the abolition of such actions by dispensing with their necessity in certain questions arising in bankruptcy. It would not meet the exigencies of the case to make it competent merely to bring in the Sheriff-Court the same cumbrous and complicated action which it was intended thus to supersede.'

'Under these opinions, and the decision following upon them, the Sheriff considers that he has no alternative but to dismiss the present action, which is one of reduction with proper reductive conclusions, with petitory conclusions tacked on to it, and leave it to the pursuers to proceed of new in competent form. It is no doubt true that the case of *Dickson* was one of an action of reduction, and reduction only, and that of an heritable right, whereas here, the reductive conclusions are only the groundwork of petitory conclusions which follow in the same summons. But although this circumstance makes a difference, it does not, in the Sheriff's opinion, create a distinction. The argument which prevailed with the Court in the case of *Dickson*, viz., that the statutes only authorised the Sheriff to consider reductive matter in disposing in bankruptcy cases of petitory conclusions, and not to render him competent to actions merely reductive, applies with equal force to the entertaining reductive conclusions when annexed to petitory ones following, instead of adjudicating on the ground of such reductive conclusions in determining the petitory ones. It was suggested at the bar by the counsel for the pursuers that the summons might still be amended by striking out the whole reductive conclusions, and leaving only the petitory ones. But it seems to me a sufficient answer to this to say, that it is incompetent at the eleventh hour to amend a summons after a record has been made up and closed, proof led, and judgment pronounced on the merits by the Sheriff-substitute. And even if the Sheriff were inclined to allow the summons to be amended, he has great doubts whether the Court of Session would sanction such a proceeding. In dismissing the action, however, he is of opinion that the defenders have no claim for expenses, seeing they did not in the record object to the competency of the action, but joined issue with the pursuers on the merits, and led proof; and it was not till the eleventh hour, and after the case of *Murray* v. *Dickson* was decided in the Court of Session, and the Sheriff-substitute had pronounced the interlocutor now appealed against, that the objection was stated by the counsel at the bar. The Sheriff-substitute's interlocutor under appeal, framed before the report of the case of *Murray* v. *Dickson* came out, was strictly in conformity, so far as the competency of the action is concerned, with the prior practice of this Court, and has only been altered by the Sheriff in consequence of the new light thrown on this important point by the decision in that case by the Second Division of the Court."

The pursuer advocated.

D.-F. Moncreiff and Clark for them.

A. Moncrieff & Lancaster in answer.

The Court held, that although the reductive conclusions were competent under the authority of *Murray* v. *Dickson*, the ground of actions involved in them might be entertained so as to give effect to the petitory conclusions of the summons.

The case was remitted, to be disposed of on the merits by the Sheriff.

Agent for Advocator—James Webster, S.S.C.

Agents for Respondents—Wilson, Bruce & Gloag, W.S.

Saturday, November 9.

FIRST DIVISION.

SCOTTISH EQUITABLE LIFE ASSURANCE ASSOCIATION *v.* DUNCAN AND OTHERS.

Husband and Wife—Conquest—Policy of Insurance—Assignation—Marriage-Contract—Universitas. By antenuptial marriage-contract a husband and wife mutually conveyed to each other the liferent of all estate "pertaining or belonging, or that shall pertain or belong, to either of them at the dissolution of the marriage." The fee of the whole property was, with a certain exception, to be divided at the death of the survivor into two equal parts, one share to go to the heirs of either spouse. The husband insured his wife's life, and subsequently assigned the policy gratuitously, continuing to pay the premiums out of income. In a claim by the executors of the wife, who survived, for one-half of the sum in the policy—*Held* that the assignees of the policy had right to the whole sum.

Per Lord Curriehill—1. Taking the words literally, the policy belonged to the spouses neither at the date of the marriage nor at the date of the dissolution. 2. The husband was entitled to administer the joint estate during the marriage, and to make even gratuitous donations, if not *in fraudem* of the contract.

