

Wednesday, June 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.

REID & COMPANY, LIMITED v.
EMPLOYERS ACCIDENT AND
LIVE STOCK INSURANCE COM-
PANY, LIMITED.

*Insurance—Accident—Misrepresentation—
Construction of Provisions in Proposal
and Policy.*

In the proposal for a policy of insurance against claims by third parties for damages in respect of accidents caused by the assured's vehicles and horses, the assured, in answer to the query "Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties?" gave the reply, "3 small claims about 9s. or 10s. each." In fact there had been at least nine claims made upon the assured during that period, in connection with some of which larger sums than 10s. had been paid. By the declaration appended to the proposal and signed by the assured, he declared the statements made therein to be true, and agreed that the proposal and declaration should be the basis of the policy. The proposal and declaration were not incorporated by reference in the policy.

By the policy it was provided that "any fraudulent misdescription in the particulars furnished by the insured shall render this policy void."

Held (diss. Lord Moncreiff) that the warranty in the proposal was not qualified by the provision in the policy so as to limit the grounds of forfeiture to fraudulent misstatements, and that it was not necessary to avoid the policy to prove that the misstatement in question was wilfully false.

Insurance—Accident—Misrepresentations—Misrepresentations Induced by Insurer's Agent—Personal Bar.

A proposal for an insurance written out by the agent of the insurers and signed by the assured, guaranteed the statements therein contained as true in fact, and provided that they should be the basis of the contract. One of these statements was admittedly inaccurate.

Question—Whether it was competent for the assured to avoid the forfeiture of the policy by proving that he had been induced to sign the proposal (without knowing the facts) by the representation of the insurer's agent that the signing of the proposal was a mere matter of form, and that the agent knew that he was not in a position to give accurate information on the matter in question.

This was an action brought in the Sheriff Court at Glasgow by Reid & Company, Limited, bakers and confectioners, Cross-

myloof, Glasgow, against The Employers Accident and Live Stock Insurance Company, Limited, in which the pursuers prayed the Court to nominate and appoint an arbiter who should, along with the arbitrator named by the pursuers, determine the sum payable by the defenders to the pursuers in respect of claims under a policy of insurance issued by the defenders in the pursuers' favour.

In defence to this action the defender averred that the statement made by the pursuers in answer to the second query contained in the proposal and declaration which formed the basis of the policy founded upon was false and fraudulent.

This proposal and declaration was dated 11th November 1896, and the part of it which was specially material to this case ran as follows:—"2. Have any claims been made upon you during the last twelve months in respect of injury or damage to property of third parties?—[Ans.] 3 small claims about 9s. or 10s. each. . . . I, the undersigned, being desirous of effecting an insurance with the above company, against my liability in respect of my drivers causing personal injury or damage to property of third parties in the street or road, do hereby declare that the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between myself and the company; and if the risk is accepted, I undertake to pay the premium when called upon to do so. (Signature) REID & Co., LTD., per A. REID jr."

The proposal also contained a description of "vehicles proposed for insurance," a statement as to how many horses the vehicles were drawn by, and a statement as to the number of drivers employed.

The defenders alleged that eleven claims had been made upon the pursuers during the period referred to instead of three as stated by them.

The pursuers, in answer to this defence, averred that they had been insured with another company before they contracted with the defenders, and that any claims made upon them were never inquired into by the pursuers but were forwarded to the insurance company to be dealt with by them, that the pursuers were ignorant of how these claims were disposed of, and that this was stated to the defenders' representative, on whose suggestion and direction the proposal was filled up, and that the statement in question was accordingly not false and fraudulent. They maintained that the policy by its terms was only rendered void by a fraudulent statement in the particulars furnished, and that consequently, even if the statement in question was incorrect, the policy was still binding upon the defenders.

Under the policy founded on by the pursuers the defenders agreed, in consideration of a premium of £7 paid to them by the pursuers, to indemnify the insured to the extent of £200 "so far as regards claims made against the insured for personal injury or injury to property" during the period of twelve months from 11th Novem-

ber 1896, "in respect of accidents caused by horses, or vehicles while drawn by horses, or by the horses attached to such vehicles, while being driven or ridden by the drivers of the insured, and belonging to the insured," and specified in the schedule subjoined to the policy, "and for which accidents the insured" should "be legally liable to third persons in respect of such personal injury or injury to property," and to indemnify the pursuers against all law or other costs incurred in defending or resisting such claims, certain exceptions being stated. The policy proceeded upon the narrative that the pursuers had made a proposal applying for an indemnity against such claims as those above mentioned, but the proposal was not incorporated in the policy by reference. The policy contained a provision to the effect that "the conditions of assurance endorsed" thereon were "held to be incorporated in this policy," and were "conditions precedent to the liability of the company thereunder." The schedule referred to was as follows:— "Description of vehicle, with particulars as to number of vehicle and owner's name, and how driven. *Vans and lorries, drawn by one or two horses (each) as required. Where to be seen—At insured's stables.*"

