SCOTLAND.

JAMES DUKE OF ROXBURGHE - *Appellant*;

JOHN WAUCHOPE, Writer to the Signet, sole accepting Trustee and Executor of the deceased JOHN DUKE OF ROXBURGHE; and the Reverend Archdeacon CHARLES BAILLIE HAMILTON, second Son of the late Honourable GEORGE BAILLIE of Mellerstain; Sir WILLIAM SCOTT of Ancrum, Baronet, Son and Heir of the late Sir JOHN SCOTT of Ancrum, Baronet; and Sir HENRY HAY MACDOUGAL of Mackerston, Baronet, the Residuary Legatees appointed by the said Duke - - - - *Respondents.*

LANDS, &c. being limited to heirs of entail by simple destination, a deed was executed in *liege poustie* in favour of the heirs general of the disponer after his death without issue, with a power to revoke or alter that disposition on death-bed; and a declaration, that so far as it shall remain unrevoked, and not altered by a writing under the hand of the disponer, it shall have the effect of a delivered evident, though, &c. By another deed, executed thirteen years after the first, all the lands, &c. together with the personal estate of the disponer, are vested in trustees in trust, to be sold, and the produce to be applied in payment of debts owing at his death, and legacies, &c. granted or to be granted, &c. (The objects of trust being different from those provided in the former deed) and the trustees are directed to convey, &c. the residue of the whole fund in favour of such persons, &c. as the disponer had directed or should direct by any writing executed, or to be executed, &c. On death-bed the disponer executes a deed of appointment, directing the trustees to convert the whole estate into money; and after giving cer-

tain legacies he bequeaths the residue to his heirs M. and E. for life, with remainder to other persons therein named; held, that this was not a revocation of the first deed so as to give to the heirs of entail a title to challenge the last deed *ex capite lecti*; although the disponees for life, under the second deed, being the heirs general of the disponer, had reduced the death-bed deed on that ground, and thereby, under the doctrine of approbate and reprobate, had forfeited the life-interest given to them by the second deed.

Where lands by an instrument in the nature of a will are disponed in trust to sell and pay certain legacies, and as to the residue for such persons as the disponer shall by writing appoint; and afterwards by deed made on death-bed he disposes of the residue, the law of death-bed applies to the case, and the disposition is reducible on that ground, so far as it relates to lands.

Lands (entailed by simple destination) being given by testamentary disposition to the sisters and heirs of the disponer, under obligation as to part of those lands, that they should be conveyed by his sisters to the heirs of tailzie, entitled by strict statutory entail to the principal mansion, &c. where the lands subject to the obligation are situated, on condition that a certain sum shall be paid by a certain day by those heirs to the sisters: by a subsequent testamentary disposition, consisting of two deeds, the latter being made on death-bed, the lands of the disponer, including those in question, are vested in trustees upon trust to sell and pay the interest of the produce to the sisters of the disponer for life, &c. who, as general heirs of the disponer, reduced the latter instrument so far as it regarded lands destined to heirs of line, as made on death-bed: held, that the heirs of entail have no title or interest to reduce the same instrument on the same ground as to the entailed lands; nor to call for a conveyance on payment of the sum specified in the condition; 1. because their interest is excluded by the *liege-poustie* deed, and is not restored, tranferred to, or vested in them, because the disponees in that deed have forfeited or rejected their right under it; 2. because they must claim as disponees or legatees under that deed, and in such character they are barred from challenging the death-bed deed; 3. because in the events which

had happened they could not fulfil the conditions on which alone the benefit of the disposition could be claimed; 4. because they are not entitled to avail themselves of the right of redemption according to the condition, and under the obligation imposed on the disponees in the first deed, inasmuch as that obligation does not extend to the trustees who take under the death-bed deed.

JOHN Duke of Roxburghe, in 1790, executed a deed by which he disponed to himself, and the heirs whomsoever of his body, whom failing, to Lady Essex Ker, and Lady Mary Ker, his sisters-german, &c. and the heirs whomsoever of their bodies, &c. and failing both his said sisters and the heirs of their bodies, then to his heir of tailzie, having right for the time to his earldom and estate of Roxburghe, &c. whom failing, to his own heirs and assignees whomsoever, all his unfettered estates, comprising lands destined to heirs of line, and lands descendible to heirs of tailzie, by simple destination, &c. except certain lands in the parish of Kelso, as to which it was provided and declared in manner following, "that "the said Lady Essex and Lady Mary Ker, and "their foresaids, shall be obliged to *dispone* and "*convey* to the heirs of entail, having right for the "time to my said tailzied lands and estate of Rox-"burghe, and to the heirs of tailzie and provision, "succeeding to them in my said tailzied estate, in "terms of the rights and investitures thereof; but "also with and under the conditions, provisions, "restrictions, limitations, and clauses irritant and "resolutive, contained in the said rights thereof; "all and whatever lands and heritages within the

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" parish of Kelso, presently belonging, or which
" may belong to me at my death, and not subject
" and liable to the limitations and restrictions in
" the entail of the Roxburghe estates; but with
" this provision always, that such heir of entail shall,
" at either of the two first terms of Martinmas,
" which shall be next after my death, make pay-
" ment to my said sisters, and their foresaids, of the
" sum of 3,000*l.* sterling, or such other sum as I
" shall appoint; and shall also discharge them of
" all claims whatsoever, which they may have against
" my representatives, for the price of teinds sold by
" me, the exchange of lands, or on any other cause
" or pretence whatsoever; declaring, that if my un-
" entailed lands and estate in the parish of Kelso,
" shall not be redeemed in manner foresaid, by my
" heir of entail, at either of the two first terms of
" Martinmas, next after my death, the same shall,
" from thenceforth, remain with and belong to my
" said sisters and their foresaids, heritably and irre-
" deemably in all time coming."

All former dispositions and settlements of his said lands, estate, and effects, are then expressly revoked, and the deed concludes with the following clause: " And as I reserve full power and liberty
" to myself, at any time in my life, and even on
" death-bed, to revoke or alter these presents, in
" whole or in part, and to sell, burden, or otherwise
" dispose of the whole estate, heritable and move-
" able, hereby disponed, or any part thereof, so I
" dispense with the delivery of these presents, and
" declare that the same, in so far as not revoked or
" altered by a writing under my hand, shall have

" the effect of a delivered evident, though found in " my own repositories, or in the custody of any " other undelivered at the time of my death."

