tive. It appears to me that this answer, taken in conjunction with the facts before us, leads to a similar answer being given to the second question. If the second parties are not preference shareholders they are not shareholders at all. They applied for and received shares which the directors had no power to give, and when that has been shown, it follows that there is no contract between the parties. These shareholders never asked for ordinary shares and never got them, for the possession of ordinary shares would have entitled them to receive more than 5 per cent., if the company had earned sufficient to distribute a larger dividend, and would have empowered them to attend the meetings of the company, and to take part in the management of the company's affairs, privileges from which they were excluded. Looking at the clauses of the resolution, the two classes of shares are as separate and distinct as two things could possibly be. The preference shares being once held invalid, there is no reason for holding that their owners are ordinary shareholders in the company.

What, then, is the position of the original allottees of these shares? I think their position is that of creditors of the company, and that they are entitled to receive back the money which they paid to the company with interest, less any dividend which they have received. As to the rate of interest, if it cannot be made a matter of agreement between the parties, I should think that 5 per cent was too much, and should be inclined to award something less. As to the position of transferees, I express no opinion, as we have not before us the information necessary for forming one.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Answer the first and second questions therein stated in the negative, and in answer to the third question therein stated, find that the first of the second parties is a creditor to the amount paid for said shares, with interest thereon at the rate of 4 per centum per annum from the date of such payment, less the amount of sums received by him in name of dividends, or composition for dividends, upon said shares; and further, find that the facts stated in the case are not sufficient to enable the Court to answer the question so far as affecting the second of the second parties: *Quoad ultra*, find it unnecessary to answer the fourth question."

Counsel for the First Party—W. Campbell—Cullen. Agent—Andrew Tosh, S.S.C.

Counsel for the Second Parties—M'Clure. Agents—Russell & Dunlop, W.S.

Counsel for the Third Party — Cook. Agent—James Skinner, S.S.C.

Friday, November 22.

SECOND DIVISION.

[Lord Low, Ordinary.

CRUIKSHANK *v.* NORTHERN ACCIDENT INSURANCE COMPANY.

Insurance — Accident — Mis-statement in Proposal — Warranty — Construction — "Slight Lameness" — "Paralysis" — Knowledge of Agent Imputed to Company.

The proposal for an insurance against accident contained the question:—"Are there any circumstances which render you peculiarly liable to accident?" To this question the assured answered, "Slight lameness from birth." Annexed to the proposal was a declaration signed by the assured in the following terms:—"I hereby declare and warrant that the above statements are true; that I have not had paralysis, or a fit of any kind . . .; that I have no physical infirmity." The policy incorporated this declaration as the basis of the contract.

At the time when the assured signed the proposal he was lame, but the extent of his lameness was manifest to the agent of the company through whom the negotiations were conducted, and who saw the assured walk across a room.

In an action at the instance of the assured's executrix for payment of the sum insured, the company pleaded that the policy was void on the ground that the above answers and declaration were untrue.

Held (1) that the defenders were not entitled to found on the description "slight lameness" as inaccurate, the extent of the lameness being known to their agent, and he having concurred in so describing it; (2) that the warranty that the assured had not had "paralysis or a fit of any kind" was to be construed as referring to a shock of paralysis in the ordinary sense, and not to local paralysis, resulting in lameness, and caused by a fall in infancy; (3) that the warranty that the assured had "no physical infirmity" must be construed with reference to the specific statements in the proposal, and therefore as referring to physical infirmity other than the lameness which had been disclosed.

In December 1894 Mrs Cruikshank, widow of George Macaulay Cruikshank, patent agent, Glasgow, raised an action, as executrix-dative of her husband, against the Northern Accident Insurance Company, Limited, for £1000, being the amount which, by policy dated 20th February 1883, the defenders promised, subject to the conditions of the policy, to pay to Mr Cruikshank's representatives in the event of his death through accident. The negotiations for the policy had been conducted, on the part of the defenders, by Mr Black, then

the general agency superintendent of the defenders at Manchester. A printed proposal and declaration had been filled up by Mr Cruikshank. The fifth question in the proposal was as follows:—"Are there any circumstances which render you peculiarly liable to accident?" The answer written opposite this question was, "Slight lameness from birth." Attached to the proposal was a declaration in the following terms:—"I hereby declare and warrant that the above statements are true; that I have not had paralysis or a fit of any kind . . . ; that I have no physical infirmity . . .; and I agree that this declaration shall be the basis of the contract between me and the Northern Accident Assurance Company, Limited." This declaration was signed by Mr Cruikshank.

