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CRAUFORD, &c. *v.* COUTTS, &c.

(M. 14958.)

MRS. ELIZABETH CRAUFORD, Widow of the deceased JOHN HOWIESON, Esq., and WILLIAM BEVERIDGE, W.S., her surviving Trustee, ... } *Appellants;*

THOMAS COUTTS, Esq., Banker, and SIR ROBERT CRAUFORD, Bart., eldest Son and heir of SIR HEW CRAUFORD of Jordanhall, Bart., ... } *Respondents.*

House of Lords, 11th July 1799.

DEATH-BED—REVOCATION—APPROBATE AND REPROBATE.—A party in 1771 executed a settlement of his estates to one 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 Craufordland 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. The deed of 1793 was executed on deathbed. In a declarator and reduction of the deeds 1771 and 1793, brought by the heir at law, setting forth, that as the deed 1771 was revoked by the deed 1793; and as the latter was executed on deathbed by the deceased, her right as heir at law had revived, and that she was entitled to have them reduced as to her prejudice. Held, that as the deed of 1771, was executed in favour of a stranger, she had no interest, as the deed 1793 could not be said to be in prejudice of the heir; and also, that she could not approbate and reprobate the same deed (1793); and that this deed, being executed in virtue of reserved powers to alter on deathbed, was not reducible. In the House of Lords, the case was remitted for reconsideration, with considerable doubts expressed as to the soundness of the judgment.*

Colonel John Walkinshaw Crauford, proprietor of the estates of Craufordland and Monkland, in the county of Ayr, did, on the 17th day of June 1771, execute a disposition or settlement, by which, for the purpose therein declared, of keeping up the representation of his family in the male line, he (having no prospect of issue himself) conveyed both estates "to himself *in liferent*, and to the heirs

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* For what was done under this remit, *vide* second appeal in this case, 6th Aug. 1803, and 14th March 1806.—*Infra.*

" male of his own body in fee; whom failing, to the late Sir " Hew Crauford, Bart., and the heir male of his body," " &c. This deed contained a clause dispensing with delivery, but reserved to himself full powers to revoke or alter it in whole or part, at any time of his life, *etiam in articulo mortis*, and to dispose of the estate otherwise, and burden the same at pleasure. The deed was never delivered to the disponee, but remained with the granter until his death, when it was found in his repositories uncancelled.

Prior to his death, and while in Edinburgh in February 1793, he executed a new disposition and settlement of the estate of Craufordland in favour of the respondent, Mr. Coutts, and his heirs and assigns, with all the clauses as in an original conveyance. The deed also assigned to him his personal estate, and also other real estate not contained in the deed of 1771, consisting of superiorities. It further contained this clause, upon which the present question principally arose:—" And I hereby revoke and recall " all former dispositions, assignations, or other deeds of " a testamentary nature formerly made and granted by " me, to whatever person or persons, preceding the date " hereof, and particularly a deed granted by me in the " year 1771, settling my estate upon Sir Hew Crauford of " Jordanhill, Bart., and his heirs: And I declare the same " to be void and null, so far as these deeds are conceived " in favour of the persons to whom they are granted, but to " be valid and sufficient to the extent of the powers therein " reserved to me to revoke, alter, or innovate the same, to " the effect only of making these presents effectual in favour " of the said Thomas Coutts and his foresaids."

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Of the same date, Colonel Crauford executed, in favour of Mr. Coutts, a conveyance, in the form of a bargain and sale, of the estate of Monkland, bearing a price paid (of £5000); but this, it was stated, was a mere device; it being alleged that no price was actually paid. Mr. Coutts was to have granted a bond for that sum, but before that could be returned from London, Colonel Crauford died, of this date.

Feb. 13, 1793.

Feb. 19, 1793.

