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 failed 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

balance on hand), as a first and final dividend. Up to that time the commissioners and the defenders had no knowledge that the pursuer intended to lodge any claim. The case might have been entirely different if at the time that their deliverance was pronounced a claim had in fact been lodged, or the circumstances even such as to make it their duty to provide for a known claim."

On 22nd February 1912 the Sheriff-Substitute (TAYLOR) pronounced the following interlocutor—"Finds the following facts are admitted—(1) The estates of Hugh Kerr were sequestrated on 28th July 1911; (2) the first statutory meeting was held on 8th August 1911, and defender was appointed trustee; (3) the said Hugh Kerr was confirmed executor of the late Mrs Elizabeth M'Lean, or Dimond, or Wallace, or Kerr, on 12th August 1910; (4) pursuer was appointed judicial factor on the trust-estate of the said Mrs Kerr on 18th August 1911; (5) the state of affairs lodged by the said Hugh Kerr contained no statement of any claim against him at the instance of himself as executor aforesaid; (6) to entitle creditors to participate in the first dividend, oaths and grounds of debt fell to be lodged on or before 28th November 1911; (7) no notice was sent to the pursuer by defender intimating the date by which claims required to be lodged in order to participate in the first dividend; (8) intimation of a possible claim at the instance of pursuer was received by defender in the letter of 30th September 1911; (9) a claim in the sequestration at pursuer's instance for £754, 6s. 5d. was lodged on 9th December 1911; (10) the commissioners on the sequestrated estate met on 30th November 1911, and decided to divide all available sums amongst the creditors whose claims had been timeously lodged: Finds in law that the pursuer is entitled to the interdict craved."

The defender appealed, and argued—The Sheriff-Substitute should have refused interdict. The circumstances in the case of *Scobie* v. *Hill's Trustees*, November 23, 1869, 8 Macph. 161, 7 S.L.R. 98, on which the Sheriff-Substitute had founded, were quite different. In *Scobie's* case the trustee did not fulfil his duty, here he did, and further in that case the creditor did not know of the sequestration, here he did. The respondent had abandoned the ground of judgment of the Sheriff-Substitute, that the cause of the omission was the fault of bankrupt attributable to the trustee. The respondent was a professional man and ought to have looked after his own interests. He could, in any event, have appealed against the deliverance of the commissioners—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) sec. 169; *Steele* v. *Ligertwood*, February 17, 1865, 3 Macph. 587. The respondent was alone to blame, and he ought to ask to have the process sisted and apply to the *nobile officium* of the Court.

Argued for the respondent—The Sheriff-Substitute was right. There were two questions in the case (1) Did pursuer's lateness forfeit his right to participate in the first dividend; (2) did his lateness forfeit his right to have money set aside to meet his claim. As to the former the only authority was *Scobie* v. *Hill's Trustee* (*cit. sup.*), which rested on a principle which was applicable even though the trustee was not in fault. Here there were two special circumstances in favour of the pursuer—(1) his representative capacity, and (2) the fact that the claim required some investigation before it could be put forward. But further, respondent asked interdict to prevent the estate being distributed so as not to allow sufficient for a second dividend. It was in contemplation of the statute that the estate should not be entirely divided up at once, but provision made for contingencies—secs. 123, 125, and 130 of the Bankruptcy (Scotland) Act 1856. The commissioners were bound to consider the contingency of a second dividend. The present case was *a fortiori* of *Steele* v. *Ligertwood* (*cit. sup.*). There was no period of finality in the statute before the expiry of the fourteen days. The policy of the Court all through had been not to press the limits of time—*Porteous & Mitchell* v. *Aitken's Trustee*, November 18, 1828, 7 S. 22; *Mitchell* v. *Wilson's Trustee*, July 7, 1829, 7 S. 841.

LORD SALVESEN—[*After narrating the facts*]—Now the Sheriff has held that the defender must be interdicted from distributing the estate so as to prejudice the pursuer, and his ground is that the "pursuer got no formal notice owing to the fault of the bankrupt, and as the case against him rests on defender's having strictly complied with all statutory provisions he is entitled to insist on that notice."

