Friday, December 6.

MUIRHEAD *v.* LINDSAY.

Husband and Wife—Jus Relictæ—*Policy of Insurance*—*Executry*—Communio Bonorum. *Held* that the *jus relictæ* extends over the sum contained in a policy of insurance on the life of the deceased husband, payable after his death. Observed that *jus relictæ* is a claim of the same nature as *legitim*. Opinion, that "goods in communion" sometimes means, not the whole moveable estate of the husband, but only that part which is applicable *ad sustinenda onera matrimonii*. Observations on *Wight* v. *Brown*, 27th January 1849.

Heritable and Moveable—*Personal Bond*—*Term of Payment.*—Circumstances in which *held* that *jus relictæ* extended over a sum of money due to the husband at the time of his death.

This was an action at the instance of the widow of the late Mr Muirhead against the factor on the deceased's trust-estate. The first conclusion of the summons was to have it found that the pursuer's *jus relictæ* extended over two policies of insurance on the life of the deceased, and over a sum of £617, alleged to be the value of the deceased's interest in certain moveables belonging to him at the time of his death, or otherwise in respect the said sum was the balance of a moveable debt due to the deceased. The other conclusions of the summons, relating chiefly to claims of terce, were not made the subject of argument in the Inner-House.

The defender pleaded that the pursuer's statements were not relevant to support the conclusions of the summons; that the sums contained in the two policies of insurance, being only conditional or co .tingent debts, and not due or payable until after the death of the husband, did not fall under the communion of goods; that the transactions relating to the £617 being truly of the nature of a personal bond, containing a clause of interest, with the term of payment anterior to the deceased's death, the pursuer was not entitled to any part thereof *jure relictæ;* and, *separatim*, that the £617, being partly secured on heritage, was not subject to the *jus relictæ*.

The Lord Ordinary (Jerviswoode) sustained these pleas of the defender, and assoilzied the defender from the first conclusion of the summons. With regard to this finding, his Lordship stated in his note:—"As respects that branch of the first of these conclusions which relates to the two policies of assurance, it appears to the Lord Ordinary that the pursuer cannot succeed under it consistently with the judgment of the Court in the case of *Wight* v. *Brown*, January 27, 1849, which proceeded upon principles altogether adverse to the contention on the part of the pursuer here. The sum of £617, 11s. arises out of a transaction of an anomalous and peculiar character, but the Lord Ordinary has not seen ground on which to give effect to the claim for *jus relictæ* in relation to it."

The pursuer reclaimed.

Lord-Advocate (Gordon) and Black for reclaimer.

Gifford and Neaves for respondent.

At advising—

Lord President—The Lord Ordinary's interlocutor disposes of the whole conclusions of this summons; but it has been reclaimed against only to a limited extent by one of the parties. The reclaiming note prays that we should recal the Lord Ordinary's interlocutor, and find that the pursuer's *jus relictæ* extends over the two policies specified in the first conclusion of the summons, and over the sum of £617, 11s., specified in the said conclusion. The reclaiming note, therefore, raises two questions, one relating to the policies of insurance, and the other to the £617. The latter point is very special, but the former raises a question of very great and general importance, and one which at first sight is attended with a good deal of difficulty. I have come, however, to have a clear opinion, to the effect that the *jus relictæ* of the pursuer does extend over the sums in the policies of insurance—*i.e.*, that the policies of insurance form part of the executry estate of the deceased, which is in this case to be divided into three equal parts—one being *legitim*, another *jus relictæ*, and the third dead's part. It appears to me that any other conclusion would lead to very anomalous results. The policies of insurance themselves were opened on 24th April 1835, and 21st May 1839 respectively. They were opened by the late Mr Muirhead himself. They were insurances on his own life, and he appears to have paid the premiums. The obligation of the insurance company is to pay, three months after receiving proof of the death of Mr Muirhead, to his executors, administrators, or assigns, the respective sums. It is quite true that the obligation is not to pay to Muirhead himself; but that arises from the very nature of the obligation, and the time when it is prestable. Such a form of obligation would have been inappropriate; and, if it is sometimes used in such deeds, it means nothing more than is here expressed. But though the obligation is not to pay to Muirhead, if it be an obligation to pay to his executors, and if payment be made to his executors because they are his executors, it is difficult to resist the conclusion that the sum in the policy is part of the executry estate. If so, the executry estate is what is to be divided into three parts. If this sum did not fall into executry, I don't know what is to become of it. It is moveable; part of the moveable succession of the deceased. It is impossible to say that it is not part of the free executry. If so, is it of such a nature as must disturb the rule of law, that in such cases divides the free executry into three parts? That would lead to very anomalous results, for if the widow is not entitled to her share of that sum, as little would be the children, and the whole sums in the policies of insurance must then form dead's part, and increase it beyond the amount of *legitim* and *jus relictæ*. That is a mode of dividing the executry unknown to law, and, if possible, would lead to strange results. Many persons are so situated that they can leave no moveable estate but such as they can save out of their income, and it is most ordinary and most prudent to invest their surplus income in policies of insurance; so that, in very many cases all the moveable estate that a man leaves consists of policies of insurance. If such a principle were admitted as is contended for, the whole moveable estate would become dead's part. No doubt, it is in the power of the husband and father, while he lives, during the subsistence of the marriage, to administer his moveable estate as he pleases, and he may so deal with it as to defeat practically the *jus relictæ* and *legitim*. But if he leaves it in such a form as to be part of his executry, there is no mode of dealing with that moveable estate known in the law of Scotland but to divide it in a bi-partite or tri-partite division, according to circumstances. The conclusion I come

