

mated value, and looking to the state of the property market and the eminence of the valuers, it is unlikely that the property will fall in value to that extent. The reporter therefore thinks that by carrying out the proposed arrangement the interests of the remaining beneficiaries will be sufficiently secured."

Argued for the petitioners—The property here consisted of shops, warehouses, and other buildings in Glasgow, which were so built that it was practically impossible to sell any one part of them without selling the whole. The present time was most inopportune for selling the estate, as house property in Glasgow was much depressed in value. Mrs Findlay's children had agreed to accept a sum below the money which would come to them on the basis of the valuation of 1883, so that even if property in Glasgow were to fall lower the other beneficiaries would not be prejudiced. The only way to carry out the intentions of the trust in fairness to everyone was to borrow on the security of the heritable estate. The Court had great discretionary power in allowing trustees to borrow under the 3d section of the Trusts Act, and this was a case in which it was expedient for the trust, and not inconsistent with the intention of the trust, that such power should be given—*Arkley and Others (Hay's Trustees) v. Miln*, June 13, 1873, 11 Macph. 694; *Smith and Another (Weir's Trustees)*, June 13, 1877, 4 R. 876; *Downie and Another*, June 10, 1879, 6 R. 1013.

The Lord Ordinary issued the following interlocutor: "Grants warrant to and authorises the petitioners to borrow the sum of £22,400 sterling on the securities of the heritable properties belonging to and forming part of the trust-estate of the deceased William Lochhead referred to in the petition, or any one or more of them, and that in one or in several amounts, or at one time or at several times, as the petitioners may find most convenient in the administration of the trust, for the purpose of carrying out the arrangement set forth in the petition, and for that purpose to grant a bond and disposition in security, or bonds and dispositions in security, containing all clauses usual and necessary, in favour of the lenders: Finds the expenses of the petition, as the same shall be taxed by the Auditor, to be a proper charge upon the trust-estate and upon the share thereof falling to the children of Mrs Findlay, in the proportion of three-fourths to the former and the remaining fourth to the latter, and decerns."

Counsel for Petitioners—R. V. Campbell.
Agents—Maitland & Lyon, W.S.

Counsel for Mrs Findlay's Children—Lorimer.

Tuesday, December 4.

SECOND DIVISION.

EARL OF EUSTON, PETITIONER.

Public Records—Register—Transmission of Volume of Register for Production at a Trial in England.

The Court granted the prayer of a petition presented by an Englishman for the purpose of having the Registrar-General authorised

to exhibit a volume in his custody before the High Court of Justice in England in a suit pending there.

The petitioner, the Right Hon. H. J. Fitzroy, Earl of Euston, was the plaintiff in a suit pending in the High Court of Justice in England (Probate, Divorce, and Admiralty Division), the purpose of which was to have his marriage with Kate Walsh Smith, otherwise Fitzroy, commonly called Countess of Euston, annulled, on the ground that at the time of the said marriage she had a husband then alive, named George Manley Smith, to whom she was married on 16th July 1863 at St Mungo's Catholic Chapel, Glasgow.

The petitioner set forth that it was necessary for the purposes of this suit to prove this previous marriage, and to identify from the principal certificate or schedule the handwriting of the contracting parties.

This principal certificate or schedule was in the custody of the Registrar-General for Scotland, at Edinburgh, and the application was presented for authority to have the volume containing it exhibited before the High Court of Justice in London under the custody of an officer selected by the Registrar-General, and by whom the said volume was to be restored to the custody of the Registrar-General.

The Court was prayed "to grant warrant to and authorise the said Registrar-General, or his deputy, to convey the said volume to London, and there to exhibit the same in the said High Court of Justice at the trial of the foresaid cause."

The Court, without hearing counsel, granted the prayer of the petition.

Counsel for Petitioner—Maconochie. Agent—Tods, Murray, & Jamieson, W.S.

Wednesday, December 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.]

FERGUSON v. WILLIS, NELSON, & COMPANY.

Husband and Wife—Jus mariti—Bankruptcy—Earnings of Wife Carrying on a Separate Business—Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. cap. 29), sec. 3—Earnings—Stock-in-Trade.

The protection from her husband and his creditors of the earnings of a married woman carrying on a separate business in her own name, which is conferred by the Married Women's Property Act 1877, does not extend to the stock-in-trade from which these earnings are made.