The conditions endorsed upon the policy so far as material were as follows:—(1) Any fraudulent misdescription in the particulars furnished by the insured shall render this policy void. . . . 4. If any damage is caused by any vehicle, animal, or plant hereby insured, and whether or not the insured is liable in respect thereof, the insured shall within three days thereafter, if the accident shall happen within twenty miles of the insured's place of business, or in any other case within four days thereafter, give notice in writing to the company at its Head or Glasgow Offices, that is specifying as far as possible the nature of the accident, its time and place, the animals or vehicles or plant by which the same was occasioned, and the names, addresses, and descriptions of the drivers or others of the persons to whom or to whose property the damage was done, and of every witness whose name is known to the insured, and any further particulars he can reasonably obtain, to enable the company to deal with any claim that may arise thereout, and shall at all times further to the utmost all reasonable requirements made by the company for the purpose of defending or dealing with any claim. . . . (2) If the insured shall be guilty of any breach of any of the foregoing conditions he shall forfeit all benefit under this policy; but the company may at any time in its absolute discretion waive any forfeiture on such terms as it shall think fit, and no endorsement on this policy will be held valid unless countersigned at head office.

The defenders pleaded—"(1) The particulars furnished by the pursuers to the defenders in the proposal and declaration which forms the basis of the indemnity policy founded on by the pursuers having been false and fraudulent, the policy is null

and void. (2) The defenders having been induced by the pursuers to enter into the contract founded on by a misrepresentation and concealment of material facts, the contract is void and defenders ought to be assoilzied, with costs."

The pursuers pleaded—"(5) The particulars furnished by pursuers in said proposal not being false or fraudulent, the prayer of the petition should be granted. (6) The pursuers having disclosed their knowledge, and the proposal being filled up at the direction and suggestion of the defenders' representative, the prayer of the petition should be granted."

After sundry procedure a proof was allowed and led, the nature of which sufficiently appears from the following interlocutor and note issued by the Sheriff-Substitute (SPENS) on 5th December 1898:— "Finds the policy of assurance in connection with which this action is brought, and under which this Court, under the Arbitration (Scotland) Act 1894, is asked to name an arbiter, was issued by the defenders on a misrepresentation by the pursuers of a material fact, viz., that the amount of claims which had been made against pursuers for the year previous to the proposal was only 'three small claims amounting to about 9s. or 10s. each,' whereas the truth was that during said twelve months there had been at least nine claims made to the General Accident Corporation Limited, with which pursuers were insured during said period: Finds as matter of law the policy is null and void; therefore sustains the defences and assoilzies the defenders, and decerns. Finds pursuers liable in expenses," &c.

Note.—"There is no doubt whatever that the policy of assurance which was issued by the defenders, who are an English Assurance Company, but who have a resident secretary in Glasgow, was issued on the basis of the representations made in the proposal No. 8-1 of process. So far as I am aware there is absolutely no distinction whatever with regard to the law of insurance policies, whether they are issued in connection with life, fire, marine risks, or as to accident, that statements which are material to the risk, and which in the proposal are untrue, render the policy null and void. In the leading case of *Carter v. Boehm*, 3 Burr 1905, the following passage occurs in Lord Mansfield's judgment:— 'Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.' And further on he also says:—'The question, therefore, must always be whether there was under all the circumstances at the time that the policy was underwritten a fair representation or a concealment, fraudulent if designed, or though not designed varying materially the object of the policy and changing the risk understood to be run.' Commenting upon this and other cases the following passage occurs in *Bunyon's Law*

on Fire Insurance, 3 ed. 83:—‘If the non-communication of material fact will avoid the policy, *a fortiori* a misrepresentation will do so. A misrepresentation is said to be material when it communicates any fact or circumstance the belief in which may be reasonably supposed to influence the judgment of the insurers in undertaking the risk and calculating the premium, and whatever may be the form of expression used by the assured or his agent in making a representation, if it have the effect of imposing upon or misleading the insurers, it will be material and fatal to the contract, and this will be equally true whether the representation was by mistake or not.’

