person firing the shot" must be read as meaning exactly what they say, and I do not see my way to extend them so as to include others than the actual firer. If that is not what is intended or desired, the course would seem to be, as your Lordship has said, that the paragraph should be altered or amended so as to remedy the supposed defect. It seems to me therefore that the paragraph does not apply to the respondent at all. It was suggested that he had been guilty of adding a peril by going back to the face as he did within the hour. I am unable to reach that conclusion. As the paragraph does not in my judgment apply, there was no actual prohibition against his returning, and as he appears to have acted in the *bona fide* belief that all was clear, I cannot say that he was acting outside his employment.

It seems to me therefore that we should answer the first question in the negative, the third in the affirmative, and that it is not necessary to deal with the somewhat obscure findings referred to in question 2.

LORD ORMIDALE—We do not require to decide the question whether or not there was a misfire, because it was admitted that there was a misfire. The first disputed question is whether paragraph 3 (*a*) is applicable or can be held to apply to any other person than he who actually applied the light to the fuse. Now that paragraph speaks of "the person firing the shot." It seems impossible to me to extend the meaning of these words so as to include not only the man whose hand applied the light but all those persons who might be present when he did so. I think it is easy to understand why this paragraph applies only to the individual, because the presumption and provision is that all other persons should have been cleared out of the way, leaving only, when the shot is actually fired, the shot-firer present on the spot. Therefore I agree with your Lordships that we cannot hold that the respondent was in any sense the firer of the shot.

Holding as we do that the prohibition does not apply to the respondent, I think we can come to only one conclusion on the question whether or not he was guilty of adding a peril to his employment, or of acting outwith the sphere of his employment. It seems to me that if the prohibition does not directly affect him he would not be going outside the sphere of his employment if he returned within the time fixed by the Order merely because he knew that there was such a rule affecting the shot-firer. In those circumstances it was open to anyone who was not the shot-firer to exercise to some extent his own judgment. Now what we are told in the case is that the respondent did in point of fact believe that the fuse had not ignited, and on that assumption he came to the conclusion and belief that there was no danger, and it appeared to him that it was his duty to return to what was his ordinary work in the mine, and he did so. On that footing I cannot see that for so doing, although he met with the accident, it can be said that he was hazarding his safety in doing something he was not employed to do.

I therefore agree that the questions should be answered as proposed by your Lordship.

LORD SALVESEN did not hear the case.

The Court answered the first question in the negative, the third in the affirmative, and found it unnecessary to answer the second question.

Counsel for the Appellants — Graham Robertson — Gillies. Agents — W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Saturday, March 12.

SECOND DIVISION.

[Lord Anderson, Ordinary.

DAWSONS LIMITED *v.* BONNIN AND OTHERS.

Insurance—Misrepresentation—Warranty—Proposal—Untrue Answer to Question—Materiality.

Under a comprehensive policy a firm of contractors insured a motor lorry with certain underwriters against third party risks, damage by accident, fire, and theft. The policy provided that the proposal should be the basis of the contract and held as incorporated therein, and it provided further that material misstatment or concealment of any circumstances material to assessing the premium, or in connection with any claim, should render the policy void. In the proposal, in answer to the question "State full address at which the vehicle will usually be garaged," the proposers answered, "Above address," the "above address" being their ordinary business address in Glasgow, the buildings of which were stone and were known to the underwriters' agent. As a matter of fact the lorry was garaged at a farm steading within the municipal boundary but some miles away, in a shed built mainly of wood and accommodating, in addition to the car, petrol lorries belonging to the proposer, and some barrels of oil or petrol. A fire broke out and the shed and insured lorry were destroyed. In an action at the instance of the contractors against the underwriters for the amount of the insurance, *held*, after a proof, that even assuming that an express warranty was to be implied, that warranty was qualified by the condition in the policy that any breach complained of must be material, and on the facts that the misstatement in question was a material misrepresentation, and defenders *assoilzied.*

Opinions reserved as to whether a mere recital in a policy that the proposal is to be the basis of this contract

and is incorporated therein necessarily imports an express warranty of the statements made in the proposal, apart from a declaration signed by the insured on the proposal form to the effect that his answers are true, and if untrue that the policy should be void.

