rities. In my opinion this part of the complaint relevantly charges the respondents with a fraud at common law in respect that they, acting in concert, fraudulently omitted to include in the return to the assessor the grassums received from the tenants, for the purpose and with the effect of escaping payment of the rates exigible on these grassums by the rating authorities.

LORD ORMIDALE concurred.

The Court found that the charge libelled in the alternative charge of the complaint was a relevant charge of crime, *quoad ultra* answered the question in the affirmative, and remitted the case back to the Sheriff-Substitute to proceed.

Counsel for the Appellant — Solicitor-General (Hon. W. Watson, K.C.)—Fenton, A.-D. Agent—John Prosser, W.S., Crown Agent.

Counsel for the Respondents—Wark, K.C. —King Murray. Agents—Patrick & James, S.S.C.

HOUSE OF LORDS.

Friday, July 14.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Wrenbury.)

DAWSONS LIMITED *v.* BONNIN AND OTHERS.

(In the Court of Session, March 12, 1921, 58 S.L.R. 334.)

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

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 be held as incorporated therein, and it contained a "condition" printed on its back that "material misstatement or concealment of any circumstances by the insured material to assessing the premium or in connection with any claim shall 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 proposers and some barrels of oil or petrol. A fire broke out and the shed and insured lorry were destroyed. The proposal was signed by the proposers, but contained no declaration by them as to the truth of the answers. In an action at the instance of the contractors against the underwriters for the amount of the insurance, in which a proof was taken, the Second Division on a reclaiming note held the policy void on the ground that the answer to the fourth question contained a misstatement material to assessing the premium. *Held* (*affirming* that judgment, *diss.* Viscount Finlay and Lord Wrenbury) that the policy was void, but, *varying* the judgment, that the fact that the proposal was made the basis of the contract made the answers thereto fundamental, and that an untrue answer made the policy void whether it was material from the ordinary business standpoint or not.

Observations per Viscount Haldane on the doctrine of warranty in contracts of insurance.

Observed per Viscount Cave that the fact that parties had agreed that certain statements should form the "basis" of a contract showed that they deemed them material to the contract.

The case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—[*Read by Viscount Cave*]—This is an appeal from a judgment of the Second Division of the Court of Session, which affirmed a decision of the Lord Ordinary who had tried the action, but varied the reasons on which that decision was based. The action was brought by the appellants to recover a sum of £500 and interest against the respondents, with whom they had insured a motor lorry against fire, and also against any claims for damages made by third parties. The vehicle had been in fact destroyed by fire. The question in the appeal is whether the respondents were freed from liability under the policy by reason of inaccuracy in a statement made by the appellants in the proposals submitted when the policy was issued, to the effect that the motor would usually be garaged at a certain address, whereas it was garaged elsewhere.

The policy was issued to the appellants on 8th February 1917 by the agent in Glasgow of the respondents, who were Lloyd's underwriters. The transaction was initiated by a proposal form signed on behalf of the appellants, who were furniture removal contractors carrying on business at 46 Cadogan Street, Glasgow. They used motor cars and lorries in this business, which they had been in the habit of insuring. Among others with whom they had had transactions of this kind was a Mr Hamilton, an insurance broker, who acted for various insurance societies. He appears to have called on them and to have offered a quotation for the insurance in question, which was accepted. He then filled in a form of proposal from information he thought he had obtained from them, and this when signed became the proposal form as to which the question has arisen. It commenced by setting out

the particulars of the motor vehicle intended to be insured, the make being of what was called the Halley lorry type, and of the scope of the indemnity desired, confined to fire and to claims by the public. There then followed ten questions (to each of which a statement in answer was given) relating to the proposer's name and address, 46 Cadogan Street, Glasgow, and the purpose for which the vehicle was to be used. The fourth of these statements was made in response to a request for a statement of the full address at which the vehicle would usually be garaged. The answer given was "Above address"—that is to say, 46 Cadogan Street. There was a subsequent question as to the district in which the vehicle would be used, to which the answer was "Glasgow and district." The rest of the ten questions and answers are not material. Following on the proposal form and in the same document came the policy itself. It proceeded on the narrative that the insured (the appellants) had subscribed and delivered to the insurers the proposal form, dated 22nd January 1917, "which proposal shall be the basis of the contract and be held as incorporated herein." The policy then stated that the premium had been paid for an insurance for twelve months, and it set forth the terms of the insurance as including, *inter alia*, indemnity to the extent of £500 against loss or damage caused by fire. Appended to the policy and qualifying it there was a statement of "Conditions of insurance." The fourth condition was 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."

