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.

At advising—

Lord President—I never saw a more clearly proved breach of promise; and I never met with a breach of promise, in the station in life in which these parties are, in which the pursuer was better entitled to damages. The defender has been courting the pursuer for years, and it was understood that the parties were to be married. So far, indeed, had the defender gone in 1865, that he gave in the names of the pursuer and himself to be proclaimed. That is proved by the evidence of Laidlaw, and no attempt is made to cut down that evidence. But for some cause or other the defender chose to withdraw the proclamation, and there was some estrangement between the parties from March 1866 to March 1867. But then again the parties came together, and in August 1867 matters were all arranged, and provision made for giving in the names to the session-clerks of the parishes of Morebattle and Jedburgh, for proclamation on 18th and 25th August. But before the 18th the defender changed his mind; and on the morning of the Sunday he called on the session-clerk for the purpose of stopping the proclamation, which was done. Down to this moment he has not given any explanation of his reasons for so doing. Then see what followed. On Saturday 24th he came to Morebattle, and again professed his affection for the pursuer, and promised to marry her, in presence of several witnesses; and again it is arranged that their names shall be given in for proclamation on the following day. He did accordingly give in the names, and they were proclaimed on the 25th, but before the arrival of the second Sunday, he again interfered and withdrew the names. The Sheriff says that if the pursuer instantly on this had raised the action she would have been entitled to damages. Therefore his reason for refusing damages, must be in what occurred subsequently. Now what occurred was this. After this breach of promise, he came and offered to renew the engagement, but the pursuer would—I think most properly—have nothing to do with him. But is that a reason why she should not have her action of damages? There is neither law nor common sense for that proposition. In such circumstances she had already received great injury, but she would probably have received much more if she had gone on with the engagement. She was perfectly entitled to refuse to have anything more to do with the defender, and also to bring her action of damages. Therefore, I am for returning substantially to the judgment of the Sheriff-substitute, but the question of the amount of the damages is still open for consideration.

The other Judges concurred.

The Court awarded £40 to the pursuer.

Agent for Advocator—David Milne, S.S.C.

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

Thursday, February 18.

MOWAT *v.* YOUNG & SON.

Obligation—Composition-Contract—Illegal Arrangement. *Held*, on a proof, that a party who had received a payment of money, was bound to deliver goods in return, or pay their value, having failed to prove that the payment was made to him absolutely, in terms of a certain arrangement.

For some time Mr Mowat, a flesher in Glasgow, and Mr James Young senior, tallow-chandler there, were in the habit of dealing together, Mowat receiving from time to time certain sums of money for tallow to be delivered. When Young assumed his son as a partner the same course of dealing was carried on. This was an action raised by Young & Son for delivery of a certain quantity of tallow, which had been paid for, or for payment of £150 as the value. The defence was substantially that the money said to have been advanced for the tallow, of which delivery was now sought, was really given in payment of the balance of an account due by James Young senior, and for which the firm was said to be responsible, as having taken over the *universitas* of the estate of James Young senior. Young & Son replied that Young senior had entered into a composition-contract with his creditors, to which Mowat acceded, for 10s. per pound, which composition had been paid. The defender maintained that he had acceded to this composition contract on the understanding that he was to be paid in full.

After a proof, the Sheriff (Bell), substantially adhering to the judgment of the Sheriff-substitute (Galbraith), pronounced this interlocutor:—"Finds that, in October 1862, the individual pursuer, James Young senior, was owing the defender the sum of £213, 5s. or thereby, but about that period the said James Young senior entered into a composition-contract with his creditors, including the defender, whereby they agreed to accept a composition of 10s. in the pound on their respective debts, in consequence of which the said debt of £213, 5s. was reduced to £106, 12s. 6d.: Finds that between October 1862 and April 1863, when the pursuers' firm began, James Young senior received tallow from the defender to the value of £118, 13s. 1d., to account of which £80 was paid in March 1863, leaving a balance of £38, 13s. 1d., which, added to the said £106, 12s. 6d., made the debt due by James Young in April £145, 5s. 7d.: Finds that the course of dealing between the defender and James Young senior, and afterwards between the defender and pursuers, was, that the defender got bills from time to time for a round sum for tallow delivered and to be delivered: Finds that the pursuers accepted the bill, No. 5–1, to the defender for £100, on 12th June, and the bill, No. 5–2, for £200, on 22d June 1863: Finds that the latter of these bills was a renewal of the bill No. 8, also for £200, which had previously been accepted by James Young sen., whose liabilities the pursuers undertook: Finds that the renewed bill was paid by the pursuers on the 23d June to the extent of £50, and, having been discounted by the defender at the bank for £150, was duly retired, as well as the bill for £100 by the pursuers at maturity: Finds that according to the pursuers there was thus paid to the defender the foresaid £145, 5s. 7d., due by James Young senior, and the further sum of £150 for tallow delivered and to be delivered: Finds it admitted by the defender that the tallow actually delivered by him to the pursuers was, as credited in the summons, 38 cwt. 2 qrs. and 17 lbs., amounting in value to £68, 1s. 6d., and leaving still undelivered, if the pursuers' averments be correct, 45 cwts. 2 qrs. and 1 lb., or a value of £81, 18s. 6d.: Finds that defender denies *in toto* that he is under any obligation to deliver said tallow or refund said money, on the ground that, though he acceded to James Young senior's composition-contract, he did so under a private arrangement with him that he was to be paid in full, and that the pursuer, James