that he would not have taken any legacy under a will which he considered to be bad.

"As we have here the clear evidence of the person who prepared the will, and of the three instrumentary witnesses, I am clearly of opinion that the judgment ought to be affirmed."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *V. Gibbs, Wm. Adam, W. Courtenay.*
For the Respondents, *Sir Samuel Romilly, Henry Erskine, David Monypenney.*

JOHN WAUCHOPE, W.S., only accepting Trustee of the deceased JOHN, DUKE of ROXBURGHE; the Rev. CHARLES BAILLIE, Second Son of the late Honourable GEORGE BAILLIE of Mellerstain, now Archdeacon of Cleveland; SIR JOHN SCOTT of Ancrum, Bart.; SIR HENRY HAY MAKDOUGALL of Makerston, Bart.; and Others, . . . } *Appellants;*

LADY ESSEX KER, and LADY MARY KER, Daughters of ROBERT, DUKE OF ROXBURGHE, deceased; and Sisters of the late Duke, JOHN: and JAMES THOMSON, W.S., their Attorney, . . } *Respondents.*

House of Lords, 21st Feb. 1812.

(Reduction on the head of Deathbed.)

DEATHBED—REDUCTION EX CAPITE LECTI.—A trust-deed was executed by John, Duke of Roxburghe, in *liege poustie*, conveying his heritable and moveable estate to trustees at his death, for these purposes; (1.) To pay his debts. (2.) To pay annuities and legacies; and, (3.) To settle the residue on such person or persons as he had or should afterwards appoint, by deed executed by him at any time during his life. He executed, on deathbed, this deed of instructions to his trustees, and this deed, in so far as it affected the heritable estate, was sought to be reduced. Held, that by the trust deed, the Duke had not divested himself of the heritable estate,—that the heir at law's right still existed until the moment of the Duke's death; and that the deed executed by the Duke on deathbed was reducible, in so far as his unentailed heritable estate

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was concerned, leaving it and the trust deed to have effect as to the moveable estate.

The present action is the reduction raised by the respondents, to set aside the deed of instructions and disposition of 19th March 1804, in so far as the Duke of Roxburghe's unentailed heritable estate was concerned, on the ground of

1803. deathbed. It was seen that a previous trust deed had conveyed his whole heritable and moveable estate to the appellants, as trustees for these purposes, 1. To pay his debts; 2. Legacies and annuities; and, 3. To convey and make over the residue to any person or persons he should appoint at any time during his life. This latter deed was accordingly executed, and called the deed of instructions on deathbed.

The facts, as to the execution of this deed, and the evidence led, are fully set forth in the preceding appeal; and it has been seen that the Duke died on the evening of the day on which the deed was executed. In this case, the Court had ordered memorials as to the question of deathbed.

When these were given in, the Court pronounced this in-

July 8 and 9, 1806. terlocutor: "The Lords reduce, decern, and declare, in "terms of the pursuers' libel, in so far as relates to the "whole heritable subjects conveyed by the trust deed, "dated the 5th day of November 1803, and descendable "to the pursuers as heirs *alioqui successuræ* under the titles "thereof, which stood in the person of John Duke of Rox-"burghe, exclusive of the *mortis causa* settlements executed "by his Grace, and decern and declare accordingly. But "in so far as regards the heritable property conveyed by "the trust deed, and descendable to the Duke's heirs "male by the titles thereof, remit to the Lord Ordinary to

Nov. 25, 1806. "hear parties thereon."* On reclaiming petition the Court adhered.

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* Opinions of the Judges:—

Lord President Campbell said,—"The challenge on this head (*Deathbed*) is clearly well founded as to the heritable estate.

"Heirs *alioqui successuræ* were not excluded by the trust-deed, (which was in *liege poustie*), but remained in their proper place till the Duke came to be on deathbed. It was too late then to execute a deed of any kind, to have the effect of displacing them, and introducing other heirs.

"The trust-deed, so far as it goes, neither is nor can be challenged, but the trustees must denude of the heritable estate in favour

After some farther procedure before the Lord Ordinary, his Lordship, of consent, disjoined the two actions which had been conjoined, and allowed them to be separately extracted, but refused to allow an interim decree, and appointed them to lodge their accounts in fourteen days.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. The trust disposition executed by the Duke of Roxburgh in *liege poustie*, on 5th

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of the heirs at law, after executing the other purposes of it, *i.e.* after paying debts and legacies, and accounting for the whole personal or moveable estate to the residuary legatees. The heirs at law, by calling upon them to denude the heritable estate, are not homologating the deathbed deed, but the reverse. The very ground of their action is, that the last deed can have no effect as to the heritage. The effect of the trust-deed was not to change the state of the heritage, and instantly to convert into moveable estate. The deed remained in the granter's power, and was to have no effect at all, even as a mandate to sell, till his death, and at that moment the succession to the moveable estate fell by law to the sisters, as heirs at law.

