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ELIZABETH CRAUFURD, Relict of the deceased John Howieson, Esq., and afterwards Widow of the Rev. Mr. Moodie, and WM. BEVERIDGE, W.S., her Trustee, and Tutor for WM. MOODIE, an Infant, her Son, - } *Appellants;*

THOMAS COUTTS, Esq., and Others, *Respondents.*

House of Lords, 6th Aug. 1803, and 14th Mar. 1806.

DEATHBED—REVOCATION—APPROBATE AND REPROBATE.—Circumstances in which the heir-at-law was held not excluded from challenging a deed executed on deathbed, although she was excluded by a prior *liege poustie* deed executed in favour of a stranger, reversing the judgment of the Court of Session.

This is the sequel of the appeal reported, Vol. iv. p. 100. In the former appeal, the case was remitted back to the Court of Session, to reconsider the interlocutor, the Lord Chancellor having entertained doubts as to the correctness of the judgment formerly given. It will be there seen that Colonel Craufurd, of Craufurdland and Monkland, had in 1771, executed a settlement of his estates to Sir Hew Craufurd, who was not his heir-at-law, under express reservation to revoke and alter, in whole or in part, at any time in his life, *et etiam in articulo mortis.* In 1793 he executed a settlement, conveying his estates of Craufurdland to and in favour of a different party (Mr. Coutts) whereby he expressly revoked the deed of 1771, but only to the effect of sustaining the deed 1793. This latter deed was executed on deathbed; and the question raised by the appellant, Mrs. Craufurd or Howieson, the Colonel's heiress-at-law, was, as the deed 1771 was expressly revoked by the deed 1793, and the deed 1793 ineffectual to convey heritage, as executed on deathbed, whether she, as heiress-at-law, was let in?

The Court of Session, on resuming the consideration of the case, under the remit of the House of Lords, ordered memorials, and a hearing.

By the deed 1771 the heir-at-law was excluded, and another preferred. By the deathbed deed the previous deed of 1771 was revoked, and another stranger called to succeed. It was therefore contended by the respondent, that the heir-at-law had thus no interest to challenge the deathbed deed, *that deed* not being to *her prejudice.* It was further contended, that she could not both found on the deathbed deed, as revoking the deed 1771, and at same time seek to reduce it. It was answered, that the moment the deed 1771 was revoked, as to the conveyance of the estate, the heir-at-law's right revived; and

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that though she challenged the deathbed deed as a conveyance to the estate to his prejudice, she did not challenge that part of it which revoked the conveyance of 1771, which might nevertheless stand entire.

The Court thereafter pronounced this interlocutor, holding that the heir-at-law was excluded. "Adhere to these "interlocutors, assoilzie the defenders from the reduction, "in so far as concerns the lands of Craufurdland, and "decern."*

* Opinions of the Judges.

LORD PRESIDENT CAMPBELL said,—"It has been supposed that this is a complex and an intricate question upon the law of deathbed, and peculiar to the law of Scotland; that the argument in support of the former judgment is obscure, and involving in it some degree of inconsistency, and that the law of deathbed is in danger of suffering if the judgment is adhered to. But when the real nature of the question is clearly understood, it will be found, that although it involves in it a point relative to the peculiar law of deathbed, it is truly of a more general nature, in so far as it arises upon the construction of different deeds, and where we must resort to the common legal rules of construction, in order to find out the import and effect of them, the deeds themselves not being at one, and objections set up which are said to strike against their validity in part but not in whole, no matter whether arising from deathbed, or from any other ground in law or fact.

"It is believed many such questions are to be found in the English Reports as well as in ours. See Cases in Equity, abridged, vol. i. p. 408; vol. ii. p. 776.

"In all such cases, where we have different and contrary deeds, and perhaps conflicting rules of law to consider, and different interests to attend to, we are necessarily called upon to inquire, what was the *will*, and what were the *powers* of the maker of such deeds? What did he intend? What has he actually done? What had he a right to do? and what have the contending parties an interest and a right to demand? This is precisely what occurs here, and, in whatever way the determination may be given, the peculiar law of Scotland, with respect to deathbed, will remain just as it did before, without being in any degree affected by it. The one party pleads upon the law of deathbed. The other admits that law; but says, that this case is not within it, and denies the right of the pursuers to make it a deathbed question. Whether it is or is not, your Lordships will determine, upon a fair examination of the deeds founded on.

"Before taking a minute view of the deeds, let me say a word or two upon a general topic which has often been the subject of discussion in such cases as the present, viz. Upon the effect of a clause, re-

serving power to alter, &c. *etiam in articulo mortis.* It is properly enough observed in p. 42 of the pursuers' memorial, that clauses of this kind are often of very little significancy one way or another. In the present case, where the deed remained within the granter's power to the last moment of his life, and the fee of his estate also in him, this clause did neither good nor harm: for, supposing there had been no such words in the deed, I am of opinion that Colonel Craufurd would have done exactly what he did with the supposed help of these words, because there was nothing done to take such power out of him.

"Clauses of this kind are meant for a different case, viz. Where the granter divests himself of the fee, or has tied himself up in some other shape, *e. g.* by contract of marriage.

"He may do this, either absolutely, or attended with the quality and condition that he shall nevertheless have a reserved faculty or power to make alterations, or to impose burdens; and, for the most part, these words, *etiam in articulo mortis*, are added.

"It is on all hands agreed, that the addition of these words will have no effect, if the heir *alioqui successurus* has not been excluded by any act done or deed executed *in liege poustie.* How far they can effect a *stranger*, called in to the succession, under that precise quality, is a different question. When this question first occurred, it must have been attended with some doubt and difficulty, not as between the heir *alioqui successurus* and the heir pleading upon the deathbed deed, but between the person called by the *liege poustie* deed and the latter; for it is very plausible to say, that no man can, by any clause of this kind, or by any figure of words, assume to himself the power of dispensing with the law, by doing what the law prohibits him from doing, viz. Disposing of his heritage on deathbed; and, therefore, that this condition ought to be held *pro non scripta*, or to be so limited as to admit of alterations only when executed *debito tempore* before the granter comes to be on deathbed; and further, that the person, although a stranger, who is called in to the succession, vesting in him a certain right of fee, defeasible only by lawful deeds, must now be considered as the heir *alioqui successurus*, and ought not to be thrust out again by any deed on deathbed. The contrary argument, however, has unfavourably prevailed in such cases, viz. That a *stranger* called in to the succession in this qualified manner, must give way to the qualities and conditions under which he is called, and is not entitled to challenge the exercise of them even *in articulo mortis.* He has no other way of getting at the estate but by claiming under that very deed, and he cannot be allowed to approbate and reprobate, *i. e.* To play fast and loose with one and the same deed. It is against the stranger heir, not the heir-at-law, that such clause is pointed.

"Such would have been the question with Sir H. Craufurd, had the fee been put in him by the deed 1771. We are apt to startle at reserved powers to alienate on deathbed, and yet, unless we re-

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solve at once to depart from all the authorities and decisions upon this subject from the beginning, we could not, in the supposed case, have decided in favour of Sir Hew. But the present case is attended with still less difficulty, as Sir Hew never had the smallest hold of this estate in any manner of way. Colonel Craufurd himself remaining, by the deed 1771, in the *entire fee* of his estate, and likewise in possession of the instrument itself, which was locked up in his repositories, and therefore at the sole disposal of the granter at any period.

" Accordingly, Sir Hew has not been advised to compete with Mr. Coutts; or, in other words, it is admitted that Colonel Craufurd had a right to take this hope of succession from Sir Hew and to give it to another stranger in preference to him, even on deathbed.

" But now the heir-at-law steps in, and says, that since you have excluded Sir Hew, by laying aside the deed in his favour, you must also lay aside the other deed claimed on by Mr. Coutts, for the one deed being thus revoked, and the other liable to the objection of deathbed, you cannot join two nullities together, in order to make an effectual settlement in favour of either the one or the other of these gentlemen, and to carry off this estate from the heir-at-law, whose right is always complete, in so much that a conveyance or devise to such heir in fee is held null. This last observation seems to be founded upon some principle in the law of England which has no existence with us.