to is, that the sums in these policies of insurance form part of the estate of the defunct, over which the *jus relictæ* of the pursuer extends.

But a good deal of argument was rested on the case of *Wight* v. *Brown*, and at first sight there is a good deal of difficulty undoubtedly from that judgment. But the difficulty lies on the surface, and when that case is considered it is quite reconcileable with the judgment which I propose should be pronounced here. There was no claim of *jus relictæ* in that case, and no question as to what formed part of the executry estate. The question there related to a policy of insurance effected by a husband on the life of his wife, and it was on the wife's death that the question arose. The claim of the wife's next of kin against the husband was the claim adjudicated on. That was a claim against a living man and his estate, and not against an executry estate, and therefore the rules which regulate the disposal of executry estate in intestacy had no application. The Court there were a good deal puzzled by the manner in which they should apply to that case the doctrine of *communio bonorum*; but that differs widely from the question we have to decide in settling executry estate, and what is comprehended therein; and besides, the policy there was not a policy on the life of the husband, but on the life of the wife. Now, before any question could arise, the marriage must be dissolved, and, until after the marriage was dissolved, the contents of the policy could not become payable to the husband. The question was, Was that policy part of the goods in communion during the marriage?—a totally different question; for the present question is, Whether the policies are part of the executry estate of the husband, which is to be divided after the dissolution of the marriage? Therefore, I think that the decision in *Wight* v. *Brown* does not in the least conflict with the decision I now propose should be pronounced.

The other question, as to the £617, 11s., is a very special one. It appears that Mr Muirhead, having agreed to sell the furniture and other articles mentioned in the condescendence to Veitch, and having stipulated for a price of £1725, with interest, &c., it was agreed that if Muirhead, during the four years that were to elapse before payment, should be of opinion that the business was not advantageous, he should have it in his power to wind up by giving certain notice to Veitch. Veitch took possession, or rather remained in possession, and paid from time to time various sums to account of the price. There was no sale, and no change in the state of possession, and no intention expressed by Muirhead of winding up the transaction, and coming to an end in terms of the agreement. But before the whole sum was paid up there was an extension of the time of payment on two different occasions. The second was on 18th May 1865, when £600 still remained to be paid. On the 18th May, Muirhead extended the time for payment till Martinmas following; but he died four days after making that arrangement. It appears that after his death £300 was paid to the executors, and there still remained a balance of £300 and interest, these two sums making up the £617 in question. The question comes to be, whether this is heritable or movable? It has been said that it must be heritable because in the same position as a bond bearing interest. But a bond bearing interest is not heritable till after the term of payment, and there is a difficulty in saying that the term of payment had arrived. The natural result of this agreement is, that there is a sale of the property, and a price stipulated, the price being payable at a certain time. Still, that was nothing but the price of moveables, and at the time of Muirhead's death what was vested in him was the balance of the price on the moveables, and it can make no difference which, for both are equally moveable.

The result will be, to alter the Lord Ordinary's interlocutor, in terms of the prayer of the reclaiming note.

