

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 Rutherford 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 *Aldery 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

favour, the Court will not on that ground sustain the appeal, but will call on the appellant to show cause why the judgment should be altered.

In this action of filiation and aliment the Sheriff-Substitute (MACLEOD SMITH) decreed in favour of the pursuer. On appeal the Sheriff (IVORR) recalled the interlocutor, finding that the pursuer had failed to prove that the defender was the father of her child. She appealed to the Second Division of the Court of Session. On the case being called no appearance was made for the respondent. Counsel for the appellant having argued the case on the merits.

At advising—

The LORD JUSTICE-CLERK delivered the following opinion of the Court:—On the merits of the case we do not differ from the Sheriff, because we are of opinion that there is no corroboration whatever of the pursuer's story. The case, however, involves the question whether, as the respondent has failed to appear, our judgment should not go out by default without the appellant being called upon to establish her case. We have looked into the authorities, and there are two in this Division, the first of which is the case of *Stewart v. Stewart*, May 16, 1871, 9 Macph. 740, 43 Scot. Jur. 509, in which it was decided that the proper course to follow was in respect of no appearance of the respondent to sustain the appeal. The second case was that of *Alder v. Clark*, July 8, 1880, 7 R. 1093. In this case the case of *Stewart* was carefully considered, and the result was that this rule was laid down, that in appeals from the Sheriff Court, where the respondent does not appear to support the judgment in his favour, the Court will not on that ground sustain the appeal, but will call on the appellant to show cause why the judgment should be altered. There Lord Ormidale mentioned that the Lord President had informed him in a conversation that that was the practice adopted in the First Division. We have also consulted with the head of the Court, and the result is that we now follow the judgment in that case. The matter, then, may now be considered to be finally set at rest.

We therefore dismiss the appeal and affirm the judgment.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuer and Appellant — Gunn.
Agent—John Fairman, S.S.C.

Wednesday, March 5.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

ROME v. HOPE JOHNSTONE AND OTHERS.

Servitude—Road—Access from Farm to Public Road—Prescriptive Use—Ish and Entry.

A road forming the only access for carts from the public highway to a farm, ran from the farm-steading over the march of the farm and through another property to the highway. For a time beyond the prescriptive period the farm had been tenanted by relatives of the proprietor of the adjoining lands

through which the road ran, and this proprietor was factor for the proprietor of the farm. A purchaser of his lands raised an action against the proprietor and tenants of the farm to interdict them from using the road as being his private property. Forty years' use of the road was proved, and also that the portions of it passing through the pursuer's lands and through the farm had been made at the same time for the purposes of the two estates. The pursuer ascribed the possession to personal privilege conferred by his predecessor on the tenant of the farm on the ground of relationship, but this was not proved. *Held* (1) that a servitude over the road had been established, and (2) that the defenders had, as incident to their property in the farm, right of ish and entry by the road.

The pursuer of this action, James Rome, was proprietor of the lands of Hillhead and St Michael's Walls, otherwise called Old Walls, near Lockerbie in Dumfriesshire. He had acquired these lands in 1879 from the trustees of Charles Stewart, the former proprietor, who died in 1875, and who had been, for about fifty years previous to his death, factor on the Annandale estates, of which the lands of Old Walls originally formed part. The lands of Old Walls were bounded on the north-east by the lands of Newfield belonging to Mr Hope Johnstone of Annandale, and on the west by a public road called the Dryfe Road, leading from Lockerbie. The dwelling-house of Old Walls was reached by a short approach from the Dryfe Road, and this access was continued up to and across the march with Newfield, whence it proceeded to Newfield farm-steading. The farm of Newfield, along with the larger and adjoining farm of Gillenbie, also on the Annandale estate, had been occupied since before the beginning of the present century, first by James Stewart, a brother of Charles Stewart, and afterwards by James Stewart's son, who died in 1882, when the two farms came into the joint occupation of the present tenants James and Hugh Sloan.

This action was raised by Mr Rome against Mr Hope Johnstone, as proprietor, and the Sloans, as tenants of Newfield and Gillenbie, for declarator that the pursuer had the exclusive right to the road above mentioned running from the Dryfe Road through his lands and eastwards over the march to Newfield, and to interdict the defenders from trespassing upon it.

He averred that the road was a private road forming part of his property, and was the main access to his mansion-house; that Charles Stewart, while factor on the Annandale estates, and afterwards as proprietor of Old Walls, had given to his brother and nephew, successive tenants of Newfield and Gillenbie, permission to use the road occasionally for access to and from the Dryfe main road as a personal privilege merely, but their use of it was never exercised in virtue of any right or servitude but merely by tolerance; that the tenants of Newfield and Gillenbie had always resided at the latter farm, and the proper access to Gillenbie, and thence to Newfield, was by a roadway leading to it from another road called the Corrie Road passing on to Newfield; that the road through Old Walls had been constructed and maintained at the sole expense of the pursuer and his predecessors solely for access to the pursuer's lands, and the defenders' authors had never assisted in making or