after the sisters executed a trust-disposition and settlement in which they conveyed to their trustees the whole estate which should belong to them or either of them at the time of the death of the predeceaser of them, under directions to pay certain legacies, and to pay over to the survivor of them for her life the annual proceeds of their said estate. There was also a clause disposing of the residue. By a codicil of 5th December 1868 the trustees were directed to fulfil the instructions of the survivor as to any change of the destination of half of the estate, and to pay over to the survivor such part of said half as she might require or demand for her own use in addition to the annual proceeds of the whole estate. Two other codicils were subsequently executed making variations on the bequests, excluding some and including others, and further, all provisions contained in the trust-disposition and codicils thereto with regard to the residue of their estate were recalled and other bequests of residue were made. On 5th January 1871 Agnes Boswall died, survived by her sister Elizabeth, who on 21st February 1878 executed a deed of directions in which she instructed her trustees to reduce certain annuities by one-half of their amount, and further disposed *mortis causa* of one-half of the estate to certain beneficiaries who were not named under the original trust-deed and codicils thereto. Various difficulties having arisen as to the construction of the above deeds, this Special Case was presented to the Court, the trustees of the deceased ladies and beneficiaries under the deeds appearing as parties of the first part, and Mrs Campbell or Boswall and Mrs Boswall or Chaffey (whose annuities had been reduced) appearing as parties of the second part. The latter maintained that the clause of the first codicil, in virtue of which the deed of directions bore to be granted, was revoked by the provision contained in the third codicil recalling all provisions with regard to residue, and they also maintained that Elizabeth Boswall barred herself from revoking any portion of the trust-disposition and codicils by accepting under their provisions the whole income of the trust-estate. In these circumstances they argued that Elizabeth Boswall had no power by the deed of directions to reduce their respective annuities by one-half, and that she had no power to dispose *mortis causa* of one-half of the estate or any portion thereof to parties not named as beneficiaries under the original trust-deed and codicils thereto.

The question submitted to the Court was—Whether Elizabeth Boswall was entitled to revoke to the extent of one-half the annuities of the second parties hereto and the bequest of residue?

The Court were of opinion that the deed of directions was a valid exercise of the survivor's right under the first codicil, and therefore they answered the question in the affirmative.

Counsel for First Parties — Asher — Millie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Parties—D.-F. Kinnear, Q.C.—Scott. Agents—T. & W. A. M'Laren, W.S.

Thursday, June 16.

SECOND DIVISION.

[Sheriff of Perth.

KENNEDY'S TRUSTEES *v.* KENNEDY.

Bill—Acceptance—Proof—Writ or Oath.

In an action by testamentary trustees to recover the amount of a bill drawn by the truster and accepted by the defender, the Court refused to allow the defender a proof at large in support of averments to the effect that the bill having been discounted by the defender was retired by the truster on its arrival at maturity in payment of a debt due by him to the defender.

This was an appeal against the judgment of the Sheriff of Perthshire in an action at the instance of the testamentary trustees of the late Robert Kennedy, distiller, Ballechin, Strathtay, who sought to recover from the truster's nephew James Kennedy the sum of £168, 1s. 2d., the amount of a bill drawn by the trustees and accepted by his nephew, the defender. The bill sued upon was found in the repositories of the truster after his death, and this action was raised close upon the time when the sexennial prescription would apply to it.

The defender averred that the truster owed him sums of money for work done under his employment, that he was disinclined to pay these debts in cash, but that in order to discharge his liabilities in part he drew the bill in question which was accepted by the defender and discounted by him, and thereafter, when it fell due, was retired by the truster, and the debt due to the defender was thus *pro tanto* discharged; further that the bill was not intended to create a debt against the defender, and that he could not therefore be made liable for its contents.

The Sheriff-Substitute (BARCLAY) allowed a proof at large that the bill sued for was not granted for value, or imposed on the defender an obligation for the sum therein. This judgment was however recalled by the Sheriff-Principal (MACDONALD, Q.C.), who found that the defender's averment could only be proved by writ or oath of party. On appeal the Court affirmed the Sheriff's judgment and dismissed the appeal with expenses.

Counsel for Appellant—A. J. Young. Agent—Begg & Murray, Solicitors.

Counsel for Respondent — Dickson — Boyd. Agent—James F. Mackay, W.S.

Thursday, June 16.

OUTER HOUSE.

[Lord Fraser, Ordinary.

BARTHOLOMEW *v.* HOUSTON.

Husband and Wife—Jus Mariti—*Process—Diligence at instance of Married Woman.*

Where a complainer who had been incarcerated on a charge proceeding upon a decree for a sum of money falling under the *jus mariti* (said charge being at the instance of a married woman), presented a note of sus-

pension and liberation on the ground that the husband should have concurred in this instance—*held* that the defect was cured *ab initio* by the husband lodging answers to the note along with his wife and intimating his concurrence in her proceedings.