Lord Curriehill—The first question raised by this reclaiming note is of great importance, and I have given it the utmost attention. In considering the principles applicable to this case we must not be led away by the use of an expression used in this class of cases—the *communio bonorum* of married persons. An idea is often taken up that that means that the funds belonging to the estate, which the husband administers during his life, are partnership property, and that the husband is not the owner of it, but merely the administrator for himself and family. Now, during the subsistence of the marriage the husband is the owner. Whatever be the rights of parties at the dissolution of the marriage, he is the owner during the marriage, with unlimited right to administer. On the death of the head of the family a division takes place. His debts must first be paid, and what remains vests in his executor, and the free estate is to be divided into three parts—the wife, the children, and the nearest of kin or legatees, each taking a share. The wife takes her *jus relictæ*, to which she is entitled by law, and that is the case here. But while she is entitled to one-third of the executry, the question comes to be, does the sum that was payable by the insurance company three months after the death of the husband fall into executry? I hold that to be indisputable. It is treated as part of the executry. The wife is on clear principle entitled to have it included in the fund from which she draws her *jus relictæ*.

The only authority founded on for the opposite view is the case of *Wight* v. *Brown*. The principles of that case require careful consideration in order to distinguish them from the principles that regulate the present case. It is satisfactory, in considering that case, to see that the judges were clearly of opinion that the principles upon which they decided it were inapplicable to a case like the present. The Lord Ordinary had strongly founded on the analogous case of a policy of insurance on the life of the husband himself, and the judges in the Inner-House, in giving judgment, were at pains not only to state that they did not hold the cases to be the same, but that they were distinctly opposed to each other. They held that the principles of the two cases were entirely different. In the first place, it was not a case of the division of the husband's executry. The husband was then alive. Then the sum in dispute was not payable on the death of the husband, but on the death of the wife. That being the nature of the fund, the question came to be one not as to *jus relictæ*, but as to the right of the wife's relatives, after her death, to a sum that was payable during the husband's lifetime. The Court held that, that being a case of succession of her next of kin, it must be something that belonged to her during the subsistence of the marriage, and were clearly of opinion that what did not become payable until after the dissolution of the marriage, and up to that time had been a fund subject to conditions that might

have evacuated the policy altogether, was not to be included in that sum of which the wife's representatives were entitled to demand a share. There was another principle recognised by their Lordships, that the object of the husband in opening such a policy was to enable him to pay off the wife's representatives, and it would be strange if that fund, intended to relieve him from such obligation, should have the effect of increasing that obligation. That these were the grounds of the judgment of the Court will be made clear by a few sentences from their opinions. For it was a carefully considered case, and the judges were unanimous. The Lord Ordinary had proceeded on the analogy of such a case as the present. The Lord Justice-Clerk says—"I am not prepared to admit the accuracy of the assumption often made, and in this argument, that the *jus relictæ*, the actual right and interest in the wife personally on survivance, and the interest of her representatives on her predeceasing her husband, in the goods in communion, are identical. In this there is a fallacy in several particulars." His Lordship then states the principles applicable to the latter claim, and continues, "One very important point for this case is, that while the wife has no sort of property in the goods in communion, yet, on the other hand (anomalous as it may appear and sound), the claim of her next of kin arises solely from *succession* to her, and does not rest on any separate right in their person as *creditors*, such as the children's right of *legitim* . . . Now this is most important in this case, for then clearly the next of kin can claim nothing which did not exist properly as a subject in communion during the marriage." And further on, "And here I must observe that, both in his interlocutor and in the note, the Lord Ordinary takes as identical two totally different matters—viz., whether a sum in a policy on the husband's own life is part of his funds, and liable for his debts after his death; and whether a sum payable under a policy effected by him on his wife's life, and payable after her death, formed part of the goods in communion during marriage. No two matters can be more distinct." And Lord Medwyn—"The argument was that it was a moveable fund which vested, that it was contingent on an event certain, but only uncertain as to time, that a bonus had been received on it, that it might be arrested, could be assigned, and might be disposed of at its value. But still I do not think that, considering the character of the claim against the insurance office, it constitutes such a debt as falls under the goods in communion. It is entered into with the express view that it shall not be payable during the subsistence of the marriage; it is not intended for a fund *ad sustinenda onera matrimonii*." And Lord Moncreiff comes to the same conclusion. These being the principles on which that case was decided, and the Court having stated that they held the very opposite opinions in a case such as the present, I am not compelled by that decision to find it effectual here. It is clear that as to this finding the interlocutor of the Lord Ordinary ought to be altered. As to the £617, I am of opinion that it also falls under the *jus relictæ*, because (1) *sua natura* it was a moveable fund, and the question is, Does it fall under the rule of law that a bond for borrowed money, with interest payable at a certain time, is held to be heritage? Now to bring a bond for borrowed money under that law it must be strictly within the rule, and the rule is, not to make it heritable till after the arrival of the term of payment. Originally the money was to be paid four years after the agreement, but the time was twice prorogated, the last time till Martinmas 1865. But before that time Muirhead died.

