Tuesday, November 2.

HAY *v.* GIBSON.

Agreement—Wire Fencing—Extra Work. Held that certain extra work, under a contract to execute wire fencing upon a farm, being necessary as a condition of the work proving "to the satisfaction of the inspector," the price thereof was not recoverable.

This was an action raised by William Hay, blacksmith, Berwick-on-Tweed, against James Gibson, farmer, Gunsgreen Hill, in the county of Berwick, concluding for £57, 18s. 4d., being the amount due to the pursuer in respect of certain extra work performed by him in connection with a contract which he undertook for the erection of wire fences on the defender's farm.

The circumstances of the case were as follows:—In the month of May 1867, the defender entered into a new lease of the said farm, and it was one of the conditions of the lease that the defender was to be at the expense of executing certain improvements thereon, and, *inter alia*, of erecting certain wire fencing. Estimates for the erection of the work were advertised for in the *Berwick Advertiser* and *Berwick Journal* newspapers in the end of October and beginning of November 1867, and the specification for the work stipulated that the whole must be executed in the most tradesman-like manner, to the entire satisfaction of the inspector. With reference to the wire fencing, it was provided that the straining posts were to be sunk two feet into the ground, and the intermediate posts sunk one and a half feet into the ground.

On 6th November 1867 the pursuer gave in an offer to Mr Murray, the inspector appointed by the defender, for the erection of the said wire fencing in the following terms:—"Sir, I hereby offer to put up the wire fencing according to plans and specifications, with best workmanship and material, for the sum of 6s. 9d. per rood of six yards." (Signed) "Wm. Hay." The pursuer's offer was accepted by the defender, and the work was soon after commenced, the lines and position of the wire fencing to be erected being pointed out to the pursuer by Murray.

When the fences in question had been partially erected (on the *higher* side of certain hedges on the farm), it was found that they were not so firm as had been anticipated, and this, it appeared, had been caused by the loose nature of the soil, and not in any way by bad workmanship on the part of the pursuer, who had erected the fences with the precise depth of foundation, &c., mentioned in the specification, and at the precise place pointed out by Murray. An arrangement was thereafter come to between the pursuer and defender, in accordance with which the wire fences were removed to the low side of the hedges, where the ground was better adapted for them, and where they were sunk to a depth of half a foot greater than that named in the specification.

The pursuer pleaded that any insufficiency which might have existed in the fence as originally erected was not due to any defects in the fence itself, which had been erected in every respect conform to the specification, but to the nature of the ground which had been selected by the defender himself or by his inspector Murray, and that therefore it was only reasonable that he should receive extra remuneration for the extra work done by him.

The defender answered that the alterations made, and extra work done, were necessary in order to enable the pursuer to complete his contract. In terms of the contract the work was to be done "to the satisfaction of the inspector," and it was to enable the pursuer to fulfil this condition, and at the pursuer's own solicitation, that the change made on the wire fences had been allowed by the defender. When the first alteration was suggested the pursuer had subscribed a document to the following effect:—"Gunsgreen Hill, 20th January 1868. On being permitted to place wire fencing on low side of the hedges on this farm, I agree to make them sufficient height to prevent all animals from leaping over, or creeping through, the same, and the sum of £20 to remain on hand until the same are properly tested." (Signed) "Wm. Hay." And, on receiving the last instalment of the contract price (which he did after the whole fencing had been completely re-erected on the lower side of the hedges), the pursuer granted to the defender a receipt in the following terms:—"Gunsgreen Hill, 22d August 1868. Received from Mr James Gibson the sum of Two pounds eighteen shillings and one penny halfpenny, being balance of cash due for wire fence erection on this farm. Settled, William Hay."

The LORD ORDINARY assoilzied the defender and the pursuer reclaimed.

SCOTT and RHIND for him.

MACKAY for the respondent.

The Court adhered, holding that, though it might be a hard case for the defender, who had evidently had greatly more work to do than he anticipated when he took the contract, he should have inquired more into the nature of the work he had to do. The extra work which had been done by him had been performed for the purpose of getting the fencing approved of by the inspector, who, it was clear, never would have approved of it without the alteration being made which was ultimately effected.

