transfer of his business to the new firm in which he is a partner, ceased to belong to the first of the two classes of members—that is to say, individuals carrying on business as master plumbers—and in my opinion he thereby ceased "to carry on business as a master plumber" within the meaning of Rule iii. The business in question is not now carried on by him. It is carried on by the new firm, and if it is to continue to be represented in the Association, that must, I think, be by the admission of the firm which owns and controls it.

I accordingly concur in the judgment which your Lordships propose.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute dated 22nd January 1920, and also the interlocutor of the Sheriff dated 29th November 1919, in so far as it found the appellants liable to the respondent in the expenses of the appeal, sustained the fourth plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for Pursuer (Respondent) — Mackay, K.C. — Gentles. Agents — R. C. Gray & Paton, S.S.C.

Counsel for Defenders (Appellants) — Moncrieff, K.C.—A. R. Brown. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 6.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

GREIG *v.* TRUSTEES OF WIDOWS' FUND OF MERCHANT COMPANY, EDINBURGH.

(Reported *ante* March 8, 1919, 56 S.L.R. 292.)

Insurance—Presumption of Life at Common Law—Proof of Death—Proof Required in Cases of Contract and Cases of Succession.

The wife of a contributor to a widows' fund sued the trustees of the fund for declarator that her husband, who had not been heard of for eighteen years, and who would have been sixty-one years of age at the date of the action, must be held to have died on the date he was last heard of, and for payment of an annuity which was contingent on his death.

Circumstances in which the Court (*diss.* Lord Dundas and *rev.* the judgment of the Lord Ordinary (Blackburn)) *granted* decree of declarator that the pursuer's husband must be presumed to have died on a date ten years after that on which he was last heard of, and *ordained* the defenders to make payment of the annuity as from that date.

Opinions per the Lord Justice-Clerk, Lord Salvesen, and Lord Ormidale that there is no distinction as to the proof necessary to establish the presumption of death in cases of succession and in cases of contract. *Opinion per* Lord Dundas *reserved.*

Interest—Widows' Fund Annuity—Judicial Determination of Date of Death of Contributor — Interest on Arrears of Annuity.

Circumstances in which *held* that a pursuer who had been successful in an action to determine the fact and date of the death of a contributor to a fund, and for payment of an annuity contingent on his death, was not entitled to interest on the arrears of the annuity prior to the date of decree.

Mrs Agnes Douglas or Greig, *pursuer*, brought an action against the Trustees of the Widows' Fund of the Company of Merchants of the City of Edinburgh, *defenders*, (1) for declarator that her husband David Greig junior, a contributor to the defenders' Widows' Fund, "must be presumed to have died prior to 31st December 1900, that he must be held to have died on that date, and that the pursuer, his widow, is entitled to an annuity out of the said Fund of £40 sterling, and (2) for decree ordaining the defenders to make payment to the pursuer of the annuity of £40 as from Whitsunday 1901."

The pursuer's averments and the pleas-in-law of the parties are set forth in the previous report.

On 8th November 1918 the Lord Ordinary (BLACKBURN) dismissed the action as irrelevant. His Lordship's opinion is reported *ante ut supra.* The pursuer reclaimed, and after hearing parties the Court on 8th March 1919 recalled the Lord Ordinary's interlocutor and allowed a proof before answer.

The following narrative of the *facts* and of the import of the evidence is taken from the opinion *infra* of the Lord Justice-Clerk: — "The question in this case is whether David Greig is dead or alive, and if dead, when he must be held to have died. The issue is one of fact. David Greig was born in 1857, and if still alive would now be about sixty-three. He was born in a respectable position, and ultimately became a partner with his father in his business as a builder. He married the pursuer in 1879 and there were four children of the marriage. About 1893 Greig gave way to drink, and this led to his ruin. His father dissolved the partnership, and the son soon thereafter executed a trust deed and was sequestrated. He was convicted more than once of assaulting his wife and of police offences. He had *delirium tremens* on two occasions, for I cannot accept the Lord Ordinary's view when he speaks of 'alleged' attacks of *delirium tremens*, and suggests that the evidence as to this has been exaggerated. I think they are sufficiently proved, and I cannot find any appearance of exaggeration. I think it is also proved that David Greig's heart was affected. His mother died of consumption. For while the Lord Ordinary says that he does not think there is any evidence 'to support the statement that the pursuer's husband's mother had died at the age of fifty of consumption,' there is, it seems to me, certainly some evidence, and there was no cross-examination on this point. Greig seems to have lost caste completely in Edin-