" But, be that as it will, the argument thus used for the heir-at-law seems to depend altogether on this, Whether, in a question with the heir-at-law, we can give an effect to the deed 1793 essentially different from what we give to it in the question with Sir Hew Craufurd.

" It assumes the very proposition which requires to be proved, and which has never yet been sanctioned by any authority or decision in such a case, viz. that one and the same party is entitled to set up two contradictory pleas upon one and the same deed, viz. that it shall be held as a good and valid deed to one effect, and null to another; that it shall be sustained, so far as it is favourable to his views, and set aside so far as it is prejudicial to them.

" The short question is, Whether the revoking part of the deed can be held as independent, and was executed with a view to intestacy, and whether it can attain that object alone, while the deed itself very clearly expresses that it was done *alio intuitu*, viz. to make way for another stranger heir, and for no other purpose or object whatever? The words of the revoking clause itself, as well as the new settlement in favour of Mr. Coutts, leave not the smallest room to hesitate about this. The revoking clause must be taken along with the context.

" The question is well put in the other memorial, whether Colonel Craufurd might not have explicitly said in his deed, that it was not

his intention to revoke the deed 1771, in favour of Sir Hew, unless to devolve the succession in favour of Mr. Coutts, and if this last object could not be obtained on account of the law of deathbed, or for any other reason, it was his determined will that Sir Hew should still be the heir, and that, in all events, his heir-at-law should remain excluded. Would there have been any room for the claim now made by the heir-at-law; and if so, is the language of this deed less strong, and the real import of it less clear, than in the case supposed?

"The reasoning in the two English cases above noticed, is very strong to this effect, and so are some of the decided cases: Dict. p. 215, case of Kerr. Kilkerran, p. 153, Dict. vol. iii. p. 172; 17th Nov. 1795. Baxters. Henderson *v.* Wilson, 31st Jan. 1797, Mor. 15444. House of Lords, 29th Mar. 1802, ante vol. iv. p. 316.

"Such clauses of reservation are in their nature conditional. It is not giving them fair play to hold them as independent deeds, unless it were so expressed in clear terms. The proper way of discharging this is by a separate deed, or by a reservation upon the back, or cancelling—and then, if another deed is executed not *incontinente* but *ex intervallo*, there may be room for the claim of the heir-at-law. Here it was all *pars ejusdem negotii*. Suppose Colonel Craufurd had ordered Sir Hew to make over nine-tenths of the succession to Mr. Coutts, or to pay him a sum nearly equal to the value of the succession; or suppose he had put in no express revoking clause, but done the same thing virtually by settling of new. In all these cases, it is admitted that the deed would have been good, yet these may as well be said to be devises, and the law of deathbed is as much affected by them as in the present case.

"The short answer, in all such cases, is, that the proprietor is exercising his legal right, and that the heir is hurt, not by the deed in *liege poustie*, against which no law operates; and there is no danger that any man will, in *liege poustie*, call a stranger into his succession with no view of favouring that person, but using him as a cover to let in another upon deathbed, for it is more than equal chance that he will die before executing this plan.

"The judgment, in short, already pronounced, is the necessary result of two distinct propositions, both of which are unquestionably true, viz. 1st, That the heir may be excluded in *liege poustie*. 2d. That he has no interest, and, consequently, no title to find fault with a deed which is not to his prejudice. See Tait's argument, information for Mr. Coutts, 22d April 1795, p. 35. It is a strong measure to divide and garble a deed. It ought rather to be presumed *in dubio*, that the whole was meant to stand or fall together.

"The judgment with regard to Monkland is perfectly consistent, —being founded on this, that the deed 1793 contains merely a revocation as to this, and does not dispose of it, and therefore the party who founds on this revocation, does not approbate and reprobate.

"It is impossible to distinguish between money heritably secured, and heritable property.

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"Had there been only one deed, excluding her, and preferring another, she would have certainly been excluded.

LORD MEADOWBANK.—"This question is of little consequence as to future settlements, because the question may be obviated by more accurate expressions. But it is of consequence as to past deeds. The object here, on the part of the heir-at-law, is, to take advantage of a critical inaccuracy in the clause in question; but as I do not hold the objection to be good, I am therefore for adhering."

LORD POLKEMMET.—"I have been all along against the interlocutor. A party may, no doubt, disinherit his heir in *liege poustie*, but that supposes a deed *inter vivos*, which is to contiuue effectual, though with reserved powers to alter, or even a *mortis causa* deed, if it is to remain the subsisting deed under which titles are to be made up. But, where it is cancelled or totally annihilated, so as to bring the deathbed deed to be the only subsisting one, then the heir-at-law may step in, because nothing excludes him except the deathbed deed alone. In the present case, the evidence is strong to point out that Sir Hew excluded the heir in all events. The *liege poustie* deed here is left as a blank, and good for nothing. No titles can be made up upon it. But if we can set up the deed 1771 at all, it would be as a mere trust not excluding the heir-at law."

LORD HERMAND.—"I am of the same opinion. The deed 1771 was simply revoked. He might burden the heir to the extent of the value of the estate, or might order him to convey to another, but if he revoked, it is at an end. It is declared void and null. The rule of approbate and reprobate has been found not to apply to the Monkland estate. Why then apply it to the other? In the case of Cunningham, 10th June 1748, Mr Whiteford was heir in both deeds. In the case of Rowan and Alexander, there was a distinction taken between an express and an implied revocation."

Mor. App. "Deathbed," No. 19. Mor. 11371.

LORD ARMADALE.—"There are two questions here to be answered. 1st. A general one; and the 2d. One of a more limited nature.

"1st Whether a person can, in *liege poustie*, reserve a power, and do an act against the law, and which the law has prohibited him from doing. *Vide* Lord Chancellor's speech. The cases of Agnew and Hog of Newliston seem to show that he may.

"2d Point is a mere question of construction, as to whether the deed 1771 was to stand good, in so far as it supported the deed 1793, and in so far as it did not, whether then there was revocation. And it appears to me that the deed 1771 is good *ad hinc effectum* There is no material distinction between an express and an implied revocation.'

LORD BALMUTO.—"The deed 1771 was completely revoked. The deed 1793 was executed on deathbed. The act of the granter strikes down the one; the law of deathbed has struck down the other. It would therefore be a fraud in the law of deathbed to sustain the last deed."

"LORD CULLEN.—"I am for adhering. The law of deathbed was introduced for the heir alone, and personal to him."

LORD BANNATYNE.—" I am for adhering."
LORD CRAIG.—" I am for adhering."
LORD DUNSINNAN.—" Of same opinion."
LORD STONEFIELD.—" Of the same opinion."
LORD JUSTICE CLERK.—" I am for altering. The stranger called is a mere donee. An express power of revocation is not necessary as to him. It is only necessary to extend the granter's power against the heir; but as that has not been exercised in *liege poustie*, and as the reservation to grant such deed, even on deathbed, is in face of the law of deathbed, I cannot agree to the interlocutor. It is true that the heir must have an interest. But here the interest arising from the revocation is plain. There is nothing in the clause bringing back the estate to Sir Hew Craufurd.

" Suppose the deed had been cancelled, or thrown into the fire. Is the party to deprive the heir still of her right? I cannot assent to that proposition."

President Campbell's Session Papers, vol. 100.

Against these interlocutors, in which these opinions were given, the present appeal was again brought to the House of Lords, urging the same arguments as in the former appeal.

After hearing counsel,

6th August 1803.

LORD CHANCELLOR ELDON said,—

" My Lords,

* " This is a cause which has undergone more consideration than almost any which I remember in this place. I had hoped I should have found it in my power, before the end of the present session of Parliament, to have made a distinct proposition to your Lordships, either for affirming or for reversing the interlocutor pronounced in this cause; but I have not yet been able to form an opinion to which I can give the character of a judgment.

