

a transaction is or is not a *nudum pactum*. We have some decisions upon that, curious enough, because in our land a *pactum* may remain *nudum* upon which a price has been paid, although in Roman law a *nudum pactum* meant a mere stipulation and nothing more, ceasing to be *nudum* whenever arles had been given, because something having followed upon it, it had become clothed. Our decisions run on the other line of rails, or did, and it may be a long time yet before a different view of the law prevails. I give no opinion, then, upon the purchase of furniture in a man's own house for his own benefit, because there there is no ceremonial of delivery. But here we have a specimen of a very different class of cases—a class provided for by the Mercantile Law Amendment Act. From what I have said it will be seen that I differ from the Sheriff-Substitute and agree with the Sheriff in his assumption, and I think moreover that his assumption is not a mere assumption, but is conform to the truth as regards the facts of the case. He says—"Without inquiring too minutely into how Mrs Gouk's claims arose, I am willing to accept the note of settlement produced in process as reasonable evidence of the alleged sale, and I shall assume that this note would have entitled Mrs Gouk at anytime before sequestration to have claimed delivery of the furniture from the bankrupt." Now, the Act says—"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 or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same." . . . Here an honest buyer, who had paid the price but had allowed the goods to remain in the custody of the seller, wishes to have delivery, and the trustee of the seller wishes to prevent delivery. I think what the trustee wishes cannot be done. All Mrs Gouk did was open and above board, and no false credit was given to the bankrupt because of his possession of the furniture. I therefore think that she or her representatives are entitled to demand delivery now.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARE, and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find in fact that the furniture in question was purchased by the late Mrs Gouk from William Begg Scott at a price ascertained by a competent person, and that the price was duly paid by her: Find in law that the pursuers, as in her right, are entitled to delivery of the furniture: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Grant interdict as craved: Find the pursuers entitled to expenses in the Inferior Court and in this Court."

Counsel for the Pursuers and Appellants—Law. Agent—Alexander Campbell, S.S.C.

Counsel for the Defender and Respondent—C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, February 20.

SECOND DIVISION.

HORSBRUGH (SCOTT'S TRUSTEE) v. SCOTT AND OTHERS.

Married Women's Property Act 1881 (44 and 45 Vict. c. 21), sec. 3, sub-sec. 2—Marriage before the Act—Husband's Right of Administration—“Estate . . . heritable, and Income thereof.”

The Married Women's Property Act 1881, sec. 3, sub-sec. 2, provides—"In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

By a marriage before the date of the Act the husband obtained a right of administration over his wife's heritable estate. *Held* that this right was not excluded by the Married Women's Property Act 1881, and that he was entitled to the income of the estate after the date of the Act, such not being "estate moveable or heritable, and income thereof" to which the wife had acquired right after the date of the Act.

The late David Gouk, merchant, Commerce Street, Montrose, who died on 10th September 1875, by disposition and settlement dated 28th August 1874 left his whole heritable estate to his wife in liferent, and to his two daughters Mrs Maconochie and Mrs Scott jointly in fee, and gave entry to the disponees in liferent and fee immediately after his death.

Mrs Gouk, the widow, died on 17th December 1885. William Begg Scott married one of the two daughters without any marriage settlement on 26th May 1876. His estates were sequestrated on 19th May 1887, and Henry Moncreiff Horsbrugh, C.A., Edinburgh, was appointed trustee.

In December 1888 a Special Case was presented to the Court by the said trustee, Mr Scott, and others, to have it determined, *inter alia*, whether the income derived since the passing of the Married Women's Property Act 1881 from the heritable estate belonging to Mrs Scott under her father's settlement fell under the *jus mariti* of her husband, the said William Begg Scott, and so was liable for his debts, or whether it was excluded by the terms of that Act.

Section 3 of the said Act (44 and 45 Vict. c. 21) provides that "in the case of marriages which have taken place before the passing of this Act . . . (2) . . . the provisions of this Act shall not apply except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

Argued for the trustee—The wife here was married before the passing of the Act. The heritable estate in question was acquired by her before her marriage, and fell under her hus-

band's right of administration, which included the right to draw the rents. From such heritable estate the provisions of the Act of 1881 were expressly excluded by sec. 3, sub-sec. 2 of that statute. The income of that estate consequently was liable for the husband's debts. It made no difference that up to the death of the widow in 1885 the right to the income was in abeyance owing to her liferent. The date to be considered was when the wife acquired right to the heritable estate, of which the income was an inseparable accessory.

