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

Turner or Smith; the policy was made payable to Mrs Smith, her heirs, executors, successors, and assignees. It was issued on the usual conditions of a policy on which a payment of one year's premium had been made, and was to be kept up by half-yearly payments, failing which the policy was to lapse. The period of payment was three months after Mrs Smith's death, which event was to make the sum in the policy exigible.

The policy was opened at a time when Mrs Smith was the wife of Mr Robert Smith, and expressly bears to have been effected with his consent. The premiums were regularly paid. She died on the 31st October 1851, intestate. She left three children, the eldest of whom, the defender in the present action, was then only a pupil, being eleven years of age. A question was raised by the Insurance Company, when a claim was made for payment of the sum in the policy by the husband, as to whether he had right to discharge it, and the result was a confirmation by the father in name of his pupil daughter, in the course of which there is contained a sort of protest to the effect that the sum in the policy might have been validly discharged by him.

As a matter of course, the policy was entered in the confirmation as a portion of the executry of Mrs Smith. Wm. Smith, the party represented by Mrs Smith, the other defender in this process, enacted himself as cautioner that the sum of £107, the amount of executry, "should be made free and furthcoming to all having interest as law will." We have determined, in a previous stage of the discussion, that the obligation was effectually come under.

The sum was uplifted by Robert Smith as administrator-in-law to his daughter. He married a second time, and died without issue of the second marriage, but leaving a trust-disposition in favour of trustees, who were also named tutors and curators to his three children by the first marriage.

In June 1857, when the defender Mrs Kerr was in minority, she, with consent of her curators, granted a receipt as for payment by her father's representatives to her, as executrix of her mother, of the sum of £133, 5s. 6d., being the debt due by her father in respect of the intromissions had by him with the executry of her mother, including the proceeds of the policy. It is abundantly proved that the receipt was matter of form, to enable a settlement to be effected with Government, and that no money was *de facto* paid over in consideration for the receipt.

The funds belonging to Mr Smith's executry estate, having come into the hands of an agent who became bankrupt, were lost, except to the amount of a small dividend; and now a second daughter of the deceased sues the defender, her eldest sister, and also the representative of the cautioner in the confirmation, for a third share of the £107, of which it is said the defender, as her mother's executrix, acknowledged receipt as a portion of her executry with interest.

The defenders raise in defence a plea which, if well founded in law, would certainly affect the decision of the case. They say that the sum in the policy was not truly at any time a portion of Mrs Smith's executry, but a portion of the goods in communion between the spouses, so as to form truly a portion of the estate belonging to her father himself, and so falling to be administered by his trustees as his own proper estate. If, in point of law, the fund never really did form part of Mrs Smith's executry, it would be difficult to rear up a liability against the defender on any ground; and impossible to sustain the demand in this action, which rests exclusively upon the footing that what is sought to be recovered is a third share of the executry estate of Mrs Smith, and nothing else.

This question is, in one view of it, of general interest, as affecting the right and interest in policies of assurance effected on the life of spouses *pendente matrimonio;* and the more important as an appeal has been made to two decisions of the Court which are said to be to some extent irreconcilable.

I shall state my views on this general question; but, in conformity with a view thrown out by Lord Cowan in the course of the discussion; I am of opinion that this case may be safely decided on principles of law sufficient for the judgment, without the necessity of deciding the more general point.

There can be no possible doubt that, *ex proposito* of Mr Smith, the policy was framed so as to operate in favour of his wife. The sum payable under the policy was to be dealt with as a fund of hers; so as her heirs, with his consent, were made the parties who were to receive the sum insured. It was made payable to *her* heirs, executors, and assignees. The only title to exact payment on the face of the policy was in her heirs *in mobilibus*. It was said to be transferable by way of assignment or alienation on her part. Its very form assumes that of the constitution of a *peculium* over which the husband and his heirs was never at any time to have any right. The devotion of monies to the payment of annual premiums to keep up the policy and the payment of the costs of the policy itself, defrayed from the common fund, of which the husband was administrator, and till the dissolution of the marriage *dominus*, could only be done *intuitu* of conferring a gift, and such a gift as neither he nor *his* executors were ever intended to touch. If that view be right, and I confess I see no answer to it, then the death of the husband without a revocation of the gift left the donation standing, and the right conferred by him on her and her heirs *in mobilibus* unchallenged. The fact that he died without being insolvent or bankrupt excludes the element of virtual revocation, so that, if it is to be regarded as a gift from the husband to the wife, it remained good. An arrangement on the part of a solvent husband to devote a fund to effect a policy, in which the wife should have an exclusive interest, is perfectly lawful. The case of the defender must be that, notwithstanding of the *enixa voluntas* of both spouses, the husband has, *jure mariti*, a right to the policy, of which, by the very act of effecting the policy in his wife's name, he seeks absolutely to divest himself—a virtual revival of the old and exploded doctrine in which renunciations of the *jus mariti* were held as "water thrown upon higher ground which ever returns."

