

for him; and though, with the same breath, the subject is given away to strangers, the alienation could not be effectual against him, being done on death-bed.

THE LORDS repelled the reason of reduction. (See DEATH-BED.)

*Fol. Dic. v. 3. p. 34. C. Home, p. 240.*

1758. January 17.

DANIEL CUNNINGHAM of Cayen, against MARY GAINER, and SUSANNAH CUNNINGHAM, her Daughter.

By minute of sale, dated 13th June 1741, Thomas Forbes of Waterton, obliged himself to dispone the lands of Holms of Dundonald to Robert Cunningham, Esq; for which Mr Cunningham thereby became bound to pay Waterton L. 1008: 14: 2 Sterling as the price. It was further declared, That the disposition to be granted, and the lands themselves, should be burdened with the said price until payment.

Mr Cunningham soon after raised a suspension and reduction of the minute of sale *ex capite fraudis*. The reasons of reduction were, however, repelled by two consecutive interlocutors of the Lords, the last of which was pronounced 30th June 1743; but a question with respect to certain deductions from the price was still in dependence at Mr Cunningham's death, November 1743.

By a deed, of date 17th July 1741, Robert Cunningham disposed to Mary Gainer in life, and to her daughter Susannah in fee, his lands in Scotland, there particularly described, without mentioning the Holms of Dundonald.

On the 27th October 1743, Mr Cunningham executed his last will and testament, by which he conveyed his estate in the island of St Christopher's (there said to yield L. 2500 Sterling *per annum*) to certain trustees, for payment of his debts and legacies, and in further trust for Daniel Cunningham his son, to whom he also thereby bequeathed certain other plantations, said to yield L. 380 of yearly rent, and his whole other estates not disposed by his will. Among other legacies given by this will, there was one in these words: 'I give and bequeath unto my dear wife, Mary Gainer, (which I have hitherto concealed,) all my lands, plate, houses, furniture, linens, horse, mares, bulls, cows, sheep, and whatever I have or shall have, in Scotland, at the time of my decease, for and during her life, for her maintenance, and for the maintenance and education of my daughter Susannah Cunningham; and after the decease of my said wife, I give and bequeath all my lands, plate, &c. and whatever I have or shall have, in Scotland at the time of my decease, unto my daughter Susannah Cunningham, and the heirs of her body; and failing such heirs, I give my said lands and premises to my son Daniel Cunningham, Esq; and his sons for ever.'

Robert Cunningham died on the 13th November 1743, when the price of the Holms of Dundonald was not paid; Waterton thereupon adjudged these lands, and Mr Cunningham's other land-estate in Scotland. Mary Gainer then brought

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By the same death-bed deed he conveyed the money to a stranger. Found the heir at law could not reduce the death-bed deed, to the effect of doing away the substitution, that he might come in before the stranger.

No 10.

A legacy of a right to lands is effectual against the testator's heir, who takes benefit from the testament in which the legacy is given.

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a suit in the High Court of Chancery against the trustees named in the will, and Daniel Cunningham, for performance of the trust, by relieving the Scots estate of the debts out of the produce of the St Christopher's estate.—It was *objected*, That the testator was not in sound judgment when the will was made; but after a proof was taken, the Lord Chancellor pronounced his decree in July 1750, declaring, That the will ought to be established, and the trusts thereof performed; and, in particular, ordering, that the estate in Scotland should be relieved of all debts which did or might affect it.'

In pursuance of this decree, the trustees paid the price due to Waterton, and took a disposition from him of the Holms of Dundonald, in favour of Daniel Cunningham, his heirs and assignees. Mary Gainer claimed these lands as legated to her, and the tenant called both parties in a multiplepinding for settling their right to the rents.

*Objected* by Daniel Cunningham, That, by the law of Scotland, neither lands, nor the right to lands, can be conveyed in a testamentary deed, by way of legacy.