Lord Deas—I agree that the first question is one of very great general importance. Mr Muirhead died in May 1865, leaving a widow and four children. He held two policies of insurance on his life for £400 each, each payable in the usual way, three months after his death was proved to the satisfaction of the insurance company. He left a trust-disposition and settlement, but the widow rejected that, as she was entitled to do, and claimed her legal rights. And the question now is, Whether the amount of these two policies of insurance forms part of the moveable estate to be reckoned in fixing the amount of her *jus relictæ?* Apart from *Wight* v. *Brown*, one would have no difficulty. The amount of these policies unquestionably forms part of the moveable estate or executry of Mr Muirhead; and the moveable estate of a husband at his death is by our law divided into three parts equally in such cases as here, where he leaves a widow and children. If the *jus relictæ* does not attach to that fund, I agree that the *legitim* could not attach either, so that where an individual has invested all he can save in policies of insurance on his life, the consequence would be that there was no fund left to which *legitim* or *jus relictæ* could attach. That may be law, but it is a very startling result to arrive at, and no authority has been quoted for it except the case of *Wight* v. *Brown*. But this case differs, for there the Court held that when a wife died, and there was an existing insurance of her life, that did not form part of the goods in communion to which the wife's representatives were entitled. If the expression "goods in communion" were equivalent to "moveable estate of the husband," I do not see how that result would be arrived at. It was moveable estate of the husband, not payable till a certain event, but it had a marketable value. But the Court held that the goods in communion—taking that expression as applicable to the case that had occurred—did not include the whole estate of the husband, but only that portion which was in communion between the spouses as a fund *ad sustinenda onera matrimonii*. That policy was not so applicable to sustain the burdens of the marriage, and so was held not to fall within the fund which the wife's next of kin were entitled to share. *Jus relictæ* is undoubtedly described by our institutional writers and authorities as a claim which attaches to the goods in communion. It seems to me that in *Wight* v. *Brown* the Court gave effect to the argument that the expression "goods in communion" is used loosely, and not always in the same sense. They may mean in one case the whole moveable estate of the husband, and in another only that part which is applicable to sustaining the burdens of the marriage, and that in that limited sense the words are used in treating of the rights of the wife's next of kin. There may be difficulty in arriving at that distinction, but the whole difficulty is whether there are sufficient grounds for making the distinction. If we had a similar case, we would probably be bound by that decision.

As to the second point, I concur.

Lord Ardmillan—Apart from the case of *Wight* v. *Brown* there is no difficulty. There is some variety, or I may say inaccuracy, of expression in

our authorities as to the nature of the claims of *jus relictæ* and *legitim.* I think they are both claims on the moveable executry estate of the husband, and that when it is said that the *jus relictæ* is a claim on the goods in communion, that is not the most exact way of putting it. It is a right of the same character as *legitim.* Both are claims arising on the death of the husband and father, to be charged on his executry estate. It cannot be doubted that a policy of insurance effected by a man on his own life, and payable to his executors, is a part of his executry. It is administrable and divisible as his executry estate, liable to all those claims which the law recognises. Therefore, apart from *Wight* v. *Brown*, it is clear that the present is a good claim, and it would be very unfortunate if it were not, for that would go to exclude all those most important rights secured to widows and children. But the case of *Wight* v. *Brown* has been ingeniously put to us. That case was carefully considered, and decided in elaborate opinions, and would require to be dealt with with great hesitation were we to depart from it. The question in that case was this. A wife died, and there was a policy of insurance on her life, and her executors claimed a share. They could have no better claim than the wife, and the case did not touch the question of the husband's executry, for he was still alive, the question being simply whether a sum payable on the death of the wife was within the goods in communion. The Court held that, as there was no debt till the death of the wife, there was no debt during the marriage, and consequently no fund that could be within the communion of goods *ad sustinenda onera matrimonii.* On that they decided the case, and almost all the judges, in the clearest terms, distinguished that case from the case that would arise on the death of the husband when a claim was made by the wife for *jus relictæ* on his executry estate, and stated that the two claims were totally different. I think that that is correct, and that the claims are totally different; that the question whether a policy of insurance on the life of a predeceasing wife can be subject to a claim by her next of kin, is totally different from the question of the surviving widow, on the death of her husband, claiming her *jus relictæ* from the husband's executry estate. As *legitim* rests on the same rule, our refusing to sustain this claim would imply our refusing to sustain a claim of *legitim.* All the apparent inaccuracies observable in dealing with *jus relictæ* appear to vanish when the writers treat of *legitim.* But there is no ground for making a distinction between the claims. Both are good claims against the executry estate. I have nothing to add on the other part of the case.

