the pursuer on a charge of theft or fraud," pleaded, *inter alia*—"(2) The defenders having acted with probable cause and without malice in lodging the said criminal information with the procurator-fiscal, they should be assoilzied. (3) The statements made by the defenders in the information laid by them before the procurator-fiscal being true in point of fact, the defenders should be assoilzied. (4) The pursuer having been guilty of theft as condescended on, the defenders are entitled to absolvitor."

On 8th March 1912 the Lord Ordinary (ORMIDALE) approved of the following issues and counter issue:—"1. Whether the defenders, in or about the months of November and December 1911 and January 1912, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the Procurator-Fiscal at Glasgow a charge or charges of the theft by pursuer of certain gauges, jigs, or other articles which were the property of the defenders, to the loss, injury, and damage of the pursuer? 2. Whether the defenders, in or about said months, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the Procurator-Fiscal at Glasgow, or the Crown Agent at Edinburgh, a charge or charges of fraud against the pursuer, to his loss, injury, and damage?" *Counter issue.*—"1. Whether during the period between 1st January 1911 and 21st September 1911 the pursuer, while in the service of the defenders, fraudulently caused to be made for himself by the defenders' employees, and at the defenders' cost, duplicates of the tools, gauges, patterns, and other articles employed in the manufacture of the defenders' instruments, and also caused to be delivered to himself a complete azimuth mirror, the property of the defenders, and further fraudulently caused the said duplicates and other articles and the said mirror to be forwarded to Birmingham on various dates during said period, for his own purposes, and to await his further instructions?"

The pursuer lodged a specification of documents for the recovery of which he craved a diligence. The first article was as follows:—"1. All charges, *applications*, statements, or other writings, lodged by the defenders or their solicitor or by any of their directors with the Procurator-Fiscal, Glasgow, or the Crown Agent, Edinburgh, and relating to charges of theft or fraud against the pursuer between 1st November 1911 and 16th January 1912." [The word "applications" in italics was deleted in the print as amended.]

His Lordship having granted diligence for the recovery of the documents called for in the first article as amended, the defenders reclaimed, and argued—The pursuer was not entitled to recover the precognitions taken by the defenders, for these were in the same position as precognitions taken by the procurator-fiscal. Such precognitions were not recoverable—*Sheridan* v. *Peel*, 1907 S.C. 577, 44 S.L.R. 406.

Argued for pursuer—The specification had been intimated to the Lord Advocate and he had not lodged objections. That being so, it was well settled that the pursuer was entitled to recover the documents called for—*Henderson* v. *Robertson*, January 20, 1853, 15 D. 292.

The Court (the LORD PRESIDENT, LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE) adhered.

Counsel for Pursuer—Morison, K.C.—C. H. Brown. Agents—Carmichael & Miller, W.S.

Counsel for Defenders—Macmillan, K.C.—Hon. W. Watson. Agents—Alexander Morison & Company, W.S.

Thursday, May 30.

FIRST DIVISION.

GIBSON (CHRYSTAL'S TRUSTEE) *v.* CHRYSTAL.

Insurance—Life Insurance—Husband and Wife—Bankruptcy—Married Women's Assurance Policies Act 1880 (43 *and* 44 *Vict. cap.* 26), *sec.* 2.

By a policy of assurance or "endowment bond" an assurance society, in consideration of the payment of a certain sum annually in advance, promised to pay to the assured on the maturity of the bond, twenty years after the date thereof, the sum of £1136. The society further promised that in the event of the death of the assured before the expiration of the twenty years, and while the bond was in force, to pay immediately upon receipt of satisfactory proof of death, the amount of the bond, £1000, to his wife if living, and if not to his executors, administrators, or assigns. The assured died before the expiration of the twenty years.

Held, in a Special Case (*dub.* the Lord President), that the policy or bond was protected by the Married Women's Policies of Assurance (Scotland) Act 1880, sec. 2, and that the widow of the assured, and not the trustee on his sequestrated estate, was entitled to the proceeds of the policy.

The Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26) enacts—Section 2—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy,

or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency; and the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof."

James Bogle Gibson, C.A., Glasgow, trustee on the sequestrated estate of the deceased David Chrystal, writer, Stirling, with consent and concurrence of the commissioners of the sequestrated estate (*first parties*), and Mrs Chrystal, widow of the said David Chrystal (*second party*), presented a Special Case for the opinion and judgment of the Court.