A woman who prior to her marriage in 1872 had carried on the business of a milliner, continued her business after her marriage, retaining her maiden name as her trading designation, and contributed by her earnings to the maintenance of the household. Her husband was sequestrated after the passing of the Married Women's Property (Scotland) Act 1877. In a com-

petition between the husband's trustee and a creditor of the wife in her separate business, who had poinded some of her stock-in-trade—held (*diss.* Lord Deas) that the wife's whole stock-in-trade had passed by her marriage to her husband *jure mariti*, and, in the absence of any evidence of a transfer by him to her, remained his down to his sequestration, and was unaffected by the Act of 1877.

The Married Women's Property (Scotland) Act 1877, which came into effect on 1st January 1878, provides (sec. 3)—“The *jus mariti* and rights 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.”

Richard Ferguson, ironmonger, Argyle Street, Glasgow, was married in 1872 to Margaret Scott, who at that time, and for some years previously, had been carrying on a successful business as a milliner at 29 Argyle Arcade, Glasgow, under the name of “M. Scott.” There was no marriage-contract between them. After her marriage Mrs Ferguson continued to carry on her business as formerly under her maiden name of “M. Scott,” and her husband did not interfere in any way in the management or carrying on of the business.

On the 12th of April 1882 the estates of Richard Ferguson, who was the sole partner of the firm of J. & R. Ferguson, ironmongers, were sequestrated, and James Henderson Ferguson, accountant in Glasgow, was appointed trustee. He thereupon, in virtue of his act and warrant, took possession of the millinery shop and business of “M. Scott,” along with the whole stock and assets.

Mrs Ferguson had, in the course of her business as a milliner, accepted, under the name “M. Scott,” a bill at four months, dated 1st February 1882, for £32, 0s. 4d., drawn by Willis, Nelson, & Company, straw hat manufacturers and warehousemen, Miller Street, Glasgow, for the price of goods sold and delivered to her under her trading name of M. Scott. This bill not being paid, was protested by Willis, Nelson, & Company, who in virtue of an extract registered protest caused a poinding to be executed of various articles constituting part of the stock-in-trade contained in “M. Scott's” shop.

Willis, Nelson, & Company then applied for warrant to sell the articles embraced by their poinding. On 22d September 1882 a petition was presented in the Sheriff Court of Lanarkshire at Glasgow by the trustee on the sequestrated estate of Richard Ferguson, praying that they should be interdicted from proceeding to sell or interfere with these articles. The pursuer set forth that there was not any exclusion of the bankrupt's legal rights as Mrs Ferguson's husband, and that no arrangement was entered into between the spouses for any settlement of his

interests in the business. He further averred that large sums of money were obtained by Ferguson from his wife's business, and that no steps were ever taken by Mrs Ferguson for protection under any of the Acts relating to the property of married women in Scotland. He also alleged that since May or June 1883 he (pursuer) had been in actual possession of Mrs Ferguson's business, which he was actually carrying on, having a person in charge supervising the business, who took charge of the accounts and kept the keys.

The defenders (Willis, Nelson, & Company) alleged that both before and since January 1878, when the Act of 1877 came into force, the spouses had treated the business and assets of M. Scott as solely the property of Mrs Ferguson; that the business had been carried on in the name of M. Scott, and solely for her behoof; that any money advanced to Mr Ferguson was by way of a loan and was so entered in the books; that the bill on which the diligence was founded was addressed to “M. Scott,” and accepted in that name, and it was on her credit and on the stock and assets of her business that the goods were supplied; and that since January 1878 the business in question had been carried on by Mrs Ferguson for her own behoof, and that her millinery business was within the meaning of the Act a trade or a business carried on for her own behoof. They also averred that part, if not all, the stock-in-trade of the business consisted of stock and assets realised out of earnings therein made since 1st January 1878. To this last averment the pursuer replied that, assuming its truth, the stock as at the date of sequestration was to be regarded as *surrogatum* for that existing at 1st January 1878.

The pursuer pleaded—“(1) By virtue of the marriage the business of Mrs Ferguson, carried on by her under the style or form of ‘M. Scott,’ and the whole property and assets thereof, became vested in her husband, and by virtue of his sequestration are now vested in the petitioner.”

