aliment at the rate agreed on, and if he withholds this aliment which enables the wife to procure board and lodging, he is in the position of breaking the implied contract between his wife and the person with whom she is living. I have no doubt that there was here an implied contract that payment was to be made for the board and lodging furnished by the pursuer to the defender's wife.

There is a peculiarity in the case which, however, only at first sight seems to create a difficulty. That peculiarity is the fact that after the separation there was another arrangement made by which the wife agreed that her husband should be entitled to pay out of the sum allowed her for aliment the debts she had incurred since the separation. But that did not absolve the husband from paying the aliment, for payment of these debts was payment of the aliment. It was not contemplated that the whole of the aliment was to be applied in payment of the debts, but only so much at a time; that is what I consider the only reasonable construction of the agreement. As it has happened, however, none of the debts have been paid by the husband, so that there is no deduction to be made from the sum of 15s. per week, the whole of which is due from the date of the separation down to the present. Therefore what is apparently a peculiarity really disappears, and on the merits I have not a word to say that has not been anticipated by the Sheriff-Substitute in his remarkably well considered and well reasoned judgment.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court refused the appeal.

Counsel for Pursuer (Respondent) — Lang. Agents—Smith & Mason, S.S.C.
Counsel for Defender (Appellant) — Ure. Agents—Dove & Lockhart, S.S.C.

Wednesday, March 5.

SECOND DIVISION.

[Lord Fraser, Ordinary.

J. & W. WEEMS AND OTHERS *v.* STANDARD LIFE INSURANCE COMPANY.

Insurance—Life Insurance—Misrepresentation of Material Fact—Truth of Answers to Queries by Company.

A person insured his life with an insurance company, making a declaration relative to the policy that the statements made by him in answer to the queries in the form of proposal were true, which declaration was to be the basis of the contract between him and the insurance company. Two of the queries were—"(1) Are you temperate in your habits? and (2) Have you always been so?" Answers—"(1) Temperate; (2) Yes." The policy provided "that if anything averred in the declaration shall be untrue, this policy shall be void, and all monies received by the company in respect thereof shall belong to the company for their own benefit." In an action on the policy, raised after the death of the insured, the insurance company resisted payment on the grounds that the answers to the queries were false—the truth being that the insured was intemperate, and died of the effects of drinking. *Held*, on a proof, which established that the insured had been in the habit of using intoxicating drink, and occasionally to excess (*diss.* Lord Rutherfurd Clark), that the evidence did not warrant the conclusion that the answers were false so as to void the policy.

Opinion (*per* Lord Rutherfurd Clark) that where an answer to a query, material to the risk, is proved to have been untrue, it will void the policy, whether the untruth be due to conscious dishonesty or to mere heedlessness.

This was an action on a policy of life assurance executed on 25th November 1881 for £1500 by the Standard Life Assurance Company on the life of William Weems, Provost of Johnstone, who died on 29th July 1882. The action was for payment of that sum, and was at the instance of J. & W. Weems, the firm to which the insured belonged, and for behoof of which the policy was entered into, and Alexander Wylie, his surviving partner, and Robert Reid, to whom the policy had been assigned in the assured's lifetime by bond and assignation in security. The defenders resisted payment on the ground that the statements made by Weems in his answers to the printed questions contained in the form of proposal submitted by him to the company, and with reference to which he had signed a declaration that they were true, which declaration was declared to be the basis of the insurance, were false in material points. The policy contained a provision that "if anything averred in the declaration . . . shall be untrue, this policy shall be void." The particular questions founded on, and the corresponding answers, were:—

"5. For what disease or diseases since those of childhood have you required medical assistance? State also when and where you required such advice. Answer—None.

"7. (1) Are you temperate in your habits, and (2) Have you always been strictly so? Answer—(1) Temperate; (2) Yes.

"12. State any other circumstances connected with your health, habits, occupation, family history, or otherwise, which ought to be communicated in order to enable the company to judge fairly of the risk of an assurance on your life? Answer—None I know of.

"14. Name and residence of ordinary medical attendant, and how long known to him, for reference as to present and general health and habits.....

"Name any other medical gentleman whose advice has been sought; and state for what complaints and when his services were required.....