Argued for Mrs Scott—The income derived from the heritable estate varied in amount according to the rents, and only fell due at the half-yearly terms. It was therefore either moveable estate which, inasmuch as it fell to the wife after 1881, was free from her husband's *jus mariti*, or it was income of heritable estate to which the wife acquired right after the passing of the 1881 Act, and from which the husband's right of administration was by that Act excluded.

At advising—

LORD JUSTICE-CLERK—The only substantial question here is as to the interpretation of sec. 3, sub-sec. 2, of the Married Women's Property Act 1881, and the question arises in this way. The late Mrs Gouk had the liferent interest in certain heritable property left by her husband, who died in 1875. Her daughter Mrs Scott had the fee. She enjoyed the liferent until her death in 1885. The Married Women's Property Act passed in 1881, and the question is, had it affected the rights of Mrs Scott, who received no rents until the death of her mother in 1885. Now, the words of the Act are—"In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act." Now, the only difficulty arises as to the meaning of the words "and income thereof," and as to how the clause applies to this case. If there had been no intervening liferent, there is no doubt that from 1875 to 1881 the daughter would have been in receipt of the income derived from the heritable estate, and her husband, under the law then in existence, would have been entitled to receive that income, and it would have been liable to all the consequences to which his own estate was liable. The question is, whether the passing of the Act deprived him of that right, and whether after 1881 the wife obtained that income free from his *jus mariti* and right of administration. Suppose Mrs Gouk had died just before the last term when the rents fell due before the passing of the Act, the husband's rights would not have been excluded as regards the rents falling due at that term. Were his rights excluded at the next term by the Act having passed between the two terms?

I think the exclusion of a husband's *jus mariti* and right of administration does not apply to any estate acquired before the passing of the Act or to the income thereof. I think that the position of estates acquired before the passing of

the Act, and the husband's right to the income of these estates are not altered by the Act, and that we must answer the question submitted to us accordingly.

LORD YOUNG—I am of the same opinion, and I think the law is as your Lordship has stated it. By the law of Scotland, before the Act of 1881, a husband had right to the administration of his wife's heritable estate, and to the income thereof. He had two rights over her heritable estate, while her moveable estate passed to him absolutely. Now, the wife of the husband in this case, who is bankrupt, became entitled to the fee of heritable estate in 1875, which, however, yielded no income to her as it was burdened with a liferent to her mother. Her husband was entitled, however, to administer the estate in her interest as far, and as soon as it began to yield income irrespective of statute he could draw the rents or possess it himself. He could enter into possession if there were no leases, and if there were he could draw the rents. The idea of the Act stopping that, notwithstanding the words of section 3, does not commend itself to me. The husband might have possessed the estate for thirty years. The idea of the statute to my mind is this—"You, who have married a wife with heritable estate, shall not be affected by this Act. Your right is a right to administer the estate and to draw the income, and that which has existed heretofore is not to be affected by the Act. After the passing of the Act you must regard any heritable estate coming to your wife as a windfall upon which you had no right to calculate, and which you must take under the law then existing." I cannot read the Act as meaning "estate heritable, and income thereof, falling to the wife after the passing of this Act." The estate and the income thereof are joined together. Each year's rent is not a separate subject depending upon the terms of the leases.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD LEE—I had some difficulty about this question. I have come to the same conclusion as your Lordships. The exclusion of the *jus mariti* applies to all moveable estate acquired by a wife after the passing of the Act, but the question is, are the rents of heritable estate excluded as moveable estate falling to a wife after the passing of this Act? No doubt the clause admits of being read as applying to the income of heritable estate which comes to a wife after the passing of the Act, and not to the income of heritable estate which fell to her before the passing of the Act, and on that ground I agree with your Lordships as to the answer we should give to the question submitted to us.

The Court found that the income derived from Mrs Scott's heritable estate since the passing of the Married Women's Property Act 1881 fell under the *jus mariti* of her husband.

Counsel for Trustee—C. K. Mackenzie.
Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mrs Scott—Law. Agent—Alexander Campbell, S.S.C.