Dawsons, Limited, general contractors, Glasgow, *pursuers*, brought an action against H. A. V. Bonnin and others, all underwriters at Lloyds, London, *defenders*, for payment of the sum of £500 for the destruction by fire of a motor lorry belonging to the pursuers and insured by them with the defenders.

The following narrative of the *facts* of the case is taken from the opinion of the Lord Justice-Clerk—"The pursuers sue the defenders for £500, being the value of a motor car belonging to the pursuers, and insured by them with the defenders, which car was destroyed by fire during the period covered by the policy and so became a total loss. The defenders maintain that they are not liable because of misrepresentations made by the pursuers affecting the validity of the policy. In the proposal submitted by the pursuers to the defenders the following questions, *inter alia*, were asked and answered, as follows, viz., 1. Proposer's name —Dawsons Limited; 2. Proposer's address —46 Cadogan Street, Glasgow. 4. State full address at which the vehicle will usually be garaged—Above address. In what district will the vehicle be used—Glasgow and district. The parties are agreed that 'above address' means 46 Cadogan Street, Glasgow. That was the pursuers' ordinary business address. Cadogan Street is a well-known business street in Glasgow, near the centre of the city, where the buildings were substantial stone buildings. The defenders' insurance agent, who carried through on their behalf the arrangements as to the proposal was well acquainted with Cadogan Street, and thought when the negotiations were going on that the premises belonging to or occupied by the pursuers at Cadogan Street were well suited for a garage and could accommodate the car in question. Mr Starr, the pursuers' London broker, knew Cadogan Street generally and the nature of the buildings in it. In point of fact the car was never garaged in Cadogan Street, but at a farm steading some 3 or 4 miles away, but still within the Glasgow municipal boundaries, in what had originally been a hay shed, a structure consisting mainly of wood supported on iron or steel columns. This shed was used for accommodating, in addition to the car in question, petrol lorries belonging to the pursuers, and some barrels of oil or petrol. One of these petrol lorries, or the petrol used for it, it is thought, caught fire, and the resulting conflagration destroyed the shed and the insured car, which was in the shed at the time. Appended to the policy issued to the pursuers was a note in these terms:—'*Note.*—Please examine your policy and see that it is what you require.' The policy set out at the beginning that the pursuers had subscribed and delivered to the defenders a proposal dated 22nd January 1917, 'which proposal shall be the basis of this contract and be held as incorporated herein.' It further set forth that it was 'subject to the condition on the back hereof, the due observance of which is a condition-precedent to all liability of the underwriters hereunder.' One of these conditions was in the following terms:—'Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

The defenders pleaded, *inter alia*—"1. The policy is void because of the untrue answer given to the question in the proposal [*i.e.*, question 4 *supra*] referred to in answer 2 hereof, and because the information contained in said answer was material to the formation of the contract and misled the the defenders on a material matter."

On 15th July 1920 the Lord Ordinary (ANDERSON), after a proof, found that the policy of insurance covering the motor lorry was void because of the untrue answer given to the question in the proposal referred to in answer 2 by the defenders in the closed record; therefore assoilzied the defenders from the petitory conclusions of the summons.

Opinion.—[*After a narrative of the facts and a consideration of certain other grounds of defence*]—"There remains only one other ground of defence to be considered, that, namely, which is formulated in the defenders' first plea-in-law.

"As will appear later, this plea is inartistically framed, as it combines two matters, falseness and materiality, of which the latter does not necessarily demand consideration and determination.

"The averments on which this plea is based are set forth in answer 2. . . .

"Dealing, then, with the point raised in answer 2 it appears that the proposal form put the following question to the insured—'State full address at which vehicles will usually be garaged.' The answer given was 'Above address.' The earlier part of the proposal form showed that this meant '46 Cadogan Street, Glasgow.' It is common ground that at the time the proposal form was signed there was no garage at that address, that there never had been a garage there, and that the pursuers had no intention of garaging their lorries there.

"*Prima facie*, therefore, the answer given was false, and the question is what legal effect does that have upon the pursuers' claim.