Agent for Pursuer—James Barton, S.S.C.
Agent for Defender—Alexander Howe, W.S.

Saturday, November 6.

FIRST DIVISION.

DICKSON & STEUART *v.* ROY & PAUL.

Accessory—Heritable—Obligation—Personal Bond—Payment—Policy—Premium. B. borrowed from C. the sum of £10,000, for which he granted a personal bond. He also granted a bond and obligation in security, in which he bound himself to pay the premiums of certain policies of insurance on his life therein conveyed to B.; and also conveyed, as a security therefor, his life interest in some heritable property. He failed to pay the premiums; and they were paid by C., who obtained a warrant to sell the policies and the obligation to keep them up. *Held* that, so soon as the personal obligation was at an end, the heritable security, as an accessory to it, fell also; and therefore, that the purchaser of the policies was not entitled to certain funds of B.'s to repay his outlay in keeping up the policies after payment of the original debt, interest and expenses.

Mr Robert Anstruther of Caiplie and Thirdpart, on 17th March 1835, granted a personal bond to

Mr Christopher Wood for £10,000, and also, in further security of the loan, a bond and disposition in security for the same amount. By the latter deed Mr Anstruther bound himself to pay to Mr Wood the premiums on the policies of insurance on his life as therein mentioned 'during my life and the not-payment of the said principal sum," with the legal interest of the premiums while unpaid. The bond also contained an obligation for extra premiums if incurred, and conveyed Mr Anstruther's life interest in the estate of Caiplie and others in security of the obligations undertaken.

To the extent of £7900 the loan of £10,000 was actually advanced, and the balance of £2100 was consigned in the Bank of Scotland on 20th May 1835 in name of Mr Paul, agent for Mr Wood, and of Mr Roy, agent for Mr Anstruther. The sum thus consigned formed substantially the fund *in medio* in the proceedings. At 20th November 1868 it amounted, with interest, to £3495, 7s. 5d.

The interest on the loan and the premiums of insurance having fallen into arrear, Mr Wood raised a process of ranking and sale in February, under which Mr Anstruther's interest in the estate of Caiplie and others was sold. Several sums were paid to Mr Wood in this process, and, in particular, under an act and warrant, dated 31st January 1847, there was paid to him the sum of £10,000, for which he granted a discharge the following day.

On 13th October 1841 Mr Wood brought an action of declarator and extinction, in which, after narrating the past procedure, he set forth that he had advanced the sum of £10,000 relying on Mr Anstruther making regular payment of the premiums in terms of his obligation, but that he had failed to do so; that he had ceased at Candlemas 1837 to pay the interest; that Mr Anstruther had, without giving notice, gone to serve in Canada during the rebellion there; that heavy extra premiums had thus been incurred, and that there was then due to him on that account £4000 besides the principal sum; that adjudication and other diligence had been used at the instance of Mr Anstruther's creditors, and that Mr Anstruther's liferent of the heritable subjects conveyed to him in part security of the debt was in course of being sold; that Mr Anstruther was bankrupt, and unable to implement his obligations. In these circumstances, Mr Wood concluded that it should be found and declared that he was not bound to continue the further payment of the premiums, but was entitled to sell the policies with the obligation by Mr Anstruther for payment of the premiums as contained in the bond, and to apply the proceeds towards payment of the principal sum, interest, and others due by Mr Anstruther.

In consequence of opposition Mr Wood withdrew from his conclusion for sale of the obligation to pay the premiums; and, having got decree for the conclusion thus modified, he exposed the policies to sale. But as he could get no purchaser, or at least only a trifling price, he again brought an action in which he stated the impossibility of selling the policies without the obligation to keep them up; and though opposed by Mr Anstruther, he got the warrant and decree that he prayed for.

The policies with the obligation and security for payment of future premiums were accordingly exposed to sale by Mr Thomson Paul, as commissioner for Mr Wood; and purchased by Mr James Stevenson, commission agent in Edinburgh, from whom Mr Paul subsequently obtained them.

