

1739.

MURRAY
AND OTHERS
v.
SIR FRANCIS
KINLOCH,
&c.

HUGH MURRAY, Kinnymound,
Trustee of the late Sir JAMES
ROCHEAD ; and JAMES DALRYM-
PLE, and DAVID KINLOCH. } *Appellants;*

Sir FRANCIS KINLOCH ; Sir JAMES
DALRYMPLE, *et alii*, - - } *Respondents.*

29th March, 1739.

DEATH-BED.—MUTUAL CONTRACT.—Whether a renunciation by an apparent heir of his right to challenge *ex capite lecti*, granted to the ancestor while he was *in liege poustie*, be binding ?

Whether such a renunciation granted by two of four apparent heirs be binding on them, the other two not having acceded to the obligation, and the party obtaining it being thus prevented from fulfilling his part of the conditions of the contract ? *

Sir James Rothead of Inverleith, by deed of en- No. 48. tail (1691,) settled his estates of Inverleith and Darnchester upon his son James, and the heirs of his body, whom failing, upon his four daughters. James was to be under the fetters of the entail, but if the succession opened to the daughters, they were to succeed as heirs portioners in fee simple. Magdalen, the eldest, was married to James Cathcart, Esq. ; Janet, the second, to Sir David Dalrymple ; Mary, the third daughter, to Sir Francis Kinloch ; and Elizabeth, the youngest, remained unmarried.

Sir James (the son) succeeded to these estates upon the death of his father, and having ac-

* It does not appear upon which of these two grounds the judgment of the House of Lords proceeded.

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quired other property, he was desirous of making an entail both of the old and of the acquired estates in favour of the same person. With this view, a contract was prepared by Sir James, which he wished all his sisters to agree to and subscribe, in order to free him from the restrictions, &c. of the entail, and to enable him to make a settlement accordingly.

By this contract it was provided, 1. That if Sir James Rothead should die without issue, then the said lands should stand charged with 120,000 merks, payable among the four sisters equally, and to such persons, as any of them, for their respective shares, should, by writing under their hands, appoint.

2. That if the said Sir James Rothead should die without issue, and without making any settlement of his estates, then the whole should fall and belong to his said four sisters, and to such persons as they should name, and failing of such nomination, to the heirs of their bodies.

3. That notwithstanding the foregoing clauses in favour of the said Sir James Rothead, and his said four sisters, yet the same clauses should no way hinder the said Sir James of his full power and free disposal of his real and personal estates, either in whole or in part, to any person or persons he pleased at any time, *etiamsi in articulo mortis*, and that without any of his said four sisters' consent, without prejudice to the foresaid possession of 30,000 merks to each of the said sisters.

4. That if any of the said four sisters should not subscribe this instrument, then she or they not subscribing, should have no power or share of his separate heritable or moveable estate, besides the

lands of Innerleith and Darnchester, but the same should accrue and belong to the sisters subscribing, and their heirs, unless the same shall be otherwise disposed of by the said Sir James Rothead.

This contract was signed, on the one part, by Sir James, and on the other by Janet and by Mary, and their husbands ; but it was not signed by Magdalene or by Elizabeth.

Upon the death of Magdalene in 1735, Sir James obtained a decree, (in absence,) in an action of declarator, (to which James Cathcart, the son of Magdalene, was made a party,) finding that the limitations in his father's settlement were personal in favour of his four sisters, and not in favour of their heirs, and that he might therefore dispose of Magdalene's share.

On 2d April, 1737, Sir James executed a disposition of all his acquired estates, and of three-fourths of the paternal estate, viz. the shares of Magdalene, Janet, and Mary, in favour of Murray and other trustees, for behoof of the sons to be procreate of the body of James Cathcart ; whom failing, for behoof of James Dalrymple, (grandson of Janet,) whom failing, of Francis Kinloch, second son of Mary.

Sir James died on the 1st of May following, within thirty days of the date of this settlement, having previously contracted the disease of which he died.

