wife's children by her former marriage, and also between the spouses themselves. The children had a legitimate interest, and were entitled to bargain that the *jus mariti* should be excluded as to the £600, the share of the past profits of the business which was assigned to their mother. On the other hand, the transaction embodied in the deed could not have been carried through except by her becoming a party to it, which she was entitled to decline to do. The Lord Ordinary thinks that it must be held that both the children and their mother became parties to the transaction only on the footing that the *jus mariti* as to the £600 was to be excluded, and that the defender took the important interests which he acquired by the deed on that footing also.

"It is not so clear whether it was intended that the exclusion of *jus mariti* should extend to the interest accruing on the £600. But the Lord Ordinary thinks that the intention of the parties, as disclosed by the deed, was to comprehend the income as well as the capital in the exclusion of *jus mariti*. There is a very ample exclusion of the husband's right of administration, and every other right he had or could have in the fund in question, and the right of unrestrained investment and disposal is conferred on the wife. The Lord Ordinary is not aware of any distinct authority on the point, which seems to be a matter of construction in each case. References may be made to the cases of *Robertson* v. *Robertson*, 13 S. 442, and *Hutchison* v. *Hutchison*, 4 D. 1399, and 5 D. 469.

"Although both parties decline to renounce probation, neither of them would ask for a proof when the point was put to them by the Lord Ordinary at the debate. In these circumstances, the Lord Ordinary thinks he has no course but to decide the case upon the documentary evidence in process and the admissions on record."

The defender reclaimed.

WATSON and BALFOUR for him.

SOLICITOR-GENERAL and SHAND in answer.

At advising—

LORD JUSTICE-CLERK—It is unnecessary to determine all the questions discussed, some of which are of considerable importance. I am prepared to adhere on a ground which does not raise them. The renunciation of the *jus mariti* was one of a number of stipulations between three parties who took and gave up important beneficial interests, and I think that sufficient for this case. What the precise nature of the right taken by Mrs Shaw from her first husband was, it might be difficult to say. She had not only a liferent, but there was an obligation upon her to continue the business for ulterior objects. It was thus partly of the character of a trust right. Then there is the question of the upbringing of the children. How far that obligation is transmissible to the second husband by marriage would be a difficult question. But it is not necessary to give an opinion upon that, because it appears to me that the second ground is perfectly conclusive. What was done by these parties?—(*recites provisions of deed of copartnery.*) These were not elusory or impossible rights. The parties took and gave up benefits mutually, and on fair and equivalent grounds. They put things on a totally different ground from what they were before, and then they go on to arrange about the furniture, and to make provisions for the future. In these circumstances, it is impossible to hold that one of the partners can repudiate. On the second question, whether the husband should pay interest I am inclined to differ from the Lord Ordinary. I do not think it was intended that he should pay interest.

LORD COWAN said that very difficult and subtle questions had been raised and argued in the case, and after commenting on the terms of the deed of copartnery, stated his concurrence, on the ground that the renunciation by the husband of his *jus mariti* was not revocable, in respect it was one of the conditions of a remunerative deed.

LORD BENHOLME concurred.

Agent for the Pursuer—L. M. Macara, W.S.

Agents for the Defender—Murray, Beith & Murray, W.S.

Thursday, January 20.

FIRST DIVISION.

GIBSON *v.* SMITH.

Sheriff—Defences—Expenses—Bill—Sheriff-Court Act 1853. The drawer of a bill sued the acceptor for payment, and was met by the defences of no jurisdiction, and that the bill was for the pursuer's accommodation. The Sheriff, after proof, repelled the defences, but allowed a defence to be lodged that the bill was a renewal one. *Held* that it was incompetent for him to do so under the Sheriff-Court Act of 1853. The Court, however, allowed the new defence to be lodged now on payment of all expenses in the Sheriff-Court, save those of the summons; and meanwhile reserved the settlement of the expenses in this Court.

John Gibson, grain merchant, Pettinain, sued James Douglas Smith, farmer, Carnwarth, for payment of £36, 18s. 5d., with interest from 31st March 1865, being the sum contained in a bill drawn by the pursuer upon, and accepted by, the defender on 28th February 1865 for £41, 9s. 8d., with discount thereon at 8s. 9d., but under deduction of £5 paid to account. The defender pleaded, as a preliminary defence, no jurisdiction; and, on the merits, that the bill was an accommodation bill for which he had received no value.

The record was closed on 10th November 1868, and a proof having been taken, the Sheriff-Substitute (DYCE) repelled the defences. To this the Sheriff (GLASSFORD BELL), on 31st May 1869, adhered, but allowed the defender, on payment of all the pursuer's expenses, except those of the summons, to lodge the following new defence. "The bill sued for was paid and retired, partly by cash and partly by a renewal bill drawn by the pursuer upon and accepted by the defender, dated 1st April 1865, payable three months after date, for £36, 18s. 5d., which was paid by, and delivered up to the defender, and is produced in process. The defender is not liable for the amount concluded for, or any part thereof." To this the pursuer objected, and his agent stated that he refused to sign this defence, except under reservation of his objections to it, as stated, and in terms of his minute in process; but he accepted payment of the expenses allowed.

