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.

No 663.

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, *Elliock*. For Colin Alison, *Maclaurin*.
Clerk, *Campbell*. For Forbes and Alison, *D. Armstrong*.

R. H. *Fac. Col.* No 100. *p.* 299.

1797. *March* 2. FRANCIS DUGGAN *against* ALEXANDER WIGHT.

No 664.
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.

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 bleachfield, &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 664. Catholic, which, at that time, and till the act 33d Geo. III. c. 44. was passed, disqualified him from holding heritable property, it was agreed that the rights should be taken in Mr Wight's name, by which means he also obtained security for the purchase-money. The pursuer accordingly concluded a bargain for the lands, with Mr Hunter the proprietor, for his own behoof, in presence of Mr Jamieson, Mr Hunter's man of business, with whom Mr Wight afterwards met for the purpose of adjusting the minute of sale, and on which occasion he mentioned to Mr Jamieson, that, although the rights were to be in his name, the purchase was for Mr Duggan's behoof; and the defender, on many different occasions, made the same declaration to many respectable persons, by whose evidence, and that of Mr Jamieson, the fact could be established.

Mr Duggan further stated, and offered to prove, *1mo*, That when Mrs Muat's lease expired in 1792, he not only settled with her for the repairs, which, by her lease, she was bound to make at its expiration, but also fixed the terms of a new lease with her, for part of her former possession, which was afterwards granted by Mr Wight, as nominal proprietor, while the pursuer, as having the real right of property, entered into the natural possession of the remainder of it, without asking Mr Wight's consent, or making any bargain with him for it as his tenant.

2do, That under the conviction of being proprietor, he had, with the defender's knowledge, laid out some hundred pounds on the subjects, in building houses, improving the land, &c. both on the subject included under his own lease, and on that which, till 1792, had formed part of Mrs Muat's.

The pursuer also *alleged*, That Mr Wight never thought of claiming the property till spring 1794, when, in consequence of having got an offer of L. 800 from a Colonel Muat for the subject included in Mrs Muat's new lease, and some acres of her former possession, which Mr Duggan had taken into his own hands, he saw the purchase would turn out advantageous; that having accordingly accepted Colonel Muat's offer, he soon after, in a conversation with the pursuer, for the first time, disavowed the trust, on which the pursuer wrote him a letter, demanding an explanation; that getting no answer to it for two months, he employed Mr Marshall, writer to the signet, to insist for one. On this Mr Wight wrote Mr Marshall a letter, dated 24th June 1794, and great stress was laid by the pursuer on the following passage of it:

"Mr Duggan sets out with saying, that he had become bound to pay his father's debts, and so had not money to spare for Kevock-mill, which he and Mr Douglas purchased from Mr Jamieson, without my being present, and that I had agreed to raise money for him, till it should be more convenient for him to spare it.

"I have now little doubt this might be meant by Mr Duggan, but I do assure you, the first time I ever heard one word of the matter, was from his letter; the facts, so far as I recollect them, are shortly these: When Mr Hunter was advertising Kevock-mill for sale, the value of which I then knew nothing about,

No 664.

Mr Duggan came to me one day, and told me it was well worth L. 1000, which was all Mr Hunter was seeking for it; that he and Mr Douglas at Leith, had been talking to Mr Jamieson about a purchase of it, but that Mr Douglas refused to have any thing to do with it; Mr Duggan farther added, as an inducement for me to purchase it, that if I was not pleased with the purchase, he would take it off my hands at the end of three or four years, in case I then inclined to part with it. Being satisfied, from what Mr Duggan said, that the purchase was a good one, I immediately went to Mr Jamieson, and, after satisfying myself, with respect to the rental and public burdens, concluded a bargain for it, without having the smallest idea that I was doing so as agent for Mr Duggan, which I understand he now alleges, or that I was bound to give up the property to him, or any man living, unless I chose to do so; nor did Mr Duggan ever hint to me, in the most distant manner, that he understood the purchase was made for him. It is indeed true, that, at this time, I said to Mr Duggan, 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; but that there was any bargain between us to that purpose, or obligation on me to do so, unless I chose, either by word or by writ, I deny in the most positive terms; besides, I think the thing speaks for itself; as you can scarce suppose I would be such a fool as come under any obligation of that nature to Mr Duggan, while he lay under none to take the property off my hand, if I should either find it a bad bargain, or be desirous to part with it, which I think he will not venture to allege he either did or was asked to do. The longest period at which I had 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 up 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 completely fulfilled my promise with him."

