Thursday, July 2.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MITCHELL'S EXECUTOR *v.* MITCHELL'S TRUSTEE.

Husband and Wife—Bankruptcy—Wife's Separate Estate—Advances to Husband—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 1 (4) *—Claim by Deceased Wife's Representatives on Husband's Estate Sequestrated after her Death—Estate Separate by Deed of Settlement.*

The Married Women's Property (Scotland) Act 1881, section 1 (4), enacts—"Any money or other estate of the wife lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Held (1) that this enactment applied where, the husband's estate having been sequestrated after his wife's death, the claim was made not by the wife personally but by her representatives; (2) that it applied even though the wife's estate had the husband's rights excluded by deed of settlement and was therefore not dependent on the statute for such exclusion.

James R. Hodge, C.A., Glasgow, trustee on the sequestrated estates of W. H. Mitchell, draper, Aberdeen, appealed from an interlocutor pronounced on 1st May 1908 in Aberdeen Sheriff Court, appointing him to rank and prefer the said W. H. Mitchell *qua* executor-dative of Mrs Mitchell, his deceased wife, upon the sequestrated estates in terms of a claim lodged by him.

The following narrative is taken from Lord M'Laren's opinion—"The question raised by this appeal is the construction of the 4th sub-section of the 1st section of the Married Women's Property (Scotland) Act 1881 (*v. sup. in rubric*). The deceased Mrs Mitchell, who was married to the defender in 1900, inherited a sum of money or personal estate from her father, which by his will and codicils was to be held by her for her separate use exclusive of the *jus mariti* and right of administration of her husband. The greater part of this money was lent by Mrs Mitchell to her husband, and the debt is constituted by deed of acknowledgment granted by the defender to his wife, bearing date 31st January 1903. Mrs Mitchell died on 17th December 1906, survived by her husband and three children. The defender has been confirmed executor-dative to his wife. On 2nd October 1907 the estates of the defender were sequestrated. The defender, as executor of his wife, has preferred a claim in the sequestration to be ranked as a creditor for the money advanced to him as an individual by his wife, amounting according to the deed of acknowledgment to £958, with interest from 31st October 1902. The trustee by his deliverance dated 27th February 1908 has admitted the claim to the extent of £200, and as to this sum no question is raised. *Quoad ultra* the trustee has rejected the claim to an ordinary ranking 'but under reservation of the claimant's right to participate in any balance of the estate remaining after the claims of the other creditors for money or money's worth have been satisfied.' The Sheriff-Substitute recalled the deliverance of the trustee in so far as it rejects the claim and appointed the trustee to rank the appellant (respondent in this appeal) in terms of his claim."

The Sheriff-Substitute (YOUNG) stated in his note—"The ground upon which the trustee has thus so far rejected the claim is, that Mrs Mitchell's funds were immixed with the funds of her husband, the bankrupt, and that consequently, in view of section 1 (4) of the Married Women's Property Act 1881, no claim in respect of her advances can be admitted until the claims of the ordinary creditors have been met. This deliverance seems to me to be mistaken. We are not here dealing with a wife's claim to a dividend as a creditor in bankruptcy. When Mrs Mitchell died on 17th September 1906, one-third of the funds to which she had right vested in her children as legitim and one-third as dead's part, while the remaining third fell to her husband in virtue of his *jus relicti*. The claim which the trustee has declined to admit is put forward on behalf of those who by operation of law acquired a vested beneficial interest in her estate long before the bankruptcy. In my judgment, then, the provisions of the Married Women's Property Act, on which the trustee rests his deliverance, have no application to the case, and the executor ought to be ranked *pari passu* with ordinary creditors for the amount due on account of the said advances and interest, the right to the one-third which belongs to the bankrupt *jure relicti* being reserved to the trustee. . . ."

Argued for the appellant (the trustee)—The Sheriff-Substitute was in error in thinking that sub-section 4 of section 1 of the Married Women's Property Act 1881 was personal to the wife herself. The section applied not only to a claim by the wife, but also to claims made by assignees or others claiming through her. Her children's claim for legitim was in no higher position than her own claim, for they claimed through her. Assignees or creditors of a claimant were in no better position than the claimant himself—*Cochrane* v. *Lamont's Trustee*, January 24, 1891, 18 R. 451, 28 S.L.R. 299.