" I have thought upon the cause, with much anxiety, again and again, but am not yet in possession of some facts, the knowledge of which would enable me the better to inform my own opinion. I am aware also, that some others of your Lordships, all now absent, whose sentiments are much attended to on such subjects, are not of one opinion in this case. One of the noble and learned persons to whom I alluded formerly, considered this case very minutely, and, I understand, adheres to his former opinion, maintaining it on the same grounds. Another also attended the pleadings in this cause, though now necessarily absent, has inclined, I believe, to think that the present case is in substance, though not in mode and form, no more than other cases of exception out of the law of deathbed. A

Lord Rosslyn.

Lord Alvanley.

* From notes revised by his Lordship.

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third, who, from indisposition, has not been present at the deliberation of your Lordships during the present session, but who, whether absent or present, never fails to attend to what relates to the judgments to be pronounced by this House, I conceive him to entertain, as well as myself, considerable doubt whether, in a case of this sort, mode and form is not of the highest importance.

" At one time, I thought that it might be advisable to remit this cause to the Court of Session for farther consideration; but, recollecting the great consideration it had originally in that Court, and, after it came here, how much it was considered by the Lord then upon the Woolsack, and the very mature discussion too that it has received since, and the great expense incurred by the parties, it does occur to me, that future deliberation may be sufficiently employed, and further, necessary information may be otherwise obtained on the points I am to allude to, before the next session of Parliament. I have doubted the propriety of remitting also, because it is utterly impossible to do justice to the merit which I conceive belongs to the Court of Session, for the learned and painful discussion given to this case, and the mode in which they have discharged their duty with regard to it.

" This cause arises out of the settlements of a Colonel Craufurd. He was seized of two estates in Scotland, Craufurdland and Monkland. In 1771, he executed a settlement, conveying both these in liferent to himself, and Sir Hew Craufurd and others, in fee. That deed contained a clause dispensing with the delivery; and he reserved power to alter it at any time of his life, *et etiam in articulo mortis*. The adoption of such a clause, has been explained to arise out of what is termed in Scotland, *the law of deathbed*. To avoid what were supposed to be the inconveniences flowing from that law, it had been considered as law, that if a former deed had been executed in due time, a person might execute another even *in lecto*, which, in given circumstances, would be effectual. By connecting the latter with the former, the disposition was considered to have been made at the date of the former, and so not to be challenged as not being made in due time; but, in most cases, at least the former, has been a deed valid, effectual, and subsisting in operation at the death of the granter.

" About twenty-two years after making the first settlement, Colonel Craufurd, in 1793, executed a new settlement of his estate of Craufurdland. It will be noticed, that this contains a procuratory of resignation, a precept of sasine, and other clauses necessary for making up the feudal title in the person of the disponee, Mr. Coutts. This deed also contained certain superiorities in Renfrewshire, which were not contained in the deed of 1771. The estate of Monkland also was not given by this deed to Mr. Coutts. If it required a joint operation, therefore, of these deeds of 1771 and 1793, to make a valid disposition, it is plain that, as to the superiorities and the estate of Monkland, there was no effectual conveyance.

The deed of 1793 contains the following clause, on which the question turns. (Here his Lordship read the clause of revocation.)

"Of same date, the Colonel executed a conveyance of his estate of Monkland, by way of bargain and sale; but this was a fictitious transaction. The reason of his choosing this mode of making a settlement of that estate has not been distinctly explained. The disposition of 1771 was not then lying by him, and he did not recollect, perhaps, that Monkland also was excluded in that deed. He wrote a letter to Mr Coutts, to send him a bond for £5000 as the price of this estate; which, it is said, was accordingly executed. But it is not necessary at present to state farther as to this.

"The heiress-at-law then brought her action, to set aside these deeds. It has been correctly explained to us, that the word, "heir" is understood in Scotland in a different sense from what it is in this country. In Scotland, an heir may be the person pointed out by destination of former settlements of an estate. In this country, the heir takes purely by descent; and the person taking by a destination is considered as a purchaser, as a person not taking in the quality of heir. Mrs. Howieson was the person destined to the succession by the settlements of the estates prior to 1771. She contended, that the deed of 1771 was made a nullity by the deed of 1793; that the deed 1793 was also a nullity, being executed upon deathbed, and that you could not, (in the phrase of a noble and learned Lord, who formerly, in this House, considered this case), by splitting two nullities together, make a valid conveyance of the estate to Mr. Coutts.

"In this action, Mrs. Howieson called Sir Robert Craufurd,* as well as Mr. Coutts, as defenders. (Here his Lordship read the conclusions of her summons, Mr. Coutts' defence, and the interlocutors 12th June 1795, and 17th November 1795.)

"After the question of deathbed had thus been decided, Sir Robert Craufurd appeared, and contended that the deed of 1771 was not absolutely revoked, and that, if Mr. Coutts did not take the estate of Monkland, under the fictitious sale, that he was entitled to it. Upon this point, the Court pronounced an interlocutor, adverse to Sir Robert's claim, declaring, that the settlement executed by Colonel Craufurd in 1771 was effectually revoked by the clause of revocation contained in the deed of 1793. It is fair, however, to observe, that the principle of the declaration cannot be stated more broadly, than that the deed of 1793 had no other effect than the effect of revoking as to the estate of Monkland. The decision, as to that estate, does not amount to a declaration of the Court, that they ought to have come to the same decision as to the estate of Craufurdland, because the two estates were in different circumstances. Sir Ro-

Jan. 30, 1798.

* Sir Robert Craufurd was the heir of Sir Hew Craufurd, in whose favour the deed 1771 was granted.

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bert Craufurd appealed against this judgment; but his appeal was dismissed for want of prosecution.

"Mrs. Howieson also brought her appeal against the judgment as to the Craufurdland estate. When the cause came to a hearing in this House, very great attention was paid to it. I hold in my hand a note of what fell from the noble and learned Lord, then on the Woolsack, when the cause was sent back to the Court of Session, from which I shall read some extracts. (Here his Lordship read the greater part of manuscript notes of Lord Rosslyn's speech, which could not be perceived to differ in any particular from what is printed in Mrs. Howieson's last memorial.)

Vide ante, vol. iv. p. 100.

"I have also the notes of the opinions formed by the Judges of the Court of Session, as they have been handed to us, and of what passed in consequence of your Lordships' remit. I should be wanting in due respect to that Court, if I did not state it as my opinion, that it is impossible to have discharged a duty more carefully, more anxiously, and more sedulously, than the Court have discharged theirs in this case. They differ considerably in opinion; but it has been the opinion of the majority, that the former judgment was right. From these notes, I cannot, however, accurately and precisely collect their respective opinions upon some, as they appear to me, important points. The cause came again here by appeal, and has since been most ably argued by advocates from Scotland. The cases, whether similar or analogous, have been fully sifted, and the law of deathbed, and its effect on the public convenience, fully examined.

"As to the law of deathbed, I never thought it necessary very anxiously to discuss its operation, as convenient or inconvenient; it is enough, that it forms undoubtedly part of the law of Scotland. It seems to have been relaxed from the rigour of the general doctrine concerning it in several decided cases, just as, in some cases, the law of England, with regard to devises by will, has also been relaxed. Though it be positively laid down, that a mere deed on deathbed shall not disappoint the heir; yet if a former deed had been granted in *liege poustie*, the granter might, by a deathbed deed, burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest of the estate given to such former grantee; the former deed remains, in that case, valid as a title deed to the estate, however burdened by the latter deed.

"Analogous decisions have been pronounced in this country on the statute, regulating the forms of attesting wills of land. By that statute, three witnesses are necessary to attest a devise of real estate; yet, it has been held, that if a testator devises his lands by a will so attested, subject to the payment of debts and legacies, he might afterwards, by any writing, with or without witnesses, and even by any parole transaction forming a contract of debt, charge, in legacies and debts, the devisee to the full value of the estate, though he could not so dispose of so much of the land itself as was

of half a crown value to any creditor or legatee. Here, however, the estate remains in the devisee under the altered will, however burdened by what is not attested. When a devise is duly made to trustees by sale of real estate, to pay certain sums to given persons, and the residue to A B, I apprehend that a subsequent devise of this surplus, or residuary interest, attested by two witnesses only, cannot be good. So much have we thought from matter of substance, that, in this country, when it has been desired by parties that the Courts should apply the decided cases by analogy to others, the Courts have refused to say, that, because you may in one mode effectually do what you intend to do, therefore, if you intend the same thing in effect, you may execute your intention in any other new mode of accomplishing it. The knowledge of this, as an English lawyer, may have perhaps caused a great difficulty in my mind in the present case.

