WILLIAM MOODIE, an infant, the representative of Mrs. ELIZABETH CRAUFURD, otherwise HOWIESON, Widow, deceased, by the Reverend JAMES MOODIE, his father, and WILLIAM BEVERIDGE, Trustee of the said Mrs. E. CRAUFURD, } *Appellants;*

THOMAS COUTTS, Esquire, Banker in London, *Respondent.*

BY REVIVOR.

COLONEL CRAUFURD, being possessed of the estates of Craufurdland and Monkland, in the county of Ayr, and of certain superiorities in the county of Renfrew, all of which he held in fee simple in the year 1771, executed a disposition of the estates of Craufurdland and Monkland in the following terms: " In favour of myself in liferent, " and to the heirs male lawfully to be begotten of my " body; whom failing, to Sir Hugh Craufurd of Jordan- " hill, baronet, and the heirs male lawfully begotten, or " to be begotten of his body; which failing, to the heirs " male lawfully begotten of the now deceased William " Craufurd, merchant in Glasgow, my cousin; which " failing, to the heirs male lawfully begotten of the also " deceased John Craufurd, late surgeon in Glasgow, his " brother; whom all failing, to my own nearest heirs and " assignees whatsoever in fee, heritably, and irredeem- " ably, all and whole, &c.

" Providing and declaring, as it is hereby expressly " provided and declared, that notwithstanding the right " of fee and property of the lands above disponed is " hereby conceived and taken in favour of the heirs male " of my own body; whom failing, to the heirs male of the " several other persons before mentioned, substituted to " them, and that heritably and irredeemably; yet, never- " theless I do hereby reserve to myself full power and " liberty at any time of my life, *et etiam in articulo mortis,* " to alter, innovate, annul, and make void these presents, " either in whole or in part, and to infringe upon, or " totally change the foresaid series of heirs, and course

CRAUFURD v. COUTTS.

" and order of succession above devised; as also to wad-
" set, contract debts, and grant heritable bonds or other
" securities upon the lands and others above disponed,
" as I shall think proper, and burden and affect the
" same to what extent I may see necessary; and sick-
" like to sell, alienate, and dispone the haill foresaid
" lands or any part thereof, and in general to do every
" deed and exercise every act of property that any un-
" limited fiar by law can do; and that without the
" advice or consent of the heirs male of my own body, if
" any there shall hereafter be, or of the other heirs male
" substituted to them in the order above mentioned, to
" be asked or obtained for that purpose; as also not-
" withstanding any charter or infeftment that may have
" followed hereupon."

This deed, which was executed by Colonel Craufurd in *liege poustie*, was not delivered to the disponees, or any person for them, but remained in the repositories of the disponer.

On the 13th of February 1793, Colonel Craufurd executed a deed by which he conveyed the estate of Craufurdland to the Respondent: " For the love, favour,
" and affection I have and bear to Thomas Coutts, Esq.
" banker in London, and to the end that all disputes
" and differences which might arise upon my death
" touching the succession to my estate and means, may
" be obviated and prevented," &c. After conveying the lands and estates of Craufurdland, and after providing for the payment of Colonel Craufurd's debts, funeral expenses, and legacies, the deed declares that the Respondent and his heirs, succeeding in the estate of Craufurdland, shall assume and bear the surname and arms of Craufurd of Craufurdland.

The deed also contains a clause in the following words: " And *I hereby revoke* and recall all former dis-
" positions, 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 Hugh Craufurd of Jordan-
" hill, 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 " foresaid."

This deed also conveys to the Respondent the superiorities in the county of Renfrew, which were not conveyed to Sir Hugh Craufurd by the former disposition in the year 1771.

Colonel Craufurd died on the 19th February 1793.

Of the same date with the disposition of the lands of Craufurdland in the Respondent's favour, Colonel Craufurd executed a separate deed, by which, without communication with the Respondent, he conveyed to him the lands of Monkland, in consideration of a sum (not paid) of 5,000*l.* sterling, as the price thereof. As soon as Colonel Craufurd had executed these deeds, he wrote to the Respondent and desired him to send his bond for 5,000*l.* as the price of Monkland; and the Respondent accordingly, on the 18th of February 1793, executed a bond for that sum in favour of Colonel Craufurd, as the price of these lands, and sent it to his agent Mr. James Dundas, writer to the signet, to be exchanged for the disposition of Monkland. Colonel Craufurd died before that bond arrived in Scotland.

On the 17th May 1793, the Respondent was duly infeft in the lands of Craufurdland and of Monkland.

Afterwards Mrs. Howieson, who was the aunt and heir at law of Colonel Craufurd, (with William Beveridge, writer to the signet, her trustee) brought an action of reduction before the Court of Session in Scotland, for reducing and setting aside the disposition in 1771, in favour of Sir Hugh Craufurd, and the two deeds executed in 1793, conveying the lands of Craufurdland and Monkland to the Respondent.

