

justly or fairly within the discretion given to the Sheriff by the enactment.

The advantage which the creditors have in bringing the matter into Court is, that the trustee in a *cessio* is bound to account for his actings to an officer of the Court. But in the present case, if the trustee is to go on to distribute the estate, and then to obtain his discharge, there is no security whatever for the creditors. The person in whose favour the bankrupt has now granted a trust-deed was also trustee under a former deed, and there is no evidence that his administration was unobjectionable. If objections are made, he is in the position of being the only party to call himself to account. I am therefore for recalling the interlocutor of the Sheriff.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

The Court sustained the appeal, recalled the interlocutor appealed from, and remitted to the Sheriff to grant decree decerning the respondent Alexander Falconer, as debtor, to execute a disposition *omnium bonorum* for behoof of his creditors, and to proceed further in terms of the Statute 43 and 44 Vict. c. 34.

Counsel for the Appellants—C. S. Dickson. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent—Strachan. Agent—Peter Douglas, S.S.C.

Tuesday, December 18.

SECOND DIVISION.

MORRISON v. TAWSE.

Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. c. 29), sec. 3—Wife's Earnings not Kept Separate.

A married woman's earnings had not been kept separate from those of her husband, but had been lodged in a bank account in their joint names, "to be repaid to either and the survivor." *Held (diss. Lord Young)* that she was entitled, even after her husband's death, to prove that her earnings had equalled his in amount, and to credit herself with half of the sums so invested before accounting, as sole trustee and executrix for her husband's trust-estate.

James Tawse, bleacher, Downfield, Dundee, died on 6th September 1886, survived by his wife and a daughter by a previous marriage. He left a trust-disposition and settlement dated 15th September 1885, by which he appointed his wife his sole trustee and executrix. After providing for payment of his debts and deathbed and funeral expenses, he provided that his widow should during her lifetime not only be entitled to the free liferent use and enjoyment of the whole trust-estate, but should also be entitled from time to time, as she should think necessary, to use and appropriate such parts of the capital of the estate as she might require for her own personal use and maintenance, and that upon her

death the residue of his estate should be divided into three equal shares, of which his daughter was to get one.

The said daughter Mrs Rachel Tawse or Morrison claimed *legitim*, and accordingly brought an action of count, reckoning, and payment against the executrix Mrs Tawse in the Sheriff Court at Dundee to have the amount of her *legitim* determined.

The Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. c. 29), sec. 3, provides that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof."

At the time of her marriage in 1868 Mrs Tawse was a washerwoman, and after her marriage she continued to take in washing.

In 1869 James Tawse received payment of a legacy of £40. In the same year, on the death of his son, he received £200 from an insurance company. From his marriage in 1868 until his death in 1886 he made on an average £1 a-week as a bleacher. Upon 1st March 1870 the sum of £240 was lodged in the National Bank of Scotland, Dundee, upon a deposit-receipt in favour of the said James Tawse and his wife, "payable to either or survivor." After that date various sums were lodged in the same bank upon deposit-receipt in similar terms until 11th April 1881, when the amount, being £400, was uplifted and lent to the Dundee Provident Property Investment Company upon a deposit-receipt in favour of the said James Tawse and his wife, and bearing that that sum was to be repaid "to either or survivor." This Investment Company went into liquidation on 12th March 1884, at which date £14, 16s. 10d. of interest was due upon said sum of £400. In January 1885 £51, 17s. 1d., or a dividend of 2s. 6d. per £1, was paid, leaving a balance of £362, 19s. 9d, which was still unpaid.

Upon 22nd November 1881 the said James Tawse and the defender opened an account with the Dundee Savings Bank in their joint names, "to be paid to either of them and the survivor," and on 24th September 1884 they opened another account with said Savings Bank in the same terms. The balances at the credit thereof at the date of the death of the said James Tawse were respectively £144, 18s. 5d., and £108, 3s. 2d., which with interest amounted together at the date of the action to £261, 16s. 6d.

The defender alleged that at the date of the marriage she had £104; that during her marriage she made from 2s. to 28s. a-week by washing; and that she was entitled to £28, 2s. 6d. as alimony, at the rate of 12s. 6d. a-week for forty-five weeks, from the death of her husband until

the date when the pursuer intimated her intention to claim *legitim*.

