1810.

GORDON, &c.
v.
TOUGH.

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Erskine, Wm. Erskine, Ar. Fletcher.*

For the Respondents, *Sir Samuel Romilly, Joseph Murray.*

CATHERINE GORDON, Spouse of WALTER STUART, Excise Officer at Cairnton (a Pauper), and him for his interest, — *Appellants;*

AGNES TOUGH, Widow and Disponee of WILLIAM GORDON, deceased, in Links of Arduthie, near Stonehaven, — *Respondent.*

House of Lords, 13th Feb. 1810.

TRUST—PROOF—PAROLE.—ACT 1696, c. 25.—Circumstances in which a trust was allowed to be proved by facts and circumstances, and the correspondence of the parties, in regard to a lease granted to the trustee *ex facie* absolute. Affirmed in the House of Lords.

The farm of Arduthy was let on a long lease to John Tough, and, several years thereafter, he subset to the respondent's husband, the deceased William Gordon, those parts of the farm called the Bog of Arduthy, the Muir, the Whiteley, and the Puttieshole. Mr. William Gordon did not obtain possession of the whole of this farm at one time, a small part of it, for which he was to pay the yearly rent of £8, was let to him in the year 1781; and another part, called the Muir of Arduthy, was set to Mr. Gordon, by a missive, at the rent of £11. 4s. for a period of 47 years from Martinmas 1783. Thus the total rent which Mr. Gordon was to pay to Mr. Tough was to be £19. 4s. annually, for a very long lease of the lands.

In the year 1784, finding that particular business would render it necessary to go to London, and leave Scotland for several years, Mr. Gordon arranged his lease matters so that, in his absence, no attempt should be made to carry off his property, in payment of debt which he was owing, and, to carry out his views, he resolved, as was alleged by the respondent, but denied by the

appellant, to make over the lease in trust to the appellant, his sister, who lived in family with him at the time. But instead of assigning the lease in trust to her, or conveying it absolutely, with a back bond declaring the trust, it appeared that he adopted the plan of getting the old lease cancelled, and a new one made out in favour of his sister, for the same rent.

In these circumstances, the question was, Whether William Gordon's sister (appellant) held this lease in trust for her brother, or absolutely, and on her own account; or whether it belonged to the respondent, the deceased's widow, and general disponee?

To try this question, the appellant brought a process of removing against the respondents before the Sheriff, three years after William Gordon's return from London; and the Sheriff having decerned in the removing against William Gordon, an advocation was brought, and a declarator at same time by the respondent's husband.

It appeared, on investigating the circumstances, that William Gordon had not gone to London immediately after this transaction, but continued on the farm for two or three years, managing it as formerly, and deriving all the profits of it, he paying the rent to his landlord, and obtaining receipts in his own name. And after he went to London, where he resided for several years, he still continued to correspond with his sister, and from time to time to give directions concerning the farm; had part of the produce sent to him; and it appeared from the correspondence between them, that Mr. Gordon, and not his sister, was the true tenant of the farm. After his return from London to his native country, he again resumed possession and the management of the farm, his sister living as formerly with him, who never for once thought of disputing his right thereto; and it was not until after the appellant's marriage to Walter Stuart that she ever formed any idea of making such a claim against the respondent's husband.

In this shape the whole question came before Lord Glenlee, Ordinary, and, after a variety of discussion and procedure before him, his Lordship took the cause to report to the whole Lords, and appointed the parties to prepare mutual informations to be lodged to and advised by the Court.

Dec. 10, 1800.

The Lords pronounced this interlocutor:—" Upon report " of Lord Glenlee, and having advised the mutual informa-

1810.

GORDON, &c. v. TOUGH.

"tions for the parties in this cause, the Lords remit to the "Lord Ordinary to take the judicial examinations of the "parties, upon all facts and circumstances relative to the "matters at issue, and also to ordain a production of all "discharges of rent and other writings tending to throw "light upon this transaction, and afterwards to do therein "as to his Lordship shall seem just."