The process of reduction came before Lord Stonefield, as Lord Ordinary, who, after hearing parties, took the cause to report; and on advising informations, the Court of Session pronounced the following interlocutor: " Upon June 12, 1795. " the report of the Lord President, in absence of Lord " Stonefield, and having advised the informations for the " parties, petition for the pursuers, and additional infor- " mation for them, the Lords sustain the reasons of re- " duction in so far as they respect the superiority of the

CRAUFURD v. COUTTS.

" lands in the county of Renfrew, contained in the char-
" ter, 12th February 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 Craufurdland, and
" others, contained in the disposition by the late Colonel
" Craufurd to the defender Thomas Coutts, of date 13th
" February 1793; assoilzie the defender, and decern:
" Find that the alleged sale of Monkland, set forth in
" the other deed of the same date, 1793, was an un-
" finished 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 Lorship, to hear
" parties procurators upon the claim competent to the
" pursuers under the disposition and tailzie 1719," and to
" do therein as he shall see cause."

The disposition, so far as concerned the superiorities in Renfrewshire, was reduced, because these were not contained in the deed 1771; and the Respondent acquiesced in this part of the judgment.

The pursuers complained of this interlocutor, by a reclaiming petition, in so far as it sustained the conveyance of the lands of Craufurdland in favour of the Respondent, and prayed the court " to reduce, decern, and declare
" in terms of the libel; and, secondly, to find that neither
" Sir Hugh Craufurd, nor any of the persons called by
" the deed 1771, have any right to the lands in question,
" but that the same belong to the petitioner as the just
" and lawful heir therein."

The Respondent put in his answer, and the court pro-
Nov. 17, 1795. nounced the following interlocutor: " The Lords having
" advised this petition, and the additional petition, with
" the answers thereto, they adhere to the interlocutor
" reclaimed against, and refuse the desire of these
" petitions."

Mrs. Howieson, and her trustee, appealed from the interlocutors of 12th June and 17th November 1795, in so far as they repelled the reasons of reduction respecting the disposition of the lands of Craufurdland. This appeal was heard at the bar of the House of Lords;
July 11, 1799. and on the 11th of July, 1799, Judgment was pro-
Judgment in the 1st Appeal. nounced; " Whereby it was ordered by the Lords Spi-
" ritual and Temporal in Parliament assembled, that the

" cause be remitted back to the Court of Session in " Scotland, and that the said court do rehear the parties " upon the interlocutors complained of on the said ap- " peal."

In consequence of this remit, parties were heard in presence of the Court of Session, and memorials were afterwards ordered, upon advising which, this interlocutor was pronounced: " The Lords having resumed conside- " ration of this cause, and in obedience to a remit from " the Most Honourable the House of Lords, having " again heard counsel for the parties upon the interlocu- " tors complained of in the appeal to that Most Honour- " able House, and having advised the mutual memorials " for the parties, they adhere to these interlocutors, " assoilzie the defender from the reduction, in so far as " concerns the lands of Craufurdland, and decern."

Feb. 3, 1801. Interlocutor appealed from.

Mrs. Howieson and her trustee also brought their appeal against this interlocutor, and the two former interlocutors pronounced in this cause, contained in the former appeal; and Mrs. Howieson having died, the appeal was revived in the name of the now Appellant, the infant, her grandson and representative.

On the 11th of July 1799, some time after the argument upon the first hearing in the House of Peers, Lord Rosslyn moved the judgment in the following terms:—

The *Lord Chancellor*:—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 communications with persons conversant in the law of Scotland, who were present at the hearing, with a noble and learned Lord*, 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 persons, and I was favoured with the result of the opinions they had formed.

11 July, 1799.

These opinions were not uniform. If they had all gone in one course I should have deemed that the safe mode

* Lord Thurlow.

CRAUFURD v. COUTTS.

for you 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 Craufurd possessed an estate, which he destined by deed, several years ago, to Sir Hugh Craufurd, who was not his heir. This deed remained in Colonel Craufurd's hands undelivered; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hugh. 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 have read cases where it was treated with great respect by Lord Hardwicke. By that law no deed is valid against the heir if executed on death-bed, that is, if the grantor 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 regulations; it is also highly favourable to the dying man, that his last moments should 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 mischiefs 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 Craufurd entertained a purpose that Sir Hugh Craufurd, 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 Hugh, and by 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 4,000 *l.* or 5,000 *l.* 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 tobe 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 Crawfurd'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 death-bed; and contending, that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hugh Craufurd 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 Hugh having stated his argument that if his deed was not revoked that estate must belong to him, the Court found that the heir was entitled to it, the deed to Sir Hugh being expressly revoked.

That determination was posterior to the decision which forms the subject of the present appeal in the other part of the cause, and Sir Hugh'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

CRAUFURD v. COUTTS.

confused mode of reasoning, to be of this nature: "It is "true, an heir at law has a right to set aside deeds exe- "cuted on death-bed; but what right have you in the "present case? Sir Hugh 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. Coutt's "favour. Sir Hugh is a bar to you; but as the intention "of the deceased was not in his favour, therefore "Mr. Coutts's right is against him."