"(If you have received no medical advice, you will state so). Answer—No medical advice."

The declaration appended to the form of the proposal was signed by Weems, and was as follows:—"I, the said William Weems (the person whose life is proposed to be assured), do hereby declare that I am at present in good health, not being afflicted with any disease or disorder tending to shorten life; that the foregoing statements of my age, health, and other particulars

are true; that I have answered truly the above questions as to any prospect or intention I may have of proceeding or residing beyond the limits of Europe; that I have concealed no circumstance connected with the probability of my proceeding beyond such limits at any future period; and that I have not withheld any circumstance tending to render an assurance on my life more than usually hazardous. And I, the said William Weems (the person in whose favour the assurance is to be granted), do hereby agree that this declaration shall be the basis of the contract between me and the Standard Life Assurance Company; and that if any untrue averment has been made, or any information necessary to be made known to the company has been withheld, all sums which shall have been paid to the said company upon account of the assurance made in consequence thereof shall be forfeited, and the assurance be absolutely null and void. Signed at Johnstone this ninth day of November in the year of our Lord one thousand eight hundred and eighty-one.—WILLIAM WEEMS."

The defenders averred—"The statements made by William Weems were, at the time of their being made, and to his knowledge, false. In point of fact he was at that time a person of intemperate habits, and he had been so for some time. His health was affected by said habits. His death, which occurred shortly after, was the result of them. In point of fact also he had been, for the last two or three years preceding the date of the said declaration, in the habit of being attended constantly by Doctor Colligan of Johnstone, as medical adviser, on account of the disturbance of his health." They also averred that the false statements of the insured were made knowingly and fraudulently in order to conceal the risk, and to induce them to accept the risk and issue a policy which otherwise they would not have done.

They pleaded—"(1) The statements, or some of them, in said declaration, having been untrue, the policy is void, in terms of the stipulation therein contained. (2) The said William Weems having concealed circumstances material to the risk to be undertaken by the proposed assurers, the said policy is void and cannot receive effect. (3) The said William Weems having falsely and fraudulently misrepresented facts connected with the proposed assurance, the policy is void."

Proof was led, the defenders being appointed to lead in the proof, but it will be sufficient to give its import with reference to the 7th question and answer thereto, as during the argument in the Inner House the defenders' case as regards the other questions and answers was withdrawn.

The defenders adduced a number of witnesses, who deponed as follows:—They had seen the insured on various occasions in a state of intoxication, especially on the occasions of parliamentary, municipal, and school board elections, in which he was much interested. On the day of one of the Paisley School Board elections he had to be conveyed home drunk in a cab. It was the habit of the town-councillors to adjourn after their debates to a public-house, there to discuss the subjects of them further, and the insured was sometimes on these occasions intoxicated. Once he had to be assisted home from the public-house by a policeman. In the council-room liquor was sometimes smelt upon him—one witness deponing, however, that this was perhaps twelve times in twelve years—and this failing was sometimes talked of by his friends and brother councillors. Several of these deponed they had remonstrated with him on the subject, and that it was hoped that when appointed Provost of the Burgh of Johnstone he would be induced by this honour to steady himself. The meetings of council were generally held in the evening, but it was also proved that Weems was occasionally observed to be smelling of spirits during the earlier and business hours. The doctor (Dr Taylor) who was in use to examine proposers for the Standard Company stated that he would not have passed him as a good life, as he knew from his appearance and his own observation of his habits that he was not a temperate man, but it appeared that in consequence of a dispute between him and the insured another doctor (Dr Wilson) had examined him for insurance.

The pursuers adduced a number of witnesses who deponed that from long knowledge of the insured they considered him a temperate man, and would have willingly signed a proposal to the Insurance Company to that effect if they had been called upon to do so. They had seen him occasionally affected by drink, chiefly at public dinners and such occasions, and sometimes had smelt drink upon him, but he was of a very excitable disposition, and his gesticulation and eagerness in debate might be easily mistaken for the influence of drink. He was very popular in the burgh, and much respected, and had in consequence been raised to the Provostship. It was proved that at times the insured took no drink at all, and at times resumed the habit.