"I come, therefore, now to mention a doubt upon this cause, which I have not yet been able to get rid of. In most of the cases which have been cited, the first deed—the *liege poustie deed*—has remained an effective operative instrument at the death of the grantor. I do not mean, as leaving a title to anything beneficial in the grantee of the *liege poustie* deed, but as continuing at the death of the grantor an interest in the grantee of the *liege poustie* deed, on which the grantee of the deathbed deed must found his right, and to which he must knit and attach it.

"If one makes a *liege poustie* deed in favour of one of your Lordships, and afterwards, by a second deed on deathbed, burdens the grantee thereof with some charge, the heir *alioqui successurus* would be, by the first deed, effectually cut out, and the grantee under the first deed, is clearly bound to fulfill the directions of the second deed; for he cannot avail himself of the law of deathbed. So also is it the case, if the grantee of the first deed is ordered to convey to a person named in the deathbed deed. In both these cases, the heir *alioqui sucessurus*, if cut out by a *liege poustie* deed, available *at the granter's death*, in the one case, the *liege poustie* deed will give the title to the estate, though burdened; in the other, it will also give it, though to be conveyed. In both, it is a subsisting operative instrument *at the death of the granter*, cutting out the heir's title.

"It is said, if you may disappoint your heir in this way, why not also by the mode used in the present case? if, by giving a title to an estate burdened to its value, as to be wholly conveyed away, why not by a deathbed deed give the estate itself, a *liege poustie* deed having been once executed, *my difficulty is to admit*, that a person can do what he has the power of doing, by all the different modes in which he pleases to do it. The principle of the former cases appears to go to this, that the grantee of the first deed would take, if the deathbed deed was not effectual; and that the heir *alioqui successurus* had nothing to complain of in such a case, and the grantee of the first deed could not make any complaint. Now, though it be

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true that the present decision puts Mr. Coutts' case on the same footing, yet I do not find, either in these notes of the opinions of the judges, or in the arguments of counsel at the bar, what is precisely the effect of the deed of 1771, in the contemplation of law at the granter's death. If a title to any estate is, at the granter's death, left in the grantee of that deed, the case falls under one consideration; but if that deed, at the death of the granter, was absolutely revoked, it is, in effect, the same case as if the *liege poustie* deed had been a disposition to the heir *alioqui successurus*, or as if it had never existed. When the interest under the deathbed deed knits and attaches itself to an estate to be claimed under the former, there is a *liege poustie* deed disposing of the title, but if there is no such estate to which that interest can attach, there is nothing but a mere deathbed deed.

" To explain myself farther: I have frequently put a question to my own mind of this nature, perhaps suggested by ignorance. Suppose the deed of 1793 had contained neither procuratory nor precept, it might still have furnished a good ground of action, to get the property in due form; but who would have been defender in such a case? Would it have been the heir-at-law or Sir Robert Craufurd? If Sir Robert Craufurd had no title to any estate remaining in him, then no action would lie against him. If the action was to be brought against the heir, must it not be admitted that the heir had some how or other got back the estate? This question has not been answered at the bar, though put at the bar. The answer to it I must endeavour to collect, and I want to know, whether the deed of 1771 be a necessary operative instrument in Mr. Coutts' title, as he must make it, or if he might, without prejudice, throw it in the fire. In one word, I wish correctly and precisely to know its effect, and whether the grantee of that deed is considered as entitled in law to any estate or interest on the property, in order thereon to make good Mr. Coutts' title?

" It was said that the deed of 1771 was not fully revoked, but only revoked *quoad certum effectum;* and that this was more a question of intention than of power. I doubt whether it is not a question of intention and power. I entertain no doubt of Colonel Craufurd's power to have given the estate to Mr. Coutts, nor of his intention to give it to him; but the law frequently gives the power of effectuating the intention, only in one mode, and you can do what you intend only in that way, and no other. If by saying that this is only a revocation *ad hunc effectum*, you mean that the deed is not revoked, but that Sir Robert Craufurd's title to the estate, burdened with a duty to convey or denude, for the benefit of Coutts, must be taken to continue for the purpose of so effectuating Coutts' title, then the deed is not wholly revoked; but, if it is wholly revoked, it seems difficult to argue, that because if a *liege poustie* deed remains effectual at the death of the grantor, a deathbed deed shall defeat the heir, therefore also

the heir shall be defeated merely because a *liege poustie* deed had been executed, but which did not remain in effect at the death of the grantor.

" If Mr. Coutts had declined to take this estate, I wish to know who would, in that case, have been entitled to it; would Sir Robert Craufurd take it in such a case? The judgment admits that the intention was exercised in a way to take the beneficial interest from Sir Robert Craufurd. If it be not given to Mr. Coutts, how should the heir proceed to make good his title? Must he contend with Sir Robert Craufurd or Mr. Coutts? Could it be argued, if Mr. Coutts had not taken, that the intent to revoke was only *ad hunc effectum*, viz. to give to Mr. Coutts, and, therefore, if he would not take, that Sir Robert should?

" I may mistake this matter very much, but I have not been able to find any case where the law of deathbed did not take effect in favour of the heir, if the *liege poustie* deed remained at the granter's death without any effect as an instrument through which the title must be made up; and the notes to which I allude, as well as the argument at the bar, contains assertions that Mr. Coutts must make up his titles under the deed of 1771, without explaining how, or the contrary assertion also, that he need take no notice whatever of it. As to these points I wish for further satisfaction. If he need take no notice of that deed, I doubt whether authority has gone the length of this judgment. If he must take notice of it, in what way he is to do so, has not been explained. I admit that it was Colonel Craufurd's intention to have revoked only *ad hunc effectum;* but I question if the purpose of the revocation be sufficient to sanction a new mode of conveying, if it be such; for I do not presume at present to say, whether or not the meaning of the words used is understood to be such as puts the judgment on this ground, and this only, that because there was once, though not at the granter's death, a *liege poustie* deed, therefore the deathbed deed is good.

" I could put many cases from the law of this country illustrative of these difficulties I entertain. Suppose I were to make a will in this country, devising my real property to a certain person; and were afterwards to execute another will revoking my former will, and that I might make the other, and then devising my real property to one not capable of taking, the revocation would be perfectly good; but the devise being ineffectual, the heir-at-law would come in, though the intent of my act was, to continue the exclusion of him. There is a fallacy, therefore, in the argument as to the effect of a revocation made *ad certum effectum*: if the revocation be complete, and an entire revocation is not a right mode of proceeding *ad hunc effectum*, the revocation will be good, and the disposition will be good for nothing.

" If I were to intend to revoke a will already formally made in this country, meaning, at the same time, to execute another in due form, and had such will prepared and ready for execution, but was

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arrested by the hand of death before completing it; we hold, in that case, that the former will is not revoked, because the revocation is not complete, and the devisee under the former will would take. Neither of those cases so put from our law, would support by analogy the present judgment. In the former case, the heir is let in; in the latter, the first devisee. But this judgment excludes both the heir and Sir Robert Craufurd.

"I may state unreservedly upon this part of the case, that I am not much impressed with the consideration of it, as being an evasion of the law of deathbed, or not such. There seems no doubt but that, in the circumstances of the case, it was completely in the power of Colonel Craufurd to have disappointed the law, and I consider the question as a question whether he can do it in this mode; whether he can do it without having a *liege poustie* deed in actual effect at his death. The suggestion so often made, that the heir was already cut out by the *liege poustie* deed, appears to me to assume all that is in dispute. For the heir cannot be said to be cut out till the death of the granter, and, therefore, it may be said that if, at that time, there is no effectual *liege poustie* deed, there was never any *liege poustie* deed that attested his title.