On the 5th of November 1803, Duke John executed a new settlement in the form of a trust disposition and nomination of executors. By this deed, he vested the whole of his unfettered lands, together with all his personalty, in the Respondent, Mr. Wauchope, and other trustees, upon trust, to sell the whole or any part of his real estate, &c. at their discretion, and apply the produce in payment of debts, legacies, &c. given or to be given, &c. The final trust is thus expressed: " The whole residue, " remainder, and surplus of my said estate and " effects, shall be conveyed and made over, or " applied and employed by my said trustees or " trustee acting for the time, to and in favour of " such person or persons, or for such uses and pur- " poses as I have directed, or shall direct, by any " deed, missive, memorandum, or other writing, " executed, or to be executed by me for that effect, " at any time of my life, and even upon death-bed."

Of the same date, he executed a memorandum relative to the said trust-deed and settlement, whereby he desired it to be understood by his trustees, in case he should be prevented from executing such a deed of appointment as he had alluded to, that it was his wish and intention that the disposition and settlement of 1790 should stand good as far as regarded his sisters the Ladies Ker.

Deed of instructions of 19th March 1804.

On the 19th of March 1804, Duke John, when upon death-bed, executed a deed of appointment or instructions to his trustees. By this deed he directs them to sell his real and personal estates, and to

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apply the produce in payment of certain legacies; and after investing the residue, to pay the interest to his sisters the Ladies Essex and Mary Ker, and the survivor; and after the death of the survivor, he directed that the residue should be paid, in certain specified proportions, to the Respondent the Reverend Charles Baillie Hamilton, Sir John Scott, the father of the Respondent, Sir William Scott, and to the other Respondent, Sir Henry Hay Macdougall.

The arrangements made by this deed, as well as by the trust disposition, were in many respects materially different from those of the settlement which had been made in 1790, but neither of them contained any express revocation of that settlement.

Duke John dying without issue, the disposition as to the unentailed lands was reduced by judgment of the Court of Session at the instance of the Ladies Ker, in their character of heirs of line to the disponer.

Duke John was succeeded in the entail by Duke William, who did not challenge these settlements.

Duke William was succeeded by the Appellant, James Duke of Roxburghe, who brought an action of reduction and declarator to set aside these settlements. The summons recites the title of the pursuer as heir of entail, and the before-mentioned deeds, and concludes, 1st, that it ought to be found and declared that "John Duke of Roxburghe did, "by the execution of the deed of the 19th of March "1804, effectually revoke and recal the foresaid "deed or instrument executed by him in *liege* "*poustie*, on the 14th day of October 1790, as "well as the foresaid writing or memorandum of

" date the 5th of November 1803, purporting to be " a direction to the trustees named in the trust-deed " of the same date, in so far as said deed or instru- " ment of 14th October 1790, and memorandum " of 5th November 1803, or either of them, was or " were prejudicial, or intended to be prejudicial, to " the heirs of the entailed estate of Roxburghe, or " to their claims to any lands or rights destined to " them by prior rights and investitures thereof, and " to the pursuer in particular." 2d, That the deed, of the 19th of March 1804, be set aside, " because " the said deed, instrument or writing, was by the " said Duke made and signed at a time when he " was upon death-bed, labouring under the disease " of which he died a few hours after, and when, by " the common and statute law of this realm, he was " incapable of making any deed to the prejudice of " the pursuer, as heir of the investitures of the said " lands. 3d, That at least, and in every event, and " although it should not be found and declared, and " although decreet should not be pronounced in " manner above mentioned, yet the said death-bed " deed of the 19th of March 1804 ought and should " be cassed, reduced, annulled, decerned, and de- " clared in manner, and for the causes and reasons " foresaid, to be and to have been void and null, so " far as concerns the lands situated in the parish of " Kelso, which belonged to the said John Duke " of Roxburghe, whether destined to his heirs of " entail or not, and to which, in virtue of the said " *liege poustie* deed of 1790, the pursuer and other " heirs of entail had a right, and were entitled to " succeed, upon payment of 3,000*l.* and fulfilling

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" the other conditions of the deed in manner par-
" ticularly before mentioned."

In this action, the Ladies Essex and M. Ker, the Respondent Wauchope, the only trustee who accepted and acted in the trusts of the deeds of 1803 and 1804, and the Respondents the residuary legatees were called as defenders. No appearance was made for the Ladies E. and M. Ker; but the Respondents having put in defences, and the case having been discussed before Lord Alloway, Ordinary, the following interlocutor was pronounced:—

Interlocutor of the 18th Feb. 1814.

" The Lord Ordinary having considered the
" mutual memorials for the parties, and the whole
" process, finds, that John Duke of Roxburghe,
" when *in liege poustie*, conveyed his whole
" unentailed subjects of every description to Lady
" Essex and Lady Mary Ker, his sisters, and their
" heirs in fee-simple; but with a destination, upon
" the failure of his sisters and their heirs, to his
" heirs of entail, and with a power to revoke and
" alter that deed, even on death-bed; finds, that
" the heirs of entail, in so far as they were the heirs
" of investiture of any parts of these lands, were
" completely excluded by that *liege-poustie* deed,
" in favour of his sisters; finds, that Duke John
" afterwards executed in 1803 a conveyance of his
" whole heritable subjects, not limited by the entails,
" to John Wauchope and James Dundas, as trustees
" for the purposes therein mentioned; finds, that
" upon the 19th March 1804, John Duke of Rox-
" burghe, when upon death-bed, executed a deed
" of instructions, directing the trustees to distribute

" his whole heritable and moveable property, by " paying certain legacies, and dividing the residue " of his fortune among certain residuary legatees.; " finds, that the right of challenging upon the head " of death-bed, is only competent to the next heir " of investiture having an interest, and who, in virtue " of the death-bed deed being set aside, would suc- " ceed to the lands and heritages therein contained; " finds, that if the death-bed deed in question were " set aside, the deed 1790, which is not expressly " revoked by the death-bed deed, must exclude the " succession of the heirs of entail; and that the " pursuer,. James Duke of Roxburghe has no in- " terest, as the heir of investiture, to insist upon " the reduction of the death-bed deed 1804; and " therefore assoilzies the defenders from the general " conclusions of the reduction: And with regard to " the particular conclusions, as to that part of the " lands situated in the parish of Kelso, the investi- " ture of which formerly stood to the heirs of entail, " but which were again conveyed by the deed 1790 " to the Duke's sisters, and which deed contains " an obligation upon his sisters to convey these " lands to the heir of entail, for the time being, " upon his discharging them of all claims whatso- " ever against them, as the Duke's representatives, " and making payment to them of 3,000 *l.* sterling, " at either of the two first terms of Martinmas, next " after his death; finds, that the right to these " subjects was actually conveyed to his sisters; and " that therefore the right and interest of the pursuer " as heir of investiture, to challenge the death-bed " deed in 1804, was expressly excluded by the deed

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" in favour of Ladies Mary and Essex Ker in " 1790; finds also, that the pursuer has no right " to challenge the deed in question *ex capite lecti*, " as to these lands, and assoilzies the defenders, and " decerns."

