

The Court pronounced the following interlocutor:—

“Refuse the appeal, and decern: Find the appellant liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Pursuer—Brand and M'Kechnie.
Agent—T. Lawson, S.S.C.

Counsel for Defenders—Watson and Balfour.
Agents—Rhind & Lindsay, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Jerviswoode, Ordinary.]

KIRKPATRICK v. KIRKPATRICK'S TRUSTEES.

Heir-at-law—Dispositive clause—Express and implied revocation—Heritage—Intestate succession—Deathbed.

A husband and wife conveyed the latter's heritage to themselves jointly and the survivor, whom failing to trustees for certain purposes, excluding the right of their only son; a year later they executed another deed, which, proceeding on the narrative that the property was the wife's own, varied the trustees, altered the beneficial interest of the beneficiaries and limited the husband's right to a liferent—this deed did not contain the word “dispone” in the dispositive clause. *Held* (*diss. Lords Deas and Benholme*), that the second deed, though inoperative as a conveyance of heritage, effectually revoked the first deed, and that the son was entitled to succeed to the heritage as his mother's heir-at-law, she having thus died intestate.

This was an action of declarator and reduction at the instance of Mr John Kirkpatrick, Advocate, and its object was to have it found and declared that the late Mrs Kirkpatrick, his mother, had in effect died intestate. The facts of the case were as follows. The late John Kirkpatrick, Advocate, formerly Chief-Justice of the Ionian Islands, married Miss Jean Glas in 1820, and in 1821 she succeeded to the heritable estates of her aunt Miss Janet Semple as heir-at-law. There was no antenuptial contract of marriage; the issue of the marriage was eight daughters and one son, the pursuer. On June 18, 1866, Mrs Kirkpatrick executed a trust disposition *inter vivos*, whereby she disposed her whole estates heritable and moveable to herself and husband and the survivor, whom failing to certain trustees for certain specified purposes. On March 4, 1867, she executed another trust-disposition with consent of her husband, whereby her estates were to be conveyed to different trustees, the interest of the beneficiaries under the deed of 1866 was altered, and the husband's right of fee limited to a liferent. The dispositive words in this deed were “give, grant, assign, convey and make over,” the word “dispone” being omitted. Mrs Kirkpatrick died on November 10, 1867. On June 26, 1868, Mr Kirkpatrick executed a trust-disposition and settlement of his late wife's property, on the narrative that he was sole fiar thereof. By it he disposed her whole heritable and move-

able estates to the trustees therein named, for purposes identical with or similar to those of Mrs Kirkpatrick's deed of 1867. He died February 10, 1871. The defenders, Miss Annabella Kirkpatrick and Sir James Alexander, were the accepting and acting trustees under the last named deed.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

“Edinburgh, 20th July 1872.—The Lord Ordinary having heard counsel and made avizandum, and considered the debate, productions, and whole process, including the joint minute, No. 19 of process, for the pursuer and the defenders, the Trustees of the Clyde Navigation, finds (1st) That the late Mrs Jean or Jane Glas or Kirkpatrick, mother of the pursuer, and spouse of the deceased John Kirkpatrick, advocate, formerly Chief-Justice of the Ionian Islands, and latterly of No. 39 Moray Place, Edinburgh, died on 10th November 1867; (2d) That no antenuptial contract of marriage was entered into between Mrs Kirkpatrick and her said husband, and that the pursuer is the only surviving son of their marriage, and heir-at-law of his said mother; (3) That Mrs Kirkpatrick succeeded as heir-at-law to the whole heritable estates of her aunt, Miss Janet Semple of Finnieston, Glasgow, and made up a title thereto in the year 1821, all as set forth in the record; (4) That by disposition and settlement (containing also a conveyance in trust) dated 18th June 1866, and with relative codicil of same date, recorded in the books of Session 10th May 1871, Mrs Kirkpatrick, with the special advice and consent of her said husband, and he for himself, his own right and interest, and they both with joint consent and assent, ‘for certain good and onerous causes and considerations,’ alienated and disposed, and gave, granted, assigned, conveyed, and made over to and in favour of them and the survivor of them, whom failing to Colonel Sir James Edward Alexander of Westerton, and the other parties therein named, in trust, for the uses, ends, and purposes therein mentioned, all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, then belonging to Mrs Kirkpatrick, or which might belong to her at the time of her death; and the said disposition and settlement also contains a clause in the following terms, viz., ‘Reserving always full power to me at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure.’ (5th) That by trust-disposition and settlement, executed by Mr and Mrs Kirkpatrick of date the 4th of March 1867, she, with the special advice and consent of her said husband, and he for himself, his own right and interest, and they both with joint consent and assent, ‘in order to regulate the management and distribution of the means and estate of me, the said Mrs Jean Glas or Kirkpatrick, after my death,’ did ‘give, grant, assign, convey, and make over’ to and in favour of Miss Annabella Kirkpatrick, their eldest daughter, and the other parties therein named, in trust for the uses, ends, and purposes therein mentioned, and to the assignees of the said trustees, heritably and irredeemably, all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, then belonging to

Mrs Kirkpatrick, or which might belong to her at the time of her death; and the said trust-disposition and settlement also contains a clause in these terms—viz., 'Reserving always full power to me' (Mrs Kirkpatrick), 'at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure.' (6th) That the said trust-disposition and settlement, while it contains no express revocation of the previous deed of 18th June 1866, varies from it as regards certain of its terms and purposes. (7th) That after the death of Mrs Kirkpatrick, her husband, the said John Kirkpatrick, executed a disposition, bearing date 26th June 1868 (being the first of the deeds to which the reductive conclusions of the summons apply); and, proceeding upon the narrative of the foresaid disposition and settlement of 18th June 1866, and of the said trust-disposition and settlement of 4th March 1867, and upon the further narrative that, with the view of carrying out the purposes intended by the said last-mentioned deed, he had resolved to grant the said disposition (which purports to be executed by him as the survivor of him and his said spouse, and as such the *fiar* of the heritable property and estate conveyed by the said disposition and settlement of 18th June 1866, and in virtue of the whole powers conferred upon him by the said deed) and by said disposition he gave, granted, assigned, and disposed to and in favour of the foresaid Miss Annabella Kirkpatrick and the other parties therein named, in trust for the uses, ends, and purposes mentioned in the said trust-disposition and settlement, and specified in the said disposition granted by himself, heritably and irredeemably, the heritable subjects therein particularly described, and which had belonged to his said spouse; and (8th) that the said John Kirkpatrick had previously, on 4th March 1867, executed a disposition *mortis causa* for the disposal of his own heritable and moveable estate, and that by codicil thereto, dated 23d March 1869, he left and bequeathed to his son, the pursuer, a free yearly annuity of £200 sterling during all the days of his life after the testator's death, and he by said codicil declared that the said annuity should form a burden upon 'the before-written conveyance, and upon my disponees under the same, and shall form a charge upon my estates, heritable and moveable, thereby conveyed;' and with reference to the foregoing findings, Finds, as matter of law, (first) that the foresaid trust-disposition and settlement of 4th March 1867 having been executed before the date at which 'The Titles to Land Consolidation (Scotland) Act, 1868,' came into operation, and Mrs Kirkpatrick having predeceased the date of the commencement of said Act, the terms of the said trust-disposition and settlement are to be construed and dealt with according to the law and practice subsisting before the commencement of said Act. (Second) That as the dispositive clause in the said trust-disposition and settlement does not contain the word 'dispose,' the said deed was ineffectual to convey the heritable estate belonging to Mrs Kirkpatrick. (Third) that the said trust-disposition and settlement must be held to have operated as a revocation of the previous disposition and settlement executed by the spouses on 18th June 1866. (Fourth) That in consequence of such revocation the late Mr Kirk-

patrick acquired no right or title through his survival of his said spouse to the fee of the heritable estate which belonged to her. (Fifth) That therefore the foresaid disposition executed by Mr Kirkpatrick after the death of his said spouse, bearing date the 26th June 1868, and purporting to convey as aforesaid the heritable subjects therein particularly described, and which had belonged to his said spouse, was ineffectual to convey the same, and that the pursuer as heir-at-law foresaid to his mother Mrs Kirkpatrick is entitled to sue for reduction of the said disposition, in so far as respects the said heritable subjects: And (Sixth) That the pursuer is not barred from challenging the said disposition in so far as regards the said heritable subjects by having accepted payment of the annuity of £200 provided to him as aforesaid by the codicil to said deed; therefore, and with reference to the preceding findings, and to the minute of restriction annexed to the summons, repels the defences stated on behalf of the defenders, the said Sir James Edward Alexander and Miss Annabella Kirkpatrick, Mr and Mrs Kirkpatrick's trustees; finds, decerns, and declares in terms of the declaratory conclusions of the summons now insisted in against them only, and as respects the said disposition by the deceased John Kirkpatrick, dated 26th June 1868, reduces, decerns, and declares in terms of the conclusions for reduction; further, and with reference to the foresaid joint-minute for the pursuer and the defenders, the Trustees of the Clyde Navigation, dismisses the action in so far as directed against the said Trustees, and decerns and finds the pursuer liable to them in their expenses in satisfying the production and lodging their defences; finds the pursuer entitled to expenses as against the other defenders, the said Sir James Edward Alexander and Miss Annabella Kirkpatrick, Mr and Mrs Kirkpatrick's trustees, appoints accounts of said respective expenses to be lodged, and remits the same to the Auditor to tax and to report.

"Note.—The Lord Ordinary trusts that, whether his present judgment be in all respects well founded or otherwise, the terms in which it is expressed will suffice to make plain the grounds on which it is rested, without any further attempt here to support the conclusions to which he has come."

The defenders reclaimed.

Argued for them—The first deed conveyed to the spouses with a destination over to trustees for behoof the eight daughters, who were to have the fee of the estate. The second deed limited the right of four of them and of their father. The third deed proceeded on the assumption that the second was invalid. Either the void conveyance in the deed of 1867 annuls the whole deed (in which case the deed of 1866 revives *in toto*)! or the trust purposes in the deed of 1867 are obligatory on the trustees who obtain their power from the deed of 1866. Either hypothesis excludes the pursuer. The heir-at-law must be prepared to show that, in the event of his succeeding in this action, the succession opens to him *ab intestato*. If he can show that, then it must be admitted that the deed of 1868 was *ultra vires* of his father. If the disposition of 1867 is held to be ineffectual, that of 1866 must be good. The heir-at-law's contention was that the conveyance of 1867 is void, and that, being void, it still revokes the valid conveyance of 1866. Even in deathbed deeds the heir-at-law is barred from challenge unless the re-

duction of the deathbed deed will vest the succession in him; if the sole effect of its reduction is to revive a prior *liege poustie* deed which excludes him equally, he has no title; the present case is on the same principle.

Validity of the disposition.—There is no express decision as to the necessity of the word “dispone;” “convey” is equivalent to it, and what can better satisfy the requirement of *de presenti* words of conveyance than the word “convey” itself. It is the “*de presenti*” which is the important element.

The revocation of the first deed must be entire; it must be actual supercession; it is impossible to look at or infer the intention of a testator except from an actual expression or a positive act.

Argued for the pursuer—The word “dispone” is essential in the dispositive clause. Stair, iii. 2, 3, is rather drawing a distinction between a *de presenti* conveyance and a mere obligation to convey. Ersk. iii. 8, 20, is only suggesting a form of words for a proper conveyance by gift, not that “dispone” may be left out, and “or,” not implying an alternative. Bell’s Prin., 1692, is strongly in favour of the pursuer. The words in the deed of 1867 are not, in fact, words of *de presenti* conveyance when read in the light of the fact that this is a *mortis causa* deed for the regulation of Mrs Kirkpatrick’s property after her death.

1. *Revocation express or implied*—There is no nomination of executors in the deed of 1866, nor the usual clause of dispensing with delivery. It is not a testamentary deed, but bears to be granted for onerous causes, and the husband stipulates that it shall not be revocable without his consent. There is no reservation of lifeferent; Mrs Kirkpatrick’s right of fee is given up, and an immediate joint fee created in the spouses. The nomination of trustees and other testamentary provisions derogate from this argument. The trustees would have had to make up a title as heirs of provision to the survivor. In any view, the main purpose of the deed was to take immediate effect.

2. What is the effect of the deed of 1866 on the rights of the wife? What power had she over the *pro indiviso* half which was all that was left to her? In one way it had no effect, as being a *donatio inter virum et uxorem* it was revocable during their joint lives. The deed of 1867 was a proper testamentary deed, as its own terms show; it is the testamentary deed of Mrs Kirkpatrick. Under it her husband’s right was limited, and she reserved full power to herself of revocation and alteration without consent of her husband, and her husband was a consenting party to giving her such powers, which were inconsistent with his own survivorship fee. He agrees that she shall dispose at her own pleasure of the fee of the estate, all that is left to him being the life income of the trust. The husband by consenting to the deed of 1867 restored the wife to the position which she occupied before the deed of 1866, both in substance and in form. The deed of 1867 was executed by both spouses at a time when revocation of the prior deed was within the wife’s power. There is no technical style of revocation; the deed begins by describing the property as Mrs Kirkpatrick’s own, which it was not if the deed of 1866 was to remain in force. The *inter vivos* deed of 1866 cannot be combined with the testamentary deed of 1867 so as to form a single settlement. If the pursuer had known at his mother’s death of the omission of the word ‘dispone’ what would have been his right as heir in regard to his mother’s

heritage? and who could have prevented him, and under what deed, from serving heir to her? Certainly not his father, for he renounced by the deed of 1867, the fee right which he had under the deed of 1866.

Authorities—*Barstow v. Black and Others*, March 27, 1865, 3 Macph. 779, July 23, 1868, 6 Macph. 147, H. L.; *Richmond v. Winton*, Nov. 25, 1864, 3 Macph. 95; Pothier, Pandects, xxviii, tit. iii, art. 1. secs. 2, 3; Bell’s Principles, 1812; *Duke of Roxburgh v. Wauchope*, Dec. 13, 1816, 6 Pat. 548; *Henderson v. Wilson & Melville*, Jan. 31, 1797, M. 15,444, 4 Pat. 316, 1 Ross’ Leading Cases, 594; *Leith’s Trs. v. Leith*, June 6, 1848, 10 D. 1137; *Sibbald’s Trs.* Jan. 13, 1871, 9 Macph. 399; Stair, ii. 3, 14; iii. 2, 3; Erskine, iii. 8, 20; Bell’s Principles, 1692; 1 More, 158; Sandford, 56, 61, 65; *Grant v. Stoddart*, Feb. 27, 1849, 11 D. 863; June 28, 1852, 1 Macq. 165; *Millar v. March*, July 8, 1853, 15 D. 823; *Barclay v. Simpson*, 5 Brown’s, 794, 1 Ross, 1; *Montgomery*, 2 Bell’s Fol. Cases, 203, 1 Ross, 7; *Henderson*, June 10, 1795, M. 4489; *Mitchell v. Wright*, Nov. 21, 1729, M. 8082; *Hamilton v. Macdowal*, March 3, 1815, F. C.; *Stewart v. Stewart*, Nov. 16, 1803, Hume, 880; Menzies, pp. 520, 664, 2d ed.; *Howden v. Glassford*, July 7, 1864, 2 Macph. 1317, 1324; 31 and 32 Vict., cap. 101, § 20; *Leith v. Leith*, June 19, 1863, 1 Macph. 949; *Earl of Ilchester*, May 21, 1803, 7 Vesey, 348, Sir William Grant’s opinion, 378; *Thomas v. Tennant’s Trustees*, Nov. 17, 1868, 7 Macph. 114; *Rowan v. Alexander*, Nov. 22, 1775, M. 11,371. Hailes, ii. 659, 5 B. S., 423; *Cuninghame v. Whitefoords*, June 10, 1748, M. 16,119, 5 B. S. 423; *Crawford v. Coutts*, Nov. 17, 1795, M. 14,958, 1 Ross, 617, 5 Pat. 73, 2 Bligh, 655; *Neilson v. Stewart*, Feb. 3, 1860, 22 D. 6; *Hardie*, May 13, 1871, 9 Macph. 736; *Brack v. Johnston*, Feb. 26, 1831, 5 W. and S. 61; *Ogilvey 1743*, M. 3336; *Simpson v. Barclay*, 1 Ross, 1; *Stewart*, Hume, 881; *Hamilton*, March 3, 1815, F. C.; *Glasgow’s Trustees v. Glasgow*, July 7, 1864, 2 Macph. 317; *Hurdie*, May 13, 1871, 9 Macph. 736.