Agent for Pursuer—W. H. Cornillon, S.S.C.
Agent for Defender—D. Curror, S.S.C.

Friday, December 6.

HELMES *v.* SWAINSON.

Reparation—Breach of Contract of Sale. Circumstances in which a party found liable in £100 damages for breach of a contract of sale.

This was an advocation of an action of damages for breach of contract raised before the Stewardcourt of Kirkcudbright. The pursuers, Thomas and William Helme, are bobbin turners at Dalbeattie and Gatehouse-of-Fleet, and the defender is a wood merchant in that neighbourhood. The defence was that the contract which the pursuers alleged was not the contract which had been made by the parties, and that the contract which had really been made had been implemented by the defender.

The contract was a verbal one, and it was made by one of the pursuers and the defender in the beginning of 1865, no one else being present. The pursuers alleged that the defenders then agreed to sell to them the whole of the wood of the kind called "bobbin wood," cut in the Killygowan plantation during the season 1865, at the price of 11s. per ton, the pursuers paying in addition the tolls of carting the wood to their mill. The defender's statement on record was that he did not sell the whole or any particular quantity of the bobbin wood; that he only sold bobbin wood at the rate of 11s. per ton; that no particular quantity was mentioned; and that he might have delivered as few tons as he thought proper.

It appeared from the evidence that, for about twenty years, the pursuers had bought wood from the defender in the same way as they alleged they had done on the occasion in question, and that in the year 1864 they had bought from him the bobbin wood of the same plantation cut in that year, and paid for the whole at the rate per ton which had been agreed on. It also appeared from the evidence that the defender's son, who had a bobbin mill at Creewood, near Newton-Stewart, and who had never before received wood from his father for his mill, removed his mill in the course of 1865 to Pulchree, near Gatehouse, in consequence of being unable to get "bobbin" wood from the Glentrool Woods, near Creewood; and that, after 212 tons of the Killygowan bobbin wood of 1865 had been delivered to the pursuers by the defender, the delivery was stopped, and the remainder, which was said to be 322 tons, was sent to the defender's son's mill at Pulchree.

The evidence of the pursuer, William Helme, in regard to the bargain was—"The defender came to me, and we verbally agreed that we were to have the bobbin wood at the same rate as last year, we paying the toll, and he the weighing machine. He expressly excluded the staves from this. He said particularly that we were to get the remainder of that Killygowan wood. There was no reservation of any of the cut, except the stave wood." And in cross-examination he said—"There was no person present besides the defender and myself when we made the final bargain as to the rest of the Killygowan wood. We only agreed to the price on that day. There was no limitation of the bobbin wood we were to get. We were to get the remainder of the Killygowan wood the same as the year before, less the toll-bar, which we were to pay, and the weighing, which he was to pay. It was to be 11s. a ton."

The evidence of the defender on the same subject was—"Of the second year's hag (1865), I sold some to Mr Helme. I sold it to Mr William Helme. About the beginning of March I met him, and said 'Can you be doing with some of yon wood?' meaning the Killygowan wood. He said that they could. I said, were they not going to give more than the 11s. a ton? I said it was hard at that price for me to pay both the tolls and the weighing. He said then that they would pay the toll. I said I would reserve, out of what I then sold him, mast wood, truss wood, and staves. They never got such wood from me. They may have got stave wood