"Another doubt with me is, if this case has been decided by the Court below on the point of *approbate and reprobate* or not? I see in the notes of individual judges' opinions, that some of them have laid great stress upon this doctrine, though others thought differently of it; but the judgment of the Court, as to the first point, I cannot collect.

"If the judgment were put on that alone, I should entertain great doubt of it. It seems very nearly to resemble the doctrine of election in this country; though I am aware of the difference between what is understood by the word heir in Scotland, and what we understand by that term. The heir has been stated to be, whom God and nature have made such—I should say that the heir, in England, is a person succeeding by the mere operation and provision of the law.

"In our doctrine of election we hold, that if a person takes benefit under any instrument, he must submit to the instrument altogether. But if I give a legacy in money to my heir-at-law, without an express condition annexed to the legacy, and give, by the same will, part of my real estate to another, and this without the attestation of three witnesses; the heir is entitled to take the legacy, and at same time to say, that this is no good devise as to the land; and, accordingly, in such a case, the heir would take the estate. So in the case of a devise against the statute of mortmain, he would take against such a devise, though he claimed under the same will. For these are not cases of election.

"If the English doctrines are to rule, this is nothing like a case of election. The heir here does not take the estate or benefit under the instrument, but under the law. If a testator in this

country was required to make his will of land sixty days before death, it would be quite competent for the heir to say here, this is a deathbed deed. I take the benefit of the law, and I take that land under the benefit of the law, and he might take personal benefits under the will. There may be, however, a considerable difference, attending to the distinction of character, between an heir in England and Scotland, and it is impossible not to see that some cases have been decided in Scotland which very nearly support the doctrine of *approbate and reprobate,* as applied in this case.

" A person in this country cannot, by a will of land, made and attested in a regular form, reserve a power of making a future devise of the land, which should be attested by less than three witnesses. The courts of this country, though they have admitted subsequent bequests, otherwise attested, of the whole value of the land, do not admit them as to a particle of the land itself, and the bequests of the value of the land must be supported by,—must knit and attach themselves to,—an instrument remaining at the death of the testator, effectual to give the title to the land itself against the heir-at-law. The title to the land, to convey the benefit of the land to those claiming under the unattested bequests, must remain at that time in some person claiming under a testamentary instrument, duly attested, to pass an estate in the land. And upon principles which, because they are very familiar to my mind, and perhaps affect it too much in the present case, I doubt whether the deathbed deed can be supported, unless it can be founded upon some claim to the estate available against the heir, created by deeds continued available until, and at the death of the granter, by the deed of 1771, to which the title under the deed 1793 may knit and attach itself, just as a burden by a deathbed deed would attach itself to an estate created by a *liege poustie* deed.

" If it were my duty to decide the present case this day, I should feel it a very irksome task, to pronounce that the judgment was right or wrong. I believe that my noble and learned friend, who has long paid so much attention to cases from Scotland, entertains considerable doubt of the judgment; whether an estate of some kind or other be not remaining in Sir Robert Craufurd—whether the *liege poustie* deed, in making up the titles, is to be regarded as an absolute nullity. It would be altogether indecent to decide the cause at present, in the absence of all the noble and learned lords, if I was more able than I am to state a judgment upon the case. But, knowing the delay that has already taken place, and the anxiety that the parties must feel, where such property is at stake, I should not have held myself excusable, had I not detailed to your Lordships, at some length, the whole circumstances operating upon my mind, when I propose that judgment should be postponed."

On his Lordship's motion, the cause was adjourned till the second day in next session of parliament.

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7th March 1806, *case resumed.*

LORD CHANCELLOR ELDON said,

"My Lords,

"This is a cause which has already occupied a great deal of attention from the Court of Session and from your Lordships. I shall not be able to conclude to day all I have to say upon the cause, but, after trespassing upon your indulgence at present, I mean to move that the cause be put off till Tuesday, to be then concluded,—but it is my intention to give the parties to-day a certainty how the cause will be disposed of, and not to occupy much time with what will remain for Tuesday.

"This cause originates in the settlements executed by Colonel John Walkinshaw Craufurd, the representative of an ancient and respectable family. He was seized and possessed of two estates, Craufurdland and Monkland, in the county of Ayr. In 1771 he executed a deed of settlement, to keep up the representation of his family, of his estates of Craufurdland and Monkland to himself in liferent, and to the heirs of his body in fee; whom failing, to Sir Hew Craufurd, and the heirs male of his body; whom failing, to a certain other series of heirs.

"This deed contained a power to revoke at any time of his life, in *liege poustie*, or *in articulo mortis*. It remained in the repositories of the granter, undelivered at his death.

"This instrument appears to be evidence of a purpose on the part of Colonel Craufurd to defeat the heir *alioqui successurus* from 1771 down to 1793. At same time, it is fair to observe that this case will fall to be decided as if the deed of 1771 was executed only sixty-one days before the death of the testator.

"When, as is admitted on all hands, Colonel Craufurd was on deathbed, he executed a new settlement in February 1793, of the estate of Craufurdland, in favour of Mr. Coutts, his heirs and assigns, containing a procuratory of resignation, or precept of sasine, or other usual clauses, (the same as in the former deed), for vesting the estate feudally in the disponee. We shall have to consider whether this deed be one altogether substantive, or if it be to be taken in connection with the former deed.

"This deed, besides the estate of Craufurdland, conveyed certain superiorities, which were not contained in the deed of 1771. These were clearly gone by the law of deathbed.

"With regard to the estate of Monkland, this deed did not attempt to convey it to Mr. Coutts. I call your attention to this at present, as I shall afterwards have occasion to refer to it more particularly when considering the principle of the interlocutors as to Monkland. (His Lordship now read verbatim the disposition of Craufurdland to Mr. Coutts. Previous to reading the clause of revocation he made some observations thereon.)

"You will observe that this was a deed under conditions, reservations, and declarations, under which Mr. Coutts might have de-

clined to take the estate. Hitherto, it has every appearance of a substantive and independent disposition. (Here his Lordship read the clause of revocation.)

" This clause, in revoking the former settlement executed by Colonel Craufurd, of course revoked also the procuratories and precepts contained in the former deeds.

" The day after the date of the deed, Colonel Craufurd wrote a letter to his agent, directing him, after his death, to open his repositories at Craufurdland. When this was done, the deed of 1771 was found lying there. He had not cancelled this former settlement, and, if cancelled at all, it is so by the deed of 1793.

" Colonel Craufurd died soon after, but before his death, and of same date of 1793, he executed a conveyance of Monkland, bearing on the face of it the receipt of £5000, said to be paid by Mr. Coutts as the price thereof. At same time he wrote a letter to Mr. Coutts to send him his bond for that sum. If that bond was sent, it did not reach Colonel Craufurd in time, for he died six days after the date of the deed.

" I must here mark the difference of the situation of the two estates of Craufurdland and Monkland. The heir *alioqui successurus*, by the judgment of the Court below, got this last estate. In their interlocutor of 31st Jan. 1798, the Court found that the deed of 1771 was effectually revoked by the clause of revocation contained in the deed 1793, in consequence of which the estate of Monkland was adjudged to the heir. It was contended that the principle of the decision as to the estate of Monkland was directly contrary to that in regard to the estate of Craufurdland.

" The deed of 1793, conceived in favour of Mr. Coutts, embraced the estate of Craufurdland and the superiorities only, and did not affect the estate of Monkland, except in the clause of revocation. The clause of revocation revoked the deed of 1771 as well with regard to Craufurdland as to Monkland; but it also gave Craufurdland to Mr. Coutts, and not Monkland.

" The attempt to dispose of Monkland for a price, was not fully completed, because not acceded to by Mr. Coutts in Colonel Craufurd's lifetime. As to Monkland, it was also clear that he meant the heir not to succeed, but the purpose of selling was only an inchoate purpose.

" The decision as to the estate of Craufurdland is upon the ground, that as to it the revocation of the deed 1771 was not an absolute but a qualified revocation to support the deed of 1793. Whereas the revocation as to the estate of Monkland, of which the new conveyance was set aside, restored the right of the heir *alioqui successurus*.