At advising—

LOD JUSTICE-CLERK—The questions which have arisen between the parties in this case depend mainly upon the construction and effect of two deeds of settlement between the late Mr Kirkpatrick and his wife, the first dated in 1866 and the second in 1867. Other deeds are brought into question in the case, but it substantially depends upon the construction and effect of these two instruments. The first of these is dated on the 18th of June 1866. It is a joint deed between the husband and the wife, having for its purpose to dispose of the estate then belonging or which might belong to the wife prior to her death; and it proceeds to state that for certain good and onerous causes and considerations the spouses have alienated and disposed, “as I, the said Mrs Jean Glas, otherwise Kirkpatrick, with consent of my said husband, and we both, with joint consent and assent as said is, do hereby alienate and dispo, and give, grant, assign, convey and make over to and in favour of us, the said John Kirkpatrick and Mrs Jean Glas or Kirkpatrick, and the survivor of us, whom failing” to certain trustees, “all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, presently belonging to me, or which may belong to me, the said Mrs Jean Glas, otherwise Kirkpatrick, at the time of my death, with the whole titles of my said heritable property, and the vouchers and

instructions of the said moveable property." There then follows a declaration of the purposes for which the destination or the substitution in favour of the persons nominated as trustees has been made; which are substantially these,—that the estate, heritable and moveable, when the substitution takes effect, shall be divided among the eight daughters of Mr Kirkpatrick and his wife, with this provision, that four of the daughters shall be entitled to have one-fourth part more than the others. There was a son, but he is not mentioned in this deed at all. The deed then goes on, after some further clauses, to revoke two deeds of settlement which had been previously executed by the spouses, and it contains this clause at the end:—"Reserving always full power to me at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." There is no nomination of executors, and there is no dispensation with delivery of the deed.

I stop for a moment to consider what the nature of this deed was, and it does not appear to me that there is much difficulty in solving that question as far as its form and terms are concerned. In the first place, I think it must be held, whatever the effect of that may be, to be a deed that was delivered. It was signed by husband and wife, but their joint interests were involved, and the presumption is certainly that it was in the possession of the husband, and there can be little doubt that such was the fact. In the second place, in form it was a conveyance *inter vivos*. It is quite true that it contains a contingent conveyance of any property which may belong to the wife at the time of her death, but as regarded the property which then belonged to her, it was a conveyance *inter vivos*. It has been said that the deed was entirely testamentary. I do not think that is a true or accurate description of it. It contains a contingent testamentary purpose unquestionably in the substitution in favour of the trustees; but then that is a mere destination, or a bare substitution, failing the survivor leaving a different disposition of the property. The main effect of this deed is to vest the property conveyed by it in the two spouses jointly, as joint or conjunct fiars, and the whole of it absolutely in the survivor, and that not by substitution, but by the operation of accretion. I think that is the nature of the deed, according to the terms in which it is expressed. One is liable to be misled by the fact that it might be set aside by the wife on the ground of being a donation *inter virum et uxorem*, but this cannot enter into the question as to what the character of the deed was as long as it stood, or what the nature of the contract was between the husband and the wife. Now that is its form, and that, I apprehend, was also its legal effect. It effected an immediate transference of the personal right to the whole estate according to its terms. There could be no room in this case, as there has been in some analogous cases, for limiting either of the disponees to a life; and for this plain reason, that the right of survivorship was protected by a stipulation not to alter without mutual consent, and thus the whole fee was carried absolutely to the survivor *jure accrescendi*. This is a stronger

case for such a result than the case of *Ferguson v. M'George*, Morison, 4202, or the case of *Forester* in the House of Lords, which is the ruling authority on this subject. Reference may also be made to the case of *Burroughs v. M'Farquhar*, 4 Dunlop, 1484.

So stood the respective rights of the husband and wife in this property when the second deed was executed in the following year. Now this deed of 1867 is in every way in contrast to that of 1866. It is, with the exception of one provision, purely testamentary. It makes no allusion to the former conveyance, but has for its avowed object to settle the estate of the wife after death. The spouses accordingly proceed to convey the whole estate of the wife on her death to trustees, who are named as executors also, and are directed to pay the annual income to her husband in case he should survive her, and on their death to divide the property among four out of their eight daughters, burdening it with an annuity of £100 a year to the other four daughters, the son being again excluded, except that an annuity is left him which is to commence after the death of his wife. The dispositive clause of this deed does not contain the word "dispose." The wife predeceased her husband, who, fearing, I suppose, that this flaw in the dispositive clause would be fatal to the second conveyance, took up the property under the trust-conveyance of 1866; and having done so, conveyed to the same body of trustees the whole estates, heritable and moveable, which were the subject of these two deeds. In these circumstances the trustees, after the death of Mr Kirkpatrick in 1871, conveyed and disposed the property to the disponees under the second deed. Accordingly, the heir-at-law has now brought this action to set aside the deed by which Mr Kirkpatrick conveyed to the trustees named, and also to set aside a conveyance which the disponees under that deed granted to the Clyde Trustees, who purchased part of the estate. The action also has declaratory conclusions to the effect that the deed of 1867 was ineffectual to convey the property so far as heritable, and that the deed of 1866 is not now a subsisting deed, but was set aside and recalled by that of 1867.

It is only necessary further to explain that the wife's property at the date of both deeds, and also at the date of her death, consisted mainly of certain heritable subjects on the banks of the Clyde, which became of the value of about £50,000, and that she also left at her death about £1000 of personal property. A considerable portion of the heritable property has been scheduled and taken by the Trustees of the Clyde Navigation at the price of upwards of £39,000. The Lord Ordinary has decided in favour of the pursuer, and has found that the deed of 1866 no longer subsists. The case is now before us on a reclaiming note for the defenders.

The questions raised for judgment are substantially three; *first*, whether the trust-settlement of 1867 was effectual to convey Mrs Kirkpatrick's heritable estate; *secondly*, whether, if it were not so, the deed of 1867 can stand as a declaration of purposes to qualify the trust-conveyance contained in the deed of 1866; and, *third*, whether the settlement of 1867 had the effect of recalling or revoking the conveyance of 1866.

1. On the first of these questions I am of opinion that the omission of the word "dispose" in the dispositive clause of the deed of 1867 is fatal to that deed as a conveyance of heritage.

Voces signatæ used in conveyancing are always the growth of time and practice, and probably the word "dispone" was not originally set apart and appropriated to the special signification which it afterwards acquired. It has, perhaps, a certain propriety in expressing the act of *de præsentis* disposition which other terms sometimes used as equivalents may not be supposed to possess. This word, however, was so long recognised in that sense in the practice of our conveyancers that I think it clear that it came to be essential to a valid disposition. It is unnecessary to quote authority beyond saying that the opinion of Lord Meadowbank in the case of *Hamilton* in 1815, and the unanimous opinion of the whole Court in the case of the *Dougalston Entail*, seem to place this matter beyond controversy. Although the recent statute has altered our forms in that respect, I think we have no choice but to enforce the former rule in regard to writs which were executed while it was in observance.

2. On the second point, I think there is no ground on which the proposition I have stated can be maintained. The deed of 1867 was in no respect in aid or supplement of the first. It was wholly inconsistent with and subversive of it. It was intended to take effect immediately on the death of the wife, and not on the death of the survivor of the spouses, and never could have operated as a deed of instructions or declaration of purposes to a body of trustees who were only to take in substitution to the survivor. The case of *Willock v. Ochertonie*, and the series of decisions which have followed on it, no doubt establish the doctrine that when heritable property has been effectually conveyed to trustees, the purposes of the trust may be declared or varied by a writing without dispositive words. But it is sufficient to say that the circumstances of this case afford no room for the application of that principle.

3. The third point is one of great difficulty. It is whether the deed of 1867 constitutes a revocation or renunciation or extinction of the conveyance of 1866; in other words, whether the defect in the dispositive clause of the deed of 1867, and the consequent failure of that deed as an effectual conveyance of heritage, have the effect of leaving the deed of 1866 as a subsisting title to the heritable property, although in all other respects it is superseded and recalled. I do not think it necessary, in order to explain the view at which I have arrived on this question, to go at length into the elaborate legal argument which we heard from the bar in regard to the rules or canons of construction applicable to such questions. Revocation is of course a question of intention, to be gathered from the validly expressed will of the granter or maker of the settlement. There is certainly nothing in law to prevent the revocation of a former settlement being deduced by clear implication from the words of an effectual posterior deed. If the deed be valid and the implication clear, the intention of the granter must receive effect. Nor, on the other hand, can I think that if a deed be altogether ineffectual or defective from want of form or solemnity, the mere fact of the attempted conveyance to another disponent can be held to indicate an intention to revoke the former settlement.

In regard to the cases which have occurred in reductions *ex capite lecti*, I only advert to them in order to set them aside as having no bearing on the question I am now considering. A deed exe-

cuted on deathbed is, and always was, a perfectly valid expression of the will of the testator; although it was, prior to the recent statute, liable to be set aside by the heir-at-law in so far as it conveyed heritage to his prejudice. The cases which have been referred to arose on what may be called a hypothetical issue. The heir-at-law proposed his challenge of the deathbed deed. It was replied by the holder of the deed that the heir stood already excluded by a prior settlement in *liege poustie*, and therefore had no interest to reduce the deathbed conveyance, because the former settlement would revive if the posterior settlement were reduced. The heir's rejoinder to that plea was that the deathbed deed contained an express revocation of prior settlements, which revocation did not fall under his challenge, but stood as a valid expression of the will of the granter. This latter rejoinder was sustained in the case of *Coutts v. Crawford*, and a series of cases which followed on that decision. The same question was raised in cases in which there was no express revocation contained in the deathbed deed, but in which it was contended that the conveyance of the heritable property, although reducible by the heir, being in itself valid and complete while it stood unreduced, must be held to import a revocation of prior inconsistent settlements. But in *Rowan v. Alexander* this plea was repelled, and it was held that it was impossible to maintain the conveyance as a revocation while it was itself the subject of challenge by the heir-at-law as executed on deathbed. Lord Loughborough and Lord Eldon doubted the logic of this view, and seemed to hold that the intention to revoke was as clearly indicated in the latter class of cases as in the first, although the principle was too firmly settled to be disturbed. With that matter however we have no concern here. The question is not, whether the deed of 1866 would revive if that of 1867 were out of the way, but whether in point of fact it now subsists,—a question which never arose in any of the deathbed cases, in all of which the prior settlement was necessarily extinguished, whether the heir's challenge prevailed or was excluded.

On the other hand, it has been very clearly decided that where a deed is not merely reducible, as in the case of deathbed, but is wholly null from want of form and solemnity, such a deed can have no effect as a revocation, because it is not the completed expression of the granter's will or intention. That was decided in the case of *Henderson v. Wilson*, and was followed in the case of *Leith v. Leith*, and I conceive that the decisions rested upon clear and sound principles; for a deed which is null and ineffectual expresses no completed intention. But it is manifest that these decisions rest on a totally different basis from the principle adopted in the case of deathbed deeds, and the ground of judgment might apply to express as well as to implied revocation.

In regard to the argument that the clauses of a settlement are always to be understood as conditional on all the other parts of the settlement taking effect, it is manifest that if this were held to its full extent it would be quite as applicable to clauses of express revocation as to revocation only implied from the purport of the deed. It is not sound as a general canon of construction, although such a condition may be deduced from the context of the clause in a particular deed.

But the present case arises in circumstances al-

together different, and presents for solution a question depending on different principles. It is a case of two incompatible general settlements of the *universitas* of the wife's estate, both of which proceed on the joint agreement of the husband and wife, and in which the posterior settlement provides for a distribution and an administration entirely inconsistent with the provisions of the first. The second settlement has failed as a conveyance of the heritable estate, but it has failed no further. It remains in all other respects valid and effectual. It certainly does not follow as matter of course that although the second settlement has failed as regards part of the property, the administration and distribution are to divide, and that the provisions of the first settlement must regulate the administration of and succession to that part of the estate which the second deed has failed effectually to convey. That is a matter to be regulated by the intention of the parties as expressed in the settlement, which, although partly ineffectual, is also in part the completed expression of the will of the granters. The question we have now to decide is whether the second deed of 1867, which is a valid and subsisting deed, operated a recall or extinction or revocation of the *inter vivos* conveyance of 1866 and its contingent trust purposes.

I have come to the conclusion, not certainly without some hesitation, that this is the effect of the deed of 1867. I found nothing on the fact that the attempted but defective conveyance of the heritable property in the deed of 1867 was or would have been inconsistent with the previous disposition of it. I rest my opinion on the general scope of the operative and effectual portion of the deed, which not only proceeds on the footing that the conveyance of 1866 was superseded and abandoned, but seems to me to cancel and destroy it. It will not require any minute analysis of the settlement of 1867 to bring out the grounds of this opinion. The view which I take of that settlement is that it was intended to obliterate all trace of the former conveyance; that it dealt with the property on the footing that it was then, and had all along been, solely vested in the wife, and hitherto undisposed of by her either *inter vivos* or *mortis causa*; and so reinstated her in the fee of the whole estate during her life that no one could thereafter pretend that any title to it had ever been vested in the husband. I deduce this result from the following considerations.

At the date of the deed of 1867 there can be no question that the fee of the whole of this estate, heritable and moveable, was vested in the spouses jointly during their lives, and absolutely in the survivor. As I have already shown, the right of the survivor was not a right of succession, but was a right of accretion, depending entirely upon his or her right of conjunct fee during the marriage. But nothing of this kind is recognised in the narrative of the deed of 1867. It speaks of the property as belonging solely to the wife, as if it never had passed from her, and the object of the deed is stated to be to settle this property after her (the wife's) death, thus holding the right of survivorship on the husband's part never to have existed. Before, therefore, we reach the conveying words of this deed of 1867, its purpose and meaning are sufficiently apparent. It is expressed precisely in the terms we should expect to find if no previous conveyance had ever been made.

The conveyance to the trustees under the deed

of 1867 and their nomination as executors is of course perfectly valid as regards the personal property. I do not understand it to be contended that this part of the conveyance was conditional on the whole deed taking effect. It might have taken effect on the whole of the property conveyed, for it is a mere accident that at the death of the wife, or the dissolution of the marriage, the bulk of the property was heritable. It is difficult to see how any part of the management provided in the deed of 1867 could possibly co-exist with the clause of substitution in the deed of 1866. The title of the trustees under the former, taking by an immediate *mortis causa* conveyance from the wife at the moment of her death, does not merely destroy, as it does destroy, Mr Kirkpatrick's right as survivor under the latter, but implies a general system of administration of the whole property which was never intended to be broken up into two. Indeed, on the part of the defenders it was contended that although Mr Kirkpatrick was entitled to take up the heritage under the deed of 1866, he was still bound by the purposes expressed in the deed of 1867,—a concession which goes very far indeed to show that the expression of these purposes, even as regarded the heritage, must have superseded the conveyance of 1866.