The certificate of death made out by the doctor who attended the insured in the illness from which he died gave the cause of death as *chronic hepatitis* (or inflammation of the liver) of four weeks' duration, and congestion of the brain of four months' duration. The defenders led medical evidence to show that in this climate excessive drinking is by far the most common cause of *hepatitis*; another less frequent cause being exposure to a tropical climate—other causes than the first-named being very rare. Medical men adduced for the pursuers—one of whom had seen the deceased a month before his death, and the other a few days before it—thought him suffering from inflammation of the brain, and from that malady only.

The doctor, Dr Colligan, who granted the certificate of death, had died before this action was raised.

The insurance was effected for business purposes, and, as shown by the dates mentioned above, the insured only lived about eight months after it was effected.

The Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that the now deceased William Weems effected an insurance upon his life with the defenders, conform to policy of assurance dated 25th November 1881, for £1500: Finds that the said William Weems died at Johnstone on 29th July 1882: Finds that before the said assurance was effected the said William Weems subscribed a declaration which contains various statements made by him as to his state of health and as to his habits: Finds that it was a condition of the policy that if anything averred in the declaration should be untrue the policy should be void: Finds that the said William Weems did not make any untrue statements in

said declaration, and that therefore the policy is not void: Therefore decerns against the defenders as concluded for in the summons.

"*Judgment.*—The Standard Assurance Company resist payment of the sum of £1500 contained in the policy of insurance on the life of William Weems, on the ground that the statements in the declaration made by him at the time when the policy was effected were untrue. The statements which are challenged are, 1st, that he had not required medical assistance since childhood; 2d, that he was always temperate in his habits; and 3d, that he had no ordinary medical attendant. As regards the first of these, the Lord Ordinary is of opinion that it is not proved, as he is also as regards the third, viz., that he had no medical attendant—in the proper sense of the term — until a fortnight before his death, and therefore that the representation which he made on these heads was a true representation. It is true that he did obtain from Dr Colligan a prescription on 16th January 1880, which might have been intended to cure a digestive disarrangement, and this prescription he appears to have used once or twice afterwards. This is not the kind of medical assistance for the cure of disease that the question and answer are pointed at. In the words of Dr Wilson, he was 'a sound healthy person' till he contracted the disease of which he died.

"In reference to a second representation, viz., that his habits were always temperate, it is necessary to ascertain exactly what is the meaning of the word here employed. The representation is made in answer to a question. The contract between the assurance company and the assured is carried on in a colloquy, and the word 'temperate' must be interpreted according to what must have been the intention of the parties with reference to the nature of the contract they were entering into. The *onus probandi* is upon the assurance company, and accordingly they were appointed to lead in the proof; and the question now is, whether they have satisfied that *onus?* The answer given by the assured that he was temperate does not mean total abstinence. The majority of people are held to be sober living though they use a moderate quantity daily of wine or spirits. It is only when the use of these stimulants is carried to excess that the person becomes intemperate. Nay, even an exceptional indulgence in drink will not, within the meaning of a contract of assurance, prove that the assured had assumed a false character in claiming to be temperate. The point here is as to the habits of the assured, not as to exceptional outbursts of indulgence. There are very few cases in the books dealing with the construction of such a condition in a policy of insurance. The case of the *Scottish Equitable Life Assurance Society* v. *Buist and Others*, July 13, 1877, 4 R. 1076, throws very little light upon the subject, it being clearly proved that there was in that case, as expressed by the Lord President, 'gross and deliberate fraud.' A case was heard before the Supreme Court of the United States in April 1882—*Knickerbocker Life Assurance Company of New York* v. *Foley*, 26 Albany Law Journal, 70, which is more to the point. The rubric is as follows:—'An occasional use of intoxicating drinks will not render a man one of intemperate habits so as to avoid a life insurance policy, in the application for which he was warranted as of temperate habits; nor will an exceptional case of excess, even although resulting in *delirium tremens*.' The law here stated is that which the Lord Ordinary adopts, and which he has endeavoured to apply to his present judgment.

