my said trustees or trustee, and the acceptors or " acceptor, and survivors or survivor of them, or the majority " of them, do and shall, as soon after my death as conveniently " may be, and as they shall think proper, make up and estab- " lish in their persons, as trustees aforesaid, such titles as may " be necessary to my said real and personal estates, hereby " conveyed:—*Thirdly*, To the end that my said trustees shall; " at the first term of Whitsunday or Martinmas which shall " ensue after the expiry of a twelvemonth 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 Whit- " sunday 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 Mountgreenan and others in Scotland, " contained in the deed 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 accumu- " lated and made part of the stock, shall be disposed of in " manner after-mentioned:—*Fourthly*, 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 estate of Mountgreenan in Scotland, as such pur- " chases can be met with, and most conveniently and advanta- " geously made, and take the rights of the lands and other " subjects so to be purchased by them, to and in favour of

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" themselves and the survivor of them, as trustees, for the ends, " uses, and purposes particularly before and after mentioned:— " *Fifthly*, 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 in strict conformity with the two entails of Mount- " greenan:—*Sixthly*, After the residue or free reversion of my " said estate shall be so invested in the purchase of lands and " heritages, and the same settled and secured in manner fore- " said, I appoint my said trustees to denude of this trust, and " to pay over any balance in their hands, and to deliver over to " the said heir of entail in possession for the time of the said " estate of Mountgreenan, and others in Scotland, the whole " title-deeds of the lands so purchased by them, together with " the vouchers and discharges of the debts and other obligations " 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 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 intromis- " sions, and which account shall be rendered upon the honest " word only of the said trustees."

This deed contained an obligation to infeft and precept of seisin, and concluded with this clause, upon which the question in the appeal mainly turned: " And I do hereby revoke all " other former deeds of settlement executed by me, in relation " to my real and personal estate and effects, herein-before con- " veyed, in so far as the same may be inconsistent with these " presents, excepting the said two deeds of entail, and a will, " conveyance, and lease, after the English form, made and " executed by me, relative to my personal estate in England, " or the West Indies, and my property there, all of the date of

" these presents; reserving always to myself full power and " liberty, at any time in my life, and even in the article of " death, to revoke, alter, or innovate these presents in whole or " in part, and to make such additions thereto, and alterations " thereon, as I may from time to time think proper; but " declaring that the same, so far as not altered by me, shall be " effectual, albeit found lying in my custody at my death, or in " the custody of any person to whom I may see fit to entrust " the same, undelivered, with the not-delivery whereof I hereby " dispense for ever."

Another of the deeds referred to in this clause was a lease, and release in the English form, which was in favour of the same persons as the disponees in the trust-disposition and settlement, and gave them power to sell the granter's West India estate, and after payment of the expenses out of the proceeds, and of any legacies he might have then given, to invest the residue in the purchase and entail of lands, in the same terms as expressed in the trust-disposition and settlement in regard to the property thereby conveyed.

The last of the four deeds was a will in the English form, giving a variety of legacies of different amounts to different persons from those contained in the deed of 1802, and devising his whole estate, real and personal, out of Scotland, to the persons trustees in the trust-disposition, upon trust to sell the property, and after payment of the legacies to invest the residue in the purchase of lands in Scotland, to be entailed according to directions in terms nearly similar to those contained in the trust-disposition, and the lease and release. By this will the testator gave Mrs. Glasgow Robertson and her husband an annuity of 3000*l.* a-year, and to the issue of their marriage a legacy of 30,000*l.*

The maker of these deeds died in the year 1827. At the period of his death he was possessed of a villa and lands adjoining, called Seafield, and likewise of other lands, all of which he held in fee simple.

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In 1829, the trustees under the deed of 1821 brought an action of adjudication in implement against the heirs-at-law of Glasgow, with the view of establishing in themselves a title to these fee-simple lands; and under a decree obtained in that action they made up a title by charter and infeftment.