Argued for respondent—1. Sub-section 4 of section 1 of the Married Women's Property Act 1881 was inapplicable, for

on the wife's death the money lent by her to her husband ceased to be hers. It then belonged partly to her children as legitim and partly to her husband *jure relicti*. At the date of the husband's bankruptcy (which was thirteen months after his wife's death) there was no "estate of the wife" in his hands. The statute only applied to cases where a husband's bankruptcy occurred during the lifetime of his wife. 2. Moreover, the statute did not apply to cases where, as here, the husband's *jus mariti* and *jus administrationis* were excluded by deed of settlement. In such circumstances a wife did not benefit by the statute, and consequently was not bound by its conditions. The object of the Act was to confer rights on married women, not to impose disabilities on such married women as did not require to avail themselves of the benefits of the Act.

At advising—

LORD M'LAREN—[*After narrative of facts quoted supra*]—The provision of the Married Women's Property Act, sec. 1 (4), on which the appeal depends, has reference to "money or other estate of the wife lent or entrusted to the husband or immixed with his funds." Such money or estate, it is said, "shall be treated as assets of the husband's estate in bankruptcy," under the reservation, which the trustee has allowed, of a right to participate in the surplus if the estate should prove to be solvent.

The Sheriff-Substitute in his note explains his view of the statute, which seems to be that the statute only puts the wife under a personal disability to rank on her husband's estate, but does not affect the right of her representatives to rank on the husband's estate for their shares of legitim and dead's part.

I am unable to agree with the learned Sheriff-Substitute in his suggested limitation of the statutory provision. If the provision had been that a claim by the wife in bankruptcy should be postponed to that of other creditors, there would be room for the argument that the provision was personal to the wife, and did not affect her representatives. But what the statute says is that money lent to the husband shall be treated as assets of his estate in bankruptcy, and if the money in question is assets of his estate, it is of no consequence whether the claim to repayment is made by the wife herself, or by her heirs or assignees, because in either case the money is affected by the statutory condition under which it is to be treated as husband's estate in a question with creditors for "money or money's wôrth."

If the defender were solvent, it would be open to the wife's executor to bring an action and recover payment of the loan. But if the husband becomes insolvent, with the wife's money in his hands, the statute takes effect upon it, and fixes the quality of assets in bankruptcy upon the money lent, entrusted, or immixed with the husband's funds.

In the present case the wife's money was separate estate in her person in virtue of her father's will, and she did not need the aid of the statute to secure it to her independent of the *jus mariti*. I only mention this point, that it may not be supposed that it was overlooked. In my opinion the provision of the 4th sub-section is perfectly general, and applies to all the wife's separate estate which she had power to retain or to lend to her husband, whether the estate came to her separate use *vi statuti*, or as a condition of a will or private grant.

I am therefore of opinion that we should sustain the appeal and affirm the deliverance of the trustee in the sequestration.

LORD KINNEAR—I am of the same opinion, and for the same reasons as those given by your Lordship.

Two points are made by the respondent—the first being that to which your Lordship last referred. It is said that this lady's estate was expressly exempted from the *jus mariti*, not by force of statute, but by the provisions of her father's settlement, and that accordingly she does not require to appeal to the statute, and is not bound by the conditions with which it qualifies the right which it confers. I agree that the answer is that the fourth sub-section of section 1 is general in its terms, and applicable to the separate estates of all married women, irrespective of the sources from which that estate may have been derived. I assent to the observation which was made by the learned counsel for the respondent, that you are not to read sub-section 4 as if it stood by itself, but that it must be construed with reference to the context and the whole scheme of the Act. But there is nothing in the purpose or general scheme of the Act to force any other than their natural meaning upon perfectly plain words.