"There is a great deal of evidence on both sides, and it is very difficult to strike the balance. William Weems, the assured, was a man who was very much liked in the town of Johnstone. He was energetic and intelligent; he busied himself with public affairs for years, so that his fellow citizens elected him at last to be Provost of Johnstone, which office he held at the time of his death; and his funeral was marked by a display of public respect somewhat unusual, the whole shops in the town (except one) being closed, as were all the shops in Paisley along the route which the funeral procession took. It is proved that he was a very excitable man, and that persons often mistook this display of excitement, when engaged in debate, as having its origin in drink. It is also proved that he abstained altogether for weeks and months; but it cannot be said that he was an abstainer. During the twelve years that he was in the council, he and other councillors, after a meeting of council, or of committees of council in the evening, frequently adjourned to a public-house to continue the debate upon the subject that had occupied their attention; and these sittings were sometimes prolonged. If Jonathan Willis, an ex-policeman who himself was dismissed from the police for drunkenness, could be believed, he twice helped the assured home, after leaving the public-house in a state of intoxication. But the chief occasions on which the assured indulged to excess were when there were parliamentary, municipal, and school board elections. In all these he took a keen interest, and was an active canvasser. His friends remonstrated with him frequently about this, telling him that he made himself too cheap with the electors by treating them as he did for the purpose of obtaining their votes. Undoubtedly on the occasions of elections he did exceed temperate bounds, and was taken home intoxicated in a cab on one occasion from Paisley, where there had been a keenly contested school board election, in which he was greatly interested. It is also proved that during his twelve years' service as a councillor drink was smelt upon him in the council-room; it was seen that he was affected by it in consequence of his irrelevant talkativeness; but this, when probed to the bottom, comes out to be twelve times in the twelve years, or once a-year.

"Now, looking to the nature of the statement which the assurance company here describe to be untrue, and judging it in the light of the opinion of the witnesses from the locality, the Lord Ordinary cannot come to the conclusion that it was untrue within the meaning of the policy. The whole of the witnesses for the pursuers, and several witnesses for the defence, while they state that Weems was not a total abstainer, pronounce him to have been a moderate drinker, which in their apprehension is equivalent to saying that he was temperate. His habits of going to the public-house after the council meetings was the habit also of his fellow councillors; and it would seriously interfere with the business of the assurance company amongst that class if the

policy in such a case as this were forfeited. All these other insured councillors were intemperate, and had policies liable to challenge if Mr Weems' was so. The difficulty in the case is to fix a standard by which a man's temperance or intemperance can be measured. Much must depend upon temperament and upon the manners and customs of the place where the assured was resident. What in one man would be moderation would in another be excess. One man takes a glass of wine to luncheon, and another takes whisky and water, and both smell of alcohol more or less; but they are not on this account, except in the eye of total abstainers, intemperate. In the balanced state of the evidence, the *onus* being upon the defenders, the Lord Ordinary cannot take upon himself the responsibility of setting this policy aside. All the witnesses, with the exception of Dr Taylor and the two Edwards, father and son, appeared to the Lord Ordinary to be equally reliable, and it is just because the evidence on both sides is so honest and reliable that the Lord Ordinary has felt so much difficulty in coming to a conclusion in regard to it. There are exceptions as to the witnesses. Dr Taylor and Weems had a quarrel —the only one apparently that Weems ever had —which resulted in estrangement, and which Dr Taylor showed with questionable taste in keeping his shop open while all the other shops in Johnstone were closed on the funeral day. As regards George Edward, he had been dismissed from the service of the assured in 1879, and did not impress the Lord Ordinary favourably; and his son Thomas Edward is contradicted in a material point by the pursuer Wylie. But even making these deductions, there is a formidable amount of evidence in favour of the defenders' case. The Lord Ordinary does not underestimate it. The company having that evidence in their possession it is not surprising that they took the somewhat unusual step of contesting their liability. There is one feature of the case on which one gladly dwells. There is no ground for imputing fraud. The assured did not consider himself an intemperate man, no more than any of the other councillors who adjourned after a council meeting to continue their debates at a public-house. Mr Reid, the agent for the assurance company, who knew Weems intimately, judged him in the same way. He was aware of the usual tenor of his life and of his occasional excesses. But he measured him by the standard of the people around him, and he took the risk, believing him to be, according to insurance law and practice, nothing more than a moderate drinker, and therefore a temperate man. The case comes within the rule laid down by the Supreme Courts of the United States, and is outwith that other case exemplified in the *Scottish Equitable Life Assurance Society* v. *Buist*, where there was wilful untruth. Although the case, therefore, is one of difficulty in estimating the value of the evidence, the Lord Ordinary must come to the conclusion that the policy here is not forfeited; and the usual result must follow, that the expenses must be paid by the losing side."