Suppose that a husband had assigned a policy to his wife and her heirs *in mobilibus*, effected upon the life of a third party, and had died without revoking the deed, and without being bankrupt or insolvent, could there be any hesitation in recognising the right of the wife's executors? In the present case the right in the policy is surely as distinctly vested by the husband to his wife and her executors as it would be in the case supposed. If it be said that the right of payment is in the wife's *executors and assignees*, and that the husband is the assignee of the whole of the wife's rights, and, among others, of this very

right, I answer that the plain intention and meaning of the expression *assignees* is—the parties to whom the wife may assign by voluntary transfer; and that the assignees there meant, who are associated with her heirs and executors, are parties who may be specially assigned into the right by the wife. To hold that the husband who assented to the effecting of the policy in favour of the wife and her executors and assignees was all the while assenting to the completion of a policy of which he himself was the true assignee, would be to nullify the whole transaction, if indeed it did open up an objection to the policy under the second section of the Act 14 Geo. III., c. 48. I hold the true construction of the expression to import an intention to make the fund the absolute property of the wife, and I know nothing to prevent that intention operating. The case of *Galloway* and *Craig* in the House of Lords seems to be directly in favour of this view, for there a right in the wife in a policy was viewed as a donation, and would have been held as revoked by the husband's bankruptcy, but for the fact that the wife was otherwise unprovided for, and that it was a provision so as to make it irrevocable.

I therefore think that we must hold the proceeds of this policy as 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* by the very terms and object of the policy.

I arrive at the same conclusion upon the separate ground that the proceeds of this policy were no part of the goods in communion, because the policy did not become a debt due by the insurance company till the marriage was dissolved.

It is difficult to figure a right to a sum vesting in the two spouses as a part of the goods in communion which only began to become due on the marriage being dissolved, *i.e.*, at a time when, by the death of one of the spouses, the *communio bonorum* has necessarily ceased.

In the case of a proper contingent obligation in favour of either spouse, when the event purifying the contingency happens after the dissolution, it is clear, on authority and principle, that the obligation does not form part of the goods in common. It is clear on authority, for the case of *Fotheringham*, Dict. 5764, so expressly finds, and no institutional writer has questioned its authority. Bankton states the proposition in terms of that decision. Mr More cites the decision as authoritative in his Notes on Stair; and Mr Bell in his Principles lays it down as undoubted. It is clear on principle, because, the event of payment ever being exigible being uncertain, no *present* obligation prestable in reference to it can have existed during the joint lives of the spouses, and thus no communion was possible.

On the other hand, as goods in communion are not limited to corporeal moveables, but include *nomina debitorum*, and other personal *jura incorporalia*, where there is a present obligation positively prestable at a future time certain to arrive, though uncertain as to the precise time, the right falls within the communion.

The case of a policy of insurance on the life of one spouse, and payable on her death, raises a case in which the fund does not, and cannot be, *de facto* a part of the goods in communion, but as to which we have to consider whether, as it is payable on the occurrence of a death—an event certain to happen—it may not be regarded as a future debt, payment of which is due, but is postponed. If so, the *right* may be held to vest and to be dealt with as a bill or bond before the term of payment has arrived, of which the terms of payment are fixed at a time beyond the endurance of the marriage.

The first distinction which arises between a debt or positive obligation, the payment of which is postponed, and such an instrument as a policy of insurance is, that the debt or obligation, though payment is postponed, is a subsisting obligation—such as an obligation as may, by an anticipation of the period of payment at the joint wish of the parties, be immediately satisfied. The non-exaction till a future day is a stipulation generally for the benefit of the debtor, and the debt being due, it may be by the joint act of the parties extinguished by anticipated payment. In the case of a policy of insurance, the sum in the policy begins to be due only when the insured shall have died. The payment of the sum before the occurrence of the event would be in contradiction to the very nature of the transaction. The second answer is, that as the payment of policies depends upon the fulfilment of conditions which may or may not be implemented, the contract in the policy is not one of certain and pure obligation, but contingent on the fulfilment of certain stipulations prestable half-yearly. This view is fully and very clearly brought out in the opinion of the judges in the case of *Wight*.