She pleaded—“(3)The defender is, as well (1st) in respect of the terms of and circumstances attending the lodgment of the foresaid sums in said banks and with the said Investment Company, as (2d) under the Married Women's Property (Scotland) Act 1877, entitled to at least one-half of the said sums in her own right, and that over and above her legal or conventional rights, and prior to any division for ascertaining the amount, if any, to which the pursuer Rachel Tawse or Morrison may be entitled as *legitim*.”

At a proof before the Sheriff-Substitute the pursuer deponed that the house occupied by her father and the defender was her property, that for five years after her father's marriage she had asked no rent for it as certain repairs had been made upon it by him, but that now she got £14 a-year for it. She admitted her father had told her the defender often made £1 a-week by washing, but said it was against her father's wish that the defender worked so hard.

The defender deponed that at the time of her marriage she had £104, and her husband had nothing; that she paid his debts, and gave him money to buy clothes; that they put up a washing-house for their own convenience, and repaired the house; that she made about 28s. a-week by washing; that she kept both the money she made herself and what was given to her by her husband, and that with it she paid for whatever was required for the house; that she kept the deposit-receipts in repositories belonging to her, and that if her husband wanted them he had to ask her for the keys.

The defender was corroborated generally by other witnesses.

The following are the interlocutors in the Sheriff Court so far as relate to the questions argued in the Court of Session:—

“*Dundee, 12th January 1888.*—The Sheriff-Substitute [CAMPBELL SMITH] having made *avizandum*, . . . Finds with regard to charge item 2, being £261, 16s. 6d. due by the Dundee Savings Bank to James Tawse and Helen Steele, his wife, to be repaid to either of them and the survivor, that the defender is bound to give the estate credit for the whole of said sum, and not merely for the half of it, in respect of failure to prove that one-half of said sum had become her property by donation or otherwise, or even to prove that the deceased knew of the distinct terms of the receipt for the money taken by her from said bank, when she, as keeper of the household purse, deposited the money in bank: Finds, with regard to item 3, being £362, 19s. 9d. of money due by the Dundee Provident Property Investment Company to the said deceased and his said wife, and payable to either or the survivor, that the defender has by facts and circumstances established her title to one-half of said debt, having proved more particularly that at the time of her marriage she was possessed of about £100; that she earned a considerable income by washing and dressing clothes, and that the deceased knew that her written title to said sum was a title joint with his own, and with such knowledge acquiesced in said title: Finds, with regard to the defender's alleged discharge, that the widow's claim for aliment falls to be disallowed to the extent of £25, and the agent's claim

for work done under the trust-deed, which the pursuer repudiates to the extent of £5: Finds that the estate realised by the defender amounts to £261, 16s. 6d., and that the amount of moneys disbursed by her for which she is entitled to take credit is £41, 6s. 11d.; that therefore the estate at present divisible into thirds is £220, 9s. 9d.; Decerns against the defender for one-third of said sum, being £73, 9s. 11d.: Further, finds the pursuer entitled to a sixth share of the debt due to the deceased and the defender by the Dundee Provident Property Investment Company, conform to acknowledgment dated 11th April 1881: Grants warrant to the liquidator of said company to pay to the pursuer or her agent, upon production of a certified copy of this interlocutor, a sixth part of whatever dividend or dividends may hereafter become payable in respect of said debt: Finds the pursuer entitled to expenses modified to ten guineas, and decerns.