Mr Cruikshank, when an infant, had been injured by a fall from his nurse's arms. This rendered him a cripple for life. His right leg was shorter than the left, and was entirely wanting in proper muscular development. With the aid of a stick and crutch he could walk along the street at the rate of two and a-half or three miles an hour.

On 24th January 1894 he met with an accident by reason of a fall, which resulted in his death on the following day.

The defenders refused to pay the pursuer the sum contained in the policy on the ground that the policy had been obtained by material misrepresentation or concealment on the part of the deceased, and that the declaration in the policy, which constituted a warranty, was untrue.

On 27th August 1895 the Lord Ordinary (Low), after a proof had been led, decerned against the defenders for payment to the pursuer of the principal sum of £1000 and interest thereon, as concluded for, and found the pursuer entitled to expenses.

Note.—"It is not disputed that the description given by Mr Cruikshank of his lameness in the proposal, upon which the policy in question was issued, was not in fact true. He described his lameness as slight, while, as a matter of fact, he was extremely lame. If, therefore, the policy was issued upon the faith of the statement made in the proposal, and of nothing else, the policy would be void.

"The pursuer, however, avers that Mr Black, the defenders' general agency superintendent, through whom the insurance was effected, saw Mr Cruikshank, and was fully aware of his condition.

"It appears that in 1883 Mr Cruikshank and Mr Black met by chance in a hotel in Manchester and got into conversation. Mr Black asked Mr Cruikshank if he was insured against accidents, and, upon the latter replying in the negative, proposed that he should take out an insurance with the defenders' company.

"In regard to what followed the evidence is conflicting.

"Mr Black says that he only saw Mr Cruikshank sitting at table, that he did not see him walk, nor did he see his lower limbs, and that he accepted the proposal upon the faith of Mr Cruikshank's statement that he was only slightly lame.

"Upon the other hand, the evidence for the pursuer is as follows:—When Mr Cruikshank returned from Manchester he told his wife that he had taken out an insurance against accidents. He then told her in detail how it had come about. He said that he had met the insurance company's agent by chance in the hotel at Manchester, and that the agent proposed that he should take out an insurance against accidents. He then said to the agent that he must first see the subject with which he had to deal, and he accordingly rose and walked across the room. The agent said that his lameness did not matter, because people in his condition took more care than those who had no physical infirmity, and that the risk to the company was therefore not greater. The matter was then concluded, the premium was paid, and a covering note given."—[*His Lordship here reviewed the evidence on this point and proceeded.*]

"I have, therefore, no doubt that the story told by Mr Cruikshank was true; and if so, I am of opinion that the defenders are not entitled to take advantage of the misdescription in the proposal of Mr Cruikshank's physical condition. The knowledge of their agent was their knowledge.

"A more difficult question arises upon the general declaration at the end of the proposal. It is, so far as material, in the following terms:—'I hereby declare and warrant that the above statements are true; that I have not had paralysis or a fit of any kind, or been ruptured; that I have no physical infirmity.'

"Mr Cruikshank's signature is appended to the declaration, and it is argued for the defenders that the declaration was not true in respect (1) that he had a physical infirmity, and (2) that he must have had infantile paralysis.

"The only physical infirmity which Mr Cruikshank had was his lameness, and if that was disclosed in the answers to the questions in the earlier part of the proposal, I think that that was sufficient. The declaration must, I think, be read in the light of the previous answers, and anything which is disclosed in the answers does not require to be excepted from the declaration.

"But then it was said that the lameness was caused by infantile paralysis, and that as the declaration was a warranty, it was not material to inquire whether Mr Cruikshank was or was not aware that he had had paralysis.

"It appears that when in a subsequent year Mr Cruikshank was insuring his life, he told the doctor of the insurance company that his lameness had been the result of a fall which he had when an infant. He told his wife the same thing. Now, if the lameness resulted from a fall, the probability is that the spine received some injury, and that partial paralysis of the legs ensued.

"Why the lameness is entered in the proposal in question as being from birth it is impossible to say. The answers in the proposal are filled in in Mr Black's hand-

writing, and the words 'from birth' appear to have been filled in after the original answer 'slight lameness' had been written. It may be that Mr Cruikshank gave Mr Black the same account of the origin of his lameness as he gave to others (at least I see no reason why he should not have done so), and that the words 'from birth' were added as a short way of describing a lameness which commenced at a time which Mr Cruikshank could not remember. But however that may be, the statement as it stands must be taken as Mr Cruikshank's statement, and the policy dealt with upon that footing.