The defenders reclaimed, and argued—In effecting policies of life assurance, insurance companies rely on the queries contained in the "proposal" forming part of the declaration as deterrents against persons insuring their lives who have not got a clean record as to their habits. The queries are queries on points as regards which these persons have a knowledge of their own. These queries must, then, be truly answered, and if they are proved to be the reverse, then the basis of the contract fails. In *Anderson* v. *Fitzgerald*, June 30, 1853, 4 H. of L. Cases, 484, a declaration such as the insured made here, as regards the truth of his answers to the queries in the "proposal," was considered as a condition of the contract, the contravention of which voided it. (Baron Parke, *ibidem*, p. 496.) The law being such, the question was whether in point of fact the insured was, as he had declared, "a strictly temperate man." The evidence led by the defenders in the proof was beyond all doubt negative of this, and the policy was therefore void. The following criticisms fell to be made on the Lord Ordinary's note:—(1) The law in the American case which his Lordship adopted could not be taken in its entirety, because when once a person has had *delirium tremens* he disqualifies himself for ever from saying he is a "temperate" man. (2) All through his note his Lordship treated the case as if the question were solely whether the insured was of "temperate" habits, entirely discarding the word "strictly." (3) The proposed introduction of the test of temperament and habits of a neighbourhood was a most dangerous one for the business of insurance offices, and not sound in law. The words must just be construed in their ordinary sense.

The pursuers replied—All that had been proved against the insured was occasional excess, and such (Lord Young in *Scottish Equitable Life Association Society* v. *Buist*, July 13, 1877, 4 R. 1076) did not involve the falsity of the statement by the insured that he was "strictly temperate" to the effect of voiding the policy. But even if more than this had been proved, the insured in answering the query believed that he was a "strictly temperate" man; in other words, he framed his reply according to his own sense of the ordinary meaning of those words—*Life Association of Scotland* v. *Foster*, Jan. 31, 1873, 11 Macph. 351.

At advising—

Lord Young—This is an action upon a policy of life insurance effected on the 25th of November 1881 by the Standard Life Assurance Company on the life of Mr Weems, then Provost of Johnstone. The action is for payment at the instance of the present holders of the policy, the insured himself having died in July 1882. The insurance company resist payment upon the ground that certain answers to the questions propounded to the insured, and with reference to which there is a declaration of the truth of the answers, were false answers. The policy contains a proviso "that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and all monies received by the said company in respect thereof shall belong to the said company, for their own benefit."

The company aver that the answers to four of these questions were untrue, and, in the language of the record, were, at the time of their being made, knowingly and fraudulently made by the