"If a statement made in a case of this kind is a warranty, only one issue arises—whether the statement is false. The issue whether the misstatement is also material does not arise. If the statement is a warranty and is false the policy is void.

"If the statement made is merely a representation there are two issues—(1) is the statement false, and (2) was it material, *i.e.*, did it affect the acceptance of the risk or the amount of the premium.

"It was maintained for the pursuers that the above statement was merely a representation, because (1) it was not expressly said to be a warranty, and (2) there was no

declaration of truth appended to the proposal form and signed by the insured. It seems to me that it is well decided that there is a third category of case in which a statement of the insured in a proposal form must be dealt with as if it were an express warranty, that, namely, in which the statements made in the proposal form are made the basis of the contract of insurance. That doctrine appears to me to be established by these authorities—*Anderson*, 1853, 4 H.L.C. 484; *Thomson*, 9 A.C. 671; *M'Donald*, 9 Q.B. 328; *Mansel*, 1879, 11 Ch. D. 363; *Marshall*, 1902, 85 L.T. 757; MacGillivray, Ins. Law, p. 284.

"Now the policy set forth in its preamble that the proposal shall be the basis of the contract, and, as I have pointed out, the proposal form and answers are incorporated in the policy as part of the contract to which the pursuers were parties.

"I am therefore absolved from considering the question of whether or not the statement (if false) was material.

"If the statement is false it follows that the policy is void, and it only remains to be determined whether or not the statement was false.

"The statement is doubtless partly true because the lorry was garaged in Glasgow, and the pursuer's counsel argued that because of this the answer was substantially true. I am unable to accept this contention. If the answer had been 'Glasgow' and nothing more I do not think this would really have been an answer to the question. It would have been almost equally helpful to have written 'Scotland.' To state that vehicles will usually be garaged at 46 Cadogan Street when in point of fact the intention was to garage them at Dovehill was in my opinion to make a statement which was substantially false.

"The only other point taken by the pursuers' counsel was that as the statement whose accuracy was challenged was merely an expression of intention as to the future it had no binding force. It might be held that the answer referred to implied something more than a reference to the future, namely, that it suggested that the pursuers' vehicles had been in use to be garaged at 46 Cadogan Street, were then being garaged there, and would continue to be garaged at that address. Assuming, however, that the answer imported nothing more than an expression of intention as to the future there is a difference in legal consequence between a representation and a warranty. In the case of a representation it is the case that mere expression of intention has no binding force; in the case of a statement of intention which is incorporated in the contract or which is made the basis of the contract there is binding force—Anson, Law of Contract, 8th ed., p. 168.

The result is that I decide that the policy is void because the pursuers in the proposal form made a statement, forming part of the basis of the contract, which was untrue in fact. The defenders must therefore be assoilzied from the conclusions of the summons."

