

No 662.

present action ought not to be considered as a declarator of trust, but as a declarator of extinction of the debt due by Mr Justice, and a reduction of the conveyance to Mr Arbuthnot, on account that the purpose for which it was granted did not now exist.

“THE LORDS adhered.”

For Elizabeth Gilmour, *Alexander Wight.*

For John Arbuthnot, *Jo. Douglas.*

A. E.

Fac. Col. No 25. p. 242.

1771. July 31.

COLIN ALISON, Wright in Edinburgh, *against* ELIZABETH FORBES, Relict of Thomas Alison, and ANNE and MARGARET ALISONS, his Daughters.

No 663.
Direct trust
not competent, in terms
of the act
1696, c. 25.
to be proved
by witnesses.

THE pursuer brought a declarator against the defenders, setting forth, that, in the year 1752, he had employed his brother Thomas to purchase a house for him, and had given him money for that purpose; and therefore concluding it should be declared, “That he had the only right to the said tenement, and that the defenders should grant a valid disposition thereof in his favour.”

Having stated a variety of circumstances, the pursuer made a farther offer of instructing the trust, by the examination of the defenders, and by the testimonies of Thomas Alison’s man of business, who had written his settlements, and of his trustees and others, who had access to know the nature of the transaction betwixt him and the pursuer.

THE LORD ORDINARY refused this proof; and in a reclaiming petition,

The pursuer *pleaded,*

That this case did not fall within the act 1696; for though the truster, in a question with the Trustee, was, on account of the *dilectus personæ*, and confidence reposed, confined to a proof, by writ or oath only, there was no reason to hold that the same confidence existed, and that the same restriction was in force when the question occurred with his heir.

The statute applied only to persons who had granted dispositions *ex facie* absolute, without taking any back-bond or declaration of trust, whereas, in the present case, the pursuer had granted no disposition to his brother at all, but a mandate merely to purchase for him the house, and money to pay for it.

The statute had not, in late practice, been rigidly adhered to. Trusts, fraudulently denied, had, in repeated instances, been admitted to proof by witnesses. Tweedie against William Lock, as to the purchase of the lands of Garshall; Skene against Balfour Ramsay; Maxwell of Lechiebank against Maxwell of Broombrae*.

The defenders *maintained,* That the proof offered was incompetent; that it was excluded by the enactment 1696, c. 25. the words of which were general,

* These cases are not reported. See APPENDIX.

to trust-rights of every kind, or, as expressed in the statute, "any deed of trust." And if the petitioner's distinction, founded on there having been no disposition *ex facie* absolute, granted to the trustee, was admitted, the statute would be of no use.

It was observed upon the Bench, That the cases of Maxwell and others, referred to in the petition, were not properly questions of trust, but challenges immediately brought of transactions as fraudulent. Here it was a direct trust.

The following interlocutor was pronounced :

" Find it not competent to prove the trust by witnesses; and therefore adhere to the Lord Ordinary's interlocutor reclaimed against, and refuse the desire of the petition, without prejudice to the petitioner, to prove the alleged trust, by the oath of the heir of Thomas Alison." And, upon advising a petition and answers, the LORDS " refused the same *in hoc statu*, but remit to the Lord Ordinary to examine the heir of Thomas Alison upon all pertinent interrogations to be put by the petitioner, and to do therein as he shall see cause."

Lord Ordinary, *Ellick*.
Clerk, *Campbell*.

For Colin Alison, *Maclaurin*.
For Forbes and Alison, *D. Armstrong*.

R. H.

Fac. Col. No 100. p. 299.

1797. March 2. FRANCIS DUGGAN against ALEXANDER WIGHT.

In 1788, Alexander Wight, writer to the signet, purchased, for L. 1000, the lands of Kevockmill and others, which were at that time possessed by two tenants.

Francis Duggan possessed one part of them, on which there was a bleach-field, &c. in virtue of a lease for 38 years, commencing at Martinmas 1784. The remainder, consisting of a dwelling-house, corn-mill, and some lands, was let to a Mrs Muat, on a lease which expired at Martinmas 1792.

In 1796, Francis Duggan brought an action of declarator of trust against Mr Wight, alleging that the subject had been purchased by him for the pursuer's behoof.

In support of his action, he gave the following statement.

The lands having been advertised for sale, in spring 1788, the pursuer was desirous of purchasing them. Mr Wight was his ordinary man of business. Their intimacy had been of long standing, and the pursuer placed unlimited confidence in him. The sale of the lands having become the subject of conversation, at an accidental meeting, Mr Wight first proposed that the pursuer should transact a purchase of them for him; on which the pursuer mentioned his wish to be the purchaser himself, but that, owing to certain embarrassments, he could not at that time command a sufficient sum of money. Mr Wight, on this said, that he would advance it to him; and the pursuer, being a Roman

No 663.

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A trust, with regard to heritage, can be proved only by oath or writing, although created by the deed of a third party. Parole evidence of trust refused, although it was alleged to be in part established by circumstances of real evidence.