burgh, and ultimately left that city about 1896 or 1897, when apparently he went to the north of England. In 1896 the pursuer obtained a decree of judicial separation against him with a decree for aliment. After 1896 Greig seems to have maintained himself in England or elsewhere out of Edinburgh somewhat precariously for several years, paying occasional brief visits to Edinburgh to see his wife and children, to whom he seems to have been genuinely attached when he was sober, being then apparently kind and affectionate. While on these visits to Edinburgh he was in want of food, clothing, and money, all of which he got from his wife and probably also from others. He once wrote to his wife from Liverpool in 1896. The letter was a very penitent one, but showed that he was still in dire straits. The Lord Ordinary says that the pursuer 'admits' that she never answered this letter. What she does say is 'I don't remember whether I sent any reply,' and no wonder, for she was speaking of a letter received so long ago as 1896. Apart from this letter there is nothing but his own statements to show where he went to when he left Edinburgh. He was last heard of about 1900 or 1901. His brother says of him that his constitution before he left Edinburgh seemed to have been undermined. His wife says she thought he was dead. She thought so after two years, because he had always been coming back to see 'us,' and she does not know anybody who knows anything about him. William Mackay, who was in the employment of David Greig's father for forty-five or fifty years and who knew David well, last saw him 'eighteen or twenty years ago if not more,' and says that he and the other men in his father's employment 'sometimes discussed what had become of him. We thought he was dead. The last time I saw him I never thought he would live two years. Twenty years ago I thought he was dying on his feet; he was just like a dying man.' The Lord Ordinary disregards the evidence as to belief of Greig being dead. I cannot agree with this view. The authorities seem to establish that it is legitimate evidence and may be important. About 1896, on one of his visits to Edinburgh from Liverpool, he told an acquaintance John Adams, at whose house he got a wash-up and a breakfast, and whom he asked to take him to the House of Refuge, that drink had got so much hold on him that he could not do without it. Adams took him to the House of Refuge, and he was there for about a month—December 1896 and January 1897. Adams thought that if he stopped drink and kept steady he would be all right. There is no evidence, however, of any such reform. If he had reformed I think a reasonable inference is that he would have returned to see his wife and children. He did not do so, and made no communication to them or to anyone else in Edinburgh after 1900. He has been advertised for both in England and Scotland, and I think reasonable efforts have been made to find him, or any news of him, but without result. His law agent Mr Buchan has heard nothing of him since 1897, and formed the impression that he had died. Dr Chalmers Watson, examined as an expert regarding alcoholic patients, says he would regard him as an habitual drunkard given to chronic intemperance, and estimates his prospects of life after about 1900 as not exceeding six to ten years at the outside. He says he has never known a man of so pronounced habits as David Greig living longer than six or ten years. Dr James, the only witness examined for the defenders, says that 'to say certainly he is dead is contrary to medical experience,' and that may be assented to, but I do not think that is an accurate way of stating the problem. In cross-examination Dr James says of a man of Greig's description—'What I would say is that you would expect none would recover, but you found here and there wonderful recoveries, and the men live to an old age.'"

It was also proved that Greig went to Australia in 1896 at the cost of his father, but returned within a few months.

On 10th December 1919 the Lord Ordinary (BLACKBURN) assoilzied the defenders.

Opinion.—[*After dealing with the facts his Lordship proceeded*]—"A number of most respectable witnesses, friends of the pursuer and her husband, entered the box and expressed their belief that her husband must be dead. This was pressed upon me by pursuer's counsel as evidence to rebut the presumption of life. In nearly every case the belief seemed to be founded on the fact that the witness had heard nothing of the husband for nearly twenty years. In so far as it was based on facts connected with the man's own history, I think I must draw my conclusions from the facts themselves, and not from the opinions of others. With regard to their evidence as to the missing man's loss of respectability after his sequestration no one suggested that he had led 'a vagrant life,' as is averred on record, or that he had reached the depths of the 'Submerged Tenth.' To cease to be an employer of labour and to become a working man, especially one addicted to drink, may well be regarded as a fall in the social scale, and I do not think that most of the witnesses meant more than this. But apart from the fact that he was addicted to drink I do not see that such a fall need necessarily prejudice the presumption of life.

"Nor indeed does it appear to me that apart from this qualification as to his drinking habits, there is anything proved in connection with his personal history to suggest that it is not probable that he may be still alive. His age would be only sixty-one. His health and medical history are irreproachable. His character was good—hard working and industrious—and there was no particular risk in the circumstances under which he last disappeared. He was returning to Hornsea, or wherever it was that he was employed, where he seems to have been supporting himself for three or four years.