*Answered* by Mary Gainer, That admitting such to be the general principle of our law; yet, as Mr Cunningham's testament, by the law of England, was available to convey the St Christopher's estate, for the uses and purposes therein expressed; and as Daniel Cunningham was, by the said will, constituted residuary legatee of that estate, from whence he reaped considerable benefit, he was thereby barred from challenging, and even bound to concur in making effectual the bequest, which, by the same will, was made of the Scots estate. So it has been decided in parallel cases; 2d December 1674, Cranston *contra* Brown, (Stair, v. 2. p. 287. *voce* *Quod potuit, non fecit.*); and 19th July 1745, Paterfon *contra* Spreul; (Rem. Dec. v. 2. p. 114. *voce* DEATH-BED.)

Further *objected* for Daniel Cunningham:

*Imo*, That the lands of Holms of Dundonald do not fall under the words of the legacy to Mary Gainer and her daughter. They could not be comprehended under the description, my lands; for the personal obligation contained in the minute of sale, cannot be said to have transferred the property of these lands from Waterton to Robert Cunningham, being only a ground of action to compel Waterton to implement. Neither could these lands be comprehended under the general words, *whatever I have or shall have, in Scotland, at the time of my decease*; because these words are subjoined to the enumeration of *bona mobilia*, such as plate, furniture, &c. without any mention of debts or obligations; and it is not the practice to extend general words subjoined to particulars to other articles of a different species.

*2do*, Neither was it the testator's intention, that these lands should be comprehended under the legacy: For Robert Cunningham repudiated, and even challenged, by suspension and reduction, the minute of sale; and to his death would have nothing to do with the lands, nor accept of a disposition from Waterton. He was preparing to try every competent method for getting free of that contract, notwithstanding the interlocutors of this Court sustaining it, when he hap-

pened to die. Hence it is plain, he could not mean to convey these lands under that legacy, when he never considered them as a part of his estate; of which the other deed he granted in his Lady's favour, upon the 17th July 1741, five weeks after the date of the minute, is further evidence; as every other bit of ground he had in Scotland, is thereby especially conveyed to her, but no mention made of the Holms of Dundonald.

And, *3tio*, Supposing this legacy could comprehend these lands, yet it could only have the effect of conveying the contract of sale, with its inherent burdens; and, therefore, if Mary Gainer claimed the benefit of that contract, she would be liable to pay the price, which was owing at Robert Cunningham's death.

*Answered* for Mary Gainer: *1mo*, The words, *all my lands*, comprehend every right to lands which Robert Cunningham had. In a deed *inter vivos*, the conveyance of all his lands, and whatever he had in Scotland, must have carried the personal obligation on Waterton to dispose these lands. And it can make no difference, in the present case, that the conveyance is in the form of a legacy. The general words are so broad, that they cannot be reasonably circumscribed to the *bona mobilia*. *2do*, The testator's intention is sufficiently plain from his words; and therefore it is incompetent to bring in extraneous circumstances for explaining away the express words of a deed. Moreover, before this testament was executed, the contract of sale had been sustained in this Court by two interlocutors, unanimoously pronounced; which could not be altered here; nor could Mr Cunningham have any good cause to expect an alteration on an appeal. Besides, it must be presumed to have been his intention, that if the contract could not be set aside, the legatee should have the right of the lands. It does not appear that Mr Cunningham intended to convey every estate he had in Scotland by the deed 1741, which contained only particular subjects; but as the Holms of Dundonald was the only subject in Scotland not thereby conveyed, the general legacy must have been intended purposely to carry it also. And, *3tio*, Were this question with Waterton, he indeed would not be obliged to dispose till the price were paid; but as the testament appointed the whole of the testator's debts to be paid out of the St Christopher's estate, and the price undoubtedly was a debt due by him at his death, it must be paid out of that estate. But this question is only competent in the Court of Chancery, which has the sole jurisdiction over the St Christopher's estate.

'THE LORDS found, That the right which the deceased Robert Cunningham had to the lands of the Holms of Dundonald, falls under the legacy left to the said Mary Gainer, the testator's widow, in the testament made by him in favour of the said Daniel Cunningham his son; and that, therefore, the said Daniel Cunningham cannot quarrel the said legacy; and preferred the said Mary Gainer to the rents of the said lands.'

For Mr Cunningham, *A. Lockhart, &c.*

*Alt. Adv. Dalrymple, Geo. Brown, Arch. Hamilton.*

*Rae.*

*Fol. Dic. v. 3. p. 34. Fac. Col. No. 88. p. 155.*