

1706 and 1708. JOHN STEWART, Writer in Edinburgh, against SIR THOMAS BURNET of LEYS.

1706. February 21.—ALEXANDER Reid, doctor of medicine in London, by his testament in 1639, leaves his estate to be divided amongst his brothers' and sisters' children, being twenty-nine in number, naming Doctor Fraser and Doctor Muirhead his executors; and Sir Thomas Burnet, then of Leys, to be overseer and trustee for the legatars. Doctor Fraser, in 1642, grants bond for 43,400 merks for their behoof; but the troubles coming on, and he retiring with King Charles II, there was little done till his restoration in 1660, at which time the Laird of Leys went to London, and transacted with Sir Alexander Fraser for his bond; and, on his return, paid sundry of the legatars, at least recovered sundry of their discharges.

Robert Stewart of Innerchat, having obtained right to five of the nephews' and nieces' shares, pursues Sir Thomas Burnet, now of Leys, as representing his grandfather, for payment: Who ALLEGED,—1mo, They were in no such propinquity and relation to the testator. 2do, That most of them were married; and so their shares fell under the *jus mariti*; and their husbands had not assigned, but only themselves. 3tio, That the legatars were more in number than twenty-nine; and so the shares of thir now pursuing behoved to suffer a proportional abatement, seeing that would reduce their legacies to less. 4to, He offered to prove, Paid and Discharged.

ANSWERED to the *first*,—The propinquity and degree cannot be denied now; seeing, in former debates, that was yielded. To the *second*, The legacies bore annualrent; and so fell not to the husbands, except *quoad* the current annualrent, unless it had been before the term of payment. To the *third*, It is not to be regarded, seeing there are no more nephews or nieces condescended on. And, as to the *fourth*, They offer to prove these discharges were not subscribed on payment, but *spe numerandæ pecuniæ*, in this manner,—That Mr Robert Reid, the testator's brother, being intrusted with these discharges by the several legatars, he, upon Sir Alexander Burnet of Leys' getting his son, Mr John Reid, into that good benefice of the parsonage of Banchory, delivered up the discharges, which were deposited beside him only in trust, without any payment.

And they did adduce many qualifications to enforce the trust, the parties being all now dead by whose oaths it could have been proven; so there remained nothing now but the indirect articles for evincing the trust. And Sir Thomas, opposing the discharges in his hand, denied any such trust.

Mr Stewart, for convincing the Lords, adduced many arguments; and, amongst others, thir following presumptions and authorities of lawyers:—That judges go oftentimes on such grounds; such as, 1mo, Trust, with us, is what the Roman law calls *fideicommissum*; and may be proven indirectly by pregnant presumptions and circumstances; such trusts being managed with great caution and secrecy: see Stair, *b. 4, tit. Probation Extraordinary*. Next, fraud and circumvention being odious, are, by the civil law, allowed to be proven *indubitatis præsumptionibus*. And, in civil cases, two or more presumptions may be joined together to make up a full probation; and, *in factis antiquis*, scarce within the memory of man, (as thir legacies and discharges in 1643 are,) *sufficit testimonium ex auditu, si a multis fide dignis processerit*; Farinacius, *quæst. 69, num. 125*.

And this cause has been protracted and delayed since 1680 that it was first raised. And, in the last place, our municipal law and decisions have often taken away writ by presumptions of trust; as, *22d February 1665, Kingston*; *12th January 1666, Executors of Stevenson*; *6th February 1669, Rule*; *24th February 1669, Earl of Annandale*; in all which trust was found probable *per famam communem* and other evidences. And although now, by the 25th Act of Parliament, 1696, it can only be proven *scripto vel juramento*, yet the case in hand of thir discharges was prior to the said act.

Leys likewise craved deduction and allowance of the expenses his predecessors were put to by many journeys to London, and otherwise, in seeking in the fund for paying thir legacies.

Stewart's lawyers not being ready to debate the grounds of the trust, the Lords assoiyled Sir Thomas Burnet; but it was only in absence.

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1708. *December 15.*—The Lords decided the long-dependending declarator of trust pursued by John Stewart against Sir Thomas Burnet; whereof, see the case fully stated at the 21st February 1706: And it being a trust anterior to the 25th Act 1696, declaring, That hereafter trusts shall be no otherwise proven but *scripto vel juramento*, it was urged, from a congestion and accumulation of many presumptions, that the many discharges now made use of to prove payment of the legacies acclaimed, were but intrusted to Mr Robert Reid and Sir Thomas Burnet *spe numerandæ pecuniæ*, without any real numeration of money; such as, that they are in the year 1643, prior to the payment of the several moieties granted in Sir Alexander Fraser's bond. And it is not to be supposed that any would be so charitable as to pay legacies before the term of payment; and that one of the legatees gives two discharges for the same individual sum, one in 1643 and the other in 1662; and the last does not except the first out of the warrandice, to secure it against double payment. And Mr John Reid, the heir of one of the trustees, is holden as confessed thereon; and, by his oath in another process, at Sir James Keith the factor's instance, he finally denies the trust, and adds, He is not to tell his private thoughts or opinions thereanent. And the tutor of Leys thought fit to submit; and, by a letter, acknowledges they were componing legacies of £1000 Scots for 500 merks.

ANSWERED,—Most of thir transactions were long before Sir Thomas Burnet, now of Leys, was born, and he nowise accessory thereto; and, there being three stage payments, the first moiety of 14,000 merks was paid by Doctor Fraser; and, out of that, some of the legatars got payment of their whole legacies. And the occasion of two discharges for one sum was, because the husband grants the last, as having right, *jure mariti*, at least to the bygone annualrents: and the holding Reid as confessed was only in the exhibition, but not as to the trust.

Many other points of fact were insisted on, but here omitted for brevity; and the Lords, by plurality, found the qualifications, adduced by John Stewart, both relevant and proven to infer that these discharges came into Leys his grandfather's hand, entirely in trust, and not on payment; and so declared.

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