The pursuers reclaimed, and argued—In all the cases referred to by the Lord Ordinary there was a declaration of the truth of the statements in the proposal form, or a warranty in the body of the contract—*Anderson* v. *Fitzgerald*, 1853, 4 A.C. (H.L.) 484; *Macdonald* v. *Law Union Insurance Company*, 1874, L.R., 9 Q.B. 328; *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363; *Thomson* v. *Weems*, 1884, 9 A.C. 671, 11 R. (H.L.) 48, 21 S.L.R. 791. Additional cases which might be cited were—*Marshall* v. *Scottish Employees' Liability Insurance Company*, 1902, 85 L.T. 757; and *Yorkshire Insurance Company, Limited* v. *Campbell*, [1917] A.C. 218. The fact that the proposal was made the basis of the contract did not imply a warranty of the truth of every answer contained in the proposal. There might be a representation without a warranty, but the representation to void the contract must be material to the risk under the contract and also be fraudulent. In *Anderson* v. *Fitzgerald, cit. sup.*, there was an express contract for voidability, and that case did not decide that everything in the proposal when made the basis of the contract must be taken to be material as Sir George Jessel, M.R., in *London Assurance* v. *Mansel, cit. sup.*, and as M'Gillivray on Insurance, founding on that case seemed to infer. The only exception to this was to be found in marine insurance, where everything written on the policy was held to be a warranty or condition-precedent. The mere fact, therefore, that the proposal form was incorporated in the policy and made the basis of the contract did not show that every answer in the proposal form was to be taken as warranted—Gloag on Contract, p. 558; *Farr* v. *Motor Trades Mutual Insurance Society, Limited*, [1920] 3 K.B. 669; *Joel* v. *Law Union and Crown Insurance Company*, [1908] 2 K.B. 863, *per* Fletcher Moulton, L.J., at p. 885; *Dalgety & Company* v. *Australian Mutual Provident Society*, 1998, Stone's Insurance Cases, vol. i, p. 177; Kerr on Fraud and Mistake, 5th ed., p. 40; Anson on Contract, 15th ed., pp. 180 and 183; *Wood* v. *Tulloch*, 1877, 20 R. 477, 30 S.L.R. 497; *Reid & Company, Limited* v. *Employers' Accident, &c., Insurance Company, Limited*, 1899, 1 F. 1031, 36 S.L.R. 825. Bell's statement in section 522 of his Principles was not a definition of warranty, and the cases cited by him did not support his proposition. It was the duty of the Court in these circumstances, before it gave effect to the respondent's contention, to be satisfied that the insured consented to the accuracy of the answers being made the basis of the contract—*Anderson* v. *Fitzgerald, cit. sup., per* Lord St Leonard at p. 507; *Fowkes* v. *Manchester and London Insurance Association*, 1863, 3 B. & S. 917, *per* Crompton, J, at p. 927; *Hemmings* v. *Sceptre Life Association, Limited*, [1905] 1 Ch. 365. If, however, there was a warranty in the present case it was a qualified warranty in the terms of section 4 of the contract, and it was only if the statements were material that they could be held to void the contract. As to whether they were material or not the onus was on the respondent. On the evidence the test was what would affect the mind of an

underwriter applying the ordinary principles of his business—*Ionides* v. *Pender*, 1874, 9 Q.B. 531. The proof showed that the question was simply put to show the area in which the car was to operate. It was only so far as it fixed the rate of premium that it was material and the error in question did not affect the rate of premium. In the case of *Craig* v. *Imperial Union Accident Assurance Company*, 1894, 1 S.L.T. 646, though the answers were false in the sense that they were incomplete, it was held that the falsity was not material and did not affect the contract. In the present case there was no evidence to show that this answer induced the contract.

Argued for the respondent—The representation in the present case was the basis of the contract, and it was incorporated in it. There could be no object in making a statement the basis of the contract if that statement were not true in fact. Materiality was to be presumed where the answer was the basis of the policy, and untruthfulness in such circumstances would void the policy —*Adamson's Trustees* v. *Scottish Provident Assurance Company*, 1868, 6 Macph. 442; Bell's Prin., secs. 475 and 522; *Yorkshire Insurance Company, Limited* v. *Campbell, cit. sup.*, *per* Lord Sumner at p. 221; MacGillivray on Insurance, p. 285. When statements in these circumstances were made the basis of the contract they became conditions-precedent, or in Scotland warranties —*Thomson* v. *Weems*, *cit. sup.*, 1884, 9 A.C., *per* Lord Blackburn at p. 683 and Lord Watson at p. 687; *Anderson* v. *Fitzgerald*, *cit. sup.*, *per* Lord Cranworth, L.C., at p. 503; *London Assurance* v. *Mansel*, *cit. sup.* Insurance was a contract *uberrimæ fidei*. Whether the statement were taken as a warranty or as a representation material to the contract the result was the same. As to whether the statement in the answer was material or not, the statement of the insurer that it was material was of primary importance — *Smith* v. *Land and Houses Property Corporation*, 1884, 28 Ch. Div. 7, *per* Bowen, L.J., at p. 16. The knowledge of the local agent was sufficient — *Cruikshank* v. *Northern Accident Insurance Company, Limited*, 1895, 23 R. 147, 33 S.L.R. 134.

