COURT OF SESSION.

Friday, January 31.

FIRST DIVISION.

[Lord Gifford, Ordinary.

LIFE ASSOCIATION OF SCOTLAND *v.* FOSTERS.

Insurance—Warranty—Failure to disclose—Negligence—Bona fide.

A party insured her life, the basis of the contract being a declaration by her that she had not certain diseases, among others, rupture. On her death by that disease shortly after, it turned out that when she made the declaration one of the symptoms of rupture existed on her person. *Held* that the declaration, which was made *bona fide*, did not amount to a warranty that she was free from that disease.

This was a case arising out of a policy of life insurance granted by the Life Association of Scotland to the late Mrs Mary Waugh or Foster. The policy was issued on the 24th May 1871, and bore to have as its basis a declaration, dated 19th May 1871, in the following terms:—"I, Mary Waugh or Foster, before designed, do hereby declare that I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true; and that I have not withheld or concealed any important circumstance. And I" (the party in whose favour the assurance is to be effected) "do hereby agree that this declaration shall be the basis of the contract between me and the Life Association of Scotland, and that if any untrue averment be made therein, or in the answers to questions by the Society's medical officer in reference to this propossl, all sums paid on account of the assurance shall be forfeited, and the assurance be null and void." Of the same date, a number of questions contained in the printed form used by the pursuers were put to Mrs Foster by James Moffat, the medical officer acting on behalf of the pursuers; and her answers to the said questions were in her presence written down by the said James Moffat, and afterwards signed by her, along with the declaration after mentioned.

Among these questions was the following:—"Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or any affection of the kidneys or urinary organs?" and to this question Mrs Foster answered, "No."

To the said statements, made by Mrs Foster in presence of the said medical officer, there is appended the following declaration, signed by Mrs Foster of the said date:—"I, the person whose life is proposed for assurance, declare that the above statements are faithful and true; and I undertake that, in the event of my having rupture, either now or at any other future time, I will constantly wear a properly-adjusted rupture-truss."

By the policy itself it was expressly stipulated—"That if anything averred in the foresaid declaration forming the basis of the assurance, or in the relative statements, be untrue, this policy and assurance shall be void, and all monies paid in respect thereof shall be forfeited to the Association.'

Mrs Foster died of strangulated hernia on Nov. 30th 1871, and the Insurance Company resisted the demand for payment of the sum contained in the policy, on the ground that at the time when the policy was granted Mrs Foster was suffering under the disease of which she died, and that her averments were therefore untrue, and that she had concealed facts highly material to the contract. The pursuers, however, made no averment of fraud.

Argued for the pursuers, that "untrue" means "disconform to fact," not morally false. That the only thing important to the Company is the fact, not the party's knowledge of it, or of its materiality. In like manner, "faithful" means true to the spirit of the question. If a fact be material, and it is admitted that this fact was material, then its materiality is the only thing to be considered, and not the moral truth of the declarant. There was admittedly an abnormal swelling on her body at the time when she made the declaration, and it was her duty to have disclosed its existence however little she might believe it to be material. If she failed to do so, and it turned out afterwards to be material, those who claim benefit under the policy must take the consequences of her neglect. The basis of the contract was not that she had not rupture to her knowledge, but that she had it not at all, and it was on this basis that the Company granted the policy and calculated their risk.

Argued for defenders—The words of the policy must be construed strictly against the Company, being proposed by themselves. "True" means that the declarant undertakes to give a true answer to the questions asked her, and she cannot be held responsible for failing to disclose that which she did not herself know. The evidence shows that she had no idea of her ailment, for she went on doing the hard work of a farm, and taking no precautions. In any case the responsibility of concealment is taken off her, assuming that she answered faithfully and to the best of her own belief, by the medical examination of the Company's own doctor, who had no right to assume a knowledge of symptoms on the part of Mrs Foster, but ought to have satisfied himself by a personal examination.

Authorities—*Duckett* v. *Williams*, 2 Compton & Meeson 348; *Anderson* v. *Fitzgerald*, June 1853, 4 Clerk, 484; *Fowkes* v. *Manchester & London Life Insurance Company*, 32 L. J.; Q. B. 153. (Blackburn, J's. opn.); *Cazenove* v. *British Equitable Assurance Company*, 1859, 28 L. J; C. P. 259; *Dalgleish* v. *Jarvie*, 2 Macnaughten & Gordon, 243. (Rolfe, B's. opn.); *Lindenau* v. *Desborough*, 8 Barnwell and Cresswell, 586; *Hutchison* v. *National Life Insurance Company*, Feb. 21, 1845, 7 D. 467; *M'Laws* v. *United Kingdom Insurance Company*, Feb. 16, 1861, 23 D. 559; *Sir Wm. Forbes & Co.* v. *Edinburgh Life Assurance Company*, March 9, 1832, 10 S. 451.

At advising—

LORD PRESIDENT—In the month of May 1871, the now deceased Mrs Mary Foster made to the pursuers a proposal for an insurance of £300 on her own life, which was accepted, and a policy of insurance was completed accordingly. On the 30th of November following the insured died of inguinal hernia or rupture.

The pursuers in this action contend that the

policy is void, and the premiums forfeited, because the insured had rupture at the time of effecting the insurance, and because in the declaration and relative papers which form the contract between the parties, she warranted that she had not then and never had rupture.

A second ground of action on which the pursuers seek to have the policy declared void is, that the insured concealed or failed to disclose a fact material to the risk.

The evidence shows that Mrs Foster had at the date of the policy and of the proposal a swelling in her groin, of no great size, which to a medical man would or might have indicated the existence of rupture, but it gave her no pain or uneasiness of any kind, and she attached no importance to it whatever, and never thought of it as a circumstance requiring her to resort to medical advice, till the month of November, when, in consequence of some unusual exertion, the swelling increased suddenly in size, and was found on examination to be of a serious character, and ultimately proved fatal. It is also established by the medical evidence that a rupture in the incipient and undeveloped condition in which this was at the date of the insurance very generally escapes the observation of the person affected, and raises no suspicion in the mind of any one not possessed of medical skill that it indicates anything more serious than the temporary swelling of a gland. Indeed, it has been the condition of the argument throughout that Mrs Foster had no knowledge or suspicion that she was affected by any malady, and believed herself to be in perfect health.

The first question, therefore, for the decision of the Court, is whether it was a condition of the contract between the parties that Mrs Foster warranted herself free from rupture.

We have heard a great deal of argument on the authorities and on the principles of law applicable to such questions, which, however, are very well settled and ascertained both in Scotland and England. The only real difficulty regards the construction of this particular contract, and the question is, whether by the terms of that contract there was a warranty that the insured was free from rupture, or whether her assertion on the subject amounts to no more than an assurance that, so far as she knew or had any reason to believe, she was not affected by that disease.

In the policy there is a proviso, "that if anything averred in the declaration forming the basis of the assurance or in the relative documents be untrue, this policy and assurance shall be void," &c.

The declaration thus referred to is appended to the proposal, and in it the insured declares "that I am at present in good health, not being afflicted with any disorder external or internal; that the preceding statements are true; and that I have not withheld or concealed any important circumstance;" and she agrees that the declaration so made shall be the basis of the contract, and that "if any untrue averment be made therein, or in the answers to questions by the society's medical officer in reference to the proposal," the policy shall be void, &c.

It is not alleged by the pursuers that there is any untrue averment in the words of the declaration itself. They admit that Mrs Foster was, within the fair meaning of the words, "in good health," and not "*afflicted* with any disorder internal or external." Neither could it be maintained that there is any untruth in the answers to the questions in the proposal, called in the declaration "the preceding statements." But the untruth is said to be contained in one of the answers to the questions put to the insured by the society's medical officer. It becomes necessary, therefore, to examine carefully not only the particular answer relied on by the pursuers, but the whole paper in which it occurs, and the nature of that document, and its relation to the other documents forming the contract of insurance.

The paper in which these questions are contained is sent by the Insurance Company to their medical officer, and contains, first the questions to be put to the insured, printed with spaces for the answers to be inserted in writing. Then follows a declaration, to be signed by the insured, in the following terms:—"I, the person whose life is proposed for insurance, declare that the above statements are *faithful and true*, and I undertake that in the event of my having rupture, either now or at any other future time, I will constantly wear a properly adjusted rupture truss." The next part of the paper consists of questions to be answered by the medical officer, and among these occurs the following:—"6. Describe the condition of the several cavities and their viscera. If anything be abnormal, however slightly, state the particulars." "If there be rupture, describe its nature and position, and state whether he wears a sufficient truss." "Is he in every other respect perfectly free from disease?" Lastly, there is appended the opinion of the medical officer, and his certificate that the questions addressed to him have been "faithfully answered to the best of my knowledge and judgment."

The first, second, third, and tenth of the questions put by the medical officer to the insured relate to matters of fact necessarily within the knowledge of the assured, and an untrue answer to any of these would amount to wilful falsehood. The seventh, eighth, and ninth questions demand particulars of the history and health of the parents, brothers, and sisters, and other relations of the insured, some of which may, and probably will, be within the personal knowledge of the insured, but others can be known to him only by hearsay or surmise. Some of these questions accordingly are answered by Mrs Foster with qualifications, "not to my knowledge," "as far as I recollect," not exactly known to me." The remaining three questions are concerned entirely with the health of the insured herself, and must be taken and construed together. These questions, with the answer given by Mrs Foster, stands as follows:—"4. Are you now *in your own opinion* in perfect health?" "Yes." "5. What ailments and medical advice have you had?" "Never had any ailments, except those diseases common to childhood, such as measles, &c., and never had medical attendance except during my confinements." "6. Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or of the brain, or liver, or any affection of the kidneys or urinary organs?" "No."

