LADY ESSEX KER, and LADY MARY KER, Sisters, Co-heiresses and next of Kin of John, late Duke of Roxburghe, deceased, and their Attorney, . . } *Appellants;*

JOHN WAUCHOPE, Esq., the REV. CHARLES BAILLIE, and Others, . . } *Respondents.*

House of Lords, 17th Feb. 1812.

(Reduction on the ground of Incapacity).

REDUCTION—EXECUTION OF DEED—INCAPACITY. — Circumstances in which a deed, executed by the late Duke of Roxburghe, sought to be reduced on the head of incapacity, was sustained, and the reduction dismissed *quoad* the moveable succession. Affirmed in the House of Lords.

This was an action of reduction brought by the appellants to set aside certain deeds executed by the Duke, their brother, immediately before his death, on the ground of incapacity.

The circumstances were as follow :—The Duke, who was never married, possessed large estates in Scotland, held under entail, and also lands and heritable estate in that country held in fee simple, besides a dwelling-house in London, and a considerable personal estate. The whole, with the exception of the entailed estate, was subject to his absolute disposal.

October 14th.

In 1790 the Duke made a testamentary disposition, whereby he gave, alienated, and disponed to himself, and the heirs whatsoever of his body, *whom failing, to the appellants equally between them, and the heirs whatsoever of their bodies ;* and failing either of them, and the heirs of her body, then her half to devolve to the other, and the heirs of her body ; whom failing, to the heirs of tailzie having right for the time to the earldom and estate of Roxburghe, the lands and heritages then belonging to him, or which should at the time of his decease belong to him, excepting his entailed estates. As also his whole personal and moveable estate, under the burden of paying all the just and lawful debts he might owe at the time of his decease. And he thereby nominated the appellants to be his executors, and reserved power to alter or revoke the said

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disposition, or otherwise burdening or disposing of the property at his pleasure.

Nov. 5, 1803.

In November 1803 he executed a disposition of all his estates and effects of which he had the power of disposal, in favour of Messrs. John Wauchope and James Dundas of Edinburgh, Clerks to the Signet, in trust, for payment of his debts and of the legacies he should make, the residue to be conveyed or made over by the said trustees in favour of such person or persons, or applied for such purposes as he should direct by any writing to be thereafter signed or executed by him. And by a writing signed by the Duke at the same time with the trust-disposition, he declared, "That "not having had it in his power to execute in legal form "a deed of appointment or direction to his trustees named "in the said trust-disposition, he desired they would understand, that in case by sudden death he should be prevented from executing such a deed of appointment as he "had alluded to, that it was his *will and intention that the* "*disposition* and settlement which he had formerly made "in favour of his sisters (the appellants), should stand good "as far as regarded them, burdened, however, with his "funeral expenses, and his just and lawful debts, and the "payment of such annuities as he had granted by bond or "otherwise."

Mar. 19, 1804.

Matters rested in this position until within a few hours of the Duke's death, which happened on 19th March 1804. A few hours before that event, the following disposition was signed and executed: "I, John Duke of Roxburgh, do "hereby direct and appoint John Wauchope and James "Dundas, Clerks to the Signet, the trustees named under a "trust disposition and settlement, executed by me on 5th "November 1803, to sell and dispose of my whole real "estate in Scotland, and of my house and appurtenances "in St. James' Square, London, at such prices as they shall "think proper, and from the proceeds thereof, and of my "personal estate, to make payment of the following legacies and annuities to the persons after named, (here a legacy to Mr. Dundas of £1000, and sundry other annuities "and legacies), I farther appoint my trustees, after payment "of the said annuities and legacies, and of any other legacies, and of my debts and funeral expenses, and expense "of management, to invest the whole residue and remainder of my funds in the public funds, or upon real security "in Scotland, the dividends and interest whereof they are

"to pay over yearly to Lady Essex and Lady Mary Ker,
"equally between them; and failing either of them, to the
"survivor, during their lives and that of the survivor; and
"upon the death of the survivor, I appoint the trustees to
"pay over the residue and remainder of my fortune to the
"persons, and in the proportions after mentioned, viz. to
"the Rev. Charles Baillie, second son of the late Mr. George
"Baillie of Mellerstone, one half of the said free revenue;
"to Sir John Scott of Ancrum, Bart., one-fourth thereof;
"and to Sir Henry Hay Macdougall of Mackerston, Bart.,
"the other fourth part thereof."