At advising—

LORD JUSTICE-CLERK—[*After the above quoted narrative of facts*]—In my opinion that condition applies to any material misstatement by the insured, or to any concealment of any circumstance by the insured material to assessing the premium herein.

I am of opinion that the proposal and the answers by the pursuer set out therein were as matter of contract made the basis of the policy and held as incorporated therein, though of course subject also to the conditions "on the back thereof"—Bell's Prin., section 522; *Yorkshire Insurance Company*, [1917] A.C. 218; *Union Insurance Society of Canton, Limited*, [1916], 1 A.C. 281.

I am further of opinion, on the proof which has been led, that the misstatement as to the garage was a material misstatement. In arriving at this conclusion I rely mainly on the evidence of Starr, Penney, and Hamilton, witnesses for the defenders who had led in the proof. Most of the pursuers' evidence to the contrary seems to me to have been prepared after the defenders' proof was closed and some of the pursuers' evidence had been led. An adjournment of the proof at that stage for some months allowed of this being done. The case made by the pursuers in the latter part of their proof was really not put to the defenders witnesses in cross-examination. We have not the advantage of having the Lord Ordinary's views as to the witnesses. But I can see no sufficient reason for doubting the honesty and reliability of the witnesses I have referred to, and I accept their testimony on the question of materiality. I agree with the Lord Ordinary that the pursuers in the proposal form made "a statement forming part of the basis of the contract which was untrue in fact," but I go further, and I think it has been proved that this untrue statement was material. I do not think I would entirely agree with what I understand to be the Lord Ordinary's views as to the legal result of the cases to which he refers—views which the defenders strongly supported in the argument before us. In my opinion the contracts which had to be considered in the cases referred to by the Lord Ordinary differed in material respects from the contract which we have here to deal with. But holding as I do that a material representation and statement made by the pursuers in the proposal as to a fact peculiarly within their knowledge, and embodied in the contract as the basis thereof, was untrue, I am of opinion that the defence must be sustained and the defenders assoilzied. [*His Lordship then dealt with the question of expenses.*]

LORD DUNDAS—I agree with the Lord Ordinary that the defenders are entitled to be assoilzied, but I reach that conclusion upon somewhat different grounds from those on which his Lordship proceeded.

It is, I think, clear that where in a contract of insurance there is a warranty as distinguished from a mere representation, then the sole question is whether the fact or the statement warranted is true or not, and the question of its materiality does not arise. More than a hundred years ago in a Scots appeal to the House of Lords (*Newcastle Fire Insurance Company*, 1815, 3 Dow 255, at p. 262) Lord Chancellor Eldon said—"It is a first principle in the law of insurance on all occasions that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown, but if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact." There have been many subsequent judgments to the same effect; and in *Weems* (1884, 9 A.C., at p. 684) Lord Blackburn, referring to Lord Eldon's opinion, said —"I think that on the balance of authority

the general principles of insurance law apply to all insurances whether marine, life, or fire."

In the next place I think that the cases cited by the Lord Ordinary, and other decisions, establish that where in a contract of insurance (*e.g.*, as in *Weems*, *sup. cit.*) the assured has subscribed a declaration at the foot of his filled-in proposal form which is declared to be the basis of the contract, and which imports that the statements made by him are true, and that if any untrue statement has been made or necessary information withheld the contract shall be null and void, then that declaration, taken in connection with the policy, constitutes an express warranty of the truth of the answers he has given, and accordingly if an answer be false there is no room for inquiry into its materiality.

