

Simon Lord Lovat, - - - *Appellant*; Case 136.

Sir James Mackenzie, of Roystoun, one of the Senators of the College of Justice; Roderick Mackenzie, second Son of Alexander Mackenzie, late of Fraferdale, and his Guardian; Mrs. Emilia and Margaret Frasers, Daughters of the said Alexander Mackenzie, and the said Alexander Mackenzie as their Guardian; Mr. William Scott, Professor of Greek in the College of Edinburgh, and his Children; Alexander Mackenzie of Garloch; Roderick Macleod of Cadboll; Kenneth Mackenzie Writer in Edinburgh; and John Paterson of Prestonhall, Esq; *Respondents.*

13th April 1727.

*Donator of Escheat competing with a Trustee.*—A father conveys his estates to a trustee for certain purposes; after the father's death, the trustee sells part of his estates, and bond for the price is taken in the name of the trustee's son, who of same date grants a back bond to the trustee, in terms of the father's trust deed; the son is afterwards denounced for treason, and his escheat granted to a donator, but he subsequently grants an assignation to his father's trustee, which, in a competition with the donator, is sustained.

*Trustee*—The creditors of a trustee could not affect the trust estate.

*Competition of Creditors and Children.*—Certain creditors being preferred to a sum set apart for children's provisions, the creditors are ordained, upon receiving payment, to convey their rights to the children, to enable them to operate relief on other subjects of the debtor.

*Consent of Party.*—The donator who consented to a decree of preference to the children, having contended that this consent did not extend to the creditors, who were preferred to the children, and petitioned to be heard against them, the prayer is refused.

*Costs.*—An affirmance with 60*l.* costs.

ON the 11th of May 1710 Roderick Mackenzie of Prestonhall, one of the senators of the College of Justice, by a deed executed, with consent of Dame Margaret his spouse, and of Alexander Mackenzie of Fraferdale, his only son, conveyed his estate of Prestonhall absolutely to Sir James Mackenzie of Roystoun, one of the senators of the College of Justice: the disposition declared it was granted to the end the said estate might be sold, and the price thereof applied towards the relief of Lord Roystoun in the engagements he had or should come under for Lord Prestonhall, in the first place; towards payment of the creditors who had real rights affecting the premises in the second place; and lastly, for the ends and uses mentioned in a back bond executed by Lord Roystoun, of same date with the disposition. Lord Roystoun, of same date, accordingly executed this back bond, reciting the said disposition, and binding himself not to sell or dispose of the said estate, but with the consent of Lord Prestonhall, while in life;

life; and after his death, with consent of Dame Margaret his spouse, Alexander his son, and George Earl of Cromarty, or any two of them, or the survivor of them, and to apply the price for payment of the debts in which he himself was bound in the first place; for payment of real creditors affecting the premises in the second place; and to lay out 40,000*l.* Scots of the remainder upon some real security for the jointure of the said Dame Margaret during her life; and in case of her predecease the fee thereof was provided to Lord Prestonhall himself, or to such person or persons as he should appoint by any writing under his hand; and failing such appointment, or in the event of his dying before his lady, in either of these cases the fee of the said sum was provided to Roderick Mackenzie, the second son of Alexander Mackenzie of Fraferdale, and Emilia and Margaret his two daughters, the grandchildren of Lord Prestonhall, in the proportion of 40,000 merks to Roderick, and 10,000 merks to each of his sisters.

Lord Prestonhall died in January 1712. He had received the rents till his death, and, till the estate was sold, his son Alexander Mackenzie of Fraferdale received the rents and profits. On the 9th June 1715, Lord Roystoun with the consent of Alexander Mackenzie (Dame Margaret and the Earl of Cromarty being then dead) sold and conveyed the premises to the respondent John Pateron, at the price of 91,400*l.* Scots. The purchaser being allowed to retain a sum equal to what would clear off the real debts affecting the estate, on the 22d of June 1715, granted his bond for the remainder, being 78,315½ merks, to the said Alexander Mackenzie. And, of same date, Alexander Mackenzie executed a back bond in favour of Lord Roystoun, reciting the disposition by Lord Prestonhall, Lord Roystoun's back bond, the disposition to Mr. Pateron, and bond granted by him for the price, and obliging himself either to apply the money due by Pateron's bond to the uses mentioned in Lord Prestonhall's disposition, or otherwise to assign Pateron's bond to Lord Roystoun, that he might apply the money to the same uses.