In the same year, (1829,) the trustees brought an action of declarator against the heirs in the two entails executed by Glasgow and against his heirs-at-law in the unentailed lands, setting forth that the lands of Seafield were not embraced by either of the entails, and were not specially conveyed, although they were generally conveyed, by the trust-disposition of 1821; that it seemed to have been the intention of Glasgow to sell Seafield; and as these lands were distant from Mountgreenan, the entailed estate, and their management would be expensive and troublesome, they could not be retained without prejudice to the trust. The summons, therefore, concluded that it should be found that the trustees were entitled to sell the lands of Seafield, and to apply the price in the purchase of other lands contiguous to Mountgreenan, and to entail such new lands by a deed in conformity with the entail of Mountgreenan.

Upon the 7th of March, 1832, the Court of Session pronounced an interlocutor in these terms:—"Find and declare, "that, under the directions contained in the trust-disposition "and deed of settlement executed by the deceased Robert "Glasgow, esquire, the trustees have full power and authority "to sell and dispose of the lands of Seafield within mentioned, "for such price as can be obtained 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 settle-"ment."

But on the 1st of September, 1835, that interlocutor was

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reversed by the House of Lords, upon appeal; 2 *Sh. & Mc L.* 333; and the Court of Session, applying this judgment of the House of Lords, sustained the defence, for the heirs-at-law of Glasgow, and dismissed the action.

Thereafter, in September, 1836, the appellant, one of the heirs-at-law of Glasgow, brought an action of declarator against the trustees under the trust-disposition 1821, the summons in which action set forth the proceedings in the action, at the instance of these trustees, which have been detailed; that the trustees had no power to sell Seafield, or any other lands conveyed by the trust-disposition, or to apply the price for the purpose of entailing other lands, or to bring these lands within the operation of the trust-disposition, but that they held them in trust for him and the other heirs-at-law of Glasgow; and concluding that it should be found that the trustees held Seafield, and the other lands, for behoof of and under an obligation to account to him and the other heirs-at-law of Glasgow, and to denude thereof in their favour; and that he, as heir-portioner of Glasgow, had a right to a *pro indiviso* share of the lands; and that the trustees should be decerned to denude of the lands, and cede possession thereof to him as such heir-portioner *pro indiviso*, and to grant all deeds necessary for vesting him with a good title.

The trustees, on the other hand, brought a multiplepoinding and exoneration of the rents of the lands against the heirs-at-law and the heirs of entail, which was conjoined with the action at the instance of the appellant.

In these conjoined actions, a condescendence and claim were lodged for the heirs of entail and the legatees and annuitants, founded upon the deed of 1821. A separate claim was likewise lodged by Anne Glasgow, now Anne Robertson Glasgow, the respondent, founded upon the trust-disposition of 1802, and the residuary gift in her favour, on failure of heirs of the body of the maker, an event which had taken place.

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The Court ordered cases prepared by the parties, to be laid before the consulted Judges. These Judges were divided in opinion; and the Court, at advising their opinions, was also divided; but, in conformity with the opinion of the majority, it pronounced the following interlocutor on the 28th January, 1842:—"In conformity with the opinions of the majority of "the whole Judges, sustain the claim in the multiplepoinding "of Mrs. Anne Glasgow, spouse of Robert Glasgow, esquire, "of Mountgreenan, and him for his interest, under the deed of "the late Robert Glasgow, esquire, of Mountgreenan, dated "30th April, 1802 years, without prejudice to any questions "which may arise between the said Mrs. Anne Glasgow and "the trustees appointed by the trust-deed of the said Robert "Glasgow, deceased, dated 23d June, 1821, or the parties "beneficially interested in that trust-deed: Repel the claims of "Hugh Allan and John Smith, and dismiss the same; assoilzie "the defenders from the whole conclusions of the summons of "declarator count and reckoning raised at the instance of "the said Hugh Allan, and *quoad ultra* find it unnecessary to "pronounce any other finding on any of the pleas maintained "by the different defenders in said processes, or parties com-"pearing in the process of multiplepoinding."

The appeal was against this interlocutor.

