

1708. *January 6.* FRANCIS MAXWELL of TINDWAL *against* IRVING of GRIBTON.

IRVING of Gribton being debtor, by bond, to Isobel Wauchop for 1900 merks, she, by her testament, names Francis Maxwel of Tindwal, her sister's son, to be her executor and universal legatar. And he having confirmed this sum, and charged Gribton, he *SUSPENDS* on double pointing, that he is likewise distressed at the instance of Francis Sinclair, another sister's son to the testatrix, who claimed the same by virtue of a missive letter written by the said Maxwell of Tindwal, the executor, to Thomas Sinclair, father to the said Francis, whereby Tindwal seems to acknowledge he was only but trustee for the said Francis's behoof, the letter bearing thir words,—That he had dealt with the defunct to give that sum to the said Francis, her sister's son; but that she answered, his mother had neglected her, and therefore she would leave it to himself; and, if not, she would either give it to Gribton, the debtor, who was likewise a relation, or bequeath it to the poor; and, rather than to do so, he had accepted it; but declared, what he did was purely for the said Francis, her nephew's profit. And, though he afterwards adjects qualities, conditions, and burdens, yet the word *purely* imports a trust and behoof; and therefore the money must belong to the said Francis.

ALLEGED for Tindwal,—That he faithfully performed the trust reposed in him by the said Thomas, for his son; but, not being able to prevail, he accepted of it; and, seeing there is nothing to constitute or instruct a trust, but his own letter, wrote with so much candour and ingenuity, they must take it as it stands; and the clause, "purely for Francis Sinclair's behoof," is fully explained by what follows,—that he is willing the money be his, if he outlive his minority, and be dutiful to his parents. So this concession can never stop from uplifting the money, either principal or annualrents, he; as executor, having the *solum jus exigendi*.

ANSWERED,—It was evident, on perusing the strain of the letter, that he was only an interposed person and a trustee; for otherwise he would never have wrote in such a style, discovering a plain struggle and conflict betwixt the point of honour and conscience on the one side, and self-interest on the other; and these conditions he now adjects are only invented *ex post facto*; and the defunct has taken his promise not to prejudge the said Francis Sinclair.

The Lords thought, that the trust being no otherwise proven but by Tindwal's letter, it must be taken in the terms it stands. And, though he has preferred Francis to himself as to the property of the sum, yet he had clearly substituted himself in case he died before majority, or disobliged his parents; which he alone was not to be judge of. Therefore, they allowed him to uplift the principal sum; but put him to find caution to refund it to the said Francis when major. All the question arose, If he should lucrate the annualrent *medio tempore*. Some thought, by the letter, he had gifted only the property of the principal sum; but the plurality of the Lords found the annualrents in the same case; and that he must find caution to restore them also, in the event of his attaining majority and carrying dutifully, without falling into irregular and unadvised shifts; in the terms of the said letter.