“Accepting these statements as a true exposition of the law, I will now inquire into the circumstances under which the policy in question came to be issued. In October 1896 the pursuers were insured against accident with the General Accident Assurance Corporation (Limited). At that time the defenders were called upon by witnesses Kinghorn and Bain, with the object of seeing if the pursuers would take out a policy with defenders. At that interview Mr Reid senr. and Mr Reid junr. were both present. There was some talk of an insurance of the horses, but Mr Reid senr. ultimately declined to have anything to do with that. There was then a talk about ‘third parties’ risk.’ It was mentioned that pursuers were covered by another company, and it appears that the General Accident Assurance Company intimated on 11th November that they were not prepared to reinsure, but, as I have said, this interview took place in October. Mr Reid junr. said that at this interview the pursuers had had no heavy claims, but that he could not state definitely the amount of the claims, because they had no knowledge of that, and that the claims had been settled by the General Accident Assurance Company without their knowledge. The matter had been delegated by Mr Reid senr. to Mr Reid junr., and Mr Bain called back again either once or twice according to Mr Reid junr.’s account, but apparently Mr Bain and Mr Reid junr. were alone when the proposal was signed. Mr Reid junr. alleges, with regard to the special subject of the statement of the number of claims, that he had already told Mr Bain that he could not definitely state the number of claims. Mr Reid junr., p. 30, letters BC, then goes on:—‘The only way I can account for the figure “3” being filled in is that after I told him, Mr Bain, what I had already told him, he said, ‘Well, we will just say three small claims of 9s. or 10s. each.’ I protested against that and remonstrated with him, saying that I could not tell definitely, but he said, ‘I only want to condescend on a figure. It is a mere matter of form, and simply to indicate the kind of thing you have.’ He repeated again, ‘You have no heavy claims,’ and I said ‘No.’ I never volunteered any ‘Statement as to the number of claims we had.’ Mr Bain is the inspector in Scotland for the defenders, and, turning to his evidence, it will be found that his account of the interview

which has been given by Mr Reid junr. is different. It appears from his evidence that, although the proposal bears date 11th November, it was really signed upon 16th October; and the explanation is made that the policy with the other company only expired upon 11th November, and the theory was that the new policy was to date from the 11th November. All the same the true date of the proposal should have been given in the proposal itself. In the first place, Mr Bain says that he called five or six times. He admits that at the early stages of the negotiation he could not get definite information as to the number and amount of the claims. He says he knew the question as to the number of claims would have to be answered if the matter came the length of a proposal. He states, ‘I remember the occasion when I called and he signed the proposal. That was the 16th October’ (he explains how he fixes the date), and then goes on, ‘When the proposal was signed there was just Mr Reid and myself present. That meeting took place in the room of Mr Reid junr., and we were having a cup of tea at the time. I asked Mr Reid again as to his claims, and his answer was, “One or two small claims.” I said, “Are you sure?” and he said, “Yes; well, one or two trifling things where the tramway glass was broken or a lamp was knocked down.” I then said, “Will I say three claims?” and he said, “That is the most.” I then asked how much will they be each, and he said, “It is difficult to tell, but they will not come to more than 8s., 9s., or 10s. each.” I then said, “I will put that down,” and I put it down.’ The question in the proposal is as follows:—‘Have any claims been made upon you during the last twelve months in respect of damage to persons or property of third parties?’ the answer being, ‘Three small claims about 9s. or 10s. each.’ Now, it is to be observed that Mr Reid’s account attempts to throw the entire responsibility of the answer upon Mr Bain, while Mr Bain repudiates that he did anything more than take down the information given by Mr Reid. I may say that I do not believe that the question of law would be affected by Mr Reid’s statement being accepted in preference to that of Mr Bain, because the proposal is signed for Reid & Company, and the directors of the defenders issued the policy upon the faith of the truth of the answers in the proposal, and I do not think that the pursuers can get quit of the responsibility for the answers by saying, ‘Mr Bain knew the state of matters as well as me.’ Assuming, however, that the acceptance of Mr Reid’s version was to affect the law of the case, this at all events is clear, that it rested with pursuers to prove that Reid’s version was correct, and I do not think it can be argued that that onus has been discharged.

“The proposal then was signed on 16th October. During the preceding twelve months it is alleged that three small claims were made. The resident secretary of the General Accident Assurance Corporation was examined. The pursuers were insured from 12th November 1895 to 12th November

1896 with this company. He put in a list of claims arising in connection with this policy, which is No. 9 of process. The last and largest in amount of these claims is in connection with a collision which is said to have happened on 9th November 1896. As already mentioned, the proposal was made on 16th October 1896, so that at that date this accident had not occurred, and it may be struck off; but there were other ten accidents of which intimation was made to pursuers, and which they again intimated to the Accident Company. I should say that there were, therefore, ten claims made; but adopting pursuers' argument, that compensation is only due where money has been paid, it appears there were six different accidents in connection with pursuers' vans and horses, and for which the Accident Company disbursed the sum of £6, 3s. 6d., being (1) double the number of claims specified by the pursuers in their proposal; and there was (2) four times the amount disbursed beyond what was mentioned therein. All the witnesses examined with any knowledge of the subject stated that the number of accidents and claims during the twelve months preceding the issue of the policy was a question which had a material bearing upon the undertaking of the risk and the fixing of the premium. Indeed, this is a matter which requires no expert evidence. It stands to common sense that an insurance company would, if they issued an accident policy, take a lower premium for the man who had only had three accidents in the preceding year than for a man who had ten or even only six. Hence I am of opinion that here the representation made in the proposal was material, and that the belief that there had only been three trifling accidents in the course of the year in connection with pursuers' horses and vans, whereas there had been ten, was a statement the belief in which may be reasonably supposed to have influenced the judgment of the insurers in undertaking the risk and calculating the premium.