This instrument was written by Mr. James Dundas, one of the trustees, and signed before these witnesses, Coutts Trotter, Esq. banker, John Battiste, the Duke's servant, and William Winter, apothecary. In the deed the date had been altered from 18th to the 19th March, but this arose from its not being observed that at the time the deed was executed it was past twelve o'clock at night of the 18th (Sunday) when it was executed.

A separate action of reduction was brought at same time by the appellants, to set aside the deed of 19th March 1804, in so far as related to the heritable property in Scotland, on the ground that at the time he executed this deed he was on deathbed. These two actions were separately argued, and separately decided. (Vide next appeal).

A proof was ordered to be taken on commission in London as to the Duke's capacity. Mr. John Clerk attended the proof for the legatees. Mr. Courtenay (now the Earl of Devon) was counsel for the appellants, and Mr. Robertson their solicitor. The medical gentlemen—the testamentary witnesses—and Mr. Dundas.

It came out in proof that Sir Lucas Pepys, who was the Duke's ordinary physician and intimate friend, had urged on the Duke to settle his affairs about twelve days before his death. He afterwards procured leave from the Duke to write for Mr. Dundas to come to London to settle these. This he did accordingly, and Mr. Dundas arrived on the 17th of March at Sir Lucas' house. He desired him to lose no time in seeing the Duke, *as he conceived that he was then hardly able to attend to business.* Sir Lucas, in giving his evidence, stated that he had two several consultations with Dr Reynolds and Mr. Dundas, that it was "agreed "by the deponent, Dr. Reynolds, and Mr. Dundas, that his "Grace was not then in a state to transact any business."

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The witness being asked to explain what he meant by the Duke's being in a state not fit to do business, depones, "That this does not apply to the debility of his body, but "to the stupid, comatose, and lethargic state of mind in "which he was then generally lying." Dr. Reynolds deponed, "That the last time he saw the Duke was at ten "o'clock on the evening of Sunday the 18th March. That "for several days before the Duke died he was becoming "rapidly worse, and both his body and mind were enfeebl-"ed: That upon his visit on Sunday evening he found the "Duke hastening to dissolution; that he does not think the "Duke knew him when he went in: That he rambled a "great deal, and was very confused; that after the arrival "of Mr. Dundas, he recollects it was the subject of conver-"sation among Sir Lucas, Mr. Keate, Mr. Dundas, and the "deponent, whether they thought the Duke in a capacity "to make a will, and they all agreed he was not, to the best "of the deponent's recollection." The other witnesses Keate and Winter thought the Duke "too far gone in im-"becility of mind and body to make a will."

In regard to the consultation of the physicians, however, Mr. Dundas gave a different account. He said that he was sent for by them after they had seen the Duke, the night before the deed was executed. They stated to him that there must be no will, as the Duke was not then in a capacity to make one. Mr. Dundas answered most honourably and firmly that he would do nothing wrong; but that if the Duke gave him instructions, and he thought the Duke to be of sufficient capacity, he would make the will. After this the Duke did send for him, and gave instructions for the will, on which he acted. Mr. Dundas further deponed as to his first visit to the Duke on his arrival from Edinburgh, "that he remained with the Duke on this occasion about "half an hour, and then went down stairs to dinner. De-"pones, that the Duke was perfectly distinct and collected "during the above (half hour's) conversation, and as much "so as ever the deponent saw him." "That at his first "interview with the Duke, his Grace, after some general "conversation, then said he was sorry he had brought the "deponent to town; but he was under the necessity of do-"ing it, as he had too long delayed to execute some deeds, "that he said the deponent knew of. That the Duke said "he was in a very bad state of health; but that if the de-"ponent had time to stay a few days in town, he hoped he

