In the first place, I take the case as it is presented to us at common law. The parties are at issue whether a certain person was a foreman or whether he was a labourer. The statement of the pursuer is, that he and two other men, under the direction of a foreman, had been engaged for a period of three weeks in taking down this old building. The defender says that there were four labourers engaged, and that the pursuer, who was one of them, had as much skill as any of the others, and was as well qualified as them in looking out for himself. Now, whether this man Merrigan was a foreman or not, the pursuer has not stated any case against the master so as to make him liable, because he has not averred any ground upon which he thinks a more experienced foreman should have been appointed over the work. If one workman or a number of workmen accept the contract with a master that they shall pull down a ruinous old building, and one of them is injured in the course of carrying out the work, I do not think that he has any ground for an action at common law against the master because he did not appoint a skilled foreman to superintend the work which the men had contracted to do.

I can understand a workman making some such accusation as this in a very special case, that he had been led into going on with the work having been deceived into the idea that he was going to work under a skilled foreman, whereas in fact the man put over him as foreman was not really a skilled man at all. But that is not the case here. The pursuer had been engaged with Merrigan in this job for some weeks, and there is no suggestion upon the record that he had been deceived into the belief that Merrigan was a specially skilled man in matters of this sort. I think that no blame can be attributed to the master for any failure in his duty as a master to provide a specially skilled foreman for this job, and therefore I think that there is no relevant case of fault alleged against Merrigan, one of the four labourers who were engaged.

Then a point was made that Merrigan was a person to whose orders the pursuer was bound to conform. No doubt the language in the Act of Parliament is very loose and general language, but I cannot read that language as meaning that whenever the master has appointed one of the workmen as foreman over the others, and the foreman gives a perfectly general order to his men to go on with their work, that the master shall be responsible for any accident which may happen in the course of the work. I think that that provision applies only to the case where one is acting as a deputy-master, whose orders are given as if they were the master's own orders, and who is giving a special order to the workmen which is being specially obeyed. Here no special order had been given, but merely a general order to go on with the work. Looking to the sum and substance of the whole case, I think that no relevant case has been averred either at common law or under the statute.

LORD RUTHERFURD CLARK—I do not think that it would be safe to exclude inquiry in this case, and therefore I think the case must go to a jury.

LORD TRAYNER—The question before us is one of relevancy only, and in the consideration of such a question I think it is impossible to keep too strictly to the pursuer's averments. The question is, whether if these are true the pursuer has not stated enough to entitle him to the remedy he seeks. I confess I think the record narrow, but I cannot say that, assuming the truth of the pursuer's averments, it is so irrelevant that he has put himself out of Court.

The Court approved of this issue:—"Whether on or about 23rd September 1890, at or near the old building at 216 Holm Street, Glasgow, which the defender had contracted to take down, the pursuer, while in the employment of the defender, was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer—Shaw—Salvesen. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Jameson—Sym. Agents—Mitchell & Baxter, W.S.

Thursday, February 26.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HAWORTH & COMPANY *v.* SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED.

Insurance—Guarantee against Embezzlement by Servant—Checks Promised by Employer Insured.

An insurance company guaranteed a firm of tea merchants against embezzlement by one of their servants, upon a proposal which formed by stipulation the basis of the contract, and in which the employers stated, in answer to certain questions, that they would balance and settle their servant's accounts monthly, and would send accounts direct to customers every three months. The employers did not settle monthly with their servant, because, as they alleged, there was never anything to settle. They sent accounts direct to their customers in the ordinary course of business, but not for more than three months after the debts had been incurred.

In an action raised by the employers against the insurance company to recover sums embezzled by their servant, it was *held* that they had not observed the checks promised, and accordingly could not recover under the guarantee.

By agreement to guarantee, dated 26th, 29th, and 30th July 1889, the Sickness and

Accident Assurance Association, Limited, Edinburgh, agreed, in consideration of payment of the premium therein set forth, to make good and reimburse to Messrs Joseph Haworth & Company, tea merchants, Manchester, to the extent of the sum of £250, all moneys which Richard Slater, one of their tea salesmen, should embezzle. The agreement proceeded upon a proposal and declaration which it was stipulated should form the basis of the contract, and which included, *inter alia*, the following questions:—"11. How often will the employer balance and settle the applicant's accounts? *Ans.* Monthly. 12. Specify the checks which the employer will use to secure accuracy in the applicant's accounts? *Ans.* Statements sent to customers by employer. 13. In particular, will the employer send accounts direct to customers, and if so, how often? *Ans.* Every three months."

