

Case 52. John Arratt late Professor of Philosophy
 at St. Andrews; - - - Appellant;
 John Wilson, - - - Respondent.

23d March 1718-19.

Trust.—Circumstances inferring the trust of a disposition, bearing to be heritable and irredeemable, and upon which infestment had followed.

The trust being declared, the trustee is ordered to continue in possession, until it be redeemed, or proved that he was paid.

After several interlocutors, holding the appellant as confessed for not deponing, the appeal is brought that he might be reponed to his oath, but the interlocutors are affirmed.

Vis et metus—During the dependance of this process, the trustee having arrested the grantor of the disposition upon one of the debts paid by and assigned to such trustee, and while under caption having taken from the grantor a discharge and renunciation of all trust, and a disclaimer of his action of reduction: this discharge reduced upon the head of *vis et metus*; and the trustee is ordered to pay 60*l.* Scots of expences, before he should be heard in the principal cause.

Costs.—40*l.* costs given against the appellant.

THE respondent brought an action of reduction and declarator against the appellant, before the Court of Session, for reducing a disposition granted by him to the appellant of the estate of Baikie and other lands, and for declaring that the same was granted upon trust only. The circumstances which gave rise to that action are stated by the respondent, as follows:

That Thomas Wilson the respondent's father being in his lifetime seised of, or having right to the estate of Baikie and other lands to the value of above 100*l.* sterling per annum, on which there were several adjudications, and other pretended incumbrances, the greatest part whereof were founded upon null and extinguished debts, agreed to settle the estate upon the respondent, on his giving security by bond, to pay his father and mother 200 merks Scots per annum during their lives, and the respondent and the appellant (who out of pretended friendship to the respondent did voluntarily offer to become bound with him as surety therein, and to whom the respondent gave a counter bond to indemnify) having granted a bond for payment of the said annuity, the respondent's father accordingly on the 29th of March 1709 executed a disposition of the said estate in favour of the respondent and his heirs:

That the appellant, whilst this agreement was transacting, having told the respondent, that he the respondent would never be able to carry on such suits, as would be necessary for reducing the said incumbrances, particularly against James Blair of Ardblair, to whom the greatest part thereof had been assigned, and against whom the appellant said that he had a personal execution, and could thereby force him to reasonable terms; and therefore proposed that if the respondent would colourably transfer his right of the said estate to him, he would not only carry on such suits in his
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own name, and disburse what money should be necessary for that purpose, but would also pay off any pressing debts, which the respondent owed, and take discharges for the same, and lend him money for carrying on his trade; and it was expressly agreed that the appellant should not make any agreement with the said James Blair, or any other of the said pretended creditors, without the respondent's consent, and that upon payment of what money he should so really disburse for or lend to the respondent, with interest for the same, and being indemnified from the said annuity he should re-convey to the respondent; and the appellant declared he would take nothing for his own trouble, although the respondent offered him 1000 merks Scots on that account: that the respondent was by these means induced to accept of what had been so proposed by the appellant, and did accordingly sign a disposition of his estate to the appellant, bearing date the 30th of March 1709, the day next after the date of the respondent's father's said conveyance to him; but designed not to deliver the same, until what had been so agreed upon between the appellant and him should be put in writing. That the respondent's father being entitled to several debts and sums of money from the said James Blair, did at the same time for enabling the appellant to make the better terms with him for the respondent's benefit, assign the same to the appellant, who thereupon by a bond or writing of the same date, obliged himself to be accountable to the respondent's father, his heirs and assignees, for what should remain thereof after payment of the said Blair's just demands, and his the appellant's own charges: and, that the appellant afterwards got into his hands both the respondent's and his father's said dispositions of the estate, on pretence of shewing them to his lawyer, and on a promise to return them, which he never did perform; and that he might be master of the whole writings, he caused his agent one Thomson to borrow up the same, whose receipt the respondent produced in process:

That the appellant did, indeed, at different times lend the respondent several sums of money, amounting in the whole to about 30*l.*, for payment whereof the appellant gave him several promissory notes; and the appellant paid some small debts for the respondent, but, instead of discharges, he took assignments thereof to himself, and did also commence suits against the several pretended creditors, but soon agreed the matter with them, and particularly with the said James Blair, without the respondent's privity or consent: that these transactions having given the respondent just cause of suspicion, he pressed the appellant, that the said agreement between the respondent and him relative to the said trust should be put in writing; but this being shifted off for a long time, and at length refused, the appellant was obliged to raise the said action of reduction and declarator.