The question in this action of multiplepoinding related to the right of property in a sum contained in a policy of insurance effected by the late Rev. Mr Duncan on the life of his wife. Mr Duncan and his wife, by antenuptial marriage-contract in 1831, mutually conveyed to each other, "in case of his or her surviving, the liferent of all and sundry lands, heritages, houses, tenements and other heritable subjects, and of all goods, gear, debts, sums of money, or other moveable estate whatever, pertaining or belonging, or due and addebted, or that shall pertain and belong or be due and addebted, to them or either of them at the dissolution of the marriage by the death of any one of them, with the whole writs and evidents of the said heritable subjects, and all bonds, bills, and other documents and instructions of the said moveable subjects, excepting always from this conveyance the liferent of the heritable subjects presently belonging to the said David Duncan, which it has been agreed shall on his death descend and belong to his own heirs in the manner after mentioned; but declaring always, as is hereby expressly declared and provided, that the survivor of the said parties who shall enjoy the benefit of the conveyance above narrated shall be bound and obliged to support, maintain, and educate any child or children which may be procreated of said marriage in a manner suitable to their station, until they shall respectively attain the age of twenty-one years complete, or be married, which ever of these events shall first happen: Moreover, with regard to the fee of said lands and heritages, and goods, gear, and other moveable estate, the said parties have covenanted and contracted and agreed as follows, viz., in the event of there being procreated of said marriage one or more child or children, then, on the death of the longest liver of the said parties, the whole of the said lands and heritages, goods, gear, and other moveable estate, shall be divided among the said children in such proportions as the said parties

shall, by a mutual deed of settlement, fix and determine, or in the event of no such mutual settlement being executed, then in such proportions as the said David Duncan shall think right, by any deed, executed at any time of his life, and even on deathbed, and failing either of such deeds being executed, then the said lands and heritages, goods, gear, and other moveable estate, shall be divided between and among said children equally, share and share alike, in the event of there being more than one child; and in the event of there being only one child, then such child shall succeed to the whole of said heritable and moveable estate; and in the event of there being no child or children procreated of the said marriage, it is hereby agreed on between the said parties that the heritage belonging to the said David Duncan at the date of these presents shall at his death descend and belong to his own nearest and lawful heir whomsoever; and as to the whole other lands and heritages, goods, gear, and moveable estate, the same shall, at the death of the longest liver, be divided into two equal shares or divisions, one whereof shall fall and belong to the heirs and executors of said Mrs Jean Thomson, and the other to the heirs and executors of the said David Duncan; declaring always, however, that both of the said parties shall have power, and full power and liberty is hereby reserved to them respectively, in the event last contemplated, of there being no children of the said marriage, to legate and bequeath, assign, dispone, and convey the fee of the said shares proposed to be descendible to their respective heirs and executors, to such persons and in such manner as they shall think proper, by any deed to be executed by them respectively." Mr Duncan did not renounce his *jus mariti* or power of administration. In the same year Mr Duncan effected a policy of insurance on the life of his wife. This policy was in 1838 gratuitously assigned by Mr Duncan to a sister and nephew, who in turn assigned it to trustees for behoof of certain of the family. Mr Duncan continued to pay the annual premiums. Mr Duncan died in 1862. Mrs Duncan died in 1864, leaving a trust-deed conveying to trustees the fee of one-half of the moveable estate which belonged to her husband and herself at the dissolution of the marriage. These trustees now claimed one-half of the sum in the policy, contending that Mrs Duncan was, under the marriage-contract, entitled to one-half of the estate belonging to her husband and herself at the date of the dissolution of the marriage; that the policy formed part of that estate; and that the gratuitous assignation of it by Mr Duncan was in prejudice of the provisions of the marriage-contract, and ineffectual so far as concerned the half to which Mrs Duncan was entitled.

The assignees of the policy, on the other hand, contended that the policy had been duly assigned by *inter vivos* deeds, and that, notwithstanding the terms of the contract, either spouse had right, by such deeds duly delivered, to make gratuitous alienations or assignations of any part of his or her property.

The Lord Ordinary (JERVISWOODE) preferred the assignees to the whole fund, adding the following note to his interlocutor:—

"It appears to the Lord Ordinary that, according to the sound construction of the antenuptial marriage-contract between the deceased Rev. David Duncan and his spouse, under the mutual conveyance in which, between the spouses, this question arises, that conveyance had relation to, and was intended to have effect only upon, the property which should pertain to the parties, or to either of them, at the dissolution of the marriage between them. It is true, terms of *de presenti* conveyance are used, consistently, as the Lord Ordinary believes, with the ordinary practice in conveyancing where heritage is intended to be included. But taking the whole terms of the deed together, it seems clear that that which was in the contemplation of the parties was that, during the subsistence of the marriage, the conveyance was not to have effect.

