

Judgment,
11 May
1720.

After hearing counsel, *It is ordered and adjudged, that the several interlocutory sentences or decrees complained of in the said appeal be reversed: and it is further ordered, that the respondent be removed from all possession of the estate in question, which he may have obtained (if he have obtained any) by virtue or colour of the said decree, and from the receipt of the rents and profits thereof; and that the commissioners and trustees for the forfeited estates take possession and receive the rents and profits thereof, and proceed to execute the powers and authorities in them vested with respect thereto, any right, title, or claim of the respondent notwithstanding.*

For Appellants, *Ro. Dundas. Tho. Bostle.*

For Respondent, *Dun. Forbes. C. Talbot. Will. Hamilton.*

By the act 6 Geo. 1. c. 24. the king was enabled to grant the same provisions to the widow and daughters of Sir Donald Macdonald, as they would have had if he had not been attainted.

Case 68. Alexander Lord Saltoun, - - - *Appellant;*
William Frazer Esq; his Brother, Guardian
and Trustee for Alexander Frazer, the Ap-
pellant's eldest Son, - - - *Respondent.*

16th May 1720.

Parent and Child.—Tutor and Pupil.—Lord Saltoun having left 4000*l.* payable at the first term after his decease, to the eldest son of the master of Saltoun, and failing him to the grantor's heirs of entail; and having appointed an uncle of the pupil to be his tutor and curator with a salary during nonage, with power to uplift the principal and interest, to employ the money in the purchase of lands, &c.: the pupil's father, the heir and executor of the grantor of the provision, was not obliged to pay over the money to the uncle without security, but to pay it to the Court of Session, who were ordered to lay it out in the manner directed by the grant.

WILLIAM Lord Saltoun deceased, father of the appellant and respondent, settled his real estate, by way of entail on the appellant and the heirs male of his body, whom failing, to certain other heirs of entail therein mentioned. Having also a considerable personal estate, he executed bonds of provision in favour of his younger children, which he designed should be paid out of the personal estate.

On the 17th of May 1714, the late Lord Saltoun executed a bond for the sum of 4000*l.* sterling to Alexander Frazer his grandson, the appellant's eldest son, then and still under age, and the heirs male of his body; whom failing, to the appellant's second and third sons, and the heirs male of their bodies; whom failing, to any other heir male of the appellant's body; whom failing, to
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the respondent and the heirs male of his body; whom failing, to James Frazer, the respondent's younger brother, and the heirs male of his body; whom failing, to return to the appellant's family. The grantor declared that the sum should be payable at the first term of Whitsunday or Martinmas after his death, but should be no charge upon his landed estate; and he recited the cause of it to be, "That his grandchild after his coming at age
 " might have an estate of his own, and not be a burden to his
 " father." Then follow these words, "Therefore I hereby
 " will and declare, that it is my earnest desire, that the said 4000l.
 " may, as soon as it can, be employed for the buying the lands of
 " Cairnbuilg, if the same can be got, with a sufficient security
 " purchased therefore; which failing in the purchase of any
 " other well-holden and well-accommodated barony of land that
 " can be got for the said sum; and when the same is purchased,
 " that the lands may be bought in the name and for the behoof
 " of the said Alexander Frazer, my grandchild, and the heirs
 " male of his body; which failing, to the other heirs male and
 " of tailzie according to this obligation, and the whole clauses
 " above and hereinafter contained." Then he nominates and appoints the respondent to be tutor and curator to the said Alexander Frazer, the appellant's son, during his pupillarity and minority, relative to the said bond, with power to him for the purposes therein recited to call for the said sum when he should think fit, and to intromet with the whole interest thereof, until the said Alexander Frazer should be of age, and to employ the said money upon security, or in purchasing lands as formerly recommended: and the respondent was to have allowance of his expences, and 500 merks for his own pains yearly; with a proviso, that he should not be chargeable for any omissions, but only for his actual intromissions with any part of the said sum and interest, or rents and profits of the lands so to be purchased.

On the 15th of November 1714 the late Lord Saltoun, having made up a list or inventory of bonds owing to him, did by dockets subjoined thereto direct certain bonds to be appropriated and applied for payment of the younger children's provisions, and that others should belong to Alexander Frazer his grandchild, and be delivered to the trustee for his behoof to be applied for payment of the said bond for 4000l.; but this notification did not amount to an assignment, and the list or schedule was scored and blotted in several places. The late Lord Saltoun died upon the 18th of March 1715.