It is on the last negative answer—taken in connection with the declaration appended to the proposal, which provides that "if any untrue averment be made therein or in the answers to the questions by the Society's medical officer," the policy shall be void,—that the pursuers rely as a warranty that Mrs Foster was free from rupture.

The question turns very much on the construction to be given to the word "untrue" in the declaration, and it is beyond dispute that the primary and usual signification of the word is "contrary to fact," and not "knowingly false." It is equally clear, however, that the word is susceptible of the latter meaning, and it must always depend on the context and the nature of the contract which of the two was the meaning intended by the contracting parties.

In questions of this description a distinction must be observed between insurance effected by a person on his own life and insurance effected by a person on the life of another. Examples of the latter occur in the cases of *Sir Wm. Forbes & Co.* v. *The Edinburgh Life Assurance Company*, 10 S. 457, and *Duckett* v. *Williams*, 2 Ex. and M., 348. In such cases it is held, on obvious principles of equity, that where one states as matter of fact that which is not within his own knowledge, with a view to induce another to enter into a contract, he does so at his own peril. He is under no obligation or necessity to do so; and if he does not possess positive evidence of the fact, he should qualify his statement, as being to the best of his belief. But if he states it without qualification, he is justly held to warrant the statement as consistent with fact. On the other hand, a person making a statement regarding his own health must be assumed generally to be speaking according to his own personal knowledge, and there are many facts regarding his health of which he cannot be ignorant, a misstatement of which would, of course, be fraudulent. But there may be many other facts, materially affecting his state of health and prospect of longevity, of which a person without medical skill or medical advice can know nothing. No doubt a contract of insurance may be so expressed as to make freedom from certain specified diseases, however latent, matter of warranty, but the contract will not so readily bear that construction in the case of a person issuring his own life, and making statements as to his own health, as in the case of one who makes such statements respecting the health of another for the purpose of obtaining a policy of insurance upon the life of that other person. The latter has no personal knowledge of that of which he is speaking, and therefore speaks from information and evidence in his possession, not accessible to the other party, on which, of course, he relies implicitly when he states unqualifiedly what is its results and import. The former has much personal knowledge, and may be fairly presumed to speak from that personal knowledge only.

In connection with this distinction, it is further to be kept in mind that such contracts fall to be construed strictly *contra proferentem*. This rule, founded on plain justice, is quite settled in practice. Insurance Companies have the framing of their contracts in their own hands. They may make such conditions as they please, but they are bound so to express them as to leave no room for ambiguity. They must be construed, as Chief-Justice Cockburn said in *Fowkes* v. *The Manchester, &c. Assurance Association*, (32 L. J., Q. B. 157), "in the sense in which the agreement would be understood by a layman who was about to enter upon an insurance transaction."

Keeping in view, then, that Mrs Foster was asked to make, and was, on the request of the pursuers, making a statement regarding her own health, and that if her answer was to be of the nature of a warranty, the pursuers were bound to make this plain to her. Could she be expected to understand that when she answered the sixth question of the medical officer in the negative, and signed her name to a declaration that her answers to all the questions were "faithful and true," she was giving a warranty to the pursuers that there were not about her any symptoms, however latent and unobservable, of any one of the fifty or more diseases embraced in that very comprehensive question?

Of the three questions regarding her personal health, the first makes a special appeal to her own knowledge and feelings:—"Are you, in your own opinion, in perfect health?" The second, in like manner, obviously is an appeal to her personal knowledge; and when the third and very comprehensive question is put, it would be most natural that she should suppose she was again expected to answer merely according to her own experience and belief. This construction receives much aid from the manner in which the question was actually put by the medical officer. He states in his evidence that he read over the sixth question, to Mrs Foster as one question, and took her one general answer "No" to the whole question; that he did not explain to her the nature of any of the diseases comprehended in the question, and did not ask her separately whether she had rupture or any other of the diseases.

It appears to me that if the pursuers desire to have a warranty of the absence of all the diseases comprehended in the sixth question, this should be made matter of very distinct provision in the contract, and not be left to be spelt out of an answer to a question, which the insured may very fairly suppose to be intended only to elicit facts and information within the knowledge of the person to whom it is addressed. The insured is almost inevitably thrown off his guard by the terms in which the preceding fourth question is put, and by the subject-matter as well as the terms of many of the other questions in the same paper; and when he is asked to attest that the answers he has given are "faithful and true," how can he suppose that this means anything more than that they are honestly given, and true according to his knowledge and belief? It would never enter into the mind of a person of mere ordinary intelligence, being neither a medical man nor a lawyer, nor a director of an Insurance Company, that he was asked to warrant that his father died at the age of 60, and not at 59 or 61, or that his mother, as in this case, died of old age, at 99, and not of a fracture of the skull, at 98. And yet it is very difficult to see how *one* portion of the answers to this catechism (where there are no qualifying words either in the question or in the answer) is to import a warranty, and another is not. The very fact that Mrs Foster was allowed to give qualified answers to some of the questions was also calculated to mislead her as to the object and effect of the others.

Indeed, it seems hardly probable that these answers were intended by the pursuers themselves to import a warranty. They instruct their medical officer to report specially as to the condition of the several cavities and their viscera, and if he makes such an examination as is necessary to enable him so to report, he will not fail to discover all the symptoms which by possibility could become known to the insured, and probably a great many

more. It is of no importance that Dr Moffat in this case confined his examination to the thorax, and neglected to examine the abdomen and the pelvis, and in consequence did not discover the swelling which would or might have indicated to him incipient hernia. But it is of importance to see that the Insurance Association are anxious to use every means to detect the presence of any of those serious diseases against which, at the same, time, they say they have got a warranty.

In construing the word "untrue" in the declaration, it is further to be observed that, unless it imports a warranty of the facts stated in the answers to the questions of the medical officer, it does not import a warranty at all, because every other statement that the insured is called upon to make regards facts within her own knowledge. But even in the answers to the medical officer's questions, the great majority of them either regard matters within her personal knowledge, or are express appeals to her own opinion and belief, or are allowed to be answered with such qualifications as "not to my knowledge;" so that, so far from this supposed warranty standing out prominently as it ought to do on the face of the contract, it is hidden away in a mere corner of the transaction, in such a way as not only not to challenge observation, but most probably to escape notice.

For these reasons, I cannot consent to enforce a warranty which, though it may be within the literal meaning of the words, is yet so expressed as not to be fitted to convey to the mind of any person of ordinary intelligence contracting with the Insurance Association the information that he is by subscribing the contract binding himself in such a warranty.

The second ground of action, viz., that the insured concealed, or failed to disclose, a fact material to the risk, rests on the same evidence as the allegation of breach of warranty. The only fact concealed or undisclosed was the existence of the swelling in the groin.

Concealment or non-disclosure of material facts by a person entering into a contract is, generally speaking, either fraudulent or innocent, and in the case of most contracts where parties are dealing at arm's-length, that which is not fraudulent is innocent. But contracts of insurance are in this, among other particulars, exceptional, that they require on both sides *uberrima fides*. Hence, without any fraudulent intent, and even *in bona fide*, the insured may fail in the duty of disclosure. His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract. Any negligence or want of fair consideration for the interests of the insurers on the part of the insured leading to the non-disclosure of material facts, though there be no dishonesty, may therefore constitute a failure in the duty of disclosure which will lead to the voidance of the contract. The fact undisclosed may not have appeared to the insured at the time to be material, and yet if it turn out to be material, aad in the opinion of a jury was a fact that a reasonable and cautious man proposing insurance would think material and proper to be disclosed, its non-disclosure will constitute such negligence on the part of the insured as to void the contract.

The only question therefore is, whether the existence of the swelling in Mrs Foster's groin was such a fact; and that question in the present case we are to decide as jurymen. My opinion is, upon a consideration of the whole circumstances as disclosed in the evidence, that the swelling which is proved to have existed at the date of the contract of insurance has not been shown to be such a fact as a reasonable and cautious person, unskilled in medical science, and with no special knowledge of the law and practice of insurance, would believe to be of any materiality or in any way calculated to influence the insurers in considering and deciding on the risk.

The result of my opinion is, that the defenders ought to be assoilzied from the conclusions of the summons.

Lord Deas—In this case the pursuers, The Life Association of Scotland, seek to reduce a policy of assurance on the life of the late Mrs Foster on two grounds, which I shall take leave to consider in the reverse order in which they were argued at the bar:—1st, Negligence; 2d, Breach of Warranty.

The alleged negligence on the part of Mrs Foster consists in her not having disclosed that she had a swelling on the groin, which, if mentioned to and examined by a medical man, would have enabled him to know that she had rupture, although she herself did not suspect anything of the kind.

The alleged breach of warranty rests upon the fact that she had rupture at the date of the Assurance contract, whereas, to the question whether she had had rupture, or various other specified diseases, her answer was "No."