Alexander Mackenzie not having appeared and given security for his peaceable behaviour in terms of the act 1 G. 1. c. 20. *for encouraging all superiors, &c.*, was, after this period, disinherited, and his single and life-rent escheat were forfeited to his majesty. In consideration of the appellant's services in suppressing the rebellion, his majesty, on the 23d of August 1716, made a grant of the said single and life-rent escheat to the appellant. And after this period, on the 23d of March 1717, Alexander Mackenzie, who got free of further consequences of his denunciation, executed, in favour of Lord Roystoun, an assignation of the bond granted by Mr. Pateron for the balance of the price of Prestonhall.

On the 14th of March 1722, Lord Roystoun assigned to the respondents Roderick, Emilia, and Margaret, the sum of 40,000 merks, being all the money remaining due upon the said bond of Mr. Pateron's, according to their respective interests. And thereupon Roderick, and Sir James Sinclair his curator, and Emilia and Margaret, by their father and administrator in law, brought

brought their action before the Court of Session, against Mr. Paterfon, to recover payment of the said 40,000 merks. Mr. Paterfon, in this action, admitted the debt, but pleaded that he was not in safety to pay, on account of the appellant's gift of escheat, and that arrestments had also been laid in his hands by several creditors of Lord Prestonhall, and of Alexander Mackenzie. The appellant, though not a party to this action, appeared at a calling of the cause, by his counsel, on the 16th of February 1724, who declared, "that he was instructed by the donator not to object against the pursuer's obtaining decret for payment of the sums libelled, and to consent thereto."

The Lord Ordinary, on the 18th of February 1724, "Found, that the back bond granted by Fraferdale to the Lord Roystoun, being relative to and of the same date with the bond for the remainder of the price granted by Mr. Paterfon to Fraferdale, both which bore date the 22d of June 1715, and was in prosecution of a transaction anno 1710, between the deceased Lord Prestonhall and the Lord Roystoun, which excluded all suspicion of collusion, did affect and qualify the said bond in the person of Fraferdale, as a trust in his name for my Lord Roystoun's behoof, and for the ends and uses mentioned in the back bond; and that the same being prior to Fraferdale's denunciation, the said denunciation could not prejudice the effect of the said back bond; and therefore the assignation granted by Fraferdale, and transference by the Lord Roystoun in favour of Fraferdale's children, stood good, notwithstanding of Fraferdale's denunciation prior thereto. As also, by reason of the said back bond, found, that none of Fraferdale's creditors could arrest the subject of the bond in prejudice of the children's right, acquired by the said back bond: and therefore, and in regard that the donator of Fraferdale's escheat disclaimed any interest in the said bond, and did not object against the pursuer's preference, decerned and declared in the terms of the libel, at the children's instance, with the burden always of the security of the purchased lands to Mr. Paterfon, according to stipulation thereanent, and with the burden of purging the arrestments laid on in the purchaser's hands at the instance of the deceased Lord Prestonhall's creditors."

Soon after, Mr. Paterfon brought his action of multiple poinding, against the arresting and other creditors of Lord Prestonhall, in which the appellant was also called for his interest. And the respondent, Mr. William Scott, on behalf of himself and his children as creditors of Lord Prestonhall, brought an action of reduction and declarator against Lord Roystoun, the grantee of Lord Prestonhall, insisting that the disposition to him was fraudulent, and ought to be set aside, and that his debt ought to be paid out of the residue of the price due by Paterfon and the other respondents. The other creditors of Lord Prestonhall made themselves parties to this action of Mr. Scott's; and the same was also conjoined with the action of multiple poinding.

