

[15th August 1834.]\*

No. 29.

ARTHUR JOHN ROBERTSON, Appellant.

Mrs. MARY SHEARER, or ROBERTSON, Respondent.

*Husband and Wife — Adjudication.* — Circumstances in which it was held (affirming the judgments of the Court of Session), that the jus mariti was excluded as to the interest on two heritable bonds, in which the husband was debtor and the wife creditor; and that adjudications accumulating the principal and interest in her favour were valid.

1ST DIVISION.

Lord Cockburn.

THE late Masterton Robertson, son of Arthur Robertson, Esq., of Inches, was married in the year 1802 to the respondent Mrs. Mary Shearer or Robertson, and the appellant was the only surviving child of the marriage. In 1804 Masterton Robertson purchased a small property adjoining to the family estate of Inches; and, for payment of part of the price, he borrowed from Mrs. Nelly Shearer, the sister of his wife, a sum of 1,400*l.*, for which he granted in favour of Miss Shearer an heritable bond over the property, in virtue of which she was infest; and, at the same time, Mr. Arthur Robertson (the father) granted a separate collateral bond for the regular payment of the interest. Miss Shearer died, leaving a disposition and deed of settlement in favour of trustees, by which she conveyed to them her whole property, including the heritable

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\* This and the following cases were decided in 1835, but were, from accidental circumstances, omitted to be reported under their proper dates. They have been therefore introduced into this volume. The correct date of the above case is 10th July 1835.

bond for 1,400*l.* and the collateral bond for payment of the interest. By this deed she directed her trustees to pay to her sister Mrs. Robertson, “but exclusive of the jus mariti of her said husband, 700*l.* sterling, and ten guineas for mournings;” and also “to divide my watch, trinkets, rings, wearing apparel, and whole household furniture,” among her sisters, including Mrs. Robertson; “and, in the last place, I hereby direct and appoint the said trustees to pay over the free residue of my real and personal estates” to her sisters, including Mrs. Robertson, “equally among them, but exclusive always of the jus mariti of their husbands.”

In part satisfaction of the provisions thus made in favour of Mrs. Robertson, the trustees, on the 30th of October 1807, executed an assignation in her favour of the heritable bond for 1,400*l.* and the collateral bond for payment of the interest. The deed proceeded on the narrative of Miss Shearer’s trust disposition, and that, in part implement thereof, the trustees “make, constitute, and appoint the said Mary Robertson, otherwise Shearer, and her foresaids\*, but exclusive of the jus mariti of her said husband, not only in and to the principal sum of 1,400*l.* sterling, and annual rents thereof from and since the term of Martinmas 1806, during the non-redemption, &c., all contained in and due by the bond and disposition in security granted by the said Masterton Robertson, Esquire, to the said Miss Nelly Shearer, of date, &c., and by her conveyed to us by the trust disposition and settlement before mentionéd, together with the collateral obliga-

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\* The words “our cessioners and assignees” were omitted.

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“ tion for the payment of the interest thereon granted  
 “ by Arthur Robertson, Esquire, of Inches, of date,”  
 &c., “ turning and transferring the whole premises from  
 “ us and our foresaids to and in favour of the said  
 “ Mary Robertson, otherwise Shearer, and her fore-  
 “ saids, whom we hereby surrogate and substitute in  
 “ our full right and place thereof for ever, with power  
 “ to them to intromit,” &c. In virtue of this assigna-  
 tion Mrs. Robertson was duly infeft in September  
 1808.

The pecuniary affairs of Masterton Robertson were in great embarrassment; and it was alleged by the respondent, that all the money which he possessed was obtained by him, either from the trustees in her name, or was given by her to him on the footing of a debt. On the 10th of July he addressed a letter to the trustees in these terms:—“ Whereas I have this day  
 “ granted you my promissory note for 1,166*l.*, as trus-  
 “ tees for Mrs. Robertson, payable at one day’s date, I  
 “ shall, whenever I get home, send you a description  
 “ of my lands of Wester Inches and Bogbain, and my  
 “ lands of Ross of Inches, and the Dell, and others  
 “ lately purchased by me, that you may make out a  
 “ corroboration bond and disposition in security over  
 “ these lands by me for her behoof, for the above prin-  
 “ cipal sum, exclusive of my own jus mariti, both as to  
 “ principal and interest, which I bind and oblige me  
 “ and my heirs and successors to subscribe and execute  
 “ whenever required by you.” The bond was not at this time executed; and on the 22d of December 1814 he wrote to Mrs. Robertson,—“ Do not be the least uneasy  
 “ about money matters. You shall not want. I shall  
 “ bring you money as you want. I shall bring all my

“ charters with me. You know it was the hurry  
 “ Mr. Grant and me were in prevented it being settled  
 “ here. You have the inventory of the furniture with  
 “ you. I shall grant my bill also for that. You know  
 “ I have several things to add to it that you wish; so  
 “ keep your mind easy upon that and every other score  
 “ till we meet, which I hope will be soon.”

