Oct. 1, 1831. into that part of the case, however, I entertain no further doubt. The opinion to which I then inclined is now confirmed; and I would move your Lordships that the judgment of the Court below, both in the original and the the cross appeal, be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—(*Sale.*)—Little, 14th Feb. 1749 (Mor. 14,177); Brown on Sale, p. 234; Sugden on Law of Vendors, 5th edit. p. 206, 334; Pothier, Traité de Vente, No. 75; 1 Ersk., 6, 29, 35; Scott *v.* Lady Cranstoun, 10th Aug. 1776 (No. 1, App. Husband and Wife). (*Expenses.*)—Falljeff, House of Lords, 12th March 1794, not reported; Maberly, 11th March 1826 (4 S. & D. No. 362); Spiers, 30th May 1827 (5 S. & D. No. 344).

Respondent's Authorities.—(*Expenses.*)—Campbell and Company, 21st May 1803 (No. 3. App. Exp.); Fleshers of Canongate, 7th July 1809 (F. C.); Falconer, 4th March 1815 (F. C.); Wilson, 12th Nov. 1814 (F. C.); Bowie, 5th Dec. 1816 (F. C.); Pringle, 6th March 1799 (No. 1, App. Exp.); Geddes, 16th Feb. 1816 (F. C.); Wilson, 18th June 1818 (F. C.); Reid, 18th Nov. 1825 (4 S. & D. No. 166); Agnew's Executrix, 24th June 1826 (4 S. & D. No. 456); Earl of Fife, 8th July 1826 (4 S. & D. No. 497); Wallace (Shaw's App. Ca. 42).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNEL, —Solicitors.

No. 54. J. B. KER and others, Appellants.—*Lord Advocate* (*Jeffrey*)—*Tinney.*

SIR R. W. VAUGHAN, &c. (LADY ESSEX KER'S TRUSTEES), Respondents.—*Dr. Lushington—Murray.*

Deathbed—Title to pursue.—A party mortis causa conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under her hand; and in default of making such writing, to pay the residue to her next of kin; and thereafter executed a writing of directions on deathbed, which was challenged by the heir at law.—Held (affirming the judgment of the Court of Session), that if the heir could set aside such writing, he would thereby occasion that default, in the event of which the liege poustie deed had disponed in favour of the next of kin; and therefore he was barred by want of interest from insisting in a reduction of the deed.

Oct. 1, 1831. ON the 1st of March 1819, Lady Essex Ker, who was possessed of landed estates in Scotland, executed a trust-disposition and deed of settlement, in favour of the late Earl of Winchelsea

1st DIVISION. Lord Newton.

and Sir Robert Williams Vaughan, of her whole estates, heritable and moveable, of which she should die possessed. The purposes of the trust, she declared, were "to sell and dispose of the "said lands and real estates, and out of the proceeds thereof, "and of my personal property to be collected and recovered by "my said trustees, to defray the whole charges and expenses attending the execution of the trust, and to pay all the just and "lawful debts I may owe to any person or persons at the time of "my decease, in any way, or by any kind of security, and then "to pay over the residue and remainder of the said proceeds to "and for the use of any person or persons I shall name by any "writing under my hand, or for such purposes as I may direct "by such writing, and in default of my making such writing, or "giving directions in writing, then to pay over my said residue "to my next of kin, according to the law of England, or "Statute of Distributions." She named the trustees her executors, and gave them "full power to prove these presents, with "any separate writing, if any be, in the nature of a codicil or "direction, so far as regards my personal estate, in the proper "Ecclesiastical Court in England, and to obtain confirmation "according to the forms of the law of Scotland." She reserved power to revoke or alter. Oct. 1, 1831.

She died on the 11th of September of the same year; and there was found in her repositories a writing in the form of a codicil or testament, bearing date the 9th of August, and having her mark subscribed to it, on the 7th of September, before three witnesses. It was not holograph of her, and it was admitted that, at the date of her subscription, she was on deathbed. By this deed she directed all her Scottish estates to be sold after her death, and bequeathed various special legacies, and, among others, to persons then her next of kin. She desired the residue of all her property to be divided into four equal parts,—one to be given to a Mrs. Garrety,—another distributed among charities,—the third to be retained by the Earl of Winchelsea,—and the fourth by Sir Robert Vaughan, &c., the two latter of whom she named her executors, and concluded with an "earnest request to them "that they will be pleased to see this my last will and testament "carried into effect, as well as the deed of trust accompanying, "executed by me March 1819, to which I have nominated them "my trustees." There was no express revocation of the trust-

Oct. 1, 1831.

deed, which it was admitted had been executed in liege poustie. The above writing was proved and sustained as a testament by the English Ecclesiastical Court; and claims were made under it in the Court of Chancery by the legatees, including the next of kin.

