1796.

OMMANNEY,&c. v. DOUGLAS, &c.

EDWARD OMMANNEY of Bloomsbury Square, in the County of Middlesex, and JOHN PAGE, trustees of Sir Charles Douglas, Bart., - - - } *Appellants;*

MRS. LYDIA MARIANA DOUGLAS or BINGHAM, and RICHARD BINGHAM, her Husband, residing at Gosport, and their Attorney, } *Respondents.*

House of Lords, 15th March 1796.

WILL—CONDITION CONTRA LIBERTATEM MATRIMONII—DOMICILE.—(1). A Scotchman by birth, residing in England, executed a will in the English form, leaving the residue of his estate to his younger children, equally among them. The respondent, his eldest daughter, having formed an attachment to a person whom she was on the eve of marrying against her father's will, he executed a codicil, declaring that if she were so married to that person, she should not be entitled to her share of the residue of his estate. They were married. Held, that this was a condition *contra libertatem matrimonii*, and not to be regarded. (2). Sir Charles Douglas, the testator, had left Scotland at 12 years of age, and entered the navy. He had been all his life in various services, and latterly in the British navy. He had a house at Gossport, where he most commonly resided when at home. He owned two houses at Edinburgh, and sometimes visited Scotland. The last time he staid ten months with his sister at Olive Bank. Having thereafter received the command of the fleet at Halifax, before leaving, he took a hurried visit to his sister and children in Scotland, where, two days after his arrival, he died of a fit of apoplexy. The question was, Whether England or Scotland was to be held his domicile, as applicable to the rights under his will? Held, reversing the judgment of the Court of Session, that England was the domicile of the deceased, and consequently, that the first interlocutor regarding the condition contained in the deceased's codicil, fell to be reversed, as the law of England, and not of Scotland fell to be applied, and that the condition in the codicil was not unlawful, but to be taken as a revocation of his former bequest to his daughter.

The late Sir Charles Douglas, then residing in England, executed a will in the English form, bequeathing his whole real and personal estate to the appellants, as trustees for the purpose of providing provisions to his wife, and to his eldest son, and the residue to be divided equally among his

younger children, with £50 additional to the respondent, Lydia Mariana Douglas, his eldest daughter. His property consisted of £15,000 of stock in the public funds, and £2000 secured by a deed, executed by the executors of Mr. Cruikshanks, a gentleman in England, by which they declared they held a bond of Mr. Gavin of Langton, in Scotland, for £5000, in trust to the extent of £2000, for Sir Charles Douglas, and two flats of a house in the Canongate of Edinburgh. 1796. OMMANNEY &c. v. BINGHAM, &c.

His eldest daughter, the respondent, having displeased him in her matrimonial alliance, he, on the 11th October 1788, added a codicil or will, whereby setting forth the cause of displeasure, and the share left her by the above settlement, he declares, that "if my said daughter Lydia "Mariana Douglas hath already married the said Richard "Bingham, son of the said *John* Moody Bingham, then, and "in such case or event, I, the said Charles Douglas, do "hereby declare my will and intention to be, that my said "daughter Lydia Mariana Douglas, or such her husband, "his or her heirs, executors or administrators, shall not, at "any time or times, after such marriage taking place, be "entitled to the share intended to be given to her by my "said will." A disposition applicable to the Scotch property, was at same time executed in the Scotch form.

The parties got married in November thereafter, against the express prohibition of Sir Charles. He died in March thereafter, without ever seeing or being reconciled to his daughter, and without revoking the codicil. March 1789.

The daughter and her husband instituted the present action of reduction in Scotland, calling for production of the two last deeds, that the same might be reduced.

The chief ground insisted on in the first branch of the case was, that the condition as to her marriage being *contra libertatem matrimonii*, and such as Sir Charles could not legally impose, was of no binding effect in law, to deprive her of her share of the residue of the deceased's estate.

Informations were ordered. The appellants, on the one hand, contended, That in disputing the legality of the condition prescribed by the testator, the respondents confounded two cases essentially different: When a father insists that his child shall marry a particular person, or a member of a particular family, he certainly exceeds the limits of that proper and lawful authority which every parent ought to possess. In the same manner, when a parent

1796.

OMMANNEY, &c. v. BINGHAM, &c.

insists that a child shall not marry at all, he exceeds the bounds and limits of parental authority. But these cases do not apply to the present question, because, although a father be not entitled either to prevent his daughter from marrying, or oblige her to marry any particular person, it does not follow that he is not entitled to impose a negative to the daughter's choice, because such a power falls legitimately within the parental authority, of which it would be both highly inexpedient and dangerous to deprive a father. A father may have good reasons for withholding his consent; and if he can withhold his consent, it cannot be illegal, or *contra bonos mores*, or *contra libertatem matrimonii*, to declare that if she married Mr. Bingham, her share should go to her other brothers and sisters. The father has power to disinherit any of his children. And it is no answer to this to say, that the respondents would not have married, had they known of these conditions, because, in point of fact, they were duly warned that if they married, that they were acting in direct opposition to Sir Charles' injunctions. In answer to this, it was stated by the respondents, that at first Sir Charles was agreeable to the match, but afterwards refused his consent. The match was in no view unsuitable; and the conditions in the settlement were therefore unreasonable. It was further contended, that the condition of marrying Richard Bingham, son of John Moody Bingham, did not apply to the circumstances which actually took place, as she had not married Richard son of *John*, but Richard son of Isaac Moody Bingham, and therefore the condition did not apply. The intention obviously was clear; but intention was not sufficient, because, applying the strict rule to such deeds of an unfavourable nature, which are *strictissimi juris*, the intention will not supply the want of suitable words, which must be express and positive. Here there was no more than a declaration in this codicil, of an intention to alter, if she were then or afterwards married to Mr. Bingham. The marriage took place thereafter, but he died without altering, and so without putting that intention into effect. But assuming the codicil to contain a sufficient alteration by itself, then as it was attendant on her marrying a particular person against his will, the condition ought to be held as void, *contra libertatem matrimonii.*

On report of the Lord Ordinary, the Court sustained the reasons of reduction, of the irritant condition contained in the codicil libelled, and found the pursuer entitled to her whole provisions, as originally destined for her, in the same