The defender pleaded—“(3) Mrs Ferguson having within the meaning of the Married Women's Property (Scotland) Act 1877 carried on the business of M. Scott under her own name, and by authority of the Act for her own behoof in whole or in part, her creditors, or the creditors of said business, are entitled to have the estate of said business kept separate from the property of Richard Ferguson, and to do diligence against said estate for said debts.”

After a proof, the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—“Finds that the petitioner is trustee on the sequestrated estate of J. & R. Ferguson, ironmongers, Argyle Street, conform to act and warrant dated 12th April 1882, of which firm Richard Ferguson was sole partner: Finds that on 11th March 1872 the said Richard Ferguson was married to Margaret Scott, milliner, Argyle Arcade: Finds that after the said marriage Mrs Ferguson continued to carry on her business as milliner under the name of M. Scott, as a separate and distinct business, without any interference on the part of her husband, and kept separate books and a separate bank account: Finds that she further continued to do so without any change from 1st January 1878, the commencement of the Married Women's Property (Scotland) Act, till after the said sequestration: Finds that by virtue of the said Act the said millinery

business and stock-in-trade, and profits thereof, do not form part of the sequestrated estate of J. & R. Ferguson, or Richard Ferguson, and that the petitioner, as trustee foresaid, has no right or title to interfere with or take possession of the same: Therefore refuses the interdict, and decerns, &c.

“*Note.*—The petitioner, as trustee on the sequestrated estate of J. & R. Ferguson, iron-mongers, of which firm Richard Ferguson was sole partner, seeks interdict against the sale of certain articles which form part of the stock-in-trade of M. Scott, milliner, Argyle Arcade, upon the ground that that business and stock fall under the sequestration. He maintains that they do so because Mr Ferguson has been since 1870 the husband of Miss Scott, though the millinery business has before and since been carried on by her in her own name. It cannot be denied that according to the common law of Scotland, which appears to be somewhat harsher to married women in this respect than the law of England, at least as the latter is tempered by equity, Miss Scott's business, and her earnings in that business, are subject to the *jus mariti* of her husband—in popular language, that they became his by the marriage; that in carrying on trade or business, she was, in the eye of the law, merely his agent; and that as he was liable for the debts contracted by his wife in that separate business, so he was entitled to appropriate and control whatever she earned in it. So the law remained (except that protection orders could be obtained in cases of desertion under The Conjugal Rights Act of 1861) until 1877, when the Married Women's Property Act excluded the *jus mariti* 'from the wages and earnings' of any married woman acquired or gained by her after 1st January 1878, 'in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name.' The question is, whether the protection from her husband and his creditors given to Miss Scott and her business creditors extends not only to her earnings from year to year since 1st January 1878, but to the stock-in-trade by means of which these earnings are made. The petitioner says that when the Act passed in 1877 the stock-in-trade was undoubtedly the property of her husband according to the law of Scotland, and that while the wife's earnings in her business as a milliner are since that date hers, and exempt from any interference by her husband or his creditors, there is nothing in the statute to deprive him, or at least his creditors, of his vested right in the stock-in-trade. On the other hand, the defenders, who are pouncing creditors of M. Scott, argue that it would be vain to protect the earnings of the wife if the business appliances by which these earnings are made remain open to the diligence of the husband's creditors; and they refer to the English case of *Ashworth v. Outram*, L.R. 5 Ch. D., and 46 L.J., Ch. 687, where under an English Act of Parliament in terms nearly the same as this, and in very similar circumstances, it was held 'that if the wages and earnings of a married woman are to be protected in an employment, the property, capital, stock, and effects embarked and employed in it at the time of the marriage, if they are allowed to be continued in the employment, and wages and earnings are allowed to be made therefrom, are

protected by this section as necessary to the fair interpretation of the Act.' The defenders also refer to the case of *Davidson v. Davidson*, 1867, 5 Macph. 710, as showing that even by the common law of Scotland there may be a renunciation of the *jus mariti* established by facts and circumstances to the effect of securing to a married woman an absolute right to her savings from her own earnings. That is a very important and novel case in the law of Scotland, but it has not, so far as I can see, a very direct relation to the present question. It was not a question with the husband's creditors, but with himself (though that is not the most important distinction), and the judgment was expressly put upon the ground that the spouses had been living separately, and that the fund had been created by the wife's savings from an alimentary fund constituted by verbal or implied agreement during the separation. Still the case might be taken as an authority, for the proposition, if that were of any moment here, that the *jus mariti* may be renounced or the husband's assent to his wife's carrying on a separate business may be effectually given without a formal writing, or without any writing.