Now I do not think it was contended before us that there was any fault on the part of the bankrupt. It is quite true that the bankrupt did not in the state of affairs that he requires to lodge with his trustee include this claim as one of the debts due by the estate, but the circumstances show quite clearly that he did not do so because he maintained, and has always maintained, that it was not a good claim against him. His case was that he never fingered a penny of the money, but that the money was appropriated by his law agents, whom he had properly employed to conduct the affairs of the executry. Therefore I cannot see that there was any fault in the bankrupt's not including in his state of affairs as a debt a claim which he did not recognise and which he had reasonable cause for not recognising as a debt against him.

Fault on the part of the trustee is not alleged. The trustee appears to me to have acted here perfectly properly and fairly. There is no suggestion of any desire on his part to take any undue advantage of the pursuer. He acted entirely in discharge of his statutory duties.

Now, is it to be said that in such circumstances, where a claim is not lodged simply through want of vigilance on the part of the person who is vested in it, that the

whole statutory procedure is to be changed in order that the person who has been so neglectful of his own or his constituent's interests may nevertheless not be penalised? I see no reason why he should not suffer the usual penalty of his failure to take the necessary steps to vindicate his rights. It is quite true that under the Bankruptcy Acts, if there is more than one dividend, a creditor who has neglected to lodge his claim so as to participate in the first dividend is entitled to have an equalising dividend set apart for him on the declaration of the second dividend if his claim has then been adjudicated upon and found good. That is a great concession to a creditor in such a position, and it may result in his not being penalised at all for not lodging his claim as he ought to have done before the first deliverance as to distribution was pronounced. But when the circumstances are, as here, that the Commissioners have resolved in entire ignorance of any outstanding claim and in the *bona fide* discharge of their duty to distribute the whole estate in one division, then it seems to me the creditor must take the consequences of his own failure to lodge his claim.

The case of *Scobie* was referred to as an authority, and indeed as the only authority, for this application, but it seems to me that that was a totally different case, and rests upon the well-known principle that if non-compliance with a statutory provision has been due to the fault of the person or body who are going to benefit by the strict application of these statutory provisions then the Court will give an equitable remedy. The Court there proceeded upon the view that but for the failure of the trustee to have the bankrupt examined there would in all probability have been notice given to the creditor which would have apprised him of the necessity of lodging a claim in the sequestration, and that as the creditor had received no such notice because of the failure of the trustee to perform his statutory duty, the creditor was entitled to the remedy of interdict against the estate being paid away to his prejudice. That I think was an entirely different case from the one which is presented to us here, and in which, as I think, there are no specialities at all, because the fact that this creditor was a creditor in a representative capacity cannot make any difference. Indeed I agree with Mr Wilton that it makes the case rather worse, because the pursuer was a professional man well versed in the Bankruptcy Statutes, having full knowledge through his position as representing another creditor of the exact position of this sequestrated estate, and therefore the very person who might reasonably be expected to do all that was necessary to protect the interests of those whom he represented.

My view is that if we were to listen to this demand on so-called equitable grounds we should really have to give the same relief to every creditor who happened to be too late in lodging his claim to participate in the first dividend, with the result of upsetting the whole scheme of distribution under the Bankruptcy Statutes.

I am therefore for recalling the judgment of the Sheriff-Substitute and refusing the prayer of the note.

LORD DUNDAS concurred.

