Thursday, June 3.

SECOND DIVISION.

PHILIP *v.* CUMMING'S EXECUTORS.

Landlord and Tenant—Lease—Verbal Agreement—Proof. Held that a minute of lease having been entered into between a landlord and tenant, an allegal verbal agreement as to a stipulation supplementary of the lease, and not mentioned in it, could only be proved by the writ or the oath of the landlord.

This was an action of damages at the instance of a tenant on the estate of Altyre against the executors of the late Sir Alexander Penrose Gordon-Cumming of Altyre and Gordonstown. The pursuer was tenant of the farm of Auchness for a period of nineteen years prior to Whitsunday 1860, and on the 15th August 1859 he obtained a renewal of his lease for a further period of nineteen years from Whitsunday 1860. No formal lease was entered into, but a minute of lease was duly signed by the pursuer and Sir A. P. Gordon-Cumming. Upon the same day—the 15th August 1859—on which this minute of lease was entered into, the pursuer averred that a verbal agreement, to which no reference was made in the written minute, was made between himself and the landlord, that the former should reclaim a piece of waste land on the farm about ninety acres in extent, and that the landlord should immediately construct a road to the ground so to be reclaimed, which road was absolutely necessary to render the ground available for cultivation. This agreement, it was averred, was entirely independent of, and was not intended by the parties to be superseded by, the minute of lease. On the faith of this agreement, the tenant proceeded with reclaiming operations, so far as they could be carried on without a road, and the landlord caused a road to be staked out. No road was, however, constructed; and this action was brought by the tenant to recover damages for the loss he had sustained in consequence of the agreement not being implemented, and pleaded that the verbal agreement had been validated *rei interventu*, and could be proved *prout de jure*. The defenders pleaded that the alleged verbal agreement could only be proved by writ of Sir A. P. Gordon-Cumming—a reference to his oath being excluded by his death in 1866.

The Lord Ordinary (MANOR) pronounced the following interlocutor and note:—

"*Edinburgh, 12th May* 1869.—The Lord Ordinary having heard parties' procurators, and considered the closed record, productions, and whole process—Finds that the alleged verbal agreement, whereby a new stipulation is said to have been imported into the written contract of lease by which the pursuer holds the farm of Auchness, and in respect of the non-fulfilment of which stipulation the present action is brought, cannot competently be proved by parole evidence, or otherwise than by writ or oath: Finds that probation by oath is excluded, in consequence of the admitted fact of the death of Sir Alexander Penrose Gordon-Cumming, with whom the alleged agreement is said to have been made; but finds that it is still open to the pursuer to prove the same by writ, if he any has: And, with these findings, appoints the cause to be enrolled for further procedure.

"*Note.*—The written minute of lease, dated 15th August 1859, under which the pursuer possesses the farm of Auchness, is drawn in very brief terms, but its brevity is supplemented by a general reference to the regulations of the estate, embracing a long detail of particular conditions. The minute contains certain vague and indefinite expressions as to the improvement of waste land, with money to be advanced by the proprietor, and expended under the conditions of the Lands Improvement Company. But to these the pursuer attached no weight or importance. He founds his case solely on the alleged verbal agreement, with regard to the terms of which he says that he had an interview with Sir Alexander Cumming on the 11th of August, immediately preceding the execution of the minute of lease on the 15th, and that on that latter day both the minute was signed and the verbal agreement completed between the parties. The minute bears no reference to any such agreement, nor does it distinctly appear even as matter of averment whether the subscription of the minute or the completion of the agreement was first in point of time, both being said to have taken place on the same day. This, however, does not appear in any way material in the shape in which the pursuer's case is put. He avers (condescendence 6) 'that the said verbal agreement was specially in view of the parties at the time the minute of lease was entered into and signed, but was entirely independent of, and not intended by either party to be superseded by, said minute of lease.' In these circumstances, the plain result is, that the pursuer is founding on a lease containing special conditions and stipulations which are not in the written minute, while the defenders, the representatives of the deceased landlord, contend that he is not entitled to anything but what is given him by the terms of the minute; and that if he seeks anything more by virtue of an alleged separate verbal agreement, he must prove such agreement by proper legal evidence. In this contention the Lord Ordinary is of opinion that the defenders are right, and that the verbal bargain can only be proved in one or other of two ways—that is, by writing or by oath. The latter of these modes of proof is now shut out by the death of Sir Alexander Cumming; but if the pursuer has any writ to support his case, it is still perfectly competent for him, and an opportunity has accordingly been given him to resort to it. In the meantime, and till the agreement be proved, his averments of *rei interventus* can be of no avail to him whatever.

"The Lord Ordinary conceives that this case is clearly ruled by the decisions in *Paterson* v. *Earl of Fife*, 27th January 1865, 3 Macph. 423, and *Walker* v. *Flint*, 20th February 1863, 1 Macph. 417, and other authorities there referred to."

The pursuer reclaimed.

SHAND and REID for him.

CLARK and H. J. MONCREIFF in answer.

The Court adhered.

The rule of law was quite clear that such an agreement as was alleged by the pursuer could only be proved by writ or oath. Proof *prout de jure* had been excluded by a consistent series of authorities. Till the agreement was set up in a competent way, the alleged *rei interventus* could not avail. But the *rei interventus* set forth consisted of acts which were presumably taken on the faith of the lease, they being ordinary farming operations, and was not of that particular nature as to suggest the idea that it had followed

upon the alleged verbal agreement, but for which it would not have taken place.

