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standing the law, it is impossible to maintain that the corroborative security in this case was *in duriorem sortem* than the original obligation.

The court at first, of this date (18th June 1776) pronounced the following interlocutor. "The Lords having advised the above-mentioned petition, with "the answers, and heard what is above set forth, they adhere to the Lord Ordi- "nary's interlocutor reclaimed against, so far as concerns the bond for 3000 "merks and bond of corroboration thereof, and refuse the petition and decern." Afterward, upon advising another reclaiming petition and answers, the Court found, "that the bond of corroboration in question is prescribed, sustain there- "fore the defence of prescription as to said bond, and decern."

A reclaiming petition against this interlocutor was refused without answers.

Lord Ordinary, *Auchinleck*. Act. *Solicitor-General Murray, Morthland*. Alt. *Rae*.

J. W.

1802. *December* 7. GILLESPIES *against* MARSHALL.

No. 2.

When no provision is made in a trust-deed, with respect to the interest of a sum, it is accumulated with the principal.

David Sommerville executed a trust-deed, by which he disponed the principal part of his fortune to the children of Janet Watson his niece, the wife of William Gillespie, merchant in Edinburgh, "equally among the whole of "them, share and share alike, and which my said trustees shall pay over to "them upon their respectively attaining the age of twenty-five years, and no "sooner." The trust-deed farther provided, that the share of any child who might die before that age, should accresce to the survivors equally; and, in the event of the whole children dying before their provisions become payable, that the estate should devolve upon the nearest heir of the disponer.

This trust-deed originally seemed to have contained the following clause: "And I hereby declare and empower my said trustees, and their foresaids, to "lay out from time to time, in case they shall see it proper and necessary, "whatever sums they shall judge proper for the education of the children or "grandchildren of the said Janet Watson my niece, of her present or any sub- "sequent marriage, and for putting them to proper businesses, provided their "father shall not be in a situation to afford such expense, or to put them to "such businesses, as my said trustees shall judge right and proper, and what- "ever sum or sums shall be laid out in this manner, shall be deducted from "the share and proportion of my said means and estate falling to the children "or grandchildren, for whose behoof the same is expended." But this clause, though still legible, was deleted; and Gillespie added, that this had been done before signing, "as it is not my intention to give my trust-disponees such "powers as are thereby conferred upon them." The deed farther contained a nomination of the trustees to be tutors and curators to manage the estate and effects of the minors.

Sommerville died in 1798, leaving a considerable fortune. Gillespie brought an action against his trustees, stating, that his income was totally insufficient for

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the maintenance and education of his children, and concluding, that the trustees should pay what he had already disbursed on their account, and allow a reasonable sum for their maintenance and education out of the fortune to which they were ultimately to be entitled.

The Lord Ordinary (16th June 1801) assoilzied the defenders. Gillespie reclaimed to the Court; and it occurred, that as the claim for aliment lay with the children as well as their father, they should be allowed to sist themselves as parties in the cause. A curator *ad litem* was accordingly appointed, and a process of aliment brought against the trustees in the name of the children, which was conjoined with the original action; and the Court, after advising Gillespie's petition with answers, ordered memorials. The pursuers

Pleaded: 1. In point of fact: Gillespie is in such circumstances as to put it altogether out of his power to maintain and educate his children in a manner suitable to their future condition.

2. Sommerville had no right to name tutors and curators to these children, except in so far as he himself made a provision for them; and it would have been a superfluous appointment, if he had intended that they were to have no interest in his funds until after majority. This presumption is nowise redargued by the deletion of the clause of the trust-deed; for by that clause the guardians would have been empowered to advance the principal as well as the interest, when they saw fit; so that their whole fortune might have been disbursed before the children attained to the time he appointed them to receive it. This has no relation to the interest of the sum; on the contrary, as no directions are given with respect to accumulation of interest, it must be presumed that it was intended to be employed in the necessary charge of education and maintenance. But, at all events, it is the duty of the defenders, as the guardians of minors, and the administrators of their funds, to provide them with a decent maintenance, and a suitable education out of the interest of their fortune, if their parents are unable to do so; Lady Otter, January 8, 1663, No. 49. p. 414. Fraser, February 11, 1663, No. 51. p. 114. and it has been found, that when no allowance is made in a trust-deed for the aliment of children until their provisions be payable, it is to be modified to them out of the trust-funds, in proportion to the amount of their several provisions; Riddells againt Riddell, March 6, 1802, APPENDIX, PART 1. *voce* ALIMENT.

The trustee *answered:* 1st, In point of fact; Gillespie is in such circumstances as to be able to maintain and educate his family, without requiring any assistance from the funds of his children.

2d, There was no legal obligation on Sommerville to maintain the pursuers, or to settle his fortune in any way different from what suited his own inclination. By the terms of his settlement, it is provided that no part of his property shall be given to the pursuers, unless they attain to a certain age: If they do not arrive at that age, it is to devolve upon others. And the deletion of the clause, empowering the trustees to advance part of the provisions before that

No. 2. time, is accompanied with an express declaration of the disponer, that it was not his intention to intrust them with any such power. Their nomination as tutors and curators to the pursuers, bestowed a power of managing the property, to which they are ultimately to have a right, but not a power of expending any part of it among them before the period specified in the trust-deed. At any rate, an argument of inference from this nomination is expressly excluded, by the declaration of the disponer, which forms a part of the deed of settlement. It is therefore *ultra vires* of the trustees to expend any part of these provisions in the maintenance and education of the pursuers.

The Court assoilzied the defenders.

Some of the Judges were of opinion, that if the clause in Sommerville's settlement had not been erased, the trustees would have been entitled, at their sound discretion, to have applied even a part of the principal sum for the education of the minors, and therefore, that the deletion of this clause only took away from them the power of employing the capital, leaving a discretionary power over the interest; or, at least, that as the deed was entirely silent with respect to the interest of the provisions, it was carrying the maxim, "*Accessorium sequitur suum principale*," very far, to hold that it should be accumulated. But the great majority of the Court seemed to think, that to find the defenders liable would be to alter the terms of the settlement, which, whatever might be the equity of the case, was beyond the powers of the Court.

Lord Ordinary, *Justice-Clerk*. Act. *Clerk, Gillies, Cranstoun*. Agent, *Geo. Tod*.
Alt. *Campbell*. Agent, *Ja. Marshall, W. S.* Clerk, *Menzies*.

J. *Fac. Coll. No.* 67. *p.* 151.