The Colonel, at the time he executed these deeds, was in bad health, and had contracted his mortal sickness, which terminated in death six days thereafter. In these circumstances, the appellant, Mrs. Elizabeth Crauford or Howieson, the deceased's aunt, as heir of line of her nephew, brought an action of reduction and declarator on the head of deathbed, against Sir Hew Crauford, the disponee under the settlement of 1771, (the person entitled to take under that

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deed, if it had not been annulled), and also against Mr. Coutts, the disponee under the settlements 1793, to have the latter deeds set aside, and her right to succeed to the estates established. In defence for Mr. Coutts, it was maintained, that Colonel Crauford had unlimited powers to dispose of the estates, and, admitting that the deeds 1793 were executed on deathbed, he contended, that as Colonel Crauford had reserved power to himself by the deed of 1771, (which was executed in *liege poustie*, and conveyed these estates to a stranger, thereby disinheriting the appellant, his heir at law), to alter the deed at any time during his life, *et etiam in articulo mortis*, the law of deathbed could not apply, as the latter deeds so executed, were granted as an exercise of the powers thus expressly reserved.

The Court of Session pronounced this interlocutor:—

June 12, 1795. "Upon report of the Lord President, in absence of Lord "Stonefield, the Lords sustain the reasons of reduction, in "so far as they respect the superiority of the lands in the "county of Renfrew, contained in the charter 12th Febru- "ary 1725, from the then Prince of Wales, as Prince and "Steward of Scotland, and reduce, decern, and declare "accordingly; *repel the reasons of reduction, in so far as* "*they respect the lands of Craufordland*, and others, con- "tained in the disposition by the late Colonel Crauford to "the defender, Thomas Coutts, of date 13th February 1793; "assoilzie the defender, and decern: Find that the alleged "sale of Monkland estate, set forth in the other deed, of "the same date, 1798, was an unfinished transaction, and "remit to the Lord Ordinary to hear parties' procurators "further thereon, and to do as he shall see just: Remit also "to his Lordship to hear parties' procurators upon any claim "competent to the pursuers under the disposition and tailzie "1719 (1771?) and to do therein as he shall see cause." On re-

Nov. 17, 1795. claiming petition, the Court adhered. And afterwards, upon the report of Lord Stonefield, the Lords found "that the set-

Jan. 31, 1798. "tlement executed by John Walkinshaw Crauford, in the "year 1771, was effectually revoked by the clause of revo- "cation contained in his after settlement in the year 1793, "in consequence of which the lands of Monkland and per- "tinents, now belong to the pursuer as heir of line, and that "she has right to make up titles to them accordingly, and "decern."

Against this last judgment an appeal was brought by Sir Robert Crauford to the House of Lords, but was dismissed for want of prosecution.

The appellants, Mrs. Howieson and her trustee, brought the present appeal against the interlocutor of 12th June 1795, in so far as it sustains the deed of 1793, and repels the reasons of reduction thereof: and also against the said interlocutor of 17th November 1795, adhering thereto.

Pleaded for the Appellants.—The deed 1771 in favour of Sir Hew Crauford, which disinherited the appellant as heir at law, was expressly revocable in its nature at any period of the granter's life *et etiam articulo mortis.* This power to alter and revoke was fully exercised by the subsequent deeds 1793, whereby he revokes, in the most express terms, the deed executed by him in 1771, and declares the same to be void and null, in so far as it conveyed the estates therein mentioned. In this situation, matters were placed on the precise footing as if no such deed had ever been executed; and the moment this was effected, the only obstacles that stood between the appellant and these estates, were the deeds 1793 now under reduction. The deed 1771 being revoked, and declared null and void; and the deed 1793 being reducible on the head of deathbed, the heir's right is unquestionable. The deathbed deed may subsist and be effectual as a revocation, although it be bad as a conveyance of the estate on deathbed, the more especially so, since the exercise of that power was only in compliance with an express right reserved in a deed *liege poustie*, to which the law of deathbed doesnot and cannot apply. Nor is it any answer to this to say, that by holding it so, the appellent would be approbating and reprobating the same deed, because the revocation of a deed *mortis causa* in favour of a stranger, and the conveying or burdening real estate upon deathbed, to the prejudice and injury of the heir, are altogether two distinct things; and their effect regulated by different principles. The law of deathbed is a restraint imposed *in favour of the heir*, but while every thing done *in lecto* to his prejudice is liable to challenge, the ancestor is in other respects at full liberty; and therefore an heir may set aside any act prejudicial to his interest done by his ancestor on deathbed, and at the same time avail himself of acts that are beneficial to him, though done under the same circumstances; and in questions of this sort, it is of no consequence whether the different acts of the ancestor are done by one or by separate writings. It is evident then that the rule in equity of ap-

