

1797.

PATERSONS, & C.  
v.  
MACCAUL, & C.

PETER PATERSON, Esq. of Merryflats, and  
ARCHIBALD CAMPBELL, Merchant in Green-  
ock, surviving trustees, nominated and  
appointed by JOHN PATERSON of Castle-  
hill, and JOHN, PETER, JAMES, and AG-  
NES PATERSONS, children of the said John  
Paterson, . . . . . } *Appellants;*

JOHN MACCAUL, Merchant in Glasgow,  
Trustee upon the Sequestrated estate of  
the said John Paterson, and WM. CRAIG  
and Others, Creditors of the said John  
Paterson, . . . . . } *Respondents.*

House of Lords, 6th June 1797.

**TRUST DEED—DELIVERY—SIMULATE—REDUCTION OF DEED IN FRAUDEM CREDITORUM.**—Circumstances in which a trust deed, granted merely for the purpose of conveying his property to his children, and distributing it amongst them at the granter's death, upon which infestment was immediately taken, was held to be reducible at the instance of subsequent creditors upon his bankruptcy, seven years thereafter, though not challenged under the statutes, but at common law.

John Paterson of Castlehill, of this date, executed a April 24, 1786. trust deed in favour of the appellants, upon the narrative, "That the children of the marriage procreated, and existing between me and the deceased Mary Sommerville, my spouse, are still unprovided for by me, in a sufficient share of my estate, to which they have good right, from the subjects I have received belonging to their mother, and that it is my intention that those children should be suitably provided out of my estate." Therefore he disposed to the appellants, as trustees and fiduciaries "for the use and behoof of John, William, Peter, James, and Agnes Patersons, my children lawfully procreated between me and the *deceased* Mary Sommerville, all and hail that piece of land called Castlehill," and certain other lands therein enumerated.

The reservations and purposes of the trust were thus declared:—"Reserving always my liferent of the subjects above disposed. But these presents are granted for the

1797. " ends and purposes after specified, namely, that the trus-  
 tees shall, after my death, dispoſe and convey to my  
 PATERSONS, " eldest ſon, his heirs and aſſignees whomſoever, and in  
 &c. " caſe of his death without lawful iſſue, to my eldeſt ſon  
 " then exiſting, his heirs and aſſignees, the lands of Caſtle-  
 MACCAUL, &c. " hill." He then directed his trustees to ſell and diſpoſe of  
 " all his other heritable ſubjects above diſpoſed by public  
 " or private ſale, and to divide the proceeds of the ſame  
 " equally among my whole children, which ſhall be exiſting  
 " at the time of my death."

The deed contained an obligation to infeft, and a pro-  
 curatory of reſignation and precept of ſaſine in common  
 form, and the appellants were infeft upon it accordingly.

John Paterson of Caſtlehill, thereafter became bankrupt,  
 Dec. 17, 1793. and was ſequeſtrated of this date, and the reſpondent  
 MacCaul, was appointed trustee on his bankrupt eſtate.

The preſent action was a reduction brought by the re-  
 ſpondents, to ſet aſide and reduce the above deed, on the  
 following grounds:—1ſt. That the conveyance was a ſimu-  
 late deed, not expreſſing the real views and intentions of  
 the grantor, but intended merely as a pretence to enable  
 him to ſettle upon more favourable terms with Agnes King,  
 a woman who pretended to be his wife. 2d. That the  
 truſt conveyance for behoof of the children was never  
 legally delivered, and the infeftments taken thereon were  
 improperly and ſurreptitiously taken, without the authority  
 or knowledge of the grantor. 3d. That the deed, ſuppoſ-  
 ing it to have been legally delivered, and ſeriously intended to  
 convey what it expreſſes, was an alienation in *fraudem*  
*creditorum*.

In defence to this action, it was answered:—1ſt. That  
 there was no legal evidence on the face of the deed itſelf,  
 to ſhow that it was a ſimulate deed, and merely to affect  
 the claims of Agnes King upon him, 1ſt, becauſe it did not  
 convey the whole eſtate. It reſerved it entire to himſelf in  
 life; and, 2d, becauſe if Agnes King made good her  
 claim of being his wife, the infeftment taken would, in that  
 caſe, not defeat her terce or dower, becauſe ſhe would be  
 entitled to her terce upon all lands in which John Paterson  
 was infeft, previous to granting that deed. 2d. In the next  
 place, the deed was a properly delivered deed, given and  
 left in the hands of John Maxwell, writer, Glasgow, who  
 was agent as well of the grantor as of the grantees, and  
 where the deed is in the hands of one who is the agent for