"As to his drinking habits, there is no doubt that for a period of three years, between 1893 and 1896, they were excessive,

and to some extent must have injured his prospects of life. But after his second conviction in November 1896 there is no evidence of any further outbreak of violence, and this suggests some moderation in his habits and possibly an attempt to reform. He must at all events have gained some control over himself between 1897 and his disappearance, as he managed to save money to come to Edinburgh to visit his family. That he had not completely mastered himself is clear from his conviction in June 1898, but the reception he got from his family on the occasions of his visits to Edinburgh was calculated to have had a bad and depressing effect upon him. I think the oral evidence and his letter from Liverpool show that he was fond of his family and very much ashamed of his habits, and if he was making an effort to reform himself while at Hornsea and hoping for a reconciliation he must have felt their reception of him acutely.

"I do not think that the evidence with regard to his drinking habits removes 'any reasonable doubt' of his death, which in the case of *Bruce* v. *Smith* (10 Macph. at 133) was said by Lord Deas to be always the question in this class of case. Much depends on the extent of his drinking subsequent to his disappearance, and I think the evidence inclines to the view that he was gradually pulling up. Dr James, who was examined for the defenders, says 'that to say certainly he is dead is contrary to medical experience.' This witness also speaks to his own experience of cases where deterioration has gone far and yet complete recovery has been made, an experience which I think has been shared by most people. On the other hand, Dr Chalmers Watson gave evidence that the man could not have lived for more than six years after his conviction in 1896. I was not impressed by his evidence, which proceeded on many assumptions as to the man's history which do not appear to me to be established by the evidence in the case.

"There remains to consider whether any inference can be drawn from the facts immediately preceding the disappearance to suggest that it was not intentional but involuntary. This is evidence to which the Court has always attached great importance. Where—as in the case of *Rhind*, 5 R. 527—a sailor in hospital in Jamaica wrote to his sister that if he lived and got out of hospital he would return to England where a legacy from an uncle was awaiting him, and nothing more was heard of him except that shortly afterwards he had been discharged from hospital, the presumption is strong that the disappearance of the man was not intentional. But in the present case there is no evidence to lead to any direct inference one way or the other. There was certainly no pecuniary reason to induce the pursuer's husband to return home, as there was a decree for aliment and expenses standing against him. His affection for his family might lead to a presumption that his disappearance was involuntary but for the cold reception he had met with on his most recent visits. It is not impossible that he had come to the conclusion that a reconciliation with them was hopeless, and that he quite deliberately made up his mind to sever all association with them. If so, he may by now have formed other ties, which would account for his continued silence. I do not feel that I can with confidence draw any inference as to the cause of his disappearance from the circumstances under which he disappeared.

"I was referred to numerous reported cases in the course of the hearing after the proof. In nearly all of them the missing man when last heard of was either abroad or was starting on a voyage for a foreign country. I have only come across two cases which deal with the disappearance of a man in this country. In *Bruce* v. *Robson*, 1834, 12 Sh. 486, the commander of a trading vessel had disappeared at Portsmouth in January 1795, four months before his father's death. There was nothing to account for his disappearance, but although nothing had been heard of him for thirty-nine years, the Court refused to presume that he had predeceased his father. In *Milne* v. *Wills*, 1868, 40 Sc. Jur. 221, where a man had disappeared in this country two years before under circumstances clearly pointing to suicide, the Court refused to serve his heir until caution was found to repeat in case of reappearance.

"But in another much more important respect this case differs from all the cases reported in the books. It is apparently the first time that an endeavour has been made to elide the presumption of life for the purpose of enforcing against a third party a contract conditional upon the missing man's life. All the reported cases arise out of claims of succession to estate to which the missing man if alive at a certain date would have been entitled. In a few cases where the Court has not been satisfied that the evidence is quite sufficient to elide the presumption, authority has been given to the missing man's heir to draw the interest of the fund without finding caution (*Campbell*, 3 Sh. 145, and 12 Sh. 382) or to take possession of the fee on finding caution — *Fettes* v. *Gordon*, 4 Sh. 150; *Garland* v. *Stewart*, 4 D. 1. But in all cases dealing with succession, whether the decision of the Court be safeguarded by the finding of caution or not, the ultimate loss, if any, in the event of the reappearance of the missing man falls upon the man himself, who is the person primarily responsible for the position which has been created. In a case arising upon a contract with a third party the loss, if any, falls elsewhere. Now although the present case only relates to the payment of a widow's annuity, its decision will, I think, decide the question of liability under two policies of insurance on the missing man's life, one of which is fully paid, while the other is still being kept up by payment of premiums. In all claims under insurance policies, whether for payment of a widow's annuity or of a capital sum, the *onus* of proving death rests on the claimant, while the ultimate loss, if any, in the event of the reputed dead person's reappearance would fall not on him

but on the insurers. For these reasons I think, to quote more fully the passage from Lord President Inglis' opinion in *Williamson*, 14 R. 226, which I referred to in my previous note, 'such a case as this does not rest on a mere balancing of probabilities. We must be satisfied that he died.' It may be that in cases of succession it is more accurate to say—'The question really always is whether any reasonable doubt exists of the death,' as stated by Lord Deas in *Bruce* v. *Smith*, 10 Macph. 133, but I do not think that evidence leading to such a conclusion would be sufficient in a case of contract. In my judgment the evidence in this case falls short of what is said to be necessary by both these learned Judges, and accordingly I shall assoilzie the defenders from the conclusions of the action."

