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

sometimes. Whereupon Mr Helme said, 'Then we're to get none but a little of the small wood.' I said, 'Just that. Isn't it best for bobbins?' After that conversation, I considered I was entitled to retain half of the bobbin wood of that wood to my own purposes, as I only told him I had sold him *some* of that wood. I did not say anything exactly about keeping to myself the whole half of the bobbin wood."

The Steward-Substitute (Dunbar) found that the pursuers had not proved the contract averred by them, and therefore assoilzied the defender. The Steward (Hector) adhered.

The pursuers advocated.

BURNET (with him GIFFORD) was heard for the advocators.

THOMSON (with him SOLICITOR-GENERAL) for the respondent.

The Court unanimously recalled the interlocutors advocated, and found the defender liable in damages for breach of contract (which they assessed at £100) and expenses.

LORD PRESIDENT—The contract, which the defender alleges on record was made, is one of a very extraordinary kind, such as I don't remember to have ever heard of being made in any branch of trade. It is one most unfavourable to the purchaser, and it is highly improbable that any manufacturer, who requires at the beginning of every season to make provision for the supply of his raw material, would enter into such a bargain. But no doubt such a contract is legal, and if made it may be enforced. If, however, the defender, on the occasion in question, meant to make such a bargain, he should have done so in very distinct terms. He should have had it reduced to writing, or, if not, he should have made his meaning quite clear to the party with whom he was transacting. If he did not do so, I think the other party could not be bound. But what is the evidence? I hold that, in regard to what was actually said on the occasion, the pursuer, William Helme, and the defender are at one, and I consider it therefore altogether unnecessary to look at the rest of the evidence in the case. The defender says he sold some of the wood, and that he reserved "mast wood, truss wood, and staves," but he does not say he reserved any bobbin wood. He thus expressed himself so as to lead Mr Helme to suppose that he was to get the whole bobbin wood as in former years. No doubt the defender goes on to say that he understood that, as he had only sold *some* of the wood, he was entitled to retain the *half* of it; but contracts are not made by mental reservations of that kind, but by express words. I hold, therefore, that the pursuers have proved the contract as alleged by them, and as there is no question that that contract has not been fulfilled by the defender, that he is liable in damages. These damages I propose to assess at the sum of £100.

The other judges concurred.

Agent for Advocators—W. S. Stuart, S.S.C.

Agent for Respondent—Hugh Milroy, S.S.C.

Friday, December 6.

SECOND DIVISION.

FOGO *v.* COLQUHOUN.

Teind—Sub-Valuation—Approbation—Dereliction—Reduction. Circumstances in which, *held* that the benefit of a sub-valuation had been lost by dereliction, and decree of approbation of said sub-valuation set aside.

This was an action brought by the Rev. John Lawrie Fogo, minister of the parish of Row, against Sir James Colquhoun of Luss, Baronet, for the purpose of setting aside a decree of approbation, dated in 1637, whereby the High Court approved of a sub-valuation, dated in 1629, of certain lands in the said parish belonging to the defender. The ground of reduction was, that the decree of approbation was in absence, and that the sub-valuation which it professed to approve had been derelinquished by the defender and his predecessors.

The facts of the case were these:—In 1629 the teinds of the lands in question—being the lands of Blairnairn and Kilbride—were valued at a certain amount by the Sub-Commissioner of the Presbytery of Dumbarton. At that time these lands formed part of the parish of Cardross; but in or about 1843 the parish of Row was erected, and the said lands were, amongst others, annexed to it *quoad omnia*. At and prior to the date of this erection the whole valued amount of the teinds of the said lands, as contained in the report of the Sub-Commissioners, was allocated and paid as stipend to the minister of Cardross, and subsequent to the erection they continued to be so paid; but the proprietors of the lands paid in addition, from that time downwards, a considerable amount of teind and stipend to the minister of Row. This they did without protest or objection, and in terms of two decrees of augmentation and locality, the one in or about 1748, and the other in or about 1803. The result was that between the two parishes a sum largely in excess of the sub-valuation was paid by the proprietors; and the question now was, whether, in the circumstances, this amounted to dereliction of the sub-valuation?

The main ground of defence was, that the payments to the minister of Cardross were not to be regarded as payments out of the teinds at all, but were perquisites founded on use and wont, and therefore not to be taken into account in a question of dereliction.

The Lord Ordinary (BARCAPLE), after a report by the clerk of teinds, and other inquiry, found for the pursuer, holding that there had been constantly and continuously, from 1643 downwards, payments in excess of the sub-valuation, and that there was no specialty in the case to prevent this from operating dereliction.

The defender reclaimed; but to-day the Court adhered, and on the same grounds.

SOLICITOR-GENERAL (MILLAR) and BALFOUR for him.

WATSON and MACDONALD in answer.

The Court ordered written argument.

At advising—

LORD COWAN—Upon advising the argument addressed to the Court on the reclaiming note, it was considered advisable that there should be full explanation of the special circumstances of the case, and, in particular, of the procedure that had occurred in the localities of the parish of Row in 1748 and 1803. With a view to such explanation, the minutes of debate were ordered, which are now to be advised.

The action is at the instance of the minister of the parish of Row, and concludes for reduction of a decree of approbation obtained in a process instituted for that purpose by the defender and others, of date 23d May 1838,—whereby the valuation of the stock and teind of certain lands now be-