Between 16th September 1889 and 3rd January 1890, Slater embezzled sums amounting to £87, 11s. 10d., by uplifting money before the usual period of three months' credit had expired, and failing to account for such sums. The first sum embezzled was £8, 14s. 6d. upon an order from W. Moran, Blackburn, of 14th August, duly executed.

In consequence of Slater's defalcations, Messrs Joseph Haworth & Company brought an action against the above-mentioned Assurance Association, under the agreement to guarantee, to recover the said sum of £87, 11s. 10d. It was pleaded in defence that—"(1) The pursuers having failed to use the checks upon Slater for the protection of the defenders, stipulated for and agreed to in the contract of guarantee, the defenders are not liable, and should be assoilzied from the conclusions of the action."

A proof was allowed, from which it appeared that no monthly settlement with Slater had ever taken place, and that no accounts applicable to orders obtained by him had been sent direct to customers until about 1st January 1890. The reasons assigned by the pursuers for neither of these things having been done sufficiently appear from the Lord Ordinary's opinion.

Upon 26th November 1890 the Lord Ordinary (STORMONTH DARLING) pronounced decree in favour of the pursuers.

"*Opinion.*—This is a claim under a contract dated in July 1889, whereby the defenders agreed to make good to the pursuer, who is a tea merchant in Manchester, all sums to the extent of £250, which Richard Slater, salesman to the pursuer, might embezzle in the course of his employment. There is no dispute as to the defalcations, which all took place between the month of August and the close of the year 1889. . . .

"The defence is that the pursuer failed to use the checks upon Slater stipulated for in the contract, . . . viz., (1) that he did not balance and settle Slater's accounts monthly; and (2) that he did not send accounts direct to the customers every three months. . . .

"What happened was this—Slater took a few orders for the pursuer in June 1889, but these do not affect the present question, for they were got in anticipation of his employment by the pursuer, and he did not take any orders as a servant of the pursuer until early in August. The first order in the list of defalcations was taken on 14th August, and the amount (£8, 14s. 6d.) was collected by Slater on 16th September. This was nearly two months before the sum was due, for all the goods were bought on three months' credit. The remaining orders were taken from time to time down to 14th December, and the amounts uplifted, in the majority of cases, much within the period of credit. Slater's remuneration (besides a nominal salary of £5) was to consist of a commission of half the net profits, but no settlement of this commission took place between him and the pursuer, monthly or otherwise, the reason being, as the pursuer explains, that he was always in advance of Slater, and accordingly there was nothing to settle. It appears from the correspondence that accounts were sent by the pursuer to Slater for collection at or about the expiry of the three months' credit, but no accounts applicable to any of the orders obtained by him were sent direct to the customers till 1st January 1890.

"The pursuer's explanation of this is that he never, as a rule, sent accounts direct to customers until they were overdue, and that customers would have resented it if he had. He also says that his only departure from that rule was in the case of the statements sent to Slater's customers on 1st January, the reason being that he had by that time resolved to dismiss him.

"As regards the absence of monthly settlements of Slater's accounts, it seems to me that the pursuer's explanation is sufficient.

"It cannot be said that in the actual circumstances a monthly settlement would have led to the detection of any of Slater's embezzlements, and I think that the undertaking so to settle meant nothing more than that he was to receive his commission, if any should be due, at monthly intervals. So far as payments by Slater were concerned, the system was that he should pay sums collected by him into the pursuer's bank account, and should send the pursuer cash-sheets, which, when compared with the bank's advice-notes, would show how far he was in the pursuer's debt. He did make certain payments into bank, and did forward certain cash-sheets, and the correspondence shows that the pursuer was constantly urging him to be more active both in obtaining orders and remitting money. But, of course, no statements by him nor settlements with him could throw any light on intromissions of his which he deliberately suppressed, and I think, therefore, that the defenders are not relieved from liability by the want of formal monthly settlements, which in the circumstances could have done no possible good.

