

the third question in the affirmative.

The fourth question is subsidiary to the third. It is, whether in claiming legitim the second party is bound to impute thereto the provisions made in the marriage-contract? On the same ground I hold that he is not. What the father must do through his executor in fulfilment of contracts—which is just through his executor paying a debt, the time of payment of which is the date of his decease—cannot constitute a bar in the way of a child who is benefitted by the contract from making such claim on residue as would be open to him did no such contract exist. It follows that what he gets by the contract cannot be founded on to diminish his claim at law to a share of the residue of his father's estate.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court found and declared in answer to the first question that the bequest therein mentioned in favour of the second party did not confer upon him a right to the fee of the residue and remainder of the estate in question; in answer to the second question, that the first party was bound to retain the said residue and remainder in his own hands until the death of the second party, and *quoad ultra* answered the second question in the negative; and answered the third question in the affirmative, and the fourth in the negative.

Counsel for the First Party—H. Johnston—Fleming. Agents—R. C. Bell & J. Scott, W.S.

Counsel for the Second Party—Guthrie—Dundas. Agents—Mylne & Campbell, W.S.

Friday, March 18.

SECOND DIVISION.

[Sheriff Court of Wick.

ANDERSON v. LEITH (ANDERSON'S TRUSTEE).

Bankruptcy—Sale—Husband Selling to Wife the Furniture of their Dwelling-house—Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 1—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 1, sub-sec. 4.

A wife agreed to pay to her husband money from her separate estate to the value of the household furniture belonging to her husband, in return for which the furniture was to be sold by him to her. Payments to an amount exceeding £225 were made by the wife to her husband at various times from January 1886 till December 1890, when the husband wrote, and handed to his wife a "sale-note" acknowledging the payments, and in consideration thereof stating that he had sold her the furniture, which was inventoried at £225.

The furniture remained in the joint use and enjoyment of the spouses.

On the sequestration of the husband's estates the wife sought to interdict his trustee from selling the furniture.

Held, that even assuming a *bona fide* transaction between the spouses, it was not one which fell within the provisions of the Mercantile Law Amendment (Scotland) Act 1856, sec. 1, and even if the Act had applied, the furniture had been "lent or entrusted" by the wife to her husband and "immixed with his funds" in the sense of the Married Women's Property (Scotland) Act 1881, sec. 1 (4), and was liable to the claims of his creditors.

The Mercantile Law Amendment (Scotland) Act 1856 provides—Section 1. "From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence in process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same."

The Married Women's Property (Scotland) Act provides—Section 1 (4). "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."

This was a petition in the Sheriff Court at Wick by Mrs Mary Benvie or Anderson, wife of the Reverend William Harley Anderson, M.A., minister of Pulteneytown, residing at Rosemount, with his consent and concurrence, against Robert Leith, solicitor, Wick, trustee on Mr Anderson's sequestrated estate. The object of the petition was to interdict the defender from carrying away certain furniture, the alleged property of the pursuer in the house at Rosemount, which he had seized and intended to sell for the benefit of the creditors.

Mr Anderson's estate was sequestrated upon 4th September 1891, and the defender was unanimously appointed trustee on 16th September, and his election was thereafter duly declared and confirmed.

The pursuer alleged that upon 9th December 1890 Mr Anderson sold her all the furniture, originally his own property, in terms of the following sale-note—"I, William Harley Anderson, M.A., minister of Pulteneytown, residing at Rosemount, Wick, hereby acknowledge that I have received from Mrs Mary Benvie or Anderson, my wife, out of her separate estate the sum of Two hundred and twenty-five pounds sterling (£225), which has been paid to her at various times since the death of her father, the late Wm. Benvie, Esq.,

merchant, Dundee, by the agents for his trustees, appointed by his settlement of his affairs, said agents being Messrs Reid, Johnstone, Scrimgeour, & Co., solicitors; in consideration of which sum of (£225) Two hundred and twenty-five pounds paid by her to me, I have sold to her all my moveable goods and effects, consisting of the furniture and plenishing of this my house situated at Rosemount, Wick, a particular statement of which follows." Then followed a detailed inventory of the furniture, valued at £225.

The pursuer averred—"They (the articles of furniture) are the absolute property of the pursuer, being purchased and paid for by her out of the sums received from her father's trustees. The said sum of £225 paid by the pursuer to the said William Harley Anderson for said furniture and other effects was a full and just price, and truly paid by the pursuer to the said William Harley Anderson, and retained by him as the value thereof."