" The difficulty upon the interlocutor is, that it lays down as a general principle, that the deed of 1771 was effectually revoked by the deed of 1793, and does not express that it was only revoked as to Monkland, and not as to Craufurdland, which was the meaning of the Court.

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" The principle so generally laid down in this interlocutor, was pressed against Mr. Coutts, but further than it would go. There may be a finding in an interlocutor in too general terms, and still the conclusion be a sound one. In considering this case, it is very material to take into view, if the decision as to the estate of Monkland be consistent with that as to the estate of Craufurdland; but it is too much to say that the decision as to Monkland is one directly contrary to that with regard to Craufurdland.

" After Colonel Craufurd's death, Mrs. Howieson, his aunt, the heir, (not as we understand the term, but the heir *alioqui successurus*, as it is termed in Scotland, under former destinations in her favour, claimed these estates.) In prosecution of her claims, she executed a trust bond, as usual in such cases, on which an adjudication was obtained, and afterwards an action of reduction was brought against the heir of Sir Hew Craufurd and Mr. Coutts.

(His Lordship here read the conclusion in the summons of reduction, noticing the more especial ground on the law of deathbed; he next read the interlocutor 12th June 1795, sustaining the reasons of reduction as to the superiorities, which was not in the deed of 1771, and repelling them as to the estate of Craufurdland, and the interlocutor of 17th Nov. 1795, adhering thereto.)

" After the Court had thus decided as to the estate of Craufurdland, Sir Robert Craufurd, conceiving that the deed of 1771, if not revoked, gave him the estate of Monkland, put in his claim to that estate; but, after a discussion upon that point, the Court, by their interlocutor of 31st January 1798, to which I have already alluded, found that the deed of 1771, in regard to Monkland, was effectually revoked by the deed of 1793.

" Then came the first appeal to your Lordships, which was heard, and remitted back to the Court of Session. Lord Loughborough was then upon the Woolsack, and another noble and learned Lord concurred with him in the opinion which he had formed. These two great and eminent persons were not content to discuss this question, as one depending merely on this construction of the instruments which I have stated, but, conceiving that there was in the principle of the judgment something vicious in regard to the law of deathbed, they were still anxious not to decide it, fearing that their own view of the case might bring into danger a system of securities as to trust bonds, then of some standing in Scotland. The substance of the opinion delivered by Lord Loughborough in that case, was as follows: (Here his Lordship read the same as printed in Mrs. Craufurd's memorial of 16th October 1800, commenting upon it as he proceeded.)

Mor. 11371, et Hailes, vol. 2, p. 659.

" On the case of Rowan against Alexander, quoted by the noble and learned Lord, I have no scruple to add the authority of my opinion to his; and if that case had come before me in a court of appeal in 1775, when it was pronounced, it would have been im-

possible for me to have given my assent to the judgment of the Court in that case, reversing the judgment of the Lord Ordinary. I see the Lord Justice Clerk Miller says in that case, as a ground of his opinion, in which the majority of the Court concurred, that as the granter might have burdened his estate to the full amount of its value, he might therefore give it to the disponee under the deathbed deed. But I by no means coincide with the doctrine, that because you may do a thing in one mode, therefore you may do it in any mode.

" It is perfectly settled in this country, that in a will devising land, which must be executed in the presence of three witnesses, you cannot reserve a power to devise any part of it by a will executed in the presence of two witnesses only. We may devise land by will, to be charged with legacies, or to trustees to pay such sums of money as the testator may direct. Such legacies may be granted, or directions given in any writing, executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land. But not one particle of the land can be devised, by our law, but by a will in the presence of three witnesses.

" But this distinction goes a great deal further ; though the whole value of the land may be given in legacies, yet, after giving legacies to a certain amount, the surplus cannot be given away in this manner. The surplus is held to be the land, and is not thus to be disposed of. These cases strongly prove the distinction between a power of giving by a certain mode, and giving by any mode.

" Though I have said thus much of the case of Rowan *v.* Alexander, it is, in my opinion, a very different thing to say what might have been done with regard to it in 1775, and what ought now to be done at this day. It would not be on any dry reasoning that I should disturb the weight of this case, as applying to another in 1793, if they coincided.

" In the present case, I think that the reasons of the judges, in the Court below, altogether amount to this, that it was the testator's purpose to bestow the estates on Mr. Coutts by the last deed ; and that he did not do so if he did not keep alive the former deed ; they held that the deed of 1793 only revoked the former deed, to the end of giving effect to the latter one.

" If it be asked, what it was he did not mean to revoke ? I understand that he did not mean to revoke that which gave a right to the disponee in the deed of 1771 to adjudge from the heir-at-law, if the disponee in the second deed should refuse to take.

" If Mr. Coutts should be unwilling to take under the deed of 1793, is there a right under the deed of 1771 to adjudge the *hæreditas* against the heir ? If such a right would not exist under the deed of 1771, under what pretence does that deed exist to bar the right of the heir ?

" Whatever I might have been disposed to decide in such a case

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as that of Rowan against Alexander in 1775, I should be one of the last men in the world, in 1806, to disturb that decided case, in so far as it applies to a case of implied revocation.

" It appears, from what was said by Lord Loughborough, that these noble Lords inclined to consider this as a case of fraud on the law of deathbed. My view of it is different, that this is not a case of fraud, and that the appellants' case cannot be made out on that ground.

(His Lordship afterwards briefly stated the case of Hearle *v.* Greenbank, 3 Atkyn's, p. 695, mentioned in the note of Lord Loughborough's speech.)

" That noble Lord concluded with saying, that he was afraid a reversal of the judgment of the Court, then under consideration, might trench upon the system established with regard to those trust bonds to which I have alluded, and therefore he thought it better to send it back to be reconsidered. He added, that Lord Thurlow and himself were of opinion, that it might be proper, to prevent all question upon these trust bonds, by an act of Parliament declaratory of the law.

" It appears to me that this case may be decided without touching any of these trust bonds.

" The cause was accordingly remitted to the Court of Session, where it underwent the most painful and minute reconsideration. I think I never saw a more honourable specimen of judicial ability than occurred in the discussion of this case, when they formed the opinion on which this second appeal arises.

" They reconsidered this case in all the points of view in which it had been taken up; in regard to the alleged fraud upon the law of deathbed; the whole principle of that law, and the particular facts and circumstances of the case. They at length narrowed the case very much from what had formerly been discussed, and put it upon what, I think, is its true merits, the effect of the second deed upon the first, through the clause of revocation.

" They agree that if the deed of 1771 was cancelled, or wholly revoked, by executing another instrument, if the right of the heir was let in *pro brevissimo intervallo*, that the deed on deathbed would operate nothing.

" A narrow majority of the Court held, that under the deed of 1793 the deed of 1771 was not revoked absolutely, but under a qualification; and they therefore held, that if the deathbed deed of 1793 was challenged by the heir (for a deathbed deed is not in any view a nullity, but only liable to effectual challenge by the heir), the disponee under it might found on the prior deed in 1771, and insist with effect that the heir had no interest to challenge the latter deed; that, if it was set aside, Sir Robert Craufurd would have, as we should say in this country, a right to the estate, or as they would say in Scotland, would have a personal right of action to obtain the estate.

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"The new question in this case therefore, is, whether or not, in a reduction brought by the heir of the deathbed deed of 1793, her claims could be repelled by any thing the disponee under it could urge upon the deed of 1771, as at the death of the granter? If he could so repel the claims of the heir, he must prevail in the action; if he could not, then the present appeal would be well founded.

"This question will still necessarily lead me into a discussion of some length; and I wish to reserve this till Tuesday, when I shall state my final opinion upon this case. If I be in an error thereon, I must say that it is conformable to the first views I have formed of the case, and that, with all the light since thrown upon it, my opinion has never varied with regard to it."