He afterwards came to Edinburgh, where his wife was; and an heritable bond for 1,500*l.* being prepared by the agent for the trustees in favour of his wife, he subscribed it on the 17th of March 1815. The narrative of this deed set forth, that he had “ borrowed and received from  
 “ Mrs. Mary Robertson, my spouse, at the term of  
 “ Martinmas last, the sum of 1,500*l.* sterling, whereof  
 “ I hereby acknowledge the receipt, renouncing all  
 “ exceptions to the contrary; which sum is hereby  
 “ declared to be exclusive of my *jus mariti*, both as to  
 “ the principal and interest, and shall in no respect be  
 “ subject to my debts or deeds, but shall be at the dis-  
 “ posal of the said Mrs. Mary Robertson in any  
 “ manner she shall think proper; and which sum of  
 “ 1,500*l.* is composed of various sums, principal and  
 “ interest due thereon, paid by the said Mrs. Robertson  
 “ to me, amounting as at present to the sum of 1,500*l.*;  
 “ and which sum of money belonged to the said  
 “ Mrs. Mary Robertson by the disposition and settle-  
 “ ment of the late Mrs. Nelly Shearer, aunt to my  
 “ said spouse, to certain trustees therein mentioned,  
 “ which disposition and settlement expressly excludes  
 “ my *jus mariti* from the said sum, principal and  
 “ interest.” He therefore bound and obliged himself  
 to repay “ the said sum of 1,500*l.* to the said Mrs. Ro-  
 “ bertson, her heirs or assignees, exclusive of the said

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 15th August “ mentioned, at the term of Whitsunday 1816, &c.,  
 1834. “ with interest termly thereafter, in case of non-  
 ROBERTSON “ payment.”  
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About the same time his father died, and he succeeded as heir of entail to the estate of Inches; but being still greatly embarrassed, he executed, in February 1817, a conveyance of his whole estates to trustees for behoof of creditors. Mrs. Robertson, in the following year, raised two separate actions of adjudication, with concurrence of a curator ad litem, on the two bonds for 1,400*l.* and 1,500*l.*; and on the 5th of June 1818 she obtained separate decrees of adjudication. The arrears of interest on the 1,400*l.* bond were accumulated, and, with principal, amounted to 1,680*l.*; and in like manner, the arrears of interest on the 1,500*l.* bond were accumulated, and amounted to 2,020*l.*

Her husband died in 1822; and she then agreed to restrict her claim of terce. The trustees rendered her a state of accounts in 1824, in which they debited her with payments made to her since her husband's death, and gave her credit for the interest on the two separate bonds, and her allowance for terce. In April 1825 the trustees conveyed to her son, the appellant, the estates which remained undisposed of, under the burden of paying the debts due by his father, which the trustees had not settled; and the appellant subscribed this deed in token of his consent. It was alleged by the respondent, that posterior thereto he did various acts and deeds homologating the bonds.

In 1833 the appellant brought two separate actions of reduction and improbation; the one being directed against the adjudication which had been obtained in virtue of the

bond for 1,400*l.*, — and the other against the bond for 1,500*l.*, and the adjudication deduced thereon. This latter action was libelled mainly on allegations of facility and incapacity on the part of his father, and of fraud and misrepresentation or undue concealment on the part of his mother. But eventually he departed from all these allegations, and confined his plea to the ground (which was common to both actions), that the exclusion of the *jus mariti* could be held to apply only to the interest which was due at the date of the bonds, and not to the future interest accruing annually; and that as the adjudications included that interest he was entitled to have them set aside to that extent. On the other hand, the respondent maintained, that the exclusion of the *jus mariti*, according to a sound construction, embraced the future interest, as well as that existing at the date of the bonds, and that the decrees of adjudication were properly taken for the accumulated amount.

