

him and his creditors, except with reference to that which strikes at the root of the original deed.

It appears to me, that the Court of Session was quite right in holding, that this second deed was not a new settlement, but merely striking out of one of the heirs, who never could come into possession except in the order of the deed. Under this deed Mary would never come into possession at all. There is no question, therefore, as to her creditors. It was impossible that there should be. They never could find her in possession subsequently. And this limitation not being a new settlement, this is not a case which is required to be registered by the Statute of 1685. If it had been necessary under the statute, then every deed relating to the estate must equally be registered. There were two months between the execution of the first deed and the execution of the second deed. Suppose the first deed duly registered, how could the execution of the second deed before the registry of the first have affected the question? It seems to me that this was considered so clear at the time, (which rather proves what the general opinion has been, according to the statement of Lord Cunninghame,) that the parties purposely kept the second deed off the Register of Tailzies, as being unnecessary to be registered: for they actually took both deeds to the registrar of the Registry of the Council, and had them both regularly registered there, which was right enough as regards the disposition having nothing whatever to do with the Statute of 1685. But when they came to obey the directions of the Statute of 1685, they drew the distinction, and they put upon the Register of Tailzies the original settlement of 1755, and they kept off that register, as being unnecessary to find its place there, the second deed of 1758.

My Lords, I have taken some time to consider this question, and have considered it very minutely, and have looked at it in every point of view, and, with all deference to my noble and learned friend, I have come to a strong opinion upon the point, that the decision of the Court below should be affirmed.

*Interlocutors affirmed.*

*Appellant's Agents, Pearson and Robertson, W.S.—Respondents' Agent, John Marshall, S.S.C.*

MAY 22, 1855.

JOSEPH MILLER, *Appellant*, v. SARAH MARSH and Others, *Respondents*.

Entail—Deathbed—Revocation—Title to Sue—*An entail was executed in favour of a series of heirs, excluding the entailer's heir at law, and reserving full powers of alteration and revocation. On deathbed the entailer executed a deed revoking the fetters of strict entail, but leaving the deed intact as a conveyance and destination.*

HELD (affirming judgment), *That the second deed did not give the entailer's heir at law an interest to challenge the destination and conveyance excluding him from the succession.*<sup>1</sup>

The pursuer appealed, maintaining that there ought to be a reversal of the judgment of the Court of Session—1. Because, by the common and statute law of Scotland, the right of the heir at law to succeed to the heritable estate of his ancestor cannot be defeated, or in any way injured, by deeds executed on deathbed. Bell's Principles, pp. 483-4; Ersk. iii. 8, 97 and 98, p. 695; *Crawford v. Coutts*, 2 Bligh, 655. 2. Because, according to the doctrines and principles of the law of deathbed, as expounded by Lord Eldon in the case of *Coutts*, which has ever since ruled the law and practice of Scotland, the deeds of entail, nomination and revocation under challenge, being in substance a conveyance of the estate in fee simple, granted on deathbed to the prejudice of the appellant's rights as heir at law, are on that ground void and reducible at his instance. Ersk. iii. 8, 22; Sandford on Entails, p. 246; *Ogilvy v. Mercer*, Mor. 3336; *Black v. Watson*, 3 D. 522; *Lawrie v. Lawrie's Trustees*, 8 S. 379.

The respondents maintained that the judgment was sound, because—1. The entail of 1829, consisting of the deed of entail, and relative deed of nomination, both bearing the same date, contained a conveyance in favour of the persons therein named and described, which was effectual to exclude the granter's heir at law; and that conveyance was not revoked by the deed of revocation of 1848. 1. Ross's Leading Cases, pp. 566 to 593; *Anstruther v. Anstruther*, 14 S. 272; Ersk. ii. 2, 1; Calvin, ad verb.; *Marquis of Breadalbane v. Chandos*, 2 S. & M'L. 377; *Smith v. Borthwick*, 11 D. 517. 2. The plea of deathbed is inapplicable to the circumstances, and cannot aid the appellant in his attempt to set aside the conveyance in the deeds of entail and nomination executed in the year 1829. Bell's Prin. § 1796. 3. Even if the law of deathbed

<sup>1</sup> See previous reports 15 D. 823; 25 Sc. Jur. 487. S. C. 2 Macq. Ap. 284; 27 Sc. Jur. 378.

were applicable to the deeds of 1829, the appellant's right of challenge is excluded by a prior deed of 16th October 1827; or, failing that deed, by a prior deed of 12th November 1810.