Interlocutor of the 11th July 1815.

A representation was given in by the Appellant against this judgment; upon advising which with answers, the following interlocutor was pronounced: " The Lord Ordinary having considered this repre- " sentation, and the answers thereto, together with " the whole process, refuses the representation, and " adheres to the interlocutor complained of, in so " far as relates to the general findings; but with " regard to the alternative conclusion, as to the " lands in the parish of Kelso, appoints the cause " to be enrolled, and parties to be heard further " upon this point; and particularly desires that the " interlocutors in the process, which formerly de- " pended before Lord Balgray, be produced in pro- " cess; and that the pursuer shall also particularly " condescend upon these lands in the parish of " Kelso, as to which the investitures formerly stood " to heirs of entail."

Interlocutors of the 14th Feb. 1816.

The Appellant represented against this judgment. The Lord Ordinary appointed the representation to be answered, and ordained a condescendence to be lodged on the special point, respecting the lands in the parish of Kelso. Thereafter, on advising these papers, the following interlocutor was pronounced: " The Lord Ordinary having consi- " dered this representation, and the whole process, " after having heard parties, refuses the represen- " tation, and adheres to the interlocutors complained

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"of;" and of the same date he pronounced this other interlocutor, as to the lands lying in the parish of Kelso: "The Lord Ordinary having again re-"sumed consideration of this process, with regard "to the lands lying in the parish of Kelso; in "respect that the former investiture of these lands, "in so far as it stood in favour of the heir of entail, "was altered by the deed 1790, executed by John "Duke of Roxburghe, *in liege poustie*; and that "the representor cannot claim any benefit from that "deed without being subjected to all the conditions "contained in it, as a disponee or legatee, in which "character he was barred from challenging the "death-bed deed in question; and as he cannot "now fulfil the conditions on which alone he could "claim the benefit of that deed, refuses this repre-"sentation, and adheres to the interlocutors com-"plained of."

The Appellant petitioned the Court of the first division against these interlocutors; but the Lords "adhered to the interlocutor reclaimed against, in "so far as it finds that the pursuer is barred by the "deed of 1790 from challenging the death-bed deed "of 1804, and that he has no right to challenge that "deed *ex capite lecti*, as to any lands to which he "would have had right as heir *alioqui successurus*; "and further find, that the pursuer, the Duke of "Roxburghe, is not entitled to avail himself of the "right of redemption of the Kelso lands contained "in the deed of 1790, inasmuch as the obligation "therein contained is not imposed on the defenders "by the death-bed deed, under which they take "these lands."

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Another petition was presented to the same division, but the Court adhered to the interlocutor.

From these several interlocutors the Appeal to Parliament was presented.

13 Dec. 1816.

For the Appellants, *Mr. C. Warren* and *Mr. Wetherell*:

The first question is, whether an implied revocation is sufficient to destroy a deed executed in *liege poustie?* By principle of law a subsequent deed, which is inconsistent with a prior deed, effects a revocation; so in the same instrument the last provision, and in different instruments the last in date, is operative and destroys the former. The deed of 1804 is explanatory and directory, and taken with that of 1803 they give the subject-matter to new disponees, and thereby declare that the dispositions of the deed of 1790 are altered. In the English law, which stands on the same principle, where the donee of a power alters the uses before limited, it is a revocation in law. So where a testator makes a later will inconsistent with an earlier will, it is an implied revocation *. According to these principles the deed of 1790 is revoked by the deed on death-bed, which is void for every other purpose but that of revocation. So by the law of England, and in principle, a subsequent will or instrument which is void for informality, or ineffectual on account of the incapacity of the devisee or donee, effects an implied revocation; as a devise to A. and afterwards to the poor of the parish, or to a corporation, or a papist; the second devise is void, and the first revoked.

* *Powell on Devises*, vol. 2, p. 132.

It is said to be inconsistent to suppose the deed invalid as made on death-bed, and yet to use it as a valid deed for the purpose of revocation; but it is used as showing the intention to revoke, and is efficient for no other purpose. Thus where a devise was made to B. and afterwards the devisor by deed poll granted the lands to his wife, that grant was held void. But although nothing passed by the deed, it was held to be a revocation *. So it is in the case of a feoffment without livery, and a bargain and sale not inrolled †.

An implied revocation is as powerful in law as an express revocation. By the law of Rome and of England as to personalty, a will is revoked by a second will inconsistent with it. The law stands on the principle of presumed intention, and is equally applicable to land. The authorities on this point, from the civil law, which is the fountain of the law of Scotland, are decisive ‡.

The failure or non-existence of the heir named in the last testament does not annul it as a will, and restore the former will §. If, indeed, no heir is

* *Beard* v. *Beard*, 3 Atk. p. 72.

† 1 Roll. Abr. 615, Vin. Dev. (P.) pl. 6, 3 Atk. 803. So an incipient act not perfected, as the making a tenant to the præcipe towards suffering a recovery without further proceeding, revokes a will. See *Harmood* v. *Oglander*, 6 Ves. 199; and formerly the grant of a reversion without attornment had the same effect.—See Wentw. Off. Ex. 22.

‡ Heineccius ad. Inst. § DLXXIII. ad. Pandect. vol. 2, p. 11, §. 30; (L. 1, l. 2, ff. § 2, § 7. Inst. h. t. l. 27, *C. de Test*)—(L. 4, ff. *De Adim. Leg.*)—(L. 6, § 2, ff. *De Jure, Codicill.* § 2, Inst. L. 16, ff. h. t.)—L. 27, C. *de Testam.*)—(L. 1, § 6, ff. *De bon. poss. sec. tab.*)—(L. ult. ff. h. t.)