"Now, in the first place, I do not think that it is proved that Mr Cruikshank ever had infantile paralysis. No doubt the evidence renders it highly probable that the lameness was caused by partial paralysis brought on by a fall in infancy. But I do not think that upon the medical evidence the defenders' case can be put higher than one of probability.

"Further, although the declaration is a warranty, it is to be remembered that it is intended to be made by members of the general public desiring to insure against accidents. Therefcre in a case of lameness following upon a fall in childhood, where the scientific cause of the lameness is paralysis, induced by an injury to the spine, I do not think that the policy would be void because the proposer did not know, and therefore did not state, that his lameness was caused by paralysis, if he stated truly and accurately the extent and nature and origin of his lameness. Now here, according to the view which I take of the evidence, the defenders knew, through Mr Black, how lame Mr Cruikshank was, and what was the nature of his lameness. They knew that the right leg was shorter than the left, and was almost powerless. They had knowledge therefore which suggested that Mr Cruikshank might have had infantile paralysis. But then it is said that Mr Cruikshank made an untrue statement as to the origin of his lameness. As regards that, the burden of proof is upon the defenders, and upon the evidence I am unable to say for certain that the statement was untrue. Mr Cruikshank told his wife and the doctor of the Life Insurance Company that he had had a fall when an infant, to which his lameness was attributed, and he must be taken to have told Mr Black that he had been lame from birth. It is not said that Mr Cruikshank made a wilfully false statement, and no one now can tell for certain whether the latter statement was in fact true or false. The origin of the lameness was not a matter within the personal knowledge of Mr Cruikshank. He had been lame ever since he remembered, and the defenders knew that that was the case. No one suggests that, if it had been stated that the lameness was due to a fall in infancy, instead of from birth, that would have made any difference in the risk. The important matters were the nature and extent of the lameness, and that Mr Cruikshank had been lame ever since he remembered. The defenders were aware of all that, and therefore they knew all that was necessary to enable them to consider whether they should refuse the proposal, or charge a higher premium, or demand a medical examination.

"Upon the whole matter I am of opinion that the pursuer is entitled to decree."

The defenders reclaimed, and argued—(1) The statement made in the proposal by the assured that he had had "slight lameness from birth" was untrue. It was clearly proved that he was very lame. The policy was issued on the faith of this untrue statement, and was accordingly void. (2) It was for the pursuer to prove that the defenders' agent Black saw the condition of the assured at the time the proposal and declaration were signed. In this she had failed. (3) Assuming the agent did see the condition of the assured, he had no authority to waive any of the conditions upon which the policy was issued, and accordingly his doing so could not bind the company. (4) In any view, the policy was void on account of the breach of the express warranty in the declaration that he had not had paralysis, and had no physical infirmity. It was proved that both the statements were untrue in fact, and this was sufficient to free the defenders from liability under the policy —*Standard Insurance Company* v. *Weems*, August 1, 1884, 11 R., H.L. 48, L.R. 9 App. Cas. 671. (5) The case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company*, May 13, 1892, 2 Q.B. 534, was distinguishable. That case was expressly decided in view of the special circumstance that the assured had only one eye, which was a patent defect, and that he was illiterate. The Court also did not consider the question of warranty.

Argued for pursuer—(1) It was proved that Mr Black had seen Mr Cruikshank walk before he took out the policy. The lameness had been described as slight lameness from birth, rendering the assured peculiarly liable to accident. If Mr Cruikshank's activity in walking was taken into account, this was not an untrue mode of describing his lameness. In any event, Mr Black's knowledge was the knowledge of the Insurance Company, and prevented them objecting to fulfil the contract on the ground that they now considered Mr Cruikshank's lameness was not of the nature described—*Bawden, supra.* (2) As regards the paralysis—in the first place, it was only a matter of medical opinion that the lameness was caused by infantile paralysis. In the second place, the paralysis mentioned in the declaration did not refer to infantile paralysis, but to what was known as a shock of paralysis, which might be recurrent.

At advising—

LORD JUSTICE-CLERK—This is a peculiar case in some respects. The late Mr Cruikshank is proved to have suffered an accident shortly after his birth, the result of which was that he was lame for the rest of his life.

