

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 *ius 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 expedite 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