

1797.

[M. 12761.]

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 DUGGAN  
 v.  
 WIGHT.

FRANCIS DUGGAN, Druggist,                   .                   .                   *Appellant* ;  
 ALEXANDER WIGHT, W.S.,                   .                   .                   *Respondent*.

House of Lords, 24th Nov. 1797.

TRUST—ACT 1696—PAROLE PROOF.—Circumstances in which a letter, written by a party holding a right to property, *ex facie absolute*, did not establish that he held it only in trust: Also, that the parole evidence offered was incompetent to qualify a title to property *ex facie absolute*.

This was an action of declarator of trust, brought by the appellant in the Court of Session, to have it found that the lands of Kevockmill, and others, were only held in trust by the respondent for behoof of the appellant, and that they were purchased by and for him alone.

Mr. Wight was a Writer to the Signet; and the appellant alleged, that after effecting the sale himself, he called on Mr. Wight, and arranged with him the conditions of the rights—he, Mr. Wight, assisting him with a loan to pay part of the price.

It was agreed, the appellant stated, that Mr. Wight should take the conveyance to the property unconditionally in his own name; this being necessary, in consequence of the appellant being incapable at the time of holding heritable property, he being a Roman Catholic; but that he had himself negotiated the whole sale personally with the previous proprietor, Mr. Hunter, Mr. Wight not being present, or taking any concern in it. That on expiry of one of the tenant's leases, he took possession of that portion of the lands as proprietor, without any lease from, or paying any rent to Mr. Wight: That he laid out large sums in improvement of the lands, and building houses: And further, that he had received an express acknowledgment from Mr. Wight, in a letter addressed to his agent, of his having bought the lands with a view to surrender them to him. Mr. Wight declares, "It is indeed true, that at this time I said to Mr. Duggan that I had no wish to become a proprietor of land, and that, in case he chose to take it at the end of three or four years at farthest, I would give it up to him; and I no doubt said frequently, not only to himself, but to many others, that I had made the purchase with that view. The

“ longest period at which I ever said I would give up the  
 “ place to Mr. Duggan, if he chose to take it, expired at  
 “ Whitsunday 1792, and I think he will not say he ever  
 “ made a proposal at that time to take it, if I would give it  
 “ to him; and since that period he declared to myself that  
 “ I was at liberty to do with it as I pleased, as I had com-  
 “ pletely fulfilled my promise with him.”

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The defence stated to the action, was a denial that he had ever held the property in trust for the appellant. Also a denial of the possession and of the improvements made upon the estate; and founded upon the act 1696, as barring the action, as well as the irrelevancy of a proof by witnesses. Upon these allegations, the Lord Ordinary “ held the proof Feb. 2, 1795.  
 “ incompetent; and in respect that the pursuer does not  
 “ offer to instruct the alleged trust, either by the writ or  
 “ oath of the defender, sustains the defences; assoilzies the  
 “ defender, and decerns;” and disallowed a parole proof. The Court, on reclaiming petition, altered the above interlocutor of the Lord Ordinary, and allowed proof. But, on a Dec. 13, 1796.  
 further petition, the Lords returned again to the Lord Ordinary’s interlocutors, adhered thereto, and assoilzied the 2 and 4 Mar. 1797.  
 defender.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant.*—At common law, every fact might have been proved by witnesses; Balfour’s Practicks, p. 361, § 17; p. 376, § 24. Sir Geo. Mackenzie, Inst. B. iv. tit. 2d, § 8, and particularly in regard to a trust; for, as Lord Stair says:—“ It were to small purpose to refer it to  
 “ his (the trustee’s) oath, for it is presumed that he who  
 “ would steal, would swear; and it is the worst kind of  
 “ stealth to betray trust, and therefore the law alloweth  
 “ that the trust may be proven indirectly by circumstances  
 “ inferring the same.” Stair, Inst. B. iv. tit. 45, § 21.