The trustees are directed to pay the whole free income of the estate to Mr Kirkpatrick himself, but he is not even given a liferent of it. No doubt, by reason of the defect in the conveyance of the heritage, this right of enjoyment of the income is limited to the personal property, but it is difficult to exclude the light which this provision throws on the meaning of the settlement. The whole estate might have been personal property at the wife's death, and yet this deed of 1867 does not so much as allude to the fact that in that event Mr Kirkpatrick would, but for its provisions, have been the absolute proprietor or fiar of the whole. I forbear to go at length through the details of the trust purposes, passing by most of them with this remark, that not one of them is consistent in spirit or intention with any part of the property being administered under the deed of 1866. I shall only allude specially to two of its provisions.

The first is a clause which carefully directs that if any of the four daughters who are provided with an annuity should claim *legitim*, the annuity is to be forfeited. The care with which the provision is expressed seems to suggest what was passing in the minds of the granters of this deed. It is impossible not to see that the object of this settlement was quite as much to exclude as to favour. It was a very partial settlement. The eldest son was to be all but excluded, and four out of the eight daughters to be but scantily provided for. But the law of *legitim* gives some protection to children against settlements of this kind, as regards their father's personal estate, but not as regards that of the mother. If the property conveyed, worth some £50,000, had been purchased, as it afterwards was, by the Clyde Trustees, it might have so chanced that at the death of Mr Kirkpatrick the whole estate might have been personal, and, under the deed 1866, subject to *legitim*. This contingency seems to have been guarded against by the entire abandonment of all right of fee in the property on the part of Mr Kirkpatrick, and I think this is made perfectly clear by the clause of reservation at the end of the deed.

That clause is very important, and seems to be conclusive upon the question I am now considering. It will be recollected that the deed of 1866 contained a clause by which that deed was only alterable, and the property could only be affected, by the joint consent of the husband and wife. The clause of reservation which I now refer to in the deed of 1867 is expressed in terms somewhat similar, but with this essential difference, that the power is not reserved to the granters of the deed—the husband and wife—nor is joint consent in any way required, but the words are, “by myself alone,” and the whole clause runs thus—“Reserving always full power to me (that is the wife) at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure.” Now, although this is expressed in the form of a reservation, that is obviously not its nature, for it neither reserves to the granters that which they had prior to the execution of the deed, nor does it reserve to the wife that which she possessed prior to the execution of the deed. It is in truth of the nature of a grant, not of a reservation. Under the former deed, according to its terms the wife could only have revoked with her husband's consent; and therefore this clause, professing to reserve, in reality grants to the wife the power of revoking without her husband's consent, and renounces on the part of the husband the right which he had to have the settlement remain entire unless he consented to its alteration. Even as regards this part of the clause, it is sufficiently clear that the failure of the words of conveyance would not have had the effect of reviving this right on the part of the husband. But the remainder of the clause admits of no limitation, and gives the wife an absolute power to sell or dispose of the whole estate, heritable and moveable, at her pleasure. The failure of the conveyance of 1867 as regarded heritage could have no effect whatever on this part of the clause, which, if it ever came into effect at all, must have operated during the lifetime of the spouses, and before the trust-conveyance could have any effect. Indeed, the power reserved would, if it had been exercised, have superseded in whole or in part the trust-conveyance of 1867, and therefore I gather that it was to take effect on the *inter vivos* rights in the deed of 1866. Now, the effect which the power thus conferred on the wife of selling or disposing of the estate during the subsistence of the marriage had on the deed of 1866, was simply that of absolute revocation and extinction, because such a power was wholly inconsistent with the right of conjunct fee which had been conferred by the deed of 1866 on the spouses. It can signify nothing that it was not exercised. If the wife resumed the uncontrolled fee of her own property, unburdened by any right or claim on the part of the husband, there was an end absolutely both to the conjunct fee during the marriage and to the right of survivorship thereafter. When the husband consented that his wife should have this power, he renounced, and I think he meant to renounce, all the rights he had as conjunct fiar, including his right of survivorship—which, being a right of accretion, could only be ingrafted on the conjunct fee which he enjoyed during the marriage. I am therefore of opinion that this deed of 1867 effectually terminated and extinguished the

former conveyance. I am satisfied that such was its intention, and that such is its legal effect. I think it was intended to replace the wife in the position in which she stood before the execution of the deed of 1866, to leave her thereupon to deal with the property as being exclusively her own, and to give her power not only to regulate the succession to it by this deed of 1867, but so to liberate the fee in her person absolutely from all rights in the husband, present or eventual, as to leave in her the uncontrolled disposal of it at any time during her life, whether before or after the dissolution of the marriage.

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD DEAS—The late Mr and Mrs Kirkpatrick were married in 1820. There was no antenuptial contract. Mrs Kirkpatrick died in November 1867; Mr Kirkpatrick in February 1871. There are nine children of the marriage—a son and eight daughters, who have all survived both parents. In 1821 Mrs Kirkpatrick had succeeded to and was infeft, as heiress to her aunt, in certain lands or portions of ground on the banks of the Clyde, which have latterly become of the value of about £50,000, in consequence of their becoming available for the purposes of the Clyde Navigation Trustees, who accordingly acquired the larger portion thereof by compulsory statutory purchase in Mr Kirkpatrick's lifetime, in 1870, for about £40,000.

In February 1872 the pursuer, as only son and heir of his mother, brought the present action to have it found and declared that a deed executed by her, with his father's consent, in June 1866, had been revoked by a deed executed by them in March 1867, but that this latter deed, owing to the omission of the word “dispone” in the dispositive clause, is ineffectual to convey the heritable estate, to which he is therefore entitled to succeed as his mother's heir-at-law.

The prejudicial question in the case, of course, comes to be, Whether the omission of the word “dispone” in the dispositive clause of the deed of 1867 is fatal to that deed as a conveyance of heritable property? That is a question upon which I can have no doubt. In Dallas's Styles, published upwards of a century ago, the word “dispone” will be found to occur not only in all the examples given or narrated of transmissions by one vassal to another, but likewise in all the examples given of Crown charters of lands whether original or by progress. In Ross's Lectures, where the history of our deeds is traced from the introduction of the feudal system downwards, he gives, as the dispositive words of an original charter, “Dedisse concessisse et disposuisse” (vol. ii. p. 157), and as the dispositive words of a conveyance by a vassal to his superior or other purchaser, “have sold, alienated, and disposed, as I by these presents sell, alienate, and dispone” (*Ib.* p. 230, note); and he says (p. 233), “the proper effective words in all cases of sale are sell, alienate, and dispone.” The corresponding words, given by all our formulists for gratuitous conveyances, are “give, grant, and dispone;” and, although all this does not prove the word “dispone” to be essential, it goes to account for its having come to be held to be so in the ruling clause of the deed, in which it was not unnaturally thought that there ought to be some fixed term required as matter of solemnity, al-

though in modern legislation a different view has been taken, and by express statute the word "dispone" may now be dispensed with in all deeds subsequent to the statute, of which the present deed is not one. The only authority cited for the non-essentiality of the word, previously to the statute, is a passage in Mr Erskine's Institutes (iii. 8. 20), in which he says that a man may effectually settle his heritable property by a testamentary—that is a *mortis causa*—deed, "reserving his liferent and a power of revocation, provided he makes use in the conveying clause of the words *give, grant, or dispone, in place of legate or bequeath.*" and he refers to the case of *Mitchell*, Nov. 21, 1759, F.C., and M. 8082. But it appears to me that Mr Erskine was not here giving a style for a disposition, but explaining the necessity for *de presenti* words of conveyance in place of *de futuro* words, which would not do; and accordingly, the question in the case of *Mitchell*, which he refers to, was simply a question whether a sum of money exceeding £100 Scots, handed over on death-bed for a particular purpose, was a *de presenti* gift, or a verbal legacy, which would have been inept. Mr Erskine, it is well known, never himself revised his great work for publication, and he seems just to have transferred to it, in the above passage, the loose language of the report in the Faculty Collection. Besides, Mr Erskine's death and the publication of the Institutes took place long prior to the case of *Galloway*, Jan. 12, 1802, F.C., in which the passage in question was quoted, and it was nevertheless decided that the words "I hereby assign, transfer, and make over," although, undoubtedly, *de presenti* words, were not effectual to convey heritage. The Court doubted the efficacy of the conveyance on some additional grounds, but the report bears that they "were satisfied that the proper terms of conveyance of heritage were not used;" and, accordingly, three successive reclaiming petitions against the interlocutor of the Lord Ordinary, who had held the deed ineffectual, were refused. That judgment was pronounced upwards of seventy years ago, and since then, besides various other authorities which I shall not stop to canvass, we have the successive opinions of Sir Islay Campbell, the first Lord Meadowbank, and the unanimous opinion of the consulted Judges in *Glassford's Trustees v. Glassford*, July 7, 1864, 2 Macph. 1324. And I am free to confess that since I came to the bar, some forty-five years ago, I have never looked upon the essentiality of the word "dispone" in a conveyance of heritage as being a debatable question, and I have no doubt at all that its omission in the deed now in dispute was a mere clerical omission, either in the extended deed or in the draft, or, it may be, in both; for I do not suppose that any conveyancer in Scotland, and far less the experienced conveyancers who prepared this deed, would ever have knowingly left it out.

But however accidental the omission may have been, we cannot escape from giving to it its legitimate effect: and that raises the important question in this case, Whether the deed of 1867 revokes the deed of 1866, and so lets in the right of the heir-at-law?

By the deed of 1866 Mrs Kirkpatrick disposed and conveyed the whole heritable and personal estate then belonging or which might belong to her at her death, to herself and her husband, and the survivor of them, whom failing to trustees, for

the purpose of being converted into money, and the proceeds divided among her eight daughters in the proportions therein mentioned.

The deed of 1867 likewise bears to convey (but without the word "dispone") the whole heritable and personal estate then belonging or which might belong to her at her death, to trustees, for payment of the rents and interest to her husband during his life, and for distribution, in equal shares, amongst her four eldest daughters, of the fee of the personal estate, and also the fee of the heritable estate, or the proceeds thereof if sold, subject to certain annuities to each of her four younger daughters, certain bequests to servants, and an annuity of £100 to her only son (the pursuer), in the event (but in the event only) of his surviving his present wife.

I shall notice the terms of these two deeds somewhat in detail hereafter. In the meantime, I mention them thus generally for the purpose of explaining in the outset what the question between the parties really is, and upon what I think it turns, which may, I hope, tend to make my more detailed remarks upon the deeds, and any observations I may make upon the authorities, more easily followed.

The deed of 1866 expressly revoked certain previous deeds and codicils which had been executed by the spouses. But the deed of 1867 contains no express clause of revocation, either of the deed of 1866 or of deeds generally. It will be obvious, however, even from what I have already said, that if the deed of 1867 were to take effect, it would supersede the deed of 1866 in all its parts. The question is, whether the mere fact that the one deed was obviously intended to supersede the other operates a revocation of the earlier deed, so as to let in the heir in heritage, although the later deed is a mere nullity as to the heritage, and fails, indeed, substantially in its purposes, even as to the personality, as I shall have occasion afterwards to explain.

Confessedly, there is no decision to that effect, and none of our institutional writers, or any of our commentators upon them, have so laid it down. It is a question of intention undoubtedly. But, even apart from authority, I cannot think that, when a mother destines the whole means and estate which shall belong to her at her death for the benefit of her husband and family,—in this case with the exception of one member,—and, by a subsequent deed varies the distribution among them, bringing in for a certain limited benefit the only child who had been left out, the implication that her intention was to die intestate, if by any blunder this last deed should prove ineffectual, so clearly recommends itself to our acceptance that we require no precedent for adopting that construction, and are even to refuse to apply precedents which, by analogy at least, seem opposed to it.

An important question, however, in the case is, Whether there are not really direct precedents for the doctrine that, where there is no express revocation, the implication is that the granter does not mean the prior deed to be revoked unless the purposes of the deed intended to supersede it take effect?

That this is settled law when the later deed is set aside on the head of deathbed, is clear beyond dispute. Mr Erskine observes (iii. 8. 98) that as the effect of a revocable deed is suspended till the granter's death, "therefore, where it is actually

revoked, the heir's right is the same as if it had never existed, consequently he may pursue reduction of any subsequent deed *in lecto* to his prejudice." Upon which Lord Ivory remarks in his note—"This is true where there is an express revocation of the *liege poustie* deed." But where the revocation is merely conditional, "or where there is no express revocation, so that the prior deed would subsist but for the contrary provision of the deathbed deed, the heir suffers no prejudice by the latter, and his right of challenge is consequently barred." Mr Bell, in his Commentaries (vol. i. 5th ed. p. 95), says—"The total exclusion of the heir's right by a deed *in liege poustie* gives efficacy to a disposition on deathbed altering that settlement"—the heir having then no interest to reduce, and he refers (*inter alia*) to the case of the Duke of Roxburgh, which I shall afterwards notice. After stating the law applicable to express revocations in different circumstances, he says—"5. Where the revocation is not express, but implied only from the deathbed deed, it has been held that the testator is to be regarded as having virtually declared the efficacy of the new deed to be a condition of the revocation of the old. This has been greatly doubted in point of principle. But it is held as a decided point not now to be shaken."

We know that in the same high tribunal in which the doubts referred to were expressed it has been most strongly laid down that the doctrine which was doubted is not now to be shaken. I refer, of course, to the observations made in the House of Lords in the case of *Coutts v. Craufurd*, to the consideration of which I shall return immediately.

In the meantime, I have to observe that the case of *Rowan v. Alexander*, Nov. 12, 1775, F.C., and M. 11,371, 2 Hailes 659, and Brown's Sup. 423, was a well-considered case. It is only necessary to glance at the account given of it in Mr Ross' Leading Cases as to Land Rights (vol. i. p. 653) to see that the argument on both sides was able and exhaustive. The judgment of the Court was adhered to on a reclaiming petition, full opinions being given at both advisings. We can desire no more reliable account of the decision than that given by Mr Tait, which is quoted by Mr Ross (p. 659), and is in these terms—"The defence chiefly insisted on was, that the first deed was not expressly revoked by the last, and therefore, although the last deed should be taken out of the way, the first would still subsist; and so the Lords found. They held a virtual revocation of the first not sufficient, and assoltied the defender. And the decision was well founded, for if a deathbed deed contains both a disposition and a revocation, there may be some reason for maintaining that though the disposition be set aside, the revocation may subsist, because they are distinct—*et utile per inutile non vitiatur*. But when the deathbed deed contains no revocation, and is cut down on the head of deathbed, it cannot be maintained with plausibility that it ought to subsist as a revocation."

Taking this to be a doctrine which is not now to be shaken, I pause to observe that I have heard no ground stated in argument why it is to be limited to deeds reduced on the head of deathbed. The Solicitor-General did not require from me the encouragement I willingly gave him to develop a satisfactory ground for such a distinction if it could have been presented to us. The cases of deathbed deeds would rather appear to me to be a

fortiori authorities in a case like the present. The deathbed deed is good against all the world if the heir does not use his personal privilege to reduce it. It might therefore be plausibly maintained that he can reduce it so far as adverse to him and yet leave the implied revocation untouched, because he has no interest to challenge that implication any more than he has an interest to challenge an express revocation. But in the present case the deed, which the heir founds upon as a revocation, is an absolute nullity so far as the heritage is concerned. It requires no reduction, and accordingly there is no conclusion for reduction of it. What the pursuer asks is, that it should be found and declared that the deed of 1867 "does not contain any valid conveyance to the trustees therein named of the heritable property then belonging to the said Mrs Jean Glas or Kirkpatrick, or belonging to her at the time of her death, and that the said last-mentioned deed was and is ineffectual to convey the said heritable property, and does not convey and has not conveyed the same." Even a declarator was not necessary to establish the nullity in this case, for if it had not been for the deed of 1866 the heir might *de plano* have made up titles to the heritable estate and pleaded the nullity by exception against any challenge of these titles. And yet it is this null conveyance which the heir founds upon as a valid revocation of the deed of 1866. And the summons accordingly, while concluding for a declarator of nullity, inconsistently, as I think, also concludes that it should be found and declared that the deed of 1866 was "effectually revoked and recalled *in toto* by the said trust-disposition and settlement, dated 4th March 1867."