A competition having arisen for the above mentioned fund *in medio* of £3495, 7s. 5d. between Mr Paul and various creditors, the Lord Ordinary (JERVISWOODE) remitted to Mr Haldane, accountant, to report on a variety of questions of accounting; and the present discussion took place on a note by him asking for direction on the following point:

"Is Mr Paul, in virtue of his right to Mr Anstruther's obligation, and the heritable security granted by Mr Anstruther for payment of premiums, entitled to claim the premiums of insurance stipulated for in the policies of insurance on Mr Anstruther's life, falling due after 1st February 1847, (when the principal sum of £10,000 was paid), and thereafter during Mr Anstruther's life; and that whether the policies were actually kept up by payment of the premiums or not?"

The Lord Ordinary answered the question in the affirmative; and, having given leave to appeal, the point was argued in the First Division.

LORD-ADVOCATE and JOHNSTONE for Mr Paul.

SOLICITOR-GENERAL and DUNCAN for Mr Steuart.

SHAND and MANSFIELD for Mr Mackenzie.

At advising—

LORD KINLOCH—This is a case which has been a great deal too long in Court; and I regret it is not before us in such a shape as to enable us to bring it to a termination. But our duty at present seems confined to instructing the accountant on the point which he has referred to us.

By the bond granted by Mr Anstruther to Mr Christopher Wood, in respect of the loan of £10,000 made by the latter, Mr Anstruther became bound to pay the premiums arising on certain policies of life insurance assigned to Mr Wood in security. I think it clear that this obligation lasted so long as any part of the debt, principal or interest, or any part of the expenses covered by the security in the bond, remained unpaid. Though the deed in one clause seems to speak of the obligation as lasting "during my life and the non-payment of the said principal sum," I think that this is only a general way of describing the non-discharge of the debt, and does not indicate that when the principal sum was paid the security should not subsist for any arrears of interest and expenses then due. The contrary is made manifest by the terms of the deed otherwise.

On the other hand, I think it equally plain that the obligation to pay the premiums, and so keep up the policies, did not subsist for a single hour after full payment of the debt, interest, and expenses. The obligation was only one in security, and when the debt was fully paid the obligation necessarily fell to the ground.

The policies were ultimately sold under the authority of the Court, and a sum of money thereby obtained to go towards extinction of the debt. The obligation to keep up the premiums was sold at the same time. But the obligation so sold was not, and could not be, more extensive than that contained in Mr Anstruther's bond. There was nothing else within the power of the Court to order to be sold, and nothing else can be held to have been disposed of. The price to be got for the policies would of course be proportional to the extent of obligation lying on Mr Anstruther to pay the premiums, and the corresponding extent to which the purchaser might be obliged himself to pay them, without relief from Mr Anstruther.

The purchaser of the policies, in whose room Mr Paul now stands, cannot, therefore, as it appears to me, be considered as having purchased

any more than the obligation actually incumbent on Mr Anstruther. He cannot be considered as purchasing an obligation such as Mr Anstruther never undertook, and never lay under, viz., an obligation to pay the premiums during the whole course of Mr Anstruther's life, whether the debt contained in the bond was discharged or not. It does not affect my conclusion that, in the pleadings presented to the Court with the view of endeavouring to prevent the Court from ordering a sale of the policies, this character was attempted to be put on the obligation, as the subject of sale. The judgment of the Court cannot be interpreted by the anticipative deprecations urged on them by a zealous and rhetorical counsel. Nor is it possible for me to give the effect of *res judicata* on the general matter of right to the mere fact that, in the ranking and sale, a warrant was granted for payment of one or more of the posterior premiums, without the Court having the general question formally raised and discussed, with all parties interested before it.

Having this view as to what alone can be considered as having been sold, I hold it necessarily to follow that we should answer the inquiry of the accountant by saying that Mr Paul, as in room of the purchaser of the policies, and as in right of Mr Anstruther's obligation to pay the premiums, is entitled to claim against Mr Anstruther and his estate the whole premiums arising anterior to the period when the debt was paid—principal, interest, and expenses as aforesaid; but is not entitled to claim any premiums arising subsequently. This is not exactly the answer given in the interlocutor of the Lord Ordinary now under review, though I think it is the answer pointed at in his Lordship's note. It seems to me that it is the answer which ought in terms to be now given.