said William Weems in order to conceal the risks attaching to an insurance on his life from the company, and induce them to grant him a policy, which they would not have done had they been aware of the true state of the facts. The questions are first—"5th, For what disease or diseases since those of childhood have you required medical assistance? State also when and where you required such advice?" The answer to that is "None." The seventh question is a double one—"(1) Are you temperate in your habits, and (2) Have you always been strictly so?" The answer to the first is, "Temperate," and to the second, "Yes." The 12th question is—"State any other circumstances connected with health, habits, occupation, family history, or otherwise, which ought to be communicated in order to enable the company to judge fairly of the risk of an insurance on your life?" The answer to that is, "None I know of." The other questions are—"Name and residence of ordinary medical attendant, and how long known to him, for reference as to present and general health and habits. Name any other medical gentleman whose advice has been sought; and state for what complaints and when his services were required? If you have received no medical advice, you will state so." The answer is, "No medical advice." These are the questions and the answers with respect to which the defenders say the statements made, as above recited, by the said William Weems were, at the time of their being made and to his knowledge, false. Apparently all these were insisted in as false answers before the Lord Ordinary; but at your Lordships' bar they were all withdrawn, with the exception of the 7th question and the answers thereto—"Are you temperate in your habits? Have you always been strictly so?" A proof was led, and the Lord Ordinary, as the result, found that it had not been proved that the answers were untrue so as to avoid the policy. As I have already explained, we have only to consider whether or not we have grounds for differing from the Lord Ordinary upon the seventh question—the double question—and the answers to it. My own opinion is, after fully considering the evidence, that it does not warrant the conclusion that the answers were false, so as to avoid the policy. I do not think it necessary, as it would not be useful, to examine the evidenee in detail. It was brought before us by all the counsel in detail—not in too great detail, but very fully brought before us—all the prominent parts of it being repeatedly urged upon our attention. I think it sufficient to say, as the result of the whole of it, that I agree in the verdict of the Lord Ordinary, that it has not been established that the answers to those questions were false. Regard must be had to the nature of the question which was asked. It is an appeal to the man for his own character with respect to sobriety—"Are you temperate in your habits? Have you always been strictly so?" Both branches of that question involve matter of opinion, involving the use of language more or less vague, and as to the use of which there is great difficulty or various opinion. Taking that in connection with the fact that it is an appeal to the man himself as to the epithets which he would apply to himself with respect to his habits, I say, that I cannot, upon the evidence submitted to us, say that his answers were false. Nor do I think it would be useful to lay down any general propositions in point of law as to the necessity of proving falsehood to the knowledge of the party, or fraud and dishonesty to him in making his answers. There are many cases in which I could not be satisfied with any testimony short of evidence which showed that the answers were false to the knowledge of the party, and that he was acting fraudulently. There are also cases which I can figure in which that might not be required. It is really a jury question of fact, and I think the safest and a sufficient mode of dealing with the question is to give a verdict upon it as a jury would do—to say whether we are satisfied or not that the answers in a particular case were false within the meaning of that proviso of the policy—that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void. In one of the cases which were referred to—*The Scottish Equitable Company's* case (4 R. 1076)—I was the Lord Ordinary, and I expressed some general views which I then entertained, and which I still entertain, upon the law applicable to this matter. I refer to that, possibly with the more satisfaction, because entertaining those views in that case, they have, I think, got undoubted support by the conclusions at which I have arrived here. Entertaining these views, I arrived at an opposite conclusion in that case, which was the case of a man who had repeated attacks of *delirium tremens;* and the evidence was, I may say, of a very markedly different character from any which we have here.

I do not think I can usefully dwell on the grounds which, after listening to the able argument addressed to us from both sides of the bar, have led me to the conclusion that the judgment of the Lord Ordinary is right.

Lord Craighill—I concur with Lord Young, and have nothing to add in explanation of my views.

Lord Rutherfurd Clark—I have come to be of opinion, with reluctance and distrust, that this policy of insurance is void—with reluctance, because I regret to say anything against the memory of one who deservedly held so high a place in the esteem of his fellow-townsmen; with distrust, because I know that I stand alone in the opinion which I have formed in this case.

The company, before issuing the policy, tendered to the proposer a number of questions which were answered by him. He declared that his answers were true, and agreed that this declaration should be the basis of the policy. In the policy itself it is conditioned that if anything averred in the declaration shall be untrue the policy shall be void:

In his answer to the questions tendered by the company, the proposer said—1st, that he was temperate in his habits; and 2d, that he had always been strictly so.

The company plead that the policy is void, because this statement was untrue, and further, that it was not honestly, or, to put it more mildly, not justifiably made. If the question related to a fact that must be within the knowledge of the proposer, there can, I think, be no doubt that if it was untruly answered the policy would be void.

But it is said that in this case the question involves a matter of opinion or belief rather than of simple fact, and it is urged that if the answer, though untrue, was honestly given, the policy is not vitiated. I do not pause to inquire how far the honesty of the proposer may protect a policy against an erroneous answer. It is not necessary. It is plain that in this case the answer related to a point material to the risk which the proposer knew more than anyone else could know. His knowledge and conscience were appealed to. He was bound to answer the question to the best of his belief, and to the best of his knowledge. So much cannot be disputed. But it is to my mind just as evident that he will fail in the discharge of this obligation if he is heedless, as well as if he was consciously dishonest. He is no more entitled to give an unreflecting than a dishonest answer. Therefore, in my opinion, if the answer be untrue from the one cause or the other the policy is void.