“*Note.*—The defender in substance claims the half of the apparent goods in communion as her own property, and she next claims the third of the other half as falling within her legal rights as widow. To give effect to that claim would be, I am convinced, to do no inconsiderable injustice to the pursuer. Her father obtained £200 from an insurance on her brother's life, who was drowned, and he also received a legacy of £40 from her mother's father, and to these sums she certainly had an equitable right, and for aught I know a good legal right to a share of them. Her stepmother's claim involves four-sixths of these sums, or what is left of them, and the equity of that claim I have not been able to discover. No doubt the defender presented her second husband, who was by no means as thrifty as she, with a suitable marriage dress, and she says (and I don't doubt her veracity, though I doubt the meekness of her temper) that she took home £104 in money, which she spent partly in paying his debts and partly in building a washing-house, and otherwise improving a property of the pursuer, and partly in investing £400 with the unlucky building society. Further, she says that she toiled night and day as a washerwoman, and earned at least as much as her husband did. I believe she earned a good deal, and also that her husband grumbled a good deal about her devotion to the washerwoman business at untimely hours. I am not able to see my way to apply the Married Women's Property Act of 1877 to the earnings of a washerwoman who works her business in her husband's premises, burns his coals, and perhaps in her eagerness to earn money neglects to cook his dinner or make his bed. If the wife be free to choose her own occupation, and to keep all her own wages, I think the husband ought to have due warning of the kind of partnership in which he is involved, and ought to have an opportunity of expressing either assent or dissent. At all events, if their interest be to be separated, their accounts ought to be kept separate. But in this particular household there were no separate accounts; there was not even a separate purse for husband and wife. There was only one purse, and the defender kept it. There was only one bank account, and the defender kept it in her husband's name and her own. Now, the presumption of law is, when there is only one conjugal purse, that it is the husband's purse, and that presumption would

extend to a joint bank account, at least when the wife manages that joint account at her own discretion, and there was no evidence that the husband knew that the written title taken by the wife was in himself and his wife or the survivor. I do not think a bank receipt in these terms is sufficient evidence of any separate property in the wife, or of *mortis causa* donation on the part of the husband. Besides, in the present case the theory of *mortis causa* donation is not consistent with the husband's last will (and he could revoke a donation *inter virum et uxorem*), nor with a previous mutual settlement signed by both of them. Each of these documents seems to me to exclude the idea that the married pair had divided all their funds in their lifetime. If they had, I am not disinclined to think that it would have been a fair enough way of winding-up the *quasi* commercial joint adventures of this double second marriage. I think the wife, in consideration of her economy and industry, may fairly enough have been entitled to half of the funds, but I hardly think she was fairly entitled to half the funds as a joint adventurer made over to her *inter vivos*, and then to a third of the remaining half as widow. Therefore it is that I think the alleged making-over of half the moveable estate to her *inter vivos* requires to be established by clear evidence. Such evidence I have failed to find. I do not believe that either the deceased or the defender ever intended to defeat the pursuer's claim for *legitim*. I believe they thought she would be content with a third of the whole property when the defender was done with it, and perhaps so she might had reasonable precautions been taken to prevent the defender spending it all."

The pursuer appealed to the Sheriff (COMBIE THOMSON), who pronounced these interlocutors:—"7th March 1888.—Recals the interlocutor appealed from to the extent and effect following, viz., in the 'discharge' of the statement of the defender's intromissions, sustains the defender's claim for aliment to the amount of 7s. 6d. a-week for forty-five weeks: Sustains the item 'solicitors' account,' as the same shall be taxed by the Auditor of Court: Finds that by virtue of the Married Women's Property Act 1877, sec. 3, the *jus mariti* and rights of administration of the defender's husband were excluded from the defender's earnings as a washerwoman from 1st January 1878."

"16th April 1888.—The Sheriff 'having resumed consideration of the cause, . . . Finds that the defender is entitled to receive credit in the accounting between the parties for the following sums, namely—(1) The sum of £16, 17s. 6d., being aliment for forty-five weeks at the rate of 7s. 6d. per week; (2) the sum of £8, 8s. 5d., being the taxed amount of the defender's agent's business account; and (3) the sum of £175, being the amount to which the defender was entitled as earnings as a washerwoman from 1st January 1878, exclusive of her husband's *jus mariti* and right of administration: Finds that the estate, as valued by the defender, amounts to £261, 16s. 6d., and that the amount for which she is entitled to take credit is £235, 4s. 5d., leaving a balance of £26, 12s. 1d. available for division; that the pursuer is entitled to one-third of said balance, being £8, 17s. 4d., for which sum decerns against the defender as exe-

cutrix of the deceased James Tawse: Finds no expenses due by either party."