12*th March* 1806, *case resumed.*

(After reverting to the opinion delivered in part by him on a former day,)

LORD ELDON said,

"The questions in this case were anxiously discussed and considered both before and after it was remitted to the Court below by noble Lords, some of whom are now no more. One of these noble Lords (Rosslyn) entertained but one unqualified opinion upon the subject throughout. He held, that the settlement 1793 was a fraud upon the law of deathbed, and that deed was an unqualified revocation of the deed executed in 1771. His Lordship therefore observed in strong, although not in legally accurate language, that it was impossible to splice two nullities, in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the deathbed deed, because it was, *prima facie*, a good deed, and was alone reducible by the heir, who was *alioqui successurus*. But his Lordship's meaning was this, that the first deed being revoked, was an absolute nullity, and as the deathbed deed could not knit itself upon the first, it was a nullity likewise in the popular sense of the word, as it could convey nothing.

"Such were the sentiments of the noble Lord, and which coincided with those of several judges in the Court below, and were supported there by very strong arguments.

"Another noble Lord, who is also now no more, (Lord Alvanley), seemed to regard the question in another view. So far as I could collect his sentiments, he did not consider the deathbed deed as an evasion of the law of deathbed, nor the *liege poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought that we should look at the effect of the two

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instruments taken together, and construe them, so as that a disposition, which the disponer had a clear power to make, might be supported, and that the manner in which he did so was to be regarded as matter of form, and not of substance.

"But to this last sentiment I never can agree. I entirely concurred with the noble Lord, whom I have mentioned, that matter of form in conveyancing is matter of substance, and that it is not sufficient that a person should have power, and an intention to dispose of his property, but that, in order to render it effectual, he must execute it *habili modo*, or, in other words, he must execute it in the form, and with the solemnities prescribed by law for conveying such property.

"The case of Rowan *v.* Alexander, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a deathbed deed; and why, therefore, not give the substance or land itself? But this is not so by the law of Scotland, any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land; and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But, it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. Your Lordships know very well, that even the surplus money arising from the sale of land, cannot pass without a will attested by three witnesses, because a court of Equity considers that as land.

"It has been also said, that if a person means to revoke an instrument, with reference to a particular purpose, if that purpose is not effected, the original instrument is not revoked.

"This proposition is, to a certain extent, true; and it is to be understood with various limitations and distinctions. It is true, that if a party sits down, meaning to revoke a disposition of his property, and by the same act, or as it is called, *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete.

"But if he completed his purpose by a new disposition, the first is revoked, however inadequate such new disposition may be to convey his property. Thus if, having made a will of land, I afterwards make another, in which I revoke it, and give my land to a monk or an alien, the revocation is good, although the devise is void, because the purpose was complete, so far as it was in my power to complete it. In the present case, the purpose of the party to dispone his

lands anew was complete, which decides the case with reference to this argument.

" A good deal has been said on the doctrine of approbate and reprobate, and that it barred the heir from claiming in this case. I have made a good deal of inquiry into the grounds of the decision, to see if it went upon that ground, and if so, how it could be maintained upon it.

" I think this is not a case where the doctrine of approbate and reprobate will apply. The heir does not claim under the deathbed deed. The heir says, ' Your deed does not give you a title unless you can show me a deed executed in *liege poustie*, existing at the death of the granter. If there be no such deed, the deed executed on deathbed is gone.

" The question is, Is there enough contained in the deathbed deed to prove that no *liege poustie* deed existed at the death of the granter? And I shall here detail the principles on which my opinion is founded.

" In various cases, which I need not at present specially mention, this deathbed has been held to be good. The law of deathbed has been so far altered, that a person may, by certain modes, give away his estate by a deed on deathbed. Upon this point, as well as upon the practice which has prevailed with regard to trust bonds, we cannot shake the cases without great danger to private property. In our own law, we have instances also of a similar kind, in the practice with regard to the barring of estates tail, and the making of conveyances to enable a person to give legacies without regard to the statute of frauds.

" If, by inveterate usage and practice, you find men's titles standing, in a certain way, you will support them to the extent of the usage; but it is very different to say that you should carry them beyond it.

" It is admitted, that if a valid *liege poustie* deed existed at the death of the granter, the deathbed deed would also be good. It is to be observed, however, that this *liege poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual.

" This is obvious in principle, the stranger disponee is bound to hold good any power reserved against him; if such power be duly executed, he cannot complain. This seems also to have been admitted by all the judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

" It is clear that Colonel Craufurd meant to give the estate to Mr. Coutts; his power of doing so is also clear. In treating this matter, I deem it better to go upon the dry points of law, than to consider if it was more fit in Colonel Craufurd to prefer the nearest branch of an ancient family, or to give his estate to that deserving gentleman,

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Mr. Coutts. The intention and power of the testator are both admitted.

" The only question is, Has he executed that intention by effectual means? It is admitted on all hands, that Colonel Craufurd might have charged the estate vested in the granter of the *liege poustie* deed to its full value in favour of Mr. Coutts; or he might have directed him to convey that estate to Mr. Coutts. Both go to this, that the testator, in doing so, goes in affirmance of the estate vested by the *liege poustie* deed, for the person to take by the deathbed deed could not call upon the disponee under the former deed, to denude, unless the estate was vested in him. The author of the deathbed deed, in such a case, though far from revoking, asserts the validity of the *liege poustie* deed.

" Such cases are not authorities for the present decision, unless you could say that Sir Robert Craufurd had some estate under the deed of 1771, of which he could denude himself in Mr. Coutts' favour, or which Mr. Coutts could have adjudged. But it is impossible to say that he had such estate of which he could denude himself, or which could be adjudged, if it can be made out on the construction of the deathbed deed that such estate did not remain in him.

" Your Lordships know that in Scotland the maxim of *mortuus sasit vivum* does not obtain as it does in this country. A proceeding in that country to take up the *hæreditas jacens* is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement. I say this, to prevent any misunderstanding of the language which I use.

" Another case was put: it was stated that the testator might have rendered the deathbed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the deathbed deed was found to be ineffectual. I do not mean to deny this. He would then have said, if my deathbed deed is not good, or if the disponee under it would not or could not take, from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, 'the estate is mine.' And he might have proceeded to connect himself with it by his procuratory and precept; or if none had been contained in his deed, by adjudications as before mentioned.

" In that case, this would be the express meaning of the testator: 'I keep alive the former deed for all those purposes, to enable the 'disponee in the deathbed deed, to say to the heir, that he has no 'interest to impugn the deathbed deed.'

" When I considered the cases of implied revocation, (and I have never considered any question more deeply than the present,) I am free to say, that I never could have assented to affirm the case of Rowan *v.* Alexander, if brought before me by appeal at the time it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a

mighty difference between what might have been fit and proper to be done when that case was recent, and what may now at this day be fit and proper thereon. No man can say that many titles may not rest on the principle of that case of Rowan *v.* Alexander, and, were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years.

" I allude to the trust bonds, which had been devised and approved by the most eminent persons on the bench in Scotland.

" In that case of Rowan against Alexander, a false principle was laid down on the bench, that, because the testator could have validly given the value of his estate in money, therefore the disposition of it was good. It was said, in that case, that there was no express revocation; but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another.

" That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked, unless the second deed was found to be good; and, expressing nothing as to a revocation of the former deed, he must be held to have meant in effect that both should stand to accomplish the purpose he wanted, of giving the estate to the disponee in the last deed. This would apply also to the case of the disponee under the second deed being unwilling to take, or incapable of taking.

" But the same principle will not apply to a case of express revocation. This is the first instance where the principle has been so applied. It is unnecessary to enter into the cases of Birkmire, &c. which are different from the present, in the revocations being by different instruments.

Finlay *v.* Birkmire, 29 July 1779. Mor. p. 3188.

" In the present case, as appears to me, there are only two questions; 1st. Is the disposition of 1771 revoked entirely? 2d. Is it revoked *ad hunc effectum*, or *ad omnes effectos, quoad* this species of question?

