Friday, July 11.

FIRST DIVISION.

[Lord Morison, Ordinary.

GORDON'S JUDICIAL FACTOR *v.* GORDON'S EXECUTRICES AND OTHERS.

Administration of Justice — Procedure — Title to Plead — Husband Claiming to Plead Case for Wife.

A husband of a woman of full age being in consequence of the Married Women's Property (Scotland) Act 1920 no longer her administrator-in-law nor her curator is not entitled to plead in Court in support of his wife's case.

James Harold Macdonald, Writer to the Signet, Edinburgh, judicial factor on the estate of the late Charles Gordon, sometime of Halmyre in the county of Peebles, *pursuer and real raiser*, brought an action of multiplepoinding against (*first*) the executrices of the late Charles Gordon, (*second*) Mrs Eleanora Gordon Cumming or Nakeska, otherwise Nakeski-Cumming, wife of Michael Naake Nakeska, otherwise Nakeski-Cumming, and (*third*) the trustee on Mrs Nakeski-Cumming's sequestrated estate, *defenders*.

Mrs Nakeski-Cumming lodged a claim, which she signed herself.

When the case was called in the procedure roll Mr Nakeski-Cumming appeared at the bar and maintained that he was entitled to be heard in support of his wife's claim.

The Lord Ordinary (MORISON) reported the cause to the First Division.

Opinion.—"The Lord Ordinary reports this cause for the direction of the Court on a question of some general importance.

"The action is one of multiplepoinding and exoneration raised by the judicial factor on the estates of the late Mr Gordon of Halmyre for the purpose of distributing certain assets among the parties entitled to them. The defenders called are (1) the executrices-dative of the late Mr Gordon, (2) Mrs Cumming or Nakeska, and (3) the trustee on her sequestrated estate.

"When the case was called in the procedure roll the husband of the claimant Mrs Cumming or Nakeska appeared and maintained that he was entitled to be heard in support of his wife's claim. He explained that he had resided in Edinburgh for the last 17 years and that his domicile was Scottish, and contended—(1) That at common law the husband had the right to appear in Court and argue questions affecting his wife's estate; (2) that this right was not affected by the Statute 10 and 11 Geo. V, cap. 64, sec. 1, and in particular that this statute did not apply because the question at issue in the action arose prior to 1920; (3) that his right of *jus relicti* in his wife's estate gave him a title to appear.

"The Lord Ordinary is of opinion that it has hitherto been the practice of the Court to hear the husband in support of his wife's claim or in a suit to which she is a party. The reason for the practice is that until 1920 the husband was also a party to the wife's suit. Prior to 1920 a wife could not in general sue an action in court without the consent of her husband, and it was necessary for a pursuer to convene the husband as his wife's curator and administrator-in-law in any judicial proceeding raised against a wife regarding her estate. This arose from the husband's common law rights—the *jus mariti* and the *jus administrationis*. He was a 'party' to the cause, and thus had the right of audience in court which a party to a suit invariably has.

"The *jus mariti* was abolished by statute in 1881. The *jus administrationis* was 'wholly abolished' by section 1 of the Married Women's Property (Scotland) Act 1920 (10 and 11 Geo. V, cap. 64). It appears to the Lord Ordinary that the effect of this statute is from its date to deprive a wife of the protection which the common law of Scotland afforded to her as regards her property, and that it is now incompetent to convene the husband to any suit which relates to her separate estate. The Lord Ordinary is therefore of opinion that the basis upon which the Court has hitherto permitted a husband to plead his wife's cause in a civil suit has entirely disappeared.

"It may be that the Court can now permit the practice to continue, but in view of the comprehensive terms of section 1 of the statute the Lord Ordinary is not disposed without the direction of the Court to initiate this procedure. It is true that the husband's *jus relicti* remains, but this claim is purely contingent and does not arise until his wife's death.

"The claimant Mrs Nakeska is an undischarged bankrupt and, the Lord Ordinary was informed, is unable to argue her claim. She may, however, apply for the benefit of the poor's roll, and if she has a probable cause her case will be conducted in accordance with the usual practice, which is in the Lord Ordinary's opinion entirely satisfactory. The Lord Ordinary is inclined to think that in the present case the process should be sisted in order to enable the claimant Mrs Nakeska to apply for the benefit of the poor's roll."

When the case came before the First Division, Mr Nakeski-Cumming appeared in person, and argued that he was entitled to plead on behalf of his wife in respect of his natural duty to support his wife and in respect that he could be made liable for expenses as *dominus litis*. He referred to *M'Ilwaine* v. *Stewart's Trustees*, 1914 S.C. 934, 51 S.L.R. 831.