What happened was this—On 27th December 1917 the vehicle insured was garaged, not at 46 Cadogan Street, but at Dovehill Farm, which had been a farm steading at Newlands on the outskirts of Glasgow, but was within the city of Glasgow area. On that date it was burned accidentally. The vehicle was at the time of the fire within a building at Dovehill which had been a hay shed and was built of wood. In this shed, which was used by the appellants as a garage for their motor lorries, there were other vehicles. One of these, a petrol motor lorry, took fire and in the conflagration the insured motor was burned up.

The question which arises is whether under these circumstances the respondents are liable under the policy they had issued. They contend that the fourth of the answers in the proposal form was untrue. They say that the vehicle insured was not intended to be usually garaged at 46 Cadogan Street but at Dovehill, and that the answer actually given to the fourth question was not accurate, inasmuch as it amounted either to a misrepresentation of intention as to present and future storing or to a contract as to storing in the future which was broken. They also argue that the fourth of the conditions appended to the policy was that any material misstatement or concealment of any circumstance material to assessing the premium was by express provision to render the policy void, and that there was actually misstatement or concealment of the circumstance that the vehicle was to be garaged at Dovehill—a garage which they alleged was in such a situation and of such a character that if disclosure had been made the assessment of the premium would have been affected.

The reply of the appellants, the insured, on this point was that the question whether the motor vehicle was to be stored at Dovehill or at Cadogan Street was not a material one. The chief risks covered by the policy were in the main wholly unconnected with fire at the garage, and the percentage of the premium allocable to that risk was very small. The respondents called evidence to prove that they did consider that the question was one of importance, and the learned Judges in the Courts below appear to have given credence to that evidence and to have attached weight to it. This is an important fact, and I am reluctant to differ from them. But I think that notwithstanding some differences in the way in which they cross-examined the witnesses called for the respondents the appellants have sufficiently proved by testimony which commends itself that in all probability no importance would have been attached to any answer to the fourth question in the proposal form to the effect that Dovehill was to be the place of garage.

But that does not dispose of the case, for if the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate whether of material importance or not, the fulfilment of this contract is a condition of the appellants being able to recover.

For this reason it appears to me that the question which really lies at the root of the matter in dispute is one of construction simply. I do not look on the fourth condition appended to the policy as what is important for this purpose, for that condition extends to classes of possible misstatements and concealments which go beyond those to which the proposal statements are confined. On the other hand they relate to any such as may be actually material in assessing the premium, as distinguished from such as are made by special stipulation as to accuracy conditions of the validity of the general contract of insurance. If there are statements in the answers to the questions in the proposal form which are in this way constituted by special stipulation conditions, they are therefore unaffected by the subsequent and independent condition dependent on materiality. Now as to the character of such conditions, and as to what is implied in their constitution, there is a good deal of authority which is instructive. It is worth while to consider how the distinction between a condition and a representation came to be drawn in this connection. The distinction had its origin in the historical development of the law of England, but as Lord Watson observed of the existing state of the law the doctrine of warranty as applied to such stipulations in a contract of assurance is the same in the law of Scotland as in

that of England—*Thomson* v. *Weems* (1884, 11 R. (H.L.) 48, 9 App. Cas. 671, 21 S.L.R. 791). Warranty is a somewhat unfortunate expression to have been used in this connection. The proper significance of the word in the law of England is an agreement which refers to the subject-matter of a contract, but not being an essential part of the contract either intrinsically or by agreement is collateral to the main purpose of such a contract. Yet irrespective of this the word came to be employed in England when what was really meant was something of wider operation, a pure condition. If goods tendered in performance of a contract do not satisfy the conditions stipulated for, the buyer may reject them, but he may alternatively accept the goods and claim damages for breach of the stipulated condition, thus treating his claim as one for damages for a breach of warranty, sufficiently so constituted. The condition is thus wider than the warranty strictly so called, but may sometimes be founded on as giving rise to a contract of warranty.