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probate and reprobate does not apply to the circumstances of this case; but only applies where one challenges one part of a deed and seeks to take by another part of the same deed, which is not the case in the present instance. The revocation of the deed 1771 is entirely separate from the conveyance of the estates of new, and to a different party, by the same deed. The former was a good revocation, because the granter had reserved power expressly to revoke at any time during his life, and even on deathbed. The latter he had also power to execute; only, in executing that conveyance, it behoved the granter to do it at a period when he could competently execute it, and not on deathbed. While, therefore, the appellant has no right and interest to challenge the revocation, and while, in point of fact and law that revocation is not void, or voidable at the instance of any party whatever, yet the conveyance of the estate is quite separable from the revocation of the former deed, and open to challenge by the heir at law, because the deed 1771 being revoked, there is nothing between the heir at law and the estate but the deathbed deed; and the latter being bad, the appellant's right to the estate is indisputable. 2. But then the respondent contends that the revocation clause is qualified, that it did not absolutely annul the deed 1771: but revoked it only *ad certum effectum;* declaring that it should be valid and sufficient to the extent of the powers therein reserved to Colonel Crauford to revoke and alter the same, to the effect of making the deed 1793 effectual in favour of Mr. Coutts. The question, therefore, is, whether this qualification of the powers reserved to revoke, can have any effect in supporting the disposition to Mr. Coutts of 1793 against the appellant's challenge upon the head of deathbed? The appellant apprehends the qualification can have no effect whatever. The deed of 1771, as well as all other deeds of a testamentary nature previously executed by Colonel Crauford are revoked, and declared null and void, in so far as they are conceived in favour of the persons to whom they were granted; *but to be valid and sufficient* to the extent of the power therein reserved to him to revoke, "to the effect "of making these presents (i. e. deed 1793) effectual in favour "of the said Thomas Coutts and his foresaids." All, therefore, was annulled except the revoking clause itself; and to give effect to the deathbed deed, because the maker, by a previous *liege poustie* deed, had reserved power to alter at

any time during life, would be in effect annulling the law of deathbed altogether; for to hold such a doctrine would be to say, that a party may, by a written instrument, executed formally in *liege poustie* declare, "I mean that my heir at law shall *not* take my estate. I reserve to myself power to give it away upon deathbed;" and then, by a deathbed deed, to give it away so that such deed would be effectual against the heir at law. Such a proposition is quite untenable in law.

Pleaded for the Respondents.—The plea of deathbed is one in favour of the heir at law; but, in availing himself of it, it must be established not only that the deed which he challenges on the head of deathbed is a deathbed deed, but also that he has an interest to challenge it, and that it is to his prejudice. To have such interest, it is necessary to show, that but for the deathbed deed conveying the estate to a stranger, he would have been entitled to succeed to the estate. In the present case, however, no such interest exists in the appellant Mrs. Crauford or Howieson, because, even if the deathbed deed were set aside, she could not take the estates; in that case the deed of 1771 would come into operation, which disinherited her, and conveyed the estates in favour of Sir Hew Crauford. The *liege poustie* deed of entail of 1771, as a subsisting and uncancelled deed, totally excludes all right in the heir at law, and therefore bars all challenge in so far as she is concerned. She has therefore no interest, and cannot be heard to say, that the deeds 1793 made her situation either better or worse. It took the right of succession not away from her, but only from Sir Hew Crauford, and other substitutes in the heir of tailzie 1771, so that her right was not prejudiced any more than it was before that deed was executed. She has therefore no right to complain, and no interest to challenge or set the deed of 1793 aside. Nor is it any answer to this to say, that the terminating destination in the deed 1771 to the heirs whatsoever of the granter is sufficient to support her interest, because that interest could only entitle her to challenge the revocation to the effect of maintaining the deed, and destination of the estate in favour of Sir Hew Crauford and other substitutes, in order that she may succeed under the deed when they shall all have failed; whereas the object of the present action is to have her immediate right to the estate declared. But it is quite clear in law that the deed 1793 was a good deed, which the granter had power to execute, and which by the deed 1771