Counsel for the other parties did not submit any argument.

LORD PRESIDENT (CLYDE) — This is an action of multiplepoinding, the pursuer and real raiser of which is the judicial factor on the estate of the late Charles Gordon. The defenders called include Mrs Eleanora Gordon-Cumming or Nakeski-Cumming, described in the summons as the wife of Michael Nakeski-Cumming and as residing with her said husband at his home address, and also the trustee on the sequestrated estates of the

said Mrs Nakeski-Cumming. Mrs Nakeski-Cumming has lodged a claim in the action and it is signed per party in her own name.

The Lord Ordinary informs us in his report that when the case appeared in the procedure roll Mrs Nakeski-Cumming's husband appeared and maintained that he was entitled to be heard in support of his wife's claim. The question is whether he is so entitled especially in view of the provisions of the recent Married Women's Property (Scotland) Act 1920.

The right of audience in the Court of Session is part of the original constitution of that Court, and is expressly defined in the legislation of 1532 [Scots Acts (duodec. ed.) i, pp. 217-227, where the legislation is attributed to the year 1537, the chapters being 36-38 inclusive; see also the final Parliamentary ratification, at p. 242], which established the College of Justice. Chapter 51 [Scots Acts (duodec. ed.) i, p. 221] of the said constitution of the Court of Session, which so far as the present question is concerned has never been altered or departed from in practice, is in the following terms:— "That na man enter to pley bot parties conteined in their summoundes and their procuratoures gif they will ony have." The procurators in question were the advocates, whose office was instituted by chapters 64, 65, and 66 [Scots Acts (duodec. ed.) i, p. 224], and whose admission and duties are still regulated accordingly. The right of audience before this Court is thus equally shared by the parties litigant before it and by duly admitted advocates who appear on their behalf, but it belongs to no-one else. Pleadings in cases called before this Court are accordingly presented to it either per party or per procuratorship of counsel and in no other way.

Until the recent Married Women's Property Act of 1920 the husband of a married woman was a proper and competent, usually a necessary, party to any litigation in which her estate was concerned or as the result of which her estate might be affected, whether such estate was heritable or moveable. (I omit any reference to the older state of matters when the *jus mariti* was operative.) The reason of course was (first) that the husband was the legal administrator of his wife's estate; and (second) that even though his legal administration had been excluded (for example, by antenuptial marriage contract) he was none the less her legal curator. The husband was therefore regularly made a party to an action such as this multiplepoinding in the double capacity of curator and administrator-in-law of his wife, or at any rate in the capacity of curator.

The Lord Ordinary points out that under section 1 of the Married Women's Property (Scotland) Act of 1920 the husband's administratorship-at-law is wholly abolished. But it is necessary to add that by section 2 the powers and duties of the husband as curator of his wife are also removed except and unless in the case in which the wife is a minor. It is not suggested that the present case falls within the exception. The action before us was therefore properly presented to the Court without calling the husband as a defender in any capacity, and indeed without any reference to the husband except in so far as Mrs Nakeski-Cumming is designed as his wife and living with him. The husband is not in any sense a party "contained in the summons." He is not even, as the law now stands, a competent party to the action at all. That is, no doubt, why in the written pleadings before the Court (comprised in the closed record) Mrs Nakeski-Cumming herself signs her claim per party. The common law of Scotland was jealous to preserve to married women the protection to to which the marriage status entitled them in defending their property and interests, and if the husband was absent or incapacitated the practice was to appoint a *curator ad litem* in his place. But the modern order of ideas, of which the Act of 1920 is an expression, supersedes all this, and the married woman (being major) is in the same position as an unmarried woman (who had attained majority) always was. It would be difficult to draw a line between the right to plead in writing and the right to plead orally. It would have been incompetent for the husband to sign his wife's claim. He could not do so per party, for he is not a party, and he could not do so as administrator or as curator, for he is no longer such. How then can he be entitled to plead his wife's case orally any more than a father, son, brother, or other relative or friend? I think it is impossible to give the husband right of audience in the present case.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD SANDS—I do not differ, but I acquiesce with some reluctance. It appears to me that under the constraint of recent legislation we are drifting away from a conception of the marriage tie which rests upon a plane higher than that of any rules of *jus administrationis* or curatory.

The Court directed the Lord Ordinary that the husband of the claimant Mrs Nakeski-Cumming was not entitled to be heard in support of his wife's claim, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuer and Real Raiser — Macintosh. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Executrices of the late Charles Gordon—Carmont. Agents—Mackenzie, Innes, & Logan, W.S.

For Mrs Nakeski-Cumming—Mr Nakeski-Cumming.