It is said that the policy has a value in the lifetime of the spouses, and may be then assigned, so that the event of the death does not create the right in the instrument.

That a policy of some endurance may bring money on a sale seems to me quite immaterial in the present question. A policy of a few years' duration only is not saleable in the market unless where the insurance has been effected on an exceptionally bad life, and the value given for the policy, when it is so sold, is given as a mere speculation on the probable amount of premium which the purchaser may have to pay—as contrasted with the sum which he may receive—an expectation many a time disappointed. It has no true marketable value; the price is paid on a conjecture as to the probable endurance of the life of the insured, and the transaction of sale is truly of the nature of a *pactum aleatorium*.

In this case it is probably true that the insurance office would have given what is called a surrender value, but this would have been for a surrender of the policy, *i.e.*, for terminating their obligation. That is not the case of a contract to be implemented, but an agreement that the contract should be ended before the period for its implement arrives. It may be perfectly well conceived, in the case of an indisputably contingent obligation, that the party under obligation may be willing to give some money to be rid of it—can such arrangements, on terms dictated by the party under obligation, alter the nature of the contract itself?

The payment made by offices is not in the ordinary case imperative. I do not know that policies ever contain a clause as to the payment of surrender value; and in the policy in this case, which I have examined, there is not one word on the subject, consequently the payment of surrender value is not *pars contractus*. Offices moved by equitable considerations, arising from the fact that the yearly or half-yearly premium is calculated upon the footing of its not being measured by the true

amount of the risk at the time of the first payment, but fixed with regard to future years, in order to equalise the payments; moved also by the necessity of liberal dealing as a condition of their existence—or it may be by the very good bargain they are enabled to make in getting rid of a heavy responsibility—go readily into such transactions of surrender. They deal more or less liberally, most of them however giving surrender value only when the policy has lasted a certain number of years, many differing as to the number of years, and one or two I believe, giving something even when a single year's premium is paid. In short, they make an arrangement whereby they give something on the dropping of a policy,—payment of which something, in the absence of special stipulation, no court of law, as I conceive, can enforce; for, as the contract is embodied in the policy, and contains no such stipulation, the law of the contract ignores a right of that description.

Again, I attribute no importance to the fact that a policy may be assigned, for undoubtedly any obligation certainly contingent may be so. A chance of succession to a living man, depending on the granter's survivance, may be validly assigned.

My view therefore is, that, inasmuch as the sum insured was not payable during the subsistence of the marriage, and began to be due on the dissolution only, and was contingent on the keeping of the policy during life, it is within the case of a proper contingent obligation, and so it was found *per expressum* in the case of *Wight*, which seems to me a sound and well considered judgment, and made to rest, in the opinions of the eminent judges who then presided in this Division of the Court, on grounds that are not capable of being assailed.

The case of *Muirhead* has been appealed to as derogating from the authority of *Wight's* case. The case was an insurance effected by a husband on his own life, who predeceased his wife. The policy was payable to *his* executors, and the widow claimed a share of the policy *jure relictæ*, and the claim was allowed, one view apparently taken being, that the contents of the policy formed a part of the husband's executry, and must necessarily suffer a tripartite division. This case was said to leave the case of *Wight* untouched, and that observation may be sufficient for the present case, because here, as in *Wight's* case, the insurance is on the death of the wife, and the rights being taken payable to her executors, is stronger than that of *Wight*, where the right was in the husband and his executors; but I cannot help saying, that if the view of the general principle of law as applicable to such contracts which I have stated is correct, it is not very easy reconciled with the judgment in that case. I think that the amount of the husband's executry is not conclusive of the question, as seems to have been taken for granted. Funds which might have arisen on a contingent obligation payable to the husband by the occurrence of the contingency a week after her death, such as the sum of a policy on a ship wrecked a day or two after the death of the party holding the policy, would, I suppose, have formed part of his executry; and personal bonds after the period of payment has passed, would certainly have done so, though such bonds are excluded from computation in a question of *jus relictæ*. In such cases the extent of the executry estate does not determine the amount of the widow's right *jure relictæ*. In fixing her share a portion of the executry must necessarily be deducted. Arrangements for mutual insurance on each other's lives are not uncommon between spouses. Such insurances were opened in the case of *Galloway*, and, though not stated in the record, I find that on the day on which this policy was opened, another on the life of the husband of the same amount in favour of his executors was also opened. Of this fact I cannot of course take judicial cognizance, but the supposition of such a case suggests the difficulty of reconciling the result of the adoption of a principle which would, in direct contradiction to the agreement of parties, either throw both sums into the communion, or give the widow, in case of his predecease, a share of what was insured on her husband's life, and made payable to his executors; while her executors, in event of his predecease, should take the whole amount, the husband's executors having no interest in the amount.