The pursuer appealed to the Court of Session, and argued—1. The respondent had no claim for maintenance against an estate of which she had been left the liferent. 2. No deductions fell to be made in consequence of the Married Women's Property Act 1877. That Act was intended primarily to protect married women living apart from evil husbands. Even if it could have been made to apply here, it could only have been by keeping the wife's earnings distinct from those of the husband, which had not been done. On the contrary, the wife had herself so put the earnings together, and so invested them, as to give her husband right to the whole fund. It was well-settled law that the terms of the deposit-receipts and of the bank account were not such as to give any portion of the money to the wife. The wife's £104 undoubtedly became the husband's *jus mariti*, and it was only after 1st January 1878 she could have separated her earnings, but there was no change in the way in which the spouses dealt with their money after that date.

Argued for the respondent—1. The appellant had been so long in lodging her claim for *legitim* that the respondent was entitled to aliment up to that date at the rate sued for, for she had arranged her expenditure on the understanding that she was to get the liferent of the whole estate. At any rate, she was entitled to aliment at that rate until the next term of Martinmas after her husband's death—*Baroness de Blonay v. Oswald's Representatives*, July 17, 1863, 1 Macph. 1147; *Fraser on Husband and Wife*, p. 990. 2. The Married Women's Property Act 1877 clearly applied. The Act said nothing about keeping the woman's earnings separate. She was entitled to make her claim at any time if she could show how much her earnings had contributed to the fund in question, and that they had not been consumed. Even if she had gifted her earnings to her husband—which was denied—she could revoke the donation in spite of his death—*Fraser*, p. 950; *Laidlaw v. Laidlaw's Trustees*, December 16, 1882, 10 R. 374. If the accounts were to be considered joint accounts, then the law presumed that a half belonged to each—*Bank of Scotland v. Robertson and Others*, January 12, 1870, 8 Macph. 391. In any view, the deductions allowed by the Sheriff fell to be made before division into thirds took place.

At advising—

LORD LEE—The question in this case is, what is the amount of the estate of the late James Tawse, for which the defender as his widow and executrix is accountable in a question with the pursuer, who claims her *legitim*.

Two points have been discussed under this appeal which affect that question—the first being whether the defender is entitled to distinguish and separate from her husband's estate the amount of her earnings as a washerwoman since 1st January 1878, when the Married Women's Property Act 1877 came into operation; and the second being as to her claim to alimony out of her husband's estate up to the term after his death, which occurred on 6th September 1886.

The facts bearing upon the first point are as follows—After her marriage in 1868 to James

Tawse, the defender, who was a washerwoman, continued to take in washing and to follow the occupation of a washerwoman. Her husband was a bleacher, earning from 18s. to 24s. a-week. Having brought her husband a little money, a part of it was spent in building a washing-house attached to the house in which they lived; and the evidence clearly shows that her husband allowed her to follow her occupation in this place, and thereby to gain earnings which are proved to have amounted to 24s. per week, and sometimes as much as 28s. Her earnings in this way (after deducting expenses) appear to have been at least equal to those of her husband. She took charge of his earnings as well as her own, the balance, after paying what was required for the house, being lodged in bank in the joint names of the spouses, "payable to either and the survivor." Down to 1881 the money so deposited, along with a sum he had received under a policy of insurance upon the life of his son, was invested in a building society in the same terms. This investment proved unfortunate. The building society went into liquidation, and a dividend amounting to £51, 17s. is all that has been received upon the joint claim, leaving a balance of £362, 19s., which is supposed to be worth 5s. in the pound. The earnings subsequently to April 1881 were deposited in the savings bank in similar terms, the defender still taking charge of the money and keeping the books. The result has been that over and above the amount due by the building society there are two deposit-receipts, amounting in all, with interest, to £261, 16s. 6d., payable to either of the spouses and the survivor. This sum is the proceeds of the earnings of both of them. Assuming that the house expenses were paid equally out of the earnings of each (and there is no ground for supposing that the wife paid more than half), it is evident that at least one-half of the amount must have arisen from the defender's earnings. The question is, whether the amount of her earnings, so far as not expended, is her property by virtue of the Married Women's Property Act 1877, and is separable by her from the amount belonging to her husband's estate? The Sheriff-Substitute answered that question in the negative, holding apparently that the statute was inapplicable to the earnings of a wife unless kept separate. For he decided against the defender "in respect of failure to prove that one-half of said sum had become her property by donation or otherwise," adding in his note that if the interests of the spouses were to be separated their accounts ought to have been kept separate. The Sheriff took a different view, and sustained the defender's claim to the effect of separating her earnings from her husband's estate. My opinion agrees with that of the Sheriff. I think that the statute is not limited to cases where the wife's earnings are kept separate, and that these being protected by the operation of the statute may be claimed by her in so far as they can be traced and distinguished like any other separate estate belonging to a wife, and from which the *jus mariti* is excluded. There may be cases (like *Edwards v. Baxter's Trustees*, 13 R. 1209, *aff.* 13 App. Ca. 385) where a wife's separate estate, or the income derived from it, has been so dealt with as to raise a presumption that it has been applied