The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about twenty-five years ago, there occurred a case* where a person possessed of two estates, *A.* and *B.*, by one deed conveyed both estates to certain disponees; and by a second deed executed on death-bed he conveyed the 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 death-bed deed, though ineffectual as a conveyance, was sufficient as an *implied revocation* of the former deed with regard to that estate; and he supported the first deed as to the other estate. This judgment was altered by the Court upon an appeal to them; and it was determined that the death-bed deed was effectual, on the 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 death-bed; and that if the death-bed 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 deed was revoked, and that the posterior one must take effect.

Another distinction was taken in the present case, namely, that though Colonel Craufurd being in death-bed 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 Hugh Craufurd the volunteer. My objection to this is,

* Rowan *v.* Alexander, 22 November, 1775.

that such a resignation cannot be allowed. A man may reserve a power to charge 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 Craufurd? it is a reservation of a power to do on death-bed what the law says he shall 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 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 her 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 her mother must be held valid. Lord Hardwicke appears to have been at first caught with this argument, but he was 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 in a fallacy. The deed in favour of Mr. Coutts being executed on death-bed was a nullity; the deed in favour of Sir Hugh 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.

* Hearle *v.* Greenbank, 3 Atk. 695.

CRAUFURD v. COUTTS.

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 Hugh, contained in the "posterior deed in my favour, then you cannot reprobate "the other clause 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 have 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 deiret 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 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, 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. CRAUFURD v. COUTTS.

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 descendable to the heir 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 re-consider 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.

Ordered accordingly.

After the remit and judgment in the court below, and the argument upon the further hearing in the House of Peers, Lord Eldon, at the end of the session of 1803, delivered the following opinion:—

The *Lord Chancellor*:—

This is a cause which has undergone more consideration than almost any which I remember in this place. I had hoped I should have found it in my power before the end of the present session of Parliament to have made a distinct proposition to you, either for affirming or reversing the interlocutors pronounced in this cause, but I have not yet been able to form an opinion to which I can give the character of judgment. 6th August 1803.

I have thought upon the cause with much anxiety again and again, but am not yet in possession of some facts, the knowledge of which would enable me the better to form my own opinion. I am aware, also, that some others of your Lordships (all now absent) whose sentiments are much attended to on such subjects, are not of one opinion in this case. One * of the noble and learned

* Lord Rosslyn.

CRAUFURD v. COUTTS.

persons to whom I allude formerly considered this case very minutely, and I understand adheres to his former opinion, maintaining it on the same grounds; another † who attended the pleadings in this cause, though now necessarily absent, has inclined, I believe, to think that the present case is, in substance, though not in mode and form, no more than other cases of exception out of the law of death-bed; and a third ‡, who from indisposition has not been present at your deliberations during the present session, but who, whether absent or present, never fails to attend to what relates to judgments to be pronounced by this house, entertains, as well as myself, considerable doubt, whether, in a case of this sort, mode and form is not of the highest importance.

At one time I thought that it might be advisable to remit this cause to the Court of Session for further consideration, not recollecting the great consideration it had originally received in that court, and after it came here how much it was considered by the noble and learned lord then upon the woolsack. From the very mature discussion too that it has received since, and the great expense incurred by the parties, it does occur to me that future deliberation may be sufficiently employed, and necessary information may be otherwise obtained upon the points I am to allude to before the next session of Parliament. I have doubted the propriety of remitting also, because it is utterly impossible to do justice to the merit which I conceive belongs to the Court of Session for the learned and painful discussion given to this case, and the mode in which they have discharged their duty with regard to it.

This cause arises out of the settlement of a Colonel Craufurd. He was seised of two estates in Scotland, Craufurdland and Monkland. In 1771, he executed a settlement, conveying both these to himself in life-rent, and to Sir Hew Craufurd and others, in fee. That deed contained a clause dispensing with the delivery, and he reserved power to alter it at any time of his life *et etiam in articulo mortis.* The adoption of such a clause has been explained to arise out of what is termed in Scotland *the law of death-bed.* To avoid what were supposed to be inconveniences flowing from that law, it had been consider-

† Lord Alvanley. ‡ Lord Thurlow.

ed as law, that if a former deed had been executed in due time, a person might execute another even in lecto, which in given circumstances would be effectual. By connecting the latter with the former the disposition was considered to have been made at the date of the former, and so not to be challenged as not made in due time; but in most cases at least the former has been a deed valid, effectual, and subsisting in operation, at the death of the grantor.

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

The deed of 1793 contains the following clause, on which the question turns: [here his Lordship read the clause of revocation.]

Of the same date the Colonel executed a conveyance of his estate of Monkland by way of bargain and sale; but this was a fictitious transaction. The reason of his choosing this mode of making a settlement of that estate has not been distinctly explained. The disposition of 1771 was not then lying by him, and he did not recollect, perhaps, that Monkland also was included in that deed. He wrote a letter to Mr. Coutts to send him a bond for 5,000*l.* as the price of this estate, which, it is said, was accordingly executed; but it is not necessary at present to make any further statement on this point.