"It is perhaps right that I should add, that while of the opinion that there was a material misstatement of fact, I do not believe there was any fraudulent misrepresentation on the part of Mr Reid junr. It was a misstatement of fact innocently, I believe, made, but which certainly should never have been made without investigation into its accuracy."

The pursuer appealed to the Sheriff (BERRY), who by interlocutor dated 9th February 1899 adhered to the interlocutor appealed against, adding the following Note—"It is a well-established rule that any misrepresentation material to a contract of insurance made by the assured in effecting it, however innocently he may have made it, is sufficient to avoid the contract. The first of the conditions endorsed on the policy in this case provides that 'any fraudulent misrepresentations in the particulars furnished by the insurer shall render this policy void.' That express condition does not, it is true, declare the policy to be void in the event of any innocent

misrepresentation by the assured, but the omission to make such a declaration does not in my opinion interfere with the operation of what is a general rule of law. The main question here is, Was there in fact a material representation.

"What is relied on as a misrepresentation is contained in the answer given to the question in the proposal No. 8-1 of process, 'Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties?' The answer was in these terms. 'Three small claims about 9s. or 10s. each.' I feel constrained to hold that, however slightly the answer may seem to have departed from what was the true state of facts, it was at variance with it, the number of claims intimated against the defenders having been ten, and if we take the number in which payments were made, six. The number of claims intimated, I gather from the proof, is regarded by insurance officials as material—a claim even where no money is eventually paid involving expenses of investigation. Apart from this view indicated by persons conversant with insurance questions generally, it cannot be contended here by the assured that the number was not material to the insurance. They signed a declaration that the particulars in the proposal were true, and that the proposal and declaration should be the basis of the contract. One of the particulars, the truth of which was thus made to lie at the root of the contract, was that the number of claims made on the pursuers during the twelve months was three. That, as I have said, was not in accordance with fact, the number having been larger. It is not proved that Mr Bain, the company's inspector for Scotland, through whom the proposal was made, knew that more than three claims had been intimated against the pursuers, and the case therefore does not, as was argued, fall within the rule stated to be implied in *Cruikshank v. The Northern Accident Insurance Company*, 23 R. 147, that the company is bound by the knowledge of an inspector through whom an insurance has been made.

"On the question whether there was anything which the law would regard as fraudulent misrepresentation on the part of the pursuers I do not think it necessary to enter. I think Mr Reid junr. was rash in putting his name to the statement that the number of claims made on his company during the preceding twelve months was only three, and that a little inquiry might have satisfied him that the number was in fact larger. The case is a warning to persons intending to insure to be careful of the answers they make to questions put before them by insurance companies in proposals for insurance.

"It has not been argued that the present question as to the validity of the insurance ought to have been referred to the arbitrators in accordance with article 12 of the conditions endorsed in the policy. If the contract itself is invalid no conditions contained in it can be of any effect."

The pursuers appealed.

The arguments of the parties sufficiently appear from the opinions of Lord Trayner and Lord Moncreiff.

Authorities quoted — For the pursuers and appellants — *Fowkes v. Manchester & London Assurance Association* (1863), 3. B. & S. 917.

For the defenders and respondents:— *Macdonald v. Law Union Insurance Company* (1874) L.R. 9 Q.B. 328; *Seaton v. Heath* [1899], 1 Q.B. 782; *Standard Life Assurance Co. v. Weems*, Aug. 1, 1884, 11 R. (H.L.) 48; *Bunyon's Law of Fire Insurance* 83; *Reese River Co.*, 4 E. & I. App. 79.

At advising—

LORD TRAYNER—In October 1896 the pursuers, through their cashier Mr A. Reid junior, made a proposal to the defender for an insurance. The proposal is before us signed by Mr Reid on behalf of the pursuers, and contains this passage—"I, the undersigned . . . do hereby declare that the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between myself and the company." On this proposal the defenders issued a policy, and the claim now made by the pursuers is founded upon that policy. The defenders resist the claim on the ground that there is no binding contract between the parties, or otherwise that the contract contained in the policy is void in respect that certain of the particulars given in the proposal are untrue. The particulars referred to are contained in the question and answer following—"Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties?" and the answer is, "Three small claims about 9s. or 10s. each." There is no room for doubt that the answer is untrue, in so far as it represents that the number of claims made on the pursuers of the character and within the period specified was only three of about 9s. or 10s. each. It is proved (and indeed admitted) that ten claims of that description had been made upon the pursuers, in respect of some of which larger sums than 10s. had been paid. Now, had the case stood thus, I cannot doubt that upon well-settled principles of law the policy, which was issued on the basis of the truth of the particulars given in the proposal, would be void, and that no claim could be enforced in respect of it. The law is trite that any misstatement of facts or non-disclosure of facts which might reasonably affect the mind of the pursuers in undertaking the risk, is fatal to the policy. It does not require to that end to be shown that the misstatement or non-disclosure were intentional or wilfully false. That being the law which I think governs the rights of parties to a contract of insurance, the question is, whether the difference between the statement made in the proposal and the actual facts as now ascertained was material as likely to affect the mind of the insurers in undertaking the risk. The evidence makes it clear that it was, and even without any evidence I should have been prepared, on the mere statement of

the facts, to hold that it was. The answer in question was a statement of fact, and amounted to a warranty. Any [misstatement which was material was fatal to the insurance—*Macdonald*, L.R. 9 Q.B., 328.