to a purpose of the wife's or to which she was a party.

But in the present case the first question is, whether the statute applied to the defender's earnings to the effect of saving them from the *jus mariti*? Upon that question my opinion is that the statute was applicable. It applies to the earnings of any married woman "acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged." In this case the exclusion of the husband's right of administration was of no consequence, because according to the evidence the husband did not exercise his right of administration. The terms of the deposit-receipts appear to have been settled by the wife with his consent or approval.

The next question is, whether the terms of the deposit-receipts imply any renunciation by the wife of her right to these earnings as her own separate estate? This question, I think, must be answered in the same way as if the estate in question had been a separate estate belonging to the wife in any other way; and I see no reason for ascribing to the terms of the deposit-receipt any different or higher effect as regards the wife's separate estate than such a deposit-receipt would imply as to the husband's estate. It does not imply in either case donation either *de presentis* or *mortis causa*. In both cases it leaves it open to the proprietor to vindicate his or her separate right in so far as the subject of that right is traceable.

If the wife's separate income from her own earnings had been paid over to the husband, or placed to the credit of his bank account, a different question would have arisen. In such a case donation might be presumed. But even in that case the doctrine laid down in the House of Lords in *Edward v. Baxter's Trustees*, 13 App. Ca. 385, would have enabled the defender to reclaim her earnings so far as not consumed. The doctrine as stated in that case was this—"By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed."

In the present case, however, there was nothing, in my opinion, from which a gift can be presumed, and I therefore think that the defender is entitled to separate from her husband's estate the amount of her earnings included in these deposit-receipts. Upon the evidence my opinion is, as I have already said, that the sum in these deposit-receipts must have consisted to the extent of at least one-half of her earnings—that is, £130, 18s. With this variation in amount, I think that the Sheriff's interlocutor allowing a deduction on account of the defender's earnings ought to be affirmed.

As to the defender's claim in name of alimony, my opinion is that it cannot be sustained. The case of *De Blonay v. Oswald*, 1 Macph. 1147, which was referred to in support of the claim, appears to me to be adverse to it in the case of a wife who takes her husband's estate under such a settlement as that which in this case has been executed in the defender's favour.

There was one point not argued which does not

stand very clear upon the interlocutors of the Sheriffs. I refer to the debt due by the Dundee Investment Company. No part of it has been recovered or intromitted with as yet, but I think that the Sheriff-Substitute's interlocutor goes too far in so far as it sustains the defender's claim to any part of the amount, excepting in so far as it consists of earnings subsequent to 1st January 1878. The £100 referred to by him, and all her earnings prior to 1st January 1878, in my opinion must have fallen to the deceased *jure mariti*.

Unless the defender could identify some part of the balance due by the Investment Company as produced by her earnings subsequent to 1st January 1878, when the Married Women's Property Act 1877 came into operation, I do not see that she can have any claim upon it as not falling into her husband's estate.

LORD RUTHERFURD CLARK concurred.