While he was staying in a hotel in

Manchester he met Mr Black, who was in the employment of the defenders at the time as an inspector of agents, and Mr Black was in the habit of getting insurances when he could, and such applications were accepted by the defenders. In course of conversation he impressed the advantages of accident insurance upon Mr Cruikshank, who admitted its importance, and expressed himself as willing to take a policy. Then and there Mr Black settled the business on behalf of the company, as far as it was possible to conclude it at the time. In exchange for a covering-note Mr Black received a premium, and the matter was concluded subject to the approval of the board.

Now, there are two things which are said to support the refusal of the company to pay the sum in the policy. It is said that a false assertion occurs in the statement which Mr Cruikshank signed describing his condition, and the falsity is said to be contained in the words "slight lameness." It is to be noted that these words occur in answer to this question, "Are there any circumstances which render you peculiarly liable to accidents?" His answer is accordingly to be read in full as follows—"I have suffered from slight lameness from birth, which renders me peculiarly liable to accidents." Accordingly, so far as the statement goes there is nothing to suggest that it was false. The only suggestion of falsehood is in connection with the use of the word "slight." Now, that is a word which may be used by different persons according to the variety of the views which they are in the habit of taking of things. It was proved that Mr Cruikshank was a man of considerable activity, and with the help of his crutch and stick could get along at a very good rate, 2½ to 3 miles an hour. His lameness did not prevent him being a very active man of business. If a man can only move with great slowness his liability to accidents is totally different from the state of a man who is capable of active and quick movement. It is a question of interpretation. One man could truthfully use the word "slight," where another would use the word "great." Taking the word by itself, I see in it no ground for holding that it was a false statement. It is important that the Lord Ordinary is of opinion that Mr Black, who wrote this answer from Mr Cruikshank's dictation, saw Mr Cruikshank walk, and saw the extent of his lameness. There is trustworthy evidence to the effect that this was matter of conversation between them, and Mr Black expressed the opinion that a man with such an infirmity was a safer subject of insurance, because he was accustomed to take greater care of himself. The deceased at the time stated to more than one person what had taken place, and Mr Black's evidence to the contrary is not in my opinion satisfactory.

Therefore, so far as this question is concerned, I think there is no ground for disturbing the interlocutor of the Lord Ordinary.

The next question is, whether the defenders are not liable because of the declaration made by the insured, which is said to be a warranty of what it contains. It is entitled "declaration," and thereby the insured did declare and warrant that the above statements were true, and that he had not had paralysis or a fit of any kind. I think that amounts to a declaration that the insured had not suffered from paralysis arising from some organic cause, and does not suggest to the ordinary mind paralysis which may ensue from an accident to a limb. There is no evidence that the insured thought that he suffered from any form of paralysis, and if this is to be regarded as a warranty, I think it can only be so regarded with reference to that kind of paralysis which is the result of disease and not the result of accident.

I am of opinion that there is nothing either in the statement or the declaration entitling the defenders to say that they were deceived by the statements of Cruikshank, or that he warranted them as against the condition of lameness in which he was.

LORD YOUNG—The late Mr Cruikshank obtained the policy in 1883, and kept it up until the accident which caused his death in 1894.

The defence to this action is that the conditions expressed in the policy were not complied with.

All the facts of the case and the views of both sides were very fully and with most commendable fairness put before us by Mr Crole in his opening speech, and I do not think that he suggested that this case raised a question of good or bad faith. The good faith of the deceased is not in dispute. But it is said that, assuming his good faith, the conditions of the policy were not complied with. If that is true, the defence must prevail, the good faith of the deceased notwithstanding.

Now, the conditions referred to are contained in a "declaration" made by Mr Cruikshank (and the title is not unimportant), whereby he did "declare and warrant that the above statements are true; that I have not had paralysis or a fit of any kind, or been ruptured; that I have no physical infirmity. . ."

The statement which is represented as being untrue is the statement in the form of proposal for the policy, and consists of an answer to this question—"Are there any circumstances which render you peculiarly liable to accidents? The answer is—"Slight lameness from birth." Of course these words must be prefaced by the monosyllable "yes," for if there were no circumstances rendering him peculiarly liable to accidents there would be none to specify, and the answer would be "no."