I do not examine the evidence in detail. It is sufficient for me to say that after a very careful consideration of it I cannot hold that the deceased was a temperate man. I do not speak of occasional excess but of his habits; the impression that is left on my mind is that he habitually took more drink than was good for him. So much was this the case, that his failing was the subject of regretful conversation amongst his friends. More than one went so far as to expostulate with him. He was too good and generous a man to be offended, but he did not repel the imputation. There is evidence that from time to time he made an effort to reform by abstaining wholly from drink. But it was never lasting.

It has been urged that his friends meant nothing more than to represent to him that he drank at places which were not fitting for a man in his position to be in. I cannot so read their evidence. I think they were trying to induce him to shake off the habits of intemperance which, to their great sorrow, were gaining upon him.

Nor, with this evidence before me, can I think that the deceased was justified in saying that he was and had always been of temperate habits. His friends had remonstrated with him for his excess. He had submitted to their reproof, and had in so doing acknowledged its justice. He could not conscientiously say that he had always been temperate in the face of such warnings and admonitions. If he had reflected for a moment when he answered the questions which were put to him, he could not but see that his answers were untrue.

I do not wish to say anything against the deceased which I can avoid, or to charge him with dishonesty. I would rather attribute his conduct to want of due consideration. Probably at the time he did not see the obligation he was under to the company in framing his answers. But if they were untrue they avoid the policy, whether their untruth was due to dishonesty or to heedlessness. In neither case could they be honestly or justifiably given.

I therefore think the defenders should be assoilzied.

Lord Justice-Clerk — I concur with the Lord Ordinary and with Lords Young and Craighill. I do not think it necessary to go into the grounds on which their opinions rest. If I had thought that the answers which were given were not given in good faith, I should have adopted the opinion that Lord Rutherfurd Clark has expressed. But I am perfectly satisfied that there was no fraudulent intention on the part of the assured here, but that he believed he might fairly characterise his habits in the way in which he did. That is a matter for more or less of difference of opinion. It is not a matter of fact, because it depends on the standard of temperance you are to adopt, or the question whether the epithet "temperate" is or is not to be applied to the habits of a particular person. If, therefore, the answer was given in good faith, I am of opinion that a general answer of that kind, on a matter on which persons may hold a different opinion, will not justify the insurance company in endeavouring to annul a policy after the death of the assured.

That this man was a convivial man there can be no question. He was very often the worse of drink beyond all question. On the other hand, he was not only a man who went about his daily avocations with perfect power, but he was a man who was in great estimation in the opinion of his fellow-men. And I attribute a great deal of importance in a question of good faith to that element, because undoubtedly the community of Johnstone must have known his habits perfectly well; and I do not think that a person who attained that position in the opinion of his fellow-men and became head of the municipality of that town can be properly said to have been intemperate in his habits. It is plain also that the insurance company might have gone on receiving premiums for twenty years and then turned round at the end of the time and endeavoured to set aside the policy on the ground that when it was entered into the assured was of such habits as are here alleged, if the company's contention were to be upheld. I have no favour for that kind of question. If there is fraud—clear dishonesty—in the answer to the question, it is quite right that that should be exposed, and the policy set aside, as it was obtained by fraudulent means. There being no case of that kind suggested here, I agree with the Lord Ordinary's opinion, and with the observations which have been made in support of it.

The Court adhered.

Counsel for Pursuers — Mackintosh — James Reid. Agent—John Macpherson, W.S.

Counsel for Defenders—J. P. B. Robertson—Graham Murray. Agent—Alex. F. Russell, C.S.

Wednesday, March 5.

SECOND DIVISION.

[Sheriff of Invernesshire.

DUNBAR *v.* MACADAM.

Process —[Sheriff — Appeal—No Appearance for Respondent.

Held (following *Alder* v. *Clark*, July 8, 1880, 7 R. 1093, 17 S.L.R. 740) that in appeals from the Sheriff Court, where the respondent does not appear to support the judgment in his