In the year 1879 Mrs Marshall, then a widow, caused an action to be raised at her instance in the Sheriff Court of Stirlingshire, at Falkirk, against William Bartholomew, a publican at Polmont, to obtain payment of the inlying charges and aliment of an illegitimate child of which she had been delivered, and of which the defender was said to be the father. Defences were given in, and thereafter a proof was led in the Sheriff Court at Falkirk. Between the date of raising the action and the diet of proof the pursuer was married to James Houston, miner, Kirkcaldy. Decree was pronounced against the defender for the inlying charges and aliment sued for, and for the expenses of process, and the decree was afterwards extracted, and the said Bartholomew was charged upon the extract at the instance of Mr Houston, and was, upon the 14th day of March 1881, incarcerated in the Tolbooth of Stirling, by virtue of a fiat of imprisonment following upon said decree and charge. Bartholomew then presented this note of suspension and liberation praying for suspension of the said decree and charge and for warrant of liberation. It was averred by the complainer that Mrs Houston's husband had been no party to any of the proceedings, but, on the other hand, the respondent averred that her husband concurred in the said decree, and gave full authority and consent to the diligence following thereon.

The said James Houston lodged these answers—"In the answers already lodged for the female respondent the male respondent concurs, and hereby adopts them as answers for him, so far as he is concerned, to said note of suspension and liberation; and further avers that he was sisted as a party in the Sheriff Court proceedings at the female respondent's instance against the complainer, and that he gave his consent thereto, and to the decree and diligence following thereon, and pleads, on the ground stated in her 3d plea-in-law, that the suspension should be refused with expenses."

The complainer pleaded—"(2) The charge complained of not bearing to be at the instance, or with the consent or concurrence of the female respondent's husband, should be suspended. (3) The charge, of which suspension is sought, having proceeded on the said decree, and, *separatim*, without the consent or concurrence of the female respondent's husband, was unwarrantable and illegal, and should be suspended."

The respondent pleaded—"(4) Assuming that the respondent's husband was not sisted, the respondent is, in her own name, entitled to follow out the diligence, and recover the claim due under it, the claim being for the aliment of her illegitimate child, and not due to her husband. (5) In any view, the bill of suspension and liberation ought to be refused, in respect the respondent's husband has not been called as a party; or, if it can be competently entertained without doing so, then, *a fortiori*, the decree and diligence, if in her own name, cannot be suspended."

The Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that on 3d July 1879 the suspender received a charge to implement the decree set forth in the record at the instance of the female respondent without the concurrence of her husband: Finds that the suspender was imprisoned in the Tolbooth of Stirling on 11th March 1881 at the instance of the female respondent by virtue of a fiat of imprisonment obtained on a decree and charge in her name: Finds that the sums decerned for by said decree, and for payment of which the said charge was given, followed by imprisonment, fell under the *jus mariti* of the female respondent's husband James Houston, and therefore he ought to have been a party insisting in the said charge: Finds that after the present note of suspension and liberation was presented the said James Houston gave in answers to the same concurring in and adopting the proceedings of his wife: Finds that the objection to the diligence proceeding in the name of a married woman without her husband's concurrence is thereby obviated: Therefore repels the reasons of suspension and liberation: Finds neither party entitled to expenses, and decerns."

He added this note:—"From the conflicting statements of the parties it does not appear whether James Houston, the husband, was sisted as a party to the action of filiation and aliment instituted by the female respondent against the suspender in the Sheriff Court. Even though he had been a party to that action, the objection would still remain, that the charge was in the name of the married woman alone. Nothing can be clearer than that diligence at the instance of a wife without her husband's concurrence is null (*Napier* v. *Rollock*, M. 6047; *Jeffrey* v. *Matheson*, June 28, 1826, 4 S. 765), and this was even found though the debt sought to be recovered was one from which the *jus mariti* had been excluded (*Wight* v. *Dewar*, March 9, 1827, 5 S. 549). In the present case the sums sought to be recovered did fall under the *jus mariti*—although they were decerned for as inlying expenses incurred by the female respondent, and for aliment for the support of her illegitimate child, they cannot be regarded in any other light than as ordinary debts due to the wife. A husband is liable for the aliment of his wife's bastard children had to other men before marriage (*Aitken* v. *Anderson*, Hume, p. 217), and the money due by these other men to the wife is just of the same character of debt which the *jus mariti* carries.

"But assuming all this, there is a series of decisions which establishes that although a wife raises diligence in her own name, without her husband's concurrence at first, the objection thereto may be obviated by his subsequent concurrence, as was given in this case. On the same page in Morison's Dictionary (p. 6047) there will be found two cases where opposite judgments on this point were given. A man being incarcerated upon a horning used at the instance of a married woman without her husband's concurrence, it was found null 'though the defender alleged it did not import much, seeing the husband was yet content to allow of them; for it was thought that it being null *ab initio* could not be helped by his posterior consent, especially the wife being at the time dead' (*Napier* v. *Rollock*, *supra*). In the other case an arrestment at the wife's instance was sustained though without her husband, because 'his subsequent consent validated the act, and that her not being *integra persona in judicio*