"It is a much more difficult question whether the pursuer has lost his remedy by a breach of his undertaking to send

statements direct to customers every three months. But there also, though not without hesitation, my opinion is in favour of the pursuer.

"I assent to the defenders' doctrine that answers 12 and 13 were not mere vague representations of how the pursuer's business was likely to be carried on, but constituted a positive undertaking by the pursuer that he would send statements direct to customers every three months as a check on Slater's conduct. Nor can I accept the view suggested by the pursuer himself in his evidence, that he sufficiently fulfilled this undertaking by sending statements through Slater. The statements, if they were to be of any value as a check, clearly required to be sent direct. But the expression 'every three months' is ambiguous. It might mean, and the defenders contended it did mean, on the first quarter day occurring after the date of the order. Thus, they say that the statement applicable to Moran's order of 14th August should have been sent out on 1st October. On the other hand, it might mean three months complete from the date of each order, in which case Moran's statement should have been sent out on 14th November. Again, it might mean, on the first quarter-day occurring three full months after the date of the order, in which case Moran's statement did not require to be sent out till it actually was sent out, viz., on the 1st of January. I reject the first of these interpretations, because I do not think the words justify it, and because I fail to see what check it would afford in the ordinary case to send a statement to the customer before the account was due. It is quite true that Slater, by importunity or contrivance of some sort, did get payment of most of his accounts before they were due; but I think that the meaning of a stipulation of this kind must be taken with reference to the length of credit given in the particular trade, and that the check was much more likely to be effectual if the statement was to be sent after the time when the salesman might fairly be expected to have received the money. It would in that case almost certainly draw from the customer the explanation that he had already paid the account, while in the other case he would not require to take any notice of it at all. For the same reason I think it unlikely that the expression 'every three months' was used or understood in the sense that an account should be sent out on the exact expiry of three months from the date of each order. The average amount of the orders is apparently not more than a few pounds; and such a course would mean a constant sending out of very small accounts, with the probability, as in the case last supposed, that it would not extract any useful information from the customer. I come, therefore, to the conclusion that the most reasonable interpretation of the undertaking is that quarterly accounts were to be sent direct to the customers, but not till the accounts were due. If that is even a possible interpretation, I think the pursuer is entitled to the benefit of it; for if the defenders understood it in a different sense, and intended to exact a strict performance of it, they were bound to clear up all ambiguity at the time.

"There is some confusion in the proof as to what the pursuer's practice was with regard to the time of sending out his quarterly statements. He says that he had no fixed quarter-days, but I rather think that in saying so he must have had in his mind the accounts which he sent to his salesman for collection, which undoubtedly were sent at various periods, occurring on the termination of the three months' credit. I agree with the defenders that the lithographed docquet on No. 245 of process, and especially the phrase 'quarterly audit,' together with such indications of practice as are to be found in the correspondence, all point to the conclusion that the statements sent to the customers were sent on fixed quarter-days. But if the defenders were not prepared to accept the pursuer's explanation that he never sent these statements in the ordinary case till the items were overdue, they might have brought evidence to show that the statements did in point of fact include items which were not yet due. In the absence of such evidence I must accept the pursuer's explanation. A number of cases were cited to me, but I do not think that the legal principles applicable to the case are doubtful.

"No assistance is to be derived from cases like *Weems* v. *Standard Life Assurance Company*, 11 R. 658 (H. of L.) 48, which turn on the question, whether statements applicable to existing facts are of the nature of representation or warranty. The answers here on which the defenders rely were undoubtedly of a different kind, and imported an undertaking for the future. I do not doubt that these answers were part of the contract, and that the pursuer was bound by them in the sense explained by Lord Wood in *British Guarantee Association* v. *Western Bank*, 15 D. 834 (at p. 839), viz., that the undertaking was one 'not requiring specific performance to the letter, but only that it should be substantially implemented or fulfilled.' This is in accordance with the *ratio decidendi* in the English case of *Benham*, 1852, 7 W. H. & G. 744. But my opinion is really founded on what seems to me the reasonable interpretation of the undertaking, and if so, there can be no doubt that it was sufficiently fulfilled." . . .