The heir at law then brought her action to set aside these deeds. It has been correctly explained to us, that the word *heir* is understood in Scotland in a different sense from what it is in this country. In Scotland an heir may be the person pointed out by the destination of former settlements of an estate. In this country the heir takes purely by descent; and the person taking by a destination is considered as a purchaser; as a person not

CRAUFURD v. COUTTS.

taking in the quality of heir. Mrs. Howieson was the person destined to the succession by the settlement of the estates prior to 1771, she contended that the deed of 1771 was made a nullity by the deed of 1793, and that the deed of 1793 also was a nullity, being executed upon death-bed; and that you would not, (in the phrase of the noble and learned Lord who formerly in this house considered this case,) by splicing two nullities together, make a valid conveyance of the estate to Mr. Coutts.

In this action, Mrs. Howieson called Sir Robert Craufurd, as well as Mr. Coutts, as defenders. [Here his Lordship read the conclusions of her summons, Mr. Coutts's defences, and the interlocutors, 12th June 1795, and 17th November 1795.]

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

Mrs. Howieson also brought her appeal against the judgment as to the Craufurdland estate. When the cause came to a hearing in this house, very great attention was paid to it. I hold in my hand a note of what fell from the noble and learned Lord then on the Woolsack, when the cause was sent back to the Court of Session, from which I shall read some extracts. [Here his Lordship read great part of the notes of Lord Rosslyn's speech as before stated.]

I have also the notes of the opinions formed by the Judges of the Court of Session, as they have been handed

to us, and of what passed in consequence of your remit. I should be wanting in due respect to that Court if I did not state it as my opinion that it is impossible to have discharged a duty more carefully, more anxiously, and more sedulously, than the Court have discharged theirs in this case. They differ considerably in opinion; but it has been the opinion of the majority that the former judgment was right. From these notes I cannot, however, accurately and precisely collect their respective opinions upon some (as they appear to me) important points.

The cause came again here by appeal, and has since been most ably argued by advocates from Scotland: the cases, whether similar or analogous, have been fully sifted, and the law of death-bed, and its effect on the public convenience, fully examined.

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

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

CRAUFURD v. COUTTS.

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

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

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

It is said, if you may disappoint your heir in this way, why not also by the mode used in the present case? if by giving a title to an estate burdened to its taker, or to

be wholly conveyed away, why not by a death-bed deed give the estate itself, a *liege poustie* deed having been once executed? My difficulty is to admit that a person can do what he has the power of doing by all the different modes in which he pleases to do it. The principle of the former cases appears to go only to this, that the grantee of the first deed would take if the death-bed deed was not effectual, and that the heir *alioqui successurus* had nothing to complain of in such a case, and the grantee of the first deed could not make any complaint. Now, though it is true that the present decision puts Mr. Coutts's case on the same footing, yet I do not find either in the notes of the Judges, or in the arguments of counsel at the bar, what is precisely the effect of the deed of 1771 in contemplation of law at the grantor's death. If a title to any estate is at the grantor's death left in the grantee of that deed, the case falls under one consideration; but if that deed at the death of the grantor was absolutely revoked, it is in effect the same case as if the *liege poustie* deed had been a disposition to the heir *alioqui successurus*, or as if it had never existed. When the interest under the death-bed deed knits and attaches itself to an estate to be claimed under the former, there is a *liege poustie* deed disposing of the title; but if there is no such estate to which that interest can attach, there is nothing but a mere death-bed deed.

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

CRAUFURD v. COUTTS.

as entitled in law to any estate or interest in the property in order thereout to make good Mr. Coutts's title.

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

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

I may mistake this matter very much, but I have not been able to find any case where the law of death-bed did not take effect in favour of the heir, if the *liege poustie* remained at the grantor's death, without any effect as an instrument through which the title must be made, and the notes to which I allude, as well as the argument at the bar, contains an assertion that Mr. Coutts must make up his title under the deed of 1771 without explaining how, and the contrary assertion also, that he need take no notice whatever of it. As to these points

I wish for further satisfaction. If he need take no notice of that deed, I doubt whether authority has gone the length of this judgment. If he must take notice of it, in what way he is to do so has not been explained, I admit that it was Colonel Craufurd's intention to have revoked only *ad hunc effectum*, but I question if the purpose of the revocation be sufficient to sanction a new mode of conveyancing, if it be such; for I do not presume at present to say whether or not the meaning of the words used is understood to be such as puts the judgment on this ground, and this only, that because there was once, though not at the grantor's death, a *liege poustie* deed, therefore the death-bed deed is good.

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

If I were to intend to revoke a will already formally made in this country, meaning at the same time to execute another in due form, and had such will prepared and ready for execution, but was arrested by the hand of death before completing it, we hold in that case that the former will is not revoked, because the revocation is not complete, and the devisee under the former will would take. Neither of these cases so put from our law would support by analogy the present judgment. In the former case, the heir is let in; in the latter, the first devisee; this judgment excludes both the heir and Sir Robert Craufurd.