§ Heineccius, *qu. sup.* note to s. 30, L. 1. ff. h. t.

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named *, or an impossible heir †, or the latter will is void in law upon the face of it ‡, it has not the effect of revocation, because it is no will; but whenever it may have an operation which is disappointed, the effect is not merely to give a preferable right to the devisee under the second will, in failure of which the right of the devisee under the first will revives, but to destroy that right altogether.

So Voet § states the law to be, that although there must be a possibility of inheritance under the second will to make it effectual as a revocation, it is not necessary that the inheritance should vest. The former testament will be equally revoked, although the latter will is rejected by the heir named in it, or because he dies before the testator, or the condition of the gift fails ||. From which it follows, that a testament once revoked by a second testament remains void, although the later will is afterwards rescinded by law; and this is equally true where the second will is revoked by a subsequent event, as by the birth of a posthumous child ¶.

These instances are precisely similar to the case of revocation by the event of death within the time limited by law. The deed is valid when made, but

* L. 11, ff. h. t. † L. 16, ff. h. t.

‡ L. 16, § 1, *ff. De vulg. et pup. subst.*

§ Vol. 2, p. 288, lib. 28, tit. 3, s. 5.

|| Inst. quib. mod. infirm. test. 16, ff. h. t.

¶ L. 12, § 1. ff. de bonor. possess. contra tab. or where the testator destroys the latter will with a view to make the former valid, as being the last will in existence. *Heinec. ad Pandect. Pars.* v. § 32. But in this doctrine the civil law appears to differ from the law of England where the latter will has not expressly revoked the former. *Semb.* See *Goodright* v. *Glazier*, 4 Burr. 2512. Peck. 210, 44. Ass. pl. 36. M. 44. Ed. 3. 33. Doug. 40. *Burtenshaw* v. *Gilbert*, Cowp. 49.

becomes invalid by a subsequent event. A disposition of heritage, intended to be in operation during the life of the disponer, and revocable until his death, is in the nature of a will, and regulated by the same principle of law.

It is supposed that the rules of the civil law are inapplicable, because the case relates to death-bed; but the true point in question has nothing to do with the law of death-bed, which is peculiar to Scotland; but to the effect of a later deed or will as to revoking a former deed or will, and this question of revocation is not peculiar to the law of Scotland, but is a point of general law and of the civil law, as the foundation of the law of Scotland.

By that law a second testament annuls the first, and makes it ineffectual *. It is a revocation, and not a conditional substitution. So with respect to a legacy given to a different person by a posterior will †, the right cannot revive in the first legatee by the event of the death of the second. Bankton ‡ on the subject of implied revocations, says, "voluntary "alienation of the thing bequeathed, or willingly "uplifting a bond, and not employing, will infer "revocation. But it is otherwise if the alienation "was necessary, or the debtor forced the payment, "and the money was re-employed on a moveable "security. In this the testator will be presumed "only to have been exercising lawful acts of administration, but not to have intended to prejudice "or recall the legacy. A transfer of the legacy "from one to another, &c. will infer a virtual re-

* Ersk. Inst. B. 3, tit. 9, s. 5.

† Stair, Inst. B. 3, tit. 8, s. 3. ‡ B. 3, tit. 8, s. 53.

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"vocation." So Erskine * says as to legacies, special and general, "they may be revoked by posterior "derogatory deeds, or general dispositions."

The deed in question contained an express power of revocation, but *mortis causa* deeds are revocable in their nature; and whether they relate to real or moveable property, in this respect is immaterial; for the question turns upon the intention of the testator or disponer, to be inferred from his acts.

But the case is supposed to be concluded by authority, and the Respondents admitting that it may be difficult, on principle and by reason, to support the law as they represent it to be, contend that it is settled by decision, and not now disputable. To support this position they cite the cases of *Irving* v. *Irving* †; *Finlay* v. *Birkmire* ‡; *Alexander Telfer* §; and *Rowan* v. *Alexander* ||.

But the cases are not applicable to the question; for in the first it was merely decided, that a death-bed-deed renewing a previous disposition in favour of the same disponee, as the previous *liege poustie* deed did not operate as a revocation. No question was raised, as in this case, whether an implied was not equal to an express revocation; and whether such revocation was not effected by a subsequent deed altering the disposition of a preceding deed. In *Finlay* v. *Birkmire* the revocation was express, and therefore not applicable to a question of implied revocation. The case of *Alexander Telfer* is not reported, but

* B. 3, t. 9, s. 6.

† Nov. 1738, Kilk. Voce Death-bed, p. 145.

‡ Fac. Coll. July 29, 1779.

§ Not reported. July 14, 1806. See the report of *Crauford* v. *Coutts*, in the note at the end of this case.

|| 22d Nov. 1775, D. P.

according to the account given by the Respondents, it was similar to the case of *Irving*; the death-bed deed being a renewal of the disposition in favour of the same party, as in the *liege poustie* deed, it was held not to be a revocation either express or implied.

As to *Rowan v. Alexander*, it is a single case, decided upon a difference of opinion; it is contrary to principle, and has not been followed in practice. The Respondents suppose it has been confirmed in the case of *Coutts*,* but the fact is otherwise. It was a case of express revocation, and Lord Loughborough in moving judgment, alluding to the case of *Rowan v. Alexander*, said, he did not agree with the Court of Session in the distinction made by them in that case between express and implied revocation. According to the opinion of Lord Loughborough, expressed in the case of *Coutts*, a second disposition, inconsistent with the first, operates *per se* as a revocation. Being of this opinion, he could not have thought *Rowan* v. *Alexander* a correct decision. In the same case of *Coutts*, Lord Eldon said, "he concurred with Lord Rosslyn, that it "would have been impossible for him, on appeal, to "have acceded to the judgment of the Court of "Session, in the reversing of the decision of the Lord "Ordinary in *Rowan* v. *Alexander*." The authority of the case is impeached by these judicial observations; it has been followed by no similar judgment, and is not supported by the practice of the courts or of conveyancers. When the case of *Craufurd* v. *Coutts* again came before the House in

* *Craufurd* v. *Coutts*, D. P. 1799. See the note at the end of this case.