LORD GUTHRIE—The question seems to arise chiefly under section 125 of the 1856 Act, which says at the close of the section that "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." Now it is said in this case that the commissioners should have had the respondent's claim in view as a possible claim. That is the first ground, and that is the ground that the Sheriff-Substitute has gone on. Mr Christie however argued that at all events, the claim having been lodged before the expiry of the fourteen days mentioned in section 125, the commissioners should have met again and given effect to the claim by considering it among the items that entered into the reasonable construction of the words "for future contingencies." Then the third question is, the commissioners not having taken either course, can we interdict the paying of the dividend? I agree with your Lordships that we cannot. The commissioners were bound to consider all claims that were actually in. It may be that if a claim had been intimated as about to be lodged, but was delayed on account of want of information, they might have been bound to consider that matter also; but here I agree with your Lordship's opinion that the contrary was the case. The claim had been suggested at an early period, but the conduct of the complainer was such as to lead to the reasonable inference that it was not to be lodged. If so it seems to me the deliverance was final and the money was payable away. No doubt *Scobie's Trustees* shows that there may be special circumstances in which the remedy here sought will be granted, and the Sheriff-Substitute had erred because he thought that the special circumstances which arose in *Scobie* exist here. It seems to me that this case is a case by contrast to *Scobie*. In *Scobie* there was fault on the part of the trustee; here it is admitted there was no fault on the part of the trustee or of the bankrupt. There were other circumstances in *Scobie* which would be sufficient to entitle to the remedy sought; there are none here. The representative capacity will not do, and the omission of the bankrupt to include the claim will not do, and Mr Christie was not able to suggest any other special grounds. Taking it, then, on the lowest footing, if it be the law that cause must be shown why the Court should interfere, then it seems to me no cause has been shown here.

The LORD JUSTICE-CLERK concurred.

The Court sustained the appeal, recalled the interlocutor appealed against and refused the crave of the initial writ.

Counsel for Pursuer and Respondent—J. R. Christie. Agent—C. Strang Watson, Solicitor.

Counsel for the Defender and Appellant—Wilton. Agent—James G. Bryson, Solicitor.

HOUSE OF LORDS.

Thursday, May 16.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Atkinson, and Lord Shaw.)

BOYD & FORREST *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

(In the Court of Session, November 10, 1910, 48 S.L.R. 157 and 1911 S.C. 33.)

Contract—Fraud—Legal Fraud—False Representation Inducing Contract—Contract to Construct Railway—Non-Disclosure of Material Circumstances as to Nature of Work.

A railway company entered into a written contract with a firm of contractors for the construction of a railway for a lump sum. The specification attached to the contract and forming its basis stated that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office, but that the company did not guarantee their accuracy, and would not hold themselves liable for any claim on account of any inaccuracy in the journal. According to the specification, only three descriptions of material were to be excavated, viz., solid rock, broken or loose rock, and soft. In the course of the work the contractors found that much of the material classified as "soft" contained rock, and it turned out that the bores had not been made by professional borers, but by employees of the railway who had been engaged in similar work before, and that the journal of bores had not been prepared by them but was compiled in the engineer's office from letters written by them. It appeared further that it did not accurately record the contents of these letters, but was the engineer's interpretation of the information these letters purported to convey, and that in particular a substance reported in three instances as "black ban" or "hard black ban," and in five instances as "rock," was changed into "black blaes" and classified as "soft." In a petitory action at the instance of the contractors against the railway company for the amount of their loss under the contract, *held* (*rev.* judgment of the Second Division) that the contract had not been induced by the fraud of the defenders in respect that the engineer honestly believed that the journal of bores correctly set forth the substance found, and corrected a misdescription of the borers as to the nature of that substance.

The case is reported *ante ut supra.*

The Glasgow and South-Western Railway Company appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—In this case the appellants entered into a contract in writing with the respondents, dated 18th September 1900, for the construction of a certain portion of the appellants' railway, called the Dalry and North Junction, about 12 miles in length, and for widening of their line between the Dalry and Swinlees Junctions, for a lump sum of £243,690. There were several cuttings to be excavated and embankments to be made in order to form this first-mentioned line. One cutting was called the Kilbirnie Cutting and another the Whirlhill Cutting.

The specification attached to the contract executed by the parties and forming its basis contains the following paragraphs amongst others:—

"*Cuttings and Embankments.*

"Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journals of these bores may be seen at the engineer's office, but the company does not in any way guarantee their accuracy or that they will be a guide to the nature of the surrounding strata. Contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.

"The formation level in both cuttings and embankments shall be 1 foot 9 inches below mean rail level.

"Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these although the material may turn out to be different from what is calculated and given in the detailed schedule.

"On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock. Where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith. All the material in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such.

"The slopes of all cuttings (except where