But the restricted limits of the English common law encouraged the development of the notion of warranty in a way which would not have been required in Scotland, where law and equity were never severed. In England it was always possible to set aside a contract for misrepresentation, but the representation, although sufficient for the jurisdiction even though perfectly innocent, had to be material. Moreover, at common law it was no defence to an action on a contract that there had been misrepresentation, unless the misrepresentation were fraudulent or of a recklessness analogous to fraud—see the judgment of Jessel, M.R., in *Redgrave* v. *Hurd*, 20 Ch. D., at p. 13. Possibly in order to provide for the difficulty occasioned by the limits of their jurisdiction the courts of common law showed great readiness to construe a representation sufficiently expressed to be the foundation for the acceptance of a proposal made by a would-be insured to an insurer, as a condition which if accepted had to be observed independently of any question of materiality. As Lord Blackburn observed in *Thomson* v. *Weems* (*ubi supra*) at p. 683—"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." He goes on to point out that in policies of marine insurance it is settled that any statement of a fact bearing on the risk is, "by whatever words and in whatever place, to be construed as a warranty, and *prima facie* at least that the compliance with that warranty is a condition-precedent to the attaching of the risk." Without going so far as to hold that this rule is also applicable to the construction of life policies generally, he thought that it applied to the life policy before him, for he says—"When we look at the terms of this contract and see that it is expressly said in the policy as well as in the declaration itself that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which I think include the statement that he was of temperate habits) is warranted."

Lord Blackburn lays stress in these words on the expression "basis." In *Attorney-General* v. *Ray* (1874, L.R., 9 Ch. 397), James, L.J., and Mellish, L.J., two great masters of accuracy in legal phraseology, employ the same term to denote what they considered descriptive of what was foundational or essential in the transaction before them. The case was not one in which the expression "basis" occurred in any policy, for it was concerned with a grant of an annuity for life, based on a representation as to age, granted by the Commissioners for the Reduction of the National Debt. Mellish, L.J., none the less, likened the transaction to one of an ordinary contract of life assurance where the representation is made the "basis" or an essential term of the contract, and materiality is consequently irrelevant. I do not think that it matters whether the representation which is made "basic" is as to a state of present fact or to something to be carried out in the future, such as garaging at a particular place. What is important in the latter alternative is that the insured cannot recover unless he can show that he has performed his part, for his performance has been made the condition of performance by the other party.

With these principles of construction in view I turn to the contract before us. As to the fourth of the appended conditions, this, as I have already observed, extends to matters which go beyond in some respects, and are outside in other respects, those dealt with specifically in the proposal form. Moreover, the fourth condition is limited to what is "material to assessing the premium," and I will assume for present purposes that nothing material in this sense was misstated or concealed. If so that fourth condition does not apply. But on the other hand I do not find in the language used in it anything which cuts down or interferes with the effect of the fourth of the answers in the proposal form, if this in itself imports a condition. If it does import by itself a condition, then I think that, as Lord Blackburn laid down in the passage quoted, it imports a condition which must be shown to have been complied with, whether material from an ordinary business standpoint or not. It is clear that the answer was textually inaccurate. I think that the words employed in the body of the policy can only be properly construed as having made its accuracy a condition. The result may be technical and harsh, but if the parties have so stipulated we have no alternative, sitting as a Court of Justice, but to give effect to the words agreed on. Hard cases must not be allowed to make

bad law. Now the proposal—in other words the answers to the questions specifically put in it—are made basic to the contract. It may well be that a mere slip, in a Christian name for instance, would not be held to vitiate the answer given if the answer were really in substance true and unambiguous. *Falsa demonstratio non nocet.* But that is because the truth has been stated in effect within the intention shown by the language used. The misstatement as to the address at which the vehicle would usually be garaged can hardly be brought within this principle of interpretation in construing contracts. It was a specific insurance based on a statement which is made foundational if the parties have chosen, however carelessly, to stipulate that it should be so. Both on principle and in the light of authorities such as those I have already cited, it appears to me that when answers including that in question are declared to be the basis of the contract this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation foundational to its enforceability.

For these reasons I feel myself compelled to assent to the general conclusion arrived at by all the learned Judges in the Court of Session. But for the reasons assigned I prefer the ground taken by the Lord Ordinary and the Lord Justice-Clerk to that on which Lord Dundas and Lord Ormidale rest their reasoning. The former decided the case on the proposal form, the latter on the fourth of the appended conditions. I should accordingly desire, speaking for myself, to vary the language of the interlocutor of the Second Division by assoilzieing the respondents from the petitory conclusions of the summons, but only on the ground of the untrue answer given to the question in the proposal form. As to expenses I should be content to adopt the finding of the Inner House. It would follow that the respondents should have their costs of this appeal.

VISCOUNT CAVE—It is common ground that the proposal for the policy of insurance issued by the respondents to the appellants contained a mis-statement as to the place where the lorry to be insured would usually be garaged, and the only question is whether this mis-statement avoids the policy.

The policy commences with a recital of the proposal (a full copy of which is annexed the policy), and proceeds "which proposal shall be the basis of this contract and be held as incorporated therein." It was faintly contended on behalf of the appellants that this provision did not bind them as it was not contained in the proposal which they signed, but only in the policy which was not signed by them; but this contention appears to me to be wholly untenable. The appellants accepted the policy and sued upon it, and they cannot, while relying upon the policy, repudiate one of its provisions. I therefore put aside this contention and treat the words quoted as a term of the contract.

