

the price then paid—that price being a fair value at the time. For full report of case *vide* Morison, p. 7221.

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On appeal to the House of Lords, it was

Ordered and adjudged that the interlocuters be affirmed, with £50 costs.

ANNAND, &c.

r.

SCOTT, &c.

For Appellant, *Dav. Dalrymple, John Dalrymple.*

For Respondent, *Ja. Montgomery, Gil. Elliot.*

(5844.)

Messrs. ANNAND and COLQUHOUN, and their Assignees, and Messrs. GIBSON & BALFOUR, Merchants, Edinburgh, and their Trustee, - - - } *Appellants ;*

HELEN CHESSELS or SCOTT, and JAMES SCOTT, her Husband, - - - } *Respondents.*

House of Lords, 24th March 1775.

JUS MARITI—EXCLUSION OF DO.—Where a party conveyed his heritable and moveable estate to his daughter, in trust for behoof of herself and children, excluding her husband's *jus mariti* in the event of his insolvency; Held that his creditors were not entitled to claim any of his moveable estate, the same being vested in the daughter; but that they were entitled to claim the rents of the heritable, and *interest* of the *moveable estate* up to the date of the husband's insolvency, on which event his right of administration ceased, in terms of the express provision in the settlement.

The deceased Archibald Chessels had, for a number of years prior to his death, considerable business transactions with Mr. Scott, who was married to his daughter, the respondent, Helen Chessels.

Before his death he executed a settlement, setting forth this narrative:—“ Considering it possible, though I hope “ not probable, that James Scott, merchant in Edinburgh, “ spouse to Helen Chessels, my daughter and only child, “ may, after my death, fail in his circumstances, and become “ insolvent; and in case my daughter (the respondent) as “ heir and executor to me, was to succeed to my estate, heritable and moveable, without any limitations or restrictions, the same, at least to the amount of her husband's “ *jus mariti*, may be evicted by his creditors for payment of “ his debts, and she may be induced to grant deeds in pre-

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“judice of herself and her numerous family of children.” Therefore he disposed and conveyed all his heritable and moveable estate, which might belong to him at the time of his death, to his said daughter the respondent, “her heirs and assignees, *in trust*, for *behoof of herself* and children, “in manner after mentioned.” The deed then refers to an inventory of his grounds of debt, docqueted and subscribed by him, of the same date with the trust-deed, and he nominates “his daughter sole executor, “and that in trust for behoof of “herself *in liferent*, for aliment and support of herself and “numerous family of children, and after her death for behoof “of her three sons, Archibald, William, and James Scott.” “And in case, in the event of the said James Scott his insolvency, I hereby seclude and debar him, the said James “Scott, his *jus mariti*, and him from the administration and “management of my said estate, heritable and moveable, “hereby disposed, and the rents, annualrents, and other produce and profits of the same;” “and I hereby declare the “same shall be neither liable nor subjected to the payment “of his debts, implement of his deeds, nor affectable by the “diligence of his creditors.” Scott was provided, in the event of his surviving his wife, with a free liferent of £100. Certain trustees were named to act along with his daughter in the management of his property in the event of her husband’s insolvency.

After Archibald Chessels’ death, it was alleged that James Scott did certain acts which were intended to raise credit on the strength of his *jus mariti*. Certain transactions were thereupon entered into with Messrs. Annand and Colquhoun, whereby Mr. Scott became largely their debtor; and the present question was commenced by the appellants executing a poinding of a parcel of timber, in the possession of Mr. Scott, valued at £248; whereupon Mrs. Scott presented a bill of suspension, on the ground that the timber belonged to her father at the time of his death, and now belonged to her in virtue of her father’s settlement, to the exclusion of her husband’s *jus mariti*. The bill was passed. But afterwards other arrestments having been used, the question before the Court assumed the character of a competition, in which Mrs. Scott contended that her husband’s *jus mariti* over the moveables was expressly debarred and excluded by the deed of settlement above mentioned. She further argued, that it was in the power of the father to make his set-

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tlement on any terms, and under any lawful conditions he thought proper. The exclusion of the *jus mariti* was a lawful condition, and in many cases, if not in all, a most proper beneficial arrangement.

In answer, it was contended, that the exclusion of the *jus mariti*, whatever effect it might have against creditors contracting with him subsequent to the publication, could not operate against prior creditors; and that an eventual exclusion, in the case of insolvency, was a device highly dangerous and illegal, and calculated to defraud creditors. In the present case, the insolvency of his son-in-law was well known to the maker of the settlement. But the *jus mariti*, which is a right conferred by law, and operates on marriage by force of law, cannot be altered by the mere deed of a third party. Creditors are entitled to rely on the rights of a husband over his wife's estate, and to deal with him on the faith of it. This interest in the wife's estate is a *jus individuum*, which may be carried by an adjudication, or which would fall under the husband's escheat, and in either of these cases, the whole right would pass, including not only the rents already become due, but those which may afterwards arise during the marriage; and the question is, Whether the husband's creditors can be deprived of the benefit of this estate, by a latent deed unknown to either? By no deed whatever can the moveable estate of a debtor be taken away from his creditors by a mere exclusion of the *jus mariti*. The presumption of ownership and property from possession totally excludes it. Besides, the exclusion of the *jus mariti* here was merely eventual, namely, on Mr. Scott's insolvency, and not an absolute exclusion from the beginning. It, therefore, could not operate to all effects. It could not affect the claims of creditors prior to that event, but only of subsequent creditors.