Here, however, there is no such declaration under the hand of the assured; it is only in the policy (which he does not subscribe) that we find that the proposal shall be the basis of the contract and be held as incorporated therein. I am not, as at present advised, prepared to accept the Lord Ordinary's assumption that the legal position is the same. It seems to me that it may well be that there is a material difference between a case such as the present and such cases as those cited by the Lord Ordinary. I desire to reserve my opinion upon this point until an occasion arises when it becomes necessary to decide it. It is not in my judgment necessary to decide it here, because, even assuming that the present case is one of express warranty, "there still remains," as Lord Watson put it in *Weems* (*sup. cit.*, at p. 687), "for consideration what must be held to be the subject-matter of the warranty." That must be decided in each case upon the terms of the particular contract. It seems to me to be clear that the warranty here, even assuming it to be such, was qualified by the fourth article of the conditions upon the back of the policy, the due observance of which conditions is by that instrument declared to be a condition-precedent to all liability of the underwriters. That article provides that "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein or in connection with any claim shall render the policy void." We must consider therefore upon either alternative view, *i.e.*, whether there be here a warranty or only a representation—whether or not there has been in regard to the fourth answer, which admittedly is not true, a material misstatement of any circumstance by the insured within the meaning and scope of the fourth condition. I do not agree with the Lord Ordinary that he was "absolved from considering the question whether or not the statement (if false) was material."

On the issue of materiality there is in my opinion a heavy presumption to be rebutted by those who seek to establish that the question and answer were in fact immaterial. Some judges indeed, *e.g.*, Sir George Jessel, M.R., in *Mansel* (1879, 11 Ch. Div. 371), seem to have held that it is not a mere rebuttable presumption but an irrebuttable term of contract—a *presumptio juris et de jure*. In *Weems*' case (*sup. cit.*, at p. 683, foot) Lord Blackburn said—"It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition-precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material." I am content for present purposes to take the matter as it was put by Lord Sumner in delivering the judgment of the Privy Council in the recent case of *Yorkshire Insurance Company, Limited*, [1917] A.C. 225—"In any case, since the parties have imported this statement into their contract presumably they thought it material." *Prima facie*, business men do not ask questions and invite answers which they make the basis of their contract unless they consider these to be material. *Prima facie* also I should have thought it was material to assessing the premium to know where the car would usually be garaged—whether in a stone building in the centre of Glasgow, or in a wooden shed on the outskirts of the city. One of the witnesses depones—"If a company is informed that a car is garaged in a wooden shed the rate would naturally be heavier. That is common logic." It seems to me to be *prima facie* also common-sense. The question of materiality is one of fact, and the evidence of persons engaged in the particular business is admissible—*Hutchinson*, 1876, 3 R. 682; *Ionides*, 1874, 9 Q.B., *per* Blackburn, J., at p. 539.

The defenders' first witness, Mr Starr, gives distinct and emphatic evidence. He says—"If I had known that the vehicle was to be garaged in a wooden shed on a farm steading I would certainly not have accepted the risk"; and again—"(Q) Do you say that if there is a misstatement made there" (*i.e.*, in answer 4) "that is material to the matter of assessing the premium under the proposed policy?—(A) I do, most certainly. (Q) The answer to that question would determine two things—whether you were to take the risk at all, and secondly, at what premium?—(A) Yes." His evidence is supported by two other witnesses. The pursuers on the other hand bring three witnesses, who say that this being a "comprehensive" policy the fire risk is a very small matter, and the premium would have been the same whether the car was to be usually garaged at Cadogan Street or in the shed at Dovehill. Their evidence, however, is open to two criticisms—the first a very formidable one—viz., (1) that the lines of their evidence were not put or suggested at all in the cross-examination of Mr Starr, and only faintly and indirectly in that of the defenders' other two witnesses, and (2) that even if the fire risk be relatively less in a "comprehensive" policy, it may still be such as, in the judgment of prudent underwriters,

would render it material to know the truth about the car's usual garage. I am unable to see why the evidence of Mr Starr and the other two witnesses for the defenders is to be rejected or is not to be believed. It seems to me that, at the best for the pursuers, the evidence on materiality might be held to be pretty evenly balanced, though I think the weight of it would be in the defenders' favour, but if I am right in holding that the presumption is in favour of materiality for the reasons stated, then the defenders must certainly prevail on this issue.

For these reasons I think the Lord Ordinary's interlocutor must be recalled; that in place of the second finding therein we should find that the policy is void, because the answer to the fourth question on the proposal form contains a material misstatement of a circumstance by the insured material to assessing the premium under the policy; and of new grant decree of absolvitor. [*His Lordship then dealt with the question of expenses.*]

LORD ORMIDALE — The policy of insurance, to which a copy of the proposal of the pursuers is appended, instructs the contract between the parties. The policy commences by reciting the delivery of the proposal to the defenders, "which proposal shall be the basis of the contract and be held as incorporated herein."