What, then, does the sentence quoted mean? I cannot think that it amounts to nothing more than a statement that the proposal initiated the transaction and led to the grant of the policy. That fact sufficiently appears from the recital of the proposal and the addition of an express stipulation that the proposal shall be treated as incorporated in the policy and shall be the basis of the contract, is plainly intended to have some further effect. "Basis" is defined in the Imperial Dictionary as "the foundation of a thing, that on which a thing stands or lies"; and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls, and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson* v. *Fitzgerald* (1853, 4 H.L.C. 484) and *Thomson* v. *Weems* (1884, 11 R. (H.L.) 48, 9 App. Cas. 671, 21 S.L.R. 791), in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue the policy should be void, but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that in *Anderson* v. *Fitzgerald* (4 H.L.C. at p. 500) Lord Cranworth referred to the above-mentioned provision as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract, and in *Thomson* v. *Weems* (9 App. Cas. 684) Lord Blackburn said—"But I think when we look at the terms of this contract and see that it is expressly said in the policy as well as in the declaration itself that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . is warranted." Lord Esher, in *Hambrough* v. *Mutual Life Insurance Company of New York* (1895, 72 L.T. at p. 141), uses the word "basis" in the same sense. Upon the whole it appears to me, both on principle and authority, that the meaning and effect of the "basis" clause taken by itself is that any untrue statement in the proposal or any breach of its promissory clauses shall avoid the policy, and if that be the contract of the parties it is fully established by decisions of your Lordships' House that the question of materiality has not to be considered.

But it is contended on behalf of the appellants that the "basis" clause is limited or qualified by the fourth condition on the back of the policy, which is 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."

And it is argued that having regard to this condition a misstatement in the proposal does not avoid the policy unless it is a

material misstatement. I do not take that view. The "basis" clause and the fourth condition do not cover the same grounds The former includes promissory statements. which are apparently not within the condition, and the condition covers misstatements and concealments outside the proposal with which the "basis" clause is not concerned. I think the two clauses are independent and cumulative provisions, each of which must take effect. But even if it be otherwise, and if the effect of the condition is that the policy is only to be made void by misstatements which are material, the result is, I think, the same, for it seems to me impossible for a court to say that statements which the parties themselves have described in the policy as incorporated in and forming the basis of the contract are wholly immaterial to the contract. As Lord Sumner said in *Yorkshire Insurance Company* v. *Campbell* ([1917] A.C. 225), "since the parties have imported this statement into their contract, presumably they thought it material," and this is certainly not less true when they have agreed that the statement shall be the basis of the contract. In these circumstances it appears to me to be irrelevant to consider the conflicting evidence in the case as to whether a misstatement as to the place of garage is in the ordinary sense material or not. The parties have agreed that it shall be deemed material, and that concludes the matter.

I must confess that I have little sympathy with the respondents, who seek to profit by a mistake to which their agent contributed, but the case must be decided according to law, and I think that the law is on their side. I would therefore vary the interlocutor of the Second Division in the manner proposed by the noble and learned Viscount on the Woolsack, the appellants to pay the costs of this appeal.

VISCOUNT FINLAY—[*Read by Lord Dunedin*]—This action was brought by the appellants, the owners of a motor lorry, to recover upon a policy of insurance issued by the respondents as underwriters. The lorry was completely destroyed by fire on the 27th December 1917 in the garage at Dovehill, Newlands, Glasgow.

The respondents raised several defences to the claim. The first was a charge of fraud in the claim. As to this the Lord Ordinary said that the defenders' allegations of a fraudulent claim were not only not proved but had been disproved. The respondents further pleaded that there were misstatements on material matters which vitiated the policy under the fourth of the conditions endorsed thereon. The Lord Ordinary found that this defence had no foundation in fact, and nothing has been said about it on the present appeal.

There remains for consideration only the defence raised in the second answer and in the first and fourth pleas-in-law for the defenders. The second answer contained the following averment:—"In the proposal which is the basis of the policy the following question and answer occur:—'State full address at which vehicles will usually be garaged.'—(A) 'Above address' (which was 46 Cadogan Street, Glasgow). The said answer is untrue and misleading. The information requested and given was of material importance to the defenders in considering the said proposal, and they contracted on the faith that the answer was true. In consequence of its falsehood the policy is void."

The first plea-in-law for the defenders was this—"1. The policy is void because of the untrue answer given to the question in the proposal 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 defenders on a material matter."