The Lord Ordinary appointed a judicial examination of the parties to take place; and the parties having been accordingly examined, his Lordship ordered memorials on the whole cause.

The following was the declaration of the parties:—"The "appellant recollects asking her brother for payment of the "different sums she had advanced for him, and for the "wages which she thought was due to her, with which de- "mand he answered that he could not comply; but he said "that he was going to take some additional land from John "Tough, and that, if the declarant liked to take the whole, "including the eight acres above mentioned, he would give "all up to her; and he desired her to take her cloak and "look at the ground, which John Tough would show to "her; that she accordingly did so, and John Tough point- "ed out what was proposed to be given: That upon her "coming home she told her brother that the land was "worth nothing; upon which he said he would make it "better for her; declares that no more passed at the time. "But some weeks thereafter, as she thinks, she saw John "Tough, who said to her, 'Miss Gordon, I think we are "going to get you as a tenant,' to which the declarant an- "swered, that *she did not know:* That upon this John "Tough further said, that her brother had told him so, and "the reason of it; upon which the declarant asked what it "was that her brother had said was the reason for giving "her the lands? To which John Tough replied, that it "was for the money which she had given to her brother, "and for the service in the family; declares, that sometime "after this the pursuer told the declarant that he would "bring John Tough, and John Low the writer, to get the "tack made in her favour; and that this was accordingly "done in March 1784. In regard to the stock, she declar- "ed that what stock was on the farm the declarant took "possession of it, and no account or inventory was taken of "it, either at the time when the declarant got her lease, or "when the pursuer went to London, and at the time when

" the pursuer mentioned any thing about the lease to be " given to her, nothing at all was said about the stocking; " and the stocking consisted of two horses, one of which " was purchased for 15s., and a cow, an old cart, an old " plough, and two old harrows."

The letters of her brother from London, and her own in answer, seemed to contradict her declaration.

Upon these, and the facts and circumstances before mentioned, the Lord Ordinary pronounced this interlocutor:— " Having resumed consideration of the whole proofs, the " Ordinary is of opinion that the account which the defend- " ant gives of the considerations for which she now alleges " that the pursuer agreed to give up the subtacks held by " him from Tough, and to allow a new subtack in 1784 to " be taken in the defender's name for her sole behoof, is " unsatisfactory in itself, and entirely inconsistent with what " was stated by her in answer to the pursuer's condescend- " ence, on advising which the interlocutor of 16th January " 1798 was pronounced. She having in that paper denied " all interference of the pursuer in the transaction by which " she obtained the subtack from Tough, and having stated " the claims which, at the period of that transaction, she " had against the pursuer, not as she now does, to have been " the consideration for which the pursuer resigned the lease " in her favour; but as an offset or ground for compensation " against that part of the libel which concludes against her " to account for the stock left by him on the lands contain- " ed in the subtack; and also for the furniture and plenish- " ing of an inn which had been kept by him, and which is " a subject said to be altogether separate from the lands " above mentioned contained in the above sub-tack; and " the Ordinary is of opinion, that when the whole circum- " stances appearing from the declarations of the parties, and " from their correspondence, are taken together, there is " sufficient ground for holding that it was not intended that " the subtack from Tough in 1784 should be a permanent " right in the defender's person for her own behoof; but " that, on the contrary, although no declaration of trust was " granted, although the parties may not have formed any " precise and accurate idea of their relative situation to- " wards each other, and of their respective interests in the " subject; yet it had been in the main understood, that " when the pursuer's situation should admit of his being " reinstated in the right of the tack, the defendant should

June 30, 1801.

The respondent, William Gordon, died soon after the appeal was taken.

1810.

GORDON, &c. v. TOUGH.

