

sions in *Harvey's Factor* and *Taylor's Trustees*, referred to at the debate, I think we are bound to answer the first question put to us in the affirmative. According to these decisions Mrs Johnston's right to the funds in question, or any part thereof, is contingent on her surviving her father. The second part of the second question must be affirmed on the authority of *Harvey's case*. This leads to the fourth question being negatived. Answering these questions as I do renders it unnecessary and inappropriate to give (at present) any answer to the third question. That question may never need to be solved if Mrs Johnston predeceases her father.

LORD MONCREIFF was absent.

The Court answered the first question of law and the second alternative of the second question of law in the affirmative, and found it unnecessary to answer the other questions therein stated.

Counsel for the First and Third Parties—Campbell, K.C.—Macfarlane. Agents—Tawse & Bonar, W.S.

Counsel for the Second and Fourth Parties—Clyde, K.C.—Hunter. Agents—Alex. Morison & Co., W.S.

Tuesday, November 26.

SECOND DIVISION.

[Sheriff-Substitute
at Edinburgh.]

WYLIE'S EXECUTRIX *v.* M'JANNET.

Right in Security—Life Insurance Policy—Policy Effected by Borrower in Security of Loan—Custody of Policy Retained by Lender—No Assignment to Lender—Premiums Paid by Lender—Preference Claimed on Proceeds—Law Agent's Lien.

A, a mill-owner, who had borrowed money from B, a solicitor, effected an insurance on his life with the view of providing security for the loan. The premiums, as they fell due, were paid by B, at first, at A's request, and subsequently, on A's disappearance, in order to maintain the security for his debt. The policy remained throughout in the custody of B, but was never assigned by A to him.

In a multiplepinding raised after the death of A, who died insolvent, to determine the rights of parties to the sum contained in the policy, B claimed a preferential ranking upon the fund for the amount of the premiums paid by him, and interest thereon, in respect (1) that he had throughout had the custody of the policy; (2) that he had paid the premiums due thereon, and so kept it in force; and (3) that he was entitled to a law-agent's lien in respect of the sums advanced by him.

Held that B was not entitled to the preferential ranking claimed by him.

This was an action of multiplepinding raised in the Sheriff Court at Edinburgh in name of the Life Association of Scotland, pursuers and nominal raisers, by the executrix of the late James Wylie, formerly manufacturer, New Cunnock, for the ascertainment of the rights of certain claimants to a sum of £500 contained in a policy of insurance effected with the Life Association by the said James Wylie on 13th July 1868.

The facts of the case as disclosed by the proof were as follows:—Mr Wylie died insolvent on 23rd April 1900, his whole estate consisting of the sum of £500 contained in the said policy. His daughter, the real raiser, was decerned executrix-dative *qua* next-of-kin by the Sheriff of the Lothians and Peebles.

In 1868, on the suggestion of Mr W. D. M'Jannet, a solicitor, and with the view of providing security for advances made by M'Jannet to him, Wylie insured his life for £500 with the Life Association of Scotland, for whom M'Jannet was agent. The first two premiums were paid by M'Jannet at Wylie's request. Thereafter M'Jannet continued to pay the premiums as they fell due, Wylie being unable to do so. Before the 1872 premium fell due Wylie disappeared, leaving no address, and from that date until his death in 1900 M'Jannet paid the premiums as they fell due in order to maintain the security for his debt. The policy remained throughout in the hands of M'Jannet, but no assignation of it in his favour was executed by Wylie.

On Wylie's death, in consequence of claims made to the proceeds of the policy by M'Jannet and others, the present action was raised. The fund *in medio* consisted of the £500 insured by the said policy. Claims were lodged by (1) the executrix, who claimed the whole fund *in medio*, as executrix-dative *qua* next-of-kin of the deceased James Wylie, for division among the creditors on his estate; (2) W. D. M'Jannet, who claimed to be ranked *primo loco* upon the fund in respect of the premiums paid by him, and interest thereon, amounting to £603, 2s. 3d. Claims were also lodged by other creditors of the deceased, to which it is unnecessary further to refer.

The executrix pleaded—"(1) The claimant being executrix-dative *qua* next-of-kin of the said deceased James Wylie, is entitled to be ranked preferably to the whole free fund *in medio*."

The claimant M'Jannet pleaded—"(1) The claimant is entitled to be ranked *primo loco* upon the fund *in medio* to the extent of £603, 2s. 3d., being the amount of premiums and interest thereon paid by him, in respect that (a) under the circumstances stated he is entitled to a lien on the proceeds of the policy for said sum, (b) the claimant's expenditure of said sum preserved the policy in force."