The defender pleaded—"(6) The household furniture and effects referred to not having been delivered, but allowed to remain in the bankrupt's possession and use, the alleged sale is invalid. (7) Reputed ownership in the person of the bankrupt."

The Sheriff-Substitute (D. J. MACKENZIE) allowed a proof.

Mr Anderson deponed—"I know that my wife has separate means and estate derived from her deceased father's estate exclusive of the *jus mariti* and right of administration of her husband. (Shown No. 4 of process)—That is a copy of the trust-disposition and settlement by William Benvie, the pursuer's late father. (Shown No. 5 of process)—That is the disposition or sale-note. I prepared that deed. It is a receipt for £225 received by me from my wife, in return for which I sold all the effects in the house. The effects here mentioned were all the effects in the house. . . . Mrs Anderson was giving me her money for my purposes, and the condition upon which she gave me the money (which was hers) was that the furniture should be hers when the money she gave amounted to the value of the furniture. The year of Mr Benvie's trust ends in June, and Mrs Anderson gets her annuity as soon after the 4th of June as the accounts can be made up, but she receives an interim payment in December of £25. (Shown No. 22 of process)—That is my pass-book with the North of Scotland Bank, Limited, which I have now produced. The first payment that I received from her, Mrs Anderson, was £25, which appears in the bank-book as a payment under date 4th January 1886. It was paid by bank-draft of date about the end of December 1885. [The witness traced other and similar entries in his pass-book.] . . . These payments that I received from Mrs Anderson amounted to over £240. I never repaid that back to her, and I then delivered the furniture over to her by sale-note in terms of the verbal arrangement. The verbal arrangement was made at the time I received the first payment, and the money

was to go in payment of my debts. *Cross-examination.* (Shown No. 5 of process)—That document was written of the date it bears. The various sums I have spoken to went into my ordinary bank account, and were applied by me for household and other purposes in the same way as my ordinary income, and during all that time Mrs Anderson lived in family with me, and she was supported by me from these funds. (Q) Was it at the time of the first payment, 4th January 1886, that the tacit understanding was come to between you and Mrs Anderson?—(A) That being the first payment she had got out of her separate estate. When she paid it over to me she did so upon the understanding that she was to get the furniture. Subsequent to that tacit understanding we have spoken about the matter, but that was the understanding all through. Mrs Anderson would not have given me the money unless I would agree to that. (Q) Did you form any opinion why she would not give you the money except on that understanding?—(A) I did not form any opinion. (Q) Did it occur to you that it was in consequence of the condition of your affairs pecuniarily?—(A) No. I am satisfied that had nothing to do with it, but I cannot form any opinion as to what was her reason."

The pursuer deponed—"In the end of 1885 or the beginning of 1886 I came to an arrangement with my husband about my furniture. I arranged that he would get my money if I got value for it, as otherwise it being my own I could have laid it out in shares or otherwise. I accordingly paid him the money I received, and I was to get the household furniture and all other effects inside the house. I was to get the effects when the sum was paid up. The last instalment was paid in December 1890. (Shown cheques Nos. 23 to 28 of process)—These cheques are all payable to me, and are endorsed by me. I handed them to my husband. *Cross-examination.*—(Q) Is it correct to say that you had made up your mind to refuse to give your income to Mr Anderson unless he gave you the furniture?—(A) I cannot say if the word 'refuse' suits, but I said to him that I had a right to invest my money in outside property, and he was to let me have for it the furniture if I gave it to him. It is correct to say that I did not refuse to give him my money. Since 1885 I have been residing in family with Mr Anderson and managed the household affairs."

Upon 18th February 1892 the Sheriff-Substitute pronounced this interlocutor:—"[After stating the facts]—Finds in law that a contract of sale was entered into between the pursuer and her husband, which is set forth in the document No. 5 of process: Finds that no delivery of the furniture followed upon said contract: Finds that the said furniture has been 'lent or entrusted' by the pursuer to her said husband and 'immixed with his funds' in the sense of sec. 1, sub-sec. (4) of the Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21): Finds therefore that under sec. 2, sub-

sec. (2), of the said Act the only claim which the pursuer can have, if she any have, to the said furniture, is a claim in terms of the sub-section of the Act first above mentioned: Finds it is inexpedient to decide in this process the validity or value of such claim, as it is in any view insufficient to entitle the pursuer to interdict as concluded for: Finds that the pursuer is not entitled to interdict in terms of the prayer of the petition, &c.

