raise the question whether a residential settlement was to be considered as coming under the same category as a birth settlement, though I am bound to say that I cannot see any distinction between them as regards this matter, and the opinion of Lord Mure in the case just quoted, where Lord Colonsay's opinion in the case of *Gibson* v. *Murray*, 16 D. 926, is cited with approval, seems to me an authority to the effect that there is no distinction between them. The opinions of the other Judges in that case are to the same effect, that the father's settlement, whether birth or residential, is liable.

I cannot see the difference to be drawn between a pupil's capacity for losing and for acquiring a settlement. It seems to me contrary to common sense that a pupil while unable to acquire a settlement should lose it by non-residence, and in the absence of authority to the contrary I hold that a pupil has capacity for neither the one nor the other. I am of opinion, therefore, that the Sheriff was right in this case in holding that a pupil child cannot by its own absence lose the settlement of its father.

Lord Ormidale concurred.

Lord Gifford—I am of the same opinion. *Beattie* v. *Wallace* is really conclusive. I cannot take the distinction relied on by Mr Smith—that in the former case it was a birth settlement and here a residential. It seems to me that it makes no difference—the pupil falls back on the father's settlement, and whether that settlement be one of birth or residence it does not matter. It is also clear, I think, that a pupil, as it cannot acquire a settlement, cannot lose one. A pupil cannot do anything, and in the eye of the law, therefore, it cannot be voluntarily absent from any parish. It is the same as a lunatic in this respect, and the cases of lunatics in which a different result was reached are all explainable on the ground that the absence began before the lunacy.

Interlocutor of Sheriff affirmed, with additional expenses to both parishes.

Counsel for Pursuer (Respondent)—Balfour—Macfarlane. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defender Mackison (Appellant)—Lord Advocate (Watson)—Guthrie Smith. Agents—Dundas & Wilson, C.S.

Counsel for Defender Christie (Respondent)—Kinnear—Rutherfurd. Agents—Frasers, Stodart, & Mackenzie, W.S.

Friday, January 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MP.—HAMILTON AND STEWART *v.* WRIGHT AND SHARP.

Husband and Wife—Nullity of Marriage—Rights of Innocent Husband over Property of Guilty Wife where Marriage Null owing to Prior Marriage.

S. was married to M. in 1838, who in 1841 deserted her. In 1854 S. went through a ceremony of marriage with W. without taking any sufficient means to ascertain whether M. was still alive. In 1875 W. discovered for the first time that there had been a prior marriage with M., and on inquiry found without any difficulty that he was still living. Prior to this, by arrangement between W. and S., the sum of £65 had been deposited with two persons as trustees for behoof of S. in liferent and her two children by W. in fee. In a competition between S. and W. as to this money, *held* (1) that in point of fact the money was part of the proceeds of S.'s own industry; and (2) that in the peculiar circumstances of the case she was entitled to have it paid to her.

Question—Whether where a marriage was a nullity from bigamy, the guilty wife forfeits all her rights in favour of the innocent husband, and whether the *jus mariti* operates as in the case of a lawful husband?

Sheriff—Jurisdiction—Action between Husband and Wife.

Where a party had married a second time while her first husband was still alive, by arrangement between the parties, a sum was conveyed to trustees for behoof of the wife and the children by that marriage. Upon its subsequently being ascertained by the second husband that his marriage was null, a dispute arose as to the right to the sum in question. *Held* that as judging from the pleadings it was possible that in the result it might be held that the fund in question belonged to the wife irrespective of whether there was a marriage or not, the action was not incompetently brought in the Sheriff Court.

Agnes Burnside Sharp was married to James Miller in 1838. He left her in 1841, having enlisted in the East India Company's service. She thereafter, on the 8th December 1854, went through a ceremony of marriage with Henry Wright, and they lived together as man and wife until 12th February 1875, when she left his house, as she averred, on account of his cruelty. Shortly after this took place Wright discovered that at the time he went through the marriage ceremony with Agnes Sharp her first husband (Miller) was alive, and that he was still alive.