About three years after his death, the respondent brought an action against the appellant before the Court of Session, insisting that he should be decerned to make payment to the respondent, for the use of the said Alexander Frazer, of the said sum of 4000l. with interest from the Whitsunday after the late lord's decease; or otherwise to make over by assignment to the respondent, for the same use, the several bonds which the Lord Saltoun by the schedule of the debts owing to him had declared should belong to the said Alexander Frazer his grandchild, and be delivered to the trustee

trustee for his behoof, towards the payment of the 4000*l*. To this action the appellant made defences, and the Lord Ordinary on the 27th of November 1719 “ Decerned the appellant to make
 “ payment and satisfaction to the respondent as tutor and adm-
 “ nistratoꝛ, for the use and behoof of the said Alexander, master
 “ of Saltoun, his pupil, of the sum of 4000*l*. sterling principal, and
 “ haill annual rents thereof, resting since the term of Whitsunday
 “ 1715, and of the same annual-rents in time coming, during the
 “ not payment thereof; or at least to make payment of the afore-
 “ said annual-rents past resting and in time coming; and in secu-
 “ rity of the said principal sum, to assign him the bonds men-
 “ tioned and contained in the inventory libelled on after the form
 “ and tenor thereof.” To this interlocutor the Lord Ordinary adhered upon the 10th of December thereafter.

The appellant presented a reclaiming petition, to which the respondent made answers, and the Court on the 23d of the said month of December unanimously “ refused the desire of the said
 “ petition, and adhered to the Lord Ordinary’s interlocutor.” The appellant having presented a second reclaiming petition, the Court without answer on the 30th of the same month “ refused
 “ the desire of the said petition, and adhered to their former in-
 “ terlocutors without prejudice to the appellant to complain in
 “ case of the respondent’s mal-administration.”

Entered,
 23 Jan.
 1719-20.

The appeal was brought from “ a decree of the Lords of
 “ Session of the 27th of November, and of several interlocutory
 “ sentences or decrees of the said Lords of the 10th, 23d, and
 “ 30th of December 1719.”

Heads of the Appellant’s Argument.

The appellant could not pay the whole sum contained in the bond and interest, since he had purchased a part of the lands of Cairnbuilg, and some other lands adjacent thereto, for about twenty-one years purchase, agreeably to the will of his father, who very well knew what the advantage of purchasing these lands would be to his estate, by their having moss and muir inexhaustible, whereas both the moss and muir, which belonged to him, would in a few years be exhausted, and he and his tenants want fuel. And the appellant was, and is content to convey these lands to his son, which are in value above 3000*l*. sterling: but what the respondent wants is to have the money at his disposal without regard to the interest of the family.

If the respondent would purchase lands which were then to be sold lying near to the appellant’s estate, he was, and is ready to pay to him the remainder of the principal sum and interest, upon his finding surety to apply the money for that end, or settling it so, as that it should be forthcoming to the minor.

If the purchase of the lands of Cairnbuilg should upon examination be judged not agreeable to the ends and purposes of the deed, the appellant was willing to bring the money into court, to be by the direction thereof settled for the use of the minor, so as the respondent should not have it absolutely in his power to misapply
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the principal sum, leaving the annual interest thereof to his management.

Though the late Lord Saltoun, at the time he executed the said deed, had bonds lying by him to the value of the sum contained therein, yet he did not think fit to convey those to the respondent for the use of his grandchild. He gave him the *jus exigendi* from none but the appellant, knowing that he had a greater concern that the descendants of his own body might have a plentiful estate, than it could be expected their uncle would have, and would take care that the money might be applied according to the will and earnest desire of his father.

Although any person should pass by a father, and name an administrator to a sum of money that he gifts to a child, yet such administrator by the law of Scotland, having no government of the child's person, is only manager or administrator of that sum, which is in effect as a steward for the child while he is under age. This is the case of the respondent; he has a salary allowed him for his pains, a thing inconsistent with the gratuitous office of tutor and curator, and which consequently gives the appellant a just title to enquire into his management.

The respondent alleged, that the late Lord Saltoun intended certain bonds for payment of the said sum; but that does not alter the case; for there is no doubt but he intended, that the debts due to him should be applied for payment of the said 4000*l.*; but he did not think fit to convey these bonds to the respondent for the use of his grandson, leaving that to be done by the appellant as a check upon the respondent. The list of these bonds is so much scored and blotted, that it cannot be looked upon as a deed.

Although the appellant did purchase the lands of Cairnbuilg, and other adjacent lands adjoining to it, without consent of the respondent, (which he could not get at the time,) yet they ought to be accepted as so much of the 4000*l.* since his father expressly ordered them to be purchased with part of that money; and the appellant could not acquaint the respondent at the time he purchased the same, because the respondent was then out of the kingdom, and the lands being exposed to sale, the appellant must have lost the purchase if he delayed it. Whether the respondent have the *jus exigendi* is not so much disputed, but the single question is, whether the appellant's natural right of administration, does not entitle him to inspect the management of a young man, possessed of no visible estate, endeavouring to take 4000*l.* out of hands where it is well secured for the appellant's children, without giving any account how he is to dispose of it, or security that he shall not misapply it.

Heads of the Respondent's Argument.

It is evident from the whole deed, that the Lord Saltoun intended to exclude the appellant from all pretensions to the management of the premises; and it was, no doubt, for good reasons, that he settled this part of his personal estate directly to his grandchild;

child ; passing over the appellant. By law, no guardian or administrator in trust, named by a donor, is bound to find security, and it can make no alteration in the rule of law, that the person who pretends to demand the security is father to the grantee : he is a father who was not thought fit to be entrusted in this affair, and for that reason he stands excluded.