" It is said that nothing remained with the Duke or his heirs, but a personal right of calling the trustees to account. But this is a mistaken view of that case. The estate itself remained, and was an heritable estate at his death, no matter whether in his own person or in a trustee for him. The right of the trustee was merely nominal. The truster, by means of his trustees, held even the feudal right, *i. e.* the substantial right. *Vide* case of Campbell in regard to voting. Suppose it could with propriety be called a *personal* estate, it was a personal right *to lands*, which is *heritable*. The word personal is too often confounded with *moveable*. The trustees cannot now exercise the power of selling, if the heirs at law choose rather to have the subject itself in kind. Cases of Durie, &c. In short, the ulterior destination has now fallen to the ground, and the mandate contained in the trust-deed has so far become ineffectual. The decided cases are all clear in favour of the pursuer, and the case of Ouchterlony no exception. The last deed having been executed *debito tempore*, the sole question was, Whether it would be rejected merely on account of its form, that is, because it was in the shape of a latter will, though truly a declaration of purposes. This was what Lord Braxfield alluded to in his observations, p. 35 of the memorial. The case of Kyde he thought different, the will there being a substantive not a relative deed. It is too critical to set aside a relative deed, merely on account of form. The Duke could not reserve to himself the power of dispensing with deathbed.

Speirs *v.* Sir Alexander Campbell, ante vol. iii. p. 201.

Willoch *v.* Ouchterlony, Dec. 14, 1769, Mor. 5539; House of Lords, ante vol. iii. p. 659.

Kyde *v.* Davidson, Mor. 5597, House of Lords, ante vol. iv. p. 63.

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November 1803, reserves to his Grace, in express terms, the power of directing his trustees, by any deed executed even on deathbed, as to the disposal of the price or produce of his property invested in them. This trust disposition thus contains a reservation of power to the Duke to do that very thing which the respondents now challenge. This reservation is a condition of the trust disposition; and as the respondents connect themselves with the trust disposition, and make use of it as their title, they have no right to object to the exercise of these several powers which are contained in the deed, and on account of which it appears chiefly to have been framed. 2. The Duke of Roxburghe was effectually denuded of his whole unentailed heritable estate in Scotland, and the trustees were invested in that estate by means of the trust disposition of 5th Nov. 1803, which was executed when his Grace was in *liege poustie*. It was this deed which divested his Grace of his heritage, and disappointed his heirs at law. But of this deed no reduction is brought, or can be attempted. The subsequent deed of instructions to his Grace's trustees, which alone is the subject of challenge in the present action, was not a conveyance of his heritable property, for of that he had been previously divested, but merely a destination of the price or produce of his lands, and was not therefore a deed of that nature which can be set aside *ex capite lecti*. 3. It is a circumstance which enters deeply into the consideration of this case, that the deed under reduction was not the effect of solicitation from any quarter; and that a settlement of this kind was long contemplated by his Grace after much deliberation, and was often spoken of by him to his agent as being, in the situation of his Grace's family, the most rational settlement that could be made. It was thus a deliberate act of the Duke's own mind, unprompted and unsolicited; and in so far as the respondents were deprived by it of the fee of the brother's estate, and restricted to the liferent of property worth at least £120,000, it was in consequence of the Duke's fixed resolution, framed for wise reasons, salutary to the respondents themselves, and which the Duke had determined upon for a course of years. The law of deathbed was not intended to strike against deeds of this description. In such a case, the tendency of the law is *ut voluntas testatoris sortiatur effectum*.

The appellants admit that the deed 19th March 1804 was executed on deathbed, and, consequently, that it was liable

to be set aside by his Grace's heirs at law, so far as any *real* interest in his heritable estates remained with the Duke at the time of his death; but they maintain that no such real estate remained in him at his death, because he had, by the trust, 5th November 1803, previously divested himself of all such. That by that deed the estates were vested in trustees in order to be sold, and, consequently, nothing remained in the Duke, or his representatives, but a right to call upon the trustees to account for the money received for the estates. Cases have been decided where the heir who accepts an estate, during the lifetime of the granter, with conditions that he should be at liberty to change it by any deed made even on deathbed, could not quarrel any such deed so made by the granter; this same rule must apply here. The deed of 5th November 1803 conveyed the heritable estate for trust purposes in *liege poustie*, and therefore the law of deathbed is out of the question.