The pursuer reclaimed, and argued—The evidence warranted the presumption that the pursuer's husband was dead, and his death should be presumed to have taken place as at 31st December 1900. The *onus* of proving death was not now so heavy as formerly, because of the greatly increased facilities of communication — Dickson's Law of Evidence (3rd ed.), section 128. The following authorities were referred to — *Greig* v. *Edinburgh Merchant Company's Widows' Fund Trustees*, 1919, 56 S.L.R. 292; *Rhind's Trustees* v. *Bell*, 1878, 5 R. 527, *per* Lord Ordinary (Curriehill) at 529, 15 S.L.R. 271, at 272; *Bruce* v. *Smith*, 1871, 10 Macph. 130, *per* Lord Ordinary (Mackenzie) at p. 132, 9 S.L.R. 102; *Sands* v. *Her Tenants*, 1678, M. 12,645; *French* v. *Earl of Wemyss*, 1667, M. 12,644; *Williams* v. *Scottish Widows' Fund Life Assurance Society*, 1888, 4 T.L.R. 489; *Doyle* v. *City of Glasgow Life Assurance Company*, 1884, 53 L.J., Ch. Div. 527; *Evanturel* v. *Evanturel*, 1874, L.R., 6 P.C. 1, *per* Sir James W. Colville at p. 29; *Beasney's Trustees in re*, 1869, L.R., 7 Eq. 498, *per* Malins, V.-C., at 500; Stair's Institutions, book iv, tit. 45, sec. 17, Presumption 19th. [The LORD JUSTICE-CLERK referred to Dickson's Law of Evidence (3rd ed.), sec. 116].

Argued for the respondents — The evidence did not warrant the presumption that the pursuer's husband was dead. The authorities stated that the presumption of life extended to one hundred years, with the exception of Bankton, who put it at eighty years—*Bruce* v. *Smith* (*cit.*), *per* Lord Deas at 10 Macph. 133. It was the presumption of life which permitted decrees of divorce to be pronounced in many cases of desertion where the husband had disappeared, because were it not presumed that he was alive a divorce could not be granted. In the present case there was no evidence at all regarding the pursuer's husband after his disappearance in 1901, and the pursuer's case depended entirely on inferences and speculations flowing from facts as to his life and conduct prior to 1898. There was no case where mere absence and drink had been held sufficient to rebut the presumption of life, and in every case where the presumption had been overcome there had been proof as to where the missing person went to. The absence of correspondence in this case was not significant, because there had been no correspondence prior to the missing man's disappearance—*M'Lay* v. *Borland*, 1876, 3 R. 1124, *per* Lord Deas at 1128. In the present case it was sought by presuming death to obtain money due *ex contractu*. Such cases were different from those where it was sought by presuming death to obtain a succession. In any event the pursuer's averments were not relevant to support any other date than that set forth in the summons. The following authorities were referred to:—*Williamson* v. *Williamson*, 1886, 14 R. 226, 24 S.L.R. 170, *per* Lord President (Inglis) at 14 R. 228, 24 S.L.R. 171, Lord Shand at 14 R. 229, 24 S.L.R. 172, and Lord Adam at 14 R. 230, 24 S.L.R. 172; *Rhind's Trustees* v. *Bell*; *Barstow* (*Maltman's Factor*) v. *Cook*, 1874, 11 S.L.R. 363; *Barstow* v. *Cook*, 1862, 24 D. 790; *Fairholme* v. *Fairholme's Trustees*, 1858, 20 D. 813; *Garland* v. *Stewart*, 1841, 4 D. 1, where consignation ordered; *Sands* v. *Her Tenants*.

LORD JUSTICE-CLERK—[*After the narrative quoted supra*]—Treating the matter as a jury question, which it is, I think the most reasonable presumption is that Greig, who was forty-three in 1900, and has not been heard of since about that date, has been long since dead, and that the reasonable result from all the evidence is that he did not survive 1910. I think the Lord Ordinary is unduly hard on the attitude of the pursuer and the children towards Greig on his occasional visits to Edinburgh. He was not always sober even on these visits. I cannot accept the Lord Ordinary's view when he says of Greig in his note—"Nor indeed does it appear to me that apart from this qualification as to his drinking habits, there is anything proved in connection with his personal history to suggest that it is not probable that he may be still alive. His age would be only sixty-one. His health and medical history are irreproachable. His character was good—hard working and industrious—and there was no particular risk in the circumstances under which he last disappeared. He was returning to Hornsea, or wherever it was that he was employed, where he seems to have been supporting himself for three or four years." On these matters I would on the evidence have come to very different and indeed opposite conclusions at the crucial date from those reached by the Lord Ordinary. As I have already said, I cannot find any evidence of reform as regards Greig's drinking habits, or if he had reformed, anything sufficient to account for his complete loss of interest in his children, and the opening sentence of the passage I have read seems to me to vitiate the whole passage. I think the assumptions on which Dr Chalmers Watson proceeded in his evidence were quite fair and reasonable.

