

1819. NOTE.—The speeches of Lord Chancellor Eldon and Lord Redesdale in disposing of the *whole* of these appeals in the Neidpath and Queensberry entails will be found reported in Bligh, vol. i., p. 340.

THE DUKE OF  
BUCCLEUCH  
v.  
HYSLOP.

1820. DUKE OF ROXBURGHE, . . . . . *Appellant* ;

THE DUKE OF  
ROXBURGHE  
v.  
WAUCHOPE,  
&c. JOHN WAUCHOPE, W.S., and OTHERS, }  
Trustees and the Legatees of the late } *Respondents.*  
John, Duke of Roxburghe, . . . . }

House of Lords 25th May 1820.

DEATHBED—REDUCTION.—A reduction was brought by the appellant, to set aside a certain settlement of the Duke of Roxburghe, on the head of deathbed. Held him to be barred from challenging the deathbed deed, 1804, by the previous *liege poustie* deed of 1790, which had not been expressly revoked.

John, third Duke of Roxburghe, by a *liege poustie* deed of settlement executed in 1790, conveyed his unentailed lands to his sisters, Ladies Essex and Mary Ker, as will be seen from the report of their case arising out of the same matters, vol. v., p. 559.

By this deed, he reserved full power to alter or revoke, even on deathbed.

Part of these lands had, by the previous investitures, stood destined to the person or persons who should succeed as heirs of entail to the Roxburghe estates. These were the lands of Kelso ; but by this deed they were expressly conveyed to Ladies Essex and Mary Ker, whom failing, to the heirs of tailzie having right for the time to the earldom and estate of Roxburghe. This deed was followed by a trust-deed in 1803, by which he conveyed his whole unentailed heritable property, as well as his moveable, in favour of the respondents as trustees, for the purpose that they might dispose of the same, and, after paying his debts and legacies, the residue was to be “made and conveyed over or applied or employed “by the said trustees to, and in favour of such person or “persons, or for such uses and purposes as I have directed “or shall direct, by any deed executed or to be executed by “me for that effect, at any time of my life and even on “deathbed.”

In March 1804, he executed a deed of instructions to the

trustees named by him under the trust deed 1803, and made a distribution of his unentailed heritable estate, &c., which implied a total alteration, but there was no express revocation either of the deed 1790, or 1803.

Then followed the reduction brought by Ladies Essex and Mary Ker, to reduce these deeds *ex capite lecti*, in order to take up what fell to them as heirs-at-law.

The result of this action of reduction, the appellant contended, was, 1st, That in regard to the lands standing destined to the heirs-of-law in general, Ladies Ker succeeded to them. 2d, That in regard to the lands destined to heirs-of-law in general in the parish of Kelso, the ladies did not prevail.

He, therefore, raised the present action of reduction, to set aside those deeds as at his instance, concluding that it should be found and declared, that by the execution of the deed of instructions, 1804, John, Duke of Roxburghe, did effectually destroy the *liege poustie* deed 1790, in so far as the same was prejudicial to the heirs of entail, or to their claims to any lands which stood destined to them by the prior rights and investitures thereof. And further, that it should be found and declared, that the said deed of instructions made and executed by John, Duke of Roxburghe, on the 19th March 1804, and relative trust-deed of 5th November 1803, are null and void, and ought to be reduced, in so far as the same pretend to convey away or dispose of any lands which, prior to the deeds 1790, 1803, 1804, stood destined to his Grace's heirs male.

This action, therefore, had reference to the unentailed estate of Kelso; and called both Ladies Essex and Mary Ker, as well as the trustees as parties.

No appearance was made for the Ladies Ker; but defences having been given in for the trustees, the Lord Ordinary, by a special interlocutor, found "That the right of chal- Feb. 18, 1814.  
 "lenging upon the head of deathbed, is only competent to  
 "the next heir of investiture *having an interest*, and who,  
 "in virtue of the deathbed deed being set aside, would  
 "succeed to the lands and heritages therein contained:  
 "Finds 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 that the pursuer, James, Duke of Rox-  
 "burghe, has no interest, as heir of investiture, to insist  
 "upon the reduction of the deathbed deed, 1804; and,