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1806, the decision in *Rowan* v. *Alexander* was again disapproved by Lord Eldon; but he said, if titles rested upon the authority of the case, it ought not to be disturbed. So that the date of the decision (1775) seems the only difficulty impeding reversal and the only ground for supporting it.

If the words "I revoke," had been used by the disponer, the revocation is admitted, although the deed is reduced on the head of death-bed. But is there any peculiar virtue in these words, surpassing the effect of an act of revocation done in pursuance of a preconceived intention? A power to revoke being previously reserved, a new disposition is made, giving the lands to new disponees. How a revocation can be more effectually made it is difficult to conceive. The act itself is conclusive to show the intention of the disponer; and in addition to this, the memorandum signed after the execution of the first deed of trust shows that the deed of 1790 was considered by the Duke as revoked. For on no other supposition could it be necessary to provide, as he does, by the memorandum, that the deed of 1790 should remain effective, if he should make no appointment under the powers of the trust-deed.

In that memorandum the power is expressly recited, the future exercise of the power is contemplated, and upon the supposition that the general deed of trust operates as a revocation, a provision is made to counteract that effect. The deed in *liege poustie* is therefore by implication revoked, and does not interfere with the right and title of the Appellant to reduce the deed made on death-bed, which, though void in law, may be used to show the intent

to revoke. These propositions are borne out by authority *.

2. The deed in question cannot interfere with the right of the Appellant, because it became ineffectual by the rejection of the disponees in that deed. The right of the heir to reduce a deed on death-bed cannot be taken away by a deed in *liege poustie*, unless a valid right is thereby constituted in some third person, and made effective by acceptance. A deed merely disinheriting the heir, or made in blank to be filled up in *lecto*, is inoperative. The former case is self-evident; the latter is decided by the case of Pennycook †; although it appeared in evidence that the testator, being in *liege poustie*, had declared that he intended to fill the blank with the name which was inserted in *lecto*. So, in a case where the name of the disponee had been inserted in *liege poustie*, but in a blank left at the time the domicile was afterwards added on death-bed, the disposition was held incomplete and ineffectual to exclude the heir from challenging the deed on death-bed ‡. So deeds executed in *liege poustie* in favour of the heir, with a power reserved to revoke and redispone on death-bed, do not exclude the title of the heir to reduce; because no effective right is established in a third person, and the power reserved is a fraud upon the law: it is the assertion of a faculty and judgment to dispose on death-bed, which the law denies. If such reser-

* *Moore* v. *Moore*, Phill. Rep. 412; and cases there cited.

† Fount. Jan. 18, 1687. See *Brudenell* v. *Boughton*, 2 Atk. 270.

‡ Buchanan, 1683. Harcarse, Lectus Egritudinis, p. 182.

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vations were permitted the law would be futile, for every heir might contrive his own law, to enable him to dispose on death-bed *. It can make no difference whether the cause of this inefficiency is original or supervenient. A disposition is equally ineffectual whether to an actual Jew, or a person who becomes a Jew; to a person actually attainted, or who becomes attainted, before the death of the disponer. So a gift to an alien, or any person incapable of taking the estate, is void; and it is immaterial whether the gift with a power of revocation be to a person originally incapable, or afterwards becoming so; or to a person capable, but having such right in opposition to the deed; or where the gift is subject to such conditions, that a rejection of the gift is the sure consequence. A *liege poustie* disposition, subject to legal objection, does not destroy the interest of the heir to reduce the deed on death-bed. In what respect can the case of legal objection, which prevents the existence of an interest to bar the title of the heir, be distinguished from the rejection of an interest by which it is equally annulled.

3. If the deed of 1790 is not revoked, the appellant may reduce the death-bed deed for the purpose of claiming the lands of Kelso. It is objected that by the former deed he is barred from challenging the latter. That might be so, if the disposition were made to a stranger; but the ancestor cannot, by this contrivance, take away the right of an heir *alioqui successurus*, to challenge the deed on death-bed.

The Ladies Ker, to whom the lands of Kelso

* *Hepburn* v. *Hepburn*, 25 Feb. 1663. Stair. *Davidson* v. *Davidson*, 17 Nov. 1687. Fountainhall.

were given, as trustees, with a beneficial condition, have rejected the gift, and their rejection is recorded by the judgment. The lands, therefore, devolve to the persons for whose benefit they were given, free from the condition, and as if the disposition to the Ladies Kerr had never existed; or supposing that, under these circumstances, the lands are not disposed of, the Appellant claims them as heir of tailzie. It is said he cannot approbate and reprobate, but as heir of tailzie he seeks only to reprobate. If it is to be considered as a gift to the heir, on the rejection by the conditional disponees, taking under the *liege poustie* deed as heir, or by paramount title, he may reduce the deed on death-bed. Considering that deed as a conveyance to the Ladies Ker, it is to them as trustees for the Appellant, as heir of entail. So it is put by the Respondents themselves, in their pleadings in the court below. In their condescendence they broadly argue, that it is in substance a disposition in favour of the heirs of entail; and so it was held by the two successive judgments of the Lord Ordinary (Balgray), who pronounces the deed of 1790 to be a settlement in favour of the heirs of entail. Whether the conditions of the conveyance are to be fulfilled, and in favour of whom, are different questions, which may be discussed afterwards in a different proceeding.

The objections as to the Kelso lands, that the condition is not imposed on the disponees in the death-bed deed, and that it contains no disposition in favour of the heirs, must be admitted as facts; but the question of law returns, whether the heir is not entitled to reduce the death-bed deed? A gift

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by *liege poustie* to an heir, or a trustee for the heir, or to him through the medium of a stranger, upon any condition, does not destroy his right to challenge a death-bed deed. If a gift to any other person, on condition to convey to the heir, with a power of revocation, defeats the right of the heir, the law of death-bed is futile, as being open to the plainest evasion. As to the objection, that the conditions imposed in the conveyance exclude him, and particularly, that the estate is to be conveyed subject to the fetters of the entail of Roxburghe: what is to prevent his fulfilling the conditions, if necessary, and taking the estate as heir *quasi* beneficial disponee? A right in the heir to redeem lands, or a right to lands subject to a burden, may be less in quantity or degree, but in quality is the same as an absolute right, and equally protected in favour of the heir by the law of death-bed. The death-bed deed is equally to his prejudice, whether he is to take as heir or disponee, and whether it be directly, or through the intervention of the Ladies Ker, or the Respondents, as their substitutes. In the case of a wadset the redeemable right is vested in the wadsetter; but the ancestor cannot dispone the lands on death-bed to the prejudice of the heir; nor is he excluded from redemption, because he cannot be served as heir, but must take by reconveyance.

