she had uplifted.——THE LORDS found it relevant that the wife had an heritable bond before her marriage; and found, that her uplifting thereof being again re-employed heritably, did not make it fall to the husband as moveable. No 32.

Fol. Dic. v. 1. p. 386. Stair.

*** Fountainhall reports the same case:

THE LORDS found, where wives uplift sums heritable *quoad maritum*, and re-employ them again upon another heritable security, the husband had no interest therein, though he got no tocher; as also they found, (which was never decided before,) that in the wife's deeds of administration of her own proper goods, not falling under communion, she needed not her husband's consent, without prejudice of his right to the annualrents *jure mariti*. This last was not debated.

Fountainhall, MS.

*** See Stair's report of this case, No 29. p. 5993.

1685. *March.*

MARION ROLLO and her SPOUSE *against* MR JOHN FORREST, nearest of kin to MR ROBERT FORREST.

No 33.
An heritable bond, belonging to a woman before her marriage, was uplifted by her during marriage, and again lent out, to her and her husband in liferent, and their children in fee; whom failing, to the husband's heirs. Found, that it fell under her husband's *jus mariti*, unless she could make it appear that it was uplifted to be re-employed otherwise than in terms of the new bond.

MR ROBERT FORREST minister, and Marion Rollo sister to the Lord Rollo, being married without a contract of marriage, she, after the marriage, renounced a comprising she had for 8000 merks upon the lands of Bannockburn with consent of her husband, and the money was uplifted, whereof they spent 2000 merks, and lent 6000 to my Lord Abbotshall upon bond, bearing the receipt of the money from Mr Robert and his wife, and providing the liferent to them, and the fee to the bairns of the marriage; which failing, to Mr Robert's heirs and assignees. After the death of Mr Robert, and of the children of the marriage, who died after their father, the relict pursued a declarator that the 6000 merks in the hands of Abbotshall was a part of her 8000 merks heritably secured in manner above mentioned; and therefore ought to belong to her, because, as it fell not under the *jus mariti*, so it was uplifted *stante matrimonio*, and settled upon the husband and his heirs to her prejudice; consequently revocable as a *donatio inter virum et uxorem*.

Alleged for the defender, That the marriage was an onerous cause, which hinders revocation of deeds by way of provision to a husband or wife, when there is no contract of marriage. 2*do*, There is nothing settled on the husband but a liferent, and the last substitution to his heirs, failing the wife's own children, who were the fiars. 3*tio*, She has homologated the settlement by granting discharges of annualrent relative to the bond, since her husband's decease.

No 33. *Answered*, The provision in favour of the husband is at least revocable *in quantum* it exceeds a rational tocher, and the 2000 merks spent was sufficient to be given *ex eo capite* to Mr Robert, who had no estate to secure his wife in. 2*do*, The termination, *failing children*, ought to be landed upon the wife's heirs, she being left altogether destitute of any supply from the means of her husband, who died in debt. 3*tio*, No homologation takes off the benefit of revocation of a donation *inter virum et uxorem*, which is allowed, *ne mutuo amore se spolient*, and the discharges were granted before the children of the marriage died; and, if they had lived, it is like the mother would not have quarrelled the terms of the bond.

THE LORDS found, That the 2000 merks, and the liferent of the whole 6000, was a sufficient provision in favour of the husband.

1685. *Feb.* 11.—Thereafter it was *alleged* for the defender, That the money being uplifted, *ipso momento* that it came to the husband's hands, it fell under his *jus mariti*, so as he might lend it out in what terms he pleased.

Answered for the pursuer, The money being uplifted with a design to re-employ it for the wife's own use, it could not fall under the *jus mariti*; otherwise married women would be put upon a hard *dilemma* to lose heritable sums, either by the debtor's insolvency, or by their falling under the *jus mariti*, if uplifted. Again, if the simple uplifting of what a wife has heritably secured did make it moveable, husbands would induce their wives to dispone their heritages, that the price might be carried under the *jus mariti*.

Replied, When heritable sums are uplifted *stante matrimonio*, with a design to be heritably re-employed, the *jus mariti* will be excluded therefrom; but, in this case, where no such design can be proved, and there is a presumption to the contrary, in respect there was no tocher, and the relict acquiesced and homologated the manner of the re-employing, *ut supra*, the money ought to fall under the *jus mariti*.

THE LORDS found the sums uplifted upon the wife's renunciation fell under the husband's *jus mariti*, unless the pursuer could make it appear, that they were uplifted to be re-employed otherwise than is appointed by the new bond, whereby she has only a liferent, and the fee provided to the husband's heirs.

Fol. Dic. v. 1. *p.* 387. *Harcarse*, (CONTRACTS of MARRIAGE.) *No* 374. *p.* 96.

*** Fountainhall reports the same case:

MARION ROLLO, Lady Garvell, her cause with the friends of Mr Robert Forrest, her first husband, was decided, anent the 4000 merks of tocher he received with her, to whom it should belong.—She *contended* it was her's, because it was secured heritably on the lands of Bannockburn, and she only consented without ratifying *ex metu reverentiali*, to please her husband, who was then melancholy, and that her consenting to her husband's uplifting of it, did not render

it so moveable as to give him any more right *jure mariti* than to the annualrents of it, even as a requisition used by a wife does not presume that she minds to give that heritable sum required to her husband. See M'Kenzie's *Institut. part* 2. *tit.* 2. *p.* 90.——THE LORDS, before answer, had taken trial if it was yet extant, and if the money in Abbotshall's hands was the same individual money she and her husband lifted as her portion; yet now, on Castlehill's report, the LORDS found, seeing it was uplifted by a transaction, the nature of it was wholly innovated, and became moveable, and so belonged to the husband and his heirs and executors, and she has only the liferent of it in the terms of the bond. But she craved compensation for what she had expended upon his children after his death. No 33.

Fountainhall, v. 1. *p.* 402.

1719. *January.* HILL of Ibrox *against* KING.

A DAUGHTER having insisted in a reduction of a disposition of lands by her father, as done without any onerous cause, in prejudice of a settlement in her favour; the LORDS found it in part onerous, and refused to reduce; but ordered the defender to give bond, bearing annualrent to the pursuer for what was wanting of a just price. The disposition was made, and bond granted during the daughter's marriage, which gave rise to the question, whether this bond fell under the *jus mariti?* That it fell under, was *contended*, because all bonds are moveable before the term of payment; and if this bond was once moveable during the marriage, it of consequence fell to the husband, and could not cease to be his, though afterwards it bore annualrent.—It was *contended* on the other hand, That the bond came in place of land, and was the same as if the wife had sold her heritage during the marriage, and taken a bond for it, which unquestionably would be exempt from the *jus mariti*. Had indeed the marriage intervened betwixt the date of the bond and the term of payment, more might be said, for that would be the same case as if a bond had been taken as the price of land sold before the marriage.——THE LORDS found the sum heritable. See APPENDIX. No 34.

Fol. Dic. v. 1. *p.* 387.