David Chrystal died on the 19th of January 1911. He left a trust-disposition and settlement, dated 6th April 1899, and two relative codicils, dated respectively 18th January 1901 and 20th June 1902. Under these deeds he appointed David Buchan Morris, then writer in Stirling (who declined to accept the office), to be his sole executor, and he appointed his wife, the party of the second part, to be his universal and residuary legatee. On David Chrystal's death it was found that he had left his estate in great confusion. The said James Bogle Gibson was on February 11, 1911, appointed judicial factor on his estate. The estate was afterwards sequestrated in terms of the Bankruptcy Acts, and the first parties are the trustee and commissioners thereon. The liabilities of the said David Chrystal at the date of his death greatly exceeded the assets. So far as the trustee had ascertained, these liabilities might be estimated to amount approximately to the sum of £69,000 and the assets to the sum of approximately £8000, inclusive of the net proceeds of the policies after mentioned. On June 28, 1894, David Chrystal married Eliza Augusta Smith (the second party). By antenuptial contract of marriage, dated 27th June, and recorded in the Books of Council and Session on 30th July 1894, David Chrystal made certain provisions in favour of his wife and appointed trustees for carrying out these provisions. In September 1894 the said David Chrystal effected at the company's branch office at 81 Cheapside, London, England, two "with profits" policies numbered 710209 and 710210, each for £1000, with the Equitable Life Assurance Society of the United States. The terms of policy 710209 were as follows—

"TWENTY YEAR ENDOWMENT BOND No. 710209 by the Equitable Life Assurance Society of the United States on the life of David Chrystal.

£55 : 15 : 0 "Number *710209*.

"FIVE PER CENT. GUARANTEED FOR TEN YEARS.

Stamp 10/. "TWENTY YEAR ENDOWMENT BOND.

"For *One Thousand Pounds* sterling.

"In consideration of the written and printed application for this Bond which is hereby made a part of this contract of assurance and of the payment annually in advance of *fifty-five pounds and fifteen shillings sterling* on or before the *18th* day of *August* in each and every year for the term of twenty years from the date hereof

"The Equitable Life Assurance Society of the United States promises to pay

At its Branch Office in the City of London, England, 81 Cheapside, London, E.C.,

on the maturity of this Bond on the *eighteenth* day of *August* in the year *Nineteen hundred and fourteen*, to *David Chrystal, Eleven hundred and thirty-six pounds sterling* together with the surplus then to be apportioned to this Bond by the Society. Or in lieu thereof to pay the surplus in cash and defer the maturity of the Bond *(£1000)* for the term of ten years or until prior death, paying until such maturity five per cent. per annum on the sum of the annual premiums paid. (If thus extended the Bond will also participate in any annual profits apportioned in excess of the five per cent.; payable in cash at the end of the ten years.) Or to convert the surplus into an annuity to increase the annual income on the Bond and extend the Bond as above for ten years or until prior death. Or to convert the Bond and surplus into an annuity for life.

Stamp 6d.

"The Society further promises that in the event of the death of the said *David Chrystal* before the expiration of twenty years from the date hereof and while this Bond is in force to pay immediately upon the receipt of satisfactory proofs of death the amount of the bond *(£1000)* to *his Wife Eliza Augusta Smith or Chrystal if living, if not then to the said David Chrystal's* executors, administrators, or assigns. And should the annual premiums paid hereon compounded annually at four per cent. interest exceed the amount of the Bond, such excess shall be added to the principal of the Bond and paid therewith. *Provided always that death in consequence of not wearing a truss is not assured against.*

"New York the *tenth* day of *September* 189*4*.

"*G. W. Phillips*, *Actuary.* *H. B. Hyde*, *President.*

"*Notice.*—This policy and the application therefor taken together constitute the entire contract, which cannot be varied except in writing by one of the executive officers printed above.

"LIST OF PRIVILEGES GUARANTEED TO THE ASSURED UNDER THIS BOND.

"The details of which will be found in the application.

"1. This Bond grants freedom of residence, travel, and occupation after one year.

"2. It is incontestable after one year.

"3. If after having been in force for three years this Bond should lapse in consequence of non-payment of any instalment, it will have a surrender value in non-participation paid-up assurance for as many twentieths of the original Bond as annual premiums have been paid; provided that such surrender be made within six months after default in the payment of the premium. This paid-up Bond will mature and be payable at the time at which the original Bond would have matured; but if the holder then desires its continuance, this payment may be extended for a period of ten years, or until prior death. If thus extended, the paid-up Bond will be entitled annually to as many twentieth parts of the income guaranteed under the original Bond as annual premiums have been paid.