Considering that for the last 10 or 12 years, life assurance policies are understood to have been effected in this United Kingdom to the estimated amount of from 20 to 30 millions of money in each year, it would be difficult to over-estimate the interest and importance attaching to a case like the present, in which the truthfulness and good faith of the party insured are altogether undoubted. The circumstances are these:—

Mrs Foster was the widow of an innkeeper and farmer near Gatehouse-at-Fleet. After her husband's death she continued to carry on a considerable dairy farm for the benefit of herself and her children. It is reasonable to suppose, therefore, that her life was of some value to her family, the youngest being only 7 years of age. On the 19th May 1871,—being then in her 52d year,—Mrs Foster made a proposal to the pursuers, through their local agent, for an insurance on her life to the amount of £300. It is stated in the record that the assurance was applied for on the urgent solicitation of the local agent, who was well acquainted with her. Whether this was so or not has not been ascertained, but supposing it to have been so, the agent did nothing more than the duty, which all assurance companies inculcate upon their agents, to procure them all the business they can, —and in this case the agent has the opinion to refer to of the pursuers' local medical officer, who certified that Mrs Foster's life was "a very eligible life for assurance."

The pursuers' printed form of proposal for assurance, supplied to Mrs Foster, contained a variety of questions with blanks for the answers, in the usual way, all of which questions, it is not dis-

puted, Mrs Foster answered quite correctly. None of these questions related to her health, past or present. The questions upon that subject were all contained in a separate schedule, furnished by the pursuers to their local medical officer, to be read by him to the applicant, and the answers taken down and signed in his presence, a printed direction to him being prefixed that "no third person should be present." I cannot say that this appears to me to be so satisfactory a mode of interrogation as the embodiment of these questions in the proposal itself, which the party has an opportunity of considering deliberately, and of being reminded by others of circumstances which may have been forgotten, and advised as to what might otherwise be misunderstood. Be this as it may, however, the answers to the medical officer were prospectively made part of the contract by the declaration appended to the proposal, which bore that "I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true; and that I have not withheld or concealed any important circumstance. And I do hereby agree that this declaration shall be the basis of the contract between me and the Life Association of Scotland; and that if any untrue averment be made therein, or in the answer to questions by the Society's medical officer in reference to this proposal, all sums paid on account of the assurance shall be forfeited, and the assurance shall be null and void."

The Society's medical officer, Dr Moffat, explains in his evidence that he read over to Mrs Foster the questions in the printed schedule thus referred to *seriatim* in their order, and himself wrote down her answers, after which he caused her to read them over, and then she signed the declaration at the bottom thereof, which was in these terms: "I, the person whose life is proposed for assurance, declare that the above statements are faithful and true, and I undertake that, in the event of my having rupture, either now or at any other future time, I will continually wear a properly adjusted rupture truss."

The questions and answers with which we are more immediately concerned contained in this schedule are the 4th, 5th, and 6th, which are in these terms: Q. 4th. "Are you now, in your own opinion, in perfect health?"—A. "Yes." Upon the answer to this question, I may observe in passing that its entire accuracy is not impugned. Q. 5th. "What ailments and medical advice have you had, trivial or otherwise?" "Names of medical advisers?"—A. "Never had any ailment, except the diseases common to childhood, such as measles, &c., and never had medical attendance except during my confinements." Upon this answer I may observe that its accuracy likewise is not impugned, unless, indeed, the swelling to be afterwards adverted to can be called an "ailment." There is a *notandum* upon this query to the effect that "the names of medical attendants at confinements should be stated;" but the medical officer either did not ask these names, or did not take them down. Q. 6th. "Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or of the brain or liver, or any affection of the kidneys or urinary organs?"—A. "No." It is upon the answer to this 6th question, coupled with the terms of the declaration already quoted, and of the declaration in the policy itself, that the present action to reduce the policy is founded. The declaration in the policy bears, "It is also expressly provided that if anything averred in the foresaid declaration, forming the basis of the assurance, or in the relative statements, be untrue, this policy and assurance shall be void, and all moneys paid in respect thereof shall be forfeited to the Association."

The medical officer admits, what indeed, the form of query sixth and the answer as taken down would presume, that he read over that query to Mrs Foster, and took her answer to it in the negative as one general query, although it embraces in its terms eleven different kinds of disease, and contains general words which may comprehend many additional diseases. He depones, "I did not ask her as to rupture or any of the other diseases mentioned in it separately." This, certainly, was a very loose mode of interrogating the applicant on matters of such importance, but that may not be of much moment in the present case, because it is clear enough that if he had asked her, separately and expressly, "Have you had rupture?" she would have answered "No,"—that being the only answer she could possibly have given without stating what she must have considered a wilful falsehood. Dr Moffat admits in his evidence that he did not explain to her the nature and symptoms either of rupture or of any of the other diseases specified in query 6th above quoted, and, on his attention being called to that part of his printed instructions from the Company which directed him to "institute an examination, by auscultation or otherwise," of the applicant's body, and to "describe the condition of the several cavities and their viscera," and if there was anything abnormal, however slight, to state the particulars; he depones that he examined "the cavity of the thorax only." And, on being reminded that he had stated that Mrs Foster might have rupture without knowing it, and asked why he did not examine to see, his answer is, "Because she stated that she had no rupture, and I did not suppose that any insurance company would expect me to expose a woman in order to ascertain such a thing." Now, this might have been all very well if Mrs Foster had been asked whether she had any swelling on her person, and had answered that she had none. I observe, from the report of the case of *Cazenove*, that one of the printed questions in the list prescribed by the British Equitable Company was, 5th. "Whether had tumour or swelling of any kind? State its nature and position." But there was no such question either prescribed to be put, or actually put, in this case, and I can find no general question even which could be naturally supposed to comprehend it.

The written answer which Dr Moffat returned to the Company, in compliance with the direction already quoted, to "describe the condition of the several cavities and their viscera," was "normal." To another direction, "If there be rupture, describe its nature and position, and state whether he (or she) wear a sufficient truss," he returned no answer. To the question, "Is she in every other respect perfectly free from disease?" his answer was, "Free." To the direction to "describe her present state, as regards positive healthiness and vigour: Is it above,—only equal to,—or below the average?" his answer was, "Above the average." He had previously stated in his report that he had known Mrs Foster for about twelve months. And his opinion at the close, which I have already

alluded to, bore that "after careful consideration of the family and personal history, and other circumstances, I am of opinion that this is a very eligible life for assurance." His report bears the same date with the proposal, viz., 19th May 1871; and on the 24th of the same month the proposal was accepted and the policy signed in Edinburgh by the directors.

Up to this time it is clear, as indicated to some extent by the medical report, that Mrs Foster had enjoyed unusually good health. She had never required medical aid except upon the occasion of her childbed confinements, the last of which had occurred seven years previously. She had, consequently, no medical adviser whose name she was required to state in the proposal, and any evidence we have otherwise is to the effect that she was a very active healthy person.

On 15th November, however, of the same year in which the assurance had been effected,—being about six months after the date of the proposal,—she was seized with violent sickness and vomiting, and Dr Cox was called in, and found her, to use his own words, "suffering from gastric derangement, and treated her for that." It appears from her son's evidence that Mrs Foster took an active charge of the dairy, consisting of the produce of some fifty cows or thereby,—that her daughter Jane, who usually assisted her, had been absent in London for about two months, and that the dairy-maid had left suddenly about eight or ten days before Mrs Foster was taken ill, whereby her duties had been increased—that she had been working among a number of cheeses in the dairy shortly before she was taken ill, and that, in particular, she had succeeded, the very day before, in the difficult task of taking out of the cheese-press a heavy cheese which others about her had tried to take out and failed. The question was not put to any of the medical men, but I presume there can be no doubt that over exertion may cause sickness and vomiting; and Dr Cox appears to assume in his evidence that it was not rupture which brought on the sickness and vomiting, for he says that on the 15th and 16th he continued to treat her for a bilious attack, and considered her suffering from nothing else, and that what first indicated to him strangulation of the bowel was stercoraceous vomiting, which did not occur till the night of the 17th. He farther says that the violent vomiting was quite sufficient to cause the strangulation, and coupling this with the fact that the swelling had not increased from the time Mrs Foster had first observed it till between the night of the 15th and the morning of the 16th, when it doubled in size, the inference seems to be that the direct cause of the strangulation was, not the over exertion, but the sickness and vomiting, although, except for accuracy, it may not be material to distinguish between the one cause and the other. Dr Cox having discovered on the 16th, by questions to Mrs Foster, and examination of her person, that rupture existed, and on the night of the 17th, that strangulation had occurred, he called in Dr Shand and Dr Dickson on the 18th, when, the rupture being found not reducible, an operation was performed, the propriety and skilfulness of which there is no reason for doubt, but, gangrene having supervened, she died on the 30th, her death being thus fairly attributable to the rupture.

In these circumstances, the pursuers, in their record and pleas seek to reduce the policy on two grounds, which, as I have already said, I shall take leave to consider in the reverse order from that in which they were argued, because I think it contributes to clearness to ascertain first whether any negligence or blame can be attributed to Mrs Foster sufficient to void the policy, with or without forfeiture of the premiums, and then to enquire whether, although there may have been no such blame, there was nevertheless a warranty that in point of fact she had no rupture—it being undoubted that if there was such a warranty, the consequences of a breach of it have been incurred. The word warranty is not indigenous in our practice, but it is the shortest and most convenient expression for the thing signified, and I adopt it accordingly.

The pursuers state, in Article 7th of their condescendence, which may be taken to be substantially correct, that for months prior to the proposal of assurance Mrs Foster was aware that she had a swelling on the groin of the size of a walnut, which, if it had been mentioned to a medical man, would have indicated to him that she had rupture, but the existence of which swelling was not mentioned by her. In Article 11th of their condescendence, the pursuers say, "in failing to disclose the existence of the said tumour or swelling, by which the said rupture was manifested, Mrs Foster withheld or concealed an important and material circumstance affecting the risk." And their 2d plea in law bears, that the policy is reducible "in respect that she made misrepresentations, and concealed facts highly material to the contract of assurance upon her life." This plea (as contra-distinguished from their first plea, to be afterwards noticed), although expressed in the plural, can only be held, I presume, to refer to the single fact of her not having mentioned the swelling in question.