LORD YOUNG—I have the misfortune to differ from my learned brethren. The action is an accounting by an only lawful child against her father's executrix, and for *legitim*. The pursuer would have been entitled, if her father had left a widow but no will, to two-thirds of his moveable estate. But as he left a will, and she has repudiated it, her claim can only be for one-third, the widow taking the remaining two-thirds. The Sheriff by his judgment gives this only child as her *legitim* a sum of £8, which will be only slightly increased by the judgment your Lordships—who take a different view from him as to the widow's claim of aliment—are to pronounce. The facts of the case on which that judgment—singular in its money result—is to proceed are these. The pursuer's father married the defender—his second wife—in 1868. He was a bleacher, and she was a washerwoman. She, the defender, says—and I accept the statement—that when she married him in 1868 she had a fortune of £104. That passed to her husband *jure mariti*, as Lord Lee has remarked. So the man had some fortune; and in 1869 he got £200 from an insurance on the life of his son, who died in that year. Again, in 1869 he got a legacy of £40. In all he starts in 1869 with a fortune of £344.

Now, during the marriage, which was dissolved in 1886 by his death, he made £1 a-week, or a little more. His wife, the defender, had earnings too. What they were is matter of controversy. But the household was conducted on this footing, that the family lived in a house which belonged to the pursuer, she having succeeded to it from the first wife, her mother. Apparently she allowed her father and step-mother to have it at an easy rent; she explains that she did so in consideration of the repairs they made upon it, and the building of the wash-house, and I accept her evidence, because I find it confirmed by this, that the rent was raised after her father died. Now, the wife, the defender, was taking in washing, and the first question is, whether her earnings as a washerwoman fell under the Married Women's Property Act 1877. I confess I am strongly inclined to be against the application of that Act (unless the parties acted on the footing that the rule thereby made was to be applicable to their arrangements) to a case in which a man allows his wife, living in family with him, to take in washing or sewing, or keep a shop

in the house in which they live. I think it is for him to determine the footing on which that shall be done. I think the intention of the Married Women's Property Act was to prevent an ill-doing husband from invading a well-doing industrious wife and taking her earnings for his own purposes, as experience showed had been often done. But these parties, I think, showed by their conduct that they were not acting on the footing of the wife carrying on a separate business and earning a separate estate protected from her husband. The case of a wife living in family with her husband, and earning money by charring or sewing or the like, is not *prima facie* a case for the application of the statute, unless, as was not the case here, the parties so act as to show they intend such case. Here there was a common fund, made up of what the spouses earned and what the husband succeeded to. This money was put in bank in the joint names indeed, but under a destination which, according to the law of Scotland, would make the husband the proprietor. Of this common fund £400 was put out in a speculation in a building society. It was all dealt with as one fund. That £400 was lost by the failure of the building society in 1880—at least only a dividend will be recovered. But the rest of the common fund, amounting to £261, 16s. 6d., remained in bank when the marriage was dissolved by the death of the husband. Now, that money he understood he was dealing with by his will. He made his wife executrix, giving her the liferent of all, with power, if need be, to spend the capital, and on her death the money is to go to his children. Was that done on the footing that she was a creditor for £175, that he had in his possession as a borrower—£175 of her money—and that his daughter, if she claimed her legal right, could only receive £8. I think he had no conception of such a thing, and neither, I am persuaded, had his widow. But her claim, if a debt, must be capable of being proved as such. It is no case of donation between husband and wife. It is a claim of debt, the same as if she were not the executrix of her supposed debtor. How would she have proposed to establish it? By parole evidence, and saying she carried on business in her husband's house as a washerwoman? Would she, by proof of the fact that she took in washing and got payment for it, have been held to have established her claim to a debt of £175. I think that is out of the question. I never heard of a claim being so established. My opinion, then, is against the application of the statute to the present case, looking to the nature of the earnings and the conduct of the parties. The husband supplied the house accommodation which they enjoyed together, and bore the expenses of the establishment, and was liable for every farthing of the debts of the household, and when the wife is put to show that she has a claim for £175 she fails. I cannot in these circumstances agree with a judgment which will give the only legitimate child of the deceased a sum of £8, and which, as I understand your Lordships' opinion, will give the widow £180 as debt due by the estate.