If therefore the want of an express clause of revocation in the deed of 1867 would have been fatal to the heir's challenge on the head of deathbed, I confess myself unable to apprehend the argument by which it is supposed that the deathbed cases are inapplicable here.

I am aware that it is said, and said correctly, that some of the noble Lords, including Lord Eldon, in the course of their observations in the case of *Coutts v. Craufurd* expressed a difficulty in distinguishing between a case of implied and a case of express revocation, and that Lord Eldon said repeatedly that if *Rowan's* case had come before him in 1775 he could not have affirmed the judgment; and from these observations the inference is deduced that the principle established by the case of *Rowan*, and cases which have followed upon it, ought not to be extended.

But it appears to me that to apply the doctrine of *Rowan's* case to the present is not an extension, but a legitimate application of the principle of that case, as to which Lord Eldon said in 1806—"Whatever I might have been disposed to decide in such a case as that of *Rowan v. 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 appears to be a case of implied revocation"—(2 Bligh Ap. 681). And again he said—"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. But the same principle will not apply to a case of express revocation."—(*Ib.* p. 687.)

The principle thus emphatically laid down by Lord Eldon, and stated by Mr Bell as not now to be shaken, applicable to the revocation implied in a reducible deed, appears to me, as I have already

indicated, to be necessarily, if not a *fortiori*, applicable to the revocation implied in a null deed—null at least as regards the heritage, which is all that the heir does or can claim. If this be so, it is unnecessary to consider whether, if the principle had not been so established, it would have recommended itself to one's acceptance or not.

But it is right to bear in mind that the question decided in *Rowan's* case was only referred to incidentally, and was not argued to the noble Lords in *Coutts's* case. A narrow majority in this Court had decided in *Coutts's* case that, even where there was an express revocation, it could not be held to have been intended that this revocation should operate, if the deed in which it occurred was reduced by the heir. And that this result was arrived at by men whose opinions were and are entitled to respect, was attested by Lord Eldon himself, who said—"I think I never saw a more honourable specimen of judicial ability than occurred in the discussion of this case when they formed the opinion on which this second appeal arises. They reconsidered this case in all the points of view in which it had been taken up," &c.—(2 Bligh Ap. p. 681.) It took the House of Lords some seven years and upwards, after the first hearing, to make up their minds to reverse that judgment, and the observations made by them from time to time during that long period were not in every instance so obviously well founded as their ultimate judgment must be held to be, by which the distinction between express and implied revocations was solemnly fixed.

For instance, on 11th July 1799 the Lord Chancellor Rosslyn, after expressing his high admiration of our Scottish law of deathbed, (since abolished), which he says he had "always looked up to as of great excellence" (2 Bligh Ap., p. 660), goes on to say, "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 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 conveying off the estate from the heir, though against a positive law." (*Ib.* p. 663.) Now I need not observe to your Lordships that there were not two nullities to splice; for the deathbed deed was certainly not a nullity, although the heir had the privilege of challenging it if he chose.

His Lordship then observes upon the doctrine of approbate and reprobate:—"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." (*Ib.* p. 664.) By the time Lord Eldon came to observe upon the case, in August 1803, the misapprehension under which these last remarks had been made had been corrected; and his Lordship then observed:—"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 a 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 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 deathbed; and that you could 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." (*Ib.* p. 668, top.)

Here Lord Eldon, while it had been pointed out to him that in the very case before the House the heir suing was an heir not made by "God and nature," but by the deed under which she claimed, still remained under the misapprehension that a deathbed deed was a nullity which the Court below had spliced with another nullity.

I refer to these instances merely as indicating that while I entertain the most profound respect for the noble Lords who dealt with the case of *Coutts*, and particularly for Lord Eldon, whose deliberate judgment I should deem it heresy for me to impugn, yet I do not feel compelled to accept their or his incidental remarks upon *Rowan's* case, which was not argued to them, as equally conclusive with a judgment on the case. It humbly appears to me that in speaking of implied revocation they at no time assigned any satisfactory reason why this should operate equally whether the new deed takes effect or not, and, indeed, that it is not clear that they are uniformly referring to deeds which did not take effect. For instance, Lord Chancellor Rosslyn, speaking of *Rowan's* case, says, "The Court of Session have 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." (*Ib.* p. 662.) Now I do not think the Judges in *Rowan's* case would have dissented from that observation. The posterior deed would certainly, in the case supposed, have taken effect, and on that supposition, of course, *cadit questio*.

The principle of *Rowan's* case came afterwards to be reconsidered, both in this Court and in the House of Lords, in the case of the *Duke of Roxburgh v. Wauchope*, 13th December 1816, F.C., affirmed on appeal, 25th May 1820 (2 Bligh's Ap. 619, and 1 Ross' Leading Cases, p. 659). In that case the Duke had executed a settlement of his estate in 1790 in favour of his sisters, reserving power to alter. In 1803 and 1804 he executed a trust-deed and deed of instructions, settling his estate in a manner inconsistent with the deed of 1790, but without any express clause of revocation. The heir-male of the previous investiture brought a reduction of the trust-deed and deed of instructions, as executed on deathbed, and at the same time founded on these deeds as an implied revocation of the deed of 1790. Lord Alloway, Ordinary, found, "That if the deathbed deed in question were set aside, the deed 1790, which is not expressly revoked by the deathbed deed, must exclude the succession of the heirs of entail," and therefore that the pursuer, the heir of entail, had no interest to insist in that reduction."

Lord Gillies, in giving his opinion in favour of the interlocutor, observed:—"If there had been an express revocation, the case must have been ruled by *Coutts v. Crawford*, but being an implied

revocation, it is ruled by *Rowan v. Alexander*. That case settled that species of question. *Stare decisis* is most material in matters of such nicety. In that light Lord Eldon viewed that decision in *Coutts'* case. Are we now to go back upon it? But farther, if *Rowan's* case were now open for decision, I should be for deciding it in the same way. I think it a sound notion that the implied revocation is conditional—if the new settlement take effect, and otherwise not." (1 Ross, p. 665.)

The interlocutor of the Lord Ordinary was adhered to by the Court, and a reclaiming petition was afterwards refused. Upon appeal the judgment was affirmed (25th May 1820); Lord Eldon, who was still Chancellor, observing, "As to the question of implied revocation, if we are to act on the maxim of *stare decisis*, the judgment cannot be disturbed. The deed in *liege poustie* reserves a power of revocation; by making another disposition under the authority of the power, it must be supposed that the disposer intended to do something effectual; and it cannot be implied that by the exercise of the power he meant to revoke it."—(2 Bligh Ap., 654, and 1 Ross, 665.)

Here it will be observed that, while Lord Eldon refers to the point as decided, he also enunciates the principle on which *Rowan's* case proceeded, in terms which carry conviction of its soundness, and this as a principle not confined to deathbed cases, but of general application; which emboldens me to think it not improbable that if he had had to hear and decide *Rowan's* case as deliberately as he heard and decided the case of *Coutts*, the result might have been an affirmance. He hesitated for years before deciding that even an express revocation would do in a deed which failed in its purpose, and it would have been an easy and natural transition from that state of mind to have come to the conclusion that where the clauses from which the revocation is implied are swept away, the implication from them is necessarily swept away also.

But the principle of *Rowan's* case is not only in its nature applicable to other cases as well as to deathbed cases, but it has been judicially so recognised and given effect to. The case of *Dundas v. Dundas*, decided in the House of Lords 21st May 1783 (1 Ross, 667), is important in two respects, 1st, as recording the opinion of Judges of great eminence, who were no parties to the decision in *Rowan's* case,—particularly of Lord Braxfield,—in favour of the principle of that decision; and 2d, as showing that, neither in this Court nor in the House of Lords has the principle been confined to deathbed cases.

In 1768 Sir Laurence Dundas had executed an entail of his whole Scotch estates, both those which he had in his son's marriage articles destined to his son in liferent and the heirs-male of the marriage in fee, and those he had subsequently purchased, reserving power to revoke or alter. In 1779 Sir Laurence executed an English will, bearing, "I do give, devise, and bequeath unto my dear son Thomas Dundas all my real estate in England, Ireland, and Scotland, as also in the island of Dominica in the West Indies, and elsewhere, not included in the settlement made on his marriage, and all my personal property, of every nature and kind soever: And I do hereby revoke all former and other wills by me heretofore made, and constitute my dear son my sole executor." On the death of Sir Laurence his son claimed the fee of the estates (except those destined by the marriage

articles), on the footing that the will revoked the entail of 1768 both expressly and by implication. There were thus two questions—1st, whether the word "wills" comprehended the entail? and 2d, supposing it did not, whether the will of 1779 revoked the entail of 1768 by implication?

At the advising Lord Braxfield observed as to this last point:—"Virtual revocation would not do, because that depends on the validity of the last deed." And again, "If it stood on implied revocation it would not do. Second settlement must be good in order to extinguish the first." On the same point Lord Henderland said: "Bequest is fee-simple. This not good by law of Scotland, and not an implied revocation."—(1 Ross, 672-3.)

On the question as to the meaning of the word "wills," a majority held the word to be so used as to comprehend the entail, and consequently that it was expressly revoked. The judgment was reversed on appeal, Lord Thurlow observing: "A testament is not good by the law of Scotland to convey land; but, supposing it were, the will here in question would not be sufficient even in England to revoke the deed formerly made. The deed of entail, although expressly revocable, declares that it shall stand good unless taken away by a deed under his hand. The natural way of doing this was by recalling the instrument, and saying explicitly, "I revoke the deed." We can only adopt an implied revocation *ex necessitate*. We cannot raise conjectures out of the deed itself. No doubt we must take his own meaning of the words; but the expression "other wills" means other instruments of a similar nature—other testamentary acts—not special settlements of a particular estate."—(1 Ross, 674.)

This case, it will be observed, had nothing to do with the law of deathbed. The English will was executed according to the law of the place where it was made. It was good to convey personal estate wherever situated, and validly appointed an executor. It bore, likewise, expressly to give to the son all the grantor's real estate in Scotland so far as not included in the son's marriage settlement. But the words of express revocation being inapplicable to the entail, and the attempt to convey the heritable estate being a failure,—just as it is in the present case,—it was held that the prior deed was not revoked by implication,—which was just in other words holding that the implied revocation (which in itself, was clear enough) was to be construed as conditional,—if the new deed should take effect.

The case of *Henderson v. Wilson and Melvilles*, decided in the House of Lords in March 1802 (1 Ross, 594), is also important, as a case in which the doctrine of implied revocation was discussed and dealt with as a doctrine not confined to cases of deathbed, and in which the result was, as in *Dundas'* case, that, although the terms of the later deed were quite incompatible with the terms of the prior deed, there was held to be no implied revocation, because the new deed was inept for its purpose. The first deed in that case was a deed of entail dated in 1757, in the form of a procuratory of resignation, duly tested according to the law of Scotland. The second deed was a deed of entail, in the same form, of the same lands, dated in 1763, varying the destination, but authenticated, not according to the Scots law, but according to the law of England, where it was executed. The second deed, although inconsistent with the first,

was held not to revoke the first deed by implication. No doubt there is this difference between the case of *Henderson* and the case of *Dundas*, that in *Dundas'* case the English will was a good instrument to convey the personal estate included in it, whereas in *Henderson's* case, as the procuratory of resignation related solely to the heritable estate, it was not good for any purpose. The second procuratory could not, however, be more inept as to the heritable estate than the second deed is here—the want of a dispositive clause being as clearly a nullity as a defect in the testing-clause. The Court, on 25th June 1795, found that the destination of the estate fell to be governed by the deed of 1757. Afterwards, in January, and again in February 1797, they found that the deed of 1763, being executed according to the *lex loci*, contained a sufficient declaration of the granter's will to vary the destination in the deed of 1757. The effect of the judgment of the House of Lords upon appeal was virtually to return to the judgment of the Court below of 25th June 1795, Lord Chancellor Thurlow observing as to the deed of 1763: "Then it is said to be a revocation. But how can a void deed be a revocation? The operation of a void settlement can be no more to revoke than to convey."

In the case of *Leith v. Leith's Trustees*, 6th June 1848 (10 D. 1137, and 1 Ross 691), Sir George Leith had in 1835 executed a *mortis causa* trust-deed and settlement of his whole property, heritable and movable, for payment of an annuity to his widow, and division of the free residue among his sons in certain proportions. In July 1841 Sir George executed, in Scotland, a holograph will, altering the proportions in which his heritable and personal estates were to be divided among his family. In December of the same year, being then in England, he executed a second will in the English form, which, after revoking 'all former and other wills, codicils, and testamentary dispositions,' bore to be a settlement of his whole estate, real and personal, wherever situated—expressed a special desire that his houses in Melville Street, Edinburgh, and in Helensburgh, should be held for behoof of his wife in life rent, and his son Alexander in fee—bequeathed certain legacies to his wife, besides an annuity of the same amount as formerly, and directed that the residue, whether real or personal, including certain Scotch heritable securities of large amount, should go to his sons Alexander and George, in the proportion of two-thirds to the former and one-third to the latter.

The question at issue was, Whether the English will revoked the Scotch trust-deed? The effect of that revocation would have been that all the Scotch heritage, including the heritable securities, would have gone to the heir-at-law, as the English will was clearly inchoate as a conveyance of the Scotch heritage. The heir-at-law pleaded, 1st, that the will contained an express and effectual clause of revocation; 2d, That the contents of the will necessarily implied revocation, as "by that deed the testator disposes of his whole property, heritable and movable, exactly as if his former settlements had been cancelled or thrown into the fire."—(1 Ross, 695.)

On the other hand, it was maintained that there was no effectual revocation, and it was specially pleaded, 1st, That a Scotch conveyance of heritage could not be revoked by a foreign instrument, which, although authenticated according to the law of the place where it was made, was not authen-

ticated according to the law of Scotland. 2d, That the words of the revoking clause did not fairly apply to and comprehend the trust-disposition.

By a majority of the whole Judges it was held that the instrument was habile to have revoked the trust-disposition had its terms been explicit, but that the words of the revoking clause did not apply to it, and that the one deed did not effectually revoke the other.

It is obvious to remark upon this case of *Leith*, 1st, That the terms of what may be called the dispositive clause of the English will were broad enough to comprehend the whole Scotch heritage, and that the reason why it was not carried by the will was simply that the deed was not in the form required by the Scotch law for that purpose; and, 2d, That if an inept conveyance in the later deed of the heritage conveyed by the prior deed, operates as an implied revocation of the prior deed, the majority who held the foreign instrument habile to revoke must also have held that there was in that case revocation; and yet this view, although stated for the heir, was not entertained or given effect to by the Judges.

These three last cases had no relation to the law of deathbed; and, from this review of the authorities, I arrive at the conclusion that the principle of *Rowan's* case was neither in its own nature peculiar to deathbed deeds, nor has it ever been understood or dealt with as being so. Lord Fullerton (than whom we have had no abler Judge) expounded the principle in *Leith's* case as one of general application to testamentary deeds, and none of his brethren controverted what he said upon that point, although an opposite view might have been sufficient to warrant an opposite result to that which was arrived at. His Lordship said, "Revocation may be of two kinds. One when, without any express recall of the former deed, the granter executes another essentially inconsistent with it; for instance, conveying to a particular donee heritage which he had by a prior deed conveyed to a different party. The effect of this, which is sometimes termed an implied revocation, will, of course, depend on the efficiency of the second conveyance; and in the case of Scotch heritage, if this second deed is defective in any of the forms requisite to support a disposition of heritage by the law of Scotland, the first deed will remain effectual. Without embarrassing ourselves with the authorities of the civil law on this point, I think we may safely hold that by the law of Scotland a revocation of this kind is not effectual unless the deed from which it is implied be effectual to convey the subject of conveyance to the new donee. The disponent, though intending to prefer the second donee to the first, is not held absolutely to extinguish the right of the first donee, and so to let in the heir-at-law in the event of the second deed failing of effect. In cases of this kind, then, the efficacy of the second deed as a revocation must depend on its efficacy as a conveyance, and in this sense it may be said that a revocation in order to be effectual requires to be executed in such a way as to be capable of affecting Scots heritage."—(1 Ross, 616.)