It must be remembered, with reference to this point, that not only was the question not specially put to Mrs Foster, either in writing or verbally, whether she had any swelling on the groin, or any swelling at all, but, as I have already observed, even the general question, not unusual in printed forms of proposals issued by Assurance Companies, whether the applicant is aware of any circumstance not specifically mentioned, which he or she thinks it right or proper to communicate to the Assurance Company, is altogether absent from the papers in this case.

It is sufficiently clear, upon the proof, that, at the date of the assurance Mrs Foster did not know or suspect that the swelling on the groin indicated rupture; and, in place of this ignorance on her part being inexcusable, or even remarkable, it is abundantly proved that nothing is more common than such ignorance among non-medical persons of intelligence and more liberal education than Mrs Foster is likely to have had. If the swelling had not indicated rupture, it is not suggested, either in the record or by the medical witnesses, that it could have indicated anything else of a serious nature, or to which Mrs Foster could reasonably have supposed the pursuers would attach importance, and which she might consequently have had a motive to conceal. The medical men say the swelling might have indicated a swollen gland, or what is vulgarly called "a waxen kernel;" and they do not say that, if they had examined the swelling and pronounced it not to indicate rupture, they would have attached importance to it on any other ground.

It is plain, I think, that even up to the time when Dr Cox became her medical attendant, Mrs Foster attached no importance to the swelling upon any ground whatever. It had been stationary in size for nearly a year, and had never caused her the slightest pain or inconvenience. The fact of its having doubled its size in the course of one restless night, coupled with Dr Cox's expressed desire to know how she had spent that night, and all other particulars, led her, for the first time, to think its existence worth mentioning, and then it was with apparent surprise that she heard from him its nature and importance. To aver, as is done in the record, that Mrs Foster "withheld or concealed," from the pursuers, "an important and material circumstance affecting the risk," appears to me to be to use words of no relevancy to the objection I am now discussing, unless their meaning be, either that she purposely withheld or concealed that circumstance—which is contrary to the import of the evidence—or that her failure to disclose the existence of the swelling was so inexcusable as to be equivalent to intentional concealment—which is, I think, equally contrary to the import of the evidence. To plead (as in plea 2d) that the policy is reducible "in respect that she made misrepresentations" on the subject, is to state a plea founded neither on averment nor fact.

Assuming now, however, that neither blame nor negligence affecting the validity of the policy can be attributed to Mrs Foster, the important question remains,—Whether there was a warranty that in point of fact she had no rupture?

That there may be such a warranty in a contract of life assurance I do not doubt. And, if there was such a warranty here, I could just as little doubt that the policy on Mrs Foster's life is void.

The all-important question, therefore, comes to be, whether the contract falls to be construed as importing the alleged warranty? And that question, again, will be found to resolve substantially into another—in what sense is the word "untrue" used in the declarations which formed the basis of the contract, with reference to the answers returned to the Society's medical officer? The case, in this view, can only be solved by a careful consideration of the contents of the whole documents.

The contract of life assurance is a contract of good faith on both sides. The assurers may stipulate for any warranty they please, and, if the assured undertakes that warranty, although it may be of something not within his or her knowledge, he or she must abide the consequences. But, when the assurers intend that there is to be a warranty of that sort, they must make it very plain that such is their intention. They must use unequivocal language, such as persons of ordinary intelligence may without difficulty understand. The preparation of the printed documents is in their hands; and by the form of these documents the answers and undertakings of the assured are necessarily so far moulded as to make it equitable to construe what is doubtful unfavourably for the assurers. It is not to be presumed that, in a contract of life assurance, a party undertakes to warrant a fact which at the time he neither knows nor has the means of knowing, and ambiguous words are not readily to be construed in that sense.

Now the word "untrue," upon which the case really turns, may be used in more senses than one. Sometimes it means untrue in point of fact, and at other times it means untrue in the knowledge of the party. This last appears to me to be the more natural meaning of the two, where the party is required to speak of his or her own ailments, diseases, and health; particularly when the words "untrue" and "true" are used along with other words or phrases, as I think they are here, indicating that the object was really to get a faithful account of what the party knew about herself.

There are two declarations, of date 19th May 1871,—the one appended to the proposal, and the other appended to the answers made to the Society's medical officer, both of which I have already quoted at length, and which I shall now analyse. The first begins thus:—"I do hereby declare that I am at present in good health, not being afflicted with any disorder, external or internal." That appears to me to be the language of a party speaking, to her own knowledge, of what she could not fail to know absolutely, and as to which it is not disputed that her answer was absolutely true. She was in good health, and not afflicted with any thing in the natural and most obvious sense of the word "afflicted."

The next words, "that the preceding statements are true," refer to the statements in the proposal, some of which were within her personal knowledge and some not, but all of which are admitted or assumed to be absolutely true. It was contended both by Mr Balfour and by Mr (now Lord) Shand, on behalf of the pursuers, that if the answers to question 5th, either as to the precise age, or as to cause of death of the applicant's father or mother, had not been precisely correct in point of fact—for instance, if the mother had died at the age of 90 or 98 in place of 99—or had died of something else than old age—that would have voided the policy; and they both admitted that such was the legitimate and necessary result of their argument on the matter of warranty. That certainly seems to me a startling result. The Lord Advocate, for the pursuers, refused to say whether he took that view or not, and I am not disposed to hold the pursuers committed to it. But the alternative must be, that the declarations cannot be read as making every answer a warranty, but that you must look at the matter of the question and answer, as well as the whole contract, to see whether there is a warranty of the particular answer or not.

The declaration I am now examining goes on "and that I have not withheld or concealed any important circumstance." I have already had occasion to observe, in dealing with the plea of negligence, that this also is language expressive of the knowledge of the applicant, and, when the declaration goes on farther to say "that this declaration shall be the basis of the contract," and that if any untrue averment be made therein, or in the answers to the questions by the Society's medical officer," the premiums should be forfeited and the policy void; I think the fair construction of the whole is that the declaration refers generally to what may turn out to have been untrue to the knowledge of the applicant.

The language of the declaration appended to the answers to the Society's medical officer, "that the above statements are "faithful and true," favours the same construction. The impression which such words naturally convey is, that the applicant has faithfully stated, to the best of her knowledge, the truth of every thing in reference to which her personal knowledge was appealed to.

The declaration embodied in the policy is just a

repetition of the declarations of 19th May, and therefore requires no special notice.

To come now to the questions as to health. These are all in the list of questions to be put by the Society's medical officer, and Nos. 4, 5, and 6 must be taken together, in order to see whether No. 6 is to be read as intended to elicit the applicant's knowledge of her own state of body, or a warranty of something not within her knowledge.

I have quoted these questions already in the first part of my opinion, and it is sufficient here to remark upon them that No. 4, in the clearest possible manner, asks nothing but a faithful opinion; No. 5 just as clearly requires an answer according to the knowledge of the party, "what ailments and medical advice have you had?" and No. 6, in the natural sequence, particularises the more serious ailments which were enquired about, by bringing them by name under her notice. It could hardly, I think, be expected to occur to anyone, answering these three questions in succession, that No. 6 was intended to be answered on a different footing from Nos. 4 and 5, unless something had been added to indicate that such was the case.

The whole questions as to ailments, diseases, and health are thus framed in the language of parties asking for faithful and honest information from the applicant, as to what he or she knew of himself or herself, rather than of parties requiring a warranty of matters of fact; and, taking the phraseology of the questions in connection with the phraseology of the declarations, I think the whole were not calculated so clearly and unequivocably to convey to the mind of the applicant that he or she was undertaking a warranty of facts, known and unknown, as would be necessary to constitute so onerous an obligation.

The contention is, that if the applicant had any one of the diseases falling within the extensive range of the 6th question, however latent and undeveloped that disease might be,—a growing calculus in the bladder, for instance, which had never yet occasioned any sensible uneasiness—or if she had disease of the heart, or some congenital malformation of that organ which at the date of the policy had never manifested itself any way—never given her the slightest pain referable to such a cause—and, consequently, had never been suspected by herself, or anybody else, to exist, and only found to have existed by *post mortem* examination, the policy was to be void and all the premiums forfeited. We know too well, and have been painfully reminded by recent instances, that such affections may exist for long periods unsuspected, and many manifest themselves only by sudden death, or by death occurring within a few days or weeks of the first symptoms of illness; and, although I do not question the legality of Life Assurance Companies taking a warranty to protect themselves against such occurrences, I certainly think there is no hardship in requiring them to make it perfectly clear to the applicant, by the language of the contract, that such is the warranty the applicant is required to undertake, more particularly where the assurers insert, as the pursuers here do, all their questions about ailments, diseases, and health, in the schedule of questions to be put by their medical officer, which the applicant does not see till she comes into his presence, when, in place of having the safeguard suggested as necessary by Lord St Leonards in *Anderson* v. *Fitzgerald*, of having a lawyer at her elbow, the pursuers' rule is that no third person shall be present.