" would be better, and would then do what was necessary.
" That the deponent said to the Duke that he would attend
" his Grace, that he had other business in town which would
" detain him some time." The next interview which Mr. Dundas had with the Duke was on the morning of Sunday the 18th March. He deponed, " That he saw the Duke in bed be-
" twixt nine and ten o'clock on Sunday morning: That the
" Duke then informed him that he had been very ill, and
" had had a very bad night, but was now getting better:
" That the Duke did not mention any thing about settle-
" ments to the deponent on that occasion, nor did he men-
" tion the subject to the Duke: That the deponent then
" went down stairs to breakfast, and the Duke sent for the
" deponent after breakfast, betwixt ten and eleven o'clock."
(A full account of this conversation is given, but the subject of the settlements was not talked of at it). Mr. Dundas afterwards deponed, " That the deponent had seen the
" Duke several times in the interval between the physicians'
" two visits: Depones, that nothing but general conversa-
" tion took place on these occasions with the Duke, until
" about six o'clock in the evening, when he received a mes-
" sage by one of the servants, that the Duke wanted to see
" him. And having gone to the Duke, his Grace informed
" him that he now found it was not likely that he should
" get the better of his illness, and that therefore it was ne-
" cessary to execute those deeds which he had so long in-
" tended, and that so soon as the visit of the physicians
" was over, he would send for the deponent, and give him
" his instructions."

Accordingly, at the appointed time, Mr. Dundas was desired to attend the Duke. He deponed, " That after the
" physicians had gone away (on the Sunday evening), the
" deponent was again desired to attend the Duke, and there
" being no table in the room, his Grace desired one of the
" servants to bring in a table, and materials for writing:
" That this was accordingly done, and the Duke proceeded
" to give the deponent his instructions; and the Duke hav-
" ing given the deponent instructions with regard to seve-
" ral legacies, proceeded to dispose of the reversion of his
" fortune, by giving the liferent to his sisters, and a fourth
" part of the fee, upon their deaths, to Mr. Charles Baillie,
" a fourth to Sir Henry Hay Macdougall, and a fourth to
" Sir John Scott; and he then desired the deponent to go
" and put these instructions into a regular shape, and that,

"by the time this was done, he would consider what he was "to do with the remaining fourth: That the deponent put "all these instructions down in writing, as the Duke gave "them, while he remained at his bedside."

When Mr. Dundas was engaged in preparing the deed, Mr. Coutts Trotter called on the Duke, to see how he was; and Mr. Dundas took occasion to explain to him the circumstance of the Duke not having mentioned to whom he wished the other fourth part was to go. Mr. Trotter said, "Might you not suggest a certain gentleman whom he "named, and whose name has been communicated to the "parties, as a proper person to whom the fourth share might "be left; stating, as his reason, that this gentleman was a "particular friend of the Duke, and was much with him in "Scotland. That the deponent said, That it was rather a "delicate thing to suggest any person to the Duke, but that "he should do it. Depones, That soon afterwards the de-"ponent went into the Duke's room, and informed his "Grace that Mr. Trotter had called to inquire for him, and "the deponent informed the Duke that he had asked Mr. "Trotter to remain to witness the deed, and that he had "agreed to do so. That the Duke said he was much obliged "to Mr. Trotter. That soon after the deponent suggested "the person named by Mr. Trotter as the person to whom "the Duke, if he thought proper, might leave the undis-"posed of fourth; but the Duke said, 'Certainly not; that "gentleman (naming him) is a very good man, but I have "no intention of leaving him any part of my fortune.' De-"pones, That the Duke then said to the deponent, You "know very well that I once had an intention of making "a wider distribution of my fortune; and he then added, "situated as he then was, he considered it better to give "Charles Baillie the remaining fourth, so that he would "have one half. The Duke further said, That he had always "a great regard for him, and always promised to do some-"thing for him; that Mr. Baillie was now beginning to have "a large family, and that it would be useful to him."

If there were any proof, stronger than another, for upholding the Duke's capacity, it was maintained that the reason given for this disposal of the remaining fourth to Mr. Baillie, was conclusive. Nay, it was further stated, and proved by the note of instructions, that the Duke gave a reason for all his legacies, which was not the act of a man wanting in capacity. For example, the one-fourth to Sir John Scott, was

accompanied with the explanation, "that he understood his "estate was encumbered, and thought his legacy would do "him good," and so with others. In the instructions, the legacy to Mr. Wauchope was first put down at £500; but when the deponent read over the instructions, the first time he came to Mr. Wauchope's legacy, the Duke said, "No; "let Mr. Wauchope have £1000." "Depones, That while "the Duke was giving the deponent these instructions the "first time, he told the deponent where he would find a "sealed parcel, and desired the deponent to bring it to him, "which the deponent did. Depones, That the Duke ex-"plained to the deponent that his reasons for wishing to "have the said parcel was, in order to see whether it con-"tained a *bond of annuity in favour of a particular person* "*in London, for whom he intended to provide.* Depones, "That the sealed parcel contained, among other papers, a "sealed letter, addressed to the deponent, in which was "enclosed a bond of annuity in favour of the person named "by the Duke."