The Lord Advocate and *Mr. Stuart* for the Appellant. The trust-deed of 1802 was a general settlement of the maker's whole estate. The trust-disposition of 1821, which must be taken in conjunction with the other deeds executed at the same time, was of the same character. It was a settlement of the granter's whole estate, wheresoever situated. Both the deed of 1802 and the deed of 1821 were effectual to vest the lands of Seafield in the trustees of either of these deeds; but the judgment of this House has determined, that after having been vested in the trustees of 1821, there are no powers in the deed

of 1821 which the trustees can exercise in regard to these lands; that, in fact, they hold a mere naked trust. If this state of the law in regard to the deed of 1821 had been ascertained prior to the time at which the trustees proceeded to make up their title to Seafield, the heirs-at-law, upon their title to the beneficial interest, might have successfully resisted that proceeding, as superfluous and unnecessary, and have established in themselves a title to the lands, to the exclusion of these trustees.

The trustees of the deed of 1802, in such a case, could not have intervened to prevent the heirs-at-law thus establishing their title, unless upon the ground that the deed of 1802 was subsisting.

But the deed of 1821 being, like the deed of 1802, a general conveyance of the granter's whole estate, its necessary effect was to destroy the deed of 1802. The deed of 1821 was effectual to vest the legal estate of Seafield in the trustees under it, although the beneficial interest in the trust was undisposed of. The legal estate feudally vested in them is beyond any challenge at the instance of the trustees of the deed of 1802. The legal estate, therefore, given by the deed of 1802 being gone, the beneficial interest built upon that estate fell likewise.

Not only was the deed of 1802 superseded and destroyed by the subsequent conveyance of the same estate, by the deed of 1821, to different parties, but it was revoked by the inconsistent purposes for which that subsequent conveyance was made. Not to go further than the respondent herself, the trusts of the two deeds were *toto cælo* different. By the deed of 1802, she was to have, out of the general estate of the testator, a legacy of 10,000*l.* and the residue of the estate, after satisfying prior bequests. Whereas by the deeds of 1821, taken as one deed, she was, also out of the general estate, to have, along with her husband, an annuity of 3000*l.* and a life interest in the residue, after payment of bequests, different from those in the deed of 1802,

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life interest therefore in an entirely different residue from that intended by the deed of 1802. If this be so, then the clause of revocation of 1821 is in truth an express revocation of the deed of 1802, for it revokes all former deeds, "in so far as the same "may be inconsistent with these presents." And if the effect of the deed of 1821, as between the parties entitled to the beneficial interest under it, and under the deed of 1802, be to revoke the latter deed, the effect must be the same as between them and the heirs-at-law. The deed of 1802 cannot be gone, as to the parties who would have been entitled to take under it, had it subsisted, and yet have effect as a title to exclude the heirs-at-law.

There is no express reference in the deeds to the heirs-at-law, one way or other; yet, if there had been in the deed of 1821 a declared intention to exclude them, they would nevertheless be entitled to take, if that deed was an effectual revocation of the deed of 1802, although it might not be in itself an effectual disposition. *Crawford* v. *Coutts*, 2 *Bli.* 655. *Gordon* v. *Clines' Trustees*, *M'L. & Rob.* 72.

If the deed of 1821 would have excluded the trustees of the deed of 1802, what possible title can the respondent have? There is no conveyance whatever by the latter deed to her. It is only through the title of the trustees that she can assert any interest which the deed gives her—and even as to that interest it is gone—it is to a residue which never can have existence—it is a gift of residue of the general estate after payment of prior charges; but the general estate is given by the deed of 1821, and subjected to charges entirely different from those in the deed of 1802.

[*Lord Cottenham.*—Your argument, that the purposes of the deed of 1802 were substituted by the purposes of the deed of 1821, is not very consistent with your claim as heir-at-law on the ground that no purposes are declared by the deed of 1821.]

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Our claim is rested on this, that the necessary powers are not given by the deed of 1821 for effectuating its purposes. If the deed of 1802 is to be set up, it can only be by resuscitating the objects of it. The other legatees and annuitants must then be entitled to payment as well as the respondent, and can she claim the 10,000*l.* given by it, and at the same time take the benefits given by the deed of 1821? The confliction that will be occasioned by this course between the parties entitled to take under the two deeds, seems to have occurred to the Court below, and to have occasioned the reservation in the interlocutor complained of.

[*Lord Cottenham.*—By the deed of 1802 provision was made out of estates, Seafield included, for payment of debts and legacies. But by the deed of 1821, as you are now compelled to read it, provision for these purposes is made out of the other estates. Is not the effect of that just to relieve Seafield from the provision?]