Pleaded for the Respondents.—Because by the common and statute law of Scotland, the person who, in the character of heir, is entitled to succeed to the real property of any species, or the heritable estate of any kind, of a predecessor, or ancestor, as things stand sixty days before his death, may set aside every deed made in that interval, by which his succession is attempted to be defeated or encroached upon, or by which he suffers any prejudice, provided that the ancestor had, at the time of executing such deed, contracted the disease which terminated in his death. That this is an accurate definition of what is styled the law of *deathbed*, with the modification introduced by the statute 1696, cannot be controverted. The question then is, Whether the respondents, as the heirs general of the late Duke of Roxburghe, could be prejudiced by the operation of that instrument which he is said to have executed on the 19th of March 1804, when it is admitted that he was in a legal sense upon deathbed? Or whether they would reap a benefit by setting it aside? The appellants attempt to maintain the negative, and the respondents venture to assert, that a more desperate attempt has never been made. What the appellants say is, that the Duke had NO REAL estate or interest whereupon that instrument could operate, or which the respondents could take as his heirs, because he had divested himself and his heirs of the whole by the trust deed 5th November 1803, when he was in *liege poustie*, the state opposed to deathbed. All that remained in him after the

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execution of that deed, according to the appellants, was a right to call on the trustees to account for and pay over the value received for the real estates, when sold, which right was moveable, and might be disposed of by will. But it is perfectly clear, in the first place, that the trust deed being testamentary and undelivered, could have no effect whatever till the Duke died; notwithstanding that deed he continued to be as much owner as ever he was, and, consequently, had in him, till the hour of his death, an estate descendable to his heirs, if he did not disappoint their succession, or so far as he did not disappoint it by that or some other deed executed in *liege poustie*. 2d. It is equally apparent that the appellants misrepresent the nature and terms of the trust deed. The estates were thereby to become vested at the Duke's death, and at that time only, if he executed no other deed, in the trustees, for the special purposes therein mentioned; and after they were answered, for the benefit of such person or persons, or for such uses and purposes, as he had directed or should direct, by any writing under his hand; and failing such directions, for behoof *of his next heirs;* and so far from there being any absolute direction to sell the estates, the deed limited the power of sale to such parts or parcels as the trustees might find necessary and expedient, for the purposes of the trust. If the trust deed had been followed by no other, it seems impossible to contend that the trustees could, in spite of those interested in the residue, have disposed of more of the real estates than were necessary to accomplish the special purposes, or of any part of those estates if the personal property was sufficient to answer those purposes. The residue must therefore have been held in trust for the Duke's heirs. And in face of all the decisions, and of common sense, it will hardly be maintained, that the law of deathbed does not attach on real estate, held through the medium of a trustee; and, above all, under a trust created by a testamentary revokable deed, not to take effect till the death of the grantor. Perhaps the simplest view which can be taken of this case, and surely the most favourable for the appellants, is by supposing the trust deed, as it stands, to have been *inter vivos*, and that the trustees had been actually and formally put into possession during the life of the Duke, and that they thereby became trustees for his creditors and donees, as well as for himself; Would not the Duke have then still had an heritable right and interest in the residue as to which

he had given no directions? Could the trustees have refused to reconvey to him, upon demand, all that was not necessary to satisfy the prior purposes? Could they, in spite of him, have insisted in converting the whole into money? Certainly not. Whatever right the Duke had under the trust, or after creating it, must have passed to his heirs, if he executed no other deed. If the whole real estates had been sold, no doubt the Duke's right would have been changed into a personal claim to the residue of the money, but not being sold *at his death*, his right was either to the whole heritable estate, or to the residue of the lands, and consequently vested in his heirs at law, but for the deathbed deed. And were it possible that the trustees could be permitted, after the Duke's death, in despite of his heirs, to sell the whole estates without necessity, it would not difference the present question, because the price must belong to those who had the beneficial interest in the estates at the time of the sale. It is, therefore, undeniable that the respondents, as heirs, are prejudiced by the *after deed*, which *restricts their right* to a *mere liferent*, and makes them also *liferenters of money*, instead of being *tenants in fee simple of land*; and if it was made upon deathbed, (which is admitted), they are entitled to set it aside, so far as they are prejudiced. If that deed had not been made, there was nothing to prevent the respondents taking up the succession as heirs at law. Under the deed 1790, they were entitled to take the estates in fee simple, or, neglecting that deed, had there been no other, they might have been served heirs in the property. The trust-deed of 5th Nov. 1803, qualified by the memorandum of the same date, was truly nothing, if the Duke did not execute a posterior appointment. The appellants feel themselves obliged to maintain that the trust-deed disinherited the heirs at law, and vested the estates in the persons therein named, for the purposes therein mentioned, and also for the purposes to *be mentioned* in any writing to be made afterwards, *even upon deathbed*: and the heirs being thus (as they contended) *completely* cut off by a deed made in *liege poustie*, it is nothing to them at what time, or under what circumstances, the posterior deed was executed. The appellants, however, do not maintain that a person can in any shape reserve a power to frustrate the succession of the heirs upon deathbed, and effectually execute that power in that situation, for that would be a palpable evasion of the law; but they say, that the purpose of the trust conveyance was to sell the real estates outright, and there-