"Thus, as respects lands and heritable subjects, the liferent of these is conveyed only 'in case of his or her surviving,' and that liferent is to extend to the whole estate pertaining and belonging and which shall pertain and belong, and so forth, 'to them or either of them at the dissolution of the marriage by the death of any one of them.' The time at which the conveyance is to operate is thus fixed, and the Lord Ordinary can see no ground which would warrant him to hold that the hands of the spouses were so tied, pending the marriage, that they could deal only with the liferent of the funds and estate to which they might have right.

"The provision in the contract which probably creates the most serious difficulty in the way of the construction the Lord Ordinary thus puts upon it, is that which relates to the heritable subjects then belonging to Mr Duncan, the liferent of which is excepted from the conveyance so far as in favour of Mrs Duncan, and the fee of which, in the event of his death, is at once to descend to his own heirs. But it appears to the Lord Ordinary, on the whole, that this exception is to be dealt with strictly as such, and that it ought not to operate so as to affect the construction due to the leading provision of the deed. Taking the case, as it has actually occurred, of Mr Duncan's predecease, the result is that his landed estate passes, in its integrity, to his own heirs, while Mrs Duncan's liferent is limited to the remainder, as that existed at the date of the dissolution of the marriage, which, as already observed, is the date which is alone stated as that at which the extent of the estate, subject to the liferent of the survivor, is to be ascertained."

Mrs Duncan's trustees reclaimed.

COOK for them.

FRASER and J. M. DUNCAN in reply.

LORD CURRIEHILL—The fund *in medio* in this action consists of a sum of £1358, being the contents of a policy of insurance effected in the office of the raisers, with certain bonus additions. That policy of insurance was opened by the Reverend David Duncan on 21st November 1833, and it was opened by him, not on his own life, but on that of his wife, whom he had married some time before, and it was payable to himself, his heirs and assignees, the terms of payment being six months after the death of Mrs Duncan. That policy was assigned by Dr Duncan, on 20th February 1838, to his sister Mrs Graham and her son Alexander Graham, and the assignation was intimated to the Insurance Company. That was again transferred to certain parties, as trustees, on 4th July, and that was likewise intimated. This intimated assignation had the effect of denuding Mr Duncan of the policy and the right to the insured sum; and thenceforth, unless there was some ground of challenge, the sum belonged to the assignees. Mr Duncan died on 17th August 1862, and he left a settlement appointing executors who expede confirmation; but that of

course did not include this policy of insurance, because it did not belong to him at the time of his death. Mrs Duncan survived for two years, until November 1864. The policy therefore, according to its terms, still subsisted, and the sum became payable six months after Mrs Duncan's death. At that time there were bonus additions, bringing the sum up to what I have stated. After the death of both parties, a competition has arisen for the policy of insurance; and accordingly the Insurance Company have brought an action to settle that competition. The competing parties are, on the one hand, the assignees of the policy of insurance, and these claim the whole sum; and, on the other hand, one-half of the sum in the policy is claimed by the representatives of Mrs Duncan. These are the competing parties, and the question we are now to decide is the merits of that competition. The ground on which the former make their claim is plain. It is an intimated assignation by the original policy holder, and of course that is a complete title unless there is some valid ground of challenge. Accordingly, the other parties say that Mr Duncan, in assigning the policy, committed a fraud on the marriage-contract, and therefore the true question depends on the meaning and effect of its provisions. The clause founded on by Mrs Duncan's representatives is as follows—[*reads clause*, ut supra]. I may remark in passing, though it is not essential to the merits of the case before us, that there is no dispositive clause of the fee of his estate. There is an agreement, however, which would be binding on the parties; but there is no conveyance, as there is of the liferent. The question comes to be, Have Mrs Duncan's representatives a right by this provision in the marriage-contract to this policy, or to one-half of it? If they have not, there is no ground for challenging the assignation. On what ground is this claim by Mrs Duncan's representatives founded? The argument addressed to us was founded very much on the usual meaning of the words used by the parties, and I shall therefore consider—*first*, how the case stands on the literal meaning of the words. In what part of the clause is there a conveyance of this policy? The clause consists of two divisions, the one contains the *acquisita*, or the property already belonging to the parties at the date of the marriage. The other relates to what shall belong to them at the dissolution of the marriage. These are two dates, and what is conveyed is what belongs to the parties at either date. What they might acquire during the intermediate period is not included, unless it should still belong to one or other of the parties at the date of the dissolution of the marriage. Now, this policy did not belong to Mr Duncan at either of these two dates. It did not belong to him at the date of the marriage, because it was not opened till afterwards. It had no existence, and there was no obligation on Mr Duncan to open such a policy. Therefore it is not included in the words "pertaining and belonging at the date of the marriage." Did it belong to him at the dissolution? No; for it had been assigned long before. Therefore, reading the clause literally, I don't think it includes this policy of insurance. And, accordingly, though it was not brought out in the debate, the ground on which it was pleaded really meant this—that the funds out of which Mr Duncan created this policy were acquired by him, and fell under the clause in the contract. My first remark as to that is, that the true meaning of that is, that Mr Duncan misapplied the funds during the marriage. Suppose that to be the case, the remedy would be to call on Dr Duncan's representatives to account, and not to pursue a subject conveyed to third parties. There is no allegation that he was insolvent. But, further, I think that the income which arose to Mr Duncan from his own industry or otherwise is not included in the conveyance unless it remained in him at the dissolution. There is no question here that the premiums were paid from income and not from capital belonging to him at the date of the marriage, for both parties are agreed on that. When the income was realised and in his pocket, it was his. His *jus mariti* was not excluded. So that plea seems to me to be groundless. And I think that is sufficient to decide this case. I think it just comes to this, that neither the policy, nor the sums paid as premiums on that policy, are included in this conveyance.