The mode in which the Duke bequeathed tokens of regard to his particular friends, also tended to confirm the evidence as to his capacity. "To John Crawford, Esq. of Auchin-"aimes, my gold watch by Mudge, with my cypher engraved "upon it, as a mark of my regard; and to Sir Lucas Pepys, "Bart. *my best gold watch by Mudge.*" The minutiæ of these bequests must have been totally unknown to Mr. Dundas.

When the deed was finished, it was carried to the Duke and read over to him. "The deponent read it over to him, "but first asked his Grace if he would allow Mr. Trotter to "come in; but the Duke declined this, saying, there was "no occasion for it; and there was no person but the de-"ponent in the room with the Duke when the deponent read "over the deed to him. Depones, That after he had read over "the deed, he asked the Duke if it was convenient for him "to sign it then, and the Duke said that it was convenient, "and desired that the witnesses might come in; whereupon "Mr. Trotter, Mr. Winter the apothecary, and some of the "servants came into the room. When Mr. Trotter came in "the Duke asked him how he did, and said he was obliged "to him for waiting so long to be a witness to that occasion, "or words to that purpose; and the Duke asked how Mr. "Coutts was." Mr. Coutts Trotter, in his evidence, stated that after the will was finished, Mr. Dundas carried it to the

Duke, and he heard Mr. Dundas *reading loud* for some time to the Duke. "The deponent then went into the Duke's "room, and saw the Duke execute the will. Depones, "That when he went into the room, the Duke was in bed "at the further end of the room, and upon seeing the de- "ponent advance, said, 'Trotter, how do you do? This is "'very kind of you,' and shook the deponent by the hand; "to which the deponent made answer, expressing his regret "to see him in that situation. Depones, That the Duke "did not appear to him to be so very ill as he, the depon- "ent, expected to find him. That the Duke spoke with a "firm and strong voice. In signing the deed, depones, "There was some difficulty, from the Duke having asked "his spectacles, which could not be readily found, upon "which his Grace expressed some disappointment. Depones, "That at first the Duke attempted to subscribe the will "when lying horizontally in bed; but finding that the atti- "tude was inconvenient, by making the ink recede from the "point of the pen, he was lifted up, and, in a sitting posi- "tion, subscribed his name twice to the will, which was laid "before him. Depones, That the Duke, in affixing his "name at each time, asked if it would do; to which the "deponent gave some encouraging answer. Depones, That "deponent observed that one of the signatures by the Duke "was mis-spelled; but that neither he nor Mr. Dundas re- "presented that circumstance to the Duke; and after the "Duke's subscribing the will, he was assisted into his former "position, and wished the deponent a good night, with "some friendly expression of hoping to see him again "soon."

John Battiste depones, "That he was called in to witness "the Duke's will; that the Duke was at this time in bed, "lying upon his back. That he attempted to sign the will "in that position, but could not do it as he lay, as the ink "would not shade, upon which Mr. Winter and the depon- "ent raised him up in his bed, and put pillows behind him, "and then the Duke signed the will. Depones, That either "Mr. Trotter or Mr. Dundas said to the Duke, 'You had "'better lie down, and not fatigue yourself, as you have "'got another paper to sign.' And the Duke did accord- "ingly lie down, and he afterwards raised himself up with- "out assistance, saying, I think I can do it now. Depones, "That when the Duke began to sign the second time, he "had not his spectacles on. That the deponent remarked

" that the Duke had not got his spectacles on, and Mr. Win-
" ter immediately whipt or put them on before the Duke
" knew any thing about it, without the Duke saying a word.
" And *the Duke then observed*, that he believed he had left
" off at U."