The Lord Advocate said that life assurance tables of premiums are framed upon the footing of the policies importing such a warranty as here contended for, so that they could not afford to dispense with that warranty. I had rather understood that the premiums were fixed with reference to tables showing the average value of human life, taking into account that men are subject to all ordinary diseases of the country and climate, and that, nevertheless, the business of Life Assurance Companies was not unprofitable when well conducted, as the great success of the pursuers' company shows their business to have been. Be this as it may, however, I cannot entertain a doubt that it is one reason amongst others why many prudent people insure their lives for the benefit of their families, that there may be undeveloped diseases lurking in their system, or congenital peculiarities, unknown and unsuspected, and yet that the result often is that they live to pay premiums which, if saved and accumulated, would greatly exceed the amount assured and payable at death. Most of people would pause, I think, in effecting a life assurance if informed in plain terms that however candid their statements, it could not, by possibility, be determined till they were dead and dissected, whether their families would be entitled to anything under the policy, or whether, on the contrary, all the money paid for it in the shape of premiums would be forfeited. Many, I think, would decline altogether to enter into the proposed contract, and, if this would be so were such an explanation given of its nature, I cannot think that assurance companies, by wrapping up the matter in generalities, or using language which is not clear and unequivocal, ought to be allowed to prevent the applicant from considering, with his eyes open, whether he will enter into such a contract.

The case of *Duckett* v. *Williams* (2 Crompton and Meeson 348) was the only case quoted at the bar in which it can be held to have been *in terminis* decided that the words "not truly stated" meant not true in fact, whatever the knowledge or belief of the party might have been. That was a case of re-insurance by one assurance company (The Provident) with another (The Hope), whether to the full or only to a partial extent is not stated. An action was brought by the Provident to recover the sum re-insured. The report bears that "the defence was that the life was not insurable." The jury returned a verdict that the life was not insurable, and the Court refused to disturb that verdict. In a second action for a return of the premiums, the jury found that the life was insurable. But on a motion to set aside that verdict, the Court, having by agreement of parties looked into the evidence, came to the conclusion that at the time when the policy was effected the person whose life was insured had upon him a disease which tended to shorten life, and consequently, I infer, that his life was not insurable at the ordinary rate of premium.

That was not the case of a party insuring his own life, but a contract of re-insurance which may be entered into on either of two different footings, which it is necessary to distinguish. The statements of the party whose life is insured may be made part of the contract, as in the case of *Sir William Forbes & Company*, March 9, 1832, (10 S. and D. 451). Or the one insurance company may accept the risk in reliance solely upon the state-

ments made by the other. This last, so far as can be gathered from the report, seems to have been the nature of the contract in *Duckett* v. *Williams*. The terms of the proposal are not given, but the declaration annexed to it, which is fully quoted, bears that the trustees of the Provident thereby declared that John Stephenson, in whose life they had an interest to the amount of £5000, was in good health, and had not laboured under any of the diseases therein enumerated, "or any other disease which tends to shorten life,"—that this declaration or statement should be the basis of the contract between the two companies—"and that if any untrue averment be contained herein, or if the facts required to be set forth in the above proposal be not truly stated," all monies paid should be forfeited, "and the assurance itself be absolutely null and void."

The knowledge and belief of John Stephenson as to his own diseases and health were thus, so far as appears, no part of what the Hope relied upon in contracting with the Provident. Whether the disease he laboured under was known to himself, or whether it was latent and unknown to him, does not appear. The last is not, I think, to be presumed. In such a case, or in any case where an applicant, on the strength of his own inquiries, ventures to make statements as to the diseases and health of a third party, with a view to obtain an insurance on the life of that third party, he would require, I think, to be very cautious as to the wording of the contract to avoid the inference that he takes upon himself the risk that he has accurately ascertained the facts he sets forth as the basis of the contract. If the statements of the third party as to his diseases and health be made part of the contract, it may be that the applicant shall be responsible only that there has been a full and faithful disclosure of all that relates thereto. But if the third party be not appealed to in the matter, one or other of the contracting parties is necessarily taking the risk of an imperfect investigation, and a contract expressed as the contract was in *Duckett* v. *Williams* may quite fairly be held to lay that risk upon the company proposing the re-insurance.

For it is material to observe that in that contract there were two things agreed to, either of which, apparently, was to infer nullity and forfeiture,—1st, "that if any untrue averment be contained herein;"—that might naturally enough refer to a class of averments as to which vigilance and good faith could alone be reasonably expected. But then there came "or" (2d), "if the *facts* required to be set forth in the above proposal *be not truly stated.*" There are no such words as these in any of the declarations in the present case—no distinction indicated between untrue *averments* and *facts* not truly stated. But it was upon the last-mentioned words alone that Lord Lyndhurst commented and proceeded in delivering the judgment of the Court. "The point," his Lordship said, "is whether *the facts* stated were not truly stated within the meaning of the declaration and agreement, and *looking at the context*, we think it clear that the parties did not mean to restrict the words in the manner contended for."

The fatal fact in that case was that Stephenson, on whose life the assurance was affected, had on him at the time a disease which tended to shorten life, and which rendered his life not insurable,—at least not at the ordinary premium. Now, when an applicant for insurance on his own life is asked to answer questions about his own diseases and health, he may naturally conclude, if not warne to the contrary, that he does all he is expected to do if he faithfully makes known to the Assurance Company all that can possibly be known to anybody. But when the same questions are put about the diseases and health of another, to an applicant for insurance on the life of that other, the applicant has not the same reason for concluding that his personal knowledge is alone appealed to; for personal knowledge he has none, and he cannot tell the company undertaking the assurance all that can possibly be known on the subject. It is not surprising, therefore, that in *Duckett* v. *Williams* the Court, looking to the context—that is to say, taking the words in which it was agreed that certain consequences should follow if the facts required to be stated were not truly stated, in connection with the whole terms and nature of the contract—came to the conclusion that the words "not *truly* stated" were intended to mean, and did mean in that case, not *correctly* stated.

I have gone thus at length into the case o *Duckett* v. *Williams*, because it was the only case commented and relied on by the Lord Advocate in support of the warranty contended for in the present case. I have not, however, failed carefully to consider all the other cases cited in the previous arguments, in which *dicta* more or less favourable to the pursuers' contention were said to have fallen from judges of high authority. It appears to me, however, that in estimating the value of these *dicta* regard must always be had to the cases in which they incidentally occurred, and that if *dicta* were to be placed against *dicta*, those of Lord Mansfield in the case of Sir James Ross in 1780 (1 Blackstone, 312) would commend themselves as more generally applicable than any that can be set against them. His Lordship is there reported to have said that, while the assured must make a full disclosure of all he knows, if he and the assurers be equally ignorant of any fact, the assurers must stand the risk. That, of course, does not mean that there may not be a warranty of a fact unknown; but it means, I think, that in an ordinary contract of assurance, by a party on his own life, the presumption is not in favour of warranty of a fact unknown, but rather the reverse.

In *Anderson* v. *Fitzgerald*, decided in the House of Lords in June and July 1853 (4 Clark, 484), there were two wilful falsehoods embodied in the proposal made by the party for insurance on his own life, viz. (1) That none of his near relations had died of consumption, whereas he knew that two of his sisters had died of that disease. (2) That no application for insurance on his life had been either accepted or refused by any other Insurance Company, whereas six companies had accepted such proposals made by him, and other six had rejected them. The Judge who tried the case had charged the jury that they must be satisfied of the materiality of the statements, as well as of their falsehood; and, after great difference of judicial opinion, it was decided by the House of Lords that it was not necessary in that case for the Insurance Company to prove the materiality, and consequently that the charge in that respect was erroneous. There was no other question in the case, except the question whether materiality fell to be proved, and incidental remarks in the course of such a case cannot be regarded as laying down a general rule

for the construction of the word "false" or the word "untrue" occurring in other contracts, and in answering questions of a different description from those which were untruly answered there.

In the case of *Cazenove, &c.*, v. *The British Equitable Assurance Company*, May 6, 1859, 28 Law Journal, Com. Pleas, p. 259, the policy was held void in respect of the untruth of the applicant's statement that, with the exception of one occasion about a year before the proposal, when he was confined to the house and his bed for a week by disordered stomach, and attended by Dr Roper, he had never, since infancy, had any disease requiring confinement, whereas he had, shortly after that illness, been confined for a week, and again attended by Dr Roper; and subsequently he had a dangerous illness, which confined him for two or three weeks, and required the constant attendance for part of that time of two additional medical men, neither of whom were at all mentioned in his statement.

Now, it is true that in that case the company withdrew their plea upon fraud, and relied upon their objection that the statements were untrue; but it is clear from the nature of the illnesses, their recent date, and the calling in of two additional medical attendants, that the applicant, while he remembered the first and slight illness, could not have forgotten the subsequent and serious illness, and consequently that he had, to say the least of it, palpably failed in his duty of disclosure in answering questions directly put to him upon matters of fact within his knowledge. Accordingly it will be seen that the learned Judges in their opinions, while they certainly do not say that the untruth must be wilful, reason upon the answers very much as if that were the question at issue; and Justice Willes, professing to be of the same opinion with the Chief Justice, observes:—"The answers in the personal statements amount to more than a mere omission to state a particular illness; they contain a positive denial of any illness but one, and are such as would mislead any person." I cannot, therefore, accept that case as ruling the present.

In the case of *Fowkes, &c.*, v. *The Manchester and London Life Assurance Association*, decided in the Court of Queen's Bench, May 1, 1863 (32 Law Journal, p. 153), Justice Compton observed:—"We must first consider what the contract really means; and, in order to find that out, it is not immaterial to observe that numbers of the matters mentioned in the policy are not material at all; therefore we must see that the parties make it a condition that these things should be true—literally and actually true."

