

JAMES CUTHBERT of Farnese, - - - *Appellant* ;
 ANNA MACKENZIE or PATERSON, and RICHARD }
 PATERSON, her Husband, for his interest, } *Respondents.* CUTHBERT
 " PATERSON, &c.

House of Lords, 13th Nov. 1775.

DEED—TUTORY—EXPIRY OF Do.—A deed contained a conveyance of subjects and effects to the wife, and a particular assignation of certain bonds therein, “to her, and her heirs and assignees,” with provision, that after paying debts, the residue was to be enjoyed by the widow in liferent and child in fee, giving to the widow the power of distribution and division, and also nominating her tutrix to the children. Held, where the widow had recovered payment of one of the bonds, after the death of her husband, and after her second marriage, that she had only a liferent of the same, and that she could not recover payment, and validly discharge that bond, either in her own right, or as tutrix for her children, her office of tutrix expiring on her second marriage.

David Mackenzie, the respondent’s father, died while she was an infant, leaving her mother a widow, who, six months thereafter, got married a second time, to Robert Edwards, a teacher in Inverness.

Sometime previous to her father’s death, her father had lent out money on bonds—one of these was granted by Mr. Mackenzie of Allangrange for £100, the other by Mr. Macleod of Cadboll for £200, both of these being taken payable to the said David Mackenzie, his heirs and assignees, burdened with a liferent to Isabel Macrae his wife, the respondent’s mother.

Of this date, her father executed a disposition and assignation or settlement in the following terms: “I hereby April 29, 1748.
 “make and constitute the said *Isabel Macrae, her heirs* or
 “*assignees*, my lawful cessioners and assignees in and to the
 “sum of £200 sterling money of principal contained in a
 “bond, dated the 15th day of Dec. 1746 years, granted by
 “Roderick M’Leod of Cadboll to me, my heirs and assignees,
 “and, in case of my decease, to the said Isabel Macrae,
 “my spouse, in liferent, payable against the term of Mar-
 “tinmas then next, and bearing annual rent from the term
 “of Martinmas preceding the date of the said bond, with
 “£40 money foresaid of liquidate penalty in case of failure.”
 Other debts and effects are then enumerated. The deed
 then “assigns Isabel Macrae, and her foresaids in and to
 “the haill annualrents due or that shall be due on the prin-
 “cipal sums contained in the said bonds above narrated,

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“ and liquidate penalties aforesaid, and in and to the said
 “ bonds themselves, hail heads, tenor, and contents thereof,
 “ with all that has followed or is competent to follow there-
 “ on,” &c., “ *with and under the burdens and conditions un-*
 “ *derwritten*, viz. To make payment of all the just and law-
 “ ful debts that shall be due by me at the time of my de-
 “ cease; and that *whatever free goods, gear, debts, and*
 “ *sums of money, that shall be due or belong to me, at the*
 “ *time foresaid, shall be liferented* by the said *Isabel Macrae,*
 “ *my spouse, during all the days of her lifetime,* and that the
 “ *children* procreate, or to be procreate betwixt us shall
 “ have right to the fee thereof,—the distribution, *division*
 “ thereof amongst the said children, to be made by the said
 “ Isabel Macrae, as she shall see just and reasonable, and
 “ according to their deserving, by a bond of provision, or
 “ any other deed under her hand.” He also nominated and
 appointed “ the said Isabel Macrae, during all the days of
 “ her lifetime, and after her decease, my friends aforesaid,
 “ or either of them, to be sole tutrix or tutor, and curatrix
 “ or curator to our said children, during their pupillarity and
 “ minority.”

Isabel Macrae never exercised the power of division conferred upon her. Her second marriage was unfortunate. Edwards was in debt, by bills to a large amount, two of which were owing to the appellant James Cuthbert, for £73. 13s. 9d. each. With the view of paying this debt, he prevailed on his wife, Isabel Macrae, to execute a conveyance of Macleod's bond, for £200, to the appellant, which conveyance was accordingly signed by her, and handed over to Cuthbert, who demanded payment from Macleod. The latter refused, on the ground that the appellant had no right to receive payment of the bond, the fee of which being in the deceased's children, and his widow having only a liferent. Afterwards, however, Isabel Macrae, Edwards, and the appellant, formed a plan by which to get over this difficulty; they made Isabel Macrae make a demand in the capacity of tutrix, on the supposition, that in this character of trustee, she at all events had power to enforce payment, and recover the contents of the bond. Into this plan Macleod himself was drawn, his only objection to pay being an insufficient discharge. By this plan, Macleod agreed to present a bill of suspension, to try the validity of this proposed new discharge. The objections to the demand of Isabel Macrae were stated, but, contrary to expectation, deemed so important as to call upon the Lord Ordinary to report to the

whole Court, who unanimously passed the bill to try the question. But, by an after transaction, to which Cuthbert and Macleod became parties, the former agreed to repay the latter, if any question should afterwards be raised by the children, and thus the appellant obtained a decerniture in his favour.