That being so, I hesitate to go farther, because it is unnecessary to do so; but as I have a clear opinion as to the meaning of clauses of deeds of the class to which this belongs, I may say that they are not to be interpreted according to the literal meaning of the words used. In Scotch conveyancing, technical meanings are attached to certain words very different from the literal meaning. There are cases in which what is called a liferent is really a fee, and in which what is called a fee is not a fee but a mere right of succession, and so on. But there is another technical meaning given to marriage-contracts from a very remote period, and that is, that where the subject conveyed consists not of a special article of property, but of a *universitas*, there are very special rules, long established, to be attended to in interpreting the conveyance. One of these is founded, I believe, on what is a common maxim among Scotch people, that a man can't be rich unless his wife let him, an arrangement by which all that is acquired during the subsistence of the marriage is provided for the married parties themselves and their issue, thereby giving an encouragement and reward to a thrifty wife to enrich her husband. But whatever be its origin, the practice is undoubted. The rule is this, that where a *universitas* is provided by an antenuptial marriage-contract to the wife and children, although it be given by a conveyance *de presenti*, the husband remains the owner of the property. His rights of administration remain entire, and his power of disposal, onerous certainly, and even gratuitous, unless the deed be of such a character as to be capable of being represented as a fraud on the contract. That rule was clearly established as to children two centuries ago, in the time of Lord Stair. There was one case, *Cowan* v. *Young* 9th February 1669 (M., 12,942), which was to be a precedent. The principle is thus stated by Lord Stair:—"Such clauses of conquest are ever understood, as the conquest is at the acquirer's death, but do not hinder him at any time to dispose or gift at his pleasure; which, if he might do to any stranger, there is neither law or reason to exclude him to do it to his daughter; and, albeit it might be interpreted fraud if nothing were left to the daughters of the second marriage, yet where they have special provision, and something also of the conquest with this burden, their father could not be found thereby to defraud them, or to hinder him to use his liberty." Gosford reports the same case, and his remark is of value as fixing it as a precedent for similar cases in future. After stating the case, he concludes with these words "the Lords declared they would make the decision a practique for the

future in all such cases, because they found that such provisions of conquest were only effectual after the husband's decease, and did not hinder him either to contract debt or to affect the same during his lifetime." Now, that has been a "practique" ever since, and decisions are scattered over the dictionary, under various heads, giving effect to that principle. Accordingly, Erskine (iii, 8, 43) gives the rule alluded to, and says—"*Thirdly*, An obligation of conquest does not bind the father so strongly as a special provision; for both our judges and lawyers have looked upon it as little better than a simple destination; so that the subject may be affected, not only by the father's onerous or rational deeds, but even gratuitous, provided they be granted for small sums, perhaps to a child of another marriage." These authorities relate to the interests of children under such a clause, but the principle is equally applicable to the rights of wives; and that was settled even twenty years earlier than the decision I have referred to in the time of *Stair*. I refer to the case of *Oliphant*, 10th February 1629 (M., 3066). His Lordship then read the reports of *Oliphant*, and continued—Therefore I don't quote any subsequent cases, for the principle runs on through two centuries. I have already said that there is no question here that the sums which were employed in payment of the premiums were not the property of Mr Duncan at the time of the marriage. Even if they had been, that would have made no difference. The result of my opinion is, that neither according to the literal nor technical meaning can the sum in the policy belong to Mrs Duncan's representatives.