I do not regard the distinction the Lord Ordinary takes as to the presumption of life or death between cases of contract and cases of succession sound. In either case the question is one of fact, and the fact is the same in both classes. On principle I cannot draw any difference as to whether

the fact has been proved or not whatever be the class. I think the Lord Ordinary's suggestion is also against authority (*Sands*, M. 12,645).

In view of the Lord Ordinary's two judgments and the difference of opinion in this Court, it is impossible to say that the defenders acted improperly in contesting the case, but I am of opinion that the defence fails. I do not think that we should be justified in holding that he died at the date mentioned in the summons, but in my opinion the reasonable presumption on the evidence before us is that he did not survive 31st December 1910. *Rhind's* case (5 R. 527), if authority were required, justifies us in adopting a later date than that named in the summons. In my opinion we should find that David Greig must be presumed to have been dead at 31st December 1910, and that the pursuer is entitled to payment of the annuity from that date.

As to interest, having regard to the circumstances of this case, I do not think the pursuer is entitled to any interest prior to the date of decree. It is admitted that the pursuer has repeatedly applied for payment. But there is no proof of the date of any such application prior to the date of raising the action. The defenders' statute and rules say nothing about interest. The pursuer had to bring an action to have the fact of death and the date of death judicially ascertained if that were possible. Having regard to the defenders' statute and rules, and to the authorities, particularly Lord Westbury's pronouncement in the case of *Carmichael* (8 Macph. (H.L.) 131), Lord Fraser's opinion in *Blair's* case (12 R. 104), and to the case of *Greenock Harbour Trustees* v. *Glasgow and South-Western Railway Company* (1909, S.C. (H.L.) 49), in my opinion the proper result is what I have above stated.

LORD DUNDAS—I think the interlocutor reclaimed against is right. The crucial issue in the case is one of fact—whether upon the evidence before us we are warranted in declaring, as matter of proof based upon reasonable inference, that David Greig died either at the date mentioned in the summons, 31st December 1900, or at another date, 31st December 1907, which the reclaimer's counsel preferably suggested in argument, or at any other date that the Court might, upon the evidence, fix as the date of his death? The conditions of our inquiry are, I think, correctly summarised in Dickson on Evidence (3rd ed., section 116) thus—"By the common law of Scotland a presumption is recognised in favour of the continuance of life for a reasonable period, so as to lay the burden of proving death upon the party alleging that fact. A precise limit to this presumption has not been fixed. Lord Bankton states it at a hundred years; Lord Stair says some extend it to that time, and others only to eighty years; while Mr Erskine does not define its duration." In *Fife* v. *Fife* (1855, 17 D. at p. 954) Lord Justice-Clerk Hope pointed out that the ultimate decision of such a question must depend on the special circumstances of the actual case; that our law wisely recognises no fixed rule as to the necessary lapse of time; and that the pursuer's burden is to establish the fact of death at some given date "by positive proof." It would, I think, be out of the question that we should find, as the summons demands, that Greig died on 31st December 1900, when he would have been forty-three years of age; indeed, the reclaimer's senior counsel, having regard probably to the pursuer's own evidence, did not insist that we should so find. He urged, however, that we should fix the date of death as at 31st December 1907, when Greig's age would have been fifty. I can see no sufficient evidence to warrant this conclusion, or for finding that Greig died at any other date. He would now, if alive, be sixty-three years of age. The Lord Ordinary has carefully analysed the proof in his judgment. His analysis was subjected to a most vigorous criticism by the pursuer's counsel, and some degree of inaccuracy, here and there, was perhaps made out—*e.g.*, whereas the Lord Ordinary says that the pursuer "admits that she never answered" a certain letter, her answer was, "I don't remember whether I sent any reply"; and again, it may be that his Lordship somewhat underestimates the effect of the evidence as to *delirium tremens*. But I think that his analysis is in the main correct, and that the attack failed to demonstrate that it was otherwise in any matter of real importance.