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he had expressly reserved power to execute even on deathbed. The deed, on these two grounds, 1. On the want of interest in the heir, the deed not being to his prejudice; and, 2. In consequence of the express powers reserved to alter and revoke at any time during his life and on deathbed, is a deed to which the law of deathbed cannot apply. It is admitted by the respondents that where a person executes a deed in *liege poustie* in favour of his heir *alioqui successurus*, with a reserved power to alter, and he alters it on deathbed to the prejudice of such heir, the heir may reduce it, because he may repudiate the former deed altogether, and take the estate, not as *hæres factus*, but as heir at law. But where the heir shall found upon and take benefit by the first deed, he must do so under all its conditions. The heir cannot approbate and reprobate the same deed. If, therefore, the appellant challenges the deed 1793 on deathbed, in her character as heir at law, then she cannot succeed, because that deed is not to her prejudice. It is only to the prejudice of the party in whose favour the destination of the estate was previously settled by the deed 1771. And, accordingly, had the deed 1793 never existed she could not have succeeded. The effect, therefore, of challenging this deed on deathbed, assuming it to be challengeable on that head, is not to benefit the heir at law, but the stranger disponee under the 1771, by which that heir at law was disinherited. And it will not do to elude this consequence of her challenge, by attempting to show that the revocation clause in the deed 1793 is separable and distinct from the disposition therein of the estates, because this proposition cannot hold, unless it can be shown that the disposition is subsequent to the revocation, and the latter deed separate and distinct from the former. In the present case, the revocation and the disposition and settlement of the granter are one and the same united act. This argument, which the appellant uses with the view of showing that the moment the deed containing the power to alter is annulled, that power is lost, and the heir at law's right revives, so as to entitle her to challenge the conveyance of the estate in that same deed. But this doctrine can only apply to two distinct acts, and where the disposition follows the revocation in separate deeds. And this argument is excluded by the nature of the revocation in the deathbed deed. This revocation is qualified. The deed 1771 is not revoked absolutely, but only *ad certum effectum*, declaring that notwithstand-

ing the revocation of it, that deed should stand *valid and sufficient to the extent of the powers therein reserved* to alter the same, to the effect of making the deed 1793 effectual to the respondent Mr. Coutts, in favour of whom it was granted. So that at all points the heir at law is excluded in her challenge, whether the revocation be held qualified or not; or whether the deed 1793 were to be set aside on deathbed or not. She cannot approbate and reprobate the same deed.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

" My Lords,

" The hearing at the bar upon this cause was had some time ago, and I have now to state the result of the opinion I have formed upon it. The more I have considered this case, the more I have felt the difficulty and importance of it. I had the advantage of trying my own opinion by communication with persons conversant in the law of Scotland, who were present at the hearing; with a noble and learned Lord (Lord Thurlow) who perused the printed cases, and with a Judge of the Court of Session, who was not raised to the bench when the judgment now appealed from was pronounced. I had verbal communication also with other parties, and I was favoured with the result of the opinions they had formed.

" These opinions were not uniform; if they had all gone in one course, I should have deemed *that* the safe mode for your Lordships to have followed, in determining this cause, though it had differed from my own sentiments. It is proper to state that the learned Lord I alluded to, concurs with me, and that our opinion is, that the judgment in the present case is contrary to law. At the same time, he feels, as I myself do, much difficulty in a question purely of Scots law, upon such opinions as we can form, to state it as advisable to reverse the judgment of the Court of Session.

" I shall mention, in a few words, the nature of the present question, to show the importance of it, the grounds upon which the decision proceeded, and the nature of my doubts with regard to it; and I shall then submit what I conceive is proper to be done in the present case.

" The facts in the cause are short. Colonel Crawford possessed an estate, which he destined by deed, several years ago, to Sir Hew Crauford, who was not his heir. This deed remained in Colonel Crauford's hands undelivered; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hew. He reserved a power, however, to alter the deed in whole or in part, *et etiam in articulo mortis.*

" This reservation referred to a point in the ancient law of Scotland, which I have always looked up to as of great excellence, and I

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have read cases where it was treated with great respect by Lord Hardwicke. By it no deed is valid against the heir, if executed on *death-bed*, that is, if the granter be attacked with the sickness of which he dies, and does not survive a certain number of days. In the argument stated in the printed cases, it was held out, that this was a personal privilege in favour of the heir at law, a regulation for his benefit alone. But, in my opinion, this comes far short of the excellence of the regulation; it is also highly favourable to the dying man that his last moments shall not be disquieted. It was perhaps at first intended to put a stop to the granting legacies to the church and to charities, which prevailed so much in those days. It now prevents the mischief that might arise from deeds obtained by besieging a person when near his death.