Agents for Pursuer—Philip & Laing, S.S.C.

Agents for Defenders—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, June 4.

FIRST DIVISION.

BAIRD *v.* FIELD AND OTHERS.

Debts Recovery Act—Failure to Proceed in Appeal. In an appeal under the "Debts Recovery Act," when the appellant fails to proceed in the appeal, the process falls to be transmitted to the Sheriff-clerk by the Clerk of the Division, without any motion or appearance of the respondent.

This was an appeal under the Debts Recovery Act. The appeal was presented on 12th April last, and on 15th April the process was transmitted to the Court of Session. By section 14 of the Act, in an appeal so taken in vacation, the appellant must, on or before the third sederunt day of the ensuing session, apply by note to the Lord President of the Division to which the appeal is taken, the presenting of which note he shall at the same time intimate by letter to the respondent or his known agent, craving his Lordship to move the Court to send the appeal to the Summar Roll; "provided always that if the appellant shall fail to bring his appeal before the Division by note as aforesaid, he shall be held to have fallen from the same, and the process shall forthwith be retransmitted to the Sheriff-Clerk, and the judgment complained of shall thereupon become final, and shall be treated in all respects as if no appeal had been taken against the same." No note in terms of this section was here presented by the appellant; and in respect thereof the respondent, by a note to the Lord President, moved that the appeal be dismissed.

ORPHOOT for respondent.

M'LEAN for appellant.

The Court took time to consider.

At advising—

LORD PRESIDENT—The Court have considered the point raised in this appeal, and after consulting with the Judges of the Second Division we have resolved to fix the procedure to be adopted under the 12th, 13th, and 14th sections of the statute. We are all satisfied that the intention of the Act is, that the entering of an appeal shall be a warrant on the Sheriff-clerk to transmit the process, and on the failure of the appellant to proceed as required in section 14 of the statute, it is the duty of the principal clerk in this Court forthwith to retransmit the process to the Sheriff-clerk, without any motion or note being required. The respondent need not appear till the case is in the roll. It is a consequence of this view that we cannot allow the respondent the expense of his appearance in this case.

His Lordship added, that of course these observations applied only to appeals under the Debts Recovery Act, and had no reference to those under the recent Court of Session Act.

No interlocutor was given.

Agent for Appellant—Wm. Miller, S.S.C.

Agents for Respondents—Neilson & Cowan, W.S.

Saturday, June 5.

SECOND DIVISION.

SMITH *v.* KERR AND SMITH.

Husband and Wife—Policy of Insurance on Life of Wife—Heirs and assignees—Communion of goods—Executry funds. A husband effected a policy of insurance on the life of his wife, which was made payable to her heirs and assignees. It was kept up by the husband during the subsistence of the marriage, which was dissolved by the wife predeceasing the husband. The sum in the policy of insurance was not payable during the subsistence of the marriage. *Held* that the proceeds formed a part of the estate of the wife, not a part of the subjects falling on her death within the *communio bonorum or jus mariti* of the husband, and that the contents were payable to her heirs *in mobilibus*.

This action was raised at the instance of Allison Smith, one of the three children of the late Mr Robert Smith, spirit-dealer, Edinburgh, against Mrs Marion Smith or Kerr, sister of the pursuer, as executrix-dative *qua* next of kin of their mother, and Mrs Alexander Brodie or Smith, the widow of the cautioner for the other defender, as executrix of her mother Mrs Marion Smith, and concluded for payment of the pursuer's one-third share of her mother's estate, as one of the three next of kin. Mrs Smith's estate consisted principally of the amount of a policy of insurance, which had been effected on her own life, payable to her heirs and assignees. She was survived by her husband, who claimed the policy as his property, but he afterwards waived any right he might have had therein, and expede a confirmation in name of the defender, Mrs Marion Kerr, his eldest child, who was then a pupil, as one of her mother's next of kin. Under this confirmation, the amount of the policy was uplifted by the husband as administrator-in-law of his daughter, and the sum so uplifted was retained by him till his death. Thereafter, his trustees, having realised his estate, set apart the amount of the policy of insurance, by obtaining a receipt therefor from the executrix, who was then a minor, with their consent, as her curators. The amount of the receipt was allowed to remain in the hands of the agent for the trust, who afterwards became bankrupt. The Lord Ordinary (JERVISWOODE) found the defenders liable to make the sum in the confirmation forthcoming to the next of kin, and decreed against them for the sum sued for. The defenders reclaimed.

FRASER and GEBBIE, for them, argued (1) that the amount of the policy did not form part of the estate of the mother, but belonged to the husband; and (2) that they were not responsible to the pursuer for the amount which had been lost in the hands of the agent for the trustees.

GIFFORD and STRACHAN in answer.

At advising—

LORD JUSTICE-CLERK—In this case, my Lords, we have to decide a question which I regret to think has found its way into this Court at all, and which I regret also, according to a practice now fortunately altered, has been before us, on successive reclaiming notes, oftener than once.

The facts of the case, as they arise upon the record and proof, are these:—In May 1847 a policy was opened for £100 on the life of Mrs Marion