John Bellenden Ker and John Bulteel, Esqrs., heirs-portioners of Lady Essex Ker, after unsuccessfully attempting to set aside the above writing on various grounds, and particularly that it was ineffectual to exclude them from the Scottish estates,* brought a reduction on the head of deathbed. The conclusions were, that it should be found null and void, "so far as the "same directs the proceeds of the said Lady Essex Ker's real "estate in Scotland to be made over to the special and residuary "legatees therein named, to the prejudice of the pursuers, her "heirs at law;" and being so reduced, that it should be declared "that the pursuers, as heirs-portioners foresaid, have the only "good and undoubted right to the residue of the said estates "conveyed by the said Lady Essex Ker to her said trustees by "the said general disposition, after payment of the debts due by "her, and that the said defenders have no right or claim what-"ever to the said real estate in Scotland, or the proceeds thereof, "under the said will or writing."

The trustees admitted that the writing or testament had been executed on deathbed; but they maintained—

1. That the right of the heirs at law to state any such objection was excluded by the trust-conveyance executed in liege poustie; and,

2. That the law of Scotland in regard to deathbed could not affect the deed in question.

The Lord Ordinary having reported the case, the Court ordered cases, and thereafter submitted to the other Judges for their opinion this question:—"It being admitted that the deed "under reduction was executed on deathbed; Whether the pur-"suers are barred from insisting in the action, on the grounds "set forth under the first, second, and third heads of the "defences?" On advising these opinions the Court sustained the defences, and assoilzied the defenders. †

---

* 7 Shaw & Dunlop, p. 454.

† 8 Shaw and Dunlop, p. 694.

Ker and others appealed, and the arguments of the parties were the same as those in the Court below. Oct. 1, 1831.

On parties having been heard the Lord Chancellor desired that the case might stand over, that he might look into and reconsider the authorities quoted. On the case being resumed—

LORD CHANCELLOR.—My Lords, in this case, I stated when it was heard, that I should look into it, and reconsider the authorities to which I had been referred, and should then mention what occurred to me. With reference to the case itself, I must say, (which I do without the least intending to impeach the very great learning and ability with which it was argued,) that I have seen questions of much more difficulty, and involving property to a much greater amount, disposed of in far less time and with infinitely less of printed paper than have been consumed upon this. It is truly nothing more than the construction and effect of these few words,—"and then to pay "over the residue and remainder of the said proceeds to and for the "use of any person or persons I shall name by any writing under my "hand, or for such persons as I may direct by such writing; and in "default of my making such writing, or giving directions in writing, "then to pay over the said residue, to and among my next of kindred, "according to the law of England." The question turns simply upon the meaning of the word "such;" and upon regard being had to those lines I have now read, referring back from "such writing" to what was the immediate antecedent—"to pay over the residue and "remainder of the said proceeds, to and for the use of any person "or persons I shall name, by any writing under my hand, or for such "purposes as I may direct by such writing." Now it is contended on the part of the appellants, that any direction, however inept, however fruitless, however void of all influence whatever, however remote from a writing by which any interest may be pretended or assumed to be given, is a sufficient performance of this condition, to prevent the operation of the words "and in default;" for that there would be no default if there was any writing at all, even if it was not an appointment, or a direction, which is no less than saying that it would have done, even if there had been a song written. My Lords, I am clearly of opinion, in the *first* place, that the interlocutor appealed from ought to be affirmed; in the *next* place, that the argument in print, and in writing, and at the Bar, ought only to be commended for its extraordinary learning and its extraordinary diligence; for this case ought to have been argued in a very small

Oct. 1, 1831.

compass and in a very short time, satisfactorily on both sides; and I cannot help thinking, that in the multitude of lights attempted to be thrown there is no light, but rather darkness visible, shed upon it. These Scotch cases are drawn most laboriously, and often unnecessarily so, and then all the points which are made in the cases are most elaborately argued at the bar. It is the custom of the country, and one difficult, perhaps, to break through. I hope, however, to see the day when the real point will be presented within a much more reasonable compass. No one probably cares to set the example, because he is apprehensive of not giving full satisfaction to his client; but I am sure that if it were known how much more satisfaction it affords to those whose duty it becomes to decide the case, the course I suggest would be pursued. I do not propose to your Lordships to give costs, and for this reason, that several of the learned judges entertained a doubt—not as to the language, but whether the intention could prevail in respect of the law of death-bed. But I am clearly of opinion that the interlocutors ought to be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Willoch v. Auchterlonie, 14th Dec. 1769 (3339—Rom. 30 Mar. 1772); Brack v. Hogg and Johnston, 23d Nov. 1827 (6 S. & D. 113, ante p. 61,); Couts v. Crawford, 17th Nov. 1795, 3d Feb. 1801, (14,958 & App. Deathbed, No. 3,) House of Lords, 14th Nov. 1806 (12 F. C. 492, Note); Batley v. Small, 2d Feb. 1815 (F. C.); Moir v. Mudy, 2d March 1820, 2 Shaw App. p. 9; Roxburghe v. Wauchope, 25th May 1820; (2 Bligh. p. 619;) Lawson v. Stewart and others, 29th Jan. 1826 (ante Vol. II. p. 625); Pothier, p. 87, sec. 205.

RICHARDS, CLARKE, and NARES—CURRIE, HORNE, and WOODGATE,—Solicitors.