It appears that up to the age of thirty-five Greig was a robust and healthy man. But about 1892 he began a drinking habit, which is proved to have continued and increased down to about 1898, involving two attacks of *delirium tremens*, and various appearances in the police court. This habit must, no doubt, have had serious effect on his condition, physical and moral. The witness Mackay, for example, pictures Greig's condition as a sufficiently lamentable one. On the other hand, when the pursuer last saw him, apparently in 1900 or 1901, he was "very quiet," and presented the appearance of a "well-fed working man." There is no evidence to show whether he subsequently relapsed further in the path of degradation, or whether he recovered, wholly or partially, his former healthy and proper conditions of life. Nor is there any evidence as to where he went after his wife last saw him; we do not know, and it is a curious feature in the case, whether he proceeded to Hornsea in Yorkshire or elsewhere.

The two points upon which the pursuer rightly relied most strongly as justifying the inference that Greig must have died at least on or prior to 31st December 1907 were (1) his drinking habit, to which I have referred, and (2) that after he was last seen by his wife he never communicated either personally or by letter with his wife or children, for whom in his happier days he seems to have had warm regard, or with any of his relatives or friends at home. I cannot hold that these points, coupled with such other minor matters as could be prayed

in aid, are at all sufficient to warrant us in deducing, as matter of reasonable inference, proof that Greig in fact died before the end of the year 1907 or at any other date.

As regards the habit of drink, I am not aware that that alone has ever been held as affording sufficient evidence for such an inference as we are asked to draw. In the present case the evidence as to drink is not, I consider, such as to warrant the conclusion that it must have proved fatal—at all events in so brief a period as that prior to 31st December 1907—even having regard to what is said on the matter by Dr Chalmers Watson; and the man may, for all that we know, have succeeded, as many men have succeeded, in recovering his former habits of sobriety in whole or in part after he was last seen in 1900. His latest appearance in the police court was in June 1898. As regards the other matter, it appears to me that his silence might be ascribed to a variety of reasons quite as probably as to his death, which we are asked to assume to have been its cause. It seems to me to have been far from improbable that Greig may have lost interest in his family and his connections, owing (as the Lord Ordinary is disposed to think) to the somewhat chilly reception which they not unnaturally extended to him on the few (four, I think) occasions when he visited them during the four years or so which immediately preceded his last departure; or he may have lost heart from a sense of shame, and a feeling that his appearances were not on the whole creditable, and have decided not again to visit or to write; or he may have formed other ties, not necessarily of a bigamous character, and other friendships elsewhere. Other suppositions might be figured, but all this is, of course, matter of conjecture only; it is enough to say that I cannot hold the man's silence to be, either of itself or in conjunction with the other elements in the case, sufficient to warrant the inference that he must be dead.

In my judgment, if we were to accede to the pursuer's demand we should be taking a step distinctly in advance of what has been considered sufficient in any of the reported cases. As already pointed out, there is no evidence as to Greig's destination, or where he may have passed his life after he was last seen. Nor is there here any such suggestive element as was a feature in most of those cases—*e.g.*, participation in an Arctic expedition (*Fairholme*, 1858, 20 D. 813), or outset on a journey of peril (*Williamson*, 1886, 14 R. 226), or illness in a notoriously unhealthy climate (*Rhind*, 1878, 5 R. 527), or the incidents and trials of a singularly chequered career (*Bruce*, 1871, 10 Macph. 130). Reference may also be made to M'Laren on Wills and Succession (3rd ed.), p. 63, section 111, and the cases there cited.

For these reasons I agree with the Lord Ordinary's conclusion. I think that the circumstances of this case, upon which our decision must depend, do not disclose any sufficient warrant for the inference which the pursuer would have us draw from them. My reasons, if they are correct, are sufficient for a decree of absolvitor.

I do not find it necessary to deal with the last paragraph of the Lord Ordinary's judgment, where his Lordship draws a distinction between cases of succession and cases arising upon contract with a third party. It is, I think, clear that the views there expressed, whether right or wrong, do not enter into the essence of his Lordship's judgment, and that, assuming them to be erroneous, the error would not affect his reasoning or his decision upon the merits of the case. We heard little or no argument upon this point from either side of the bar, and, as I have formed no decided view upon it, I prefer to reserve my opinion until a case shall arise where it may be necessary to hear argument and pronounce judgment upon the matter.

I am for adhering to the interlocutor now under review.

LORD SALVESEN—The question in this case is whether a certain David Greig junior, who was the husband of the pursuer, must be presumed to have died at some time prior to the institution of the action. The old rule of the law of Scotland was that the presumption of life in the case of a missing person was so strong that unless he had attained a very ripe age, variously put at eighty or a hundred years, as at the date when declarator was sought, that he must be presumed to have died, he would still be presumed to be alive apart from circumstances from which it could be inferred without reasonable doubt that he had in fact ceased to live. That rule was established when the facilities of travel and postage, not to mention advertisement, were in a very backwaad state compared with the times in which we now live. At that time if a man went to a distant country the expense of returning, and even the expense of communicating with his friends, was so great as to make it difficult for anyone who did not attain a position of some affluence to undertake the cost. Mere silence accordingly, even for a very long period of time, was held not sufficient *per se* to overcome the presumption of life unless the absent person had at the date when the declarator was sought already reached the utmost span of human existence.