I may state unreservedly upon this part of the case, that I am not much impressed with the consideration of it as being an evasion of the law, or not such. There seems no doubt but that, in the circumstances of the case, it

CRAUFURD v. COUTTS.

was completely in the power of Colonel Craufurd to have disappointed the law *; and I consider the question as a question whether he can do it in this mode: Whether he can do it without having a *liege poustie* deed in actual effect at his death? The suggestion so often made, that the heir was already cut out by the *liege poustie* deed, appears to me to assume all that is in dispute, for the heir cannot be said to be cut out till the death of the grantor, and therefore it may be said, that if at that time there is no effectual *liege poustie* deed, there was never any *liege poustie* deed that affected his titles.

Another doubt with me is, whether this case has been decided by the court below, on the point of approbate and reprobate, or not. I see in the notes of the individual Judges opinions that some of them have laid great stress upon this doctrine, though others thought differently of it; but the judgment of the Court as to that point I cannot collect. If the judgment were put on that alone I should entertain great doubt of it. It seems very nearly to resemble the doctrine of election in this country, though I am aware of the difference between what is understood by the word *heir* in Scotland, and what we understand by that term. The heir has been stated to be whom God and nature have made such: I should say that the heir in England is a person succeeding by the mere operation and provision of the law.

In our doctrine of election we hold, that if any person takes benefit under any instrument he must submit to the instrument altogether; but if I give a legacy in money to my heir at law, without any express condition annexed to the legacy, and give by the same will part of my real estate to another, and this without the attestation of three witnesses, the heir is entitled to take the legacy; and at the same time to say, this is no good devise as to the land, and accordingly, in such a case, the heir would take the estate. So in the case of a devise against the Statutes of Mortmain, he would take against

* The right of the heir stands upon decision. The decision which first gave the land to the eldest son, rather than to all the sons or children, and the decision which prevents a man from disinheriting his heir in his last sickness, within sixty days of his death, are no more law than the decision that he may do so, if he has previously executed a deed in *liege poustie*, which is unrevoked at the time of his death.

such a devise, though he claimed under the same will, for these are not cases of election.

CRAUFURD v. COUTTS.

If the English doctrines are to rule, this is nothing like a case of election. The heir here does not take the estate or benefit under the instrument, but under the law. If a testator in this country was required to make his will of land 60 days before death, it would be quite competent for the heir to say, This is a death-bed deed; I take the benefit of the law, and I take the land under the benefit of the law. And he might also take personal benefits under the will. There may, however, be a considerable difference, attending to the distinction of character between an heir in England and Scotland; and it is impossible not to see that some cases have been decided in Scotland, which very nearly support the doctrine of approbate and reprobate, as applied in this case.

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

If it were my duty to decide the present case this day, I should feel it a very irksome task to pronounce that the judgment was right or wrong. I believe that my

CRAUFURD v. COUTTS.

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

*Cause adjourned accordingly.*

The *Lord Chancellor* (Eldon.)

March 1806. This is a cause which has already occupied a great deal of attention from the Court of Session and from you. It originates in the settlements executed by Colonel John Walkinshaw Craufurd, the representative of an ancient and respectable family. He was seised and possessed of two estates, Crawfurdland and Monkland, in the county of Ayr. In 1771 he executed a deed of settlement to keep up the representation of his family of his estates of Craufurdland and Monkland to himself in life-rent, and the heirs of his body in fee, whom failing, to Sir Hugh Craufurd, and the heirs male of his body, whom failing, to a certain other series of heirs.

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

This instrument appears to be evidence of a purpose on the part of Colonel Craufurd to defeat the heir *alioqui successurus* from 1771 down to 1793. At the same time it is fair to observe that this case will fall to be decided as if the deed of 1771 was executed only 61 days before the death of the testator.

When, as is admitted on all hands, Colonel Craufurd was on death-bed, he executed a new settlement in Feb. 1793, of the estate of Craufurdland, in favour of Mr. Coutts, his heirs and assigns, containing a procuratory

of resignation, a precept of seisin, and other usual causes, (the same as in the former deed for vesting the estate feudally in the disponee,) we shall have to consider whether this deed be one altogether substantive, or if it be to be taken in connection with the former deed.

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

With regard to the estate of Monkland, this deed did not attempt to convey it to Mr. Coutts. I call your attention to this at present, as I shall afterwards have occasion to refer to it more particularly when considering the principle of the interlocutor as to Monkland.

[His Lordship here read verbatim the disposition of Crawfurdland to Mr. Coutts; as far as the clause of revocation.] You will observe that this was a deed under conditions, reservations, and declarations, under which Mr. Coutts might have declined to take the estate. Hitherto it has every appearance of a substantive and independent disposition. [He here read the clause of revocation.] This clause, in revoking the former settlement executed by Colonel Craufurd, of course revoked also the procuratories and precepts contained in the former deeds.

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

Colonel Craufurd died soon after; but before his death, and of the same date with the deed of 1793, he executed a conveyance of Monkland, bearing on the face of it the receipt of 5,000 *l.* said to be paid by Mr. Coutts as the price thereof. At the same time he wrote a letter to Mr. Coutts to send him his bond for that sum. If that bond was sent, it did not reach Colonel Craufurd in time, for he died six days after the date of the deed.