INDORSEMENT ON BACK.

"Number *710209.*

"ISSUED ON THE LIFE OF

"*D. Chrystal*

"Payable at maturity on the

"*18th* day of *Aug. 1914*

"Until which date no dividend will be declared on this Bond.

"Amount *£1000.*

"Annual instalment *£55 : 15 : 0.*

"Due on the *18th* day of *Aug.*

"Register date of Bond *Aug. 18th, 1894.*

"20 payments (1/20) 20 years Bond."

The terms of policy 710210 were similar.

The parties during the hearing, at the suggestion of the Court, lodged this minute —"The parties have ascertained that in the event of article 3 of the list of privileges guaranteed to the assured under each of the said policies . . . being brought into operation, the document to be granted by the Assurance Society effecting this would, in accordance with the practice of the said Society, be an endorsement on the policy in the following terms:—'Inasmuch as the premium due has not been paid upon the within policy, it is hereby agreed and declared that in accordance with the wish of the assurant the said policy has become a paid-up policy for £ sterling, without profits, requiring no further payments except for extraordinary privileges. The paid-up policy will not participate in the tontine or any other dividend, will be known under No. and in favour of the same beneficiaries as before. The conditions of the said policy, except as herein modified, remain as before.'"

The premiums of insurance on said policies or bonds were paid out of the said David Chrystal's own funds, the party of the second part having no separate estate. David Chrystal died before the expiration of twenty years from the date of the said policies or bonds. On August 28, 1905, the sum of £376 was borrowed by the said David Chrystal from the said Assurance Society on the security of each of the said two policies or bonds. On November 2, 1908, a further sum of £162, 10s. was similarly borrowed on the security of each of the said two policies or bonds. The sums so borrowed were used by the said David Chrystal for the purposes of his business. In respect of the second party's interest as a beneficiary in the trusts created by the said policies or bonds the said Assurance Society required her to be a party to the assignments in their favour granted in consideration of the said loans. The sums due under the said two policies, under deduction of these loans, which amount *in cumulo* to £1077, were paid by the Society on the joint-receipt of the trustee and the second party thereto, and have been put on deposit-receipt in joint names to await the decision of this case. They amounted after the deduction to £1580, 13s. 6d. The question between the parties was, who was the party entitled to the balance of the proceeds of the said policies or bonds after paying off the said loans. The parties were agreed that the said David Chrystal was a domiciled Scotchman at the date when the said policies were effected, and remained so continuously until the date of his death, and that the said question fell to be determined on the same footing as if the contracts embodied in the said policies or bonds had been entered into in Scotland, and were to be construed in accordance with the law of Scotland.

The *first party maintained* that as trustee on the sequestrated estate of the said David Chrystal he was entitled to the said balance as being part of the estate of the said David Chrystal, in respect (*a*) that having regard to the nature and terms of the policies referred to, they were not effected and held by the late David Chrystal as trustee for the second party under the Married Women's Policies of Insurance (Scotland) Act 1880, and (*b*) that having regard to the provisions made by the said David Chrystal for the second party by the foresaid antenuptial marriage contract, the subsequent effecting of the said policies and the payment of the premiums by the said David Chrystal *stante matrimonio* constituted a gratuitous donation *inter virum et uxorem* which was revocable, and which had been revoked by the insolvency of the said David Chrystal.

The *party of the second part* maintained that she was entitled to the said balance on the ground that the policies of insurance, in so far as the second alternative obligation thereby imposed upon the Assurance Society was concerned, viz., to make the payments therein set forth in the event of the death of the said David Chrystal before the expiration of twenty years from the date of said policy to the second party, whom failing, the said David Chrystal's executors, administrators, or assigns, were policies of insurance effected by the said David Chrystal on his own life, and expressed on the face of them to be for the benefit of his wife, the second party; and that in terms of the 2nd section of the Married Women's Policies of Insurance (Scotland) Act 1880, the policies, in so far as the second alternative obligation was

concerned, were held in trust for her benefit. In the event which had happened, viz., the death of David Chrystal survived by the second party, the second alternative obligation and not the first alternative obligation was the one which had become prestable against the assurance society, and the second party was accordingly entitled to the balance of the sums payable by the assurance society under the second alternative obligation in virtue of the trust created for her benefit. Alternatively, the second party maintained that, looking to the failure of the said David Chrystal to implement completely the terms of his antenuptial contract of marriage, the said policies constituted no more than was necessary to complete reasonable provision in favour of his wife.