" The heir has a right to set aside all deeds executed contrary to this regulation. It appears, in the present case, that Colonel Crauford entertained a purpose that Sir Hew Crauford, in whose favour he had made the former deed, should not succeed to his estate; and that he also had the intention, when in a declining state of health, to leave it to a very respectable gentleman, an old and intimate friend, perhaps his relation. By him it was neither asked nor expected; and when I mention that this was Mr. Coutts, the respondent in the present appeal, I need not add, that he could be supposed to want it but little. Without communication with Mr. Coutts, he revoked the disposition in favour of Sir Hew, and by the same deed conveyed one of his estates to the former.

" A singular transaction took place with regard to another estate, which he meant to give to Mr. Coutts, by means of a fictitious sale, for £4000 or £5000. He writes that gentleman a letter, mentioning that he had sold him the estate, and would give him a receipt for the price; but payment was still to be supposed, and he desired Mr. Coutts to send him a bond for the money. This transaction makes no part of the present appeal.

" After Colonel Crauford's death, the appellant, his heir at law, claimed his estates, if no person could show a better right to them. For this purpose, she brought an action before the Court of Session, for setting aside the disposition to Mr. Coutts as void, being granted on deathbed, and contending that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hew Crauford as parties. But the latter was entirely out of the case; the only title he could make was through the deed which had been revoked. He, however, founded upon this, that it was the intention of the deceased that he should take the estate, if it did not go to Mr. Coutts. But the deed in his favour was revoked in the most marked manner, and all intention as to him was clearly gone. When the question was agitated with regard to the estate which was the subject of the fictitious sale, Sir Hew having stated his argument, that if his deed was not revoked, that estate must be-

long to him, the Court found that the heir was entitled to it, the deed to Sir Hew being expressly revoked.

"That determination was posterior to the decision which forms the subject of the present appeal on the other part of the cause, and Sir Hew's argument in some degree arose out of that decision. The Court then held the ground of giving the estate to Mr. Coutts, by some confused mode of reasoning, to be of this nature:—"It is true "an heir at law has a right to set aside deeds executed on deathbed, "but what right have you in the present case? Sir Hew must "take in preference to you, though his deed was revoked, it was a "revocation only to the purpose of validating the deed in Mr. Coutts' "favour. Sir Hew is a bar to you; but as the *intention* of the de- "ceased was not in his favour, therefore Mr. Coutts' right is good "against him."

"The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about five and twenty years ago, there occurred a case, where a person possessed of two estates A. and B; by one deed he conveyed both estates to certain disponees; and by a second deed, executed on deathbed, he conveyed the second estate B, to certain other persons. Lord Auchinleck, a respectable judge, before whom this matter was first argued, held, that the heir at law was entitled to the estate B, and that the deathbed deed, though ineffectual as a conveyance, was sufficient as an implied revocation of the former deed with regard to that estate. This judgment was altered by the Court upon an appeal to them, and it was determined that the deathbed deed was effectual, on this ground, that the heir was cut off by the first deed, of which there was no express, but merely an implied revocation by the subsequent disposition of the estate B on deathbed; and that if the deathbed deed was not to subsist, the prior deed would be effectual. The Court of Session here made a distinction between an *express* revocation and an implied one, which I confess I do not feel. If a person makes a disposition of his estate, and locks it up in his repositories, and, at the distance of ten years, makes another disposition of the same estate, I should be of opinion that the former undelivered deed was revoked, and that the posterior one must take effect.

Rowan v. Alexander, 22 Nov. 1775 M. 11371; Brown's Supp. 423. 2 Hailes, 659.

"Another distinction was taken in the present case, namely, that though Colonel Crauford, being on deathbed, could not execute a valid disposition of his estate, yet he could still execute the reserved power to alter contained in his former deed, and which he had charged on Sir Hew Crauford the volunteer. My objections to this is, that such a reservation cannot be allowed: A man may reserve a power to change his disponee, whose sole right being founded on the disposition, he cannot object to any part of it. But what is the nature of the reservation made by Colonel Crauford?—It is a reservation of a power to do on deathbed what the law says he shall

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not do in that situation. He might reserve a power to alter his former disposition at any time of his life, which was a reservation against the disponee; but he could not reserve a power against the heir at law to do a deed which was contrary to law.

