applied here. It would be to the detriment of all parties that they should continue to be linked together while they are, in fact, in a state of bitter opposition and disunion owing to the fault of one of the partners.

"The Lord Ordinary is satisfied that the respondent, besides violating the *contract* by withdrawing his capital from the business to an extent exceeding the amount authorized by the 6th article, and taking the adverse part he did along with his brother in bringing pressure upon the Company and embarrassing their pecuniary arrangements, and, besides absenting himself from the business and leaving his duties undischarged, has also furnished good ground for this petition against him by refusing to communicate with his partners, or to give them such information as was necessary for enabling them to keep the books of the company in order, and render their accounts to the customers; that he has further, in violation of the express resolution of his partners, purchased goods for the business not required therefor; and lastly, that he has wrongfully refused to implement his part of the contract, by declining to go on with a reference as proposed by his partners for settling their differences, in terms of a special provision in the contract by which he was bound to such reference. All these additional particulars have been clearly proved; but, as already observed, the matter of the respondent's overdrafts, and what ensued immediately in connection with the stoppage of them, form the central point of the case, and are thought to be by themselves sufficient for its disposal. It has therefore been deemed unnecessary to go further in the way of examining the proof.

"There remains only one point to be adverted to in conclusion. At the debate which took place before the Lord Ordinary, the respondent's counsel raised a question as to the interpretation of the sixth article of the contract, suggesting a doubt whether, upon a sound construction of its terms, the respondent could be held to have violated the rule with respect to overdrafts. The obvious answer to any such argument is that, even assuming the article to be in any respect ambiguous, the understanding and course of dealing among the partners themselves must regulate the manner in which the Court is to deal with them in regard to it. But all the partners undoubtedly were agreed as to the construction of that article. The respondent, in particular, raises no question on the record on the ground of its ambiguity; and in his deposition as a witness in the cause he states that he thought his partners justified in what they did in stopping his overdrafts, but objected to the manner in which they did it, and characterised the letter which they sent him on the occasion as insulting, impertinent and harsh; hence arose his resentment and all the consequences which followed of his absenting himself from the business, and refusing when he returned to do the duties of his place, or to communicate with his partners, or aid them by his counsel and advice, which they were entitled to expect."

The said interlocutor has become final.

Agents for Petitioners—G. & H. Cairns, W.S.

Agents for Respondent—Campbell & Smith, S.S.C.

Wednesday, February 17.

FIRST DIVISION.

MACKENZIE *v.* WILSON.

(*Ante*, p. 285.)

Husband and Wife—Exclusion of jus mariti—*Wife's separate estate.* Circumstances in which *held* that a small heritable property, the title to which stood in a wife's name, and a number of deposit-receipts, also in her name, were the property of the wife, and subject to her disposal without control of her husband, she having had for many years an income, derived from her father's estate, sufficient to account for the whole property standing in her name, her husband's *jus mariti* being excluded, and he having ample means of his own to support the burdens of the marriage.

William Hogg, by his trust-disposition and settlement, appointed his trustees to pay to his widow, and to his daughter Grace Hogg or Wilson, wife of Robert Wilson, equally, if they survived him, and to the survivor of them, the whole free income of his estate. The *jus mariti* of Mrs Wilson's husband was excluded. Hogg died in May 1847. His widow and daughter survived him, and jointly liferented his estate, which yielded about £50 annually, till March 1856, when the widow died. Thereafter the estate was liferented solely by Mrs Wilson till her death in 1867. At various periods, from 1847 down to 1867, sums of money were deposited by Mrs Wilson in bank, and otherwise invested, in her own name; and in 1858 she purchased a small heritable property, worth about £145, taking the title in her own name. She left a trust-disposition and settlement conveying her whole estate to trustees, but, as the persons named as trustees declined to accept, the pursuer Kenneth Mackenzie was appointed judicial factor on her estate.

Mackenzie now brought this action against Robert Wilson and others, for declarator that he, as said factor, had a right to the whole estate, heritable and moveable, left by Mrs Wilson, and calling on Robert Wilson to count and reckon for his intromissions with his deceased wife's estate.

The defender Wilson alleged that during the marriage he had supplied the means for housekeeping, except "a small sum which his said wife drew annually from the property which had belonged to her said father William Hogg and his wife Marian Henchlewood or Hogg, and which she undertook and was bound to apply in the same manner." He farther alleged that his wife had saved out of the housekeeping money the various sums which had been applied by her partly in purchasing the heritable property, and party in investment in deposit-receipts. "These sums were all lodged on deposit-receipts or other obligations, payable to Mrs Wilson simply, without any exclusion of the *jus mariti*. The defender, who had sufficient means of his own otherwise, did not object to these moneys being so deposited. He knew from his wife's disposition that there was no danger of their being squandered. He also knew that, being in his wife's name, they belonged to himself, and that if he required them they were at his command at any time. Considering that it was the same thing as if he had deposited the monies himself, he allowed his wife to continue making these deposits, the idea of which seemed to gratify her while it did him no injury."

