

Ex parte

David Falconer of Newtown Esq; - - *Appellant*; Case 84.

Dame Elizabeth Falconer, Relict of Sir Charles Ramsay, late of Balmain Bart., Sir Alexander Ramsay, now of Balmain, Mr. David Archer, Minister of the Gospel at Laurencekirk, or Conveth, and Mr. Robert Mortimer, Schoolmaster there, - *Respondents*.

4th May 1721.

Presumption.—Two mortifications for educating children at a parish school, are found in the grantor's repositories after his death; the one bore date four years after the other, but was in same terms with the first, with this alteration only, that a larger sum was mortified, and a greater number of boys to be educated: the Court having found that both subsisted as distinct deeds; the judgment is reversed.

The Court having also refused a proof by the instrumentary witnesses, of the donor's intention; their judgment is reversed, and liberty given to examine the instrumentary witnesses.

ON the third of June 1712, Sir Alexander Falconer, late of Glenfarquhar, the appellant's uncle, deceased, by a deed reciting, that in regard it had pleased God, in his mercies, to increase and bless his means and effects, and lengthen his days to a very great age; Therefore, out of the charitable regard he had to the education of poor children, either of his own name, or born within the parish of Conveth, where his predecessors lived and resided, and for the encouragement of letters and learning, he left and appointed the sum of 50 merks Scots, and 18 bolls of meal, to be paid yearly by his heirs out of the lands of Middleton, for the uses following, viz. the sum of 50 merks to be paid yearly to the schoolmaster at the church of Conveth, for his encouragement, who should therefore be bound to teach the children of poor men, who were not able to pay schoolmasters' fees, gratis; and the said 18 bolls of meal for maintaining three boys, at the rate of six bolls of meal yearly; which boys should be presented by his heirs and successors, of the name of Falconer, to be paid by two half-yearly payments, and to commence at the first term of Whitsunday or Martinmas after his decease. And the said boys were to wear a badge.

The said Sir Alexander Falconer, by another deed, bearing date the 7th of August 1716, with the same recital verbatim as the former, appointed 40*l.* Scots (being 60 merks) to be paid to the schoolmaster at the church of Conveth yearly, and 24 bolls of meal, for the maintenance of four poor scholars, payable out of the same lands, by the same payments, and to be presented in the same manner as the former. In both deeds the respondents were appointed trustees.

Sir

Sir Alexander dying soon after, the appellant, his nephew, succeeded as heir to his estates. After his death both the said deeds of mortification were found amongst his papers. The appellant apprehending that it was not the intention of Sir Alexander that both deeds should subsist, but that the latter deed should supersede the former, declined to pay any but the last. The respondents, however, insisting upon both, the appellant in 1719 brought his action of reduction and declarator, before the Court of Session, to set aside the first mortification, and to have it declared that the last was the only subsisting deed: and the respondents brought a counter action to have it declared, that both were subsisting deeds.

These causes coming to be heard before the Lord Ordinary, his lordship, on the 20th of June 1720, "found, that it is to be presumed, that the second mortification came in place of the first, and that the first became thereby extinct, and declared accordingly."

The respondents represented against this interlocutor, and the appellant having made answer, the Lord Ordinary reported the case to the Court, and their lordships, on the 7th of December 1720, "found that the two mortifications subsisted as two separate donatives."

The appellant reclaimed against this interlocutor praying, amongst other things, that since both deeds were found among the grantor's papers, after his decease, and since they were both drawn and written by a learned gentleman at the bar, who was a witness to the execution of both, he might be at liberty to examine that gentleman and the other instrumentary witnesses as to the directions given to the said gentleman for preparing these deeds, and what declarations the grantor had made; and whether it was intended by the grantor that both should subsist, or that the second was to include the first, and that only subsist. After answers for the respondents, the Court, on the 23d of December 1720, "adhered to the former interlocutor, and refused the desire of the petition."

The appeal was brought from "an interlocutory sentence or decree of the Lords of Session of the 7th of December 1720, and the affirmance thereof of the 23d of the same month."

Entered,
13 Jan.
1720-1.

Heads of the Appellant's Argument.

As the grantor has not in his last deed declared that both should subsist, so it seems apparent that it was not his intention they should. In both deeds there is contained the same recital without any variation; they are to have the same commencement, to be paid at the same terms, and differ in nothing but that the second gives a larger salary, and appoints one boy more to be educated: therefore, as when the first was executed, the grantor intended only to have three boys educated, he appointed a proper maintenance for them, and a suitable encouragement to the schoolmaster; so afterwards intending to add one boy more to be maintained, he,

he, by the second deed, made an additional allowance for that boy's maintenance, and likewise gave to the school-master, an additional allowance for his trouble: but he cannot be thought to have intended seven boys to be educated. It seems a natural construction that the last was intended to include, and be an addition to, the first.

Should there be any difficulty as to the construction of these two deeds, and should it appear uncertain what was the intention of the grantor, (which ought to be the rule of construction in voluntary grants of this kind) the method proposed by the appellant in his reclaiming petition was regular and proper. The gentleman, who by the grantor's directions drew both deeds, is alive; he wrote them both, and is an instrumentary witness to their execution; and he cannot, certainly, but know what the grantor declared to him in relation to these deeds, and what his intention was as to the subsisting of both, or only of the last.

Whereas this day was appointed for hearing counsel ex parte upon this petition and appeal; and counsel appearing for the appellant, but no counsel for the respondents, and the appellant's counsel being heard and withdrawn, It is ordered and adjudged, that the said interlocutor of the 7th of December last, finding the two mortifications subsisted as two separate donatives, and the interlocutor of the 23d of the same month, in affirmance thereof, be reversed: and it is further ordered and adjudged, that the appellant be at liberty to examine the instrumentary witnesses, according to his petition to the Lords of Session for that purpose; and such further proceeding shall thereupon be had before the Lords of Session as to justice shall appertain.

Judgment,
4 May
1721.

For Appellant. *Rob. Raymond. Will. Hamilton.*