

1787.  
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 SINCLAIR  
 v.  
 YOUNG, &c.

NOTE.—When this case came back to the Court of Session, the Court sustained the defence pleaded against the passive title *gestio pro hærede*, it being observed on the Bench, that as the Court had given relief in the case of actual service, while there was no intention to represent, so *a fortiori*, the same indulgence was due here.—M. 9734.

ARTHUR SINCLAIR of Masilapatam, Esq., *Appellant* ;  
 MARGARET YOUNG, wife of JAMES GORDON,  
 Younger of Cairston, and GEORGE }  
 ANDREW, Writer in Edinburgh, her } *Respondents.*  
 Curator, - - -

House of Lords, 20th March 1787.

SUCCESSION TO ADJUDICATIONS—INTEREST—HERITABLE OR MOVEABLE.—Whether the accruing interest in an adjudication belongs to the heir or executor? Held, in a question of compensation, that the interest accumulated and accruing, in an adjudication, is heritable, and belongs to the heir, and therefore did not fall under the husband's *jus mariti*.

Captain Allan was, before his death, owing Andrew Young, the respondent's father, the sum of £12,000 Scots, (£1000 sterling), for which debt he adjudged Allan's estate of Cairston for the accumulated sum of principal and interest, amounting to £18,305. 10s. Scots.

Andrew Young having died, was represented by his only child, the respondent Margaret Young. On Captain Allan's death the appellant succeeded to his estate, and being anxious to redeem the same from the adjudication, offered to do so; but insisted that he had a right to compensate or set off against that part of the accumulated sum and interest which belonged to Margaret Young, a sum of £300 owing by her husband, James Gordon, to him, which being refused, he brought a bill of suspension to try the question.

July 5, 1785.

The Lord Ordinary, of this date, found “ That Mr. Gordon, Margaret Young's husband, has right to the annual-rents arising from the accumulated sum in the adjudication, *jure mariti*, and that during the subsistence of the marriage; therefore sustains the reasons of suspension, as

“pleaded on the ground of compensation and retention.” But, on reclaiming petition to the Court, the Lords unanimously altered the Lord Ordinary’s interlocutor, and “Repel the grounds of compensation pleaded by the suspender, find the letters orderly proceeded, and decern.”—And a reclaiming petition against this judgment was refused.

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 Jan. 31, 1786.

Against these interlocutors the present appeal was brought.  
*Pleaded by the Appellant.*—The one-half of this debt belongs to Mrs. Margaret Young or Gordon. On this sum interest runs, and it therefore follows that the interest due upon that sum falls under the *jus mariti* of her husband. For although an adjudication renders heritable the accumulated sum for which it is led, yet the interest accruing thereon, from the time it becomes due, is a personal subject, falling under the executry like any other arrear of rent or interest, and therefore compensation ought to be sustained to that extent.

*Pleaded for the Respondents.*—The *jus mariti* of the husband over his wife’s estate, does not extend to her heritable estate. This right extends only to the moveable estate; and the adjudication here makes the debt heritable, so as to deprive him of all benefit, under his *jus mariti*, over the same. Nor can he ever have any claim over the interest of that sum, because an adjudication is a diligence resorted to, in order to recover payment of the debt out of the real estate, and not to afford a security for an annual income. The interest, therefore, accruing upon it, cannot be considered in the same light with the arrears of interest in an heritable bond, for these are separated from the principal as they fall due, but, in an adjudication, there is no obligation to pay interest annually; and it has been long settled, that the interest accruing on an adjudication descends, along with the principal, to the heir, and therefore is not covered by the *jus mariti*; and so compensation here is not pleadable.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For the Appellant, *Ilay Campbell, William Tait.*

For the Respondents, *R. Dundas, Alex. Wight.*

NOTE.—This case is shortly noticed in M. 5545, but it does not seem to be noticed that the case was appealed. It is there stated, that “the Court of Session declined entering into a discussion of the question, as a departure from a general rule so solemnly establish-

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“ ed ;” and “ That the whole sums contained in a decret of adjudication, whether principal, annual rents, or penalties, belonged to the heir.”

[M. 14,955 et M. 5229.]

MRS. ELIZABETH ROSE of Kilravock, - *Appellant* ;  
JAMES ROSE, an Infant, and FRANCIS RUSSEL, } *Respondents*.  
Advocate, his Guardian, - - - }

House of Lords, 2d April 1787.

SUCCESSION—HEIRS PRIMARILY LIABLE—RELIEF AMONG HEIRS—HEIRS WHATSOEVER, HOW INTERPRETED?—Several estates belonging to the same ancestor, were together conveyed in security of debt by heritable bonds. Part of the estate descended, after his decease, to the heir of line, and another to the heir male. Held, reversing the judgment of the Court of Session, that the heir male has not relief against the heir of line, in so far as the bonds are charged on his estate.

The barony of Kilravock, along with other estates, belonged to the family of Rose, the investitures in which, for the last 500 years, had stood destined to *heirs male*, and had descended from father to son, without interruption, till the death of Hugh Rose in 1600. After this, it had descended in the same manner to the fourth Hugh Rose, the appellant's brother, who died in 1782 without issue, leaving the appellant, his sister and heir of line, the heir male being the respondent, who was a grandson of their granduncle. According to the old investitures, the latter was entitled to succeed as heir male, and claimed the estate accordingly. But, in consequence of an alteration of the investitures during the possession of the latter series of heirs, between 1600 and 1782, chiefly for the special purpose of creating votes, a new order of heirs was introduced. The way this is usually done is, by first separating the property from the superiority. And in doing this, in the present instance, the property and Barony of Kilravock was conveyed by feu charter to a Lewis Rose, whom failing, to return to him, the said Hugh Rose, “ *and his heirs and assignees whatsoever.*” In the conveyance of the superiority, the same terms of destination were used, “ to four gentlemen named in liferent,