The Lord Ordinary assoilzied the respondent in both actions, on the 27th of November 1834, with expenses; and in the action on the bond for 1,400*l.* he issued this note: — “ The whole case depends on the  
 “ point, whether the *jus mariti* of the defender’s de-  
 “ ceased husband was or was not excluded, not only  
 “ quoad the principal sum, but quoad the interest  
 “ of the bond on which the adjudication was led.  
 “ Miss Nelly Shearer, the aunt of the defender, held  
 “ a bond, by which the defender’s husband bound  
 “ himself to pay the 1,400*l.*, together with the legal  
 “ interest. She also held a separate obligation by his  
 “ father for the interest. Miss Shearer died, leaving a  
 “ special legacy to the defender, and dividing the whole  
 “ free residue ‘ of my real and personal estates ’ among

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“ her and other three ladies, ‘ but exclusive always of  
 “ ‘ the jus mariti of their husbands.’ Miss Shearer’s  
 “ trustees conveyed the foresaid bond for 1,400*l.* to the  
 “ defender, to account of her claims under their author’s  
 “ settlement. Their conveyance (not brought under  
 “ reduction) is awkwardly expressed, owing to the ac-  
 “ cidental omission of the words, ‘ our cessioners and  
 “ ‘ assignees,’ or some such words. But no plea is  
 “ maintained on this; and the deed plainly enough  
 “ assigns, ‘ not only the principal sum and annual  
 “ ‘ rents thereof,’ together with the collateral obligation  
 “ for the payment of the interest granted by Arthur  
 “ Robertson, Esq., of Inches, but also the bond, &c.,  
 “ with the said obligation, and all expressly exclusive  
 “ of the jus mariti. And even though the jus mariti  
 “ had not been excluded quoad the interest, the effect  
 “ of the defender’s adjudication in making the future  
 “ interest heritable would be an answer to the pur-  
 “ suer’s conclusion, which is, that these being moveable,  
 “ belong to him.”

In the other action his Lordship issued this note:—  
 “ At the debate the pursuer abandoned all his state-  
 “ ments and reasons of reduction and pleas in law,  
 “ which were founded on alleged fraud, facility, in-  
 “ capacity, misrepresentation, or undue concealment,  
 “ and confined himself exclusively to the third plea in  
 “ law, under which he maintained that the jus mariti  
 “ was not excluded quoad the interest of the bond. On  
 “ this the Lord Ordinary refers to his note in the other  
 “ case about the 1,400*l.* bond between the said parties,  
 “ only the record in this case contains a letter from the  
 “ pursuer’s father, by which he agrees to the exclusion  
 “ of his jus mariti expressly in reference to the interest.”

The appellant reclaimed to the First Division of the Court, but their Lordships, on the 10th February 1835, adhered.\*

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Robertson appealed.

*Appellant.*—It is settled law that the current interest or annual rents of heritable sums falling due during the marriage belong to the husband *jure mariti*.† The *jus mariti* confers not merely a right to claim the property which is of a moveable nature, but has the effect to vest the right *ipso jure* in the husband. It may, no doubt, be excluded, but this must be done in terms so clear and explicit as to leave no doubt on the subject. The plain intention was, and the legal meaning is, both with reference to the bond for 1,400*l.* and that for 1,500*l.* that the exclusion should be confined to the principal sum itself, and not extend to the future interests. If the appellant be correct in this, then the adjudications were erroneous, in so far as related to the accumulated interest, because that interest belonged not to the respondent but to her husband.

*Respondent.*—The question simply is, who was creditor under the bonds for the principal sum and interests? The respondent maintains that her husband was debtor for both, and that whether the terms of the bonds themselves be regarded or the letters written by him, it is clear that it was the intention and meaning of the parties that his *jus mariti* should be excluded, not only in

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\* 13 S. & D., 442.

† Brown's Synopsis, vol. ii. p. 878 to 880.



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 15th August Such an exclusion is perfectly competent, and has been  
 1834. repeatedly sustained. Besides, the interest for which  
 ROBERTSON the adjudication was obtained was not past interest but  
 v. future. The former is moveable, and falls under the  
 ROBERTSON. jus mariti, but that which is future and prospective is  
 heritable.\*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

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\* Ersk. b. ii. tit. 12. sec. 45; Ramsay v. Brownlee, 1st Dec. 1738, Mor. 5538; Baikie v. Sinclair, 16th Jan. 1786, Mor. 5535; Ryder v. Ross, 1st July 1794, Mor. 5549.

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