If this be so, the sum of £100 was rightly included in the confirmation, and the defenders must account for it. The transaction, in so far as regards Mrs Kerr, was very prejudicial, but the recognition in the act of granting the receipt while acting with her curators, and the absence of a challenge during the *quadriennium utile*, seems to exclude the redress which might be open in a reduction on the head of minority and lesion. The case of the other defender, in the view which I have now given, seems hopeless. The sum in that view rightly in the confirmation must be made furth-coming.

LORD COWAN—The interlocutor of the Lord Ordinary of date 21st February 1868 was adhered to, subject to the reservation, to be disposed of on the merits, of "all questions and objections affecting the extent of the liability of the defenders to make payment of the amount confirmed as accords of law." The cause having returned to the Lord Ordinary, and proof been led, his Lordship, on 1st December 1868, pronounced the interlocutor under review—by which it is found that the receipt attached to the document, No. 23 of process, granted by the defender Marion Smith or Kerr, with the advice of her curator, afforded evidence that she had received the sum of £133, 5s. 6d., as the sum due by her father Robert Smith to her as executrix of her deceased mother, and that the defenders had failed to prove that the sum thereby acknowledged to be received had not in fact been received by the defender Marion Smith or Kerr. His Lordship therefore decerned against the defenders in terms of the conclusions of the summons. On advising the case, further proof before answer was allowed on the defender's motion, which was taken before Lord Neaves. On the merits of the case, I am of opinion that the interlocutors of the Lord Ordinary are consistent with the legal import and effect of the proof, parole and documentary; and, but for the new plea raised by the defenders at the advising of the cause in the Inner House, in reference to the £100 recovered under the policy of insurance, and forming the main part of the amount confirmed by the executrix, I would not have said more than to have given my concurrence to the reclaiming note being refused. Liability to account to the pursuer, as interested in the mother's executry to the extent claimed in the summons, is the necessary result of the defender Marion Smith's intromissions with her mother's estate as her confirmed executrix. And the other defender, as representing the cautioner in the confirmation, is necessarily liable along with the executrix to those interested in the estate intromitted with by her.

The policy under which the £100 was recovered from the insurance company was opened by Robert Smith, father of the pursuer and defender, on the life of his wife, Mary Turner or Smith, and was declared to be payable "three months after her death to her heirs, executors, successors, or assignees." Mary Turner or Smith predeceased her husband on 31st October 1851. The husband survived till May 1856. Meanwhile he had expede confirmation as administrator-in-law to his daughter, Marion Smith, in her name as her mother's executrix, in March 1852; and as such administrator-in-law he received the £100 from the insurance office, granting receipt in that character. Subsequent to her father's death the defender Marion Smith, with consent of her curators, discharged the trustees acting under her father's settlement. She was then in minority, but she has not challenged any of the actings of her guardians within the *quadriennium utile*. The claim now made against her is for one-third of her mother's executry with which she is thus proved to have intromitted. But it is contended that, as the policy of insurance was opened by her father, and payable on his wife's death to her representatives, the amount in the policy formed part of the goods in communion between him and his wife, and that consequently she had no individual interest in the amount which the confirmation could attach, and which her executrix is bound to make forthcoming as having truly been part of her moveable estate, and the case of *Muirhead*, 6th December 1867, in which it was "held that the *jus relictæ* extends over sums contained in policies of insurance effected by a husband on his own life," was founded on as excluding any individual right to the fund which the wife's representatives could claim.

I do not think that the decision relied on can be held conclusive authority in the circumstances in which the present question arises. The policy here was opened in name of the wife. In *Muirhead's* case it was opened in name of the husband. In this case it is upon the life of the wife, while in the other case it was on the husband's life. The obligation in this policy is to pay the amount three months after the wife's death to her representatives. In *Muirhead's* case the obligation was to pay to his own executors, administrators, or assigns. In all these respects the circumstances of the two cases are in direct contrast; and I cannot therefore recognise the applicability of the decision to the question now before us; and this all the more as the authority of the case of *Wight* v. *Brown*, 27th January 1849—the principle of which I hold to be here directly applicable—is specially recognised, and its authority not disputed in the opinions of the Judges who disposed of the case of *Muirhead*.