I must here remark the difference of the situation of the two estates of Craufurdland and Monkland. The heir *alioqui successurus*, by the judgment of the Court below, got this last estate. In their interlocutor of the 31st of Jan. 1798, the Court found that the deed of 1771 was effectually revoked by the clause of revocation con-

CRAUFURD v. COUTTS.

tained in the deed of 1793, in consequence of which the estate of Monkland was adjudged to the heir. It was contended, that the principle of the decision as to the estate of Monkland was directly contrary to that in regard to the estate of Craufurdland.

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

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

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

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

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

After Colonel Craufurd's death, Mrs. Howieson his aunt (not as we understand the term, but the heir *alioqui successurus*, as termed in Scotland) taking under former destinations in her favour, claimed these estates. In

prosecution of her claims she executed a trust-bond, as usual in such cases, on which an adjudication was obtained, and afterwards an action of reduction was brought against Sir Hugh Craufurd and Mr. Coutts. [His Lordship here read the conclusions of the summons of reduction, noticing the more especial ground on the law of death-bed. He next read the interlocutor of the 9th of June 1795, sustaining the reasons of reduction as to the superiorities which were not in the deed of 1771, and repelling them as to the estate of Craufurdland, and the interlocutor of the 17th Nov. 1795, adhering thereto.]

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

Then came the first appeal here, which was heard and remitted back to the Court of Session; Lord Loughborough was then upon the woolsack, and another noble and learned Lord concurred with him in the opinion which he had formed. These two great and eminent persons were not content to discuss this question as one depending merely on the construction of the instruments which I have stated, but conceiving that there was in the principle of the judgment something vicious in regard to the law of death-bed, they were still anxious not to decide it, fearing that their own view of the case might bring into danger a system of securities as to trust-bonds, then of some standing in Scotland. The substance of the opinion delivered by Lord Loughborough in that case was as follows:—

[Here his Lordship read the same, of 16th Oct. 1800, commenting upon it as he proceeded.]

On the case of *Rowan* v. *Alexander*, quoted by the noble and learned Lord, I have no scruple to add the authority of my opinion to his; and if that case had come before me in a court of appeal in 1775, when it was pronounced, it would have been impossible for me to have given my assent to the judgment of the court in that case, reversing the judgment of the Lord Ordinary. I see

CRAUFURD v. COUTTS.

the Lord Justice Clerk Miller says, in that case, as a ground of his opinion, in which the majority of the court concurred, that as the grantor might have burdened his estate to the full amount of its value, he might therefore give it to the disponee under the death-bed deed. But I by no means coincide with the doctrine, that because you may do a thing in one mode, therefore you may do it in any mode.

It is perfectly settled in this country, that in a will devising land, which must be executed in the presence of three witnesses, you cannot reserve a power to devise any part of it by a will executed in the presence of two witnesses only. We may devise land by will to be charged with legacies, or to trustees, to pay such sums of money as the testator may direct; and such legacies may be granted, or directions given, in any writing executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land, but not one particle of the land can be devised by our law but by a will in the presence of three witnesses. But the distinction goes a great deal farther; though the whole value of the land may be given in legacies, yet after giving legacies to a certain amount the surplus cannot be given away in this manner. The surplus is held to be land, and is not thus to be disposed of. These cases strongly prove the distinction between a power of giving by a certain mode, and giving by any mode.

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

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

If it be asked what he did not mean to revoke, I understand it to be supposed that he did not mean to revoke

that which gave a right to the disponee in the deed of 1771, to adjudge from the heir at law if the disponee in the second deed should refuse to take. If Mr. Coutts should be unwilling to take under the deed of 1793, is there a right under the deed of 1771 to adjudge the *hereditas* against the heir? If such a right could not exist under the deed of 1771, under what pretence does that deed exist to bar the right of the heir?

Whatever I might have been disposed to decide in such a case as that of *Rowan* and *Alexander* in 1775, I should be one of the last men in the world, in 1806, to disturb that decided case, in so far as it applies to a case of implied revocation.

It appears from what was said by Lord Loughborough that those noble Lords who coincided in opinion with him were inclined to consider this as a case of fraud on the law of death-bed. My view of it is different; that this is not a case of fraud, and that the Appellant's case cannot be made out upon that ground.

[His Lordship here briefly stated the case of *Hearle* and *Greenbank* (Atk. p. 695.) mentioned in the note of Lord Loughborough's speech.]

That Noble Lord concluded with saying, that he was afraid a reversal of the judgment of the Court then under consideration, might trench upon the system established with regard to those trust-bonds to which I have alluded; and therefore he thought it better to send it back to be re-considered. He added, that Lord Thurlow and he were of opinion that it might be proper to prevent all question upon these trust-bonds by an Act of Parliament declaratory of the law. It appears to me that this case may be decided without touching any of these trust-bonds.

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

They re-considered this case in all the points of view in which it had been taken up in regard to the alleged fraud upon the face of death-bed; the whole principles of that law, and the particular facts and circumstances of the case. They at length narrowed the case very much from what had formerly been discussed, and put it upon what

CRAUFURD v. COUTTS.