The fourth plea-in-law was the following:—"4. The proposal of the pursuers being false and misleading with reference to the place where the motor car insured would be garaged, the defenders are entitled to absolvitor."

The appellants are contractors who used motor vehicles in the course of their business, one of them being the motor lorry in respect of which this action is brought. They had an office and warehouse used for storing furniture at 46 Cadogan Street, Glasgow. The respondents are a group of underwriters at Lloyd's, who issue what are known as the "Premier" policy. One of their agents was Mr Thomas Miller Hamilton, who is an insurance broker carrying on business in Glasgow. He called on the appellants at their office, 46 Cadogan Street, with a view to getting the appellants to insure with his clients, the respondents. Mr Hamilton then and there filled up the proposal form, as he said, on information given by Mr Maxwell, the appellants' secretary. Mr Maxwell initialled the proposal as filled up by Mr Hamilton. It contained the following:—"1. Proposer's name—*Dawsons Ltd.* 2. Proposer's address—46 *Cadogan Street, Glasgow.* . . . 4. State full address at which the vehicles will usually be garaged—*Above address.* . . . 9. In what district will the vehicles be used—*Glasgow and district.*" The lorry in question was in fact never garaged at 46 Cadogan Street. Mr Hamilton says that he must have got the information as to the place of garage from Mr Maxwell, the appellants' secretary. Mr Maxwell denies this, and taking the evidence of both Mr Hamilton and Mr Maxwell together it is, I think, clear that the answer to the effect that the vehicle would usually be garaged at 46 Cadogan Street was the result of a blunder on the part of Mr Hamilton himself and was not based on information from the respondents. Mr Maxwell, however, failed to detect the blunder so made by Mr Hamilton, and signed the application which had been filled up by him. The fact remains that Mr Maxwell made the proposal in this form, and that his company accepted the policy which incorporated the proposal and insurance. The defenders contend that the mistake in the answer as to the garage forms a good defence to the action, and its validity must of course be decided on legal principles. No defence has been pleaded raising any ques-

tion how far the respondents can take advantage of a mistake in the answer for which their agent was primarily responsible, and the question whether this mistake in the proposal vitiated the policy must be decided simply on grounds of law and on the pleadings. The proposal form contained a description of the vehicle to be insured and the answers to which I have already referred. The policy itself recites the proposal and says that it is to "be the basis of the contract and be held as incorporated herein." The underwriters bound themselves to indemnify the assured subject to the conditions on the back as against certain perils, including loss by fire. The fourth of the conditions on the back is this—"4. Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void."

It was urged on behalf of the respondents that the statement of the usual place of garage was a warranty in the sense in which that term is used with reference to contracts of insurance, and that if it was not correct the action must fail whether the statement was material or not in itself. The Lord Ordinary held that this statement was such a warranty, and in his interlocutor of the 15th July 1920 found that the policy "is void because of the untrue answer given to the question in the proposal." On appeal the Second Division also decided in favour of the underwriters, the respondents, on the present appeal, but on grounds entirely different from that on which the Lord Ordinary had proceeded. They held that the fourth condition endorsed on the policy applied, and that the policy was void because the answer on the proposal form contained a material misstatement by the assured of circumstances material to assessing the premium on the policy.

I agree with the Second Division that the case is governed by the fourth of the endorsed conditions. I am unable to agree with them in the view that the statement as to the garage was material to assessing the premium on the policy, and if I am right in this view it will follow that the appeal should be allowed and judgment entered for the appellants.

I am wholly unable to adopt the view on which the Lord Ordinary proceeded that the clause amounted to a warranty. The expression "warranty" imports that a particular state of facts in the present or in the future is a term of the contract, and further, that if the warranty is not made good the contract of insurance is void. It is not necessary that the term "warranty" should be used, as any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality of the facts in themselves is irrelevant. By contract their existence is made a condition of the contract. But if the language used is not clear the materiality or immateriality of the facts said to be warranted may be an element in arriving at a conclusion on the question whether the language used should be construed as constituting a warranty.

In the present case it appears to me that the evidence establishes that the statement as to the garage was not material to the present insurance. In the case of an ordinary policy covering a motor against fire risk the question of the garage might be very material. Its structure and locality might affect the chances of fire or the chance of fire being extinguished if it should break out, but as to the present policy the evidence of the pursuers' witnesses Olden, Stuart, and Ballantyne is quite distinct that the risk of fire in the garage is so insignificant in comparison with the other risks insured, which are those of the road, including fire on the road which might result from self-ignition, that it is ignored in fixing the premium. It is true that the evidence of the defenders, upon whom lay the *onus probandi*, had been taken before the evidence for the pursuers, and it is said—and I think with justice—that the cross-examination of the defenders' witnesses on this point was insufficient. The defenders, however, did not object on this ground to the reception of the pursuers' evidence on this point, and further, the defenders if they had been in a position to controvert the pursuers' evidence might have applied to be allowed to adduce evidence on the point which had been so clearly developed in the evidence of the pursuers' witnesses. They made no such application, and for this there can be only one reason, namely, that they were not in a position to controvert the truth of the evidence given by the pursuers' experts. We must therefore take the evidence as it stands, with the result that there is no contradiction of the pursuers' evidence on this point.