The policy of insurance in the case of *Wight* was payable six months after her death to the husband, his executors or assigns. The wife having predeceased, the amount was held to form no part of the goods in communion, and the claim of the wife's next-of-kin to participate in it was rejected. The principle there recognised was that the obligation in the policy was contingent, and that the sum, not being payable till after the death of the wife, could not be regarded as falling under the *communio bonorum*. The opinions of the Judges are clear upon the principle; and the authorities summarily noticed by Mr Bell in his Principles, sect. 1550, establish,—(1) that the fund must not only accrue, but vest during the marriage in order to characterize it as moveable to fall under the *communio;* and (2) that conditional bonds do not vest before the purifying of the condition. This appears to me to rule the present question, and to exclude the plea which has been advanced on the part of the defender. The observation made by Lord Medwyn in *Wight's* case well states, not merely the effect of that judgment, but the general law on the subject (11 D. 467), "We should view it (life insurance) where it was simply an undertaking to pay a sum on the death of a party whose life was insured: and if it was by a husband on his own life or on the life of his wife, it being in no event due till the dissolution of the marriage, it seems impossible to hold that the sum could be looked as goods in communion *ad sustinenda onera matrimonii*."

There is, however, a distinct view of the case which to my mind is equally conclusive of the right to this fund being in the wife's representatives. A policy of insurance opened by the husband payable to her representatives on the wife's death, cannot be treated on any other principle than such policy opened by the husband and payable to the wife or her representatives after his own death. Such a case occurred in *Craig* v. *Galloway*, 22d June 1860, reversed in the House of Lords, in May 1861, on the special ground that the gift to the wife, *stante matrimonio*, was in that case held to be a *provision*, and therefore so far not gratuitous, but *quasi* onerous. This Court had held the policy effected on the wife's life to be a donation which was revoked by the husband's sequestration, and the specialty recognised in the House of Lords above led to the reversal of the judgment. In the present case I view the policy opened by the husband on his wife's life as a donation which he might have recalled, or which might have been disappointed by his bankruptcy. Nothing of the kind occurred. The husband died solvent without having revoked the donation, and having, on the contrary, by his acts treated the sum in the policy as his wife's estate descending *utile* to her executrix.

Lord Benholme—The most important question in this case is this, Whether the contents of the policy in question, which became payable on the death of Mrs Turner or Smith, became, on that event, payable exclusively to her executors, or belonged to the extent of two thirds to her surviving husband?

This question may, no doubt, be held to be solved by the specialty alluded to by your Lordship—viz., that this policy is a *peculium*, or donation by the husband to the wife. But I cannot say that I am so clear as to this view, as to relieve me from the consideration of the more general one, which may be thus stated: Does a policy of insurance, done on the life of the predeceaser of two married parties, fall under the *communio bonorum*; so as to suffer a partition between the estates of the two spouses?—or does it belong exclusively to the party, or representatives of the party, in whose favour the policy is conceived? However this question may be determined, I cannot suppose that it will, in the least, depend upon the contingence whether the predeceaser is the husband or the wife. The extent of the *communio bonorum* plainly depends upon the nature and circumstances of the funds, or the rights, concerning which the question occurs, and not upon any difference in the situation of the husband and the wife, as having an interest in the common fund.

Now, it appears to me that the question stated above has been differently decided, in the case of *Wight* and in that of *Muirhead*, referred to in the pleadings.

In the former case that spouse was preferred to the whole, in whose favour the policy was conceived; on the principle that the policy did not fall under the *communio bonorum*. In the latter case the policy was held to be divisible between the estates of the spouses.

In this aspect of these two cases, some embarrassment might be occasioned to us, in determining the present case.

But it is pleaded that the argument of the successful party, in the case of *Muirhead*, avoids this apparent conflict. That argument seemed to amount to this,—that on the predecease of the husband, the doctrine of the *communio bonorum* takes no place, in reference to the claims of the widow. The widow's claim extends to an *aliquot* part of the whole executry or moveable estate of the husband. The *jus relictæ* is in every case co-extensive with the *legitim;* and whatever funds or rights are affected by the latter, must also be affected by the former.