The *questions of law* were—"(1) Is the trustee on the sequestrated estate of the said David Chrystal entitled to the balance of the proceeds of the said policies? or (2) Is the second party, as wife of the said David Chrystal, and named in the policy, entitled to the said balance?"

Argued for the first parties—The provisions of the policies did not fall within the protection of the Married Women's Assurance Policies Act 1880 (43 and 44 Vict. cap. 26). The policies did not bear to be for the benefit of the wife, but on the contrary appeared to be primarily for the benefit of the husband, the assured. They were primarily bargains for the payment of sums of money to the husband after the expiry of twenty years. The Act did not protect a policy which was not primarily but only contingently for the benefit of the wife, but on the contrary if a policy were to have the protection of the Act then the wife must have under it an immediate vested right, and the husband must hold for her irrespective of anything that he might do or that might happen to him—*Schumann* v. *Scottish Widows' Fund Society*, March 5, 1886, 13 R. 678, 23 S.L.R. 474; *Coulson's Trustees* v. *Coulson*, July 4, 1901, 3 F. 1041, 38 S.L.R. 752; *Stewart* v. *Hodge*, 23 February 1901, 8 S.L.T. 436; *Dickie's Trustees* v. *Dickie*, March 8, 1892, 29 S.L.R. 908; *Holt* v. *Everall*, 1876, 2 Ch. D. 266; *In re Seyton*, 1887, 34 Ch.D. 511; *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; *Barras* v. *Scottish Widows Fund Society*, June 27, 1900, 2 F. 1094, 37 S.L.R. 831. (2) Assuming they were right, and the policies were not protected by the Act, then in view of the antenuptial provisions they were revocable as a donation *inter virum et uxorem* and were revoked by bankruptcy—*Galloway* v. *Craig*, July 17, 1861, 4 Macq. 267, Lord Ardmillan at 271, approved by Lord Chancellor Campbell.

Argued for the second party—The absence of reference to the Act did not take the policies outwith the protection of the Act. The interest of the wife was no more contingent than that of the husband, and in point of time hers was the primary right. In any case the presence of a destination-over was not inconsistent with the Act. The mere fixing of a period of time did not take the policies out of the protection of the Act, for until the expiry of the twenty years the policies were beyond the control of the husband. Even if the wife's right were regarded as contingent the condition had been purified. They referred to *Holt* v. *Everall* (*cit. sup.*); *ex parte Dever*, *In re Suse & Sibeth*, 1887, 18 Q.B.D. 660; *Robb* v. *Watson*, [1910] 1 Ir. R. 243; *in re Parker's Policies*, [1906] 1 Ch. 526. (2) In any case the provisions were reasonable and not excessive.

At advising—

LORD JOHNSTON—I have examined the cases referred to by counsel, but I do not find that they give much assistance in the determination of the present, because, though there are even several of them which depend on the construction of policies of this particular American assurance company, they were not concerned with policies of the same class as that with which we have to deal.

This is a policy of a peculiar description. It is a combination of the ordinary endowment insurance and of the "Married Woman's Policy of Assurance," and the only difficulty in the case arises from that combination. The methods of the Equitable of New York are not those to which we are accustomed in the practice of our insurance companies. But they are only more complicated. They are perfectly legitimate developments of the principles of life insurance.

The policy in the present case is, as regards the primary interest of the assured David Chrystal, a twenty-year endowment policy—that is to say, it secures him payment of the sum assured with accrued share of profits on his maintaining the policy for twenty years and surviving the term. That it allows him to take payment in four alternative ways is immaterial. What is material is that at and after the expiry of the endowment period he and he alone is entitled to the benefits under the policy.

But within the endowment period, by which I mean the period of twenty years which is the primary currency of the insurance, the policy is a provision for the wife of the assured. In the event of the death of the assured within the twenty years, the policy being meantime duly maintained, the sum assured is made payable to the wife of the assured *nominatim*, if surviving, and failing her, to the assured's representatives.