The Court pronounced this interlocutor: " Find that Ar- Mar. 4, 1774.
" chibald Chessels' heritable subjects, and also his moveables,
" executry funds, including the timber, and the rents of his
" lands and houses, and annualrents due to him at and pre-
" ceding the time of his death, in November 1768, were vest-
" ed in Helen Chessels, his daughter, in trust for the pur-
" poses mentioned in his deed of settlement, and were not
" affectable by James Scott or his creditors; and find, that
" the rents of the heritable subjects, and interest of the ex-
" ecutory funds, which fell due from the time of Archibald's
" death, until the time of James Scott's insolvency, in De-

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 “ children were alimeted by James Scott), fell under the
 ANNAND, &c. “ right of administration of James Scott, and are affectable
 v. “ by his creditors ; but find, that in December 1769, when
 SCOTT, &c. “ James Scott became bankrupt, his right of administration
 “ of the said subjects ceased, and that the rents and annual-
 “ rents that fell due thereafter, belong to Helen Chessels
 “ and her children, in terms of Archibald Chessels’ settle-
 “ ment, and are not affectable by James Scott’s creditors,
 “ and remit to the Lord Ordinary to proceed accordingly ;
 “ reserving to the creditors to be heard before the Ordinary,
 “ how far James Scott was a creditor upon Archibald Chessels’
 “ estate, at the time of his death, or how far said estate has
 “ been benefited since that time out of Scott’s funds ; and
 “ also reserving to the parties to insist before the Ordinary,
 “ in their respective claims of preference, upon the foresaid
 “ rents and annual-rents falling under James Scott’s right of
 “ administration foresaid, and with power to his Lordship to
 “ do further in the cause as he shall see just, and with
 “ these explanations and additions, adhere to their former
 “ interlocutor reclaimed against,” which found that Mr.
 Scott had become insolvent in 1769,—had retired to the
 sanctuary ; and had made over his effects to his creditors.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—An eventual exclusion of the *jus mariti*, in case of insolvency, is an unfair device, calculated to ensnare creditors, and to defraud them of their just rights. Creditors are entitled to rely, and in the present case, the appellants were entitled to contract, upon the faith of Scott’s legal rights over his wife’s estate, that estate being then in possession. And even the deed of settlement founded on by the respondents, does not absolutely exclude the *jus mariti*. It only excludes on a certain event, namely, on insolvency, but as the wife had it in her power to prevent this, they had it in their power to make this condition operate or not just as they chose ; and such, therefore, cannot be sustained to the hurt of creditors, especially in regard to a deed which they studiously concealed, for the avowed purpose of raising credit. The conduct of the respondents, therefore, in the contraction of this debt, ought to be held as sufficient to bar them from taking advantage of the deed. The appellants admit that the right of the wife was a trust,—that she had merely a liferent of the estate, the fee being in the children ; but while they concede

this, they maintain that this liferent fell under the *jus mariti*, not only by operation of the law, but by the settlement itself; and, therefore, the appellants, as Scott's creditors, are entitled to come in his place.

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Pleaded for the Respondents.—An unlimited proprietor can settle his estate as he pleases, and full effect must be given to every lawful condition annexed to such settlement. The estate here was conveyed by the testator, to his daughter in trust, for behoof of her in liferent, and her children *nominatim*; and the condition adjected to this was, an absolute exclusion of her husband's *jus mariti* in the event of her husband becoming insolvent. This event took place, and thus prevented and barred him or his creditors from touching the moveable estate, or the rents of the land estate, descending by this settlement, including the timber arrested, which belonged to the deceased Archibald Chessels, and was carried by the settlement.

After hearing counsel,

LORD MANSFIELD said:

“That the intention of the testator being clearly and expressly evident, the deed gave a vested interest to the daughter and her children, exclusive of her husband's *jus mariti*, in the event of his insolvency.—This right being exactly similar to that created by a trust estate in England, for the sole and separate use of a wife, or a wife and her issue; and therefore moved to affirm.”

It was ordered and adjudged that the interlocutor be affirmed.

For appellants, *J. Montgomery, Al. Wedderburn, Henry Dundas.*

For Respondents, *E. Thurlow, Dav. Rae, Alex. Murray.*

WILLIAM LORD FALCONER, of Halkerton

Appellant;

ROBERT TAYLOR, DAVID BEATTIE, CHRISTIAN
Low the Widow, and JAMES LOW the Son
of JOHN LOW, and Others, Tenants upon
the Appellant's Estate, in Kincardineshire,

Respondents.

House of Lords, 7th April 1775.

LEASE—AMBIGUOUS CLAUSE—PAROLE PROOF.—Construction of clause in lease for 57 years, to renounce at the end of every 19 years, in the option of lessor and lessee. Held, this not to im-