It is objected, that as to the Kelso lands, the Appellant in his summons founded on his right, under the disposition of 1790; but he founded mainly on his right as heir of investiture, a right which appears on the face of that deed; and if the fact were as contended, the rules of Scotch

pleading do not exclude a party founding upon a deed in his summons, from abandoning that ground in court, and claiming as heir. The disposition of lands subject to redemption, it is contended, makes the heir a disponee, and that the right of redemption is personal to the heir, which right he cannot exercise without acknowledging the validity of the deed under which he takes. But the disposition only qualifies the right of the heir, still leaving to him that character; the right of redemption is real in the heir, as by the exercise of that right he is reinstated in his inheritance. The objection, that the condition was to be performed after the Duke's decease, within a time which is past, and that it cannot now be performed, is too technical and too inequitable to be maintained. The question has been under litigation ever since the Duke's death, and no payment could be made till the death-bed deed was reduced.

For the Respondents:—*The Attorney General* and *Mr. Clerk.* *

The lands which are the subject of controversy were settled by simple destination, without fetters, upon the heirs of entail of the Roxburghe family. These lands were given by the deed of 1790, a deed *inter vivos* to the Ladies Ker, upon conditions; one of which is, the power reserved to revoke and alter. That power existed without reservation; but the clause dispensing with delivery is considered necessary where the author intends to keep the deed in

* Since raised to the Bench of the Court of Session, under the title of Lord Eldin.

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his repository; and, according to the general opinion, a deed is ineffectual without such clause, if not delivered. The deed of 1790 remained in force and unaltered until the execution of the deed of 1803, whereby a new disposition is made of the estate, so far as it is thereby vested in trustees. The beneficial interest might not ultimately have been affected by that deed. It is by the deed of 1804, operating upon the trusts of the deed of 1803, that the estate is destined to the Respondents, the beneficial devisees. The question arising out of this state of facts is one purely of Scotch law.

Arguments drawn by analogy from the law of England are dangerous to be applied in deciding on questions of the law of Scotland. By the law of Scotland, a person possessed of an hereditary right, without fetters, has power to dispose in *liege poustie*; he may reserve a power of revocation on death-bed. It is admitted that by the same law a person cannot on death-bed dispose of heritable property to the prejudice of his heir.

The Duke of Roxburghe had complete dominion over the property in question, of which he made a disposition by the deed of 1790. If this had been the only instrument executed by him, it is not disputed by the Appellant that it would have been a good disposition. By that deed he reserved a power to revoke on death-bed; by the deed of 1803 he gives the whole residue of his estate and effects, consisting of realty and personalty, in trust for such persons and uses as he *had directed* or should direct by any deed thereafter to be executed.

It has been argued at the bar that this deed alone

operated as a revocation of the deed of 1790. It was not so argued in the court below; but that the deeds of 1803 and 1804 together so operated. If no death-bed disposition had been made, it is clear that the Ladies Ker would have been entitled under the residuary clause in the first of those deeds. For the deed of 1803 expressly refers to that of 1790; and it seems to be admitted in the proceedings below by the Appellant, that the deed of 1790 remained in operation, so far as it was not altered by that of 1803, until the execution of the deed of 1804. And such appears to be the right construction from a passage in the speech of the Lord Chancellor, in the case of * *Ker* v. *Wauchope*. It was lawful to revoke by a *liege poustie* deed, although not by a death-bed deed. The language of the deed of 1804 becomes important in considering whether it is or is not a revocation of the deed of 1803. The deed of 1804 is a deed of appointment or instruction to his trustees already named in the deed of 1803. By the deed of 1804 he gives to those trustees the power to sell the real and personal estates already vested in them by the former deed, and to apply the produce in payment of legacies, and upon the other trusts specified in that deed. So far is this from an intention to revoke the deed of 1803, that it is founded upon it, and the authority is derived from it. It is on this ground that the two deeds together are said to be a revocation of the deed of 1790.

To reduce a death-bed disposition, it must be to the prejudice of the heir, and no one else can ques-

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* Ante, Vol. 1. p. 1. The passage is not reported. It probably occurred incidentally in stating the facts of the case.

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tion it. The law of death-bed was made in favour of the heir *.

If there has been a *liege poustie* disposition to a stranger, the heir at law cannot question the death-bed disposition; although on death-bed a disposition in favour of the heir may so far be made as to revoke a *liege poustie* disposition made against him †.

A party may by a *liege poustie* deed reserve a power to alter on death-bed. The arguments on the other side would show, that a death-bed disposition operates as a revocation of the *liege poustie* deed. *Rowan* v. *Alexander* is not the only, nor even the first case on the subject. It was both preceded and followed by others decided on the same principles. In *Ker* v. *Ker* ‡, a deed made partly in favour of a grandchild, the son of the second son of the disponer, was delivered by him *sub silentio* to a stranger. The disponer afterwards, on death-bed, required the depositary to redeliver the deed, and having obtained possession of it, delivered it to a notary, to whom he also gave two blank papers, with his signature, desiring him to fill up the one with a disposition to his second son, the other, with a disposition to the only daughter of his eldest son, who was dead. Upon these facts it was held, that the first delivery was conditional, and that the recalling was effectual, although made on death-bed; seeing thereby the heir had no prejudice; since, if the death-bed deed were reduced, the former *liege*

* Regiam Majest. Stair. Erskine's Princ. of the Law of Scotland.

† See *Craufurd* v. *Coutts*. *Post*.

‡ Stair, p. 474. 499. Dict. of Decis. 3250.

poustie deed was set up. The disponee in the first deed could not challenge it, because that deed was made revocable* on death-bed, which is lawful as against all persons but the heir.

In *Craufurd* v. *Coutts* there was an interval during which the right of the heir at law revested in him. But where there is a virtual revocation there is no such revestment †. In *M'Kean* v. *Russell*, where a creditor having taken a bond payable to himself, if living, and after his decease to persons therein named as substitutes, with a power reserved to him at any time of his life to receive and discharge the same, without consent of the substitutes, exercised the power on death-bed by disponing the bond to persons not being either the substitutes or his heirs at law; this disposition being questioned, in an action of reduction upon the head of death-bed, it was argued for the heir, that the death-bed deed annulled the substitution, and revested his right; and although by the same act the subject was disponed to strangers, the alienation was ineffectual as against him, being done on death-bed. But these reasons of reduction were repelled by the court ‡.