2. The act 1696, c. 25, upon which the respondent relies, relates only to “ deeds of trust made,” and has been held in several cases, (*Spreul v. Crawford*, 16th July 1741), *Kilkerran’s Reports*, p. 581; *Mudie v. Ochterlony*, 13th June 1766, *Fac. Col. Dic. of Dec.* vol. ii. p. 272), not to extend to any trust which may exist without a deed, as in the case of moveables, or as in the present case, to a trust which does not arise from any deed or disposition of the trustee; but from the voluntary interposition of the trustee. Thus was the law established by these two decisions. And trusts have in various instances been established by facts and cir-

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cumstances, as in the case *M'Laren v. Chiesley's executors*, Dict. of Dec. vol. ii. p. 272. Also in the case of *Gilmour v. Arbuthnot*, 11th Dec. 1765; Fac. Col. Also in three cases not reported, *Alison v. Fairholme*, Nov. 1765; *Stewart's Executors v. M'Arthur*, in 1777; and *Donaldson v. Morison*, decided in 1787. This last case resembled the present. The parties intended to make a joint purchase of two small enclosures near Edinburgh, at a public roup: Donaldson attended and made the purchase, and having afterwards resolved to keep the whole to himself, Morison brought an action against him to compel him to execute the trust he had reposed in him, and in this action Morison prevailed. 3. The present case is taken out of the statute 1696, by the statute 1700, c. 3, against allowing papists to purchase or hold heritable estate, "or any person in trust for their behoof, any lands or houses, &c." But if the statute 1696 did apply, the requirements of that statute are supplied by the respondent's letter above quoted, which clearly acknowledges the trust.

*Pleaded for the Respondent.*—It is a principle clearly established in the law of Scotland, that an heritable right, instructed by authentic written titles, such as those produced in the present case, cannot be taken away or qualified, or the import thereof be explained by parole evidence. This is the general rule of the law of Scotland,—a rule which all the writers on that law have considered as entitled to the highest approbation. It is even a settled point now, that where a doubt occurs with regard to the import of any clause of a deed, no parole evidence can be admitted, not even of the person who framed the deed, or were present at its execution, to explain what was the real meaning and intention of the parties. An allegation of trust therefore, against the deed, *ex facie* absolute, can never be allowed to be proved by witnesses. And, accordingly, a proof by such witnesses, and of this nature, was the very thing the statute 1696 was enacted to prevent. The decisions referred to by the appellant, do not bear upon the point. The respondent further, has no objections that the letter founded on be read, as his oath in reference, and when so considered, and taken and read as a whole, it will not be found to contain any acknowledgment of trust; it rather seems to import a denial of any such trust, and therefore makes out a negative to the allegation of trust altogether. A proof by witnesses even of those other facts which the appellant alleges, would not suffice to make out a trust; and, at the distance of several years, it would be improper, besides incompetent, to allow

such evidence to qualify an absolute right of property. Besides, the act 1696, in express words states, that nothing will be sufficient but the “written declaration or back-bond of trust, lawfully subscribed by the person alleged to be trustee, or unless the same be referred to the oath of the party *simpliciter*.”

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After hearing counsel,

LORD LOUGHBOROUGH said,

My Lords :

“I cannot find out where any difficulty lay in this case, so clear and conclusive were the terms of the statute 1696; and I would even have awarded costs against the appellant, but for the consideration that he had obtained an interlocutor of the Court of Session in his favour.”

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, M. Nolan, Thos. W. Baird.*

For Respondent, *R. Blair, W. Grant, W. Tait.*

WALTER SIME, Esq., Collector of Customs }  
Aberdeen, - - - - - } *Appellant;*

THE RIGHT HON. VISCOUNT ARBUTHNOTT, } *Respondent.*

House of Lords, 27th Nov. 1797.

LEASE, REDUCTION OF—FRAUD AND FACILITY—FORCE AND FEAR.—

A reduction of a lease, granted while a current lease had still many years to run, and made to commence forty-four years after its date, was brought, on the ground of its being unequal and unfair in its terms, and the granter incapable, from facility, and that fraudulent and improper means had been obtained in procuring it. Held, upon proof, that the lease was bad, and reduced accordingly.

This was an action of reduction of a lease granted by the respondent’s father to the appellant, in the following circumstances :—

The late Viscount Arbuthnott had always manifested a strong dislike to long leases, and had never been in the practice, up to a certain date, of granting leases for more than nineteen years.

He died at the age of 88, in April 1791. During the latter period of his Lordship’s life his mental faculties were impaired, and his bodily strength much weakened. The respondent further stated, that when he succeeded, after his