That remark as to the character of the averments—the untruth of which is to forfeit the premiums and void the policy—applies here; for it could not have been held material although the applicant's father had died at 61 or 62 in place of, as averred, at 62 or 63; or although his mother had died at 98 in place of 99, or had died of some disease known in medical nomenclature in place of old age; and yet, as we have seen, the words of the declarations make no distinction between the consequences of the untruth of any one of the averments, and of any other. Forfeiture as well as nullity are equally to follow in either case. Consequently, before we can infer a warranty, we must see, as Justice Crompton said in *Fowkes'* case, that the parties clearly made it a condition that the things said to be warranted were to be literally and actually true.

Justice Blackburn, in the same case, adds a remark with which I entirely agree, "that in cases of instruments the language used by one of the parties is to be construed in the sense in which it might reasonably be understood on the other side;" and I think that rule is particularly applicable to contracts of life assurance, which are daily entered into by all classes of persons on the footing that the questions put to them are not expressed in language which lawyers alone can understand, and which, as happens in this case, may be put to a woman in the common rank of life without being previously communicated to her, and on an occasion when no third party is allowed to be present.

The report of this case of *Fowkes* does not give the terms of the questions and answers there under discussion, but the opinions and result are affirmative, I think, of the important general principle that such contracts are not to be construed favourably for the plea of warranty of facts not within the knowledge of the assured party.

The only other case I shall mention is the case, in this Court, of *Hutchison* v. *The National Life Assurance Company*, Feb. 21, 1845 (7 D. 467). I have reserved it for notice out of the order of its date to avoid breaking the continuity of the reference I have made to the English cases; but I attach to it great importance, as bearing more directly than any of these other cases, upon the present question of warranty, and as being a well-considered judgment which, in so far as applicable, we are bound to follow.

Mrs Hutchison had stated that she had no disease nor symptom of disease. It turned out, on a *post mortem* examination, that the dropsy of which she died had arisen from disease of the liver, which must have existed at and prior to the date of the contract of assurance. It had been stipulated, as in all the cases, that the declaration should be the basis of the contract; and the declaration bore, *inter alia*, as here, that if any untrue allegation was made, the premiums should be forfeited and the policy void. The Court and the Lord Ordinary, after full discussion, concurred in holding that there was no warranty against latent and unknown disease; and that, assuming Mrs Hutchison to have had no knowledge or suspicion of the existence of the disease of the liver, her representatives were entitled to recover the sum assured. I go entirely with the judgment in that case, and with the general scope of the opinions delivered upon it. I think full and fair weight was given in it to the prior English cases, and that the general bearing of those of subsequent date has been confirmatory of the soundness of the views there laid down.

In forming my opinion in the present case, on the question of warranty, I have confined myself entirely to what appears on the face of the written documents, looking to the proof only as establishing that, at the date of the contract Mrs Foster, although excusably ignorant of the fact, had rupture, which afterwards caused her death. My opinion, both upon the point of negligence and the point of warranty, is very clearly against the pursuers.

Lord Ardmillan—In this very important and interesting case I shall endeavour to express my opinion so as to avoid recapitulation as much as

possible. I need not again read the declarations relative to the policy, as they have been already read.

It will conduce to a clearer understanding of the case, as it is now presented on the proof, if we consider first the plea of the pursuers—that Mrs Foster withheld or concealed from the Insurance Company a material fact which she was bound to communicate, and failed to communicate.

I am of opinion that for this plea there is in the proof no foundation. Reading pursuers' allegations on record, and after attentive consideration of the proof, I entertain no doubt of the entire good faith, honesty, and truthful intention of Mrs Foster. Indeed that has not been seriously challenged by the pursuers, and there is no ground whatever for doubting it. It is not necessary to enter on the details of the proof in this respect. The result is beyond doubt. I am satisfied that she did not withhold or conceal any fact which she knew, and which it was her duty to have communicated. I am quite convinced that at the date of the policy, and at the date of her declaration, she was actually, honestly, and innocently ignorant of the existence of rupture, or of the existence of any symptom which did to her indicate, or which can reasonably be held to be such as ought to have indicated to her, the existence of rupture, or of any other disease. The small swelling referred to in the proof did not indicate to her, and cannot now be viewed as a symptom which ought to have indicated to her, either rupture or any other disease. This innocent ignorance on her part is, to my mind, the result of the evidence, and my opinion is confirmed by the testimony of Dr Watson, an eminent medical man, speaking from the experience of a large practice. I think it scarcely admits of doubt. Indeed, the pursuers' case was ultimately put almost entirely on the more general plea, which I shall now proceed to consider. It is not on the head of concealment that this policy can be reduced.

But the leading plea of the pursuers is, that, apart from all question of concealment, and assuming, as has been proved, the entire honesty and good faith of Mrs Foster, still that this policy contains as a condition an absolute warranty against rupture, whether known or unknown, and that on rupture having subsequently been the cause of death, the policy must be reduced as null and void.

I am anxious that my view of the real issue—the true controversy—in this case should be correctly understood and appreciated. I think there has been some attempt to escape from it. There has been some attempt to make the case turn on the effect of a warranty, rather than on the existence of a warranty.

The question is—not whether an absolute warranty can be escaped from in respect of the ignorance, even the innocent ignorance, of the party giving the warranty? If there be really absolute warranty unqualified and to the extent maintained, the warranty must be enforced, though the contract would then be one of extreme severity and ruinous result to the party assured. As was observed by Lord President Boyle in the case of *Hutchison*, such a construction of the contract as the pursuers contend for would practically put an end to life insurance. But the true question here is, whether in this case, under this policy, there was an absolute warranty against disease, known or unknown,—warranty against the existence of an obscure disease, confessedly not known to the declarant, and proved to have been innocently unknown—that is to say, not reasonably within her cognizance—a disease of which she was ignorant and excusably ignorant. There is no presumption of such an absolute warranty in a contract of insurance made by a party in a humble condition with an insurance company, the contract being framed, and the words chosen, by the insurance company.

There is not only no presumption in favour of such an absolute warranty. All reasonable and equitable presumption is against it. It is, however, here alleged by the insurance company, and it must be clearly proved by them to be within the contract. In other words, it must be made clearly to appear that absolute warranty against disease, known or unknown, was within the true and honest meaning of this contract. The Lord Advocate maintained that the meaning of the parties was of no consequence, if the legal meaning of the words has been made out. I cannot admit that to be sound. I think that, in a consensual contract, the true and honest meaning of the parties, ascertained from fair construction of the words, is the legal meaning of the contract. In a bilateral contract there must be mutual good faith, concurrence of honest intention, *consensus in idem placitum*, and in a contract where, as in a policy of assurance, the highest equity pervails, the mutuality of consent must be especially clear. That is the true meaning of my contract, which I desire the other contracting party to put upon it, not that which, in my own favour I wrap up in general phrase, or hide in multiplicity or generality of words, and mean to put upon it myself. Still less can that be the true meaning of my contract which neither party meant at the time, but which afterwards, when fulfilment of the contract is demanded, I, for my own benefit, attach to the words.

A policy of insurance should be so framed that he who runs may read. "No form of expression should be there used by which the assured can be caught; *non meus hic sermo sed quod praecepit Ofellus*, certainly not *rusticus abnormis sapiens*," These are the words of Lord St Leonards. They are in this case most important and appropriate. So are the words of the same learned Lord, "Unless the provisions in a policy are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families hy insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written." It was the belief of Mrs Foster that out of the limited means of her widowhood she had provided by insurance for her orphan children. The pursuers say that, in consequence of the discovery of a disease unknown to her, the policy is not worth the paper on which by them it was written.

Can it be supposed that Mrs Foster would have entered into this contract if she had known that she was giving a warranty—a counter assurance—against eleven diseases, including rupture, whether known or unknown to her? I think clearly not. No person of ordinary intelligence would ever enter into a contract with such a warranty. The pursuers surely did not mean her so to understand the contract as to contain that warranty, for they must have well known that if they had inserted the words, "known or unknown," she would never

have so contracted. But can they now be permitted to put on the contract a meaning which they did not venture to express, knowing that its expression would have prevented the contract,—a meaning which they did not intend her to put on it? I am humbly but very clearly of opinion that the pursuers cannot be permitted so to interpret, and so to enforce, a contract which they framed themselves, and might have made clear if they had chosen to do so. Lord Stair (4, 42, 21) followed by all our best authorities (Ersk. 3, 3, 87), lays down two rules for construction of mutual contracts. The first is, the words are to be construed *contra proferentem*—against the framer of the writing; and the second is, that, if one of the contracting parties be in humble life and acting without legal advice, the words are to be understood in the "common and vulgar sense." To the same effect, and in the same just and equitable spirit, we have the word of Lord Chief-Justice Cockburn in a recent case of *Fowkes* v. *The Manchester Insurance Company*—"The true reading of a policy is according to the way in which a layman (or unlearned person) would read the words." That is the honest reading. That is the reading which must have been intended. Any other reading would be one by which the assured might be caught. Therefore, it is one which law and equity, justice and good faith, reject.

Absolute warranty is a guarantee against all faults,—in this case all diseases,—known or unknown. If it is established that the true reading of this policy is that both parties meant such an absolute warranty here, then there is an end of the case; and the insurance of this poor widow, which she believed she had effected for her orphan family, is of no force or effect. Then was her mother's effort vain, and her mother's hope a dream, and the thought of the provision for her children which was her earthly comfort in death, altogether without foundation. The policy, which she meant as a provision for her children, would be, according to the pursuers' contention, not worth the paper on which it is written. The question, therefore, is, does this contract of assurance, framed by the pursuers, and which ought to have been so expressed that he who runs may read, really contain, as its honest meaning plain to the understanding of a layman, this absolute warranty against rupture, and ten other diseases known or unknown?