As to *Rowan* v. *Alexander*, it is said the property was but small, and the question not much discussed in the court below. The case was fully argued both there and in this house. The *liege poustie* deed in that case was most materially altered

* By implication under the circumstances of the delivery.

† *Ker* v. *Ker*, 9. s.

‡ Dict. of Decis. Death-bed, p. 3277.

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by the death-bed disposition. It is in almost every circumstance similar to the present case.

It is admitted that by a death-bed disposition the *liege poustie* deed may be burdened; what is that but a revocation *pro tanto*? *Rowan* v. *Alexander* was decided in 1775. Many estates are held upon the law as settled by that case.

It was followed by the case of *Donaldson* *. On

* *Donaldson* v. *M'Kenzie*, 20th July 1776. The case is not reported. The following is a short outline of the facts, pleadings and judgment:—John Donaldson, bookseller in London, adjudged certain subjects in the neighbourhood of Edinburgh as belonging to Alexander Thompson. In that process, Mrs. M'Kenzie of Redcastle, daughter of James Thompson, by a second marriage, appeared, and insisted that the subjects sought to be adjudged belonged to her; and to prove this to be the fact, she produced, 1st, A mutual disposition (1768) between her father and mother, disponing to themselves, and to Mrs. M'Kenzie and her heirs, their whole heritable and moveable estate. 2dly, A holograph deed, dated 13th Sept. 1769, by which James Thompson conveyed to her the subjects in question. 3dly, A trust disposition by James Thompson, with consent of his spouse, conveying his whole estate to trustees for certain purposes therein expressed. This trust disposition was executed *in lecto*, and Mr. Donaldson insisted that the trust deed should be reduced upon that ground, in as far as it was prejudicial to Alexander Thompson, the heir of his father. As to the holograph deed, Mrs. M'Kenzie could not prove its date; and of course it was held to have been executed *in lecto*. And lastly, with regard to the mutual disposition of 1768, Mr. Donaldson insisted that it was revoked by the trust disposition.

Lord Monboddo, Ordinary, repelled this plea of Mr. Donaldson, who reclaimed to the court; putting his cause upon the following points:—" That both in law and in equity he is " entitled, as creditor to the heir apparent, to insist, 1mo, That " the mutual disposition and settlement founded on is effectu-

advising the petition in *Donaldson's* case, it was refused without answer, on the ground that the death-bed disposition was not to the prejudice of the heir.

The case of *Craufurd* v. *Coutts* was decided on the ground that an *express* revocation revested the right in the heir, and then the death-bed deed was to the prejudice of the heir. The Lord Chancellor in that case held*, that at the time of the death-bed disposition there was no effectual *liege poustie* deed in existence.

" ally revoked by the trust disposition; and 2^do^, That he is " entitled to reduce the said trust disposition *ex capite lecti*, " without giving effect to the former deed; or in other words, " to use the trust disposition to cut down the former settlement, " and thereafter to reduce the same disposition as executed on " death-bed."

In support of the last of these propositions, Mr. Donaldson founded, at great length, upon the case of Cunningham*; insisting that it was a well-founded decision; but, on moving his petition, the court was of opinion that the case of Cunningham was erroneously decided. Lord President Dundas and Lord Corrington said, that they knew the history of that cause very well; that before it came to be heard at the bar of the House of Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the interlocutor of the Court of Session was ill-founded; in consequence of which understanding the matter was compromised by payment of a large sum of money. When counsel were called to the bar the cause was not argued; but it was stated that the matter was made up, and that both parties concurred in wishing the decree to be affirmed. Upon which Lord Hardwicke observed from the woolsack, that the Respondent had done wisely in not risking a judgment, and thus the interlocutor was affirmed.

* See note at the end of the Case.

* *Cunningham* v. *Whiteford Falconer*, 10th June 1748.

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In the court below, Lord Gillies, in the disscussion of the present case, said, as to the case of *Rowan* v. *Alexander*, "That even if wrong it ought to be "upheld;" and he conceived "that there was a "great difference between implied and express "revocation." The term, "implied revocation," cannot properly be applied to this case: according to the law of England it always proceeds upon the supposition, that the grantor has power to grant. There is no case in which it has been held that a deed executed by a person having no power can be a revocation. By the law of Scotland, upon a deed *inter vivos*, such as the *liege poustie* deed in this case, a power being reserved to alter on death-bed, it could only be altered by express exercise of the power; and the execution of a subsequent deed, which is destroyed by legal challenge, was never in that law held to be such an exercise of the power. That implied revocations have the same effect in law as express revocations, is a doctrine contradicted by authorities in the law of Scotland, showing that parties whose interest it was to contend for that doctrine, and who must have succeeded if it had been well founded, never thought of resorting to it as an argument in support of their claims *. The distinction between express and implied revocations is established by the cases of *Rowan* v. *Alexander* and *Craufurd* v. *Coutts* †. On that point the Judges of

* See Kilkerran, p. 151, *Finlay* v. *Birkmyre*, 29th July 1779. Case of Telfer, Jan. 14, 1806.

† See also the opinion of Bankton, upon a case stated by him, B. 3. tit. 4. s. 49.

the Court of Session, who delivered their opinions in this case, were unanimous.

There is no such head in the dictionary as implied revocation, and the term itself is foreign to the law of Scotland. The cases of *presumed* revocation are totally different; as where a legacy is given, and the subject of the gift is afterwards disposed of otherwise; or where a specific legacy is followed by a general disposition of all the funds, including that legacy: there it is rather a question of preferable disposition than of implied or even presumed revocation. If by law the disponer has the power on death-bed to substitute a new object of his bounty in the place of the *liege poustie* disponee, how is that end to be effected? According to the argument of the Appellant, on the doctrine of implied revocation, the attempt to make a new disposition operates to displace the right of all the disponees, and gives the benefit to a party excluded by the author. Such a doctrine, if admitted, could only have the effect to prevent any disposition after a deed in *liege poustie*.