If the risk of fire in the garage did not affect the premium it could not be material. It would require clear language in the policy to establish that a statement on an immaterial point of this nature had been made a condition of the policy by warranty. The very usual clause making the truth of the answers in the proposal a condition of the policy so that it is void if they are in any respect untrue does not occur in the present policy, and the fact that such a clause is usual cannot be ignored in determining whether a policy in which it is absent amounts to a warranty.

The respondents are therefore driven to rely solely upon the clause in the policy that the proposal should be the basis of the contract and be held as incorporated therein. This clause appears to me to be inadequate to support the conclusion which the respondents desire to draw from it. The proposal is no doubt the basis of the contract of insurance in the sense that it initiated the transaction and that in response to it the insurance was granted. But this does not in the least involve the proposition that any inaccuracy on any point in any of the answers, however immaterial, would be fatal to the policy. If the statement were material to the risk it might be another matter altogether. The policy is put for-

ward by the underwriters, and it must be construed *contra proferentes*. If its effect is ambiguous it must be read in favour of the assured.

The existence of the fourth condition endorsed on the policy tends strongly to show that the answer as to the garage should not be read as a warranty. The fourth condition is one, subject to which the contract of insurance came into existence, and it is an integral part of the contract. On the fair reading of the contract as a whole, including the fourth condition, the inference seems to me irresistible that it was only material mis-statements, whether in the proposal or elsewhere, that were to render the policy void.

A great many authorities were cited in the argument. The most important of them is *Thomson* v. *Weems* (1884, 11 R. (H.L.) 48, 9 App. Cas. 671), 21 S.L.R. 791. In that case the "declaration" was stated to be the basis of the assurance, and it was provided that if anything averred in the declaration should be untrue, the policy should be void and all moneys received by the insurance company in respect thereof should belong to the company. The policy was on life, and in the answers to the questions in the proposal it was stated that the habits of the assured were temperate and had always been so. These answers were false in fact. It was held in the House of Lords that the truth of particulars in the declaration was warranted, and that their untruth, apart from any question of fraud or recklessness, vitiated the policy (p. 684). Lord Watson said (p. 687)—"The question" (as to temperance) "must in my opinion be interpreted according to the ordinary and natural meaning of the words used if that meaning be plain and unequivocal and there be nothing in the context to qualify it. On the other hand if the words used are ambiguous they must be construed *contra proferentes* and in favour of the assured."

In the present case there are no such words as those which formed the ground of decision in the *Weems* case, and I think that the attempt to spell out their equivalent from the terms used in the present policy has not succeeded. The case really falls to be determined on the fourth of the endorsed conditions, and as the misstatement was not material to the question of premium, the appeal in my opinion should be allowed.

LORD DUNEDIN—I have found this case one of difficulty. Had I been able to take the view that was taken of the evidence by the learned Judges of the Court of Session it would have been easy. That view is embodied in the finding—"Find that the policy is void because the answer to the fourth question in the proposal form contains a material misstatement of a circumstance by the insured material to the assessing of the premium under the policy."

I think that the evidence shows that the misstatement was not in fact material to the assessment of the premium. I cannot therefore decide the case upon the ground of the application of the fourth section of the conditions of assurance, which 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." The same view of the evidence disposes of what I may call the common law doctrine in insurance cases as to disclosure of facts material to the risk. Nor am I able to say that the series of cases, of which *Weems* may be taken as a type, enable me to find direct authority. In each of these cases—they are cited by the Lord Ordinary in his opinion—there was either a statement signed by the proposer that his answers to the questions put to him were true, and that he warranted them to be true, or there was a clause in the policy that if any of the statements were untrue the policy was to be void.