On the ground that the statements in the proposal are made the basis of the contract of insurance the Lord Ordinary has held that they are the subject of express warranty, that therefore he is absolved from considering whether or not the statement now challenged by the defenders, viz., the answer to question 4, was material, and that the only question to be determined is whether or not the statement was false.

In the cases, however, referred to by the Lord Ordinary as supporting the view taken by him, it appears that there was a declaration signed by the insured on the proposal form to the effect that his answers to the questions put were true, and that if any of his statements were untrue then the policy should be void.

There is no such declaration appended to the proposal in the present case, and I am not satisfied that the Lord Ordinary is warranted in holding that the mere recital in the policy that such a proposal is to be the basis of the contract necessarily imports an express warranty of the statements made in the proposal. I agree, however, that it is not necessary to determine that question, for, assuming that such a warranty is implied, there is a clause in the policy which must, I think, be held to limit or qualify that warranty. I refer to the words "subject to the condition on the back hereof, the due observance of which is a condition-precedent to all liability of the underwriters hereunder." Turning to the back of the policy we find several conditions, No. 4 of which is in these terms—"Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein or in connection with any claim shall render the policy void."

Now answer 4 is a misstatement. It states in reply to the question — "State full address at which the vehicles will usually be garaged?"—"Above address," *i.e.*, 46 Cadogan Street, Glasgow, whereas as matter of fact the vehicles were never garaged there, and were never intended to be garaged there, but at Dovehill Farm, Newlands, Glasgow.

Was this a material misstatement? The question to my mind is a narrow one. It is, however, for the pursuers to prove that the misstatement was not material. As Lord Sumner says in *Yorkshire Insurance Company, Limited* ([1917] A.C. 218, at p. 225) —"And in any case since the parties have imported this statement into their contract presumably they thought it material." That is what the parties in the present case have done. They have imported the answer 4 into their contract, and presumably therefore they thought it material. Have the pursuers rebutted the presumption? On a full consideration of the evidence I have come to the conclusion that the pursuers have not discharged the onus that lay upon them. I feel that it is impossible to give the same weight to the evidence of the witnesses Messrs Olden, Stewart, and Ballantyne as I should otherwise have been inclined to do if only the view presented by them had been submitted in cross-examination to the defenders' witnesses as it ought to have been. Their testimony is to the effect that in the case of a comprehensive policy like that in question the premium is fixed according to the area in which the vehicle insured is likely to operate, irrespective altogether of the construction and surroundings of the building in which it is garaged. That appears to me a quite understandable proposition, but the defenders' witnesses if asked about it might have demonstrated its unsoundness. But there is not a trace of it being put to any of them except Hamilton, who is asked one or two questions which may be said to indicate it. On the other hand Mr Starr put the matter from an ordinary insurer's point of view thus—"In a country district and in a wooden building I would most probably have refused the risk, but if I had accepted it I would have made stringent conditions as to the keeping of the vehicle, and in addition I would have charged considerably more premium for the risk I was running." He is hardly crossed on this. The evidence of Penney and Hamilton is also to the effect that the premium falling to be charged is determined by the character of the building in which the vehicle is to be garaged. The three witnesses are all agreed that the difference between a brick and stone building like 46 Cadogan Street and the converted wooden shed at Dovehill is a material difference.

On the whole matter therefore I am of opinion that the defenders are entitled to be assoilzied.

LORD SALVESEN did not hear the case.

The Court recalled the second finding in the interlocutor of the Lord Ordinary, and in lieu thereof found that the policy was void,

because the answer to the fourth question in the proposal form contained a material misstatement of a circumstance by the insured material to assessing the premium under the policy, and *quoad ultra* adhered to the Lord Ordinary's interlocutor.

Counsel for the Pursuers and Reclaimers — Mackay, K.C. — Gentles — Jamieson. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Defenders and Respondents—Christie, K.C.—Ingram. Agents—Allan Lowson & Hood, S.S.C.