“While it is clear, and indeed conceded, that by virtue of the statute, Mrs Ferguson's earnings since January 1878 are free from the *jus mariti* of her husband, and cannot be affected by the diligence of his creditors, it is equally clear that this is merely a result of the enactment, and could not have been accomplished by any voluntary act of the husband, or any postnuptial contract between the spouses apart from the statute. A husband cannot gratuitously withdraw part of his estate from his creditors by making it a provision for his wife taking effect during the subsistence of the marriage. This has been decided in a long series of recent cases, with which *Davidson v. Davidson* is quite consistent. It is thus to the terms of the Act alone that we have to look, and the case of *Ashworth v. Outram* is useful only so far as it guides to the true construction of the Act. The differences between our law and that of England are such that we cannot regard it as an authority except so far as it shows how to apply principles of interpretation, which are common to all systems of jurisprudence. While it is not relevant or sufficient to say that the proof shows that Mr Ferguson renounced his *jus mariti* over his business, and made it his wife's—a thing which he could not effectually do *quoad* his creditors, whom the pursuer represents—it is altogether a different question, whether and how far the Act of Parliament did make it her separate estate? Can it be held that her earnings from year to year are separable from the business and stock-in-trade which *ex concessis* were in law the husband's at January 1st 1878? Can we distinguish the capital employed at that time, and divide the annual profits into two parts—interest on capital, and wages for skill and labour? It is just possible that if the rights of parties are to be accurately adjusted that may have to be done in some cases, or even here, but about that I have no opinion. There is, however, no such question in this case, in which the pursuer attempts to seize the wife's whole business without paying any regard to her earnings—which the statute protects—beyond the suggestion that she may claim for them in

the sequestration. It appears to me that that is not the protection which the Legislature intends to give, and does give. It protects the wife's earnings 'in any business which she carries on in her own name, and 'these earnings are deemed to be settled to her sole and separate use.' In the words of Lord Coleridge in *Ashworth v. Outram*—'How far does that carry us? It seems to me that it must carry the protection, I will not say beyond the wages and earnings, but it must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. Therefore the effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband; for without the protection of the trade itself it is manifest that the protection of the wages and earnings in the trade is impossible. How can a person carry on an occupation or employment without materials? Can wages be made in any employment without what we may call tools? How could earnings acquired by the exercise of artistic skill be protected without protecting the pens and papers, the canvas and brushes, or the other necessary implements which a person has to use in order to obtain the literary, artistic, or scientific result? It is plain that to give—I do not say a liberal or loose—but a rational construction to the Act the protection afforded by it must be extended so far.' In short, Mrs Ferguson's earnings in the business are not only exempt from the *jus mariti*, but are deemed to be settled to her separate use, and they cannot be so if the apparatus of goodwill, connection, and stock-in-trade, by which alone they exist, are carried by the sequestration of her husband to the trustee for his creditors, and are liable to be sold and realised by him. It may be a question how far the creditors of a husband who after 1st January 1878 has allowed his wife to carry on a separate business, or of one who after that date has furnished capital with which his wife has begun and prosecuted in her own name a successful trade (for the two cases appear to be alike), may make good a claim to reimbursement of his contribution to the going business as a donation *inter virum et uxorem*. But it is not consistent with the provisions of the Act that that claim, if it exists, should be enforced by the trustees taking possession of the whole business carried on by the wife, and dealing with it as part of the husband's estate. That would be not only to set aside the statute, but to make it, as was said in argument, a mere trap for the creditors who have trusted the wife as a separate trader."

The pursuer appealed to the Court of Session. After hearing counsel, the Court allowed additional proof, which was led before Lord Shand. It appeared that the pursuer had had exhibited to him a balance-book of Mrs Ferguson's business of M. Scott when he was investigating the husband's affairs at the instance of creditors before the bankruptcy. This book showed that the business had been falling off since 1877. The pursuer had been entirely unable to recover it after the sequestration, and under a commission granted by the Court it was not recovered. A balance-sheet of M. Scott's business as at June 17, 1881, showed a sum of £789, 9s. 6d. as owing by the business of J. & R. Ferguson to her.

