No 661. exhausted by other debts paid by her, she at least remained creditor in the 1100 merks paid for the adjudications; and that she, and those deriving right from her, had right to retain the subject in security thereof.

But the Lords found, "that she had no claim for repetition of the 1100 merks or any part thereof."

A general disposition, even when with the burden of debts, has always been thought sufficient to defend against the universal passive title; and therefore, if she had not acquired the disposition, she could not have been subjected to the payment of the price, upon her instructing that the moveables with which she had intromitted were exhausted by payment of other debts; but as she had acquired the disposition and paid the price, and as her intromission had been *per universitatem*, without inventory, the Lords found her not entitled to repetition.

Kilkerran, (Trust.) *No* 4. *p.* 582.

1765. *December* 11.

Elizabeth Gilmour, Relict of the deceased Mr James Justice of Justice-hall, *against* The Honourable John Arbuthnot.

No 662.

Parole evidence competent to prove that a conveyance of a real right was in trust.

Mr James Justice, in 1747, granted a bond to Mr James Arbuthnot, merchant in Edinburgh, for L. 100 Sterling; and, as a farther or collateral security, for the sum in the bond, Mr Justice conveyed to Mr Arbuthnot an adjudication against the estate of Stanhope for L. 1000 Scots principal, and considerable bygone annualrents.

Some time after this transaction, Mr Justice's affairs being in disorder, he named certain trustees, who took the management of his subjects; and, from these trustees, Mr Arbuthnot received payment of his debt of L. 100, contained in Mr Justice's bond.

Mr James Arbuthnot having died without reconveying the adjudication, on the estate of Stanhope, to Mr Justice, an action was raised by Mr Justice against Robert Arbuthnot, the heir of James, concluding that the right which stood in Mr Arbuthnot's person to that debt, should be reduced; and that Robert, as heir to James, should be obliged to denude thereof in favours of Mr Justice, the debt, for security of which it was conveyed, being *aliunde* satisfied and paid.

Before any judgment was given in this action, both Mr Justice and Mr Robert Arbuthnot died. But Elizabeth Gilmour, the widow and executrix of Mr Justice, having wakened the process, and transferred the same against the Honourable John Arbuthnot, the heir of Robert and James Arbuthnots, the Lord Ordinary, before whom the action came, allowed a proof, before answer, of all facts and circumstances for supporting the libel, and afterwards pronounced this interlocutor: "The Lord Ordinary having advised this process, proof adduced by the pursuer, and writs produced, finds it proved, that the conveyance

of the debt in question, and diligence thereon, against the estate of Stanhope, was only granted as an additional or collateral security, for payment of the sum of L. 100 Sterling, and annualrents thereof, due by the bond libelled on, granted by the deceased Mr James Justice; finds it likewise proved, that the said James Arbuthnot was thereafter assumed into the benefit of the trust-right, executed by the said Mr James Justice, for behoof of his creditors, in consequence of which, he and his representatives received payment of the debt contained in the said bond; and, therefore, finds the Representatives of the said Mr James Justice have the only good and undoubted right to the decreet of adjudication, deduced for the foresaid debt upon the estate of Stanhope, and lands, and sums of money therein contained; ordains the defender, Mr John Arbuthnot, and his father for his interest, to make up and establish a proper right thereto, in his person, as representing the deceased Robert and James Arbuthnots, and habily to convey and make over the same to the said Mr James Justice's Representatives, they always completing their titles to the said debt and diligence, before extracting; and reduces, decerns, and declares accordingly." And to this interlocutor the Lord Ordinary adhered, with the variation of finding, that the pursuer must be at the expence of making up titles, in the defender's person, to the debt in question. No 662.

Mr Arbuthnot reclaimed to the Court, and *contended*, That, as the proof was allowed by the Lord Ordinary before answer, all objections to the competency of a proof by witnesses, in this case, were entire. It was acknowledged that the pursuer had brought pretty satisfactory proof that this was a trust; but it was *pleaded*, That, in point of law, a trust could not be proved by parole evidence, the act of Parliament 1696, cap. 25. having altered our former practice, as to trusts, as, by that act, it is statuted and ordained, "That no action of declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs, or assignees, the declarator shall be intented, or unless the same be referred to the oath of party *simpliciter*." And, as there was here no back-bond, or declaration of trust subscribed by James Arbuthnot, and as Mr Arbuthnot was now dead, so that a proof, by his oath, could not be had, therefore the action must fall; and, in support of this plea, the pursuer referred to the decision in the case of Watson *contra* Forrester, 9th December 1708, No 658. p. 12755.

Answered for Mr Justice, There is, in this case, sufficient evidence to show that the debt of L. 100, contracted by Mr Justice to James Arbuthnot, by his bond in 1747, was wholly paid up; and likewise, that the assignation to the debt, on the estate of Stanhope, in favour of James Arbuthnot, was granted only as a collateral security, for payment of said debt of L. 100, contained in Mr Justice's bond. And, as these facts are instructed, it would be contrary to material justice to deprive Mr Justice's Representatives of this debt, upon any nicety or peculiarity of the law. The act of parliament 1696 does not apply, as the

No 662. present action ought not to be considered as a declarator of trust, but as a declarator of extintion 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.