The pursuers, however, endeavour to take this case out of the rule or principle I have indicated by saying (1) that the statement in the proposal is not theirs but the defenders' agents, and (2) that a condition of the policy, to which I shall afterwards advert, made it necessary that any misrepresentation must be fraudulent before it will affect the validity of the policy.

Upon the first of these points my judgment is without any hesitation against the pursuers. The proposal was no doubt written out by the pursuers' agent. He says that he only wrote down what Mr Reid told him; that when he asked Mr Reid what claims had been made "his answer was 'One or two small claims.' I said, 'Are you sure,' and he said 'Yes, well, one or two trifling things, where the tramway glass was broken or a lamp-post knocked down.' I then said, 'Will I say three claims,' and he said, 'Well, that is the most.' . . . I then said, 'I will put that down,' and I put it down.' On the other hand, Mr Reid junior states that he did not know how many claims had been made against his firm, that they had had nothing but trifling claims, and that the pursuers' agent "did not ask about the number" of claims. He adds, "The only way I can account for the figure 3 being filled in is, that after I told him what I have already said, he said, 'Well, we will just say three small claims of 9s. or 10s. each. I protested against that, and remonstrated with him, saying that I could not tell definitely, but he said, 'I only want to condescend upon a figure, it is a mere matter of form, and simply to indicate the kind of thing you have.'" And he denies that he made the statement "that the claims would be one or two, or three at the most." Now, I offer no opinion as to which of these statements is the more probable. I take the two conflicting and irreconcilable statements, and inquire which of them is supported by other evidence, and I find that the statement of the defenders' agent is corroborated and Mr Reid's contradicted by the writing under Mr Reid's own hand. Mr Reid cannot free himself from the statement to which he has appended his signature. By signing it he made the statement in the proposal his own. The pursuers, therefore, on this point of their case, in my opinion, entirely fail.

The second point made by the pursuers was that the condition expressed in the proposal (on which the defenders rely) was in effect superseded by a condition expressed in the policy. The condition in the policy is thus expressed—"Any fraudulent misdescription in the particulars furnished by the insured shall render this policy void." This condition, the pursuers contend, excludes the voiding of the policy on any other misdescription in the particulars furnished by them than a fraudulent misdescription, and they refer to the case of

Fowkes, 32 L.J. (Q.B.) 153, in support of their view. I shall revert to that case immediately, and consider whether it affords any authority for the pursuers' contention. But in the meantime I observe that the condition in the proposal and the condition in the policy are not in any way inconsistent; they might very well co-exist as providing against different things. They are neither inclusive or exclusive of each other. The condition in the proposal was that the truth of the statements there made was the basis of any contract between the parties. If the statements therefore were not true, the basis of the contract disappeared, and the contract with it. There was no binding contract at all if the statements in the proposal were untrue. The condition of the policy deals, or may quite fairly be held to deal, with misdescription of particulars furnished after a good contract had been made. For example, suppose the statements in the proposal to be all true, that no exception whatever to the policy could be stated on account of the particulars furnished in the proposal, but that in a claim made upon the company under the policy there had been a fraudulent misrepresentation or misdescription of the circumstances under which the claim had arisen, or of the nature and extent of the damage done for which the claim for indemnity was made, such fraudulent misdescription would void the policy. Without that condition a fraudulent claim would not have voided the policy. The fraudulent misdescription when discovered would have been an answer to that particular claim, or to that part of the claim which was fraudulent, but it would have left the policy as a current obligation untouched. In short, the clause in the proposal protected the company from being bound at any time or to any effect by a contract induced by statements that were untrue in point of fact; the clause in the policy protected the company against fraud, when the obligation which the policy imposed upon them was sought to be enforced. To attribute to the clause in the policy the meaning and effect for which the pursuers contend reduces the clause to mere surplusage. If it only meant that the policy was to be void, if the issuing of it had been induced by fraudulent misdescription, it was quite unnecessary, as no contract induced by fraud can be enforced. The clause in that view of it was, as I have said, mere surplusage, for the law without any such clause would have held what the pursuers say the clause was intended to provide.