Soon after the commencement of this action, the appellant caused the respondent to be arrested for one of the said debts which had been assigned to the appellant; and the respondent
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while under caption signed a discharge of all things relating to the said trust, and a disclaimer of the said action.

The respondent having afterwards nevertheless proceeded in the said action, and referred the proof of the trust to the appellant's oath, he for that purpose exhibited several interrogatories for the appellant's being examined thereon, before the Lord Ordinary in the cause, one of which related solely to the manner of procuring the said discharge. The Lord Ordinary on the 9th of December 1714 "of consent of the appellant's procurators, without an act before answer, ordained the appellant to depone before him on the several interrogatories, and assigned the 15th of the same month for that effect."

The appellant did not give his deposition; but at next calling of the cause the appellant's procurators produced the said discharge, and insisted, that the whole process and effect thereof was discharged, and that therefore there was no occasion for the appellant's deponing. To this it was answered for the respondent, that the discharge was extorted, and that one of the interrogatories was with respect to the way and manner of obtaining thereof; and that, therefore, it ought not to be made use of against the appellant's being holden as confessed. The Lord Ordinary on the 17th of December 1714 "Held the appellant as confessed upon the several facts or allegations contained in a condescendance given in by the respondent; and in the mean time allowed the respondent to see the discharge produced by the appellant, and both parties to be ready to plead the import thereof at next hearing."

The respondent afterwards brought an action for reduction of the said discharge, and set forth the means by which he contended the same had been extorted from him. This was opposed by the appellant's procurators, who denied the reasons alleged for reduction thereof, and insisted that though they were true, they were not relevant; for what had been done therein was to compel payment of a just debt, and nothing could hinder the appellant from accepting a discharge that was just and reasonable in itself. The Lord Ordinary on the 21st of January 1715 "Found the reason of reduction relevant to be proved by the respondent, and allowed him a time for proving the same." The respondent having accordingly cited his witnesses, the appellant afterwards presented a petition for a conjunct probation, which being answered by the respondent, whose witnesses were then waiting to be examined, the Court on the 25th of February 1715 "Ordered the respondent's witnesses to be examined that afternoon, and granted to the appellant for examining his witnesses to the 5th of June following." The respondent's witnesses were accordingly examined, but the appellant examined no witness.

The Lord Ordinary having reported the proof which had been taken, the Court on the 30th of June 1716 "Found the reasons of *vis et metus* proved, and therefore reduced the said discharge, and decerned the appellant to pay to the respondent the
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“ sum of 60*l.* Scots of expences, before he should be heard further in the cause, and remitted both parties to be heard in the principal cause, after payment of the said 60*l.* Scots before the Ordinary.”

The appellant then insisted that he might still be allowed to depone, since he had been deprived of the opportunity of doing it only by the shortness of the time allowed him for that purpose, and that there was no act extracted upon the interlocutor holding him as confessed.

The respondent stated that the appellant's not deponing and insisting upon a discharge which he had extorted during the dependance of the action, was a plain indication of the trust. The Lord Ordinary having reported the debate, the Court on the 25th July 1716 “ Before answer as to that point how far the appellant was to be reponed against his being held as confessed, ordained him to give in before the Ordinary a condescendance of the *res gesta*, and for what onerous cause the disposition was granted.” The appellant not having given in such condescendance, the Lord Ordinary on the 27th of the same month “ Adhered to the said interlocutor holding the appellant as confessed, and ordained him to denude himself of the lands in the said disposition, in favour of the respondent bearing all clauses necessary.”

The appellant pleaded, that it being seven years since the disposition was made to him, it was impossible for him in two days to make up such special condescendance, or give an account how such onerous cause had been performed: but, after sundry proceedings, he gave in a condescendance of sums alleged by him to have been paid to the respondent and his father's creditors, amounting to 2784*l.* sterling, which, he contended, far exceeded the value of the lands; and he petitioned the Court still to allow him to depone, whether the disposition was in trust or not.