I think its true merits, the effect of the second deed upon the first through the clause of revocation.

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

A narrow majority of the Court held, that under the deed of 1793 the deed of 1771 was not revoked absolutely, but under a qualification, and they therefore held, that if the death-bed deed of 1793 was challenged by the heir (for a death-bed deed is not in any view a nullity, but only liable to effectual challenge by the heir) the disponee under it might found on the prior deed in 1771, and insist, with effect, that the heir had no interest to challenge the later deed, that if it was set aside Sir Robert Crawfurd would have (as we should say in this country) a right to the estate; or, as they would say in Scotland, would have a personal right of action to obtain the estate. The true question in this case, therefore, is, whether or not, in a reduction brought by the heir of the death-bed deed of 1793, her claims could be repelled by any thing the disponee under it could urge upon the deed of 1771, as at the death of the grantor.

If he could so repel the claim of the heir, he must prevail in this action; if he could not, then the present appeal would be well founded.

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

12th March 1806.

*Lord Eldon*, [after reverting to the opinion delivered in part by him as above.]

The questions in this cause were anxiously discussed, and considered both before and after it was remitted to the Court below, by noble Lords, some of whom are now no more. One of these noble Lords (Rosslyn,) entertained but one unqualified opinion upon the subject throughout. He held that the settlement of 1793 was a fraud upon the law of death-bed, and that that deed was an unqualified revocation of the deed executed in 1771. His Lordship,

therefore, observed in strong, although not in legally accurate, language, that it was impossible to splice two nullities in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the death-bed deed, because it was *primâ facie* a good deed, and was alone reducible by the heir, who was *alioqui successurus*. But his Lordship's meaning was this, that the first deed *being revoked was an absolute nullity*, and if the death-bed deed *could not knit itself upon the first*, it was a *nullity* likewise in the popular sense of the word, as it could convey nothing. Such were the sentiments of the noble Lord, which coincided with those of several Judges in the Court below, and were supported there by very strong arguments.

Another noble Lord *, who is also now no more, seemed to regard the question in another view. So far as I could collect his sentiments he did not consider the death-bed deed as an invasion of the law of death-bed, nor the *liege-poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought we should look at the effect of the two instruments taken together, and construe them so as that a disposition, which the disponer had a clear power to make, might be supported, and that the manner in which he did so was to be regarded as matter of form, and not of substance.

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

The case of *Rowan* and *Alexander*, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a death-bed deed, and why therefore not give

* Lord Alvanley.

CRAUFURD v. COUTTS.

the substance or land itself. But this is not so by the law of Scotland any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land, and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. You know very well that even the surplus money arising from the sale of land cannot pass without a will attested by three witnesses, because a Court of Equity considers that as land.

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

This proposition is to a certain extent true, but it is to be understood with various limitations and distinctions. It is true, that if a party sits down, meaning to revoke a disposition of his property, and by the same act, or as it is called *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose by a new disposition, the first is revoked however inadequate such new disposition may be to convey his property. Thus, if having made a will of land, I afterwards make another in which I revoke it, and give my land to a monk, or an alien, the revocation, is good although the devise is void, because the purpose was complete so far as it was in my power to complete it. In the present case, the purpose of the party to dispone his land anew was complete, which decides the case with reference to this argument.

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

I think that this is not a case where the doctrine of Approbate and Reprobate will apply. The heir does not

claim under the death-bed deed: The heir says, " your " deed does not give you a title unless you can show me " a deed executed in *liege poustie*, existing at the death " of the grantor: if there be no such deed, the deed exe- " cuted on death-bed is gone."

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

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

It is admitted that if a valid *liege-poustie* deed existed at the death of the grantor, the death-bed deed would also be good. It is to be observed, however, that this *liege-poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. This is obvious on principle—the stranger disponee is bound to hold good any power reserved against him; if such power be duly executed he cannot complain. This seems also to have been admitted by all the judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

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

The only question is, Has he executed that intention by effectual means? It is admitted on all hands, that Colonel Craufurd might have charged the estate vested

CRAUFURD v. COUTTS.

in the grantee of the *liege-poustie* deed to its full value in favour of Mr. Coutts, or he might have directed him to convey that estate to Mr. Coutts. The testator in doing so acts in affirmance of the estate vested by the *liege-poustie* deed, for the person to take by the death-bed deed could not call upon the disponee under the former deed to denude, unless the estate was vested in him. The author of the death-bed deed, in such a case, so far from revoking, asserts the validity of the *liege-poustie* deed.

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

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

Another case was put; it was stated, that the testator might have rendered the death-bed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the death-bed deed was found to be ineffectual. I do not mean to deny this. He would then have said, if my death-bed deed is not good, or if the disponee under it would not, or could not, take from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, "the estate is mine;" and he might have proceeded to connect himself with it by his procuratory and precept, or if none had been contained in his deed, by adjudication. In that case this would be the express meaning of the testator; I keep alive the former deed to all those purposes to enable the disponee, in the death-bed deed, to say to the heir that he has no interest to impugn the death-bed deed.