The defenders reclaimed and argued—The pursuers had failed to observe the checks promised in their proposal, and could not therefore recover under the policy. Even if not perfect, the checks if observed might have prevented the embezzlement or at least have limited the amounts taken. Although no commission was owing, Slater should have been called upon to give an account of his transactions every month. No direct communication had taken place between the pursuers and their customers for more than four months after Moran's (the first) order. Pursuers were

not entitled to recover sums embezzled within the last three months, because if the check promised had been observed in November something might have been recovered from Slater and further embezzlement stopped.

The respondent argued — The monthly accounts to be settled were commission accounts, but there had never been any commissions to settle. Even if Slater had been asked monthly about customers' accounts, it would have been no check upon him. He would simply have lied. As to sending accounts direct to customers, that was only to be done after three months. It would not have led in any case to the discovery of embezzlements in and after October. But it was capable of meaning at the first quarterly audit after three months had expired, and this had been done and the check had operated successfully. If the term was ambiguous it was to be construed against the insurance company. Further, the policy contemplated considerable trust being put in the person whose honesty was guaranteed. That was the reason of the policy. The checks were not to be read too strictly. They were honest expressions of intention rather than conditions-precedent—*M'Taggart & Others* v. *Watson*, April 16, 1835, 1 Sh. & Maclean 553, Lord Brougham 590-91; *Benham* v. *United Guarantee & Life Assurance Company*, June 7, 1852, 7 W. H. & G. (Excheq.) 744; *British Guarantee Association* v. *Western Bank of Scotland*, July 8, 1853, 15 D. 834.

At advising—

LORD YOUNG—The insurance here was a policy or agreement to guarantee entered into upon a proposal with questions and answers which it is clear formed the basis of the contract between the parties. The important part of the proposal so far as before us is the account therein given by the employers of the checks they would use to prevent embezzlement by the employed whose dishonesty was insured against. Two of these checks have been prominently brought forward, viz., first, that the employers would call the employed to account monthly, and secondly, that they would render accounts directly to their customers every three months—that is, that those customers not reported to them as having paid their accounts should have accounts regularly and directly sent to them every three months, with the view plainly of checking the employed if inclined to embezzle by uplifting money and not accounting for it.

Now neither of these two checks was employed, and the only question is whether that fact is a good answer to the claim now made. It is with regret that I have come to the conclusion that it is, for the employers evidently acted in perfectly good faith and with no intention of neglecting the legitimate interests of the insurers. I think, however, that they did neglect these interests, and I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

Counsel for the Pursuers and Respondents—J. A. Reid—Ferguson. Agents—Fyfe, Ireland, & Dangerfield, S.S.C.

Counsel for the Defenders and Reclaimers—Lorimer—W. C. Smith. Agents—Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Monday, July 14, 1890.

(Before Lord Chancellor Halsbury, and Lords Watson, Herschell, Macnaghten, and Morris.)

NORTH *v.* STEWART.

(*Ante*, July 5, 1889, vol. xxvi. p. 650, 16 R. 927.)

Jurisdiction—Foreign—Arrestment jurisdictionis fundandæ causa—Decree for Expenses—Act 23 and 24 Vict. c. 127 (To Amend the Laws Relating to Attorneys, Solicitors, &c.), sec. 28.

The Act 23 and 24 Vict. c. 127, enacts, sec. 28—"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court . . . to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property . . . for the taxed costs, . . . and it shall be lawful for such court or judge to make such order or orders for taxation of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

North, a domiciled Englishman, was sued in the Queen's Bench Division by Welsh, a domiciled Scotsman, but in April 1887 obtained decree for expenses. On May 26th Stewart arrested in the hands of Welsh the sum due under the decree, and next day served a summons on North. On June 13th North's solicitors in the English suit obtained a charging order in terms of the above-cited Act, on the costs for which North had obtained decree.

Held (*aff.* judgment of the First Division—*diss.* Lord Morris) that jurisdiction had been properly founded by