On the subject of the Duke's capacity, Mr. Dundas de-
" poned, in answer to an interrogatory, " That the Duke
" was, to the best of the deponent's knowledge, as capable
" of making a will as ever he was in his lifetime; if the de-
" ponent had been of opinion that the Duke's faculties were
" impaired, or that he was incapable to make a will, he, the
" deponent, would not have presented a will to him to sign."
Mr. Trotter deponed, " That the Duke was in possession of
" his faculties, and knew what he was doing. Interrogated,
" Whether, if the Duke had then made a draught on him
" of £500, he would have held himself safe to pay? Depones,
" That, in point of form, from the deponent's being present,
" the Duke could not make a draft upon him as a banker;
" but had he given the deponent any written direction for the
" disposal of money to that amount, he would not have re-
" fused it." John Battiste deponed, " That the Duke was
" in possession of his intellects, though weak in body."
James Elliot and William Frazer, two of the Duke's ser-
vants, who attended him constantly to the last, concurred
in opinion, that his mental faculties were entire; and Mr.
Winter, the apothecary, deponed, " That the Duke, the
" night before he died, was quite collected, but was so weak
" in bed as to be scarce able to perform it, and was badly
" done at last." Mr. Winter added, " That he was at times
" confused, but that this may have arisen from the compos-
" ing medicines prescribed for him by his physicians."

Mr. Dundas had been called as a defender, being one of
the trustees appointed, but, on production of a renunciation
of his office of trustee, and also of the legacy left to him of
£1000, he had been assoilzied from both actions.

The cause, with the proof, was reported to the Court.
The Court afterwards unanimously pronounced the follow-
ing interlocutor :—" The Lords having advised the state of
" the process, writs produced, testimonies of the witnesses,
" &c., Repel the reasons of reduction on the head of incapa-
" city; sustain the defences in so far as regards the move-
" able or personal estate; assoilzie the defenders to that
" extent, and decern. But *quoad* the heritable estate in
" Scotland, ordain both parties to prepare and give in me-

Dec. 21, 1805.

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"morials to the Court upon the question of deathbed." On reclaiming petition the Court adhered.

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

Pleaded by the Appellants.—Because it is established by the evidence that the Duke of Roxburghe was not of a sound disposing mind, or possessed of his faculties in a sufficient degree, when it is alleged that he gave instructions for, and executed the testamentary instrument in question.

Pleaded for the Respondents.—The whole circumstances which took place at the execution of the deed, together with the instructions given by the Duke in regard to the particular bequests, which were numerous, and the whole evidence, demonstrate that his Grace was of sound disposing mind. Also, that the instructions given to make the will were the spontaneous dictate of his own mind, and not brought about by importunity, solicitation, or suggestion from any person whatever; that these instructions were implicitly followed, and the instrument, when copied, read over to the Duke, in an audible voice, who expressed his entire approbation of it; and that it was afterwards regularly executed by the Duke, and acknowledged to, and attested by subscribing witnesses, of characters altogether unexceptionable.

After hearing counsel,

Lord Chancellor (Eldon) said,—

"My Lords,—

"Perhaps I ought to apologize to your Lordships for what I did in the present case, a proceeding not usual with me. I stopped the respondents' counsel, in his commencement, to ask if they meant to press for costs. I did so, because I was impressed with a conviction, clear of all doubt, that the unanimous judgment of the Court of Session was right.

"I also approve of what the respondents' did, in declining to claim costs, because the expectation of the Ladies Ker may have been naturally enough raised in regard to the inheritance of their brother's estates, which might generate an anxiety with regard to his will, and the manner in which it was executed.

"The two circumstances which pressed most upon my mind were, 1. That the Duke's name was mispelt in his signature; and, 2d. That it appears the Duke had not made up his mind to whom he should leave the remaining fourth of his property.

"As to the first of these points, what weight is due, (and some weight is due to it), can only be determined by examining the rest of the evidence. God forbid that one of the most valuable

rights belonging to us, of disposing on deathbed of what we may have acquired in life, should be taken from us, because the palsied hand may then refuse to do its office. There are fair objections to the evidence of some of the servants on the score of interest; but I see this matter of the Duke's subscription explained by one of the servants, joined to an affecting circumstance of his attachment to his master. He states that part of the subscription was done without spectacles, and that the Duke then called for his spectacles, and that Mr. Winter put them on.

"With regard to the other circumstances, it appears that when the Duke set about making a will, Mr. Dundas put questions, and got answers, and thus received the proper instructions.

"We are not to ask if there be more or less of delicacy in what occurred in suggesting the name of a friend of the Duke on this occasion. But to this suggestion, the Duke said no, 'he is a worthy 'man, but I never intended to leave him any part of my fortune. 'Let Mr. Charles Baillie have a half instead of a fourth.' It is impossible for us to allow ourselves to consider if there was delicacy in this suggestion or not.