On 25th February 1874, before Wright suspected the existence of the prior marriage, and following upon the difference which led to a separation, a sum of £62 was put in bank in the names of Claud Hamilton and John Stewart as trustees for behoof of Agnes Sharp in liferent and her two children by Wright in fee. That sum formed the fund *in medio* in this multiplepoinding, which was brought by the trustees in question as nominal raisers, the real raiser being Wright, and Sharp being the only other claimant. Neither the children nor the first husband were called or appeared. Wright claimed that the whole fund *in medio* should be made over to him; Sharp that it should continue to be held by the nominal raisers in trust, or alternatively that it should be paid to her. She averred that in point of fact the money was hers, being the product of a drapery business which she carried on before and after her marriage with Wright. He denied this, and averred that the money was his own.

Wright pleaded—". . . (2) The claimant having been induced to entrust the fund *in medio* to the nominal raisers, in the belief that the said Agnes Burnside Sharp was] his wife, he is entitled, now that it turns out that she never was the wife of the claimant, to payment of the same. (3) The handing of the money to the nominal raisers under the circumstances above set forth was an act which was revocable by the claimant; and as he has since revoked it, he is now entitled to the fund *in medio*."

Sharp pleaded, *inter alia*—"(1) The fund *in medio* having been paid over to the pursuers by or with consent of both claimants for a specified purpose, ought to be allowed to remain with pursuers until that purpose is fulfilled. . . .(3) The interest of third parties, viz., the children of said marriage, in said fund *in medio* being imperilled by this action, they ought to be called for their interest. (4) The said Agnes Burnside Sharp having had in her possession a greater sum than the fund *in medio* prior to and at the date of her marriage with the said Henry Wright, or at all events a larger sum being then due to her by her customers, she is entitled to get payment of the fund *in medio* now that the said Henry Wright repudiates the said marriage." . . .

The Sheriff-Substitute (GUTHRIE), and on appeal the Sheriff (CLARK), dismissed the action, on the ground that it involved directly and primarily a question of status which could not competently be tried in the Sheriff Court. Wright appealed, and the First Division on Nov. 7, 1878 recalled the interlocutors of the Sheriffs and remitted to the Sheriff to allow the parties a proof of their averments before answer.

At advising—

LORD PRESIDENT—I am of opinion that the Sheriff-Substitute and the Sheriff have fallen into error in supposing that this action is incompetent. It may possibly turn out in the course of the action, and after the facts have been determined, that the question raised upon these facts may be incompetent in the Sheriff Court. But the question raised in the record is not necessarily incompetent there.

The Sheriffs seem to have proceeded on the assumption that the first question is, Whether there is a marriage subsisting between these two claimants? But it appears to me that this is not only not the first question, but that it is a question which may never arise in this case at all. The money was deposited with the nominal raisers certainly with the knowledge of both parties. The terms of that deposit are not in writing, and therefore must be proved by witnesses. Now, that proof may show that the terms are such that this money belongs to the wife or alleged wife, whether there was a marriage or not, or that, on the other hand, and on the same alternative, it belongs to the husband or alleged husband. And in either of these events it is quite clear that the question is one which the Sheriffs may competently dispose of. It may no doubt turn out that the terms of the deposit are such that the property of the money depends upon whether the parties were married or not. But it is quite premature at present to say that the right to this fund cannot be determined in this competition of multiplepoinding.

I am therefore for recalling the interlocutors of the Sheriffs and remitting the case for proof before answer.

LORD DEAS and LORD SHAND concurred.

LORD MURE was absent.

A proof was accordingly taken, the result of which sufficiently appears from the judgments *infra*.