Thereupon the heirs at law of Sir James, viz. Mary, (with consent of her husband, Sir Francis Kinloch,) Elizabeth, the youngest sister, and the descendants of Magdalene and Janet, brought their several actions for reduction of this settlement, so far as their shares were concerned, on the head of death-bed. But a doubt having occurred whether

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James Cathcart, (the son of Magdalen,) and Elizabeth, were not barred from claiming as the heirs of law of Sir James, by the proviso in the contract in 1715, “ that the sisters refusing to “ subscribe the same should be excluded from the “ succession to any part of Sir James’s acquired “ estates,” they raised a reduction of this contract, on the ground, *inter alia*, that Magdalen and Elizabeth had not been made parties to it, and had not even been required to subscribe it; and in this action they obtained decree of reduction, so far as their rights of succession were involved, (26th January, 1738,) which was affirmed on appeal to the House of Lords, (18th April, 1738.)

To the action at the instance of Mary and her husband, and of the heirs of Janet, it was objected on the part of the trustees, that as Mary and Janet had agreed to the contract in 1715, and had accepted certain rights, qualified with a power to Sir James to dispose of the heritable estate *etiam in articulo mortis*; neither they nor their heirs could now be allowed to dispute the validity of the deed 1737, which was executed in virtue of that power.

Answered:—As the contract in 1715 has been found ineffectual to exclude the two sisters, who had not subscribed it, from their share in the succession, it can have no effect against the other parties to it, because the reason which induced them to subscribe was the hope of that advantage of which they are now deprived; (*viz.* the shares of those who should refuse to subscribe;) and the deed of settlement could not be good in part, and bad as to the residue; neither was it in the power of the heirs of Sir James to dispense

with the public law, by giving him power to dispose of an heritable subject on death-bed.

The Court found, (23d June, 1738,) that Sir Francis Kinloch and Mary his wife, and Sir James Dalrymple, (the son of Janet,) were not barred by the contract in 1715 from challenging the deed of 2d April, 1737, on the head of death-bed; and remitted the case to the Lord Ordinary.

Thereafter the Lord Ordinary, (27th June,) sustained the reasons of reduction libelled, viz. that Sir James had contracted the disease of which he died before executing the deed in question, and that he died within sixty days of its date, and allowed a proof.

The court adhered, (6th July,) and upon advising a proof they found the reasons of reduction proved, and reduced, &c. &c. (29th July.)

An appeal was brought by the trustees, and by James Dalrymple and Francis Kinloch, (the heirs under the settlement in question,) from these interlocutors of the 23d and 27th of June, and 6th and 29th of July.

Pleaded for the Appellants:—Although a man cannot, on death-bed, convey away his heritable property to the prejudice of his heir at law, yet where a conveyance of such estate has been made to the heir, reserving a power to alter *in articulo mortis*, and this has been accepted by the heir, he cannot challenge a posterior deed upon the head of death-bed. The sisters, therefore, having by the deed 1715, (by which they were in a certain event called to the succession,) empowered Sir James to dispose of his estate on death-bed, are barred from challenging the deed 1737.

Although the contract 1715 was set aside as to

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James Cathcart and Elizabeth Rothead, because they were not parties to it, this can have no effect with regard to Janet and Mary, who were parties to it and subscribed it; and the judgment of the Court of Session and of the House of Lords, was expressly confined to the shares of Magdalen and Elizabeth.

Pleaded for the Respondents:—1. The contract 1715, is void by non-performance on the part of Sir James Rothead; for it is a rule in mutual contracts, where conditions are to be performed *hinc inde*, that the contract must subsist, and be made effectual in all its parts, and non-performance in any one article resolves the whole.

2. No power of disposing on death-bed was given to Sir James Rothead by the contract 1715. It contains only a reservation of the powers previously competent to Sir James, and no more.

3. Though an heir may dispense with the law of death-bed by ratification of a particular deed, (the contents of which he knows,) no general power or consent given by him, antecedent to the making of such settlement, can bar him from making the objection.

After hearing counsel, “it is ordered and adjudged that the said appeals be, and they are, hereby dismissed this house, and that the interlocutors complained of be, and the same are hereby affirmed.”

For Appellants, *Ch. Areskine, W. Hamilton.*

For Respondents, *R. Craigie, W. Murray, Alexander Lockart.*

Judgment,
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