The difference between the policy in question and the usual policy taken out by a married man for the benefit of his wife, is that the latter confers a right on the wife contingent merely on her husband predeceasing, while this policy confers a right on the wife contingent on a double event, viz., (1) the husband predeceasing her, and (2) dying during the endowment period, that is, before the expiry of the twenty years during which the policy is primarily current.

I think, notwithstanding this double

contingency, that the policy in question comes under the protection of the Married Women's Policies of Assurance Act 1880. It is a policy effected by a married man on his own life, and it is expressed on the face of it to be for the benefit of his wife. The statute does not restrict the benefit of the wife to any specified interest in the policy. The statute does not say that the benefit of the wife must be absolute and void of contingency, so as to leave nothing in the husband. It is recognised that her interest may be clogged with the contingency of her survivance of her husband, and that should she not do so his radical right may result. On the same principle, the benefit of the wife may, I think, depend not merely on one but on two contingencies, viz., the predecease of the husband and occurrence of the predecease within twenty years from the date of the policy, and yet the policy be for the benefit of the wife in the sense of the Act. The Act declares the policy together with all benefit thereof to be deemed a trust for the benefit of the wife for her separate use, or for the benefit of children, &c., and to vest in the husband and his legal representatives in trust for "the purpose or purposes so expressed"; and to be not otherwise subject to the husband's control or to form part of his estate. I cannot read the statute as requiring that the policy must be in favour of the wife unconditionally to admit of it, "together with all benefit thereof," being deemed a trust for the benefit of the wife. I read the enactment as providing that the policy and all benefit thereof shall be deemed a trust for the benefit of the wife for her interest, as that interest is defined or expressed in the policy. That is, I think, the meaning of "in trust for the purpose or purposes so expressed"; and I hold that that interest and benefit may be a contingent interest and benefit. It is to the policy that one must go to find the wife's interest or benefit. It is the statute that gives protection, such as the common law would not confer, to the interest or benefit so created.

It is consistent with and a fair test of this view that when the spouses sought to borrow on the security of the policy it was found the wife had such a vested though contingent right in the policy that the spouses could not do so except jointly for their respective interests, as evidenced by the assignment in security of a loan.

The doubt which the Court experienced at the hearing was as to whether the policy, on surrender being made under the third head of the list of privileges endorsed thereon within the twenty years of its currency, would cease to be held for the benefit of the wife, but this doubt is entirely resolved by the minute which the parties have lodged.

An argument was maintained by Mr Chrystal's trustee as to whether, having regard to his marriage-contract, the effecting of the policy in question was not in excess of a reasonable provision and revocable as a gratuitous donation, and was revoked by his insolvency. But that objection is just one against which the statute expressly protects the wife. The point is, I think, beyond argument.

Accordingly I think that the first query should be answered in the negative and the second in the affirmative.

LORD MACKENZIE—The only question argued in this case on which it is necessary to express an opinion is whether the two policies or endowment bonds are within the protection of the Married Women's Policies of Assurance (Scotland) Act 1880, section 2. If they are, the second party, who is the widow of the late David Chrystal, is entitled to receive from the Assurance Society the sum of £1580, 13s. 6d., being the balance payable upon the bonds after deduction of the sums borrowed on their security. If the bonds are not protected by the statute the proceeds go to the trustee on the sequestrated estate of the husband. It appears to me that the Act does protect the bonds in question. They are in identical terms, are both dated the 10th September 1894, and are issued by the Equitable Life Assurance Society of the United States. They bear to be twenty year endowment bonds. Each bond provides for the payment annually in advance of £55, 15s. for the term of twenty years from its date. The benefits which result from these payments fall under two heads. In the first place the Assurance Society promises to pay on the maturity of the bond to David Chrystal a specified sum of £1136, together with a share of the surplus. Then follow certain alternative benefits which are conceived in his favour, none of which, however, can be claimed by him until the maturity of the bond. In the second place there is an obligation on the Society in the event of the death of the husband before the expiration of twenty years, *i.e.*, before the maturity of the bond, provided the bond is in force, to pay the amount of the bond—£1000—to his wife if living, and if not, then to the husband's executors, administrators, or assigns. The theory of these provisions is intelligible and reasonable. The view appears to me to be this—the husband was desirous, by contributing out of his annual savings, to have at his command, if he so desired it, at the maturity of the bond a capital sum of money. He was, however, also desirous of safeguarding the interests of his wife during the period when these savings were being made. The same considerations would apply if a person entitled to succeed to an estate insured his life for the benefit of his wife to provide for the contingency of his not succeeding to the estate. The two parts of the bond are and must be kept separate. Nothing that the husband could do so long as the annual premiums continued to be paid could, in my opinion, diminish the benefit secured by the terms of the bond to his wife during the currency of twenty years. She was entitled to this benefit provided (1) her husband died before the bond matured, and (2) she survived him. This benefit, no doubt, only continues while