In these conjoined actions, several interlocutors were pronounced, preferring the creditors of Lord Prestonhall to his grandchildren; and the question of preference between these creditors themselves, having been disputed for near two years, the Lord Ordinary, on the 20th of July 1726, pronounced the following interlocutor: “ Preferred Lord Roystoun to as much of  
 “ the said sum resting by Mr. Paterfon, and contained in the said  
 “ bond granted by him, as would satisfy and pay him the sum of  
 “ 38,315½ merks, and interest thereof from Whitsunday 1715,  
 “ during the not payment (to which he restricted his payments  
 “ and engagements for Lord Prestonhall) *primo loco*; and found  
 “ that the other creditors and the children, in the order of pre-  
 “ ference after mentioned, could only draw the 40,000 merks of  
 “ principal assigned to the children, and such part of the interest  
 “ as was resting since Whitsunday 1715, and the interest of the  
 “ said sum in time coming; and found it was instructed by the  
 “ said bond, and condescendance given in by Mr. Paterfon, that  
 “ he was resting of the price of the said lands at Whitsunday  
 “ 1715 (besides the sum for which the Lord Roystoun was pre-  
 “ ferred as above) the sum of 40,000 merks; and found him  
 “ liable to the said creditors and pursuers for the said sum  
 “ and interest thereof from the said term of Whitsunday during  
 “ the not-payment; and preferred certain creditors of Lord Pres-  
 “ tonhall in the order then settled *primo loco*. Preferred the said  
 “ children of Fraserdale, in the next place to the remainder of  
 “ the said sum found due by Mr. Paterfon, and decerned Mr.  
 “ Paterfon to make payment accordingly; and discharged all the  
 “ other persons called by the multiple poinding to molest him on  
 “ that account in time coming: and decerned the several cre-  
 “ ditors preferred as above on the sum transferred to the children,  
 “ to assign and give up their grounds of debt and diligences re-  
 “ spectively in favour of the said children, in order that they  
 “ might operate their relief out of any other subject or estate  
 “ which belonged to Lord Prestonhall or Fraserdale as accords  
 “ of the law.”

The appellant now appeared as a defender to the multiple poinding, and gave in a representation to the Lord Ordinary, praying that the proper officer might be directed to give him up the process to be considered, receive his title as donator of escheat, and in the mean time stop extracting the decree. The Lord Ordinary, on the 25th of July 1726, “ Ordained the other parties  
 “ concerned to see this representation, and all parties to be ready  
 “ next day to argue the same before him.” The cause being accordingly argued on the 26th of July the respondents insisted that the subject in question being of the effects of Lord Prestonhall, the appellant could have no interest therein; and they referred to the judicial consent given two years ago by the appellant’s counsel to the decree in favour of Lord Roystoun: the Lord Ordinary thereupon, of that date, “ Refused the prayer of the ap-  
 “ pellant’s representation, and allowed the decree to be extracted.”

The

The appellant thereupon reclaimed. The Court, after a hearing, on the 29th of July 1726, “adhered to the Lord Ordinary’s interlocutor, and refused the desire of the petition.”

The appeal was brought from “several interlocutory sentences or decrees of the Court of Session of the 18th of February 1724, the 20th, 25th, 26th, and 29th of July 1726.”

Entered,  
1 Feb.  
1726-7.

[It has not been deemed necessary to detail the argument on either side upon this case: such argument relating almost entirely to the circumstances involving the fact of the trust, impugned on one side, and defended on the other, upon which no correct information is given.]

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 60l. for their costs in respect of the said appeal.*

Judgment,  
13 April  
1727.

For Appellant, Dun. Forbes. Will. Hamilton.  
For Respondents, P. Yorke. Ch. Areskine.

---

David M’Culloch, of Pilton, - - - Appellant; Case 137.  
Christian M’Culloch, - - - Respondent.

17th April 1727.

*Aliment by a mother to her son, if granted animo donandi or not.*—A father grants bond of provision to a younger son, in a certain sum, binding himself and his heirs to aliment him till 21, or to pay interest on the bond: the mother marries a second husband, and in her marriage-contract stipulates a power of alimending her son, out of her jointure from her first husband: in a process by the assignee of the younger son, against his eldest brother, for interest, as not being alimended by the father’s heirs, such interest is decreed, and the mother is found to have alimended the younger son *gratis*.

*Litigious.*—The eldest son, pending this action, paid his mother’s second husband a sum for his younger brother’s aliment, but it is found that the discharge taken for that sum, being granted *pendente processu*, did not influence the cause.

*Bond.—Termly Penalty.*—A bond of provision by a father contains a clause of annual-rent, but no penalty on failure: in an action of damages for not punctual payment of interest, and expences thereon incurred, the defence that the bond contained no termly penalty is overruled.

*Costs.*—An affirmance with 80l. costs.

JAMES M’CULLOCH of Pilton left issue three daughters, Jane, the respondent Christian, and Catherine; and two sons, David the appellant, and Alexander, who were twins. The real estate descended to David the appellant, as eldest son; to his other children he granted bonds of provision, payable at the first terms of Whitsunday, or Martinmas, after Alexander should attain his age of 21 years, or the daughters be married, with interest from the terms of payment; and he bound himself and his heirs to aliment and educate these younger children severally till the interest upon