This opinion was delivered in a case which was not the case of a deathbed deed. Every word of it is literally applicable to the case now before us. If it had not been regarded as a sound opinion the decision in *Leith's* case ought to have been the reverse of what it was.

Let us look back for a little to the two deeds of 1866 and 1867, and see whether there is anything in the nature or terms of these deeds to exclude the applicability of the principle which, I think, I have shown to be firmly established in our law and practice.

Although the deed of 1866 were to be regarded as an *inter vivos* deed which took immediate effect, I do not think that that would affect the result although it might affect the mode of stating and considering the question. The only property conveyed or attempted to be conveyed by both deeds was the property of the wife. The only party who could have pretended to found upon it as an *inter vivos* deed was the husband, and as to him it was a *donatio inter virum et uxorem*, revocable by the wife at her pleasure. Let the nature of the deed of 1866 be what it may, she had full power, without the aid of any conventional reservation, and without the consent of her husband, to execute the deed of 1867. This would have been the case although that deed had been a delivered deed. But there was no delivery. As an *inter vivos* deed delivery was essential to its coming into operation. The deed was not a mutual deed in any legal or even equitable sense of the term. It bears indeed to have been granted with joint consent and assent, for certain good and onerous causes and considerations. But the law cannot infer from these vague and general words any onerous consideration to have been given by the husband to the wife, where none is specified. The husband was a mere consentor to the deed. He conveyed nothing to his wife, and it is out of the question to hold the deed either to have been onerous or to be a mutual deed which required no delivery.

It is, as I understand, the foundation of the opinion just delivered by the Lord Justice-Clerk that the effect of this deed of 1866 was at once to divest the wife of one-half of her heritable estate, and to invest the husband in the fee of that half, with an irrevocable right, in the event of his survivorship to the fee of the other half. Surely, if that was so, it was a deed which required delivery. The case of a wife stripping herself of her heritable estate to the value of some £25,000, or, as the case might be, to double that value, in favour of the husband, is not the easiest conceivable case for establishing delivery. Even judicial ratification on oath of such a deed, for which no consideration had been given, would not presume delivery to the husband—*Lady Bathgate v. Cochrane*, January 1685, M. 17,004 and 6077. A husband may be presumed custodian for his wife, but the wife cannot be presumed custodian for the husband of a gratuitous *inter vivos* deed, in the husband's favour, flowing from herself. Here there is no averment whatever of delivery. It is not even said that the deed passed from her hand to his, or that it was not found in her own repositories at her death. As Lord Fullerton said in *Leith's case*, "While the deed is retained by the party himself, it confers no right of any kind,—it is the evidence of no right of any kind—it has no existence of any kind, except in relation to the party himself; and in regard to him it is just as much part of his moveable property as if the paper or parchment had never been written upon." (1 Ross, 714-15.)

I think we may dismiss this view, therefore, of an immediate divestiture of the wife to the extent of creating a *pro indiviso* fee, and a right of survivorship with all that is founded on it, as wanting

its very foundation, even if it would otherwise have aided the heir's plea of revocation, which I think it would not.

However it may affect the argument, I cannot doubt that the deed of 1866 was in its terms a *mortis causa* deed, and revocable by Mrs Kirkpatrick, in its nature as well as upon the ground of donation. The dispositive clause is necessarily in the present tense, as by our law and practice every such clause, whether in *mortis causa* or *inter vivos* deeds, must be. But what it conveys is "all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, presently belonging to me, or which may belong to me, the said Mrs Jean Glas, otherwise Kirkpatrick, at the time of my death." The conveyance is "to and in favour of us, the said John Kirkpatrick and Mrs Jean Glas or Kirkpatrick and the survivor of us, whom failing," the trustees therein named, and the survivors or survivor, "and the heir of such survivor, in trust for the uses, ends, and purposes after mentioned, viz., in the first place, that the said trustees shall pay and make over to our eight daughters," who are then named, in certain specified proportions, the proceeds of the property, means, and estate, thereby disposed and assigned, and the whole rents and interest thereof, under deduction of the expenses of management: "And (second), that the said trustees, so soon as they can do so advantageously, of which they shall be the sole judges, shall sell and dispose of the whole estate, property, and effects, heritable and moveable, hereby conveyed," and pay over the proceeds to the daughters in the specified proportions.

Then there comes an express clause of revocation of previous deeds, which the experienced conveyancers who prepared all the deeds knew quite well how to express when the parties wished it. "And I hereby, with consent foresaid, revoke the disposition executed by me and the said John Kirkpatrick, my husband, on the 18th October 1830, and two additions or codicils thereto, dated respectively the 7th January 1856 and 2d April 1863; "and I also, with consent foresaid, revoke the disposition executed by me and my said husband on the 1st day of May 1863." This is followed by a reservation of power to the spouses jointly, or to the survivor of them, to alter or revoke, and to sell and dispose of the whole subjects, heritable and moveable, at pleasure. There is no clause dispensing with delivery, but that, although a usual clause of style, is not essential to the effect of a *mortis causa* deed found in the grantor's repositories at death, as has long been decided—*Stark v. Kincaid*, 11th Dec. 1679, M. 17,002; *Canon v. Gordon*, July 1687, 2 Brown's Sup., 108; *Young v. Wauchope's Next of Kin*, 6th February 1695 (4 Brown's Sup., 259); *Porterfield v. Stewart*, 16th May 1821, 1 S. and D. 9, N. E., 6. The clause may possibly have been omitted in the present instance just to avoid even the semblance of an immediate divestiture in favour of the husband, either of one-half or the whole of the property which then belonged or might belong to his wife at her death. The scheme of the deed was to give the husband the power of altering if he was the survivor, but to settle the distribution among the family if he either did not survive, or surviving did not alter. The eventual rights thus conferred on the husband did not make the deed the less a *mortis causa* settlement of Mrs Kirkpatrick's whole heritable and moveable estate, then belonging or which might belong to her at her death, which are

the ordinary words of style of all such settlements. Accordingly, when we come to the deed of 1867 we find that it commences in the very terms of a deed which had not been preceded by any *inter vivos* deed by the wife which had already taken effect. It does not bear to convey or distribute any property or estate belonging to the spouses jointly. It bears to be granted by the wife with the consent of her husband, in order to regulate the "management and distribution of the means and estate of me, the said Mrs Jean Kirkpatrick, after my death." It then bears to give, grant, assign, convey, and make over to the trustees therein named,—who are not altogether the same with the trustees in the first deed,—“All and Sundry the property, means, debts, and estates, heritable and moveable, real and personal, presently belonging or which shall belong to me, the said Mrs Jean Glas or Kirkpatrick, at the time of my death,” in trust, 1st and 2d, for payment of debts, expenses, and burdens; 3d, “that the said trustees shall make payment to the said John Kirkpatrick, my husband, during all the days of his life after my decease, in case he shall survive me, of the whole rents and income of the heritable estate, and of the interest or annual proceeds of the moveable means and estate hereby conveyed.” 4th, Of an annuity of £15 a year to a servant (Alexander Sheriff), if in the service at the death of the survivor of the spouses. 5th, Of a legacy of £200 to another servant (Margaret Galloway), on the same condition; and of such other legacies as Mrs Kirkpatrick might leave by any writing under her hand, formal or informal. 6th, On the death of the survivor of the spouses, to dispense to the four eldest daughters therein named, equally, share and share alike, or the survivors or survivor of them, the whole lands and heritages thereby conveyed, under burden of an annuity of £100 yearly to each of the four younger daughters, also therein named, “and which annuity shall be made a real burden upon the lands so disposed;” and also under burden of payment to the pursuer, John Kirkpatrick, if he should survive his wife, of an annuity of £100; declaring that if the lands and heritages were sold during the lifetime of the spouses or survivor of them, or if so much should be sold by the trustees as not to leave sufficient security for the annuities, then corresponding annuities should be purchased, and which annuities should be accepted in full of all claims, and if any of these annuitants claimed their legal rights, then their annuities should be held as revoked. This deed further bore,—“reserving always full power to me at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke, these presents, either in whole or in part, and to sell, burden or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure: And I dispense with the delivery hereof: And I consent to registration,” &c.

Now here we have as distinct a case as could well occur of a mother conveying, by *mortis causa* deed, in 1866, the whole means and estate which should belong to her at her death, for the benefit of her husband and family, and, within seven or eight months thereafter, while the state of the family was precisely the same as formerly, varying the distribution among the beneficiaries by the *mortis causa* deed of 1867, which, by an unexpected and unintentional blunder, or clerical omission, of the writer of the deed, has totally failed in its purpose as regards the heritable estate, worth

£50,000, and substantially failed in its purposes altogether. All the nine children who were alive at the date of the first deed were alive at the date of the second deed. Neither death nor marriage had intervened in the family. The wife must have known that although everything was put in the husband's power by the first deed, if he happened to be the survivor, his great age, which, although not stated in the record, we cannot help being personally aware of, made his survivorship very problematical, and excluded, at all events, any probability of a second family, or of his desiring to do otherwise than to acquiesce in or vary the distribution among the existing family who were his own children. The question is, whether this is a case in which the granter of the second deed, notwithstanding that she has purposely left out the revoking clause she had inserted in her former deed, must be held to have exercised two separate and distinct acts of the mind,—first to revoke absolutely and in all events the provisions she had previously made for her husband and family; and second, to prefer the heir at law, whom she was cutting off with a small and contingent annuity, to her eight other children, among whom, although unequally, she was still proposing to distribute her estate. It might have turned out that the second deed had been executed on deathbed; and if that contingency had occurred, it is undoubted that *Rowan's* case would have been directly applicable. It would be very anomalous if a different principle were applicable in the circumstances which have actually occurred, and I have heard no intelligible reason stated why this should be so. The result would not only be to bring in the heir, but to produce substantial intestacy. It is not stated in the record that Mrs Kirkpatrick had any personal estate exclusive of the *jus mariti* of her husband; but in answer to my question, it was said at the bar that there might be about £1000 in that position. Supposing this to be so, it is obvious that, after providing for the annuity of £15 a-year to one servant, the legacy of £200 to another, and expenses, there can be little or nothing left. Except upon the footing that her heritable estate was effectually conveyed by her deed of 1867, Mrs Kirkpatrick would never have divided and distributed her means and estate as she did by that deed at all. We have no means of knowing what would have been her will as to the personal estate if the heritable estate had not been included. Without that estate, or its value, the deed is not her will to any effect whatever. The whole distribution is necessarily a failure, and the revocation of the former deed is therefore proposed to be implied from a new deed, which substantially has no effect at all.

It must not be lost sight of throughout that the question relates to the intention of Mrs Kirkpatrick, the granter of the deed, who had everything in her power. Did *she* mean that if the deed of 1867 proved a failure there was to be no distribution of her estate among her family at all? The intention of the husband has very little to do with the matter, except upon the untenable footing that he had become by the former deed irrevocably vested with the fee of one-half of his wife's means and estate in her lifetime, and right to the fee of the whole if he happened to be the survivor.

Even in that view, no plea of personal bar, founded on the husband's consent to the new deed, can affect the question whether the wife's

implied revocation is to be construed as conditional on the new deed taking effect. And this leads me to repeat, what I suggested in the course of the discussion, that I do not think we have before us all the parties interested, even in the general discussion,—and still less in a question with the husband's dispone,—if anything is to be held to turn either upon personal bar or upon mutual agreement between the spouses under the deed of 1867. The trustees under both deeds are called as defenders, but no appearance has been made for the trustees under the deed of 1866, and it does not appear that any of them have accepted. The only parties judicially defending the action are the two accepting trustees under the deed of 1867, viz., Miss Annabella Kirkpatrick, the eldest daughter, and Sir James Alexander, who can neither act nor plead without her concurrence, although he might no doubt bring the trust to a dead lock by dissenting from her views. Now, the four eldest daughters have an interest in maintaining their father's deed of 1868, adversely to the interests of the four younger daughters, as beneficiaries under the deed of 1866. If, then, their father were to be held excluded—as I understand some of your Lordships think he was—from claiming under the deed of 1866, in respect of his consent to the deed of 1867, an important question would arise between him and the four younger daughters, as beneficiaries under the deed of 1866, whether any plea of that kind could go beyond discharging his own interest under the primary destination to himself in that deed, leaving the trust and trust purposes to which that destination was introductory in full force. The father may possibly have agreed to give up his own place in that destination, or barred himself from taking advantage of it by becoming a party to the deed of 1867. But I cannot at present see how this could evacuate the substitution or conditional institution in favour of the trustees, of whom he was not even one, or defeat any other rights under the deed of 1866 than his own.

Apart from that, however, which cannot be decided except in an action in which the four younger daughters shall be duly represented, I am of opinion that, although the powers of the deed of 1867, if they had taken effect, would no doubt have superseded the provisions of the deed of 1866, with which they are throughout incompatible, the legal and true construction of the deed of 1867 is, that this was only to be the result if this latter deed took effect. I should have thought this the sound construction if the question had been open; but I think it has not been open for nearly a century, and that the whole cases on the subject during that period go to fix a principle peculiarly applicable to this case, reasonable in itself, and which it would be perilous to depart from.

LORD BENHOLME—If there be anything certain at all in this case, it is that during the later years of the lives of Mr and Mrs Kirkpatrick their *enixa voluntas* was to disinherit their son, and to give her heritable property to their daughters. I do not mean to say that intention is the only matter to be considered here, or indeed the chief matter. What has been effectually done, if anything has been done, ought to rule our decision. But if we come to consider the question of revocation, especially of implied revocation, I cannot throw out of

view so clear, so consistent, so determined an intention as that of this husband and wife. I do not mean to inquire into the motives, or rather the justice, of that determination. I don't think we have anything to do with that. But I am clear as to the fact that it was their main intention—I would almost say their only object—in the deed, which they executed towards the end of their life, to bring about that result. In the deed of 1866 that object is provided for by a substitution subjoined to the conveyance to the husband and wife and the survivor. The intention is distinctly expressed, although in somewhat different terms, in the deed of 1867. The daughters are not preferred in the same rank as in the former deed—there was a change of intention as to the amount to be given to each of the daughters, but as to the son there was no alteration whatever. I am quite clear that the second deed, as the law of Scotland stood at the time when it came into operation, is ineffectual to convey that heritage; but I am also satisfied that the lady never knew of the defect, and never adverted to it during her life, for had she done so, can it be doubted that she would have just made another deed containing the word “dispone”? That is as certain as possible. I am equally clear that the husband had discovered the omission after his wife's death; and that his only object in executing the third deed, which is more especially under reduction, was to supply the defect in the former deed, and to carry out effectually the intention of both the parties to that deed. That was the object of it. I think it must have been executed by the husband under a strong conviction of his obligation to supply the unintentional defect in the deed that his wife and he had executed the year before. I think he held himself bound to do so. I think that in honour he was bound to do so; and I think that by the deed of 1866 he was entitled and enabled to do so. The deed of 1867 is ineffectual to convey the heritage. Had it been effectual to convey the heritage, that would have constituted in itself, if not a revocation, a supersession of the former deed. It is a maxim well known in the Roman law, and established in our law, that a second will, rightly made, *rite factum*, puts an end to the first. It seems to me to be an equally clear maxim, that if the second deed is null and void as to the subject of conveyance, it can have no effect in that way against the first deed. Its power of revocation or supersession depends on its own efficacy; and if it be supposed inefficient to convey, it can neither revoke nor supersede. I speak of the case where the second deed contains no clause of revocation, and nothing amounting to a substantive intimation of the intention of the party to revoke the first deed—where all that can be said is, that the second deed, had it been effectual, would have put an end to the first—the conclusion being, that if it is not effectual it cannot have that effect.