"Note.— . . . Such being my view of the main facts of the case, it does not appear that the sale of the furniture was gratuitous or reducible in view of his bankruptcy, as the defender contends, but the effects of that sale have further to be considered in the light of the circumstances which follow. The furniture apparently remained in the joint use and enjoyment of the spouses. If the transaction had been one between independent persons, I think it would probably have been ruled by the principles laid down in *Sim v. Grant*, June 3, 1862, Scot. Jur. 517; see also *M'Bain v. Wallace*, 1881, 8 R. 106—and the first section of the Mercantile Law Amendment Act would have been held not to apply. Here there is no subordinate title such as loan or lease which would exclude the operation of the doctrine of reputed ownership, and modify the question of the application of the Mercantile Law Amendment Act. See Lord Young's remarks in the case of *Scott and Others v. Horsburgh*, February 20, 1889, 26 S.L.R. 362, on the question of the effects of a sale of a person's furniture in his own house, he retaining possession. In the present case the transaction is one between husband and wife, and the somewhat difficult problems which would arise in other circumstances are to my mind set aside to a large extent by the provisions of the Married Women's Property Act (44 and 45 Vict. cap. 21). That Act applies to this transaction, as the property (if it were acquired by the wife) has been so acquired since 1881, and any rights she has in this furniture are regulated by it. Now, it is not, I think, denied that this furniture has been used in common by the spouses, and therefore even if the wife had acquired the full property in it, it has been subsequently so immixed with the property of the husband as to give her no more than a claim after the other creditors—See Goudy on Bankruptcy, pp. 291, 293. This ground is sufficient for the decision of the question raised by the present action, which is one for interdict against the trustee, and as the validity or extent of the wife's claim in the sequestration is a separate and distinct question, it does not appear to me to be desirable to decide it here."

The pursuer appealed.

Cases cited—*Brown v. Brown's Trustee*, December 19, 1850, 13 D. 373; *Scott v. Scott's Trustee*, February 20, 1889, 16 R. 504.

At advising—

LORD JUSTICE-CLERK—If it had been necessary to consider the question whether this sale of furniture by the husband to the wife was a *bona fide* and honest trans-

action, I confess I should have had great difficulty in holding it to be such. It is not necessary, however, to decide the case on that ground, as there is sufficient for our decision in this view, that whatever may be the truth of the matter, this furniture which was in the husband's house, if it be assumed that it was the property of the wife, was entrusted by her to him, and remained in his house. On his bankruptcy, therefore, it falls under the limited protection afforded by the Married Women's Property Act, and neither she nor he is entitled to object to the creditors getting possession of it.

LORD YOUNG—I am of the same opinion. I think the Sheriff-Substitute's interlocutor is right. *Prima facie*, the trustee for the creditors is entitled to take possession of the furniture in the bankrupt's house, and the question is, whether the pursuer has proved anything to the contrary of his legal right? The furniture was originally the property of the minister. His wife was entitled to a certain annual income from the estate of her deceased father, and she says, and he concurs, that for some years before this time he drew the income from the trustees and spent it, and that in 1890 when the whole was counted up it amounted to £225, and the allegation is that he then sold this furniture to his wife by a bill of sale. It may be quite right, but so far as I know there is no precedent for such a case that a husband should draw his wife's income for some years, and use it to support herself and their family—which it was his duty to do—and then give her a bill of sale over the furniture which was in his house, so that when he was in embarrassed circumstances it should be put beyond the reach of his creditors. It has not an honest or straightforward appearance, and my opinion is that this was a proceeding to favour the husband and wife to the prejudice of their creditors. In my opinion, this was not a lawful sale, and looking at it in that view there is no need to examine the provisions of the Mercantile Law Amendment Act or the Married Women's Property Act. But the question was argued to us, and it is right I should state my opinion upon it.

With respect to the Mercantile Law Amendment Act, I am very doubtful if it has any application to such a case as this at all. It is primarily meant for sales taking place in the course of business, but this is not a sale of that kind. There may be cases in which it would be difficult to say whether the Act applied or not. There may be a borderland—a region where it is difficult to say what cases fall under it—where there is very little distinction between cases in which the Act applies and in which it does not. Even if we assume the honesty of the transaction, I think this is not a case that falls within the spirit or letter of the Act. Even if the pursuer were entitled to claim this furniture so far as the Mercantile Law Amendment Act would allow her, and represent it as her own, I think this is just a case of a wife entrusting her husband with the custody of her pro-

perty. One duty of the husband was to have a house with furniture in it for the accommodation of his wife and family, and he had that furnished house before he sold his furniture, but if the transaction she alleges was a true one, and the furniture became her property, I think that she entrusted her husband with the custody of it so that he could carry out that part of his duty. Well, that exposed her property to the diligence of her husband's creditors, and I concur with your Lordship that the Sheriff-Substitute's interlocutor is right and ought to be affirmed.