Mrs Ferguson deponed that since her marriage she had provided the household expenses.

The pursuer deponed that from documents in his hands Mr Ferguson appeared to have contributed to these expenses.

Argued for the pursuer—It was of importance to consider the husband's position. Was he proprietor of the stock-in-trade, or was he merely a creditor of his wife's? If the former, then the Act must be held, though it did not say so, to protect and secure to a wife, not only her earnings, but also the stock-in-trade. No benefit could be derived by an appeal to English law, as the common law was different in the two countries, and so the statutes which affected the common law produced separate results. Besides, the case of *Ashworth* was one into which the elements of rights of creditors and of sequestration did not enter. The words of sec. 3 of the Married Women's Property Act 1877 only protected a wife's "wages or earnings," and it could be shown from the proof that none of these were invested in this stock-in-trade. If not carried by the Act to the wife, the stock-in-trade remained the property of the husband, whose it became at the date of the marriage, and to whom no equivalent in money has been given. The Act was not intended to apply to a case like the present, where the wife carried on business with her husband's money and as his agent. It was said that "earnings" meant profits, and that by implication the capital of the business must go along with them as the means by which they are made, but the Act could not apply to undrawn profits. Even if the Act did give the wife the whole profits drawn or undrawn, it merely gave her a right to an accounting. She became a creditor of her husband's business, not a partner in it.

Argued for the respondent—The reasoning in the case of *Ashworth* was sound, and the principles there laid down were equally applicable both to England and to Scotland. The husband could not, since the passing of the Act, step in and claim the stock and implements by which he had set his wife up in business. The proper interpretation of the statute would be one which would protect not merely the earnings and profits but also the whole funds embarked in the undertaking, otherwise the wife would be only the reputed owner. The Act applied to all cases where a wife is in business of any kind whatever where credit is required, and where the wife pledged her own name. The interpretation suggested by the other side would do away with the very benefit which the Act was intended to confer. Here the millinery business was carried on solely by M. Scott, but it was proposed to make her responsible for the debts of J. & R. Ferguson contracted in their business as iron-mongers. As the stock which now pointed was not in the shop in 1878, but was only purchased recently, that fact should be sufficient to displace the pursuer's claim. If the husband was a creditor of his wife's there would be no necessity for an accounting, because he would get his share out of his wife's sequestration. The true position of matters was that the husband was not creditor but debtor to M. Scott, and that by the passing of the statute the capital of the millinery business became the wife's subject to a right of accounting—*Fraser's Husband and Wife*, 699; *Davidson v. Davidson*, 1867, 5 Macph.

710; *Biggart v. City of Glasgow Bank*, January, 15, 1879, 5 R. 470.

At advising—

LORD PRESIDENT—The pursuer here is the trustee of Richard Ferguson, ironmonger, Argyle Street, Glasgow, whose estates were sequestrated in 1882, and the question which arises is one of considerable interest and importance under the Married Women's Property Act of 1877.

The bankrupt was married to his wife Margaret Scott in the year 1872, and it does not appear that there was at that date any marriage-contract or exclusion of the husband's legal rights. At the time of the marriage Miss Scott was carrying on the business of a milliner at a shop in the Argyle Arcade there, and it appears that she had been engaged in that occupation since 1850. Now, as the law stood at the date of this marriage, there can be no doubt that the whole of Miss Scott's business, with the stock-in-trade and goodwill, passed to her husband by the assignation of marriage. He became full owner by the operation of the marriage just as much as she was before. No doubt the business continued to be carried on just as it had been previously by Mrs Ferguson in her maiden name; it was the business of M. Scott, and no arrangement appears to have been entered into as to any alteration in the manner of conducting it, or as to the principle upon which the profits were to be disposed of. Therefore from 1872 to 1877 the position of matters was, that M. Scott carried on her old occupation, realised the profits, and spent them in the maintenance of the household.