The defender, on the other hand, strictly adhered to the statement given in this letter, and denied that he had ever held the subject in trust for the pursuer, a thing which he alleged was, on many accounts, very improbable; for, *1mo*, By the act 1700, c. 3. the seller, or his heirs, might at any time have evicted the subject from him, as being trustee for a Roman Catholic, which makes it extremely unlikely, that he would engage in so hazardous an undertaking, for a man he was so little connected with as Mr Duggan, (it not being true that the defender was his ordinary man of business,) particularly as at the time of the purchase there was no reason so soon to expect the repeal of the laws against Roman Catholics, so that, *ex hypothesi*, the defender was undertaking a trust of unlimited endurance; *2do*, To enable him to pay the price, he was obliged to borrow money, and give security over the lands, which it is not

No 664. natural to suppose he would have done, without prospect of advantage, and solely to oblige the pursuer.

Further, Mr Wight denied that improvements had been made by Mr Duggan, nearly to the amount which he alleged, while he accounted for those which the pursuer had made, from his having a lease, of which 28 years were yet to run. The defender also averred, that Mr Duggan entered into Mrs Muat's possession, in virtue of a verbal agreement between them, by which the pursuer was to have a lease of it for the period which was then to run of his former lease, and that the reason for not fixing the rent was, that part of the subject consisted of a corn-mill, the value of which could not be ascertained till a bargain which the defender was then about to make respecting the thirlage should be completed.

Mr Wight likewise stated the following circumstances as real evidence that he had always held the lands for his own behoof; *1st*, He had paid the whole expense of making up his titles, of which Mr Duggan, till 1796, had never offered to reimburse him: *2dly*, The interest of the price exceeded the free rents of the subject, but the pursuer never proposed to make up the difference to him: *3dly*, Mr Duggan uniformly paid the defender the rent stipulated in his lease, and accepted receipts for it, precisely in the same style with those usually given by a landlord to his tenants: *Lastly*, Mr Wight stated several facts relative to Mr Duggan's circumstances, with a view to show that he was neither at the time of the purchase, nor now, in a situation to give L. 1000 for land, and that he never thought of making the present claim till the sale of part of the property to Colonel Muat, which proved not only that the defender's bargain would be advantageous, but showed him also an easy way of getting the money to pay up the original price.

Such were the allegations of the parties; and the pursuer having craved a proof before answer, of the facts averred by him, it was opposed by Mr Wight, who

Pleaded; The object of the proof is to establish a trust; but the act 1696, c. 25. expressly enacts, '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 trustee, and against whom, or his heirs or assignees, the declarator shall be intented, or unless the same be referred to the oath of the party *simpliciter*.'

Answered; *1st*, Before this statute, trusts could be proved *prout de jure*; Stair, b. 4. tit. 45. § 21.; the statute being therefore correctory of the common law, is to be strictly interpreted; Lord Strathnaver, No 660. p. 12757.; 8th February 1710, Maclaren, No 659. p. 12756.; 13th June 1766, Mudie, No 212. p. 12403. Now, a deed of trust, properly speaking, is a conveyance granted by the truster to the trustee. The trust in question, however, was created by the deed of a third party, and, as such, falls not within the statute; 16th July 1741, Spruel, *voce* Trust.

2dly, The trust, to a limited extent at least, is established by the defender's letter. It is also supported by a number of facts and circumstances; and in such cases a proof by witnesses is allowed to instruct not only trust, 8th July 1777, Stewart against Macarthur Stewart*; but all other contracts and transactions which, in general, can only be proved by oath or writing; 26th July 1622, Davidson, No 60. p. 12303.; Stewart against Riddoch, No 74. p. 11406.; Farquhar against Shaw, No 120. p. 12341.; 3d February 1697, Drummond, No 105. p. 12329.; 25th July 1766, Gibb, No 38. p. 909.; 11th December 1765, Gilmour, No 662. p. 12758.; 11th March 1786, M'Donald, No 157. p. 12366.; 21st February 1793, Smollet, No 128. p. 12354.; 21st June 1794, Trustee for Rae's Creditors, No 5. p. 3078.

No 664.

In particular, the pursuer's entering into a great part of Mrs Muat's possession at the end of her lease, is a strong circumstance against the defender. Nor does he mend the matter, by saying that a verbal agreement for a lease of it had previously taken place between them. For as he afterwards sold five acres of these very lands to Colonel Muat, on condition that he was to get into the natural possession of them, a breach of one of the obligations must be admitted; and if the defender could overlook one obligation, there can be no difficulty in supposing that he might overlook another.

3dly, The action resolves into a charge of fraud; and wherever fraud is alleged, parole evidence is competent; 4th February 1773, Moses, No 126. p. 12352.; 1787, Donaldson against Morrison not reported.—*See*, APPENDIX.

Replied; *1st*, The act 1696 is strictly conformable to the common law, of which one of the leading principles is, that an heritable right cannot be qualified or explained by parole testimony. The practice of allowing trust with regard to heritage to be proved by witnesses, was a deviation from the rule, introduced about the middle of last century, which the statute was meant to correct. Hence it receives the most liberal interpretation; Erskine, B. 3. T. 3. § 21. *et seq.*; 30th July 1748, Ramsay, No 661. p. 12757. But the construction put on it by the pursuer, is contrary to its spirit, and unauthorised by its words; a trust created by the deed of a third party being as much a "deed of trust," as if it had been granted by the granter himself.