Saturday, March 19.

FIRST DIVISION.

FLEMING *v.* FLEMING.

Succession — Will — Construction—Bequest to Younger Children Equally among them of Annuity Secured on Lands — Permanent or Life Annuity—Accretion.

In a mutual trust-disposition and settlement by spouses the trusters, after disponing the lands to the two elder children who should survive the longest liver of the spouses declared that said disposition was with and under the real and preferable burden of a fixed yearly sum, payable to such children only as should not succeed to the lands, "equally between or among them," with power, however, to the heir in possession of the lands to disburden the same of the said yearly payment by paying a fixed capital sum to the parties in right of the yearly payment at the time of redemption. At the date when the succession opened there were three younger children entitled to share in the annual payment, and to each of these the trustees proceeded to pay one-third of the annual sum. Thereafter, following upon the death of one of the three children, questions arose as to the meaning and effect of the trust-disposition. *Held* (Lord Mackenzie *diss.*) (1) that failing redemption by an heir in possession, the yearly sum was a permanent burden on the lands, and (2) that the share of the yearly sum enjoyed by the deceasing child did not accresce to the survivors but passed to the child's executors.

Opinion per Lord Skerrington that there is no *prima facie* presumption in the law of Scotland that a testamentary gift of an annuity or rent-charge is for the life only of the annuitant.

The Reverend Archibald Fleming, D.D., of Inchyra, in the county of Perth, and others, being his brothers and sister and the executors of a deceased sister, presented a Special Case for the opinion of the Court.

The circumstances of the case and the contentions of the parties, as narrated in the opinion (*infra*) of Lord Mackenzie, were as follows — "The questions in this Special Case arise under the mutual disposition and settlement by the Rev. Archibald Fleming and his wife dated in 1872, with a codicil dated in 1892. He died in 1900, and his wife in 1910. The settlement proceeds on the narrative that they considered it to be a duty incumbent on them for the welfare of their family to settle their affairs in the case of their deaths. They then disponed the estate of Inchyra (which we were informed was the property of the wife) 'to and in favour of Archibald Fleming, our eldest son, and the heirs-male of his body, whom failing to Hamilton Fleming, our second son, and the heirs-male of his body, whom failing to Maxwell Fleming, our third son, and the heirs-male of his body, whom failing to any other son or sons that may be procreated of our present marriage in their order, and the heirs-male of their bodies, whom failing to Isabella Fleming, our daughter, and the heirs-male of her body, whom failing to any other daughter or daughters that may be procreated of our present marriage in their order, and the heirs-male of their bodies'; and then follows a destination to heirs-female and the exclusion of heirs-portioners, the clauses being suggestive of those appropriate to a deed of entail. The clause which follows is the one which gives rise to the present controversy — 'But declaring always, as it is hereby expressly provided and declared, that the foresaid lands and others are disponed with and under the real and preferable burden of a yearly sum of £250 sterling, payable to the said Isabella Fleming and Maxwell Fleming, and to any other child or children that may be procreated of our present marriage, but to such of them only as shall not succeed to the said lands of Inchyra or the lands of Hamilton House after disponed equally between or among them, and that at two terms in the year, Whitsunday and Martinmas, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall occur after the death of the longest liver of us for the period from the date of the death of the longest liver of us to that term, and the next term's payment thereof at the term of Whitsunday or Martinmas following for the half year preceding, and so forth thereafter, with a fifth part more of liquidate penalty in case of failure in punctual payment, and interest at the rate of five pounds per centum per annum from the said respective terms of payment till paid; but declaring always that it shall be in the power of the heir in possession of said lands to free and disburden the same of said yearly payment by making payment of a capital sum of six thousand pounds sterling to the parties in right of said yearly payment at the time.' There is in the settlement a disposition of the lands of Hamilton House to and in favour of Hamilton Fleming (the second son) and the heirs-male of his body, with ulterior destinations in terms similar to those above quoted in the case of Inchyra, with a declaration that the children should only succeed to the lands of Hamilton House in the event of them and their heirs not succeeding to Inchyra 'if there shall be more than one heir of our bodies alive at the