It appears that Ferguson was not very successful in his trade as an ironmonger, and the spouses seem accordingly to have lived principally upon the profits of M. Scott's business. When the Act of 1877 was passed no change appears to have been made by M. Scott in the mode of conducting her business, and nothing of the nature of a transfer between the parties is suggested to have taken place. The stock continued to be possessed by the husband, unless anything in the Act of 1877 transferred it to the wife, and so remaining in the husband, it continued in him until his sequestration in 1882. It appears that the business had been going back for some years prior to 1882, and it is satisfactorily proved, I think, that the stock was not at this later date equal in value to what it was either in 1872 or in 1877. There has been some difficulty in getting evidence upon this point, owing to the disappearance of the balance-book, but still I think we have enough before us to show that at the date of Ferguson's sequestration the stock was inferior in value to what it was at the date of the marriage.

Such being the state of the facts, the question comes to be, What was the effect of the Act of 1877? The respondents here are the creditors of Mrs Ferguson, who, as M. Scott, had granted a bill for £32, which was protested by the respondents, who thereafter executed a poinding of a portion of the stock-in-trade of the millinery business, and the present proceedings are brought by the husband's trustee to prevent a sale under the poinding. It is beyond dispute that at the date of the marriage the stock-in-trade passed to the husband *jure mariti*, and no evidence can be seen of any arrangement by which the effect of the marriage was taken off, or thwarted in any

way, prior to the passing of the Act of 1877. The wife carried on the business in the capacity of agent of her husband, and she was so carrying it on when the Act of 1877 was passed.

Now, it is provided by section 3 of that Act "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 her sole separate estate, and her receipt shall be a good discharge for such wages, earnings, or property, and investments thereof." The first case here comprehended is that of wages and earnings of a married woman. That seems to point at the case of a married woman being employed as servant or manager, and whether she should be paid by wages or salary, or, it might be, by a share of the profits, these wages or earnings are to be exempt from the husband's *jus mariti*. Then follows the case of a married woman who carries on business in her own name. Here the word "earnings" must be taken as applicable to the business which the woman carries on in her own name, and what the Act provides is, that the earnings of a married woman in any business which she carries on in her own name—which is the precise case with which we are dealing—shall be exempt from the husband's *jus mariti*. There is also provision for excluding the *jus mariti* of the husband from earnings obtained by the exercise of any literary, artistic, or scientific skill. Here the statute contemplates not only annual earnings, but sums of money in the lump or "property," and these are to be exempted from the *jus mariti*. The question comes to be, whether it can be maintained that where a married woman carries on a business in her own name, anything is protected by force of the statute against the husband's *jus mariti* except what properly falls under the words wages and earnings? I am of opinion that it is impossible to read these words in any more expansive sense than as protecting wages which the wife might earn in employment, or the periodical profits which might be earned in the conduct of business carried on in her own name. How, then, is it possible to say that the effect of the passing of this Act is to transfer from the husband to the wife the stock-in-trade and business which had been carried on at the date of the statute by a married woman in her own name? If it had been intended that such an effect should be operated, it surely would have been provided in apt words that not only the earnings of a married woman in any business carried on in her own name shall be protected against the husband's *jus mariti*, and be her absolute property, but that the stock-in-trade, as it stood at the date of the passing of the Act, shall also *ipso jure* be transferred from the husband to the wife. It would be a strange implication which would embrace thus in the earnings the property in the stock of the business. Therefore I cannot construe the statute in that way. There is nothing to prevent a married woman from

carrying on business and securing the earnings under the provisions of this statute, because, even if the stock-in-trade might be her own absolute property, it would still require the benefit of the statute to secure to her the earnings in the business as her own separate estate. It is, however, needless to deal with a case of that kind, because the business, so far as I can see here, belonged to the husband from the beginning, and never belonged to the wife after the date of her marriage in 1872. Therefore I am obliged to differ from the Sheriff-Substitute in the view he has taken. I think that the Sheriff-Substitute has been misled by the reference to the English authority. So far as the law of Scotland is concerned, I do not see how it is possible to reconcile his construction of the statute with some of the principles of the law of Scotland relating to husband and wife. The English authority quoted is *Ashworth v. Outram*, and I should not have been disposed to have even referred to the law of England if it had not been dealt with by the Sheriff.