It is clear that if there be no such absolute warranty as a consensual condition of the contract, the pursuers have no case. If there is only a representation, or statement short of warranty, then the undoubted and entire honesty and innocence and sincere good faith of the representation, will protect the policy.

It has been strenuously argued by the pursuers that the answer of Mrs Foster to the 6th question put by the medical officer, comprehending eleven diseases at least, and answered in the one word "No," is an absolute warranty against all these diseases, known or unknown. It was also contended, and was the logical sequence of the argument, that all the other answers to the questions of the doctor when given in unqualified terms, affirmative or negative, are also warranties, whether the fact was known or unknown. The argument, boldly and broadly put, was, that every unqualified answer amounted to such a warranty, and that, in a question of proper warranty, materiality does not enter into consideration.

A dexterous effort was made by my learned and very ingenious friend the Lord Advocate to escape from the breadth and generality of this plea, and to limit the argument to what he calls the particular warranty here in question. In the pleading by Mr Shand and Mr Balfour the argument was broadly pressed in its more general aspect. In order to do full justice to the pursuers' case, I shall deal with the argument under both its aspects. All the answers to which I now refer are in words unqualified. Either they are all warranties, or in regard to some of them a qualification is understood though not expressed. 1st, Is each of these answers an absolute warranty of the fact, known or unknown? It is said that each of them is a warranty because they are within "the basis of the assurance."

Let us see how this stands.

The first step in the procedure is the proposal by Mrs Foster. She makes a declaration appended to the proposal in the following terms:—"I, Mary Waugh or Foster, before designed, do hereby declare that I am at present in good health, not being afflicted with any disorder, external or internal; that the preceding statements are true, and that I have not withheld or concealed any important circumstance. And I (the party in whose favour the assurance is to be effected) do hereby agree that this declaration shall be the basis of the contract between me and the Life Association of Scotland, and that if any untrue averment be made therein, or in the answers to questions by the Society's medical officer in reference to this proposal, all sums paid on account of the assurance shall be forfeited, and the assurance be null and void."

She here refers to answers to questions by the Society's medical officer. That reference must mean answers given or to be given; for, in point of sequence, the examination by the medical officer comes after the proposal, and after the appended declaration. When examined she makes the replies to the questions put to her, her answers being written down by the medical officer of the Company, and the only attestatien of these questions and answers is by a second declaration on a separate paper from the proposal, signed by Mrs Foster, and declaring that "the above statements are faithful and true." These words are, in my opinion, important. I read them as meaning true according to her consciousness, knowledge, and good faith; then the medical officer reports his opinion, and then the Insurance Company, having before them the proposal with the original declaration, and the answers to questions attested by the second declaration bearing that the answers are faithful and true, thus deal with the proposal and declaration. They state in the policy that it rests on the basis of a declaration, and then they provide in the policy that, "If anything averred in the foresaid declaration forming the basis of the assurance, or in the relative statements, be untrue, this policy and assurance shall be void, and all monies paid in respect thereof be forfeited to the Association."

Reading these provisions strictly, the only declaration which is in words stated to form the basis of assurance, is the first declaration appended to the proposal. That declaration does not mention rupture, and, taken by itself, it would not support the pursuers' case. It might well be contended, that the answer to the questions of the medical officer, being separate from the proposal, are not

within the basis of this assurance. Such a contention could scarcely be challenged by the pursuers, for it would not rest on a construction more strict or severe than that which the pursuers urge against the defenders. But I am not disposed to take this very strict view of the provision in the policy. I think that the statements in answer to the doctor, being relative to the proposal, and referred to in the first declaration, may be brought within the basis of assurance. But, in order so to bring them within the basis, they must be proved. Now, the only proof of them is to be found in the attestation that they are "faithful and true." It was maintained by the pursuers' counsel that these words, "faithful and true," should not be taken into consideration. I am not of that opinion. The attestation cannot be considered without them, and without the attestation the pursuers have no proof of the answers. That second declaration, containing the words, "faithful and true," must either be admitted or excluded. If it is admitted, the words "faithful and true," must be construed, and must receive due effect. If it is excluded, the answers are not proved. The true meaning of the qualifying words "faithful and true" can scarcely be doubted. They must mean that the answers are made in good faith, and are true to the best of the declarant's knowledge and belief. From the dilemma in which the pursuers are placed in regard to this second declaration it is difficult for them to escape. The admission of the second declaration brings in the element of the declarant's good faith as qualifying her answers. The exclusion of the second declaration shuts out all proof of the answers. The pursuers have no case without proof of the answers. They have no good case if the words "faithful and true" are held as qualifying the answers.

Even assuming that the answers are so referred to as to be brought within the provisions of the policy, the next point is, —Are all the answers to these questions, which are given without special qualification, warranties, on the accuracy of which the validity of the contract depends? Let us take one or two of the questions. Take the answer given to question seven, in regard to the declarant's mother, viz.?—That she died at 99, of old age. Suppose it turned out to be incorrect in point of fact, because, unknown to the declarant, the mother had died at 98 and of a specific ailment, or from the effects of an accident. I put the question to the pursuers' counsel, whether that answer, honestly made to the best of her knowledge, would have been fatal to this policy? His reply was, that it would be fatal to the policy. I then put to the pursuers' counsel a question with regard to the eighth answer, wherein the declarant states that she has two brothers alive and both healthy. Suppose that one of her brothers, unknown to her, was at that time ill in India, or that, unknown to her, he had died in India the day before her declaration, would that inaccuracy make void the policy? The reply again was, that it would make void the policy. I must say that my learned friend at the Bar seemed a little doubtful as to his reply. But, if it be the meaning of their plea, it seems to me to be a result so extravagant, so unjust, and so ridiculous, as to amount to a *reductio ad absurdum*, fatal to any reasoning which involves such a result.

But I am quite ready to take the other alternative, and assume these questions to the counsel to be answered the other way, as the Lord Advocate appeared to suggest, though he sagaciously declined to choose between the two alternatives.

If so, then the pursuers do not maintain that all the answers made to the doctor's questions without special qualification amount to warranties. In some instances the qualification that the answer is morally truthful, made in good faith, and according to knowledge and belief, is assumed or accepted. Why should it be excluded or rejected in regard to the sixth question? It appears to me that, if there is any answer to which that reasonable qualification applies, it is the answer to the sixth question. Consider it in relation to the questions which precede it. The fourth question is, "Are you now, in your own opinion, in perfect health?"—A. "Yes." This answer, necessarily given from her own consciousness, is not disputed to be honest and perfectly true, though she had the hidden disease which was afterwards ascertained. The fifth question is, "What ailments, and medical advice have you had?" That could only be answered according to her knowledge, and it is not disputed that it has been answered honestly. The sixth question is, "Have you had rheumatism, gout, rupture, fits," &c., including eleven named, and twenty or thirty unnamed diseases. She answers "No." In regard to these questions it is stipulated by the Insurance Company that no third party shall be present. Alone and unaided she was questioned, and it is said that then and there she undertook a warranty against disease, known and unknown. It is proved that this most comprehensive list of diseases was simply read over to her: no explanations were given her, and separate questions in regard to each particular disease were not put. Her answer was taken to the whole list in one single word. I cannot help saying that I think this mode of questioning a rustic, and a widow, was misleading. The pursuers now say that they meant the answer to their question to be a warranty absolute against all these eleven diseases, known or unknown. Did they so mean, and conceal their meaning? They did not tell her that. They gave her no warning that they would hold her innocent ignorance to be as fatal to her as a wilful falsehood. If they so meant, then the question as now pleaded was put in order to obtain an absolute warranty, yet that was not explained to her, and the question was not even put separately to her in regard to each disease. Then what is the meaning of the expression, "Have you had such disease?" I think that question must mean, Have you had consciousness of such disease? Are you conscious of having had such disease? I do not think that any one could answer that question, put in regard to eleven diseases at once, in the affirmative, except from personal consciousness of having suffered from one or other of the complaints. This lady had no such consciousness. She could not, according to her knowledge, have truly answered the question in the affirmative. She therefore answered it in the negative, faithfully, and, according to her knowledge, consciousness, and belief, truly.

On the alternative view which I am now taking of the pursuers' plea—and taking because the pursuers desired it—I must assume that every answer given without qualification is not a warranty. I must assume that the qualification of moral truthfulness and good faith is implied and understood in regard to some. But that seems to me fatal to the logic of the pursuers' argument. I can see no

reason to support the distinction. For, if equity demands that the qualification be understood in regard to the seventh and eighth answers, then, how can it possibly be rejected in regard to the sixth answer, given to a question framed, as we have seen, and put to this poor woman with reference to eleven diseases at once, without explanation, and even without separation of the question as applicable to the different complaints? I really do not know which alternative is most unfavourable to the pursuers. On either alternative, I am satisfied that they have no just or sound case.

We are dealing with a declaration on a subject within the scope of personal consciousness in regard to an obscure disease in the declarant's own body. She had never consulted a medical man on the subject. She had never felt pain from it. She had never been conscious of the existence of it. Nay, more, it is well proved that she was innocently, as well as honestly, ignorant of its existence. Only from her own consciousness could she reply to the question whether she had ever had that disease. She replied in the negative. She could not honestly have replied otherwise. She attested her replies as "faithful and true." And they were so.