Lord Deas has gone over the authorities upon this point in such detail that I think it would be inexcusable on my part to resume that discussion. To my own mind, the ground in law of the effect which a second deed, well executed, has upon any former deed relative to the same subject is quite clear. I think the distinction between an express revocation and an implied revocation is equally clear in law. In the present case I should have been very glad indeed could I have put my finger upon a single clause in the second deed intimating

a revocation of the first deed. I should have been very glad to think that the lady had taken a second thought of her duty towards her son, and had intended to revoke that disinherison of him which had marked her former deeds. I am sorry to say I cannot find that, or any thing approaching to an express revocation. And indeed I think the able argument which we had from the bar resolved into this, that it must be held to constitute an implied revocation—implied not from its own efficacy as a conveyance, for that is given up, but from something else in the deed. A good deal was said upon the suggestion that there might be moveable property effectually conveyed by the second deed. What has that to do with the heritable property? Nothing whatever. Nor can I discover any plausible argument from which implied revocation can be inferred. The hopelessness of the argument in favour of implied revocation was impressed on my own mind by the footing on which the Lord Justice-Clerk in his able opinion mainly put the idea of revocation. It was the clause of reservation in the deed of 1867 upon which he especially founded. Now, let me read the clause of reservation which is supposed to revoke the deed of 1866, for so it must be put—"Reserving always full power to me at any time of my life, and even on death-bed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke *these presents*, either in whole or in part." Now, this is a clause empowering the lady to revoke the deed that she was executing; but how can that be supposed to have anything to do with the revocation of the deed of 1866. She goes on—"And to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." This is plainly an addition to the reservation as to revoking the deed of 1867; and in another form reserves the power to herself, notwithstanding *that* deed, to burden these estates. But she never did burden them; and what is the effect of reserving a power if it is not exercised? Now, here is a clause of reservation upon which nothing is done. It may ascertain the powers of the lady, especially in reference to the deed she was then executing; but if these powers are never in any respect exercised, which it is clear they were not, can they be held to constitute a revocation of a former deed which is not mentioned at all? At this late period of the day I am hardly able, and I am certainly not willing, to detain your Lordships at any length, but it appears to me that this is a case in which there is not even a plausible argument in favour of implied revocation. It would operate contrary to the intention and the wishes of both parents. The conclusion arrived at by the pursuers is this, that the lady died intestate; for that is the result—that, notwithstanding the *eniza voluntas* expressed in the deed of 1866 in favour of her husband, in the first place, and ultimately in favour of her daughters—in spite of the second deed in favour of the daughters, with a reservation in favour of her husband for his liferent—and in spite of the husband's deed in strict execution of his wife's intentions, which had been defeated by the unforseen nullity of her second deed—in spite of all these deeds, in which both parents concurred in the most express manner in disinheriting the son and instituting the daughters, your Lordships are asked to hold that her intention was to revoke the first deed, and consequently

to cause the husband's deed to be useless for a purpose in which both concurred. I am humbly of opinion that the Lord Ordinary's interlocutor ought to be altered, and the defenders absolved from the reduction.

LORD NEAVES—1. The first question in this case is, Whether the deed of 1867 contains an effectual disposition of heritage? I am of opinion that it does not. The want of the word "dispone" seems to me to be fatal to it in that respect. I hold that under the former law it was definitively fixed by dicta, decisions, and practice, that that word was essentially necessary to such a disposition. The law is now changed, but it needed the intervention of the Legislature to make such a conveyance as this valid.

2. The next question is, Whether, after the execution of that deed (the deed of 1867) the previous deed of 1866 still subsisted as a disposition of heritage? The question is one of nicety and difficulty; but I am of opinion that the conveyance in the deed of 1866 did not survive the execution of the deed of 1867, but was wholly revoked or superseded by that deed.

The question seems to involve two inquiries. 1st, what was the nature of the deed of 1866; 2d, what acts or writings will revoke or supersede a pre-existing deed of that kind.

(1.) The deed of 1866 is rather anomalous. I consider it myself as partly an *inter vivos* deed, intended to take immediate effect as regards existing property of Mrs Kirkpatrick. It is certainly not in the usual form of a *mortis causa* deed. According to the law of Scotland as it then existed, every deed conveying heritage was in the form of a *de presenti* conveyance; and it was chiefly by the subordinate clauses that its operation was shown to be prospective merely. Those clauses were mainly a reservation of liferent and a dispensation with delivery. No such clauses exist here; and there is the special peculiarity that the deed is in favour of both the spouses and the survivor. Now although it is possible that testators may have granted deeds that were absurd in this respect, the natural presumption seems to be that such a deed of the granter to himself or herself is to take immediate effect, and is not to be suspended till the granter's death.

At the same time, I do not think that, although the deed of 1866 were held to be *mortis causa*, this would make any essential difference in the case.

This is clear either way, that the deed of 1866 was revocable by the joint consent of the two spouses. This is expressly declared in it. But in fact, independently of any declaration to that effect, the deed was revocable by the late Mrs Kirkpatrick by her own act alone, as being a donation *inter virum et uxorem*; which is always revocable by our law.

Further, it is clear that by the deed of 1866 any right conferred on Mr Kirkpatrick, whether *inter vivos* or *mortis causa*, was not of the nature of a trust right, but was a right of *fee*, a joint fee during the joint lives of the spouses, and a sole fee in the event of his survivance. The question now is, if that right of joint or sole fee continued to exist after the execution of the deed of 1867.

(2.) The question thus raised, Whether, namely, the right of fee bestowed upon Mr Kirkpatrick by the deed of 1866 was revoked, surrendered, or superseded by the deed of 1867? involves the con-

sideration of the principles applicable to the extinction of such rights.

It seems clear that the rules of law or conveyancing applicable to the creation or constitution of heritable rights do not necessarily apply to their revocation or extinction. This matter was fully discussed in the case of *Leith*, 10 Dunlop, 1134; and it was there held by a majority of the Judges that a good conveyance of Scotch heritage might, if revocable, be validly revoked, even as regards that heritage, by a will executed in England in the English form: though it was also held there that revocation was not intended by the English deed, and therefore did not take place.

The general doctrine there promulgated was that revocations of revocable deeds do not require the same technical language as deeds of disposition, or indeed any technical language at all; but that their purpose is effected if it be clearly declared. It must of course be declared in a deed that is adequate to express the testator's intention and to show his will. A deed therefore that was wholly improbable—that was not the testator's deed at all—would be equal to *no deed*, and would have no effect.

Here, however, this cannot be said. The deed of 1867 is quite a good and probative deed to speak the mind of the testator. In so far as anything could be done by her mere will, this deed does it. It fails, indeed, on one point, viz., the new conveyance of her heritage, as to which her will is clearly disclosed, but the law denied her the power of disposing of her heritage by will. That inability, however, will not prevent the Court from seeing what her will was, and giving it effect so far as they can do so.

It seems to follow from what has above been said that if a testator says merely, in negative words, "I no longer wish my former deed to take effect," this is enough to revoke it. This would seem to reduce the matter here to the simple inquiry—Did the deceased continue to *will* that the deed of 1866 should take effect, or did she change her mind, and sufficiently indicate that change?

But it is said that there is no express revocation of the prior deed, and consequently it is argued that the revocation being merely implied is contingent, and that the first deed can only cease to operate if the second conveyance takes effect. An implied revocation, it is contended, has in it an implied condition that the testator's manifest will to discard the first settlement is not to be carried out unless the new conveyance comes into operation.

I greatly doubt the soundness of this view, and I consider that the transference of it to cases like the present from cases of *deathbed* is not a legitimate mode of reasoning. There is a great difference between the two situations. In a case of *deathbed* the deed objected to is not null but merely reducible at the heir's instance. There the dispositive clause of the deed is *ex hypothesi*, not only adequate to express the will of the deceased, but adequate also to carry out that will by a good feudal conveyance but for the extraneous circumstance that he was ill of the disease of which he died. That ground of challenge can only be carried out by the reduction of the deed, and if the only revocation of a previous deed is contained in and by virtue of the dispositive clause of the new one, the heir, by the very act of reducing that clause, would reduce the only revocation which the

deed contains, and would thus set up the prior deed by means of his own reduction of the essential part of the later one. This state of things, therefore, destroys his interest in the reduction he is attempting. But here the heir needs no reduction. The later deed stands as a clear expression of the testator's intention, as a complete expression of will, and its only defect is that the will is not a hable mode of effecting the alienation of heritage. It may be, and it is quite effectual as a declaration of will, and the Court are bound to give effect in that way as far as they can do so, and may no longer be bound to uphold a previous settlement which the testator did not ultimately wish to carry out; nor is it easy to see that they are entitled to import into the deed by implication a condition which the testator has not expressed, and which may be quite adverse to his wishes.

I am not satisfied that any cases have been decided which have extended the doctrine of *deathbed* to a case like the present. There seem to me to be specialties in all cases founded on that view which do not exist here.

But further, the argument of the defenders here involves a postulate which, I think, cannot be conceded to them. This is, that the deed of 1867 contains no other expression of intention except what is implied in the new conveyance. It appears to me that this is not the case. If we compare the deed of 1866 with that of 1867, it will be found, I think, that there are substantive parts of the later deed which expressly interfere with and destroy the operation of the prior one. Some of these have been noticed by the Lord Justice-Clerk, and I shall now only dwell upon those indications that have particularly affected my own mind. By the prior deed the spouses were, in the first instance, made the joint fiars, and the survivor the sole fiar of the property, and in accordance with that view is the clause of reservation, which is in these terms:—"Reserving always full power to me, at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." But in the deed of 1867 the rights of the parties are put on an essentially different footing in a new clause of reservation—"Reserving always full power to me, at any time of my life, and even on deathbed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." Now it appears to me that the effect of this change is very important, and enters deeply into the present case. Under the first deed the husband got and was recognised as getting a *jus disponendi*, at first jointly, and afterwards solely; and it is needless to say that that *jus disponendi* is of the very essence of the right of property or fee. But by the later deed that *jus disponendi*, which had been given to the husband, is manifestly taken away, and is vested wholly in the wife, and this not merely to the effect of giving her power to *alter* the settlement, or to deal with the property *mortis causa*, but also to "sell, burden, or dispose of the subjects at pleasure." It appears to me that after the execution of that deed it is impossible to hold that any right of property re-

mained in the husband, either present or prospective. The sole and absolute *jus disponendi* and concomitant right of property reverted to the wife, from whom it had come, as much as if the deed of 1866 had never been executed. It follows from this view that at Mrs Kirkpatrick's death there was no fee remaining in her husband, no joint fee that he could exercise, or which could expand into a full right of fee by his survivance. Her heritable property, therefore, did not pass to her husband, whose rights had been evacuated, surrendered, or resumed, so that the heritage formed a part of her inheritance to be taken up by any valid deed executed by her after 1866, if such existed, or by her heir-at-law if no such deed existed. Looking to the state of matters as at Mrs Kirkpatrick's death, it seems out of the question to suppose that her husband could take up the property under the deed of 1866. It is not pretended that he could do so for his own behoof or as absolute fiar. It seemed admitted that he was under some restraint in this respect. But if he could not so take up the estate, it must have been because his right of property had been entirely superseded, for the deed of 1866, according to its terms, made him sole and absolute fiar upon his wife's death. He was never a trustee, and if his right of absolute fee ceased or was extinguished so as never to begin, he had no other character in which he could claim the heritage at all.

There is an aspect of the deed of 1867 which deserves special attention. That deed was executed with the consent and concurrence of Mr Kirkpatrick, and it certainly was intended by him as a surrender of all his rights under the former deed. It was, moreover, an effectual surrender in so far as regarded the whole moveable succession, and I am afraid there was a strong motive for the measure thus adopted, and a purpose which might be of great importance to the interests, or at least to the wishes, of these parties. There seems to have been a prospect of Mrs Kirkpatrick's heritable property being sold on advantageous terms, as it afterwards was; and if that had occurred while the deed of 1866 subsisted, the price of those subjects might have come into Mr Kirkpatrick's person, either to the extent of one-half or even to the entire amount. If that sum so falling to him by the deed of 1866 could not have been timeously changed in its form, a right of legitim would have arisen on the part of his children, which would not at all have suited the apparent views of the parents. The deed of 1867 averted that risk, and was undoubtedly effectual to that extent. Legitim is not due out of a mother's moveable succession, and by the deed of 1867 the parties took care that no part of any moveables, including any price for the mother's heritage, could pass to the father.

If the deed of 1866 had remained unaffected at Mrs Kirkpatrick's death, it is clear that her estates, heritable and moveable, would have belonged wholly to her husband, and would have been liable for his debts and deeds; and if he had become bankrupt, they might have been attached by his creditors. This confessedly cannot be the case now as regards the fee of her moveable estate. But would the fee of her heritage have remained liable for his debts after the deed of 1867, upon the ground that there was no effectual new conveyance of that heritage, although the deed contains a clear declaration that the wife alone was to retain the *jus disponendi* of her whole property? I think not;

but if not, this must proceed on the footing that the conveyance of the heritage to the husband had been recalled or surrendered, and consequently that he was no longer fiar, which is the character in which he grants the deed of 1868. If he had not that character he could not grant that deed, and the defenders have no conveyance of any kind to this heritable estate.

This is the main question here at issue. Was Mr Kirkpatrick, after the execution of the deed of 1867 by himself and his wife, entitled to fall back on the deed of 1866, and take up the heritable estate as if he was fiar? That is the character in which he did so, and it is on his title in that character that the defenders are obliged to found.

The true history and position of the case seems to me to be this:—The heritage in question was originally vested solely in Mrs Kirkpatrick by a title in her own person. By the deed of 1866 she changed that state of things for a time, and conferred on her husband a joint, and eventually a total, right of fee. But by the deed of 1867 she undid that arrangement, and declared, with his own consent, that he should have no control over the property, but that she alone was entitled to dispose of it. This brought matters back to their original condition, and her full right to the property revived, as vested in her by her primary title. If she had at the same time validly conveyed away the heritage to new trustees, that would have been effectual; but as she did not do so, the property is left in her *hereditas jacens*, as if neither the deed of 1866 nor the deed of 1867 had ever been granted, and her heir-at-law must take it out as connecting himself with his mother and her original title.

I have said that I consider it of little importance in the case whether the deed of 1866 be considered as mainly an *inter vivos* or wholly a *mortis causa* deed. If it be wholly a *mortis causa* deed, it is all the more easily revoked or superseded by any declaration adverse to its main objects. Other questions of nicety too would arise, not favourable to the defenders. For a *mortis causa* deed is not presumed to be delivered in the grantor's lifetime, and it is doubtful if it would have become a delivered deed as regards heritage merely by the wife's death, where there is not the usual clause dispensing with delivery, nor any reservation of liferent. The deed, as a mere *mortis causa* deed, would become extremely anomalous and very difficult to sustain.

In the circumstances of the case I have already noticed the power which the wife had to revoke the deed of 1866 as having been a donation, and this independent of her husband's will or consent. But the deed of 1867 excludes any question on this head, as it is granted with the husband's full consent, and if its clauses amount to a renunciation or resumption of the powers or rights which had been gifted to him by the previous deed, it seems impossible for him to interfere further, or to exert any control over the property beyond at least his legal right of courtesy, which is a mere liferent. It seems out of the question that after the terms of the later deed he should put himself forward as a fiar under the donation contained in the prior one. The second deed by its plain declarations restores the *status quo* which existed before the first deed of 1866 was granted, and so much so that even the liferents given by this deed of 1867 are defeasible by the ample powers reserved and restored to the wife.

