MILLER, ... APPELLANT.

MARSH ET AL., ... RESPONDENTS.

1855.
May 22d.

Death-bed.—Deed of Revocation.—The law of death-bed does not apply to a deed of revocation executed under a power taking off fetters, but creating no new estate.

By deed of entail dated 3d March 1829, William Henry Miller, Esquire, gave, granted, and disponed his estate of Craigiutinny to certain heirs of taillie, whom failing to certain heirs of tallie named by him in a deed of nomination mentioned in the said deed of entail as of the same therewith.

The deed of entail contained the usual prohibitory irritant clauses of strict entails in Scotland; and, furthermore, it contained a special clause, whereby the settlor reserved power to himself to alter or revoke the same in whole or in part.

The relative deed of nomination was duly executed along with the said deed of entail, and both instruments appeared to have been duly recorded. Infeftment likewise followed.

On the 30th October 1848, the settlor executed a deed of revocation under the power reserved. On the following day he departed this life. The question was, whether, having regard to the law respecting death-bed dispositions in Scotland, this deed of revocation was valid? On this head Mr. Erskine states that the Scotch law, "from its jealousy of the weakness of mankind when under sickness, and of the importunity of friends in that conjuncture, has declared

that all deeds, if they be granted by a person on death-bed, *to the damage of the heir*, are ineffectual." But, by the Act of 1696, c. 4, a reduction *ex capite lecti* is excluded, if the settlor be proved to have lived sixty days after having executed the deed.

The present action of reduction was brought by the heir-at-law of the settlor to have the deed of revocation set aside, under the head of death-bed.

On the 7th July 1852, the Lord Ordinary *Wood* repelled the reasons of reduction, and explained the grounds of his decision in a note, which was partly as follows:—

"The whole question resolves in this—1st, Whether the entail could competently be freed from the prohibitions, limitations, and restrictions, and yet remain a valid and effectual disposition of the estate; and 2d, Whether this could competently be done on death-bed. Upon the *first* point, the Lord Ordinary finds no authority or principle to satisfy him that there is any incompetency in discharging the prohibitions and fetters of a tailzied destination, without injury to the *disposition and conveyance* in the deed of entail, so that they shall remain valid and effectual as such, and the legal result thereby produced be, that the heirs shall be entitled to take the estate as a fee-simple. And if so, the Lord Ordinary is further of opinion upon the *second* point, that the power or competency of thus revoking and discharging the prohibitions and restrictions is not impaired by the circumstance of the deed of revocation being executed on death-bed."

To this decision the Lords of the First Division, on the 1st July 1853, adhered; the present Appeal was the consequence.

Mr. *Roundell Palmer* and Mr. *Buchanan*, for the Appellant, chiefly relied on *Crawfurd* v. *Coutts* (*a*).

The *Solicitor General* (*b*), Mr. *Rolt*, and Mr. *Anderson* were not called upon.

Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

My Lords, this is a mere question of Scotch conveyancing; the positive rule is that if there be a

(*a*) 2 Bli. 655. (*b*) Sir R. Bethell.

MILLER v. MARSH ET AL. — *Lord St. Leonards' opinion.*

power to revoke, and that power is exercised on the death-bed, that revocation is a good one; at the same time the law of Scotland, or its form of conveyancing, denies to the same instrument the power of creating any new estates or even the same estates which were in the original instrument.

Now, in this particular case there was an original instrument, with all the prohibitory, irritant, and resolutive clauses, and all proper fences. After the grantor's own estate and the heirs of his own body had ceased, he reserved the power of nomination, and he exercised that power of nomination in a way which is free from all objection. The way in which the case has been argued at the bar is, not that there was any objection to the deed of nomination, but that the subsequent revocation altered the character of the estates which had been so introduced by the nomination; and that those estates could not have been so introduced originally under the original deed.

Now, the simple question is, whether under this power of revocation this gentleman did or did not create any new estates. That he had the power to revoke all the estates if he thought proper, nobody disputes. That he had the power to revoke all the prohibitory, irritant, and resolutive clauses nobody will dispute. He might have revoked the whole, and if he had done so, then of course the authorities would have compelled your Lordships to decide that he could not create any new estates, or not even the same estates according to some of the cases, by a death-bed disposition. But the gentleman who prepared this instrument seems to have been rather too astute in the practice of conveyancing for the Appellants; for instead of taking that mode which would have been fatal to the disposition he was making, he very acutely left the estates precisely as he found them in the original settlement

MILLER
v.
MARSH ET AL.
—
Lord St. Leonards' opinion.

aided by the deed of nomination. Taking those deeds both together as constituting the settlement, he does most cautiously revoke all the prohibitory, irritant, and resolutive clauses, and all the fetters; in short, he removes the fetters but leaves the estate. Where is the objection to that? He does not attempt to create any estates; he leaves the estates. But then the Appellants say he has altered the character of the estates. My Lords, he has not altered the character of the estates, except in this way, that he has removed the fetters which he had a perfect right to remove. Nobody disputes his right to remove the fetters, and nobody can dispute it. Then the estates remain, and the estates were to go according to their destination. But they may be alienated and taken in a different way, no doubt. Why? Because the fetters have been removed. But he had a right to remove the fetters, and the estates which are now perfect, existing under these two original instruments not revoked, will take effect under thosedeeds, and not in any manner whatever by force of the death-bed disposition. The death-bed disposition was good to remove the fetters, and it was inoperative with regard to the estates created.

My Lords, I think the point lies in a nutshell. It is perfectly clear that it admits of no doubt. In my apprehension it is a mere question of Scotch conveyancing. I think the deed is regular, and is not touched by any of the authorities, and therefore I move, your Lordships, that the interlocutors of the Court below be affirmed.

Interlocutors affirmed with costs.

DEANS AND ROGERS.—MURRAY.