I conceive that for the purposes of the accountant any further answer is unnecessary. A question is indicated by the accountant as to how far premiums could be charged which were not actually paid by the creditor in keeping up the policy. It was stated to us from the bar that in point of fact all the premiums were paid to the insurance office down to the date of Mr Anstruther's death. The contrary of this was not shown. The state of fact has therefore not arisen to which this question is applicable, and we cannot be called on to answer the question contingently and hypothetically.

The other judges concurred with Lord Kinloch, after commenting on some specialties in the history of the case and the position of the parties in it.

Agent for Mr Paul—T. J. Gordon, W.S.
Agents for Mr Steuart—J. & C. Steuart, W.S.
Agents for Mr Mackenzie—Mackenzie & Black, W.S.

Saturday, November 6.

SECOND DIVISION.

M'LAREN *v.* HOWIE.

Trust—Provision—Legacy—Payment by Anticipation—Proof—Legitim. (1) Circumstances in which *held* that the executors under a trust-deed had proved by competent evidence prepayment during his lifetime of a provision made by a father to one of his children. (2) *Held* that a provision of this nature may thus be satisfied so as to bar a claim against the executors on the ground that it was not expressly revoked. (3) That the provision in the deed having been accepted by the child in full of legal claims, she could not maintain an action for her share of legitim.

Question, whether it would be competent to prove the ademption of a *pure* legacy, standing uncancelled in the will, by payment in anticipation during the life of the truster?

This is an action at the instance of Mr and Mrs M'Laren, Gillespie Street, Edinburgh, directed against the executors of the late Thomas Howie of Boghall, in the county of Perth, under his trust-disposition and deed of settlement. The female pursuer is a daughter of the late Mr Howie, and she sues the defenders, who are her brothers, to count and reckon with her for their intromissions with their father's estate, and, alternatively, to pay to her a sum of £500 as the balance to be held against them. The defence to the action is, that in 1846 Mr Howie executed a trust-settlement of all his means and estate, by which he provided the pursuer a legacy of £40, being a like sum as was granted to the other daughters. The deed, it is said, declared these provisions in favour of his children to be in full to them of all legitim, bairns' part of gear, or other claim whatsoever. The defenders further say that Mrs M'Laren was aware of the provision in the deed to her, and then they make the following statements:—"(8) During the lifetime of the said Thomas Howie the female pursuer was frequently in the habit of writing letters to him complaining of want of money, her family being then young, and her husband, as she alleged, not being in very good health. In order to relieve his said daughter, the said Thomas Howie in his lifetime made several payments to her in anticipation and satisfaction of the specific legacy bequeathed to her in his deed of settlement. The said payments, at least, amounted to the sum of said bequest, and were accepted by the female pursuer and her husband as in payment and satisfaction thereof. (9) Accordingly, the pursuers subscribed and transmitted to the said Thomas Howie a receipt in the following terms:—'*Edinburgh, 9th September* 1853. —I, Mrs Ann M'Laren or Howie, spouse of Peter M'Laren, Officer of Excise, Edinburgh, with consent concurrence of my said husband, and him for his interest, grant me, the said Ann M'Laren or Howie, to have at different times received from Mr Thomas Howie, farmer, Boghall, my father, sums amounting in whole to £40 sterling, being in full of my share of the estates and effects of the said Thomas Howie, and of the late Mrs Ann Baxter or Howie, his wife, which would fall to be paid to me or my children by and through the decease of my father, he and his heirs, executors, or representatives being discharged of all claim competent to us, or either of us, in any manner of way.' (Signed) 'ANN M'LAREN. PETER M'LAREN. £40 stg.'"

After the record was closed, the pursuers obtained leave to amend their record, to the effect of enabling them to ask payment of the legacy in question, and they made an averment that it had not been paid. After a debate, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record and productions,—Finds that the pursuers now claim, under the conclusions of the summons, the sum of £25, bequeathed to the female pursuer by