The more I consider the special clause referred to, the more I feel convinced that it is a substantive and immediately operative recall and extinction of the rights conferred on the husband by the deed of 1866. It is not merely a reservation, but a *declaration* of right, emanating from the wife, who had power as a wife to revoke any previous gift, and moreover expressly consented to by the husband, even if he had had power to oppose it. If by the deed of 1867 there is declared or recognised by both husband and wife that the wife alone, and by herself alone, is now to have power to "sell, burden, or dispose of the whole subjects," heritable as well as moveable, it seems to me impossible to deny that Mrs Kirkpatrick was thus constituted, or reconstituted, *sole* fiar, and it was impossible that another person could be even joint fiar, or could have any fee or right of disposition. I cannot conceive how there can be two persons that have independent rights of burdening or disposing of a heritable subject. If the wife can sell, burden, or dispose of the whole or any part of her heritage of herself alone, at her own pleasure, it seems clear that the husband has no power or right to do the same thing to any extent; and this is all the clearer when we consider that the feudal right and title were originally in the wife. The encroachment on the wife's right introduced by the deed of 1866 could clearly have been done away with without any definite technical language and form, provided the will of the parties were expressed, and I cannot imagine a clearer expression of the will, both of wife and husband, that the husband should no longer have any power over the fee of the estate. This was plainly intended, and it seems to be clearly expressed both by the general scope and purpose of the deed, and specially by the explicit clause I have referred to.

It only remains for me to notice the attempt to support the defence on the authority of *Richmond v. Wilson*, 3 Macph. 95. That case was essentially different from the present, in respect that the original conveyance was a trust conveyance, and when that is the case it is always competent for the testator to declare the purposes of the trust by any deed expressive of his will. Here the original conveyance in the deed of 1866 was not a trust, but a conveyance to the husband in absolute fee, and a right of that kind cannot be converted into a trust right without a new conveyance. The conveyance in trust in the first deed is only a substitution or secondary deed, and did not come into operation. The husband by his survivance would have become the fiar, and thus excluded the trustees. The renunciation or resumption of his *jus disponendi* accresced to the wife, and prevented that result, but did not make way for the trustees under the first deed. The case of *Richmond* therefore has no application.

I am therefore for adhering to the interlocutor under review.

LORD ARDMILLAN—On the first question raised in regard to the validity of the dispositive clause in the deed of 1867, I do not think it necessary to add anything. I concur in the opinion that, at the date of this deed, and at the date of the death of Mrs Kirkpatrick, the word 'dispone' was indispensable to a dispositive clause purporting to convey heritage.

In considering the next question which arises, I assume that the deed of 1867 is, on the ground

which I have mentioned, and which has been already explained, ineffectual as a conveyance of heritage. But it is in all other respects a good deed, duly signed and attested, authentic and complete in all respects as a clear expression of will on the part of the granter and her husband, and as validly conveying and distributing personal estate.

It is now important to ascertain the true position and effect of this deed of 1867 in relation to the other deeds in process, viz., the deed of 18th June 1866 and the deed of Mr Kirkpatrick of 26th June 1868.

The first of these deeds, that in 1866, bears to be granted by Mrs Kirkpatrick with advice and consent of her husband, and with joint consent and assent, for causes and considerations which are not explained, but which are stated to be "good and onerous." By that deed Mrs Kirkpatrick, with such consent, disposes and conveys to her husband and herself, and the survivor, whom failing to certain trustees, her whole property, real and personal, then belonging to her, or which might belong to her at the time of her death. It is not necessary again to state the particular terms or purposes of the trust, except to say that the pursuer, the only son and heir-at-law, was not provided for. A previous disposition and settlement, in April 1863, and another in May 1863, were revoked. There is a clause of reservation in this deed of 1866 in the following terms:—"Reserving always full power to me, at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents, either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." It is important to observe that by this clause Mrs Kirkpatrick does not reserve power to revoke the deed at her own hand and without consent of her husband, or to sell or dispose of any part of the subjects without his consent. The only power of revocation or disposal which is reserved is to both spouses with joint consent, or to the survivor. It is obvious that if in a subsequent deed there shall be a reservation of power to Mrs Kirkpatrick, acting alone and without her husband's consent, to revoke their settlement, or to sell or dispose of the subjects, that will be a most important alteration, and quite inconsistent with this deed of 1866.

The character of the deed of 1866 is, I think, somewhat different in regard to the first part of the deed, wherein the whole estate, heritable and moveable, is conveyed directly to the two spouses and the survivor of them, and in regard to the second part of the deed, in which a trust is created and trust purposes explained, and trust administration and distribution directed. In one sense the deed may be called a *mortis causa* deed, by which I mean that the property conveyed comprehends the whole estate at the date of Mrs Kirkpatrick's death; and the trustees have no powers or duties before that date. But, in another sense, a person can scarcely make a last will in his own favour, and certainly the primary purpose and effect of the deed is direct disposition and conveyance in favour of the two spouses and the survivors, and it is only failing both spouses—in other words, after the death of the survivor of the spouses—that the trust, with the provisions to the daughters, in

certain proportions comes into existence, or that any right or interest in the trust-estate can arise.

I am disposed to think that, as a matter of conveyancing, Mr Kirkpatrick had a conjunct fee with his wife during the subsistence of the marriage and an accrescent fee in his own person after the decease of his wife. This right in him was that of primary disponee under the deed of 1866; and the trust, charged with all the trust interests, was substituted to the two spouses and the survivor. As the heritable subjects were the property of Mrs Kirkpatrick, a question of her revocation of the conveyance in 1866, as of a *donatio inter virum et uxorem*, might have been raised. It is not necessary to question it. She never did revoke it as a donation. The defenders' case is that it never was revoked. They stand on the deed of 1868, executed by Mr Kirkpatrick after his wife's death; and they maintain that deed by Mr Kirkpatrick to be effectual. Apart from that species of revocation as of a gift by the wife, the only revocation to which Mr Kirkpatrick's right and interest was liable under the deed of 1866 was a revocation by both spouses with mutual consent, or by his wife if she survived him, which she did not.

So standing the rights of the spouses under the deed of 1866, we have next to consider the deed of 1867, subtracting from it the clause purporting to convey the heritage. It is enough to say of this deed of 1867 that its meaning is not doubtful. It certainly seems to have been meant to be a complete testamentary deed, and the only expression of the will of the maker. The revocation of the first deed appears to be contemplated in the second deed at its very commencement. The very words of the clause in the deed of 1866 reserving power to revoke are set forth in the opening of the deed of 1867, which bears to be granted by Mrs Kirkpatrick with consent of her husband, and by "both, with joint consent and assent, in order to regulate the management and distribution of the means and estate of Mrs Kirkpatrick." Plainly the regulation of the whole succession was intended. Plainly the exercise of the joint power of revocation was intended. Plainly the substitution of the deed of 1867 for the deed of 1866 is what was intended. Of this I think there can be no doubt. Then observe, as a marked difference between the two deeds, that no right of fee, whether conjunct during the marriage or arising on survivorship, is in the deed of 1867 given to Mr Kirkpatrick. No right to the personal estate is given to him except in liferent and through the medium of the trust. A body of trustees, differing in some respects from those under the former deed, are appointed; and while the first trustees had been substituted to the spouses, these second trustees are made the primary disponees, and are directed to pay to the husband the income of the whole estate during his survivorship of his wife. In the first deed he had a right of fee direct and primary coming in before the trust. By the second deed he had only a liferent annuity on survivorship, to be paid by the new trustees. But further, the purposes of the trust and the distribution of the estate—more particularly the personal estate (for the heritable estate was not validly conveyed),—are quite different under the deed of 1867 from what they had been under the deed of 1866. The will of the parties making the deeds had changed. I need not explain these points of difference, they have been pointed out by your Lordships, and

there is no doubt about it. Then there is provided, as a burden on the heritable estate, an annuity of £100 a-year to the pursuer, John Kirkpatrick, the only son of the family, and to that annuity is attached the very singular condition,—certainly a severe condition, I should say a cruel condition,—that it shall commence only from and after the death of his own wife. By this deed, executed by the parents who should have guarded their only son against a temptation to evil, these parents conferred on him an interest in the death of his own wife. I have heard no explanation in defence of this singular stipulation. But at least it is not surprising that the heir should seek to vindicate his rights, and to escape from the unnatural position in which the deed of 1867 placed him. It is not possible to read these two deeds without being satisfied that they were not intended to form a series of writings constituting one settlement. In every important respect they differ. Each professes to be a general settlement. They cannot stand together. The *enixa voluntas* of the maker of both deeds is expressed in the last deed, and it is clearly different from what it was as expressed in the first deed. I think it impossible to read the deed of 1867 as an addition or supplement to the deed of 1866, even after subtracting from the later deed the inept clause purporting to convey heritage.

But then the deed of 1867 contains a clause of reservation very different from that which was in the deed of 1866: "Reserving always full power to me at any time of my life, and even on death-bed, by myself alone, to add to, alter, or revoke these presents, either in whole or in part:" nor is that all—it proceeds, "and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure." This is a most important alteration; and I concur in the remarks made by the Lord Justice-Clerk on its meaning and effect. Observe, there has been no attempt to revoke the deed of 1866 on the footing of donation; and these defenders, trustees who maintain the deed of 1868 by Mr Kirkpatrick, repudiate any such interspousal revocation. Revocation in any form, or for any purpose, is fatal to their case. They would have no case at all if the heritable estate had reverted to the wife; for she has not disposed of it, and the pursuer is her heir-at-law. But what was done in the deed of 1867 was to convert Mr Kirkpatrick's right into a mere claim for a liferent from the new trustees, and to make even that claim dependent on the sole pleasure of his wife. This alteration is quite inconsistent with the deed of 1866, and equally inconsistent with the idea of a series of successive testamentary writings to be read together as a settlement. It is clear to me that you cannot use the one deed to work out the purposes of the other deed, and you cannot use the one trust to administer the estate set forth in the other deed. Thus the case of *Richmond* is not in point. There is nothing whatever to suggest that the granters of the deed of 1867 intended to keep alive and keep in force the deed of 1866. Mr Kirkpatrick assented to the deed of 1867. He subscribed it, not only as expressing his consent to his wife's deed, but as recording his will and intention, "for himself, his own right and interest," in regulating the management and distribution of the whole estate, which he concurs with his wife in describing and disposing of as her estate—her estate in 1867.

There is everything to suggest, and indeed to make it clear, that the parties meant the new deed to be a general settlement of the whole estate, and to stand in place of the old deed.

If in the deed of 1867 there had been an express revocation of the deed of 1866, a revocation to which Mr Kirkpatrick was himself a party, I think it quite clear that on the death of the wife he could not have made up his title to the fee of the estate as under the deed of 1866. The heir of the mother would have succeeded to the fee of the estate. But if the revocation be clearly implied that is sufficient. In such a case as this it is not necessary that it be express. The point raised is precisely the same as would have been raised if Mr Kirkpatrick had on the death of his wife claimed the fee of the estate under the deed of 1866. His right to execute the deed of 1868 depends on his right to the fee of the subjects after his wife's death. If he had not the fee, the deed of 1868 is void as flowing *a non habente potestatem*. The defenders have no case except on the assumption that Mr Kirkpatrick had in 1868 the fee of the estate, and could then dispose of it, and did effectually dispose of it, after his wife's death. Such disposal, I think, he could not, and did not, make.

Both of these two deeds purport to be deeds disposing of the universal estate of Mrs Kirkpatrick; and it is settled law that in such circumstances the second deed operates as a revocation of the first. If the second deed were not signed, or was not tested—so that it was not legally signed—or if the maker of the deed was in a position in which the law forbids the expression of his will in regard to heritage—as in the case of deathbed,—then it might be argued that there are not two deeds. But here it is not so. There are two deeds, and both are authentic, and both deal with the *universitas* of the estate. The will of the maker remains as finally expressed in the last deed. In the case of *Sibbald's Trustees v. Greig*, Jan. 13, 1871, this point, in regard to the last of a series of testamentary deeds, was carefully considered, and the decision is clearly an authority apt and weighty in support of the proposition which I have now stated. The maxims of the civil law, when rightly understood, are, in my opinion, to the same effect. The words, "*Tunc autem testamentum rumpitur quum posterius rite factum est*" have been quoted to us as implying that in order to sustain revocation the second deed must be effectual as a conveyance. I think not. The expression "*rite factum est*" does not, I think, mean effectually done, but regularly, formally, correctly done. It is so understood, I think, in our own law. The presumption that "*omnia rite acta sunt*" is not a presumption that the thing done is valid in regard to effect. It may not be so. It may be too late. It may be by the wrong party, or against the wrong party. The presumption is merely that the procedure is regular and formal,—done duly and in the usual manner. This is, I think, the meaning of the word "*rite*" in such a question and in so far as the maxim of the civil law may be held applicable.

The question whether there was revocation of the first deed when the second deed was executed is a question of intention. The implication of intention to revoke arises not from the antagonism of results but from the antagonism of will. The incompatibility of the first deed with the will expressed in the second,—the will, be it observed, of

both parties—the husband as well as the wife,—raises the implication of intention to revoke. In this case the first deed did not express the last will,—the final and deliberate mind of the disposer. It was only her deed conditionally, and it conferred no right except under condition. That condition was, that the granter and her husband, or the survivor, did not revoke it. Revocation by them was in their own power. The question is, did they so will it? I do not again resume the explanation of the reasons on which I think it clear that, by the deed of 1867 Mrs Kirkpatrick expressed her will, and Mr Kirkpatrick concurred in the expression of her will, that the deed of 1866 should not stand. I feel very strongly the force of the Solicitor-General's remark, that to set up the deed of 1866 now as a conveyance of the fee to Mr Kirkpatrick would be to defeat the will of Mrs Kirkpatrick. It may be that she had no will to give the real estate to her son and heir; but the heir's title stands not upon will. His right emerges when a contrary disposal fails. There can be no disinheritance without a conveyance to another. The surviving husband could not have been permitted to withdraw his renunciation of his own right, and his concurrence in his wife's deed, as expressed in 1867. If he could not then have maintained his right to the fee of his wife's estate, then these trustees cannot resist the pursuer's case, for the deed of 1867 does not convey the subjects, and the trustees cannot maintain the deed of 1868, or their right under the deed of 1868, which is under reduction. That deed of 1868 was granted by one having no power to grant it, unless Mr Kirkpatrick himself could have claimed the fee immediately on the death of his wife.

I have considered all the authorities referred to, and have carefully attended to the comment on them in the very powerful opinion of Lord Deas. But I am not able to concur in the view which he has taken: and I have come to the conclusion that, except in so far as reliance is placed on the decisions in cases of deathbed, there is no authority to support the defenders' contention; and I am of opinion that the decisions in the cases of deathbed—a chapter of curious law now closed by statute—though very interesting, are not applicable to the question now before us. A deed is here necessary to exclude the heir; and the deed of 1866 is the only deed which can exclude him. But the analogy of the law of deathbed supplies no argument to support the deed of 1866. In no case has the prior deed been sustained in a case of deathbed. It is the deathbed deed which stands when the heir is shut out. On this point I concur so entirely in the opinion which has been given by the Lord Justice-Clerk and by Lord Neaves that I have nothing to add. On the whole cause, I am of opinion that the pursuer, the only son and the heir at law, is entitled to succeed.

LORD JERVISWOODE—This interlocutor was pronounced by me, and I was conscious when I pronounced it, and am conscious still, of the very great difficulty and delicacy which attend the decision of the case; but on the whole I remain of the opinion which I formerly held, and I am contented to refer to the views expressed by the Judges who have come to the same result.