The case of *Fowkes* differs from this case in what appear to me to be material respects. In that case the executors of a deceased claimed on a life policy which the deceased had effected. In the proposal for the insurance the deceased had given answers to a variety of questions regarding his life, health, habits, &c., and in the declaration appended to his proposal he stated that "the above-written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis of the contract be-

tween the parties, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein," then the premium should be forfeited and the policy "should be absolutely null and void." The policy which was issued contained a proviso that if any statement in the said declaration (which declaration shall be considered as much a part of the policy as if it had been actually set forth therein) is untrue, or if the insurance by the policy . . . should have been effected by or through any wilful misrepresentation, concealment, or false averment whatsoever the policy should be void. Now, what was held in that case was that the word "untrue" in the policy (especially looking to its collocation "with wilful misrepresentation, concealment, or false averment") must be read in the same sense as the words in the declaration which were incorporated with the policy, these words being "designedly untrue." In a word, taking the policy and declaration to mean the same thing, it was held that according to the contract of the parties the policy was only to be void in respect of fraudulent misrepresentation, or false, that is, designedly untrue, statements. The first observation that occurs in reference to that case is, that as the judgment was one on the construction of a particular deed, it cannot be regarded as an authority on the construction of another deed, which is not the same in terms. In the present case the instrument under construction is different from that in *Fowkes'* case. The declaration in the proposal is not made part of the policy, nor even directly referred to. The only words in the policy on the subject are that the pursuers "by a proposal, dated 11th November 1896, have applied" for an insurance, and there is, as I have said, no reference to the special terms of the declaration appended to the proposal. The words, therefore, in the policy may mean something other than the words in the declaration, and I have shown how their application may be very different. In *Fowkes'* case the words said or supposed to be different in their meaning were all contained in the same deed. But the same words in the same deed are generally taken to mean the same thing. The word "untrue" was therefore held to be equivalent to "false"—that is wilfully untrue. That rule of construction cannot be applied here; the words to be construed are contained in different deeds. Nor, I think, should it be left out of view that the opinions in the case of *Fowkes* must have been delivered with some reference to the special facts of the case. It was a life policy, and in the proposal for such a policy questions are asked to which the would-be insured may not be able to give answers absolutely true. I gather (not from the report of the case, but from a reference to it in Porter on Insurance) that what happened in *Fowkes'* case was that the question put in the proposal was whether the applicant for the insurance had gout, to which he answered No, although there were symptoms from which a medical man

could have diagnosed that gout existed. With reference to such a question, all that can be expected or required is that the applicant shall answer the question truthfully so far as his knowledge goes. In the present case the untrue statement in the declaration was with regard to a matter within the knowledge of the proposer, or certainly was ascertainable by him with precision and exactness, and, as was said by Lord Cairns in the case of *Reese River Company v. Smith* (L.R., E. & I. App. iv. 79), "If persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." If that *dictum* be applied to the present case it would bring the pursuers' statement, as to the number of claims made upon them, within the words even of the policy; for it would then be, "in a civil point of view" a false, and therefore fraudulent, misdescription.

I think the Sheriffs have arrived at a sound conclusion upon the case, and that this appeal should therefore be dismissed.

LORD MONCREIFF—I am of a different opinion. The declaration which was signed by the pursuers, and the first condition endorsed on the policy if taken together, may reasonably be construed as meaning that the policy shall be rendered void only in consequence of any of the particulars furnished by the insured (including those in the proposal) being proved to be fraudulently misdescribed, and if there is a doubt as to the meaning of the documents they must be construed in the sense most favourable to the insured.

In the proposal form various particulars are asked for to enable the defenders to decide whether and on what terms a policy should be granted, the numbers of drivers employed by the proposers, the description of vehicles proposed to be used, the number of horses by which they are to be drawn, and so forth.

The query as to the particulars with which we are specially concerned is thus expressed "2. Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties." I observe in passing that as this question is worded, neither number nor amount of claims being mentioned, it might properly have been answered—"Yes, a few small claims." The answer which was filled in by the defender's agent, on information which he says was given to him by the pursuer Andrew Reid junior was, "3 small claims about 9s. or 10s. each."

The declaration appended to the proposal, and which was signed by Andrew Reid junior on behalf of the pursuers was as follows: [*His Lordship read the declaration quoted supra*]

Taken by itself this declaration amounts to a warranty that the particulars given by the insured are true. Now the answer to the second query is not true in this

sense that it is not accurate, because in point of fact during the preceding twelve-months ten claims were made against the pursuers, six of which were paid by the General Accident Company with which they were insured. The total amount paid was trifling, viz., £6, 3s. 6d., and of the six claims paid three added together did not amount to £1. Still the answer was not accurate, and I assume in the meantime that it is material.

But the policy of insurance which followed this proposal and declaration was granted subject to certain conditions, the first of which is this—" (1) Any fraudulent misdescription in the particulars furnished by the insured shall render this policy void." The question which we have to decide is whether this condition applies to the particulars furnished by the insured in the proposal and qualifies the terms of the declaration. I am of opinion that it does, and that it cannot be read in a more restricted sense without doing violence to the words used.