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“ therefore, assoilzies the defenders from the general con-  
“ clusions of the reduction. And with regard to the par-  
“ ticular conclusions as to that part of the lands situated in  
“ the parish of Kelso, the investitures of which formerly  
“ stood to the heirs of entail, but which were again conveyed  
“ by the deed, 1790, to the Duke’s sisters, and which deed  
“ contains an obligation upon his sisters to convey these  
“ lands to the heir of entail for the time being, upon his dis-  
“ charging them of all claims whatsoever against them, as  
“ the Duke’s representatives, and making payment to them  
“ of £3000 sterling, at either of the two first terms of Mar-  
“ tinmas next, after his death: Finds, that the right to  
“ those subjects was actually conveyed to his sisters; and  
“ that, therefore, the right and interest of the pursuer, as  
“ the heir of investiture, to challenge the deathbed deed in  
“ 1804, was expressly excluded by the deed in favour of  
“ Ladies Essex Ker and Mary Ker, in 1790. Therefore,  
“ finds also, that the pursuer has no right to challenge the  
“ deed in question, *ex capite lecti*, as to these lands; and  
“ assoilzies the defenders and decerns.”

July 11, 1815.

On representation, the Lord Ordinary adhered “ in so  
“ far as relates to the general findings; but with regard to  
“ the alternative conclusion as to the lands in the parish of  
“ Kelso, appoints the parties to be further heard.”

Feb. 14, 1818.

The Lord Ordinary thereafter found, “ With regard to  
“ the lands lying in the parish of Kelso, in respect that the  
“ former investiture of the lands, in so far as it stood in favour  
“ of the heir of entail, was altered by the deed, 1790, executed  
“ by John, Duke of Roxburghe, in *liege poustie*, and that  
“ the representer cannot claim any benefit from that deed,  
“ without being subjected to all the conditions contained in  
“ it as a disponee or legatee, in which character he was barred  
“ from challenging the deathbed deed in question, and as he  
“ cannot now fulfil the conditions under which alone he could  
“ claim the benefit of that deed, refuses the representation,  
“ and adheres.”

July 4, 1816.

On reclaiming petition, the Court pronounced this inter-  
locutor:—“ Adhere to the interlocutor reclaimed against, in  
“ so far as it finds that the pursuer is barred by the deed,  
“ 1790, from challenging the deathbed deed 1804; and that  
“ he has no right to challenge the said deed, *ex capite lecti*,  
“ as to any lands to which he would have had right as heir,  
“ *alioqui successurus*; and farther, find, that the pursuer, the  
“ Duke of Roxburghe, is not entitled to avail himself of the

“right of redemption of the Kelso lands, contained in the deed 1790, inasmuch as the obligation therein contained, is not imposed on the defenders by the deathbed deed under which they take these lands.” On further reclaiming petition, they adhered.

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 THE DUKE OF  
 ROXBURGHE  
 v.  
 WAUCHOPE,  
 &c.

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

After hearing counsel,

LORD CHANCELLOR (ELDON) said :—\*

“My Lords,

“Having looked carefully into this case of the Duke of Roxburghe and Wauchope, and others, I can see no sufficient reason for saying that this judgment should be at all altered. In consequence of which, the form of the House requires that I should move that the judgment be affirmed, it appearing to me, upon the best consideration I can give the case, that upon all the points controverted at the bar, the respondents are right.”

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

For the Appellant, *Mat. Ross, J. H. Mackenzie.*

For the Respondents, *Sir Saml. Romilly, John Clerk, J. Fullerton, Henry Cockburn.*

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[Tinwald Entail.]

CHARLES, MARQUIS OF QUEENSBERRY,	. Appellant;	
SIR JAMES MONTGOMERY of Stanhope, Bart.,	} Respondents.	MARQUIS OF QUEENSBERRY v. MONTGOMERY, &c.
WILLIAM MURRAY, Esq. of Henderland,		
and EDWARD BULLOCK DOUGLAS, Esq.,		
Executors of the late Duke of Queensberry,		

1820.

House of Lords, 26th May 1820.

ENTAIL—CONTRAVENTION—DAMAGES—LEASES.—The entail of Tinwald restricted the heirs of entail from granting “tacks or rentals for any longer space than nineteen years, and without any diminution of the rental; or for the setter’s lifetime in case

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\* From Mr Gurney’s short-hand notes.