not be valid and effectual unless granted by a person of the age of twenty-five years complete, not subject to any legal incapacity, and born after the date of the tailzie.' The petitioner's son and heir-apparent is therefore disabled from consenting by the express terms of the proviso, and no curator *ad litem* or other guardian could consent for him under the 31st section of the statute, because that section has no operation in cases where it would be inconsistent with the other provisions of the Act.

"But the 12th section of the Act 1882 authorises a curator *ad litem* to consent for a person under disability 'in any application under the Entail Acts to which the consent of any person is required, when such person is disabled under the provisions of the Entail Acts or otherwise from consenting by reason of being under age or subject to other legal incapacity.' The enactment is wide enough to embrace any application to disentail, and it applies in terms to a disability attaching under the express provisions of the Entail Acts, such as that created by the proviso above quoted from the first section of the Rutherfurd Act. I see no reason to doubt that the new enactment is applicable to such a case as the present, and the curator *ad litem* of Lord Fincastle is therefore, in my opinion, in a position to consent on his ward's behalf to the proposed disentail."

Counsel for Petitioner — Dundas. Agents — Dundas & Wilson, C.S.

HOUSE OF LORDS.

Friday, August 1.

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

(*Ante*, p. 453—5th March 1884.)

Insurance—Life Insurance—Answers by Assured to Questions put by Insurer—Warranty.

A person insured his life with an insurance company, making a declaration relative to the policy that the statements made by him in answer to the queries in the form of proposal were true, which declaration was declared to be the basis of the contract. Two of the queries were—(1) Are you temperate in your habits? (2) Have you always been so. Answers (1) Temperate; (2) Yes. The policy provided that "if anything averred in the declaration shall be untrue, this policy shall be void." In an action after the death of the assured the company refused payment, on the ground that these answers were false, the truth being that the insured was intemperate. *Held* (*rev.* judgment of Second Division) (1) that in point of fact the insured was intemperate; and (2) in point of law, that his answers to these questions formed a warranty of the truth, and having been untrue, rendered the policy void.

The Standard Assurance Company appealed.

At delivering judgment—

Lord Blackburn—My Lords, the respondents in this case, the pursuers, sought to recover from the Standard Life Assurance Company, who are represented by the appellant, £1500, the amount of a policy on the life of William Weems.

The policy, on the true construction of which much depends, was executed on the 25th November 1881. It commences by reciting that William Weems "having subscribed or caused to be subscribed and deposited at the office of the said company in Edinburgh, a declaration bearing date the 9th November 1881, which is hereby declared to be the basis of this assurance, and having paid £55, 17s. 6d. as the premium for such assurance for one year from the 15th November 1881," then follows the operative part of the policy for one year, with a stipulation that it may be continued from year to year on the payment on or before the 15th of November of the same premium (as the life dropped before the 15th of November 1882 this never came into operation), and two provisos, of which the one is—"Provided always that the assurance hereby made shall at all times and under all circumstances be subject to the terms and conditions printed on the back of this policy, which terms are to be considered as incorporated in and following part of this policy." There is no averment as to what these terms and conditions are, and no question is raised as to the effect of this proviso. But the next proviso is important—"Provided also that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and moneys received by the said company in respect thereof shall belong to the said company for their own benefit."

The declaration referred to is in a printed form partly filled up by William Weems, and I think it convenient to read the document as it is instead of attempting to abridge it. I will not read the questions and answers, but refer to them as if they were read. Then follows this declaration—"I, the said William Weems (the person whose life is proposed to be assured) do hereby declare that I am at present in good health, not being afflicted with any disease or disorder tending to shorten life; that the foregoing statements of my age, health, and other particulars are true; that I have answered truly the above questions as to any prospect or intention I may have of proceeding or residing beyond the limits of Europe; that I have concealed no circumstances connected with the probability of my proceeding beyond such limits at any future period; and that I have not withheld any circumstance tending to render an assurance of my life unusually hazardous. And I, the said William Weems (the person in whose favour the assurance is to be granted), do hereby agree that this declaration shall be the basis of the contract between me and the Standard Life Assurance Company; and that if any untrue averment has been made, or any information necessary to be made known to the company has been withheld, all sums which shall have been paid to the said company upon account of the assurance made in consequence thereof shall be forfeited, and the assurance be absolutely null and void.

Signed at Johnstone this 9th day of November in the year of our Lord, 1881. Signature of person whose life is proposed to be assured, WILLIAM WEEMS. (Signature of person in whose favour policy is to be granted),
Agency, Johnstone and Lochwinnoch."

There was no dispute that William Weems died on the 29th of July 1882. No case was set up of fraud, but there was a defence set up that there was an untrue averment in the declaration, inasmuch as William Weems had made a statement in answering the seventh of those questions which was untrue. No other statement was relied on before the Second Division or in this House.

The case came on before the Lord Ordinary, who in his note to the interlocutor says, I think very truly, "there is a great deal of evidence on both sides, and it is very difficult to strike the balance." He pronounced an interlocutor finding 'that the said William Weems did not make any untrue statement in the said declaration."