It appears from the evidence that Mr Cruikshank had been lame from his earliest infancy. It seems that he had been let fall while an infant, and so injured as to be lame for life. Thus, perhaps, strictly speaking, his lameness was not from birth, but I do not think that anything turns upon a distinction between injury received before birth or immediately after.

But this lameness is characterised by the word "slight," and I think we must look at the evidence to say what effect ought to be given to this adjective, applied to the lameness, as rendering the insured peculiarly liable to accidents. I am inclined to accept the view of the Lord Ordinary on the evidence, and to conclude that the lameness was such as to be manifest to anyone who saw Mr Cruikshank upon his feet. When Mr Black proposed that he should take out a policy I agree with the Lord Ordinary in thinking it proved that Mr Cruikshank rose and walked across the room. Mr Black, who wrote the replies into the form of proposal, having seen this lameness, described it as slight, and reading this word so written, I cannot regard it as an untrue answer on which a defence to this action can be founded. I think that this lameness was expressly described as making Mr Cruikshank peculiarly liable to accidents, and that the degree of this lameness being so written by their agent cannot be founded on by the defenders as untrue. Taking this as a written contract, the terms of which must be complied with, I think that so far the plea stated in defence to this action that the conditions of the contract were not complied with must fail.

With regard to the declaration that the insured had not had paralysis or a fit of any kind, I think that we must take the language of the declaration in the sense in which it was probably and reasonably understood. I think that when a man applies for insurance, and states that he is afflicted with lifelong lameness which renders him peculiarly liable to accidents, that a statement in regard to "paralysis" is not to be understood as declaring that paralysis in any form was not the source of the lameness which was disclosed. I think the fair view is that "paralysis" is to be taken in connection with the words "fit of any kind." Paralysis is commonly understood as a fit or shock. I do not think it is commonly used so as to suggest such paralysis as is the result of a fall causing paralysis. I think the Lord Ordinary is of opinion that it was not proved that Mr Cruikshank ever had paralysis, and I agree with him. There are certain attacks of illness which produce forms of paralysis. I suppose that a fainting fit is, while it lasts, a species of paralysis. It is at least a paralysis of the nerves of motion. But I do not think that the word "paralysis" is used in this declaration as designative of less serious seizures to which the term might with more or less accuracy be applied. I think it is used as applicable to that graver form of attack which is associated with lesion of the brain. I agree with the Lord Ordinary that it is not proved that Mr Cruikshank had paralysis in any sense in which the word is used in this declaration. But the declaration proceeds—"I have no physical infirmity;" and the question is, what bearing this declaration has on the liability of the defenders when taken in connection with the lameness of the insured. I do not think it is to be taken literally, for I suppose there is not any human being, or indeed any animal, free from physical infirmity. An ear which hears less distinctly than the other, an eye which sees less clearly than its fellow, a weak voice, might each be described as physical infirmity. The effort would be endless to attempt to express the varieties of physical infirmity to which all living beings are liable.

But in what sense, then, did the defenders understand this declaration on the part of a man who had declared that he had slight lameness from birth? I think the two statements must be taken together. I think the insured must be taken to have meant that he had no physical infirmity except the lameness, which, I think, was fairly disclosed. I am therefore of opinion that the declaration cannot be read as importing a warranty that the insured was absolutely free from all physical infirmity.

I can understand that the defenders might at any time during the currency of the policy have desired to know what was the kind and extent of the lameness of the insured, but they were quite satisfied to take it as it stood, the insured remained in good health, and I am not surprised that the defenders did not desire to have any further information as to his condition.

On the whole matter I conclude, along with the Lord Ordinary, that the defence of breach of warranty existing in misstatements in the proposal for insurance and in the declaration is not proved.

LORD TRAYNER—I entirely concur, and can add nothing usefully to what has been said. I therefore agree that the Lord Ordinary's interlocutor should be affirmed.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuers—Vary Campbell—M'Clure. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Defenders—Balfour, Q.C. —Crole. Agents—J. & R. A. Robertson, S.S.C.

Friday, November 22.

FIRST DIVISION.

COUNTY COUNCIL OF RENFREWSHIRE *v.* BINNIE AND OTHERS.

Process — Special Case — Court of Session Act 1868, *sec.* 63—*Competency.*

A Special Case which discloses no true *lis* or controversy between the parties is incompetent.

This Special Case was presented by the County Council of Renfrewshire, first parties, and Robert Binnie and others, trustees for the Orphan Homes of Scotland for Destitute Children, second parties, to determine a question of assessment.