

## S E C T. VII.

## Undue influence.

1746. July 9.

WRIGHT of Kersy and RITCHIE of Sinks *against* JAMES MURRAY.

## No 50.

A woman, to whom the liferent of a subject was bequeathed, with a faculty of disposing it at her death to any of certain friends of the testator, having disposed it to one of them, who promised to allow her husband the liferent, and gave him a sum of money in place of the liferent; the exercise of the faculty was craved to be reduced as fraudulently elicited. The Lords found, that there was no evidence of fraudulent dealing, and repelled the reasons of reduction.

ANNA MEGGAT, relict of James Johnston of Polton, having purchased the lands of Hillhead, took the rights to herself, and such heirs and assignees as she should name at any time of her life; in virtue of which faculty she 'nominated and appointed Catharine Johnston her daughter in liferent, during all the days of her lifetime, for her liferent use allenary, and the heirs to be procreated of her body; which failing, such of (the said Anna Meggat) her own nearest heirs and assignees, one or more, as the said Catharine Johnston should nominate at any time in her lifetime, with or without consent of her present or any future husband; and failing of such nomination, her own nearest heirs and assignees whatsoever, to succeed to her in the lands of Hillhead.'

It would seem that Anna Meggat was very anxious to secure the estate from ever falling to her daughter's husband, or any heirs of his other than his children by her; for by a subsequent clause it is provided, that if the heirs of her body should decease without issue, or without disposing of the lands, the right should not devolve upon their heirs, but upon the disposer's own heirs whatsoever.

Catherine Johnston having no children, named James Murray receiver-general of the customs, grandson to Anna Meggat by her eldest daughter, to succeed to the lands.

Richard Wright of Kersy and John Ritchie of Sinks, two other grandchildren, raised a reduction of this nomination, as being obtained by fraud and practices *contra bonas mores*, in as far as it was made by the influence which George Seton, Catharine's husband, had over her, who had bargained to receive for it from Mr Murray 1000 merks Scots to himself.

Mr Murray being ordained to answer to interrogatories, acknowledged that George Seton said to him at two or three different times, that he thought that he the defender had best right to the fee of the lands of Hillhead, as being his wife's eldest sister's eldest son, and wished she would give it him, but never made the least insinuation to the defender of any reward whatsoever: That some time after, upon the defender's going out to Hillhead to see his aunt at her desire, she, after some compliments to him, said she was an old woman, and intended him for her successor, and desired he might get proper rights drawn,

which she would sign with pleasure, and at the same time desired her husband Mr Seton might have the liferent; to which the defender answered, that he thought it most reasonable, and would willingly agree to it, and, to the best of his memory, Mr Seton was not present: That at the same time the rights and writings were delivered to him, in order to get the proper deed in his favours made out: That afterwards Mr Seton understanding what his wife desired to be done, he and the defender met and agreed, that the defender should give 1000 merks as the value of his liferent; that some time after the defender went out to Hillhead, when the deed of nomination in his favours was read over to his aunt, to which she gave great attention; and in token of it she asked, why Mr Seton's liferent was not reserved; to which Mr Seton answered, that the defender and he had agreed about that; and she thereupon replied, that she was satisfied, and signed the paper; and afterwards talked with great satisfaction of what she had done, and said, she wished it had been ten times more for his sake.

*Pleaded* for the pursuer, Catharine Johnstone's right in the estate was only a liferent, besides which she was entrusted with naming any of Anna Meggat's nearest relations to succeed to it; but her power did not extend to give it, or any benefit thereby, to any body else, much less to George Seton her husband, to save it from whom was the cause of the very particular nature of Anna Meggat's settlement; it was plain from every circumstance, this nomination was owing to his influence, and a contrivance to give him a benefit; the defender had owned the first mention of giving him the fee came from George Seton, and it was submitted to the Court, whether this was not thrown out with an intention to sift him. He was afterwards sent for to Hillhead, and the proposal made to him, which was not necessary, unless the intent of naming him had been suspended till he should consent to the liferent. And at last the deed was not executed according to Catharine Johnston's directions, but agreeably to a private bargain between themselves. Had Catharine Johnston openly pacted with any of Anna Meggat's heirs for a sum to be paid, either to herself or any body else, the deed, in consequence of such an agreement, would have been set aside; and can it be supported, because brought about in this indirect way.

It may be difficult to prove any direct solicitations by the defender, but it is plain the nomination has been the work of George Seton, who has taken advantage of his wife when near her death; and the defender, when the offer was made, knew well enough the consequences of refusing.

*Pleaded* for the defender, There is no evidence of any bargain made by him with his aunt to purchase the nomination in his favours, nor that the choice of him was owing to any influence of her husband over her; his relation made it very natural for her to name him, and at the same time it was natural for the old woman to desire that her husband should have a comfortable subsistence after her death, which he had consented to out of pure generosity; and this was

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no way to the prejudice of the pursuers, as they had no claim to the subject. He might have taken the deed with the burden of Mr Seton's liferent, which burden might afterwards have been quarrelled, to his own and not the pursuer's profit; this he did not do, but gave it for an equivalent.

A case something like has been decided by the Court. William Dundas of Airth and Catharine Elphinston his spouse gave a bond of provision for 20,000 merks Scots to five younger children *nominatim*, subject to the granter's power of division; three other children were afterwards born, and the only method in the power of the parents to provide them, was by giving a larger share to such of the five elder as would consent that part of their provision should go to the unprovided children. THE LORDS sustained the division, and yet in that case what was given was out of the pocket of the five elder children; and here it comes off the defender.

THE LORDS thought there was here no proof of a corrupt bargain.

'They repelled the reasons of reduction.'

Reporter, *Elchies*.

Act. *Lockhart*.

Alt. *R. Pringle*.

Clerk, *Gibson*.

*Fol. Dic. v. 3. p. 245. D. Falconer, v. 2. No 130. p. 156.*

## S E C T. VIII.

### Facility and Lesion, without condescending on acts of Circumvention.

1696. November 27. ALISON against BOTHWELL.

No 51.

THE LORDS advised the debate in the declarator of circumvention pursued by James Alison against Harry Bothwell of Glencross, for causing him, a simple young man, to renounce an infestment of annualrent of 2500 merks he had well secured, and give down 200 merks of the principal, and take a personal bond for the rest, and a penalty of 500 merks on him, that his adjudication contained the whole sum. It being proven to the Lords, that he was a very weak young man, they reponed him against the failzie of 500 merks, and any other advantages taken of him; for though there was not *dolus dans causam contractui*, yet there might be *dolus in re*, and every inequality in a bargain ought