My conclusion is, that the deduction to be made from the executrix estate is £43, 4s. 5d. (expenses of the trust). Deducting that from £261, we have £218, a third of which is £72, which I should find to be the pursuer's

legitim. In short, I concur substantially with the judgment of the Sheriff-Substitute, while I have thought it right to make the observations I have now made as to the application of the statute to the circumstances, and as to the necessity of the wife in the circumstances establishing her claim as a creditor.

The case was argued on 20th October before the appointment of the Lord Justice-Clerk.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of the Sheriff-Substitute of 12th January 1888, and whole interlocutors subsequently pronounced in the Inferior Court: Find that the defender’s liability, as executrix of the deceased James Tawse, to account to the pursuer for her *legitim* out of the estate of the said James Tawse is not now disputed; and with regard to the account produced by the defender, and the pursuer’s objection thereto . . . (2) Find as to the balance due upon two accounts kept with the Dundee Savings Bank in name of the deceased and the defender, ‘to be repaid to either of them and the survivor,’ that the same consisted to the extent of one-half, or £130, 18s. 3d., of earnings gained by the defender as a washerwoman subsequent to April 1881, and did not form part of the deceased’s estate; (3) find that no part of the balance due by the Dundee Provident Property Investment Company has been recovered or intromitted with by the defender, and that she was not in right of the same excepting in so far as she might have proved the sums to have consisted of earnings by her as aforesaid subsequent to 1st January 1878, and find that she has not proved that any part of said balances was composed of such earnings: Subject to these findings, approve of the charge side of the account: Further, as to the discharge side of the account, Find that the defender, as executrix under the trust-settlement of the deceased husband, has no claim in name of alimony out of his estate; and therefore sustain the objection to the item of £28, 2s. 6d.: Repel also the pursuer’s objection to the charge for expenses of administration, and with these findings remit the case to the Sheriff that effect may be given thereto, and decern.”

Counsel for the Appellant—Sol.-Gen. Darling, Q. C.—Chisholm. Agent—David Milne, S. S. C.

Counsel for the Respondent—Rhind—Baxter. Agent—Robert Menzies, S. S. C.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WOODSIDE STEEL AND IRON COMPANY v.
DICK & STEVENSON.

Contract—Executory Sale—Delay—Disconformity to Contract.

Under a contract for the supply of machinery which specified no time for completion of the work, the price was payable, one-half upon delivery, one-fourth upon the machinery being started, and the remaining fourth three months thereafter. The first instalment and part of the second were paid at the time stipulated. In an action against the purchaser for the balance of the second instalment he sought to set off alleged loss from undue delay in delivery, and from disconformity to contract, and pleaded that the pursuers, being themselves in breach of the contract, were not entitled to sue under it.

Held that the allegations of disconformity were relevant, but did not form a sufficient defence, seeing that the third instalment, which exceeded the abatement claimed, had become due.

Messrs Dick & Stevenson, engineers, Airdrie Engine Works, Airdrie, by letter of specification dated 5th February 1883, offered to supply The Woodside Iron and Steel Company, Coatbridge, with a horizontal 3-cylinder engine with Stevenson’s Patent Rolling Mill Clutches, at the price of £2680, and their offer was accepted by letter dated 12th February. The following were the important parts of said letter of specification—“The price of the whole is to be £ , one-half payable when the principal parts of the materials of the engines and gearing are delivered at place of erection, one-fourth on the same being started, and the remaining one-fourth within three months thereafter. . . . We undertake to uphold the whole machinery herein specified for the space of twelve months from date of starting, inasmuch as we will supply and fit up, free of charge, parts to replace every part which may prove defective during that time, and will re-adjust all parts which may wear out of order within the time named; and, in short, we guarantee that the whole will be left by us in as good and perfect working order at the end of twelve months from date of starting as at first, excepting (of course) ordinary wear and tear and such wasting or breaking of parts as may be caused by accident or by derangement of the mills or other parts of machinery not embraced in this specification, and excepting also the doings of ill-disposed or malicious persons.”

By letter dated 20th February 1883 the engineers offered to change the engine from horizontal to vertical form, and to make certain other alterations in the specification on condition of the price being advanced to £2830, and this was agreed to. No precise time was specified within which delivery was to be given.

The engine and gearing were begun to be laid down in the Woodside Company’s works in Octo-