This argument, if well-founded, would indeed avoid the apparent conflict of the two decisions; but at great expense, as it appears to me, of the established law of Scotland.

It cannot be disputed that there are several subjects which belong to the moveable succession of the husband, which do not fall under the *communio bonorum*, and which are, consequently, excluded from the *jus relictæ*. Thus bonds for borrowed money lent out at interest, conditional claims, and (in one view of the present question) policies of insurance, are excluded from the *communio bonorum*, and are, consequently, not affected by the *jus relictæ*.

When such subjects as these form part of the predeceasing husband's funds, it is altogether incorrect to say that the *jus relictæ* extends over the whole moveable succession of the husband. Excluded, as these are, from the *communio bonorum*, they are equally, and consequently, excluded from the *jus relictæ*. Although the widow has no claim upon them, they fall under the *legitim*, and are equally divided between it and the dead's part.

In such a case, in order to distribute the husband's succession, a single division is not sufficient. There must first be (where there are children), a tripartite division of the simply moveable subjects, amongst which are not included the subjects above-mentioned; and afterwards there must be a division of the rest of the moveable estate between the *legitim* and the dead's part.

Lord Stair, after speaking of such bonds as, by by Statute 1661, c. 32, are moveable as to succession, but remain heritable as to the fisk and relict, observes (iii., 4, 24):—"Whereby there arises a different division of moveable sums falling under executry,—one of such as were moveable before the said Act, which, if there be a wife and children, are divided in three, whereof the bairns' part is a third, and the dead's part a third, and the wife's part a third. Another, in the same testament, of bonds bearing annual rent, which, if there be bairns, is divisible in two parts, whereof the one-half is the bairns' part, and the other half the dead's part, and the relict has no part, being excluded." And Mr Erskine (iii., 9, 22), specially referring to this passage of Stair, observes:—"Personal bonds due to the husband, because they are by 1661, c. 32, moveable in respect of succession, and heritable as to the widow, must therefore increase the *legitim* and dead's part, but not the *jus relictæ*."

Whilst I have thus stated my doubts as to the soundness of the arguments by which the case of *Muirhead* is accounted for, with a view of reconciling it with the previous case of *Wight*,—I am bound to admit that, from the opinions of the Judges who decided the case of *Muirhead*, they had no intention of overturning or impeaching the principle upon which the previous case was decided.

I am therefore of opinion that, whether we are satisfied or not with the latter decision, we are fully at liberty to follow the former. And I cannot help thinking that, in reference to the general question as to policies of insurance, with which I commenced these observations, the case of *Wight* solved that question in the proper manner—viz., that when a policy of insurance is done upon the life of the predeceasing spouse, the whole contents of the policy belongs to that spouse, or his or her representatives, in whose favour the policy is conceived. With respect to the othe r points of the case, I agree with your Lordships.

LORD NEAVES concurred.

Agents for the Pursuer—Thomson, Dickson, & Shaw, W.S.

Agent for the Defenders—M. Macgregor, S.S.C.

Monday, June 6.

TEIND COURT.

(Before the Lord President, Lords Deas, Ardmillan, Kinloch, and Mure.)

HARRISON AINSLIE AND CO. *v.* THE OFFICERS OF STATE.

Teinds—Valuation—Approbation—Absence of Titular—Rental Bolls. In an action of approbation of a report by Sub-Commissioners, made in 1629, valuing teinds by rental bolls—*held* that it was not a good objection, that one of the heritors and the titular had not been proved to have consented to valuation by rental bolls, and that the absence of the titular did not form a good objection, as his beneficial interest was fully represented by the parson as tacksman.

Harrison Ainslie and Co., who are proprietors of the lands of Kendmoir and others in Argyleshire, raised this action of approbation of a report of the Sub-Commissioners appointed for valuing the stock and teind of the lands within the Presbytery of Argyle, dated 1629, by which the teinds of the lands of Kendmoir and others were valued by rental bolls. At the date of the valuation the Bishop of Argyle and the Isles was titular of one-fourth of the teinds of the parish, and the Crown has acquired his right. The Officers of State opposed the approbation, and pleaded—(1) The report of the Sub-Commissioners founded on is invalid and ineffectual, in respect that neither the heritor to whom the lands of Kendmoir and others belonged, nor the titular, consented to the valuation of the teinds according to rental bolls in use to be paid. (2) The said report is invalid and ineffectual, in respect that the Bishop of Argyle and the Isles, titular of one-fourth of the teinds, was not called as a party to the process.