On 17th August the Sheriff-Substitute pronounced the following interlocutor:—"Having heard parties' procurators at the diet of adjustment, and having been satisfied that the proposed defence now minuted was perfectly relevant, allowed the same to be recorded; but as the pursuer's agent has declined to

sign the same, except under reservation of his objection stated in the Minute No. 20, although such objections he has manifestly waived by receiving payment of the expenses awarded by the Sheriff's interlocutor of 5th July last: Therefore holds the pursuer as confessed, and dismisses the action: Finds the defender entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged, to the depute-clerk of court, as auditor, to tax and report, and decerns." Against this the pursuer appealed, on the ground that mere refusal to authenticate the addition to the record did not justify the Sheriff in dismissing the action.

HALL for him.

ASHER in answer.

At advising—

LORD PRESIDENT—This is an appeal against a final judgment in the Sheriff-court, and therefore is a perfectly competent appeal. The appellant asks to have it reversed, on the ground that it was incompetent. The whole cause is therefore before us. But the appellant now goes back upon the proceedings, and the first question raised before us is whether the Sheriff was justified in admitting the new defence after the record was closed? I have no difficulty in holding that his act was incompetent. The clause under which he is justified in opening up the record is section 16 of the Sheriff-Court Act of 1853. At the end of that clause it is provided that "it shall be competent for the Sheriff, where the cause is before him on appeal on any point, to open up the record *ex proprio motu*, if it shall appear to him not to have been properly made up." The object of this enactment was to allow a remedy where there was a defect in the record, as it was possible, nay certain, from experience, from the unskillfulness with which Sheriff-Court records are prepared, that such defects would occur. But the enactment provides that the correction must be made *ex proprio motu* of the Sheriff, and this was certainly not done on the motion of the Sheriff, but at the request of the defender, and in spite of the opposition of the pursuer. Nor is the admission of this additional defence such a correction of the record as the statute contemplated. The object of the enactment was to allow matter to be stated more explicitly where it was ambiguous; but not to allow new defences to be set up.

But though the Act of 1853 does not give the Sheriff this power, we possess this power under the Act of 1868; and I think we should exercise it on like conditions. And therefore I think we should allow this addition on payment by the defender of all the expenses in the Inferior Court subsequent to these allowed by the Sheriff. But I would propose to your Lordships to reserve the question of expenses in this Court, as I do not see that the pursuer is in any better condition here than he was in the Sheriff-Court. And if the defender eventually succeed in this action, it will be on the ground that the pursuer's claim is a dishonest one, and that therefore this action should not have been brought.

The other Judges concurred.

Agents for Pursuer—Maclachlan & Rodger, W.S.

Agents for Defender—Maconochie, Duncan & Hare, W.S.

Friday, January 21.

JAMIESON *v.* PATERSON.

Vesting—Trustees—Authority to convey and to withhold—Suspensive Condition. A party "authorised" his trustees to bring up his natural son to his business "in the event of circumstances in regard to him being favourable;" to devolve the whole management of it upon him "in the event of his attaining an age, and being in the estimation of my trustees of a character and capacity, and himself possessed of the inclination, for conducting the work;" and to convey the residue of the trust-estate to him on his attaining majority "and being of the character and capacity which, in the estimation of my trustees, would render the same prudent (of which they shall be the sole judges)." The truster also "authorised" the trustees to withhold the conveyance either for a time or absolutely, and to dispose of the whole or part, and pay the son an annuity in the event of his failing to "conduct himself creditably and to the satisfaction of my trustees." The son survived majority twelve years, and received from the trustees various sums of money. He was of satisfactory character but of delicate health, and was not brought up to his father's business. *Held* that the trust-estate could not vest in him till the suspensive condition was purified of the trustees passing a resolution to convey it to him.

By trust-disposition and settlement dated 31st August 1847, the late James Paterson, residing in Musselburgh, conveyed to certain trustees his whole heritable and moveable estate. On the narrative of his wish to make provision for his natural son James Loudon Webster Paterson, then residing with him, and his intention to have his son brought up to carry on his fishing net manufactory, the truster, by the third purpose of the trust-deed, directed the trustees to educate his son so as to fit him for the business, and when they thought him of an age and capacity sufficient therefor, to devolve the management upon him. The fourth purpose was as follows:—"Upon the said James Loudon Webster Paterson attaining to twenty-five years of age, and being of the character and capacity which, in the estimation of my trustees, would render the same prudent (of which they shall be the sole judges), I authorise my trustees to dispone, assign, and convey, but under the burdens and provisions after-mentioned, the whole, or such part as they may consider proper, of my subjects, estate, and effects that shall then remain, in such terms as to destine the same to him, and to any lawful child or children of his body, equally among such children if more than one, and failing such," to certain other persons. The purpose thereafter proceeds to state, "but my desire to benefit the said James Loudon Webster Paterson being in a great measure in the expectation that he will, as from his good dispositions and education I have reason to hope he will, conduct himself creditably and to the satisfaction of my trustees, yet, in the event of his failing to do so, I authorise my trustees to withhold the conveyance of my subjects and estate from him, either for a time or absolutely, and to sell and dispose of the whole, or part thereof, as they may see proper, and to pay him from the price or produce such a sum in the way of annuity and as ali-