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Some considerable time thereafter, the respondent Anna Mackenzie, the only child and executor of her father, David Mackenzie, raised action against Macleod for payment of his bond of £200, as far therein. She stated that her father had died without leaving any debt owing—that his means otherwise had been considerable, and had been taken possession of by her mother; and she having been the far of that bond, she was now entitled to recover the same. Macleod brought an action of relief against Cuthbert; and both processes being conjoined, the Court, of this date, pronoun-

July 27, 1774.

ced the following interlocutor: “ Find that the £200 in
“ the deceased Cadboll’s bond to David Mackenzie was
“ taken up by Isabel Macrae, in consequence of a fraudulent
“ contrivance on the part of James Cuthbert; and therefore
“ find Robert Bruce Æneas Macleod, now of Cadboll, and
“ his tutors and curators (if he any has) for their interest,
“ and the said James Cuthbert, liable conjunctly and se-
“ verally to the pursuer, Ann Mackenzie and her husband,
“ in repayment of the said sum of £200 sterling, and the
“ interest thereof since the 12th June 1761, when the
“ said Isabel Macrae died, and in time coming till payment,
“ and decern. Find the pursuer, Ann Mackenzie and her
“ husband entitled to expenses. Find James Cuthbert liable
“ to Cadboll in full indemnification of the sums he shall pay
“ to the said Ann Mackenzie, and decern.”

On reclaiming petition the Court adhered.

Aug. 10, 1774

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

Pleaded for the Appellant.—That Isabel Macrae had power to receive the sum in the bond from Macleod, because her heirs and assignees were mentioned in the deed, and a power given to her of distribution, and to receive payment, and grant discharges. Her interest, therefore, was not limited to a simple liferent merely. The children were to have the fee, but then it was the fee only of the residue, after all burdens and debts were paid; but, assuming that her interest was limited to a mere liferent, her title otherwise to recover payment was indisputable. The deceased’s settlement was

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partly for her own behoof, and partly as trustee for her children; and if in law she was held to be a trustee, then her power of raising and discharging could not be disputed. There was something more than mere tutory here. There was a trust reposed in her, which is an office of a more permanent character, and which, as declared in the deed itself, was to last *during her life*. It could not, therefore, fall on her second marriage, but subsisted by force of the deed, and the deceased's own nomination. But, further, she had a power to enforce payment, by force of the special assignment in her own name. "I hereby make and constitute the said Isabel Macrae, *her* heirs and assignees, my lawful cessioners and assignees, in and to the sum of £200 sterling of principal, contained in a bond," &c. It thence appearing that Isabel Macrae, being invested with all the rights which before were in the maker of this deed, was entitled to recover and grant valid discharges of the bond in question, and this power, if in her as amply as it was in the maker, could not be abridged or nullified by her subsequent marriage, her right as legatary and assignee being thereby unimpaired.

Pleaded for Respondents.—The original bond granted by Macleod of Cadboll was taken to the children in fee, the wife having only a liferent. And by the subsequent settlement, executed by David Mackenzie, the fee of the whole, and not the residue, was still conveyed to his children, the wife being confined to a liferent. To this was her interest limited. In addition, he made her tutrix and curatrix to her children, for preserving the estate, and with such powers only as a tutrix could exercise for the advantage of the estate confided to her, and proving beneficial to the children. Such being the nature of the deed, and such her limited interest and power under it, Macleod could not, while in the knowledge of this deed, pay the bond in *bona fide* to Cuthbert, because, neither from the nature of her interest, which was that of mere liferenter, nor as tutrix, could she have a title to receive payment and discharge the same. Besides, even if at any time she had such a power, this power as tutrix, was put an end to by her second marriage. Macleod, therefore, before paying, ought to have considered this question—whether her office of tutory subsisted after her second marriage? By that event, the respondent contends her tutory came to an end, and payment then to Macrae was inept and illegal. Ersk. b. i. tit. 7, § 29 says: "The office both of

“tutary and curatory expires; First, By the marriage of a female tutor or curator. Thus, when a father names his wife as tutor to their common child, the nomination was adjudged to fall upon her second marriage, both from the impropriety of a woman having one under her power, who is herself subjected to the power of another, March 8th 1636, Stewart, *vide supra*, § 12.” Hence, her powers having expired on her marriage, her right was then reduced to a mere liferent, which did not entitle her to discharge and uplift the bond. The whole plan, by which the conveyance of the bond was devised, was undoubtedly intended as a fraud, for the purpose of disappointing and carrying off the children’s estate.

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After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For the Appellant, *Al. Wedderburn, Dav. Rae, Ar. Macdonald.*

For the Respondents, *Alex. Murray.*

Not reported in Court of Session.

EDWARD HEWIT, surviving Partner of HEWIT and BROCKHURST,	} <i>Appellant ;</i>
DAVID ELLIOT, GEORGE M’CRAE, SIMON BROWN, JOHN AULD, and JAMES BALLAN- TINE, Trustees for the Creditors of AN- DREW STEVENSON, Merchant Glasgow,	
	} <i>Respondents.</i>

House of Lords, 6th Dec. 1775.

BANKRUPTCY—RETENTION—ADMISSIBILITY OF WITNESS—INTEREST—TUTORING.—Circumstances in which a party, having procured possession of bills in a legitimate manner, though sent for, and to be appropriated to a special purpose, was held entitled to retain these bills in payment *pro tanto* of his own account, against the creditors of the remitter of these bills: reversing the judgment of the Court of Session. Circumstances in which objection to examination of witness, on the ground of interest, not sustained. Also objection to witness, as having been tutored, and having perused the papers, &c., in the cause, repelled.

The appellant, and his deceased partner Brockhurst, car-