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fore it was not upon the estate, or the succession to it, that the after deed was to operate, but upon the money arising by the sale of the estate. Now the trust deed is to be considered in three views; 1st, It was a trust for the Duke's creditors, and those to whom gifts by *liege poustie* deeds were conveyed, and so far it must stand good; but it is of no consequence, because it was also a conveyance or will, as to personal estate, sufficient, probably, for the payment of all the debts, and which must be so applied before encroaching on the real estates; and because, at any rate, the real estates were liable for the debts, if the personal estate proved insufficient; 2d, It was a trust for raising money to pay any legacies the Duke might leave by any after deed or will; but it is a settled point that a person on deathbed can no more affect the heir, or encroach on the real estate, by giving legacies or making gifts, than he can give away the estate itself: and vesting an estate in trust to satisfy legacies, when the reversion or remainder remains to the heir, is a mere device to elude the law of deathbed which cannot be supported. And, 3d, It was a trust as to the remainder for such persons as the Duke might afterwards appoint to take the benefit, which was precisely a trust for the grantor himself and his heirs at law, *if he did not make a different appointment in liege poustie;* to carry the matter farther would at once annihilate the law of deathbed. The trust deed, as already observed, does not direct or authorize a total sale of the estate, and if it had, it would have been of no other consequence, if a sale did not take place before the Duke's death, than that the right of the respondents would have attached on the money; for, subsequently, it was their estate which was sold: and hence it is evident that the right of the heirs at law was in no view cut off, but that there was an *heritable* estate, in which they continued interested, and might, *as heirs,* have claimed, but for the last or deathbed deed, which directs a total sale, and an investment of the money arising, for the benefit of *strangers.* Hence their right to set aside a deed by which they are clearly prejudiced. The appellants attempt to press into their service the decisions by which it is established, that if the heir has taken the estate in the life of the grantor, under conditions or reserved powers to the grantor, he cannot quarrel the exercise of those powers, though made on deathbed. There is no room for pretending that the respondents are in that predicament, and therefore this case does not apply.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors appealed from be, and the same are hereby affirmed.

For the Appellants, *Sir Sam. Romilly, John Clerk, Adam Gillies, David Monypenney.*

For the Respondents, *Wm. Adam, Matthew Ross, Wm. Courtenay.*

[Mor. 13905.]

WM. CADELL, Esq. of Banton, . . *Appellant;*

WILLIAM, JOHN, JAMES, MARY, MARGARET, ALISON, AGNES, ANNE, JEAN, ELIZABETH, JANET, and CATHERINE BLACK, all Children of the deceased Henry Black, late tenant in Scotstown, parish of Abercorn, and shire of Linlithgow, and JOHN SOMMERVILLE, Writer in Edinburgh, their Tutor *ad litem*, . . } *Respondents.*

House of Lords, 20th Feb. 1812.

DAMAGES—ASSYTHMENT—RELEVANCY.—The appellant had acquired right to an estate in which there was a pit not then in use, (and which had remained so, uncovered and unfenced, for many years previous to his purchase), situated at the side of a public road. A passenger on horseback having on a dark night deviated from the path, and fallen into the pit, the question was, Whether in law there lay any relevant claim of damages against the appellant, as owner of the land in which this pit was, and whether he was to blame in not fencing the pit. Held him liable in £800 of damages. Affirmed in the House of Lords.

This was an action of damages raised at the instance of the respondents, for the death of their father, Henry Black, farmer in Scotstown, occasioned by his falling into an unfenced pit, situated within the grounds of Grange, belonging in property to the appellant, while travelling home at night. The conclusions for damages were, 1st, For £2000 as reparation to them for the loss of their father. 2d. For £23 as the expense incurred in recovering the body; 3d. For £20 as the value of the horse.

The father of the respondents was an industrious farmer, who married early in life, and had a very large family, whom his frugality and activity enabled him to support. He had his farm from Sir James Dalyell, at the rent of £120