"Mr. Dundas is a person totally unknown to me. All the judges in Scotland speak of him as a man of high honour and character; and this was admitted by the appellant's counsel at the bar.

"Allow me to say that protection is due from your Lordships to a man of honour and character situated as Mr. Dundas was.

"He did not set himself forward to make this will; but he was sent for from Scotland on purpose to come to town to make the will. This was done by Sir Lucas Pepys. Accordingly, he comes to town, and he finds that the opinion of the medical people is, that the Duke was not competent to make a will; and Mr. Dundas was of the same opinion, and, according to the physicians, repeatedly (told so.)

"He was thus placed in a situation of great difficulty and delicacy. If he should find the Duke capable of making a will, and if he does thereupon act with firmness, he must foresee that his own character was at stake, and liable to be pulled to pieces by minute observations on all that should occur.

"What did Mr. Dundas do then? There appears to have been a sort of expostulation between him and Sir Lucas Pepys, as to the propriety or impropriety of making a will. Mr. Dundas says, 'He 'need not be afraid, as he would do nothing improper; but if the 'Duke gave correct instructions, he would execute them.'

"Then it appears from the evidence of him and Mr. Coutts Trotter, that the instructions were given at two different intervals, and the witnesses were Mr. Coutts Trotter, Mr. Winter, and one of the servants. These witnesses all give evidence to the Duke's capacity; Mr. Coutts Trotter swears, That he would have paid money on the Duke's draft at that time.

"But it is said, we have the evidence of the physicians strongly on

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the other side. I can see no inconsistency in their evidence with that given by Mr. Dundas. As to Winter, I should have great difficulty in allowing him, in a court of law, to blow away the evidence arising from his attestation, as an instrumentary witness, of the Duke's sanity at the time.

" Dr. Reynolds says no more than this, that the Duke was in a comatose state when he saw him; but he says, in express words, that he thinks the Duke's sanity must depend upon the evidence of those who were present when the will was executed. Thus he does not undertake to say, that the Duke was not capable to make a will.

" As to Sir Lucas Pepys, he was of opinion that the Duke was not likely to be able to execute a will; he cautioned Mr. Winter and Mr. Dundas against the execution of any will; but the will, notwithstanding, was prepared by Mr. Dundas, and witnessed by Winter.

" Then we have Mr. Winter's letter to Sir Lucas on the morning after, mentioning that the Duke had executed a will; he notices the difficulty as to the signature, that it was badly done, but 'he hopes 'it will do.' We have also Mr. Winter's letter to Sir G. Douglas about a fortnight afterwards, in which he mentions that the Duke was 'quite collected.'

" Then we see that Sir Lucas accepts a legacy under that will. There is some evidence of his having thought of the Duke's Delphin Classics;* but I know Sir Lucas Pepys very well, and am satisfied

* The Delphin Classics here alluded to by Lord Eldon, as having been prized by Sir Lucas Pepys, were esteemed of great value; and, at the sale of the Duke's library, so much celebrated for its having contained the most select and valuable collection ever offered for public sale in England, they were keenly competed for, and bought by the Duke of Norfolk at the price of £500. They were the first edition of the work, bound in a magnificent style, as for the French king's library, and might well have formed the nucleus of a second Pepysian library. At the same sale, there was a book, which, if not of more transcendant worth, at least brought a much higher price. This was the celebrated unique copy of the Decameron of Boccaccio, which was knocked down to the Marquis of Blandford, eldest son of the Duke of Marlborough, at the large sum of £2260, the then Lord Althorpe being the bidder against him. It is said that Lord Althorpe, after having gone as far as prudence would dictate in the competition, stopped short, exclaiming to his brother near him, " What " would our grandmother say to this?" The wholesome respect in which he held that lady operated fortunately in this instance; for the Decameron was sometime afterwards sold a second time, apparently under disadvantageous circumstances. At this sale it was bought by Messrs. Longman & Co. at nine hundred guineas, for Lord Spencer, and it now forms a part of the Althorpe Library, now one of the noblest in England. —*Vide* Dr. Dibdin's " Ædis Althorpianiæ," with account of the Althorpe Library.

The first Duke of Roxburghe had bought the Decameron for £100.

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