Thereafter the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that the claimants Henry Wright and Agnes Burnside Sharp or Miller went through a ceremony of marriage on 8th December 1854, and lived together as husband and wife till 1875: Finds that on or about 25th February 1875 the fund *in medio* was placed by the said parties in the hands of the nominal raisers in trust for behoof of the said Agnes Burnside Sharp or Miller in the event of the death of the said Henry Wright: Finds that at the said 8th December 1854 James Miller, to whom Agnes Burnside Sharp or Miller was married in 1838, was alive; and finds, therefore, that the marriage between her and Henry Wright is void and null: Finds that the fund *in medio* is the proportion of the funds jointly possessed by the claimants in February 1875, which belonged to Agnes Burnside Sharp before the said 8th of December 1854, or had been earned by her exertions, and therefore ought in the circumstances to be paid to her: Therefore . . . . ranks and prefers the said claimant Agnes Burnside Sharp to the fund *in medio* in terms of the second alternative of her claim. . . .

"*Note.*—. . . This sum (viz. the £62) is the fund in dispute in the present multiplepoinding, which has been raised by the claimant Wright. He desires to have the money paid over to him on the ground that his marriage to Mrs Miller in 1854 was null, in respect that her former husband James Miller was then and still is alive; and he pleads, alternatively, that even if he is not proved to be alive, the provision of £62 was a donation *inter virum et uxorem*, which he (Wright) is entitled to revoke. Mrs Miller, on the other hand, asks that Messrs Hamilton and Stewart should retain the money on the original trusts, or pay it over to her, pleading that if her marriage with Wright is good, it was an irrevocable provision, because really made out of her own funds; and that if the marriage is not valid, the money is hers, as it was from the first.

"The evidence is in some respects very meagre, but enough is proved to make the case free from any difficulty. Mrs Miller was married in 1838 to James Miller, who left her in March 1841, enlisted, and was sent to India. She had, according to her own account, two letters from him, in 1844 and 1845, after which she says she heard no more from him or of him except that his uncle had got a letter from a missionary stating that he was just dying. 'I did not think,' she says, 'after that there was any use making any inquiry about him, and I did not do it.' Nor does it appear that anything was heard of Miller until after the parties ceased to live together in 1875, when Wright made some inquiries, which led him to the conclusion that Miller is still living and has risen to a respectable position in the Indian army. Both parties appear to me to have been somewhat remiss in regard to the proof of Miller's existence, for the real raiser Wright has left the matter to depend upon some documents from the India Office and

a letter from Miller to himself in answer to one in which Wright asked in effect whether he was really the husband of the woman with whom Wright had been living as his wife for twenty years. The handwriting of this letter seems to me strongly to resemble that of the letter to Mrs Miller, to which she has sworn, with such differences as were to be expected from the lapse of thirty-four years during which the writer was being educated from a raw recruit to be an officer in the Queen's service. The style also speaks to the truth of the pursuer's case, for it is certainly a letter which only consummate genius could fabricate to suit the circumstances. I cannot refuse credence to a document which bears its own credentials so clearly on its face. Yet it would have been fair and right, I think, that the claimant Wright, on whom the *onus* lies, should have brought some oral testimony, if not to Miller's survivance, at least to the authenticity of the letter. The only other testimony which exists in the process consists of one or two official documents from the India Office, which are not proved. But the strongest corroboration of the letter which I find is in the fact that the female claimant refrains from bringing any rebutting evidence against it although she had an opportunity, three weeks having elapsed between the diet at which it was produced and the adjourned diet of proof. Had she not been conscious of the weakness of her case in regard to this point, she would have brought her husband's sister Mrs Macdonald, who is said to be alive and to be in communication with Miller. It is not to be doubted that in a matter of this kind the one party as well as the other is aware of such a fact in the family history as the renewal after such an interval of communication with a long lost relative. For this reason, though I think it would have been proper and becoming for Wright to bring Mrs Macdonald, or some similarly qualified witness, I take it that both parties have been dealing with the existence of Miller, as indeed their conduct at the trial suggests, as a fact hardly admitting of doubt. It should also be noted that the document—a progressive inquiry schedule—issued from the India Office, said to have been found among Mrs Miller's papers after she left Wright's house, and not in any way contradicted or disowned by her in the proof, appears to show that she was aware of her husband being alive in 1848 and at some time after May 1854, and suggests a reason why she has made no effort to rebut the other claimant's case on this head. It also suggests very strongly that she was in bad faith in entering into the marriage with Wright; but as no plea has been stated on this ground, the effect of that bad faith on the rights of parties has not to be considered. All these considerations leave no doubt in my mind, dealing with the case as a jury question, that James Miller, who was married to the party Agnes Burnside Sharp in 1838, was alive when she went through the form of marriage with Henry Wright in 1854, and probably still lives. The marriage being thus null, the £62 would be a provision made for a wife under essential error, and would fall to be restored to the claimant Wright if it had been furnished out of his funds. But it is tolerably clear that it was not so. It is admitted that Mrs Miller carried on business on her own account as a money-lender in a small way, and had also a small drapery business, both before and after her connection with Wright. When that connection began he was a journeyman tailor, with wages of 24s. per week and a family, and it is not alleged that he had any means at all. In 1874 there was about £125 in bank, and it appears that they divided it equally—Wright says for the sake of peace on his side, and in the belief that he could revoke the provision as a donation *inter virum et uxorem*. I do not firmly believe his statement as to his belief at the time; but whatever he may have thought or intended, I have no doubt, from the whole history of the parties as narrated by themselves, that the money was divided as it was simply because, though Wright as the husband had control over it, it was really the produce of the exertions of both. I should not be surprised if it had been in a greater degree the produce of the woman's exertions. I take it, therefore, that a fair and right division was then made by the parties themselves; and as there was no marriage, there is no reason why the trust should be longer maintained."