*R. Palmer Q.C.*, and *Buchanan*, for the appellant.—The doctrine is well settled, that a testator cannot on deathbed defeat or prejudice the rights of the heir at law by a voluntary deed, either directly or indirectly, and any device whereby this is attempted cannot succeed.—*Crawford v. Coutts*, 2 Bligh, 655. It makes no difference that the deathbed deed is in favour of the same parties who were called by a previous *liege poustie* deed.—*Moir v. Mudie*, 2 Sh. Ap. 9; *Anderson v. Fleming*, 11 S. 612. The whole question here is—whether there is anything done under the clause of revocation which amounts to a valid and effectual conveyance. A power to alter and change a succession is a power to dispoise anew, and not a power to engraft a new succession on the original settlement. *Per* Lord Thurlow in *Wilson v. Henderson*, 4 Paton's Ap. C. 324. We contend that the provisions in the deathbed deed in substance revoke the whole deed, for the provisions, conditions, &c., of an entail cannot be destroyed without revoking the entire deed.—*Per* Baron Hume, cited in note to *Stewart v. Porterfield*, 1 Ross L.C. 590; *Cathcart v. E. of Cassilis*, 1 W.S. 239; *Halkett v. Nisbet's Trustees*, M<sup>c</sup>L. & Rob. 53.

*Solicitor-General* (Bethell), and *Anderson Q.C.*, for the respondents, were not called on.

LORD ST. LEONARDS.—My Lords, this a question of conveyancing, merely applicable to Scotland. The positive rule is, that if there be a power to revoke, and that power is exercised on deathbed, the revocation is a good one. At the same time the law of Scotland, or its form of conveyancing, denies to the same instrument the power of creating any new estates,<sup>1</sup> or even the same estates which were in the original instrument.

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

Now the simple question is—whether, under this power of revocation, this gentleman did or did not create any new estates? That he had the power to revoke all the estates if he thought proper, nobody disputes. That he had the power to revoke all the prohibitory, irritant, and resolute clauses, nobody will dispute. He might have revoked the whole; and if he had done so, then, of course, the authorities would have compelled your Lordships to decide that he could not create any new estates, or not even the same estates, according to some of the cases, by a deathbed disposition. But the gentleman who prepared this instrument seems to me to have been rather too astute in the practice of conveyancing for the appellants, for, instead of taking that mode which would have been fatal to the disposition he was making, he very acutely left the estates precisely as he found them in the original settlement, aided by the deed of nomination. Taking those deeds both together as constituting the settlement, he does most cautiously revoke all the prohibitory, irritant, and resolute clauses, and all the fetters; in short, he removes the fetters, but leaves the estate. Where is the objection to that? He does not attempt to create any estates. He leaves the estates. But then the appellants say he has altered the character of the estates. My Lords, he has not altered the character of the estates, except in this way, that he has removed the fetters, which he had a perfect right to remove. Nobody disputes his right to remove the fetters, and nobody can dispute it. Then the estates remain; and the estates were to go according to their destination. But they may be alienated and taken in a different way, no doubt. Why? Because the fetters have been removed. But he had a right to remove the fetters; and the estates, which are now perfect, existing under these two original instruments not revoked, will take effect under those deeds, and not in any manner whatever by force of the deathbed disposition. The deathbed disposition was good to remove the fetters, and it was inoperative with regard to the estates created.

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

*Interlocutors affirmed, with costs.*

*Appellant's Agent*, John Cullen, W.S.—*Respondents' Agents*, Dundas and Wilson, C.S.

<sup>1</sup> NOTE.—The word "estate" is used throughout this and other judgments in the English sense, viz., as denoting the right or interest which one has in land.