I shall now proceed very briefly to notice the legal authorities in respect of which the pursuers maintain that this policy of insurance, of which the honesty and good faith on the part of Mrs Foster is beyond dispute, and which she believed to be a provision for her children, is nevertheless null and void, and the premiums forfeited to the company.

The question on which authority in point of law is required to support the case of the pursuers is, not authority to prove the inflexible character of an absolute warranty, if such a warranty has been here undertaken. I think the Solicitor-General did not raise any doubt on that subject. I certainly entertain none. The question really is, Whether, in this contract the answers of Mrs Foster to the questions put by the medical officer of the company must in law be held as amounting to an absolute warranty? The authorities urged on us by the pursuers have all been English decisions. They are most interesting and important, and I have given to them my most respectful and attentive consideration. But it is not to be overlooked that the leading Scottish authority on the subject is certainly against the pursuers.

The decision in the case of *Hutchison* v. *The National Life Assurance Company* (Feb. 21, 1845, 7 S. and D. 467) is of very high authority. The judgment of Lord Wood as Ordinary, explained by him in an elaborate note, was affirmed by the unanimous judgment of the Court, each Judge giving a separate and decided opinion in favour of the assured, and repelling the plea of absolute warranty against an unknown disease. When it is remembered that these Judges, affirming the opinion of Lord Wood, himself a Judge of high authority, were Lord President Boyle, Lord Mackenzie, Lord Fullerton, and Lord Jeffrey, it must be acknowledged that the decision is entitled to the highest respect as a Scottish authority: and in this Court it has never since been challenged or doubted.

But I have felt no desire to escape consideration of the English authorities. For my own part, I have always cherished, as not only important and authoritative, but as precious and even sacred, the great rules and principles of Equity for which we are indebted to the jurists of England. I have therefore carefully studied the decisions which the pursuers' counsel have so earnestly and ably pressed on us, and studied them with reference to these great principles of equity, and I have come to the conclusion that none of these decisions meet the true question raised in this case.

After the remarks which have been already made on these decisions, I shall not presume to enter on any further analysis of them. In every one of them, where the decision has been in favour of the Insurance Company, special grounds of judgment can be discovered which distinguish the case from the present. There is no case in which an answer to the question of a medical officer, given as this answer was given to a question framed as this question was framed, and related to the policy as this answer is related to the policy, has ever been sustained by decision as an absolute warranty against a disease of the existence of which the declarant was innocently ignorant. The case of *Duckett* v. *Williams* has been strongly pressed on us. That was a case of reinsurance, the policy being on the life of another, and the life being not insurable. I do not think that case in point. Where a person proposing to insure the life of another, and, in order to obtain a policy, is speaking in regard to the health of another, and makes absolute and unqualified statements of facts, in regard to which he can have no personal consciousness or complete assurance, then he is going beyond the scope of his knowledge and out of his ground; and, doing so voluntarily and to promote his own ends, he is held to guarantee what he asserts. Besides, the party so applying for insurance, and the party whose life is proposed for insurance, are viewed as standing in a certain relation to each other: they are held as respectively agents for each other in the matter, and they are presumed to be in communication. If the one whose life is to be insured knows the truth, and the other who proposes the insurance does not ascertain it, but, being personally ignorant, makes a statement contrary to the truth, such ignorance is, under the circumstances, not excusable ignorance, for he ought to have ascertained the truth before he made the statement, and such ignorance cannot avail. In the case of *Sir William Forbes and Co.* (March 9, 1832, 10 S. 451), Lord President Hope said that the proposer of the insurance and Lord Mar, on whose life the insurance was proposed, stood in the relation of agents for each other, and that the proposer was bound to know what Lord Mar knew in regard to his Lordship's habits and health, since he ought to have ascertained it. In the case of *Hutchison*, to which I have already referred, the case of *Duckett* v. *Williams* was founded on by the Insurance Company, and the distinction between the case of *Duckett* v. *Williams* and such a case as the present was fully recognised and fully explained.

With the exception of this brief notice of *Duckett* v. *Williams*, I do not think it necessary to trespass on the time of the Court by minute investigation of the English authorities quoted: because I concur in the remarks which Lord Deas has made on these cases. In none of them have the pursuers presented the authority of express decision; and the judicial dicta founded on must be viewed as applicable to the special circumstances of the particular cases. There are also dicta, not without great weight and authority, in the opinion of Lord

Mansfield in the case of *Ross* v. *Bradshaw* (1 Blackstone, 312-14), of Lord Denman in *Swete* v. *Fairlie* (6 Car and Payne, p. 1), and of Lord Chief-Justice Cockburn, in *Fowkes* v. *Manchester and London Assurance Company* (3 F. and T. 440). I do not suggest these as decisions opposed to those quoted by the pursuers. But I think that the dicta of these distinguished Judges are more appropriate to the immediate question before us than are some of the judicial remarks on which the pursuers rely,—remarks made in cases of a very different description.

The observations of the Judges in the case of *Fowkes* relate to the question on which, in my humble opinion, this case ought to turn. I must again remind you that the pursuers' counsel maintained that the intention of the parties, even of both the parties to this policy, is of no consequence, but that the words must be construed and enforced strictly. I cannot think that proposition well founded in law or in equity. In a consensual contract the true intent and meaning of the parties must be ascertained if possible. Chief-Justice Cockburn, in the case of *Fowkes*, says that the intention of the parties is to be ascertained, and that the words are to be construed *contra proferentem*,—that is, against the framers, the Insurance Company. The other Judges express the same opinion; and Chief-Justice Cockburn follows up his remark by saying, that the true sense of the agreement is 'that in which it would be understood by a layman,' meaning an unlettered man.

Now it does not appear to me possible, according to reason or justice, to hold that this poor widow, Mrs Foster, meant to peril her insurance on the absolute verity of a statement of fact which she made according to her belief and her consciousness, and of which she could not otherwise have personal knowledge. Nor can I, in justice to the pursuers, suppose that they meant to entrap her into a warranty, and that they intended that she should so peril her insurance without meaning it. That would be a fraud. I cannot believe it. The intention is thus against the warranty on both sides.

One of your Lordships put the question during the argument, whether the pursuers maintained the same law in regard to a congenital disease of the heart, unknown and unsuspected during life, and only ascertained on *post mortem* examination. If I do not mistake, the answer was, that such congenital disease would be within this warranty. If the pursuers' argument is well founded, no life-policy could have been validly effected at any time by such a person, though he may have lived for many years, and on his death the policy would be declared void, and all the premiums forfeited. It is often said that heart disease is more common now than formerly, and if the pursuers' proposition is sound in law, it is right that the proposition and the law should be known.

I do not mean to say that I have felt this question free from difficulty. The argument for the pursuers has been no less able than urgent; and there have occasionally been judicial remarks made in England on the enforcement of warranty, which, if applied to this case, might create difficulty.

But, on the prior question, Whether there is in this contract an absolute warranty against this disease, known or unknown, I think there is no authority opposed to the case of *Hutchison*.

According to my conviction, there is no such warranty here. Justice and equity and good faith forbid it, and it is relief to my mind to feel satisfied, as I do, that no authority in point of law has been adduced clear enough and strong enough to compel me to decide against the good faith of the policy, and in favour of the Insurance Company.

I think that on both grounds of action the defenders are entitled to absolvitor.

LORD JERVISWOODE concurred.

Counsel for Pursuers—Solicitor-General (Clark), and Asher. Agents M'Ewen & Carment, W.S.

Counsel for Defenders—Lord Advocate (Young), and Balfour. Agents—Melville & Lindesay, W.S.

Friday, January 24.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

SIR ANDREW AGNEW *v.* THE LORD ADVOCATE.

Property—Foreshore—Grant by the Crown—Possession.

A. possessed certain lands under grant from the Crown "with part and pertinent." He had from time immemorial exclusive possession of the foreshore *ex adverso*. *Held* that the possession was conclusive as to the extent of the grant.

This was an action of declarator, raised at the instance of Sir Andrew Agnew of Lochnaw, Bart., against the Lord Advocate, as acting for the Commissioners of Woods and Forests.

The pursuer averred that (cond. 4) "The several lands mentioned in the summons are all included in the said Crown charters and deed of entail, and are upon the sea-shore. The portions of the shore mentioned in the summons, and extending between the several boundaries there specified, have for time immemorial, or at all events for a period greatly exceeding forty years, been in the exclusive possession of the pursuer and his ancestors as part and pertinent of their said estates. They have constantly and without challenge dealt with the said shores as their own property, and from time immemorial, or at least for upwards of forty years, have exercised their proprietory rights by acts of possession of every kind of which the subject was capable. Amongst the said acts have been taking gravel, sand and stones from the shore, and preventing others from doing so, boring for coal and freestone, erecting and using saltpans on the foreshores, using the shores for landing and embarking persons, cattle, and goods, taking wrack and ware, and letting for a rent to others the right of doing so. The said possession has been exclusive of any possession on the part of others." And further (cond. 5) "From time immemorial, or at all events for more than forty years, the pursuer, the said Sir Andrew Agnew, and his predecessors, proprietors of the said lands and others foresaid, have, by virtue of their said writs and titles, possessed the oyster beds, scalps, or fisheries on the shores between high and low-water mark of ordinary spring tides *ex adverso* of their whole lands above mentioned, and also the salmon fisheries in the sea *ex adverso* thereof, and that exclusively, continuously, and without any lawful interruption made to them therein. They have, during the whole of the said period, by themselves, their tenants, and others deriving right from them, taken oysters from the