The Sheriff (CLARK) recalled this interlocutor, and ranked and preferred Wright to the fund *in medio*, adding this note:—

"*Note.*—[*After stating the facts*] . . . It appears to be the law of Scotland (see Fraser on Husband and Wife, second edition, vol. i. p. 152) that when a marriage is a nullity in consequence of the fault of one of the parties, and without any fault upon the other side, the innocent party shall preserve his or her rights intact as though the marriage had been effectual; and that, as in the present case, where the husband is the innocent and aggrieved party, he retains his *jus mariti* as regards all moneys and estate over which it would have extended if the marriage had been valid, except in so far as these may be claimed by the real husband. Upon that ground, therefore, I apprehend that in this case the male claimant is entitled to prevail. It must be observed that if the marriage between the two claimants had been valid, any funds possessed by her at the date of such marriage, or any funds which she afterwards acquired by her own industry would have fallen under the *jus mariti* of her husband, because there was no marriage-contract creating separate estate, and the recent Act declaring the earnings of a married woman during her coverture to be separate estate had not yet come into operation. It cannot be said that the arrangement by which the funds were placed in the hands of the nominal raisers can now receive effect in favour of the female claimant, inasmuch as that arrangement, and all that took place in consequence, proceeded on the essential error of supposing that the two claimants were married persons. That being so, this arrangement becomes of no value, and the male claimant becomes entitled to those funds under his *jus mariti*, except in so far as the claims of the real husband are concerned. Upon no ground, therefore, can the female claimant have any right to the fund *in medio*. I have been induced to find the female claimant liable in expenses, inasmuch as she is entirely responsible for the deception practised upon the male claimant, and for his occupying his present most unsatisfactory position. By her conduct in concealing from him her previous history at the time of her pretended

marriage, she must be held to have inflicted as serious a wrong upon him as perhaps it is possible for one person to inflict upon another."

Mrs Sharp or Wright appealed, and argued—The money was in fact hers; at anyrate it stood in her name, and the *onus* was consequently on Wright. Admitting, therefore, that there had been no marriage, the rights of parties ought simply to be determined by the agreement, and that was in favour of the appellant. The Sheriff's law was wrong. At anyrate it had not been proved that the appellant was in *mala fide* in concealing the first marriage.

Argued for Wright—The money was Wright's, but even if it was not, it ought to be made over to him. For he had through a long period of years treated Mrs Sharp as his wife, and supported her, he being *in optima fide*, and she being in the knowledge that her first husband was alive, or at least having taken no steps to ascertain the truth. At the time the deposit was made he could undoubtedly have appropriated the money, whosever it was, but relying upon his *jus mariti* he had allowed the deposit to be made, at the best as provision for his supposed wife. It was equitable, therefore, that he, and not the guilty wife, should have the money. [Lord Shand—Do you mean that if the supposed wife had had £10,000 left to her, that her husband could appropriate it simply because she had deceived him into the marriage?] It was not necessary to go that length here, but the principle on which the Sheriff proceeded would lead to that result.