When I considered the cases of implied revocation,

(and I have never considered any question more deeply than the present,) I am free to say that I never could have assented to affirm the case of Rowan and Alexander if brought before me by appeal at the time when it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a manifest difference between what might have been fit and proper to be done when that case was recent, and what may be so at this day. No man can say that many titles may not rest on the principle of that case of Rowan and Alexander; and were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years. I allude to the trust-bonds which had been devised and approved of by the most eminent persons upon the Bench in Scotland.

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

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

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

In the present case, as appears to me, there are only two questions; 1st, Is the disposition of 1771 revoked

CRAUFURD v. COUTTS.

entirely? 2dly, Is it revoked *ad hunc effectum*, or *ad omnes effectus quoad*, this species of question.

The case of express revocation proves, (and the decision in this case, with regard to the estate of Monkland, is the strongest of them all) that if the heir is let in *pro brevissimo intervallo*, the intention or power of the grantor signifies nothing, though he had half a dozen ways of giving away his estate upon death-bed. It signifies nothing if this is not done *habili modo*. The cases of the destruction of the *liege-poustie* deed, though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

In the case of Monkland the Court seems to have had considerable difficulty with their own decision; more, indeed, than I feel with regard to it. The disposition of Monkland was by a different deed from that of Craufurdland. The former disposition of Monkland was revoked, that Colonel Crawfurd might dispose of it by a sale; and on the same day he executed a disposition to Mr. Coutts by such mode of sale, but before completing this purpose Colonel Craufurd died. We see here strongly that the power to give away in certain modes, and the intention, are nothing. The Court, in their judgment declared, that it was the testator's purpose to give to Mr. Coutts, but they found (in terms too general to reconcile that decision with the decision with regard to Craufurdland) that the deed of 1793 had revoked the deed of 1771, and therefore they give the estate to the heir.

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

In Scotland no man could make a valid *liege-poustie* deed in this form—"Know all men by these presents "that I do hereby reserve a power to dispose of my estate

"at any time of my life, *et etiam in articulo mortis.*" The *liege-poustie* deed must be some actual deed of disposition existing at the death of the grantor.

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

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

The question of construction, as to what the testator has said, arises upon this. He says, I don't intend that the disponee in the deed of 1771 shall take; nor that the deed of 1771 shall be *kept alive*, and that the disponee therein shall denude in favour of Mr. Coutts; but I do expressly revoke that deed, so far as conceived, in favour of the persons to whom it is granted; and I keep it alive only with regard to the powers to alter, innovate, and revoke therein contained; thereby reducing the deed to nothing but one containing a power to alter and revoke.

I never in this case could bring my mind to any other opinion, than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui suc-*

CRAUFURD v. COUTTS.

*cessurus*, because if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

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

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

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

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

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*Ven.* 14 *Mar.* 1806.

The Lords &c. find, that in this case, the question, whether the heir hath a title and interest to challenge the deed of 1793, as made on death-bed, depends upon the particular nature and effect of the several deeds executed by the late Colonel Craufurd, and especially on the nature and effect of the deed of 1793, regard being had to the particular terms of that deed, as

expressing the same to be a revocation and recalling of all former dispositions; and find, that the deed of 1771, though executed in *liege poustie*, ought not to be considered as being at the death of Colonel Craufurd, such a subsisting valid instrument or disposition executed in *liege poustie*, as that thereby the interest of the heir to challenge the deed of 1793, as to the lands by the same deed disponed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains in terms the most express revocation of all former dispositions, assignations, or other deeds of a testamentary nature, formerly made and granted to whatever person or persons preceding the date thereof, and particularly of the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null so far as they are conceived in favour of the persons to whom they are granted; and also find, that although the deed of 1793 contains a declaration that the former deeds should be valid, and sufficient to the extent of the powers therein reserved, to revoke, alter or innovate the same to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared so to be, or to be made the ground of a construction whereby such former deeds should be held to be valid, or sufficient in any respect in which they are, by the same deed, in express terms, declared to be null and void; and find, that although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together at the death of Colonel Craufurd, under any parts of the former dispositions so expressly revoked, and so expressly declared to be null and void, exist in any persons named in such former deeds any personal or other right in the lands by the deed of 1793 disponed to the defender, secure against the challenge of the heir, *ex capite lecti*, on which the disponee *in lecto*, under the deed of 1793, could be entitled to found as his defence against the reduction of the deed made *in lecto*; and find also, that as the deeds in this case are conceived as to the terms thereof, the disponees under the deed of 1793 cannot be considered as having title or right under the former dispositions, as if they had been named therein, or otherwise under the effect thereof; and find, likewise, that the heir is not excluded in this case from challenging the deed of 1793, *ex capite lecti*, and at the same time founding thereon, as revoking the former dispositions. And it is therefore ordered and adjudged, That the Interlocutors complained of, so far as they are inconsistent with the findings and declarations aforesaid be and the same are hereby Reversed; and it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be meet, regard being had thereunto.