During the past fifty years conditions have so changed that in both England and Scotland Parliament has enacted that a man shall be presumed to have died for purposes of succession on the completion of seven years from the date when he was last heard of, and although this provision has been given effect to in the two countries in many hundreds and possibly thousands of cases, there are so far as I am aware no recorded examples of a man who has been so declared to have died reappearing and claiming the estate which he had forfeited, and which had been legally distributed amongst his representatives. It is true that the Presumption of Life Limitation Act does not apply to the circumstances of the present case, but the altered conditions of life in the respects I have already referred to have a very direct bearing on the question which has to be answered in each indi-

vidual case, whether the facts proved are such as to enable the Court to affirm without any reasonable doubt that he must be presumed to be dead. In reaching this conclusion it is not, and never was, necessary to establish the certainty of his death. If a thing can be affirmed as a certainty there is no room for the application of any legal presumption.

[*His Lordship narrated the facts and proceeded*]—Medical evidence was led on both sides, but in my opinion it was substantially to the same effect. Both doctors have known individual cases of men who after a prolonged course of intemperance have completely recovered themselves and have lived a normal period. They agree that it cannot be affirmed with certainty that from a medical point of view David Greig might not have survived the twenty years during which he has been missing. If he continued in his evil courses his life could not be a long one. While before 1890 he was a strong and vigorous man, his family history was not of the best, for his mother had died of consumption at a comparatively early age—a fact to which insurance doctors attach much, and possibly undue, significance. From the insurance point of view he was utterly uninsurable after his habits of intemperance commenced, and still more after they had persisted so long. Doctor Chalmers Watson puts seven or ten years as the outside period of his survivance if he continued his dissipated habits. In 1896, when he had one of his attacks of delirium, his heart had been already affected, and this was one reason why he required two male attendants to restrain him from violent movement. One witness who saw him about 1900 thought he looked like a dying man.

Apart from the medical evidence the defenders adduced no witnesses at all. As it was their interest to prove that he was alive after the date (31st December 1900) at which the pursuer desired a declarator of his death, their inquiries, if they made any, must therefore have been as barren of result as those of the pursuer.

These being the facts, I am able for myself to draw without any hesitation the inference that David Greig presumably died at a time not later than 31st December 1910. I cannot otherwise account for nothing having been seen or heard of him all these years. If he had retrieved himself, looking to the kind of man he was before he gave way to intemperance, I cannot otherwise account for his not having communicated in any way with his wife and children. The fact that there was a decree of separation against him and a decree for aliment had no deterrent effects on a man who had nothing to lose, for the three visits which he paid to his wife between 1897 and 1900 were after that decree had become operative. In the only letter which has been preserved he evinces affection for his wife and children, some of whom were quite young at the time he was last heard of. It is suggested that he may have formed new ties. Suggestions of this kind are always possible, but in this case they lack every trace of probability. On three occasions he had a chance of retrieving his character, twice when he was kept in an inebriate home at the expense of friends, and once when he was sent to Australia at his father's expense. What probability is there that later, when he was picking up a precarious livelihood as a labourer, he should have been able to rid himself of the incubus which had oppressed him for ten years?

Although it seems to me that the Lord Ordinary has somewhat unfairly discounted the effect of some of the evidence led, the conclusion he arrived at is partly vitiated by the circumstance that, *ex concessis* of the defender's counsel, he erred in law when he held that evidence which might establish a presumption of death in cases of succession would be insufficient in cases of contract. I do not know whether he would have reached the same conclusion if he had not made this error. I should have thought it doubtful, seeing that he introduces this topic with the words—"In another much more important respect this case differs from all the cases reported in the books." I do not see why the Lord Ordinary entered on this topic at all unless it formed an element in the opinion which he formed. But in any event this is a case where we must apply our own judgment as to the inference to be drawn from the proved facts. I am able to affirm that in view of these no reasonable doubt exists of the death of David Greig at or prior to 31st December 1910, and I am prepared to give judgment accordingly.

LORD ORMIDALE—The pursuer in this case asks for declarator that her husband David Greig must be presumed to have died on 31st December 1900. I am not prepared to affirm that proposition, but I agree with your Lordship in holding that it may be inferred from the facts proved in the case that David Greig was dead on 31st December 1910.

In cases of this description it is recognised that the decision in each must depend on the particular circumstances established in the case. The question to be determined is a jury question, and, as stated by Lord Deas in *Bruce* v. *Smith*, 10 Macph. 130, at p. 133, "really always is whether any reasonable doubt exists" of the missing man's death.