The words of the Married Women's Property Act applicable to England are different from those used in the Act relating to Scotland, and are intended to apply to a very different system of jurisprudence. There was also this further difference, between *Ashworth's* case and the present, that in the case of *Ashworth* there was no insolvency, and, besides, the judgment in the case proceeded not so much upon the Married Women's Property (England) Act as upon a principle of the English Chancery law which is quite inconsistent with our law of husband and wife. This appears very clearly from the opinions of James and Baggally, L.J.J., and therefore the case of *Ashworth* is a misleading authority. The occurrence of bankruptcy, and the impossibility of a gift by a husband to a wife standing against the right of creditors to revoke, exclude the notion of a husband being in the position of trustee for his wife. I think therefore that the appellants must prevail, and that he is entitled to get the interdict he seeks.

LORD DEAS—I consider this a very important case, for it depends upon the way in which it is decided whether the Married Women's Property Act of 1877 is to have any practical effect in Scotland or not.

The parties were married in 1872, and for a good many years before that date the wife had carried on in her own name a millinery business. The occupation was one peculiarly suited for a woman, and she seems to have been very successful, and to have established a remunerative business. She continued after her marriage to carry on her old occupation, and she was so employed at the time when the Act of 1877 was passed, and for nine or ten years thereafter, and indeed up to the date of her husband's sequestration. It is with the earnings made by her from the time of her marriage down to 1883 that I consider we have to deal with in deciding the present question.

When I read over the judgment of the Sheriff-Substitute (which I considered a very able one) for the first time I came to the conclusion that the judgment was a right one, but after I understood that some of your Lordships took a different view of the case, I carefully reconsidered the opinion which I had formed and re-read the

Sheriff-Substitute's judgment. I have, however, again arrived at the same conclusion.

The only difficulty which I understand your Lordships felt was, that although this lady had made substantial earnings by her business, which was one much more suited for a woman than for a man to carry on, yet by her marriage the whole stock and business had been assigned to her husband, and there was no evidence of any specific re-transfer of them by him to her.

But I think that as this business was carried on by the wife after her marriage exactly as it had been carried on by her before it, and in her maiden name, there is sufficient evidence from facts and circumstances to come in place of any express transfer by the husband to the wife. I entirely concur in the view of this case taken by the Sheriff-Substitute, and desire only to add these few words to his able judgment, to which therefore I am for adhering.

LORD MURE—This is an action by the trustee on the sequestrated estate of Richard Ferguson, ironmonger in Glasgow, and he seeks to have the sale of certain pointed goods interdicted, and alleges that these goods belong to the bankrupt. The articles in question are part of the stock-in-trade of a shop where Mrs Ferguson, under the name of M. Scott, carried on her business as a milliner, and the pointing was carried out by certain of her creditors to recover payment of a protested bill of the value of about £32, and the sale about to follow upon this pointing is interdicted by the husband's trustee, who claims the articles as part of the sequestrated estate. The question really depends upon whether the goods pointed are the property of the husband or of the wife, and that again turns upon the construction which is to be put upon section 3 of the statute of 1877.

But for the provisions of this Act the goods would have been without a doubt the property of the husband; they passed to him by the assignation of marriage, and must remain his unless the words of the section of the Act of 1877 read by your Lordship bear the construction which it is contended they do, and which in that case would have the effect of re-transferring the property in these articles to the wife. The stock of this shop was undoubtedly the property of the husband at the date when this Act came into operation, and the question therefore comes to be, whether there is anything in the Act which takes it away from him. Now, I cannot say that I see anything in the Act which would have such an effect. I see no exclusion of the *jus mariti* by the statute from the stock-in-trade of any business which a married woman may carry on in her own name, and that being my view of the Act, I cannot see how the stock-in-trade of this shop ever ceased to be the husband's.

LORD SHAND—I concur in the opinion expressed by the majority of your Lordships. The statute by its terms gives to a married woman a right to the profits or earnings of any business which she carries on in her own name, but to nothing more. Clearly, I think the Legislature did not intend that a wife, while getting the wages or earnings of any business, should at the same time also get the capital which belonged to her husband at the date

of the marriage. For it became his business by the operation of the marriage, and it continued to be his at the date when the statute which we are now considering came into operation. The proof discloses the nature and extent of the earnings derived from this business, and it also shows that these earnings were devoted by Mrs Ferguson to the maintenance of the household. Had they, instead of being so expended, been laid out by her as an investment, there can be no doubt that they would have remained her property; or if payments had been made by her in repayment of advances of capital made to her by her husband, then no doubt a different and somewhat difficult question would have arisen.