"I may illustrate this, by mentioning an instance where Lord Hardwicke determined a similar question upon a similar point of law. A person conveyed her estate to her daughter, an infant, with power to dispose of the same during her minority, or to devise it by will for certain purposes. The daughter was a grown infant, and was under coverture. After the mother's death, the infant's husband got her to grant a conveyance to his creditors, which was a different purpose from those pointed out by the mother. The daughter afterwards devised her estate by will, and died before the age of twenty-one years. It was contended in this case, that though the daughter was an infant, yet what she did in execution of the power granted by the mother, must be held valid. Lord Hardwicke appears to have been at first caught with the argument; but he was afterwards clear, that the powers mentioned in the mother's conveyance were contrary to law, and though an infant of twenty years had a greater capacity of mind than one of tender years, yet by law they were under the same disabilities. The same mode of reasoning applies to the case now before us.

"It appears that the judgment of the Court below must have proceeded on a fallacy. The deed in favour of Mr. Coutts being executed on deathbed was a nullity; the deed in favour of Sir Hew was also a nullity, because it was revoked both expressly and by implication. But the Court, in some singular way, by splicing these two nullities together, which, taken singly, were of no effect, formed a deed carrying off the estate from the heir, though against a positive law.

"The respondent founded part of his argument upon what is termed in Scots law the maxim of *approbate and reprobate.* Says Mr Coutts, "if you approbate the revocation of the deed to Sir "Hew, contained in the posterior deed in my favour, then you "cannot reprobate the other claims of that deed." But this is false reasoning; the Court cannot say to the heir at law under what deed do you claim? It is enough for her to say, God and nature have made me heir at law; show me by what deed my right is cut off. The title of an heir at law is always complete, insomuch, that a conveyance or devise to such heir in fee is held null and of no avail. The law of England, in such a case, says the heir is in by *descent* and not by *purchase.*

"Having stated so much of the argument in the present case. I must now mention the doubts that has occurred to me upon the subject. I cannot concur in the judgment which has been pronounced; and if I had been sitting as sole judge in a court of law, bound to

act according to the dictates of my conscience, I must have determined against the judgment of the Court below. But the case is different here; when I am to state what I conceive is fit to be done, I cannot arrogantly desire that my opinion should be held better than that of the Court of Session; and, on a point of Scots law of great importance to the public, assert that they have been mistaken.

"A matter which I have yet to mention, appears to have biassed the Court considerably. Within these last twenty-five or thirty years, an attempt has been made to remedy an inconvenience in conveyancing, which was a good deal felt. In Scotland every security on real estate is itself real. Persons in this country having money to lend, are informed that the titles to estates in Scotland are clear, and that interest is there well paid; but they are staggered when they learn that they cannot dispose of such securities by will. A desire at first prevailed to have this matter settled by act of Parliament, but it was not effected. The present Lord President of the Court of Session, and the late Lord Justice Clerk, who was eminent for his knowledge in conveyancing, thought they could do away this difficulty, and still make a good security, by creating a trust, and so reserving a power to devise by will. I am apprehensive that the decision in this case would involve questions relative to the securities so vested in trustees; and, therefore, I feel the more delicacy with regard to it, where the consequences might be so widely extended, and so disagreeable.

"I have considered this point along with the noble and learned Lord already alluded to, and we agree in opinion, that it should be regulated by an act of Parliament, declaring that money secured on real estates should still be considered, and be devisable as money, though descendible to the heirs at law, as in mortgages in fee in this country.

"Upon the whole, my opinion is, that the case should be remitted to the Court of Session, with a direction to them to reconsider their judgment. I think a future consideration of it may open and enlarge the views of the Court; for, upon a part of the cause, subsequent to that now appealed from, they preferred the heir at law, and they must then have entertained an idea of the case which was not consistent with their former decision."

It was accordingly

Ordered and adjudged that the cause be remitted to the Court of Session, with a direction to re-hear the parties upon the interlocutors complained of.

For the Appellants, *R. Dundas, W. Grant, Ad. Rolland, Rob. Craigie.*

For the Respondents, *T. Erskine, Wm. Adam, Henry Erskine.*