LORD RUTHERFURD CLARK—I also am of opinion that this furniture must go to the creditors, but I am inclined to put my judgment upon the ground that I am not satisfied there was any *bona fide* transaction between the parties by which the wife acquired a right to these articles.

LORD TRAYNER—I agree with the Sheriff-Substitute. I am not able at this time to affirm whether there was a sale or not. The Sheriff is of opinion that there was a *bona fide* transaction, and I think a good deal might be said on either side, but I cannot affirm there was only a simulated sale.

But even if we assume that there was a *bona fide* transaction, does the Mercantile Law Amendment Act apply? I agree with Lord Young that neither in letter nor spirit does the Act apply to a case of this kind.

Assume, however, that the Act does apply, then the pursuer has to meet the provision in the 4th sub-section of section 1 of the Married Women's Property Act 1881, and applying that section to the circumstances of this case, I agree with your Lordships in thinking that the furniture had been entrusted to her husband's custody, and therefore was liable to the claims of her husband's creditors.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellant—Strachan—
Craigie. Agent—Alexander Mustard,
S.S.C.

Counsel for the Respondent—M'Lennan.
Agent—Thomas Liddle, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, February 2.

(Before the Lord Justice-General, Lord
Adam, and Lord M'Laren.)

SHARP v. TODD.

*Justiciary Cases—Summary Prosecutions
—Sentence—Deviation from Statutory
Form—Summary Procedure (Scotland)
Act 1864 (27 and 28 Vict. cap. 53), sec. 18,
Schedule K.*

In a summary prosecution for a penalty for a contravention of the Merchant Shipping Act 1854, brought under the Summary Jurisdiction (Scotland)

Acts 1864 to 1881, the Sheriff pronounced a sentence decerning against the defender for payment to the complainer of the penalty. The sentence contained no conviction of the contravention charged. *Held* that the sentence was bad.

George Sharp, shipmaster, was charged before the Sheriff Court at Aberdeen upon a complaint under the Summary Jurisdiction Acts 1864 to 1881 and the Criminal Procedure Act 1887 at the instance of George Todd, fireman, Aberdeen, with concurrence of George Cadenhead, Procurator-Fiscal of Court, which complaint set forth that he "did on 12th September 1891, in Aberdeen, upon payment of the wages due to the complainer, or on the 17th day of September 1891, in Aberdeen, upon the discharge of the complainer, a fireman on board the steamship 'Spray' of Aberdeen, of which the said George Sharp is master, fail to sign and give to the complainer a certificate of his discharge in the form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge, contrary to the Merchant Shipping Act 1854, particularly section 172 thereof, whereby he has rendered himself liable to a penalty of not exceeding ten pounds sterling, together with the expenses of prosecution and conviction, as provided by section 531 of said Act;" and prayed the Court "to convict him of the said contravention, and to adjudge him to suffer the penalty provided by the said Act."

After trial the Sheriff-Substitute pronounced the following decree—"Having heard the agents for the parties and considered the proof adduced, decerns against the defender for payment to the complainer George Todd of the sum of 10s. of penalty and £1, 17s. 6d. of expenses, and grants warrant for arrestment and pointing in default of payment, such arrestment and pointing to be carried into effect by sheriff-officers in the same manner as in cases arising under the ordinary jurisdiction of the Sheriff." Sharp took a case.

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 18, provides—"The sentence of the Court may be in one or other of the forms contained in Schedule K to this Act annexed, or as nearly as may be in such form, according to the nature and circumstances of the complaint."

At advising—

LORD JUSTICE-GENERAL—I am of opinion that this conviction—I should rather say decree—cannot stand. The complaint alleges a contravention of section 172 of the Merchant Shipping Act 1854, and it is important to observe the terms in which the section penalises a contravention. "If any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding ten pounds."

The complaint quite properly takes the same view of the legal qualities and nature of the contravention, because it craves the Judge to "convict the said George Sharp