It is to be observed, that the deed of 1790 conveyed no right to the disponee at the time of its execution. It was an undelivered deed, kept in the repositories of the author, and containing an express reservation of power to revoke. The effect of such a deed is suspended, both as to the heir and the disponee, until the death of the author. In a testamentary instrument, the event of death operates as a delivery. If it be revoked, the right of the heir revives, or rather remains unaffected. But how is the power of revocation to be exercised? Erskine *

* B. 3. tit. 8. s. 98.

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says, "Where it is *actually* revoked the heir may pursue reduction of any *subsequent* deed made on death-bed to his prejudice." By *actual* revocation can he mean *implied*, or any thing less than *express* revocation? The deed to be reduced must be subsequent to the revocation, according to the doctrine expressed in that passage, which excludes the notion of a revocation in favour of the heir by a deed which is intended to operate in favour of another object of the author's bounty. That in such case there should be an implied revocation is a contradiction in terms.

If the analogy of English law is to prevail, the question is decided by the case of *Goodright* v. *Glazier**, which is law, notwithstanding the case of *Moore* v. *Moore* †. A second will being cancelled sets up the first.

As to the cases from Rolle's Abridgment, they are on the ground that an alteration in the estate has taken place, which alters the seisin; so that, technically, the party has not the same estate. That rule of law depends on the words of the statute of wills.

The case in Cowper ‡ was decided on the ground of express revocation, by one of the modes prescribed, and having operation according to the

* Burr. p 2512. † *Qua Supra.*

‡ *Burtenshaw* v. *Gilbert*, p. 49.—In this case there were two parts of the first will, one of which being in the possession of the testator was cancelled; the other, being a duplicate, in the possession of a depositary of the testator, was found uncancelled in the room where the testator died. The opinion of the court was, that both parts were cancelled by the cancellation of one.

words of the statute of frauds. If the second will is to be reduced on the ground of incapacity in the testator, it cannot be looked at for any purpose whatever, and then the first instrument remains in operation. It comes under the principle of decision in *Goodright* v. *Glazier*.

In the cases of *Pennycook* v. *Thomson*, *Hepburn* v. *Hepburn*, and *Davidson* v. *Davidson*, there was no previous deed in *liege poustie* to exclude the heir. In the first the deed was signed blank, and filled up on death-bed with the name of the disponee.

If the gift were to a person incapable of taking, the case might be different; and if, even to a dying person, according to the extreme case put by the Appellant, a question might arise, whether such deed were not null and void, as fraudulent and fictitious? Cases of fraud are decided upon the peculiar ground of fraud.

If there have been no cases on implied revocation since the decision in *Rowan* and *Alexander*, it must be on the ground that the law is considered as settled. Here is no express revocation as in *Craufurd* v. *Coutts*, but on the contrary, a reference to the previous deed, which is evidence that the interest of the heir is cut off; and if revoked in any sense, can only be to the effect of transferring the estate and right to the new disponee. If implications are to prevail, there is, with other implications, an implied assignation to the *liege poustie* deed, to make the gift to the new disponee effectual.

It has been argued that the Ladies Ker having repudiated the deed of 1790, the title of the heir at

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law vests; but there must be something to repudiate. They had not an absolute, but only a qualified and conditional right, subject to the power to alter on death-bed, which power was exercised by the testator; and neither they nor the Appellant as disponees can question the death-bed disposition. They could only repudiate for themselves, not for other parties interested: as to them it is *res inter alios acta.* According to the state of law supposed in this argument, the death-bed disponee and the *liege poustie* disponee may, by collusion, exclude the heir; or the heir, and the *liege-poustie* disponee may, by a similar operation, exclude the death-bed disponee; and the effect of the author's bounty will depend upon the contrivance of the parties: but no such attempt has ever been heard of in the law. There is no ground for this doctrine of repudiation. The estate does not vest during the life of the disponer, and it requires no acceptance at his death, but vests immediately upon that event. In the Bargany case the party repudiated by an instrument duly executed. There must be, together with the repudiation, an investment of the right in another; which in heritable rights, can only be effected according to the known forms of law. The deed executed on death-bed constituted a right preferable to the right contemplated by the deed of 1790: that deed became accessary to the deed on death-bed, by the will and intention of the author, and the heir has no interest in the disposition. According to English law, if an estate is given to *A.*, with a condition to pay a sum of money to *B.*, *A.* may repudiate, but he cannot disappoint the legatee.

By the deed of 1790, the Kelso lands are given to the Ladies Ker to convey to the heirs of entail, on payment of a certain sum on a given day. This confers no right upon the heir in his representative character. It is a privilege affecting the lands, whether entailed or unentailed. As heir of entail he could have no claim to unentailed lands; and, with respect to lands entailed by simple destination, he was excluded by the deed on death-bed. It is argued, that by the operation of that deed he is remitted to the right under the deed of 1790. But in what character is he to maintain that right? not as heir, but as disponee. The legacy of a right to purchase the lands was displaced by a subsequent disposition. By the deed of 1790, the heirs of entail were put out of the investiture of the lands. Suppose the disposition had been in favour of heirs of line, could the heirs of entail have raised a claim? To support such claim the heir must be a person who is deprived of the estate by the death-bed disposition. But in this case he was deprived by the previous deed of 1790. The claim must be supported on the ground that by the will they have a right as heirs of entail; but it is no right to the lands; it is a mere personal obligation on the Ladies Ker, the disponees. The offer was to be made within the time limited by the deed, which has not been done, and it is now too late.

The *Lord Chancellor*:—

[In the course and at the conclusion of the argument.]

Testamentary deeds executed in *liege poustie*

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usually contain a power to revoke. It is argued that a revocation of the deed revokes the power, which is part of it. But unless the power is expressly revoked, no court can impute to the author of a deed the absurdity, that he means to revoke a power which he professes to exercise.

On the points as to the repudiation and the Kelso estates, the judges of the Court of Session having differed, it is necessary that those questions should be accurately considered. As to the question of implied revocation; if we are to act on the maxim of *stare decisis*, the judgment cannot be disturbed. The deed in *liege poustie* reserves a power of revocation; by making another disposition under the authority of the power, it must be supposed that the disponer intended to do something effectual; and it cannot be implied that by the exercise of the power he meant to revoke it.

25 May. 1820. The *Lord Chancellor* :—Having looked carefully into this case, I can see no sufficient reason for saying that this judgment should be altered. It appears to me, upon the best consideration I can give to the case, that upon all the points controverted at the bar the Respondent is right.

Judgment affirmed.