Was then the statement as to the usual place of garage material? I pointed out in the case of *Wade* v. *Waldon* (1909 S.C. 571, at p. 576, 46 S.L.R. 359), that there are in contracts certain stipulations which go to the root of the contract, a breach of which entitles the other party to hold the contract at an end; and that there are other stipulations which do not go to the root and only give rise, if broken, to actions of damages. At the same time I quoted Lord Watson, who in his turn quoted the judgment of Lord Blackburn in *Bettini* v. *Gye* (1876, 1 Q.B.D. 183), and pointed out that it was within the power of parties to contract that particular matters, however trivial, might form conditions-precedent. Have the parties so contracted in this case? That raises the pure question, as yet I think undecided, when certain statements are said to be the "basis of the contract and incorporated therewith," is that equivalent to saying that these statements are held to be contractually material?

After much consideration, unwillingly in the circumstances of the case and contrary to my first impression, I have come to the conclusion that it is. I think that "basis" cannot be taken as merely pleonastic and exegetical of the following words—"and incorporated therewith." It must mean that the parties held that these statements are fundamental, *i.e.*, go to the root of the contract, and that consequently if the statements are untrue the contract is not binding. And therefore I come to the same conclusion as has been come to by the noble Viscount (Cave) who has preceded me and for essentially the same reasons.

I ought in justice to the learned Judges of the Court of Session to say that I find that they had proposed to follow what Lord Sumner said in the *Yorkshire Insurance* case ([1917] A.C. 218), but by the finding quoted they put the judgment on the other ground. I am of the opinion that the appeal must be dismissed with the variation proposed.

LORD WRENBURY—I make two preliminary observations upon the fourth question in the proposal. First, the appellants have argued that the purpose of that question—"State full address at which the vehicles

will usually be garaged"—is to fix the area for rating purposes, *i.e.*, for the purpose of determining the rate under which the risk will fall, that the relevance of the answer lies in the word "Glasgow," and that no discrimination is to be made as between Dovehill Farm and Cadogan Street. That argument overlooks the ninth question—"In what district will the vehicles be used?" The answer to that question will determine the area. The purpose of the fourth question must be some purpose other than that. Secondly, the fourth question is directed solely to the situation and not to the construction of the garage. The second question asked for the proposer's address. The fourth asked for what may be called the car's address. It made no inquiry whether the building of the garage would be of stone, brick, iron, wood, or any other material. There is no question anywhere in the proposal form as to construction. At most it asked information which would enable the intending insurers to visit the building and see what its construction was.

With this premiss I turn to consider the contract. It may be described as consisting of three parts. The first part consists of the proposal. This is a document signed by the intending assured but not by the intending insurers. It contains no words such as there were in *Thomson* v. *Weems* (1884, 11 R. (H.L.) 48, 9 App. Cas. 671, 21 S.L.R. 791), and in *Yorkshire Insurance Company* v. *Campbell* ([1917] A.C. 218) expressive that the intending assured declares or vouches or warrants that the statements contained in it are true. It is a document whereby the proposer makes certain statements of fact, and if those statements are inaccurate or misleading the proper consequences will follow which result from misstatement made in inducing a contract. In order to see what these are in this case it is necessary to look further. The second part consists of the operative body of the policy consisting of recital and operative words of obligation. By way of recital this document states that the proposer has made a proposal which is to be "held as incorporated herein." As this proposal was a unilateral document signed by the proposer only, it can be incorporated only by way of recital. When I have incorporated it I find only that the policy says that the proposer had made certain statements, and so he had. As further part of the recital under review the document runs—"which proposal shall be the basis of this contract." The whole effect of these words I think is to state that the proposal is to be taken to be the initiation and foundation of the contractual relation, and the statements contained in the proposal are to be statements on the faith of which the insurers are prepared to contract. The statements in the proposal are thus made material. I must look at the contract to see what effect is to be given to their materiality. To see what is to ensue if any of them are inaccurate I have therefore still to look further.

If a contract is induced by misrepresentation, the misrepresentation does not necessarily render the contract void. It may render the contract voidable at the instance of the contracting party who proves that he was misled. This differs *toto cœlo* from a case in which the contract itself provides that if a certain alleged fact is not true the contract shall be void. In that case the contract becomes contractually void, because the contract itself provides that in that event it shall be void. In the former case the contract remains an operative obligation, but one from which the party misled may be in a position to relieve himself because he cannot be held to a contract which was tainted at its source.

The question here is what was in this case the position of the insurers in this respect. This brings me to the third part of the contract, viz., the "conditions of insurance." By the operative words of the policy the obligation of the insurers is "subject to the conditions on the back hereof, the due observance of which is a condition-precedent to all liability of the underwriters hereunder." The fourth condition is "Material misstatements 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." As matter of construction I hold that this means "material misstatement, by which I mean misstatement material to assessing the premium." Further, I think that the sentence is a pregnant sentence, and by providing that certain statements shall render the policy void it intends that those and only those misstatements shall render the policy void, thus excluding a construction which would give to other statements the effect of a warranty. Misstatements not material to assessing the premium are not to render the policy contractually void, but their effect is to be determined by the considerations relevant to misstatement as distinguished from warranty.