Lord Deas and Ardmillan concurred.

Lord President—I adopt all the grounds of judgment of Lord Currichill, and, in particular, I agree with his exposition of the fixed technical meaning put by the law of Scotland on clauses of conveyance or obligation in such terms as now before us. I also concur on the other point. I don't think that, in any view, the representatives of Mrs Duncan can claim the sum in dispute, because it is to be observed that the provision of conquest is that the general estate of the spouses, whaetver that may be, shall, at the death of the longest liver, be divided into two equal shares, one to go to the heirs of the husband, and the other to the heirs of the wife; reserving to both parties power to bequeath or assign the fee of said shares. It may very well be that the representatives of Mrs Duncan are entitled to one-half of the estate in value, but not to any specific subject; and if they get one-half of the value of the estate, that is the full extent of their claim. On the other hand, the assignees of the policy will be preferable to the executors of the husband, and they will be entitled to take that as part of the husband's estate. It is quite impossible here in this competition to sustain the claim of the representatives of Mrs Duncan.

Interlocutor of Lord Ordinary recalled, and, of new, the claim of the assignees sustained, and the claim of Mrs Duncan's representatives repelled.

Agent for Reclaimers—J. N. Forman, W.S.
Agent for Respondents—Robert Hill, W.S.

OUTER HOUSE.
(Before Lord Barcaple.)

MAXWELL *v.* PRESBYTERY OF LANGHOLM.

Manse—Garden Wall—Heritors—Presbytery. Held (by Lord Barcaple, and acquiesced in) that a minister of a parish was entitled to have his garden inclosed with a wall. Presbytery instructed to require heritors to erect wall in conformity with report and estimate prepared by architect to whom Lord Ordinary had remitted.

This was a suspension at the instance of Sir John Heron Maxwell, Bart., of Springkell, against the Presbytery of Langholm, of deliverances by the presbytery in reference to the erection of a garden wall round the manse garden of the parish of Half Morton.

It appeared that the garden attached to the manse of Half Morton has, since 1840, when the manse was erected, been inclosed by a hedge. In 1866 the present incumbent of Half Morton applied to the presbytery to ordain the heritors of the parish to build a wall round the manse garden. After certain procedure (the heritors not having complied with the presbytery's orders), the presbytery approved of specifications for the erection of said wall, and decerned against the heritors (who are only two in number—the suspender being proprietor of nearly the whole parish) for the cost of the same, the suspender's proportion thereof being £147.

The suspender averred that the hedge presently surrounding the garden is a good and sufficient fence, and more suitable as an inclosure for the garden than a stone fence. He also averred that stone fences as inclosures for gardens are not adopted, and are all but entirely unknown in the district of Half Morton.

On the law, the suspender pleaded that, in the absence of any statutory enactment rendering it incumbent on the heritors of a parish to inclose the manse garden with a stone wall, the Presbytery were not entitled to ordain such an enclosure to be built; and further, that the stone wall ordained by the presbytery to be built was of a much more expensive description than was warrantable.

For the presbytery it was averred that the hedge was not a sufficient fence, and did not protect the minister's garden from the ravages of hares and rabbits. The presbytery also averred that every manse garden within the bounds of the presbytery was surrounded by a wall except the manse garden of Half Morton.

On the law, the presbytery pled that the accommodation of a garden wall was allowed to the parochial ministers throughout the country, and was necessary for the beneficial occupation of the manse garden of Half Morton.

After hearing parties, the Lord Ordinary, before answer, and without inquiry as to whether the hedge was a sufficient fence for the garden, remitted to Mr James C. Walker, architect, Edinburgh, to examine *inter alia* the specifications and estimate approved of by the presbytery, and to report whether the same were "more costly than is proper and necessary for the erection of a suitable, wall for the manse garden at Half Morton, and, if so, to report a specification of such wall as he is of opinion would be suitable, having regard in his report to the usual style of such walls to manse gardens in rural parishes."

Mr Walker reported that the plan and specification of the wall approved of by the presbytery "was more costly than was proper and necessary for the garden, and the offer or estimate was extravagantly high." He also reported that he had obtained an estimate from a respectable local tradesman to do the same for between £50 and £60 less than the estimate decerned for by the presbytery.