David Greig was born in 1857, and would now be sixty-three years of age. In 1910 his age would be fifty-three. There is a presumption in our law in favour of life for a much longer period. His age taken by itself does not therefore suggest even a probability that his life has reached its close. The proof of the presumption that he is now dead must be sought in other facts. [*His Lordship here narrated the facts.*]

The sudden and complete cessation of visits to his family, on the theory that the man remained in life for any length of time, is to my mind very difficult indeed to explain or understand. Everything that is proved about him points to the certainty of his coming back to them, especially if he had reformed his conduct. As I have said, he

was at heart fond of them all, and I cannot agree with the Lord Ordinary that his wife's bearing to him was markedly or unduly harsh or repellant. Nor would he have been deterred by the fact that she held a decree for aliment against him. That had proved no deterrent for several years prior to 1900. The inference to be drawn from the evidence is that there was no break off in his habits of dissipation.

If that be so, then according to the medical testimony in the case his prospect of life was of the poorest. As I read it, the evidence of both the doctors who were examined is to the same effect in regard to this. There may be cases of men as completely addicted to drink as David Greig was, pulling themselves together and living a considerable time, but they are very exceptional. Dr Chalmers Watson, founding on the history of David Greig as established by the evidence, puts his expectation of life in 1900 or rather earlier at from six to ten years.

Extensive inquiries for the missing man have been made in all the most likely quarters with no result. Twenty years have elapsed since he disappeared. His relatives and the friends who knew the man best have come to think that he is dead.

The difference drawn by the Lord Ordinary between the proof necessary to establish death in cases of succession and cases of contract was not very strenuously nor as I thought seriously insisted in. No authority was cited in support of it, and it does not appear to me to be well founded.

On the whole matter the true inference to be drawn from the facts in this case is, in my judgment, that there is no reasonable doubt that David Greig is dead—that he may be presumed not to have survived 31st December 1910.

I agree, for the reason stated by your Lordship, that the claim by the pursuer for interest cannot be sustained.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor: Find, decern, and declare that David Greig designed in the summons must be presumed to have died as at 31st December 1910, and that the pursuer as his widow is entitled to an annuity out of the Widows' Fund of the defenders, to which the said David Greig had been a contributor, at the rates and for the periods after mentioned: Decern and ordain the defenders to make payment to the pursuer of the sum of four hundred and thirty pounds, ten shillings (£430, 10s.) in satisfaction of the said annuity to which she is entitled for the period from said 31st December 1910 to 11th November 1920, being at the rate of £42 per annum for the period to 11th November 1918 and at the rate of £50 thereafter, which rates respectively are admitted by the defenders at the bar to be correct for said periods: And decern and ordain the defenders to make payment to the pursuer of the said annuity at the said rate of fifty pounds (£50), and that half-yearly, termly, and proportionally during all the days of the pursuer's life as from and after the term of Martinmas 1920, . . . with interest at the rate of five per centum per annum upon such termly payments from the time of the same becoming due after the said term of Martinmas 1920. . . ."

Counsel for the Reclaimer (Pursuer)—Wilton, K.C.—Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Respondents (Defenders)—Lord Advocate (Morison, K.C.)—W. J. Robertson. Agent—A. C. Drummond, Solicitor.

HOUSE OF LORDS.

Tuesday, November 30.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

GATTY *v.* MACLAINE AND OTHERS.

(In the Court of Session, March 12, 1920, 57 S.L.R. 334.)

Right in Security—Contract—Loan—Construction — "Punctual" — Proviso that Interest should be "Punctually" Paid—Bar.

A proprietor borrowed on the security of his estates certain sums. The conditions on which the loan was made were expressed in a minute of agreement. One of the conditions was, that provided the interest on the loan "be punctually paid in terms of the bond," the lenders agreed (1) not to call in the loan for a period of fourteen years, and (2) to modify the rate of interest to 4 per cent. A quarterly payment of interest in terms of the bond became payable on 1st August 1918. It was not paid till 8th August 1918. *Held* (*aff.* judgment of the First Division) that there had not been punctual payment in terms of the bond, and that in the circumstances the lenders had not barred themselves by their actings from insisting upon payment on the exact date.

The case is reported *ante ut supra.*

The defenders appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated the 12th March 1920, recalling an interlocutor of Lord Sands of the 12th March 1919, and decerning against the defenders, the present appellants, in the terms of the conclusions of the summons. The facts giving rise to the present dispute are shortly as follows:—The appellant Maclaine borrowed on the 9th November 1910 a sum of £36,000 on the security of his estate in Lochbuie in the island of Mull. The transaction was carried out by means of two documents, namely, a registered bond and disposition in security,