After answers for the respondent the Court on the 8th of January 1717 “ Ordered the appellant to produce upon oath his whole writings with the grounds and vouchers thereof.” And on the 1st of February thereafter, the Court “ Found, that the holding the appellant as confessed upon the trust should not prejudice him of any debt, right, or diligence he had upon the estate, in as far as might be extended to the sums truly paid by him on account thereof, and remitted to the Lord Ordinary to proceed accordingly.”

The cause coming to be heard before the Lord Ordinary, his lordship on the 13th of February 1717 “ Ordained the appellant to produce the minute of agreement between the said James Blair and him, about the transaction, both as to the liferent escheat, and his pretensions on the estate of Baikie, for clearing what he paid for the same.” And this interlocutor was adhered to by the whole Court on the 11th of June 1717.

The Court on the 9th of July 1717 “ Found that the disposition made by the respondent and his father was redeemable by the respondent for the sums truly paid or undertaken by the appellant, and his necessary charges, and the interest of the
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“ said sums and charges from the respective times of payment
 “ thereof, deducting the appellant’s receipts of the rents of the
 “ lands, and other effects of the respondent and his father, from
 “ the respective times they were received; and ordered the ap-
 “ pellant to continue in the possession, until it be redeemed, or
 “ proved that he was paid, and remitted to the Lord Ordinary to
 “ proceed accordingly.”

The cause being heard before the Lord Ordinary, his lordship on the 23d of July 1717 ordered the appellant to give in an account, charge, and discharge, of his intromissions in terms of the act of federunt, by Thursday then next; but the time was afterwards enlarged to the 5th of November following. At a calling of the cause on the 13th of November 1717, the Lord Ordinary, on the appellant’s craving further time for giving in his said account of charge and discharge, “ Ordered him to give in
 “ the same by Tuesday then next, with certification if he failed,
 “ he should be found liable to the penalty in the said act of
 “ federunt.”

The cause being afterwards heard before the Lord Ordinary, he on the 21st of November 1717 “ In regard the appellant had
 “ failed to give in his account of charge and discharge in terms of
 “ the former interlocutor, and that the respondent had given in
 “ an account of charge and discharge signed by him in terms of
 “ the said act of federunt, held the appellant as confessed upon
 “ the said account given in by the respondent, and found that by
 “ the said account the appellant was satisfied and paid off all his
 “ rights on the said estate, and therefore decreed the appellant to
 “ denude himself of the said estate in favour of the respondent,
 “ and declared in terms of the respondent’s libel, and also de-
 “ cerned the appellant to pay to the respondent 8*l.* 11*s.* 4*d.*
 “ Scots, being the balance of the said account.”

The appeal was brought from “ An interlocutory sentence
 “ of the Lord Ordinary the 9th of December 1714, and
 “ from another interlocutor of his lordship of the 17th of the
 “ same month, and from an interlocutory sentence of the Lords
 “ of Session of the 30th of June 1716, and from an interlocutor
 “ of the said Lords of the 25th of July following, and from an in-
 “ terlocutor of the Lord Ordinary of the 27th of the same month,
 “ and from the interlocutor of the Lords of Session of the 8th of
 “ January and 1st of February 1717, affirming their former in-
 “ terlocutors, and from their interlocutor and decree of the 9th
 “ of July 1717, and also from an interlocutor of the Lord Or-
 “ dinary of the 21st of November following.”

Heads of the Appellant’s Argument.

The lands in question were purchased by the respondent’s father in 1667, from the Earl of Strathmore, the superior, for the price of 95*l.* 13*s.* 4*d.* sterling; and the Earl reserved a feu duty of 12 bolls of victual and 1*l.* 13*s.* 4*d.* sterling. The respondent’s father was, according to the laws of Scotland, denounced for not payment of a debt, and having continued under rebellion for a
 year,

Entered
 26 Dec.
 1717.

year, his life-rent escheat fell to the superior. The superior granted the same to John Lyon, Esquire, who thereupon brought an action before the Court of Session, and in 1687 obtained judgment, whereby it was decreed, that the rents and profits of the respondent's father's real estate, during his life, did of right belong to Mr. Lyon the donatory; and in pursuance thereof, the tenants were ordered to pay their rents to him. The respondent's father being thus turned out of possession, and being considerably in debt, was obliged to retire to Edinburgh, 40 miles distant from his estate, and live privately there, having little or nothing to maintain himself and his family.