both, it is presumed to have been delivered for behoof of the grantees. In the second place, it is impossible to say that a deed has not been delivered, on which sasine has been given, and the instrument of sasine duly recorded. Further, the consent of John Paterson was not necessary to this infestment, as that was conclusive from his leaving it in the hands of the grantee's agent, with the usual clauses for infestment. 3. The deed was not granted to the prejudice of prior creditors, for the grantor then owed no debts, or if he did, they have been all since paid, and the debts of the creditors who now reduce this deed, were contracted five or six years after its date; neither was it granted in contemplation of bankruptcy, for the deed is dated in 1786, and the bankruptcy took place in 1793. At the time the deed was granted, John Paterson was perfectly solvent. The case of *Street v. Mason*, founded on by the respondents, instead of being against, is in favour of the appellant, as showing that the deed is not impeachable as *in fraudem creditorum*.

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Stair's Deci-  
sions, July 2,  
1673; Reed v.  
Reed, Dec. 4,  
1673.

The Lord Ordinary, of this date, pronounced this interlocutor:—"Reduce, decern, and declare, in terms of the "libel." And, on representation, his Lordship adhered. And on petition to the whole Lords, the Court adhered to the interlocutor of the Lord Ordinary.\*

Jan. 26, 1796.

Feb. 4, —

Feb. 26, —

Nov. 15, —

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

*Pleaded for the Appellants.*—1st. The deed was not simulate in any one degree, except as to Agnes King, and therefore must receive effect to every other purpose, and in particular, as regards the respondents, who challenge it. 2d. Because there is every legal presumption of the deed having been delivered, both from the general rule of law in regard to deeds executed according to the form of law of Scotland, which throws it upon the respondents to show that it was not delivered, but which they have not done; and also from the fact of its having been deposited with a person who was agent both for the grantor as well as the grantees; in which case, the presumption is, that it is delivered to him as agent for the grantees. And what makes

\* Opinions of Judges :—

LORD PRESIDENT CAMPBELL.—"This was evidently a *mortis causa* deed, and cannot be sustained against creditors. *Vide* Dictionary, *voce* "Fraud," case of *Stewart v. Mason*. Mr. Paterson showed his own sense

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this delivery more conclusive, is, that sasine was taken upon the conveyance, and the instrument duly recorded, which precludes the possibility of saying that the deed was not a delivered deed. Whether the infestment was taken with or without the consent of the grantor, makes no difference, for he had bound himself in the deed to give sasine, by granting his authority to that effect. 3d. The deed, further, was not granted in defraud of prior creditors, nor granted in contemplation of bankruptcy, nor has any special act of fraud been stated or proved, to support such a ground; and yet, upon the authority of the cases upon which the respondents have relied, fraud must both be stated and proved.

Muirhead of  
Bradisholm  
and her Son v.  
Muirhead,  
Fountainhalls,  
Dec. 26, 1686.  
Ross v. Mac-  
kenzie, affirm-  
ed in the  
House of  
Lords, 29th  
April, 1776.  
App. to this  
vol.

*Pleaded for the Respondents.*—1st. The trust deed was a simulate deed, not expressing the real object and intention of the grantor, but intended merely as a pretence, to enable him to settle upon more favourable terms with Agnes King, or at least was not intended to be effectual, unless he prevailed on her 'claims. Had she prevailed in making good her claim, she would have been entitled to a share in his estate, and this deed was granted to disappoint that object. The deeds executed by persons about to engage in rebellion, conveying their estates to their next heirs, to save forfeitures, have always been reduced as simulate, or not meant to take effect, unless the forfeiture took place. Here the risk wished to be avoided never took place, because Agnes King's claim was finally settled and bought off, leaving rights to stand as before this deed was executed. 2d. The trust-deed was never legally delivered, and consequently cannot be effectual to the grantees or donees. 3d. The trust-deed was farther reducible, as being *in frau-*

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of the matter, by cutting his name from the disposition. The deed, besides, was executed for a particular purpose, and *not a fair one* at the time. When that object ceased, the trustees wished to make another use of it, which was equally unfair. I am for refusing the prayer of the petition."—"I adhere to the former interlocutor."

LORD JUSTICE CLERK.—"I am for adhering. This is an unilateral deed, and no other was meant to have a *jus quesitum* in it. It was put into the hands of his own doer, who had no authority to take infestment *for delivery*, but only *for making it a real right*. The deed remained still in his own power."

LORD POLKEMMET.—"Of same opinion."

Vide President Campbell's Session Papers, vol. lxxxiii.