LORD PRESIDENT—There are two questions

which have been argued upon which I shall say nothing, except merely to indicate my concurrence with the whole of your Lordships. I think the disposition of 1867 is ineffectual to convey heritage; and I think that it cannot be read as constituting, along with the deed of 1866, the settlement of Mrs Kirkpatrick; nor can it be read as a paper of instructions addressed to the trustees under the prior deed. But the important question remains behind. Mr John Kirkpatrick comes here to vindicate his rights as heir-at-law of his mother, against a very determined attempt to disinherit him. I agree with Lord Benholme that nothing can be clearer than the obstinate intention to disinherit the heir; but to that I attach not the slightest importance. The only question is, whether those who set themselves to do so have succeeded in doing it in the only way that the law can recognise. The heir, at the time of his mother's death (she being infeft in the estate), was entitled to be served in special to her unless there could be produced a deed which effectually conveyed that estate to some other person; for that is the only deed of disinheritance that the law of Scotland knows. Now the first deed that is appealed to is the deed of 1867; and the answer of the heir-at-law is—that deed does not convey the estate. If it had been a deed executed upon deathbed it would have conveyed the estate, and it would in one sense have effectually conveyed the estate, and therefore it would have been a deed of disinheritance according to the law of Scotland. But just because it was a deed of disinheritance, and at the same time was executed on deathbed, it would have been liable to challenge by the heir in the exercise of the peculiar privilege given to him by the law. In such cases, if the deed executed upon deathbed contained a mere conveyance of the heritable estate, and contained no other clauses, and no other expression of the mind or will of the maker, then the heir-at-law would not be entitled to set aside the deed, if there was in existence a prior deed also conveying the estate, although it might be not to the same person. That rule is well fixed; but I am of opinion, with those of your Lordships who are in favour of the interlocutor, that that rule has no application to the present case. The heir here requires to reduce nothing in so far as the deed of 1867 is concerned; and indeed he requires to reduce nothing at all that was left behind by Mrs Kirkpatrick, or that had any existence at the date of her death. His answer to the deed of 1867 is that it does not convey the estate, and therefore does not exclude him. But the reason why he says it does not convey the estate is—not that it is a null deed, for to many effects it is a valid deed and a deed that must receive effect. Of that I shall have more to say hereafter; but what I wish to observe in the meantime is, that it is not the objection of the heir to this deed that it does not represent the mind of the maker, that it is not duly tested, and therefore is not to be taken as an expression of her will. The objection is simply that in its form and structure it is not capable of conveying that part of the deceased's estate to which the heir lays claim. Therefore I think that other class of cases, of which *Henderson v. Wilson* is the most important example, has in like manner no application to the present case; because they all depend upon the principle embodied in Lord Thurlow's question, How can a null deed be a

revocation? We come next to consider the substance and effect of the deed of 1866; and if that be a subsisting deed left by Mrs Kirkpatrick to regulate her succession, or if it be a deed which took effect during Mrs Kirkpatrick's life, and stood unrevoked at her death, then unquestionably the heir-at-law is excluded. I am not sure that it is essential to the argument on either side to determine whether it is a deed *inter vivos* or a deed *mortis causa*. But for the sake of clearness I think it is desirable that we should address our minds to that question, and see what was the effect of the deed when it existed, and what would have been the effect of the deed if no other deed had been subsequently made. Now, the first part of the dispositive clause conveys the entire estate of Mrs Kirkpatrick, heritable and moveable, to herself and her husband in conjunct fee, and to the survivor; and I don't apprehend there can be any difficulty in the construction of such words of conveyance. I have not heard it suggested that they can mean any but one thing, viz., that the parties who are made disponees under that deed in the first instance—the husband and wife, who are also the makers of the deed—become joint disponees, and that the survivor of them takes the entire fee upon the predecease of the other. Now, how the survivor can take the entire fee upon the predecease of the spouse, in consequence of a conjunct fee having been vested in them, if no conjunct fee was ever vested in them, I don't quite see. It seems to me that the clause is unintelligible if it is not intended to have effect during the lifetime of the two spouses. It can have no meaning and no practical effect. Whether there is anything else in the deed that prevents that part of the dispositive clause from receiving effect is another matter; but the clause itself is plainly in its expression and meaning a clause that ought to receive effect as soon as the disposition is delivered, and during the lifetime of the two spouses. But then it is said that the deed after all is not intended to have that effect, but is only a *mortis causa* deed, and that the effect of it is to give the fee of the estate to the survivor, and then to give effect to the subsequent destination failing the survivor. I cannot see any evidence of that intention in the deed. I am of opinion that to certain effects and in a certain event this deed would operate to regulate the succession to the estate, and in that sense it is a *mortis causa* deed. If Mr Kirkpatrick turned out to be, as he was, the survivor of the two spouses, and did not evacuate the substitution, the effect of the deed would be after his death to make the trustees therein named heirs of provision in trust for the daughters; and so it would be a deed regulating the succession. But it would not be a deed regulating the succession until that event occurred,—until Mr Kirkpatrick or the survivor of the spouses died and left the destination to take effect. In so far therefore as the spouses were concerned, it was in my opinion a deed *inter vivos*; in so far as the ultimate destination was concerned, it would, if allowed by the survivor to take effect, have operated as a deed *mortis causa*. But it seems to be thought that even supposing this is the proper construction of the first part of the dispositive clause, the deed could have no effect without delivery, and that it was not delivered. Now I am disposed to concur in the opinion expressed by the Lord Justice-Clerk, that a deed of this kind, not a mutual deed,—for I don't understand his Lordship to have suggested that it

was a mutual deed—but a joint deed executed by the spouses in favour of themselves, and making themselves joint disponees, may be held to be a delivered deed, especially when it is left in the custody of the husband, and disposes of the wife's estate. And that that was the condition of matters is fairly presumable. My brother Lord Deas suggests that if this matter of the delivery of the deed was of moment, it ought to have been averred and proved on the part of the pursuer that it was delivered, while there is no statement of that kind on the record. It would have been a very strange thing for the pursuer to have undertaken any such proof, or to have made any such averment, his contention being that that deed is not a subsisting deed, but was revoked by a subsequent deed; and whether it was delivered or not is therefore a matter of indifference to him. I make the observation upon the probability of its being in such a position as to operate as a delivered deed only for the purpose of making more clear my construction of that first part of the dispositive clause. Now this being the nature of the deed, and the power of alteration being expressed in the terms which have been so frequently referred to—reserving to the spouses during their joint lives, and to the survivor a power to alter—the position in which the parties stood after its execution appears to me to be this: Mrs Kirkpatrick undoubtedly had a power to revoke the deed as a donation *inter virum et uxorem*. I think that cannot admit of doubt. But she had also a power, either jointly with her husband, or by herself alone if she survived, to alter the deed without exercising her right to revoke it as a donation; and these are two totally different things. Such was the position of the parties when they changed their minds as to the mode in which this estate should be settled, and proceeded to make the deed of 1867. Now I think they made the deed of 1867 in exercise of the power reserved to them in the deed of 1866. I think they are very careful to show that that is so,—that Mrs Kirkpatrick is not revoking a donation which she made to her husband, but that the two spouses, with joint consent and assent, in the very terms of the reservation at the end of the previous deed, proceed to make a new one. The plan of this new deed is quite obvious. The estate of Mrs Kirkpatrick was almost entirely heritable, but if it had been converted into moveable, and had become upon her death the absolute property of her husband, and he had failed to convert, or had not had an opportunity of again converting it, into heritage, the object of the spouses in making both the deeds would have been defeated, and a claim of legitimum would have been opened up to all the children. This second deed was made, among other purposes, for the purpose of cutting off such claims; whether that was the only purpose, or whether it was the chief purpose, I shall not undertake to say, but it was one of the purposes that the spouses had in view in making this deed. In order to attain that object it was indispensable to divest Mr Kirkpatrick of the fee that was given to him in the previous deed. It could not be done without that. They therefore proceed to deal with this estate as the estate of Mrs Kirkpatrick alone, and in the expression of the inductive clause of the deed of 1867 we have this statement, that it is in order “to regulate the management and distribution of the means and estate of me the said Mrs Jean Glas or Kirkpatrick after my death.”

That is the declared object, and the only declared object, of the deed under the hands of both the spouses. Now that is totally inconsistent with the existence of a fee in the husband,—either a joint fee along with his wife or a fee in the event of his surviving her. If the deed of 1866 is to subsist, the estate is not the estate of Mrs Kirkpatrick. It is an estate already disposed of, and disposed of in such a way that from the date of the execution of the previous deed it ceased to be her estate. The deed proceeds to convey both heritage and moveables, and, being ineffectual as a conveyance of heritage, my brother Lord Deas seems to think that it is a very unimportant deed in its effect altogether,—that the conveyance of moveables is practically inoperative, because there was really very little moveable estate left by Mrs Kirkpatrick; and he seems also to have imagined that such moveables as she did leave were not bestowed upon her daughters. But that is a mistake; for the moveable estate is by very express words directed to be given to certain of the daughters. But what is of far more importance to observe is, that the conveyance of the moveable estate, if the Clyde Trustees had by compulsory sale taken the land, would have been the only operative part of the deed; and if the Clyde Trustees had taken a portion of the land, then both the heads of the conveyance would have been important,—both the conveyance of the heritable estate and the conveyance of the moveable estate. In short, the deed is not more important in the eyes of those who made it, and might have been less important in their eyes, in respect of the conveyance of heritage than in respect of the conveyance of moveables. At all events it is perfectly clear that it does subsist as a conveyance of moveables, and is effectual; and it subsists not only as a conveyance of moveables, but it subsists also as a very strong and distinct expression of the mind and intention of the parties as to the regulation of Mrs Kirkpatrick's succession, and the condition in which her estate is to remain during her survivance and down to the day of her death; because the effect of the deed, apart altogether from the conveyance of moveables, is in my opinion to operate on the one hand a renunciation by Mr Kirkpatrick of the right of fee given to him under the deed of 1866, and a restoration of Mrs Kirkpatrick to her full right of fee in that estate; and all that, I apprehend, can be operated by a declaration of purpose without the necessity of dispositive words. I put this question as a test of Mr Kirkpatrick's position under this second deed—Suppose that the heir had not interfered, but that Mr Kirkpatrick had come forward after his wife's death and said, This is not a good conveyance of the heritable estate, and consequently the deed of 1866 stands in force as regards the heritable estate, and I claim the right of fee adversely to my daughters,—could he have done that? He certainly could if the deed of 1866 subsists. If the deed of 1866 is not destroyed by the deed of 1867 that was his right. But can anybody be heard to maintain that, after this arrangement with his wife for the regulation of her succession, and after he had given up his right as heir under the deed of 1866, and restored her to the full right and management of her own estate, he could still at her death claim under the deed which was so superseded? I apprehend that is impossible. And that appears to me to be a crucial test; because this defect of the deed of 1867 is not a defect available to

the heir only, as in the case of deathbed. It is a defect available to everybody having interest; and if Mr Kirkpatrick had a fee under the deed of 1866, and that fee was not destroyed by the deed of 1867, he could have claimed that fee adversely to his own children. But I think that he would have been barred most effectually by that to which he agreed under the deed of 1867, and that he would have made that claim in vain. The clause of reservation, to which reference has been made, in the deed of 1867, is one of very great importance, but I take it not by itself but in connection with the whole of the rest of this deed, as showing very clearly that Mr Kirkpatrick gave up his right of fee, and consented to be reduced to that position which the law would have assigned to him, at any rate as regards the heritable estate, viz., to have a liferent by courtesy. I say this reservation at the end of the deed is most important when taken in connection with all the other clauses of the deed, indicating that purpose and desire. But the clause of reservation itself, as it is called, though it is a great deal more than a clause of reservation, does in so many words distinctly declare that from that time forward Mrs Kirkpatrick is full and unlimited fiar of the estate. It does not give her a faculty. That is not the nature of the thing at all. It is a reservation to her of that which naturally belongs to her, viz., the full property and right of disposal of the estate: and supposing that she, not revoking the deed of 1866, not asserting her original right as fiar of the estate before any deeds were executed at all, but reciting this clause of reservation at the end of the deed of 1867, and professing to act upon that and that alone, had conveyed the estate either gratuitously or onerously, could any one have competed with her disponent's title? If she had sold it, would the purchaser not have had a good title in competition with Mr Kirkpatrick? If she had given it gratuitously, would the gratuitous disponent not have been entitled to it in competition with Mr Kirkpatrick? Now if that is so, how is it possible that there could still subsist, notwithstanding of that right and power in Mrs Kirkpatrick, a present right of joint fee, and a prospective right of sole fee in her husband? The two things are utterly inconsistent. They cannot stand together; and yet the whole of this deed, except that part of the dispositive clause which professes to convey heritage, is a subsisting and valid deed, expressive of the wishes, desires, and intentions of the two spouses. For these reasons, I come to the conclusion that the deed of 1867 operates as a revocation of the deed of 1866, and I am not sure that I should be quite content to say that it implies a revocation of the deed of 1866. At all events, I do not say that at all in the same sense in which a revocation is implied from a mere new conveyance. The case is very different from that. This revocation depends not on the new conveyance, but on the express desire, the explanation of the arrangement which is made between the spouses for the disposal of Mrs Kirkpatrick's estate after her death. Their whole intention and purpose as expressed in this deed are so inconsistent with the subsistence of the previous deed that if it does not amount to an express revocation, it is at all events an implication of a very different and a much stronger kind than that which arises from the mere execution of a new conveyance. For these reasons, I concur with the majority of your Lordships in holding that the interlocutor ought to be adhered to.

The Court pronounced the following interlocutor:—

“Adhere to the interlocutor reclaimed against, and refuse the reclaiming-note: Find the pursuer entitled to additional expenses, and remit the account thereof to the Auditor to tax and report.”

Counsel for Pursuer—Solicitor-General (CLARK), M'Laren, Asher. Agent—Alexander Howe, W.S.

Counsel for Defenders—Millar, Q.C. Watson, Balfour. Agents—Murray, Beith & Murray, W.S.

Thursday, March 20.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

BRIDGES v. SALTOUN.

River—Mill-lade—Servitude—Prescription—Abandonment.

Where the proprietor of a mill, having, in exercise of a right of servitude, for more than forty years diverted water from the main stream for the purposes of his mill, executed works with a view to the abandonment of his right—*held* that he was not bound to continue the exercise of his right of servitude, but that in abandoning his right he could do so only in such a manner as would not expose the owner of the servient tenement to any damage or risk of damage to which he was not exposed during the continuance of the servitude.

This was an action raised at the instance of the Rev. Alexander Henry Bridges, proprietor of the lands of Ardlaw, against Lord Saltoun, proprietor of the lands of Tyrie. The conclusions of the summons were for declarator “that the defender had and has no right to shut up or obstruct the watercourse or mill-lade taken off from the burn of Tyrie, at a point in said burn where it forms the boundary between the lands of Ardlaw and Tyrie, respectively belonging to the pursuer and the defender, and thence proceeding through the defender's said lands to the Nether Mill of Tyrie, and thence proceeding through the defender's said lands until it joins the burn of Tyrie at a point below the pursuer's lands of Ardlaw, or to do anything whereby the flow of water throughout the whole course of the said watercourse or mill-lade may be in any way impeded or obstructed;” and “that the operations of the defender upon the said water-course and mill-lade, and the diversion of the water thereof by him, are and were illegal and unwarrantable:” for decree against the defender ordering him to “restore the said water-course or mill-lade to its former state, or at least to restore or open up the same, so that the water may flow as freely as before along the whole course thereof, and that at the sight of a man of skill to be appointed” by the Court; as also, for interdict, upon matters being restored to their original state, against the defender “causing the water now taken, or that was in use to be taken, into the said mill-lade from the said burn, to be returned thereto at any other point than that at which it has from time immemorial and prior to the said illegal operations been returned, and from interfering with the water of the burn of Tyrie, or