In these circumstances the respondent's father frequently applied to the appellant for relief, and pressed him to accept a conveyance of the inheritance of the said lands, subject to the claims of the superior's grantee, and likewise subject to his own debts, and to 200 merks Scots yearly to him and his wife during their lives. The appellant in pity to the circumstances of the respondent's father, did at last agree to his request, and accordingly the transaction took place by the dispositions first of the father to the respondent, and next day of the respondent to the appellant, which was followed with saine. The appellant did accordingly pay the debts chargeable upon the said estate, and the annuity to the respondent's father and mother during their lives.

By the act of the Scots parliament 1696, c. 25. no deed of trust can be proved but by writ or oath of party; and as, in this case, the respondent does not pretend to have a counter bond, or so much as a missive letter from the appellant, declaring the trust, so neither, as the appellant apprehends, ought he to have been excluded from the benefit of the said act of parliament by giving his oath, whether such deed was given to him in trust, or for an onerous cause, and especially seeing there was no decree extracted upon these interlocutors, nor could the appellant, as the circumstances of the case are, possibly appear to be examined upon oath, in so short a time as was at first limited; and he is willing still to make oath, that the said conveyance was absolute and not in trust.

Heads of the Respondent's Argument.

The appellant not having thought fit to answer upon oath to the interrogatories relating to the said trust, but suffered himself to be held as confessed thereon, and to rely wholly on the said discharge, which he had extorted from the respondent, would now fain be admitted to swear him out of his estate, on pretence that he was some distance from Edinburgh, and could not come thither to depone by the time prescribed. But this is entirely false, and never was suggested for more than two years and a half after his being so held as confessed. And though there has not been any proof made or offered on that account, *he, upon the head only of his being excluded the benefit of the said act of parliament, by his not being admitted to depone upon the said interrogatories after his being held as confessed thereon,* has brought his appeal for reversal of all
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the said interlocutory sentences: But the respondent hopes, that the same shall be sustained for the following reasons, which would have been sufficient to have proved the trust before the said act of parliament, viz.

There was no valuable consideration; for as to what money the appellant lent to the respondent, and now pretends to have been part of the consideration, he always had the respondent's notes or bills for it; whereas if it had been a purchase he would have taken discharges for the same.

As to the bond for the respondent's father's annuity the respondent was bound as principal, and the appellant only as security therein, and he had the respondent's counter bond to indemnify him; and for his further security, an assignment of a decree against John and James Crichton, for about 80%. which manifestly implies a trust and not a purchase.

If it had been a real purchase and not a trust, there had been no occasion for the estates being conveyed first by the respondent's father to the respondent, and then by him to the appellant, which only served to make the respondent liable for his father's debts, whereas it might have been conveyed at once by the father to the appellant.

It is particularly to be observed, that the appellant has not at any time during the action pretended that he had given any obligation or covenant to indemnify the respondent or his father from these debts, the payment whereof the appellant would have to be the onerous or valuable consideration of his pretended purchase; and the greater the burthen of debts was, the trust was the plainer, or the fraud the greater, since the respondent's father in his lifetime was, and the respondent still is, liable for these debts.

The respondent's father's assignment of the debts and claims which he had against the said James Blair to the appellant, and his, the said appellant's, giving a bond to be accountable to the respondent's father for the same, with the appellant's submission to an award for these claims, on behalf of the respondent and his said father do plainly denote a trust.

The method which the appellant took to get free of the action, by extorting the said discharge, does infer a trust; for else, if he had not been conscious thereof, why should he be at so much charge and pains to get that discharge, and found his defence thereon, when by giving his oath at first, he might easily have acquitted himself of this process.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that all the several interlocutory sentences and decrees and affirmances thereof in the said appeal complained of be affirmed; and it is further ordered, that the said appellant do pay, or cause to be paid to the said respondent, the sum of 40l. for his costs in respect of the said appeal.*

For Appellant.	Sam. Mead.	Will. Hamilton.
For Respondent.	Robert Raymond.	Bat. Turnbull.

Judgment,
23 March
1718-19.