The Lord Ordinary (JERVISWOODE) sustained the claim of the judicial factor, adding this Note:—"The Lord Ordinary has become satisfied, since he heard the parol evidence which was adduced before him, and has anew considered the debate, with the documents founded on, that the pursuer, the judicial factor on the deceased Mrs Wilson's estate, has established the case which is set forth on the record on his behalf. There cannot, in the Lord Ordinary's opinion, be ground for doubt that it was a competent act on the part of the deceased William Hogg to provide for his daughter, so as to exclude the *jus mariti* of her husband, in the distinct terms contained in his deed of settlement. If this be so, it seems clear, and the point appears to have been so assumed in the recent case of *Davidson* v. *Davidson*, 28th March 1867, that sums of money so exempted from the *jus mariti*, if saved by the wife, and so retained or invested by her as to be capable of identification, and of being traced and identified as the produce of the capital sum to which the exclusion applies, must remain the property, and at the disposal of the wife, free from the husband's control. As respects the character of the evidence on which the judicial factor here relies, as proof that the property and the sums he claims were truly acquired by the deceased Mrs Hogg or Wilson in her own right, the Lord Ordinary thinks it unnecessary to say much. It must speak for itself, but he cannot say that he has entertained any serious doubt as to its sufficiency, if, as he holds it must be, it be taken as competent evidence at all. It may, he thinks, be safely assumed, even from the evidence of the defender himself, that the deceased Mr Wilson was well aware of the fact that his wife was making investments and deposits of the funds which she considered her own, and that he did not interfere with her doing so. He may have supposed he might assert a right to these sums at an after time, but the fact that his wife was saving on her own account, and not on his, must have been known to him."

Wilson having died, his trustees reclaimed.

PATTISON and HALL for reclaimers.

GIFFORD and PATERSON for respondent.

At advising—

LORD PRESIDENT—I have no doubt that the Lord Ordinary has arrived at a just conclusion.

Hogg, Mrs Wilson's father, died on 13th May 1847, leaving a widow, and a daughter, Mrs Wilson, who enjoyed the liferent of his estate jointly, and as the widow survived till 30th March 1856, they had a joint enjoyment for nine years. During that time Mrs Wilson's income from her father's estate was only half of £50. But, after Mrs Hogg's death in 1856, Mrs Wilson came into the enjoyment of the entire liferent of her father's property, and, as she survived till 1867, she had the full income of £50 for eleven years. It is settled that, as regards this annual income, the *jus mariti* of her husband was effectually excluded. She was entitled to lay by that annual income, to save it, and refuse to contribute anything to the family expenses, for her husband had ample means of his own to sustain the burdens of the marriage. It may be that she chose to apply the income as it arose in payment of the expenses of housekeeping, but it is not probable, and it is not to be presumed while the husband had sufficient means for that purpose. It may be proved that she did so, but unless it is proved, the fair presumption of fact arising from the facts and circumstances is, that she did not so apply her income, but, on the contrary, that she saved it up. If she did so, that completely accounts for the money she died possessed of; for at the time of her death she had heritable property worth £145, besides money in deposit receipts to the amount of £845. It cannot be disputed that if she saved this income for nine years, and then the increased income for eleven years, duly accumulating the interest, that would amount to fully the sum she died possessed of. This circumstance raises a strong presumption that she did what she might be expected to do, namely, keep her own estate separate from her husband, saving it up in bank for her own purposes. This is corroborated by the deposit receipts being in her own name, and the heritable property was taken in her own name. Apparently, too, the money was paid by her. I do not think the husband could have taken any of this money for the household purposes without his wife's consent. If he had been poor, and this money had in fact got into his hands and been spent by him, a presumption might have arisen that she had consented to this arrangement; but the circumstances are quite the opposite of that. On these facts, without going minutely into the proof, I arrive at a conclusion favourable to the interlocutor now under review.

The other Judges concurred.

Agents for Pursuer—J. & A. Peddie, W.S.

Agent for Defender—J. Somerville, S.S.C.

Wednesday, February 17.

TURNBULL *v.* DODDS.

Reparation—Breach of Promise of Marriage. Damages awarded for breach of promise of marriage, although the pursuer of the action had, after three or four years' courtship, refused to marry the defender, his conduct justifying her refusal.

This was an action of damages for breach of promise of marriage, at the instance of Mary Turnbull, servant to Robert Young, a shepherd in the parish of Morebattle, against Dodds, son of a farmer at Hardenpeel, in the parish of Jedburgh. The pursuer was for some time in the service of the defender's father. The defender began to court her in 1864. About Martinmas 1865 he gave in the names of himself and the pursuer to the session-clerk at Jedburgh, for proclamation of banns, but withdrew the notice. On two subsequent occasions he gave in the names, and again withdrew them. After that, he again offered to marry the pursuer, but she declined. She then raised this action.

The Sheriff-substitute (RUSSELL) after a proof, found the breach of promise proved, and gave £20 damages.

The Sheriff (RUTHERFURD) reversed, and assoilzied the defender, adding this note:—"It appears in the proof that, before raising the action, the pursuer said to the defender she would have nothing to do with him, and the Sheriff is of opinion that she thereby relieved him from his former obligation. His conduct seems very unjustifiable, and she would have been well entitled to damages had she raised her action on his withdrawing his notices of proclamation. The circumstances are such that the Sheriff has not given expenses to the defender."

The pursuer advocated.

KEIR for advocator.

J. C. SMITH for respondent.