This being my view of the contract I turn to the evidence. I am satisfied by the evidence of Olden, Stewart, and Ballantyne that the question whether the car is to be garaged in a building of brick, stone, or wood makes no difference in assessing the premium. The risk of fire (including both risk on the road and risk in the garage) carries a very small proportion, say 5 per cent., of the premium; and fire risk on the road is so much greater than fire risk in the garage that the latter is negligible, and in point of fact the construction of the garage is not taken into account at all in assessing the premium. Assuming that there was a misstatement as to construction of the garage, this was not within condition four a misstatement material to assessing the premium. Further, there was no misstatement at all as to the construction of the garage. There was no statement about it. None was asked for. Neither under the condition nor under the general law as to misstatement therefore can the insurers avoid the contract.

I have the more satisfaction in arriving at this conclusion because I can have no doubt that the insurers attributed no importance at all to this question of construction — that at most they asked for and

obtained information as to locality of which they might have availed themselves if they attributed importance to construction, but that they never did so. And further, looking at Hamilton's evidence in the record and Maxwell's evidence, it is plain that it was not Maxwell, the secretary of the assured, who introduced into the proposal the words "above address." Indeed Maxwell did not know they were there, and would not have signed if he had known. It was Hamilton, the broker of the insurers, who was seeking to obtain the contract, who wrote the words "above address," and by the words "supposing he did" (*i.e.*, supposing Maxwell said something to the effect "We garage our own cars") it is plain, I think, that Hamilton was not prepared to say, and could not truthfully say, that Maxwell made the representation upon which all the edifice of an alleged statement that the car would be garaged in a stone or brick building and not in a wooden building is founded.

In my opinion the resistance of the insuring office who have taken the premium to satisfy the claim of the assured upon his policy is neither creditable nor capable of being sustained. I think the assured is entitled to succeed on this appeal.

Their Lordships ordered that the interlocutor appealed from be varied by omitting the first finding [that the answer to the fourth question contained a misstatement material to assessing the premium], and restoring the second finding of the Lord Ordinary [that the policy was void because of the untrue answer to the fourth question], and with this variation affirmed the interlocutor with costs against the appellants.

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COURT OF SESSION.

Saturday, June 24.

FIRST DIVISION.

[Exchequer Cause.

LARGO AND LUNDIN LINKS GAS COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue — Income Tax — Lands and Heritages — "Mills, Factories, and Similar Premises" — Annual Value — Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Nos. I and III of Schedule A — Finance Act* 1919 (9 *and* 10 *Geo. V, cap.* 32), *sec.* 18 (2) *and* (3).

Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918 provides as follows:—"In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments, or heritages, the annual value shall be understood to be the profits of the preceding year." Section 18, subsections (2) and (3) of the Finance Act 1919 (9 and 10 Geo. V, cap. 32), provides, *inter alia*—"(2) In estimating the profits for any year of any of the concerns enumerated in Rules 1, 2, and 3 of No. III of the rules applicable to Schedule A, there shall be allowed to be deducted as expenses incurred in any year, on account of any mills, factories, or similar premises owned by the person carrying on the concern and occupied by him for the purposes of such concern, a deduction equal to one-sixth of the annual value of those premises. (3) Annual value for the purposes of this section shall be estimated according to the principles governing the estimation of the annual value for the purposes of Schedule A of mills, factories, and similar premises in the United Kingdom."

Opinions per curiam that the annual value mentioned in the above section is to be estimated according to the principles which apply to ordinary lands or heritages occupied as a mill or a factory under No. I of Schedule A, *i.e.*, the estimation is based on the rent, actual or valued, and not on the principles which govern the estimation of the annual value of the special and peculiar concerns enumerated in Rules 1, 2, and 3 of No. III of Schedule A.

Opinion reserved per Lord Cullen as to the method of valuation where the whole concern as distinguished from a part fell to be regarded as embracing nothing but mills or factories or similar premises.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40) enacts—"First Schedule. Schedule A. No. I.—*General Rule for estimating the annual value of lands, tenements, hereditaments or heritages.*—In the case of all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this Schedule), the annual value shall be understood to be—(1) The amount of the rent by the year at which they are let, if they are let at rack-rent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment; or (2) If they are not let at a rack-rent so fixed, then the rack-rent at which they are worth to be let by the year. . . . No. III.—*Rules for estimating the annual value of certain other lands, tene-*