Authorities—*Brymer* v. *Riddell*, Feb. 19, 1811, reported as Bell's Report of a Case of Legitimacy under a Putative Marriage; *Craig* v. *Galloway*, July 17, 1861, 4 Macq. 267.

At advising—

Lord Deas—It appears that this lady was married a great many years ago to a husband who has been for a long time abroad, and who now disclaims all intention of living with her or interfering in her pecuniary affairs any more. We do not see why the parties separated, but we do see that going abroad has proved for the husband's advantage, for after leaving this country he raised himself very creditably to a respectable position in the Indian military service. His wife in his absence endeavoured very properly and industriously to make a livelihood for herself. She carried on a drapery business, which was so far successful that at the time of her marriage with Mr Wright there does not seem to be the least doubt that she had earned money for herself, which was deposited in different banks in various forms. Wright, who carried on the business of a tailor, seems to have contributed after he married her to swell the amount so deposited. At a particular date—not very long ago—misunderstandings arose between him and her. She says he treated her with cruelty, and that she could not continue to live with him as his supposed wife any longer. The consequence was that the money which stood in her name, but for the joint-behoof, was uplifted, and an arrangement made to divide the sum between them, she getting £65 or thereby as her share, and he £75; and this division was made accordingly.

At that time Mr Wright was not aware that his supposed wife was married to another man when she went through the ceremony of marriage with him; but I do not think it doubtful that she was aware, and at all events she was bound in the circumstances to have been aware, that her first husband was alive, and in consequence that her marriage with Wright was a nullity. In this stage of matters Wright claims the whole of this money, whether contributed by himself or by her; she, on the other hand, claims what she herself contributed, estimated at £65.

It seems that on receiving her share of £65 she deposited it with two persons as trustees, to be held by them for behoof of herself in liferent, and her two sons Harry Wright and William Sharp Wright in fee. But it does not appear to me that there is such a *jus quæsitum* in these children as to entitle them to come forward (which they have not done) and claim that the fee of that money shall be made effectual to them. It does not appear that more was intended than that if Mrs Wright happened to die without using or disposing of the money it should go to them. The only question is, whether her share of £65 is her own or belongs to Wright?

The Sheriff-Substitute has found in favour of Mrs Wright holding that she is entitled to retain the amount which she had earned by her own industry. But the Sheriff has altered this, and held that the money belongs wholly to Wright, and this on the ground entirely of a doctrine which he quotes from Fraser on Husband and Wife—that when the marriage turns out to be a nullity from bigamy, the guilty wife forfeits all her rights in favour of the innocent husband, and that the *jus mariti* is as effectual in his favour as if the marriage had been a lawful marriage.

Now, I do not think it necessary to say whether this is sound law or not. If the wife had a fortune or considerable capital, an important question of that kind might arise. But assuming the general law to be as stated by Mr Fraser, it does not appear to me that it could reasonably be applied to a small sum like that here in dispute, earned by the wife's industry, and required for her present subsistence. I cannot deal with a sum of that kind on such great principles.

Well, then, they had agreed to divide the money—the marriage turns out a nullity—so that in point of fact the parties have no relationship to one another. Wright did not know that at the time of the agreement, but it seems to me that the result of that in the circumstances would simply be a *restitutio in integrum*; that is not proposed, and on the whole I concur with the Sheriff-Substitute that the agreement ought to be considered final.

Lord Mure, Lord Shand, and the Lord President concurred.

The Court recalled the interlocutor of the Sheriff, and ranked and preferred Agnes Burnside Sharp or Wright to the fund *in medio*.

Counsel for the Claimant Sharp or Wright (Appellant)—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Claimant Wright (Respondent)—Brand. Agent—Adam Shiell, S.S.C.