without her husband was introduced in her favour, and so ought not to be detorted to his prejudice; and therefore repelled the nullity and sustained the arrestment' (*Hepburn* v. *Blair's Children*, Jan. 29, 1702). The doctrine here laid down is the sound one, viz., that the protection of the interests of the husband is the reason for denying to the wife power to interfere with any moneys, which although originally due to her, were acquired by him in virtue of his marital rights; and therefore where he appears in Court after the objection is taken, and concurs in the wife's action, it is right to hold the objection thereby removed. There are two recent cases in support of this view. The husband's concurrence in the first of these (*Borthwick* v. *Urquhart*, 7 S. 420) was given in a process of suspension and interdict of the diligence used in name of the wife. Lord Corehouse's finding, which was adhered to by the Court, was, 'that the poinding though executed in the name of Margaret Urquhart alone was validated by the consent of her husband subsequently interponed.' In *Lyle* v. *Macgowan or Mackay*, 23d January 1849, 11 D. 404, the husband again gave his concurrence to the proceedings of his wife in the process of suspension of the charge at her instance; and again, it was determined that the concurrence of the husband though given after the execution of the diligence barred all objection, Lord Fullerton remarking as follows:—'It has been said that it would be a strong thing to sustain this diligence, but it would be much stronger, with these authorities before us, to refuse to give effect to it.' The result of the authorities, therefore, is that the reasons of suspension must be repelled; but as the challenge was a good one until the husband appeared in this process, no expenses have been found due to either party."

This judgment was acquiesced in.

Counsel for Complainer — Macdonald, Q.C. Agent—W. G. Roy, S.S.C.

Counsel for Respondent—Nevay. Agent—R. Broatch, L.A.

HIGH COURT OF JUSTICIARY.

Friday, June 10.

(Before the Lord Moncreiff (Lord Justice-Clerk), Lord Young, and Lord Craighill.)

MORTON *v.* GREEN.

Sale of Food and Drugs Act 1875 (38 *and* 39 *Vict. cap.* 63), *sec.* 6—*Sale of Food and Drugs Act Amendment Act* 1879 (42 *and* 43 *Vict. c.* 30)—*Adulteration—Selling Article of Inferior Quality, but Undiluted with any Foreign Substance, at Inferior Price, whether Criminal.*

Where there is no definite standard of quality of an article, it is not a contravention of the Sale of Food and Drugs Act 1875, sec. 6, to sell as such article at a low price an inferior quality of the article undiluted with any foreign substance.

A person was convicted of a contravention of section 6 of the Sale of Food and Drugs Act 1875, by selling as cream an article not of the quality of cream. It was proved that several qualities of cream were known to the public, and that the cream sold on the occasion libelled was one of these, and was sold at a fair price, and though diluted with 34 per cent. of skim milk, was unmixed with any foreign substance. *Held* that there was no contravention of the Act libelled, and conviction *quashed.*

James Morton, carrying on business at Elderslie House, Renfrew, under the style of the Public Dairy Supply, was charged before the Sheriff of Renfrew and Bute, at the instance of Robert Green, sanitary inspector of the burgh of Paisley, with an offence against the Sale of Food and Drugs Act 1875 (38 and 39 Vict. c. 63), as amended by the Sale of Food and Drugs Act Amendment Act 1879 (42 and 43 Vict. c. 30), particularly section 6 of the first mentioned Act, in so far as in Paisley on 15th February 1881 he, by the hands of his servant and agent, "did, to the prejudice of the purchaser, sell to the said Robert Green 4d. worth or thereby of cream, being an article of food, which article of food, when sold as aforesaid, was not of the nature, substance, and quality of the article demanded from him by the said Robert Green, in respect it was diluted with 34 per cent. or thereby of skim milk, whereby the said James Morton is liable in a penalty not exceeding £20." Section 6 of the Sale of Food and Drugs 1875 enacts that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds." Section 2 of the Sale of Food and Drugs Act Amendment Act 1879 enacts that in any prosecution under the principal Act for selling to the prejudice of the purchaser any article of food, &c., "it shall be no defence to any such prosecution to allege that the purchaser having bought only for analysis was not prejudiced by such sale. Neither shall it be a good defence to prove that the article of food in question, though defective in nature or in substance or in quality, was not defective in all three respects."

After a proof, from which it appeared that the inspector had on the day libelled demanded from the defender's servant, who was then selling milk and cream in the public street in Paisley, 4d. worth of cream, and had been supplied with an article which on being analysed was found to be cream diluted with 34 per cent. of skim milk, the Sheriff convicted the accused and fined him in the modified penalty of £5.

Morton took a Case for appeal. The Case stated by the Sheriff, after narrating the facts above set forth, proceeded as follows to narrate that at the trial it was proved:—"That cream taken from milk which has stood twelve hours contains on an average 25 per cent. of butter-fat, 8 per cent. of solids not fat, and 67 per cent. of water. That the article delivered to the respondent contained 10·50 per cent. of butter-fat, 8·14 per cent. of solids not fat, and 81·36 per cent. of water. That in arriving at the conclusion that the article in question was diluted with 34 per cent. of milk, the analyst