the bond is in force. If it lapses during the first three years the whole benefit would apparently be lost. A list of privileges guaranteed to the assured under the bond is attached thereto, the third of which provides that if after having been in force for three years the bond should lapse in consequence of non-payment of any instalment it is to have a surrender value in non-participation paid-up assurance for a certain proportion of the original sum, and this substituted bond is to mature and be payable at the same time as the original bond. This article appeared to cause a possible difficulty, because if its true meaning was that the husband could at any time during the twenty years make available as a fund of credit for his own behoof the amount of the premiums then paid up, this would put an instrument in his hands which might enable him to defeat the interest vested in the wife by the terms of the body of the bond. The minute of amendment lodged by the parties removes this difficulty, because it makes it clear that the paid-up assurance substituted for the original policy is to be in favour of the same beneficiaries as before. The nature of the right vested in the wife would remain the same as before — its extent only would be affected.

Loans were obtained on the security of the bonds in question the amounts of which found their way into the hands of the husband. The indefeasible nature, however, of the wife's rights under the bonds is recognised by the fact that the assignments in security, which the society took, are granted by her as well as by her husband. The result of this, in my opinion, is that by the bond a policy of assurance was effected by a married man on his own life and it is expressed upon the face of it to be for the benefit of his wife. It therefore, in terms of the second section of the Act, is to be deemed a trust for the benefit of his wife for her separate use. Immediately on its being effected it vested in the husband in trust for the purpose so expressed, and is not subject to his control, nor does it form part of his estate, nor is it liable to the diligence of his creditors, nor revocable as a donation, nor reducible on any ground of excess or insolvency. There is no definition or limitation in the Act as to the form in which the policy is to be expressed. The fact that in certain circumstances there is a destination to the husband's executors, administrators, or assigns will not prevent the statutory consequences of the policy receiving effect. As matters stood during the whole of the twenty years until the bond matured, the policy by virtue of the Act was held for the wife absolutely. It appears to me that there must be in all such cases the possibility of a resulting benefit in favour of the husband. It was so in the case of *Schumann* v. *The Scottish Widows' Fund Society*, 13 R. 678. In that case, in the event of the wife predeceasing her husband, it was provided that his heirs, executors, or assignees should be entitled to receive a certain specified sum after his decease. In the present case the fact that if the husband survived the period when the bond matured a benefit then accrued to him, does not appear to me to be of a different nature or that there is anything in this feature of the bond under consideration which would render the wife's right defeasible during its currency. A similar point arose under the English Married Women's Policies' Act, and it was held that the possibility of a resulting trust in favour of the husband's representatives did not exclude the operation of the Act—*Holt* v. *Everall*, 1876, L.R., 2 Ch. D. 266, and *Seyton* v. *Salterthwaite*, 1887, L.R., 34 Ch. D. 511.

Upon the whole matter, therefore, I am of opinion that the bonds are within the protection of the statute, and that the first question should be answered in the negative and the second question in the affirmative.

LORD KINNEAR—I am of the same opinion. The conclusive consideration to my mind is that in the event which has happened the bond gives the whole benefit of the insurance money, which is the fund now in dispute, to the insured's wife, and that in terms falls within the second section of the Married Women's Policies of Assurance Act. The husband had, no doubt, a contingent interest in the insurance, but that contingent right never became absolute, and was completely and finally determined by his death. The result, to my mind, was to leave this a policy of insurance for the benefit of the wife and of the wife alone. I do not think any second argument arises upon the point which was raised by the trustee as to the provision for the wife being revocable as a donation *inter virum et uxorem*. That simply raises the same question over again—Does the Married Women's Policies of Assurance Act apply, or does it not. If it did not there would be, no doubt, a very strong ground for the trustee's contention; if it does it expressly enacts that the assurance shall not be revocable as a donation *inter virum et uxorem*, and the insurance money cannot be paid to the husband's creditors.