" The cases of express revocation prove, and the decision in this action with regard to the estate of Monkland, is the strongest of them all, that if the heir is let in *pro brevissimo intervallo,* the intention, or power of the granter signifies nothing, though he had half a dozen ways of giving away his estate upon deathbed, it signifies nothing, if this be not done *habili modo.* The cases of the destruction of the *liege poustie* deed, though cancelled only to execute another deed; or the revocation by an instrument, when a new deed was next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

" In the case of Monkland, the Court seems to have had considerable difficulty with their own decision; more indeed than I feel with regard to it. The disposition of Monkland was by a different deed from that of Craufurdland. The former disposition of Monkland was revoked, that Colonel Craufurd might dispose of it by a sale; and, on same date, he executed a disposition to Mr. Coutts,

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by such mode of sale; but, before completing this purpose, Colonel Craufurd died. We see here strongly that the power to give away in certain modes, and the intention, are nothing. The Court, in their judgment, declared that it was the testator's purpose to give to Mr. Coutts, but they found (in terms too general to reconcile that decision with the decision with regard to Craufurdland) that the deed of 1793 had revoked the deed of 1771, and therefore they give the estate to the heir.

"It is clear, in this country, where an estate can only be devised by a will, executed in the presence of three witnesses, that in such will a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. All the doctrines connected with this were much canvassed in the case of Habergham against Vincent. A person in this country cannot, by the medium of a will or deed, reserve to himself powers contrary to law.

Habergham *v.* Vincent, 1793, 4 Brown's Ch. Ca. 355; S. C. 2 Vesey, Jun. 204.

"In Scotland, no man could make a valid *liege poustie* deed in this form: 'Know all men by these presents, that I do hereby re-'serve a power to dispose of my estate, at any time of my life, *et* '*etiam in articulo mortis.*' And if this *liege poustie* deed is itself to have any effect at all, it must be some actual deed of disposition, existing at the death of the granter.

"Put the case that Mr. Coutts had repudiated the disposition in his favour, contained in the deed of 1793, could the heir under the deed of 1771 have made use of his procuratory and precept to attach himself to the *hæreditas jacens?* or if there had been none such, could he have used an adjudication in implement against the estate? This question depends upon the fact, whether the deed of 1771 was revoked by the deed of 1793 or not. If the testator left the deed of 1771 a subsisting deed, the disponee under the deathbed deed might make use of that shield to protect himself against the heir-at-law. In order to find that this case can be ruled by the decision in Rowan against Alexander, you must find the direct contrary of what the testator has expressed in the present case."

"The deed of 1771 was a deed standing by itself, containing a procuratory and precept, and all the usual clauses of style. Let us see what the testator does or says with regard to this deed; does he say that the deed of 1771 shall stand if the deed of 1793 is found not to be good? does he substitute Mr. Coutts in the room of the disponee under the deed of 1771? He does no such thing. The dispositive part of the deed of 1771, the procuratory and precept, are all revoked, and the deed of 1793 is made a complete disposition, standing solely by itself, containing a new procuratory and precept, and other usual clauses. It also contains the clause upon which this whole question turns. (Here his Lordship read the clause of revocation.)

"The question of construction, as to what the testator has said, arises upon this:—He says, I do not intend that the disponee in the deed of 1771 shall take, nor that the deed of 1771 shall be kept

alive, and that the disponee therein shall denude in favour of Mr. Coutts; but I do expressly revoke that deed, so far as conceived in favour of the persons to whom it is granted, and I keep it alive only with regard to the powers to alter, innovate, and revoke, therein contained, thereby reducing the deed to nothing but one containing a power to alter and revoke.

"I never, in this case, could bring my mind to any other opinion, than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui successurus*; because, if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

"I put another question to myself, which I hope will free me from any charge of mistaking the law. I cannot conceive that the deed of 1793 would do, whether it contained an express or implied revocation of the former deed, unless I were able to say, that if Mr. Coutts could not or would not take, some right to take up the *hæreditas jacens* under the deed of 1771 would still remain. Now such right could not remain under the deed of 1771, because the revocation goes to everything but what is therein excepted. How could a personal right of action be made out in the disponee under the deed of 1771, as the deed of 1793 absolutely revokes that deed, so far as containing any disposition?

"The case turns entirely on the true construction of this part of this instrument; it destroys all right granted under the former deed, without which, the reserved powers to alter were vain.

"In the opinion which I have formed, I have the misfortune to differ from many persons in the Court of Session, of whom I am bound to say, that if I have been of any use in matters of Scotch law, I owe it to them; but I have also the satisfaction to agree with many others in that Court, and with some who heard the case argued in this House.

"I repeat, that this is a question of construction only, and that all apprehension may be dismissed of its touching any title to estates, or any other decided case; the present case turning upon another point, and neither upon any general or special construction of the law. I shall defer giving in the judgment which I mean to move in this case till to-morrow, contenting myself at present with stating this conclusion, that the heir *alioqui successurus* has both a title and an interest in this case."

Next day his Lordship moved the following judgment:—

The Lords find, that in this case, the question, Whether the heir hath a title and interest to challenge the deed of 1793, as made upon deathbed, depends upon the particular nature and effect of the deed 1793, regard being had to the particular terms of the deed, as expressing the same to be a revocation, and recalling of

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all former dispositions; and find that the deed 1771, though executed in *liege poustie*, ought not to be considered as being, at the death of Colonel Craufurd, such a subsisting valid instrument or disposition, executed in *liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793 as to the lands by the same deed disponed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains, in terms of the most express revocation of all former dispositions, assignations, or other deeds of a testamentary nature, formerly made and granted to whatever person or persons preceding the date thereof, and particularly the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null, so far as they are conceived in favour of the persons to whom they are granted; and also find, that although the deed of 1793 contains a declaration that the former deeds should be valid and sufficient to the extent of the powers therein reserved, to revoke, alter, or innovate the same, to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication, rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared to be made the ground of a construction, whereby such former deeds should be held to be valid or sufficient, in any respect in which they are, by the same deed, in express terms, declared to be null and void; and find, that although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together at the death of Colonel Craufurd, under any part of the former dispositions, so expressly declared to be null and void, exist in any persons named in such former deeds, any personal or other right in the lands by the deed of 1793, disponed to the defender, secure against the challenge of the heir *ex capite lecti*, on which the disponee *in lecto* under the deed of 1793 could be entitled to found, as his defence, against the reduction of the deed made *in lecto*. And find, that as the deeds in this case are conceived as to the terms thereof, the disponee

under the deed 1793 cannot be considered as having title or right, under the former disposition, as if they had been named therein, or otherwise under the effect thereof; and find, likewise, that the heir is not excluded, in this case, from challenging the deed 1793 *ex capite lecti*, and at sametime founding thereon as revoking the former dispositions. And it is therefore ordered and adjudged that the interlocutors complained of, so far as they are inconsistent with these findings, be reversed. And it is further ordered that the cause be remitted to the Court of Session to do therein as shall be meet.

For Appellants, *R. Dundas, Ad. Rolland, Robert Craigie.*
For Respondents, *Wm. Adam, Wm. Robertson.*

(Mor. App. I. "Writ" No. 3.)

JOHN HOWIE, - - - *Appellant;*
JAMES MERRY, - - - *Respondent.*

House of Lords, 17th March 1806.

DEATHBED—DEED—VITIATION IN ESSENTIALIBUS—PAROLE.—(1.) A deed was challenged on the ground of deathbed and incapacity, by a party not the heir-at-law, but by one to whom the same subject had been disponed by a previous deed. Held him entitled to challenge on deathbed. (2.) This deed, in order to get over the objection of deathbed, had been vitiated and altered in its date, and a proof being allowed, held that the deed challenged being vitiated, and its date false, was null and void. (3.) Observed that the want of the date here could not be supplied by parole, and still less the vitiation of a date.

John Howie, proprietor of certain lands, resolving to convey these to the appellant and respondent in two moieties, executed a disposition in 1777 in favour of each: But thereafter, and by a disposition of this date, he conveyed the whole two moieties to the appellant, without revoking or taking any notice of the former disposition. He died two days thereafter, whereupon the appellant took possession of his estate. Jan. 6, 1785.

Action of reduction was brought by the respondent, in so far as concerned the one half of the lands conveyed to him