The condition applies without qualification to all particulars furnished by the insured. It is said that it is limited to particulars mentioned or referred to in the policy and conditions.

I do not see how this can be. The particulars mentioned in the policy itself are taken from the proposal. Indeed all the particulars in the proposal which could appropriately be inserted in the policy are to be found there. For instance, the number of drivers, and the description of vehicles, and the number of horses to be used by the pursuers are taken from the proposal. If, as I suppose will not be disputed, the condition applies to those particulars, I can see no ground on which it can be held not to apply to the particular in question.

Again it is suggested that the condition is confined to the particulars mentioned in the fourth condition in connection with claims to be made in respect of accidents. But, as I have already observed, the condition is unqualified in its terms and is not confined to such particulars. If this had been intended, I should have expected to have found the condition appended to or following the fourth condition instead of being in the position which it occupies. Lastly, no good reason has been suggested why proof of fraud should be required in order to render the policy void on account of misdescription of particulars specified in the policy and conditions, while the particulars furnished in the proposal and declaration are to be held to be warranted true under penalty of forfeiture of the policy if they are proved to be inaccurate.

But, in truth, the declaration and condition are not necessarily inconsistent; they can be read together (and not as providing for different things) without doing violence to either. It is a standing condition of the defenders' policies that they shall be forfeited only on account of fraudulent misdescription of particulars on the part of the insured. It is quite consistent with this condition, which is so far a concession to

the insured, that the defenders should desire to obtain under the hand of the proposer a declaration of the truth of the particulars required as being the best evidence of the description which has been furnished by the proposer, and also, perhaps, as an inducement to accept the risk. But the fact that they have taken such a declaration does not prevent the defenders from modifying the consequences of inaccuracy in the particulars furnished, and perhaps it may suit their business to do so. The declaration says nothing as to the consequences of an untrue declaration; the policy provides for that. If the particulars declared to be true prove to be untrue and to have been given fraudulently is unintentional and not fraudulent the policy will be forfeited. If the inaccuracy will stand.

I agree that the case of *Fowkes v. The London & Manchester Life Assurance & Loan Association*, 3 B. & S. p. 917, is not in all respects the same as the present; but it seems to me to have some application and to be valuable on account of the views expressed by the judges as to the construction of such documents.

It differs in this respect that there the qualification occurred in the declaration while the condition in the policy was less favourable to the insured. Again, in the policy the declaration was expressly declared to be part of the policy as if it had been actually set forth therein. But although in the present case neither the declaration nor the policy is so fully expressed, their effect I think is the same. The proposal and declaration form the basis of and are imported into the policy; and the first condition of the policy applies to all "particulars furnished by the insured" without qualification, words which apply in terms to the particulars furnished in the proposal. In the case of *Fowkes* it was held that the two documents must be read together as practically forming one contract, and that they should be construed in the sense most favourable to the insured; and that I think should be done here.

If I am right in this, if in order to render the policy void fraud must be proved, I think it is clear that no fraudulent misdescription was given. Looking to the circumstances in which the information was asked for and given I think there is solid ground for argument that, as the defenders' agent Mr Bain (who repeatedly pressed Mr Reid for a proposal) knew, as his evidence shows, that Mr Reid was unable to give him precise information, the defenders were barred from taking this objection. But, however this may be, there is no evidence of fraud or anything approaching even constructively to fraud. I think the error was not inexcusable; there was ample excuse for it.

On these grounds I am obliged to dissent from the judgment proposed.

LORD YOUNG—I own that I have had much difficulty in arriving at a conclusion. We are dealing, however, with a judgment of both Sheriffs, finding that the policy is ren-

dered void by material mis-statement in the proposal. I think that the proposal is part of the policy, and I may say that that is not a part of the case in which there is room for doubt. I think the proposal is so joined to the policy as to be inseparable from it. The Sheriff, affirming the Sheriff-Substitute's judgment, has found the policy void in respect of what I may call inaccurate information given by the assured of what was material. That inaccurate statement—that mis-statement—is in answer to the question—"Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties?" It is clear enough that the Sheriffs are right in holding that this was a question on a material point, and the answer to which was material to the contract. It was, "three small claims about 9s. or 10s. each." Now, that is admittedly not a correct statement.

The great difficulty lies in the view, which has commended itself to Lord Moncreiff, that looking to the circumstances, and the manner in which the information was given to the agent or canvasser for the company, the defenders ought not to be allowed to take advantage of this defence, and I am surprised that the company do think it according to their interest and duty to do so. But it is and has been held by the Sheriffs to be a reasonable ground of defence that the statement is not according to the fact, and that though there was no wilful falsehood or intention to deceive, yet Mr Reid was blameworthy in giving this inaccurate information on this material point, even in the manner and circumstances disclosed in the proof. I certainly agree in holding that there was no fraud, in the sense of falsehood or intention to deceive. Yet I think there may be ground for the defence if the true conclusion be that though there was no intention to deceive, Mr Reid was inexcusable and blameworthy, for he may be blameworthy though wilful falsehood be not attributable.