On 14th June 1901 the Sheriff-Substitute (MACONOCHE), after a proof, pronounced an interlocutor ranking and preferring the claimant, Wylie's executrix, as executrix-dative *qua* next-of-kin of the deceased James

Wylie in terms of her claim.

The claimant M'Jannet appealed to the Court of Session, and argued—There was here a *de facto* although not a formal assignation of the policy to the claimant. It had been effected to secure Wylie's indebtedness to him, and had remained throughout in his custody, and he had paid all the premiums. In these circumstances he was entitled to a preferential ranking over the other creditors. In any view, he had an equitable lien over it as Wylie's agent for the amount of his cash advances—*Meikle v. Wilson & Pollard*, November 6, 1880, 8 R. 69, 18 S.L.R. 56; *Robertson v. Ross*, November 17, 1887, 15 R. 67, 25 S.L.R. 62.

Counsel for the executrix were not called upon.

At advising—

LORD TRAYNER—The fund *in medio* consists of the proceeds of a policy of insurance effected over the life of a Mr Wylie, now deceased. It is claimed by Mr Wylie's executrix as part of the executry estate, and the Sheriff-Substitute has sustained her claim to the effect of entitling her to get the money in order to its distribution among the creditors of the deceased according to their respective rights. The appellant claims that the fund *in medio* should be awarded to him on the ground that he has a claim to it which is preferential to the claim of any other creditor. Even if that were so, the executrix in ordinary circumstances would be entitled to get the fund, because the rights and preferences of creditors *inter se* is a matter to be decided in the distribution of the estate. We were asked, however, by the counsel for the appellant to decide now and in this process upon the question whether he is entitled to the preference claimed. If deciding that question could prejudice any other creditor who had not been heard, I should have declined to express any opinion upon it. But I think no such prejudice can arise. I am clearly of opinion that the appellant is not entitled to the preference he claims. His claim is based, as I understand his case, upon two grounds—(1) that he is the actual custodian of the policy in question, and (2) has paid all the premiums due upon it on behalf of the assured. The first of these grounds will not sustain his claim, for the mere possession of the policy without any assignation to it confers no right to the policy or any claim arising in respect of it. The second ground also fails the appellant, for it amounts to no more than this, that he made certain cash advances on behalf of the assured. These constitute a debt against the assured, but give no preferential right over any other creditor to the fund produced by the policy. Nor can the appellant maintain his right to hold the policy in respect of the hypothec which a law-agent has over his client's papers, for that hypothec can only be exercised for the amount of a professional account and not for cash advances—*Christie v. Ruxton*, 24 D. 1182. There appears to me therefore no

legal ground on which the preference claimed by the appellant can be sustained. It appears to me, however, that instead of preferring the executrix to the whole fund, as the Sheriff-Substitute has done, leaving her to distribute the same, it would be in the interest of all concerned to have the fund distributed in this process. In view of the conflicting claims it is more than probable that the executrix might not be able to distribute the fund except under a process similar to this, and it will obviously save expense that such distribution should take place in this process, which the executrix herself has brought. I think, therefore, we should recal the interlocutor of the Sheriff-Substitute, and with a finding that the appellant has no right to a preferential ranking, remit to the Sheriff to dispose of the claims on the fund *in medio*.

The LORD JUSTICE - CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of 14th June 1891: Find in fact that the claimant W. D. M'Jannet paid the whole premiums due and exigible under and in respect of the policy of insurance on the life of the late James Wylie, mentioned on record; that such payments were made by the said W. D. M'Jannet, partly at the request of the said James Wylie, and partly with the view of maintaining a security for payment of debt due by the said James Wylie: Find in law that in respect of the said payments the said W. D. M'Jannet has no preferential claim on the executry estate of the said James Wylie: And with these findings, and of consent, remit to the Sheriff of new to order claims to be lodged on the fund *in medio* by all creditors claiming to be ranked thereon, and to proceed to adjudicate on the claims so made, and to proceed further in the cause as accords.”

Counsel for the Claimant and Appellant W. D. M'Jannet—Salvesen, K.C.—Hunter. Agent—Wm. Croft Gray, S.S.C.

Counsel for the Real Raiser, Claimant, and Respondent, Wylie's Executrix—Watt, K.C.—Horne. Agent—Robert Macdougald, S.S.C.