The question therefore comes to be, if the property of this stock-in-trade was not transferred to the wife by the operation of the statute, how has it been transferred, for nothing of the nature of a deed of transference seems to have been executed between the spouses. The Sheriff-Substitute has found that it was by virtue of the Act that the stock-in-trade and profits of her business do not form part of the sequestrated estate of her husband. He does not specify any act on the part of the husband constructively making over the stock-in-trade to his wife, but as he explains at the end of his note that by the statute "Mrs Ferguson's earnings in the business are not only exempt from the *jus mariti*, but are deemed to be settled to her separate use, and they cannot be so if the apparatus of good-will, connection, and stock-in-trade by which alone they exist are carried by the sequestration of her husband to the trustee for his creditors, and are liable to be sold and realised by him."

I confess I cannot concur in the view taken by the Sheriff-Substitute of the operation of the Act. It would come to this, that by the statute alone not merely earnings but capital and stock-in-trade are equally exempted. Now the statute does not say this, and in the absence of any express provision to that effect, I do not think that anything of this kind can be inferred. Again, if there was any satisfactory evidence of donation between the spouses whereby it could be shown that the husband gave to his wife the stock-in-trade of this business, that might have been of importance in supporting the contention of the defenders, but I cannot see any evidence of this. There does not appear from the actings of the parties to be anything to take the wife out of the position of acting as an agent for her husband in the conducting of this business. But the mere fact of the husband's allowing the business to remain on the footing upon which it stood before the marriage, and of permitting it to be conducted by his wife in her maiden name, cannot be construed into a donation. The stock-in-trade of this business became the husband's by virtue of his marriage, and it continued so in spite of the Married Women's Property Act, and it has not been proved that he ever alienated it by donation, as occurred in the case of *Ashworth*. The Sheriff-Substitute at the end of his note says that "if the husband's trustees are entitled to take possession of the business carried on by the wife, and to deal with it as part of the husband's estate, the effect of that would be, not only to set aside the statute, but to make it a trap for the creditors who had trusted the wife as a separate trader." But the wife's creditors are not entitled, because the statute gave to a married woman the right in

certain circumstances to her earnings, to act as if it gave to her the stock-in-trade also. The wife's creditors will have their claim against the husband's estate if they can show that the stock-in-trade has been improved by her exertions, and that he has in any way been benefitted thereby. That the stock-in-trade as it now stands is the property of the husband, and passes to his creditors, I can have no doubt whatever.

The Court pronounced the following interlocutor:—

"Find in fact, that the appellant is trustee on the sequestrated estate of J. & R. Ferguson, ironmongers, Argyle Street, Glasgow, conform to act and warrant in his favour, of which firm Richard Ferguson was sole partner: Find that on 11th March 1872 the said Richard Ferguson was married to Margaret Scott, milliner, Argyle Arcade, Glasgow: Find that no marriage-settlement was made between the spouses either before or after the solemnisation of the marriage: Find that after the said marriage Mrs Ferguson continued to carry on her business as milliner under the name of M. Scott, as a separate business in her own name, with the knowledge and acquiescence of her husband, and that she continued to do so without any change till after the sequestration of her husband: Find that the stock-in-trade of the said business at the date of the marriage was of greater value than it was at the date of the sequestration: Find that there is no evidence that at the date of the marriage, or at any subsequent time, the said Richard Ferguson gifted or transferred to his wife the stock-in-trade of the said business, or any part thereof: Find in law, that the said stock-in-trade, by force of the marriage in 1872, became the property of the said Richard Ferguson *jure mariti*, and is now part of his sequestrated estate: Find that the Married Women's Property Act 1877 has not the effect of transferring from the husband to the wife the stock-in-trade belonging to the husband of a business carried on by a married woman in her own name: Therefore recal the interlocutor of the Sheriff-Substitute dated 30th October 1882: Grant interdict as craved in terms of the prayer of the petition, and decern: Find no expenses due from the date of closing the record in the Sheriff-Court till the date of the Sheriff-Substitute's interlocutor of 30th October 1882: *Quoad ultra*, find the appellant entitled to expenses in both Courts," &c.

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Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender—J. P. B. Robertson—
Jameson. Agents—J. & J. Ross, W.S.