LORD PRESIDENT—I confess I have had considerable difficulties in this case, and indeed, that the first inclination of my judgment was against the result at which your Lordships have arrived. What pressed upon my mind was that I think that at common law, and apart from the provisions of the Married Women's Policies of Assurance Act, undoubtedly this money would belong to the husband's creditors. It is, therefore, really the protection of the Act and of the Act alone that effectuates the other result. Now the Act which grants the privilege says—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use." What struck me at first was that this policy was certainly

prima facie not a policy for the benefit of the wife but a policy for the benefit of the husband himself, because the first clause provides that if he lives to a certain age he will get a sum of money, and the provision in favour of the wife is only put in to meet the case of his not living to that age.

But I am sensible of the strength of the arguments which your Lordships have used. I feel also that the Act is an enabling statute, and that the class of insurance which is here disclosed seems to be a very sensible one. It provides for the wife if the husband is taken away by an early death, and, on the other hand, if he lives long enough it provides him with a considerable sum of money out of which he can make a provision for her after his death. That being so, I do not feel sufficient confidence in the view that first struck me to intimate a formal dissent.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the First Parties—Cooper, K.C.—C. H. Brown. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Second Party—M'Lennan, K.C.—Hedderwick. Agents—Cumming & Duff, S.S.C.

Friday, May 31.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WISHART *v.* HODGE.

Bankruptcy—Sequestration—Distribution of Estate—Dividend—Omission to Lodge Claim—Interdict—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 125.

The judicial factor on the estate of a deceased lady whose husband's estate had been sequestrated failed to lodge a claim as creditor in the sequestration until nine days after the commissioners had met and declared a first and final dividend. He was cognisant of the sequestration, but had received no formal notice from the trustee in the sequestration of the date by which claims required to be lodged.

Held, in respect of his knowledge and of the fact that there was no fault on the part of the trustee, that he was not entitled to interdict the trustee from dividing the estate.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), section 125, enacts—"Immediately on the expiration of four months from the date of the deliverance actually awarding sequestration, the trustee shall proceed to make up a state of the whole estate of the bankrupt, . . . and within fourteen days after the expiration of the said four months the commissioners shall meet and examine such state . . . and they shall declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors."

George Hodge, C.A., Glasgow, judicial factor on the trust estate of the late Mrs Elizabeth Kerr, *pursuer*, brought an action in the Sheriff Court at Glasgow to interdict John Wishart, accountant, Glasgow, trustee on the sequestrated estates of Hugh Kerr, contractor, Glasgow, *defender*, from dividing the whole funds available for division in payment of a first dividend among the creditors, until he had set aside a figure sufficient to pay an equalising dividend on pursuer's claim. Hugh Kerr was the executor-nominate of Mrs Elizabeth Kerr, his wife, and the pursuer averred that Hugh Kerr had collected sums under two policies of assurance on the life of the late Mrs Kerr, and had failed to account for them to the beneficiaries under her will.

The following narrative of the *facts* of the case is taken from the opinion of Lord Salvesen—"The pursuer Mr Hodge, who was appointed a factor on the trust estate of the deceased Mrs Kerr, claims to be a creditor *qua* factor of her husband Hugh Kerr, on whose sequestrated estate the defender is trustee. The pursuer was appointed factor so far back as 18th August, his appointment was extracted on 29th August, and he intimated his appointment as factor to the defender in the beginning of September. The examination of the bankrupt took place on 30th August, and it appears, and I think it is a material circumstance, that the pursuer was represented at that examination, because in another representative capacity he was a creditor of the bankrupt. He therefore had from that early date, if not sooner, full knowledge of the sequestration of Hugh Kerr, and it was his duty to apprise himself, if necessary, by examination of the *Gazette* of the procedure in that sequestration. He probably even did not require to look at the *Gazette*, because as a representative of another creditor he would get all the usual notices issued to creditors of the estate.

"The pursuer at an early stage seems to have thought that there might be a claim against the bankrupt in respect of his having falled to account for the executry estate, and in September there was some correspondence between him and the defender on that subject. Nothing followed and no claim was lodged by the pursuer as factor on Mrs Kerr's estate, and I think the trustee, the defender in this case, was perfectly entitled to assume that, having had the possibility of such a claim brought to his mind, the pursuer had elected not to pursue it. The statutory period of four months expired on 28th November, after which, and within fourteen days, the commissioners were required to meet and to consider as to the distribution of the estate. The commissioners, in fact, met on the ninth day after the 28th November, and they then passed a deliverance to the effect that the whole estate should be distributed (except a small