The general purpose of the Act is to give married women in general the same exclusive right in their separate estate as was already secured to those whose estates were settled by deed upon themselves to the exclusion of the *jus mariti*. That being the primary purpose of the Act, I see no reason for presuming any intention to introduce a limitation of the right to the disadvantage of the particular class of married women whom the Act was specially intended to favour. The terms of all the other sub-sections of section 1 are plainly of general application. The first applies to all cases where "a marriage is contracted after the passing of this Act." The second sub-section provides that "Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded. . . ." That the words "such estate" refer to the moveable or personal estate of a wife acquired before or during a marriage contracted after the passing of the Act seems to me to be clear, and I cannot doubt that if a married woman's estate were settled by deed without express mention of the *jus administrationis* of the husband, that right would be

excluded to the extent specified. Sub-section 3 enacts—"Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate . . . is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband." That again plainly applies to the estates of all married women. I see no reason why the fourth sub-section, on which the present question depends, should be more restricted in its application. The ground, in policy, whatever it may have been, on which it was thought that a wife should not be allowed to compete with her husband's creditors in bankruptcy must be the same whether, as between the spouses themselves, the husband's rights are excluded by a deed of settlement or by operation of law. But at all events the words of the Act cover both cases.

The second point rested on an argument of some subtlety, but I think fallacious. It was said that we were not concerned with the wife's money, but with the money of the children, and that the purpose of the Act was to regulate the patrimonial rights of the spouses during the marriage, but that it had nothing to do with the rights arising to either party on its dissolution—in this case by the death of the wife. It is common ground, however, that the wife's right to claim repayment of her advances is transmissible, and that it passes to her representatives or to her legatees. Now if the statute makes no provision to the contrary, the legal character and effect of the transmission must be regulated by the ordinary rules of law, and her representatives must take her estate exactly as it stood in her, and not otherwise. The question therefore is what was the extent of the wife's claim upon the sequestrated estate, because that is the claim which has passed to her representatives or to her children exactly as it stood in her. The respondent sought to enforce his argument by a somewhat confused assumption that what passed to the children was the money. But the money remains at her death exactly where it was before—in the hands of the husband or of his trustee in bankruptcy. The representatives do not take a real right by mere survivance. What passes to them is a *jus crediti*. If the husband had been solvent, the wife's representatives would have had a good action for repayment of the money, but on his sequestration the right to the money passed to his trustee in bankruptcy; the right of the wife and her representatives was converted into a claim for a dividend, and she and they alike must take that claim under the condition which the statute imposes. If a similar condition had been stipulated by contract when the money was advanced, no one would doubt that the wife's stipulations would have been binding upon her representatives, and I think it makes no difference that the conditions of her claim are fixed by statute.

I am therefore entirely of the same opinion as your Lordship. I think the rights of the children are no higher than the rights of this lady herself, and that accordingly the trustee is entitled to deal with the claim exactly as if it had been made by the wife herself in her lifetime.

LORD MACKENZIE—I am of the same opinion and on the same grounds.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the interlocutor of the Sheriff-Substitute and affirmed the deliverance of the trustee.

Counsel for Pursuer (Respondent)—Clyde, K.C.—Morton. Agent—Charles George, S.S.C.

Counsel for Defender (Appellant)—Cullen, K.C.—C. D. Murray. Agents—Cairns, M'Intosh, & Morton, W.S.

Saturday, July 4.

FIRST DIVISION.

[Sheriff Court at Elgin.

DUNBAR *v.* GILL.

Right in Security—Long Lease—Statute—Assignation in Security—Action of Maills and Duties—Competency—Registration of Leases (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 26), *secs.* 6 *and* 20—*Heritable Securities (Scotland) Act* 1847 (10 *and* 11 *Vict. cap.* 56), *sec.* 2.

Held that as section 6 of the Registration of Leases (Scotland) Act 1857 provides a particular procedure whereby an assignee in security of a long lease may enter into possession, such assignee is not entitled to bring an action of maills and duties to recover sub-rents.

The Registration of Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26), which in section 4 makes provision for assignations in security of long leases recorded under the Act, enacts—Sec. 6—"All such assignations in security as aforesaid shall, when recorded, be transferable, in whole or in part, by translation in the form as nearly as may be of the Schedule (D) to this Act annexed; and the recording of such translation shall fully and effectually vest the party in whose favour it was granted with the right of the granter thereof in such assignation in security to the extent assigned; and the creditor or party in right of such assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled, in default of payment of the capital sum for which such assignation in security has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased; and the Sheriff, after intima-