"so reinstate him; and, on the whole matter, find that, "upon the defender being satisfied and fully paid all her "claims which she can instruct she justly has against the "pursuer, she was and is bound to denude in his favour, "and cede possession, and in so far in the ordinary action "repels the defences, and decerns; and with respect to the "extent of the defender's claims, and all matters of ac-"counting between the parties, declares he will bear them "farther; and finds that, in the meantime, and until it shall "appear that the defender has claims against the pursuer "which are not yet extinguished, the possession of the farm "ought to remain with the pursuer; and therefore, in the "advocation, advocates the cause, assoilzies from the re-"moving *hoc statu* and decerns, superseding extract till the "third sederunt day in November next." A representation against this interlocutor was refused; and, on reclaiming petition to the Court, the Lords adhered.

Nov. 7, 1801.

Jan. 12, 1802.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. It is the undisputed law of Scotland, established by the act 1696, c. 25, and explained and confirmed, if it required explanation or additional strength, by a uniform series of decisions since that time, that a trust can only be proved by a written declaration or back bond of trust, lawfully subscribed by the person alleged to be trustee, or by the oath of the same party. This is laid down by all the institutional writers. But the respondent contends that the statute does not apply to the present case, but only to cases where the truster grants a deed *ex facie* absolute, which has been delivered and followed by possession. This, however, is a doctrine utterly subversive of the provision of the statute, which declares in broad terms that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter. To render the act applicable to the case, all that is required is, that there shall have been a trust deed, which the lease in question must be held to have been, or a deed against which a trust is alleged, and such has been the interpretation put on the act by all the writers, and by the decisions of the Court, as illustrated in the case of Duggan. 2. Further, the evidence actually adduced, were it legally admissible, is adverse to the respondent's claim. But, 3. In point of law, the evidence relied on here is not such as can prove a trust, and ought to have been totally disregarded.

Vide ante vol. iii. p. 610.

1810.

SPENCE v. AUCHIE, &c.

Pleaded for the Respondent.—1. Although by the act 1696, c. 25, it is provided that an allegation of trust cannot be proved by parole evidence, yet it is a fixed and established point, as proved by various authorities, that a trust may be proved by facts and circumstances, and particularly by the terms of a correspondence between the alleged truster and trustee. 2. The facts and circumstances appearing in this case, and the correspondence between the late William Gordon and sister, the appellant, afford the most convincing and complete evidence that the appellant held the sublease of part of the farm of Arduthy for behoof of her brother, William Gordon.

M'Lean v. Creditors of Cheesly, Feb. 8, 1810. Forbes' Dec. Moses, Feb. 4, 1773, Fac. Coll. et Mor 12352.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Erskine, Henry Brougham.*

For the Respondent, *Wm. Alexander.*

NOTE.—Unreported in the Court of Session.

[Mor. 14226].

JOHN SPENCE, Merchant in Greenock, Trustee on the Sequestrated Estate of WILLIAM MATHIE, Merchant in Greenock,	*Appellant;*
Messrs. AUCHIE, URE, and Co. Merchants in Glasgow, ...	*Respondents.*

House of Lords, 16th March 1810.

SALE—STOPPING IN TRANSITU—CONSTRUCTIVE OR ACTUAL DELIVERY.—Thirty-two puncheons of rum, belonging to the respondents, were lodged and bonded in the King's warehouses, kept by Messrs. Sandeman. While in this situation, the respondents sold the rum by auction, Mathie becoming the purchaser, giving bill for the price at four months, and receiving a delivery order from the sellers, which was duly intimated to the warehousemen, and the sale marked by them in their books, with the name of Mathie as the purchaser. Mathie thereafter sold eighteen puncheons, which were delivered, and the duties paid. But fourteen puncheons still remained in the King's cellar, when he became bankrupt, with the bill for the price still unpaid to the respondents. In an action brought by them to recover the fourteen puncheons, as still undelivered and in *transitu,* Held them entitled to stop in *transitu.*