2dly, The defender's letter does not infer a trust of any sort, nor for any length of time. It implies nothing more than an intention once entertained by him, of giving up the purchase to the pursuer within a certain period for the price which he had paid for it; but as such a declaration could have no effect in binding the pursuer to take the lands on these terms, as little could it bind the defender to give them up to him. Besides, if the defender's letter proves the trust, a parole proof is unnecessary, if it does not, it is incompetent; House of Lords, D. of Hamilton against Douglas, No 40. p. 4358.

A trust may no doubt be proved by facts and circumstances. But to allow a parole proof in support of them, is just to return to the erroneous practice put an end to by the act 1696; 22d November 1785, Logan against Campbell. ‡

* Not reported. *See* APPENDIX.

‡ Not reported. *See* APPENDIX.

No 664.

3*dly*, Were a charge of fraud sufficient to render a parole proof competent, the act 1696 would be entirely defeated; as the denial of a trust always implies fraud. The rule, that fraud may be proved *prout de jure*, applies only where the transaction has been brought about by means of it. But here nothing improper is alleged, either at the time of the sale or for many years after.

The Lord Ordinary found, that " the facts condescended on by the pursuer are, in general, irrelevant; and the proof offered by witnesses incompetent for instructing that the defender holds the feudal right to the property of the subject under titles *ex facie* absolute, merely as trustee for the pursuer; 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."

The cause came three times before the Inner-house, and much diversity of opinion was entertained respecting it. Several of the Judges, moved by the expressions in the defender's letter, and the facts stated by the pursuer, were very clear for allowing him a proof *prout de jure* before answer. Wherever (it was observed) real evidence of any sort is produced sufficient so afford reasonable grounds for suspecting a trust, a proof before answer should be allowed, not directly to establish a trust, but facts and circumstances from which it may be inferred. And the practice of the Court, since the act 1696 was passed, evinces that it was not the object of that statute to exclude such investigation.

Ultimately, however, a majority of the Court were of opinion, that the admission of parole evidence, to establish an alleged fraud arising from breach of trust, was the very thing which the statute meant in all cases whatever to prevent.

The Court, at first, on advising a reclaiming petition for Mr Duggan, with answers, " adhered to the interlocutor of the Lord Ordinary." Afterwards, on advising a second petition, with answers, the Lords " altered the interlocutor reclaimed against; and, before answer, allowed the petitioner a proof of the several facts and circumstances stated in his petition, and in the condescendence there referred to; and to the respondent a proof of the facts and circumstances stated in his petition, and in the condescendence there referred to; and to the respondent a proof of the facts and circumsances stated in the separate answers given for him to the petition and condescendence; and to both parties a conjunct probation of all facts and circumstances they shall judge material to the issue."

Mr Wight, however, having presented a reclaiming petition against this judgment, the Lords, on advising it, with answers, " altered the interlocutor reclaimed against, sustained the defences, and assoilzied the defender."

Lord Ordinary, *Eskgrove*. Act. *M. Ross, Hope, T. W. Baird*.
Alt *Solicitor-General Blair, R. Craigie, Rae*. Clerk, *Menzies*.

R. D. *Fac. Col. No* 20. *p.* 44.

_ This case was appealed:

The HOUSE of LORDS, 24th November 1797, ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.—*See* APPENDIX.

SECT. XIV.

Acceptance of Tutory.

1668. *December* 2. SETON of Pitmedden *against* SETON of Minnes.

No 665.
A writ subscribed by a tutor designing him so, makes him as fully liable as if there were a nomination or gift of tutory produced.

MR ALEXANDER SETON, advocate, intented an action of count and reckoning, as heir and executor to his deceased brother, the Laird of Pitmedden, against George Seton, as representing his father, who was one of Pitmedden's tutors, and for proving thereof produced a contract, and some other writs, subscribed by him, wherein he was designed tutor. THE LORDS found, that these did make him liable to count and reckoning, not only for actual intromissions, but for all that he ought and should have intromitted with, notwithstanding it was alleged, that unless there was a nomination or gift of tutory produced, he could only be liable as to those deeds wherein he did acknowledge himself tutor, and from that time. But they refused to grant process against the defenders until all the rest of the tutor's heirs or executors were called.

Fol. Dic. v. 2. *p.* 272. *Gosford, MS. p.* 20.

_ Stair's report of this case is No 18. p. 2185., *voce* CITATION.

1714. *January* 28. WATSON *against* WATSON.

No 666.

A TUTOR's acceptance found proved by his subscribing inventories of the pupil's means, and judicially producing them by a procurator.

Fol. Dic. v. 2. *p.* 251. *Forbes, MS.*

_ This case is No 60. p. 3244., *voce* DEATHBED.