However the appellant may imagine and plead that the money is well secured in his hand, it is evidently otherwise, since the 4000*l.* can be no charge upon the entailed estate : so that if the appellant should squander away this money, his son could have no relief.

The respondent who is named administrator in trust, with an ample and discretionary power, is better judge of the security than the appellant who stands debtor, and he must in consequence, by the trust reposed in him, secure it according to the best of his judgment. It can import nothing, whether the respondent has a visible estate of his own or not ; the late Lord Saltoun has put confidence in him as trustee, and knew very well what estate he had ; yet in fact he has a provision of two thousand pounds and upwards, which it is hoped will be more than sufficient to make up any loss by default of management, if any such shall happen, which there is no ground to suspect. In the case of the mismanagement of a guardian or trustee, the law has directed proper remedies, and the appellant may complain, if any such thing happen ; but he cannot, under colour of demanding securities from the trustee, retain the minor's money in his own hands, and debar the trustee from entering upon his office.

The lands offered by the appellant are held by a very bad tenure, and with a very insecure title, and bought at an exorbitant price ; so that the trustee could not be answerable to make such a purchase for the minor. Nor is it adviseable for the minor, to have the lands conveyed to him from the appellant, seeing by the laws of Scotland, it might bring him in danger of being made liable for the appellant's debts.

After hearing counsel, *It is ordered and adjudged that the said decree, and the several interlocutory sentences or decrees affirming the same, complained of in the said appeal, be reversed ; and it is further ordered and adjudged that the appellant forthwith bring before the Lords of Session, to be deposited with their proper officer, the 4000*l.* in question, with the interest due to the time of bringing it in money, or good securities to be approved by the Court, the principal sum to be laid out with the approbation of the said Lords of Session, in as soon as conveniently may be, in the purchase of lands, according to the intention of the bond of the late Lord Saltoun, in the pleadings mentioned ; and in the mean time, until such purchase can be had, to be put out at interest, with like approbation, and the interest ; as well that to be brought in by the appellant as the future interest to grow due during the infancy of the respondent the infant, to be applied for his benefit in such manner as the Lords of Session shall find most proper for his advantage ; and afterwards the growing interest to go as the profits of the lands to be purchased, are appointed to go by the said bond : That the appellant lay before the*

Lords

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Lords of Session, his title to the lands in Cairnbuilg by him purchased, and the value thereof; and in case the Lords of Session shall approve of his title thereto, or to any part thereof, the appellant shall convey the same or such part thereof, according to the intention of the said bond of the late Lord Saltoun: And so much as the Lords of Session shall find the lands so by the appellant conveyed to be really worth, not exceeding the price paid by the appellant for the same, they shall cause to be paid back to the said appellant out of the said 4000l. so soon as such value is ascertained and conveyance made: and those lands so conveyed shall be esteemed part of the purchase directed to be made with the said 4000l., as aforesaid: And it is further ordered, that the appellant and the respondent William Fraser, may each of them have liberty to propose to the Lords of Session, from time to time, securities or purchases for the said money.

For Appellants, *Rob. Raymond. Sam. Mead. Dun. Forbes.*
 For Respondents, *Rob. Dundas. Tho. Lutwyche. Tho. Kennedy.*

Thomas Fairholm of Piltoun, - - - *Appellant;* Case 69.
 Sir William Cockburn, and Sir George
 Hamilton, Baronet, - - - *Respondents.*

21st May 1720.

Mutual Contract — Personal and real.—A creditor by adjudication, with an unexpired legal and without infestment, enters into an agreement with two other creditors, by which he consents that they shall be paid before him; in a competition between a singular successor of the adjudger with notice, and the representatives of those two creditors, it is found that the preference in the contract was perpetual, and that as it concerned a personal subject on which no infestment had followed, it was effectual against the singular successors of the contractors.

Fraud.—A creditor pursuing a judicial sale, enters into a contract before the sale to sell to a third party at a certain sum; he afterwards, at the sale, purchases for a smaller sum, but is obliged to account for the larger sum, which had been paid to him on terms of the prior contract.

Bona fides.—A purchaser at a judicial sale having paid a debt *bona fide* to creditors ranked before him; in accounting to creditors who were prior to both, has allowance of such *bona fide* payment; but action of repetition is reserved to the prior creditors.

Costs.—6*l.* costs given against the appellant.

IN 1682, James Riddell was possessed of the estate of Kinglass; but was indebted to several persons in various sums of money. To Sir James Cockburn, and Sir Robert Mill, under whom the respondents claim, he owed a debt of 8443*l.* Scots; and Sir James and Sir Robert had used inhibition against their debtor, and he having forfeited his single and life-rent escheat to the Crown, the same was granted to them. To Walter Riddell, his brother, he owed another debt of 42,624 merks Scots, for which Walter Riddell had obtained a decree of adjudication in 1681; no infestment had been obtained by Walter Riddell.