I do not think it could be disputed that if this misstatement stood alone (albeit so given) its materiality and its want of conformity to fact would void the policy if it were not for the argument which arises on the policy that there must be intentional and fraudulent disconformity to fact before the policy can be held void. And so the question really comes to be, whether the condition endorsed upon the policy—"Any fraudulent misdescription in any of the particulars furnished by the insured shall render this policy void," means that the policy is to be made void only by misdescription or inaccuracy which is wilfully false and intended to deceive as well as material. Now, I have difficulty in holding that the Sheriffs are wrong (and much more when Lord Trayner, for the powerful reasons he has given, agrees with them) in holding, as they do, that that question is to be answered in the negative. The word "fraud," when used with reference to an insurance, does not always mean wilfully false. It may be applied to a statement

made in circumstances which render it blameworthy, and I cannot think that Mr Reid was other than blameworthy in allowing the company to act upon the information, which he made his information, that there had been during the last year "only three small claims of 9s. or 10s."

Throughout the case I have had sympathy with the views which Lord Moncreiff has expressed, that the defenders are not in the circumstances entitled to take advantage of that blameworthy conduct and to maintain that the policy is void. But I should not, I think, be justified in setting aside the judgment of the Sheriffs, for I think that the case is not reduced to this, that no misstatement albeit blameworthy shall void the policy unless it was wilfully false and intended to deceive.

I am prepared to concur with Lord Trayner in holding that the appeal must be refused with expenses.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the pursuers' appeal against the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 5th December 1898 and 9th February 1899, Dismiss the appeal and affirm the interlocutors appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 5th December 1898: Therefore of new assoilzie the defenders from the conclusions of the action, and decern: Finds the pursuers liable in expenses in this Court, and remit the same and the expenses found due in the Inferior Court to the Auditor," &c.

Counsel for the Pursuers—Guthrie, Q.C.
—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Defenders—Sol.-Gen. Dickson, Q.C.—W. Hunter. Agent—J. Gordon Mason, S.S.C.

Friday, June 30.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

ANDERSON'S TRUSTEE v. JOHN SOMERVILLE & COMPANY, LIMITED.

*Bankruptcy—Illegal Preference—Act 1696,
c. 5.—Cash Payment—Indorsation of
Cheque within Sixty Days of Bank-
ruptcy.*

The indorsation of a cheque within sixty days of bankruptcy is not a cash payment in the ordinary course of business, but an assignation, and therefore null and void under the Act 1696, c. 5.

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So held where in payment of an unsecured debt of the bankrupt's, his law-agents endorsed a cheque in their own favour which they had received in payment of the price of property belonging to the bankrupt.

Carter v. Johnstone, March 5, 1886, 13 R. 698, followed.

Right in Security—Absolute Disposition with Back-Letter—Limitation of Security to Specified Amount.

A & Co. having made advances to C, a customer, the title to certain premises acquired by C was taken in name of B, one of the partners of A & Co., but a back-letter was granted by him to the effect that he held the disposition in security of sums due and to become due to an extent not exceeding in all the sum of £700. C thereafter required a further advance, and it was arranged that his law-agents, who also acted for A & Co. throughout the transactions now in question, should draw a bill upon C, which he was to accept and get discounted, A & Co. guaranteeing repayment of the amount (£200) to the law-agents. The bill was renewed, but was ultimately dishonoured by C, and paid by the law-agents, who endorsed it to A & Co. and debited them with the amount. C when he received this accommodation agreed that in certain events his law-agents should have leave to sell the subjects, and he subsequently gave them authority to do so. A purchaser was found by A & Co. but the missives of sale were signed by C. The disposition following upon this sale was granted by B with consent of C. At the settlement a law-agent's clerk, who was acting for the purchaser and also for A & Co., paid on behalf of A & Co. the amount due in connection with the bill to C's law-agents, and at a later period of the same day, on behalf of the purchaser, handed to them a cheque for £900 in their favour and £500 in cash in payment of the price of the subjects sold, and thereafter on behalf of A & Co. received back from C's law-agents the cheque in their favour endorsed by them, which together with £45 paid in cash made up the amount of A & Co.'s account against C, including the sum in the bill. A few days afterwards C was sequestrated.

In an action at the instance of C's trustee against A & Co. for recovery of the amount refunded to them out of the price in respect of the bill which they had paid—held (1) that A & Co. were only secured under the absolute disposition and back-letter to the extent of £700 and no more, and (2) that, the property being C's, and having been sold by him, and the price having been paid to his agents for his behoof, subject to A & Co.'s claim for £700 out of it, A & Co. had no right of retention over any part of the price after their debt so far as

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