But Seafield is vested in the trustees of 1821, who are entirely different from those of 1802.

[*Lord Cottenham.*—You must read the deed of 1821 as if the testator had said, out of the proceeds of my lands, except Seafield, do so and so. Won't that, on the supposition that the deed of 1821 conveyed all the lands, Seafield included, leave the trusts of 1802 to take effect, the deed of 1821, as to Seafield, only appointing new trustees?]

No reference is made from the one deed to the other, so that the trustees of the deed of 1821 could be cognisant of the trusts of the deed of 1802; there is nothing in the deed of 1821 that pointed out to the trustees of that deed that they should execute, in regard to Seafield, the trusts of the deed of 1802; and if the trusts of that deed are to be executed, there is no power to do so but in the trustees appointed by it; no such power is given to the trustees appointed by the deed of 1821.

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The Solicitor-General and *Mr. Bethel* were heard for the Respondent.

LORD CHANCELLOR.—My Lords, the contest in this case is between the heirs of Robert Glasgow and Mrs. Anne Glasgow, his natural daughter, the latter claiming under a settlement of 1802, the former insisting that such settlement was revoked by a subsequent settlement of 1821, although no new trusts were declared of the property in question, as was decided by this House, which no party therefore is now at liberty to dispute. But that decision only established that the property was not subject to the uses, ends, and purposes expressed in the deed of 1821; it left untouched the question whether it was at all affected by the deed of 1821, or whether the settlement of 1802 was revoked by it. That decision, however, so far assists in the construction now to be put upon the deed 1821, as it compels us to read the deed as if it contained an exception of the property in question; if that exception were introduced into the description of property to be affected by that deed, there could be no question as to the subsistence of the settlement of 1802; but it is consistent with the decision that the exception should only be introduced into that part of the deed which declares the uses, ends, and purposes for and upon which the property comprised in it was given in trust. The revocation in the deed of 1821 does not affect this question, because it only revokes "all former deeds of settlement in so far as the "same may be inconsistent with these presents," and it having been decided that the property in question was not subject to the uses, ends, and purposes declared by the deed of 1821, it follows that, as to this property, the provisions of the deed of 1802 cannot be inconsistent with those of 1821, any more than would have been the case if the deed of 1821 had in terms excluded the property in question.

I have before said that if the deed of 1821 were to be read

as excepting the property in question, the claim of the heirs would necessarily be excluded; and it appears to me that introducing the exception in that part of the deed which declares the uses, ends, and purposes, is equally fatal. In that case, assuming that the property in question was, together with all other parts of the estate of Robert Glasgow, transferred to the new trustees, the declaration would be that those presents were granted in trust, (except as to the property in question,) for the uses, ends, and purposes after expressed, and no otherwise. The effect, therefore, would be, as to the property in question, to transfer it to new trustees, but not to affect the trusts and purposes upon which it was before held; and the revocation being, for the reasons before given, inoperative, the new trustees would hold upon the old trusts.

Whether, therefore, the property be considered as altogether unaffected by the deed of 1821, or as included in it only to the extent of vesting it in new trustees, it appears to me that the decision of this House, declaring that it was not subject to the uses, ends, and purposes declared by that deed, so preserved and set up the deed of 1802 as to exclude the claim of the heirs. This seems to have been the view taken by Lord Mackenzie, with whom the majority of the Judges concurred; and agreeing with him in this view of the case, I move your lordships that the interlocutor appealed from be affirmed, but the appellant suing *in forma pauperis*, it will be without costs.

LORD BROUGHAM.—My Lords, I am of the same opinion as my noble and learned friend. At the hearing of the case it was considered necessary that it should be looked into in order to see the bearing of the former judgment, I am of opinion that the Lord Ordinary, (Lord Mackenzie,) with whom the majority of the Judges agreed, came to a right conclusion. I therefore think that the interlocutor appealed from should be affirmed.

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LORD CAMPBELL.—I entirely agree in that opinion.

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutor, in so far as is therein complained of, be, and the same is hereby affirmed; and that the said cause be remitted back to the Court of Session in Scotland, to do further therein as shall be just consistently with this judgment.

WALMISLEY—RICHARDSON and CONNELL, Agents.