The Second Division by a majority adhered to this, and the appeal is against these interlocutors.

Your Lordships have before you all the evidence on which the Lord Ordinary acted. He had the great advantage of seeing the witnesses, and so far as anything turns on their demeanour, I would not lightly disregard the opinion of the Judge who tried the cause. He says in his note that all the witnesses appeared to him equally reliable, with the exception of Dr Taylor and the two Edwards. As far as regards George Edwards he says that witness did not impress the Lord Ordinary favourably, and as that is a matter on which he had much better means of judging than your Lordships have, I think that much reliance ought not to be placed by your Lordships on George Edwards. The Lord Ordinary's reasons for distrusting Dr Taylor and Thomas Edwards are such that your Lordships can form an opinion on them. And I take it that what your Lordships have to do is, to determine on the whole evidence whether the statement was or was not "untrue" within the meaning of that word as used in the policy and declaration incorporated in it. I think that to a great degree depends on the construction of the whole contract.

Those whose business it is to insure lives calculate on the average rate of mortality, and charge a premium which in that ordinary average will prevent their being losers. There are some expressions used by the Judges in the Court of Session in the case of *Hutchison*, 7 D. 473, which would seem to lay it down, at least when it is the party's own life that is assured, that it is illegal, or at least so absurd that no one would make such a contract, to engage that if the life is such that the risk is of the ordinary kind, the insurer shall be bound, but that if there is a disease tending to shorten life, such as to make it not the ordinary risk, the insurer shall not be bound, whether the assured knew it or not. I cannot agree in this, it seems to me a very reasonable stipulation on the part of the insurer, and that it is not at all absurd or improper on the part of the assured to assent to such being a term of the contract. It is seldom that a derangement of one important function can have gone so far as to amount to disease without some symptoms having developed themselves, but the insurers have a right if they please to take a warranty against such disease whether latent or not, and it has very long been the course of business to insert a warranty to that effect.

If there was no more than a warranty to that effect, if it was disproved the risk would never have attached, the premiums there would never have become due, and might, if paid, be recovered back as money paid without consideration. But it became usual, I do not know when, but at least for the last fifty years, to insert a term in the contract that if the statements were untrue the premiums should be forfeited.

That, no doubt, is a hard bargain for the assured if he has innocently warranted what was not accurate; but if he has warranted it, "untruth" without any moral guilt avoids the insurance; and in *Duckett* v. *Williams*, 2 Crompton, Meeson, and Roscoe, 348, in 1834, it was held, on reasoning to my mind irresistible, that in a declaration, substantially as far as regards this point the same as this, what was untrue so as to have the effect of avoiding the insurance was also untrue so as to cause the forfeiture of the premium.

In *Anderson* v. *Fitzgerald*, 4 House of Lords. 507, Lord St Leonards points out very strongly that where such a consequence would follow from a warranty, before a contract is held to have the effect of a warranty it is necessary to see that the language is such as to shew that the assured as well as the insurer meant it, and that the language in the policy being that of the insurers, if there is any ambiguity, it must be construed most strongly against them. But he never questioned that if it was a warranty, and it was not fulfilled, it avoided the policy. And, with the exception of *Hutchinson's* case, 7 Dunlop, to which I have already referred, I think that in every case in which moral guilt was thought an element in the question of true or untrue, it has always been on the ground that the contract was such as not sufficiently to shew that there was an agreement on the part of the assured that there should be a warranty.

In *Forster's* case, 11 Macph., I think there was a very strong ground for saying that it was not shewn that the assured contracted that her answers to a medical man selected by the company, who was to examine her alone and report to them confidentially the conclusion to which he came, were warranted to be accurate; the very object of the examination would be frustrated if the patient was not to answer frankly and without reserve the questions she was asked. There are other grounds for holding that there was in that case no warranty, — stated in the judgment of the Lord President,—which I think very sufficient, but which have no bearing on the present contract.

Lord Young, as Lord Ordinary, had in his note in *Buist's* case (4 R. 1076) said of the misstatement: "If not wilful, it must be inexcusable in this, that it consists in a blameably reckless or careless assertion or omission, of which an honest man, giving ordinary attention to the matter in hand, would not have been guilty;" and he says in the present case that he still entertains the opinion he then expressed.

My Lords, I do not think anyone would ques-

tion that, when the proof goes so far, the policy is void; but it seems to me that to hold that it is necessary to go so far is in effect to say it is not a warranty at all. And whether in any case it is necessary to go so far depends, as I think, on whether there is or is not a warranty in that case.

This, in my opinion, depends on the construction of the whole instrument. It is competent to the contracting parties, if both agree to it, and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so, the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.

In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and whatever place, to be construed as a warranty, and, *prima facie* at least, that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that, on the balance of authority, the general principles of insurance law apply to all insurances, whether marine, life, or fire (see per Lord Chancellor Eldon, in a Scotch appeal on a fire insurance, 3 Dow, 262). No question arises on that in the present case; but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies. But I think, when we look at the terms of this contract, and see that it is expressly said in the policy as well as in the declaration itself that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which I think include the statement that he was of temperate habits) is warranted.

The Lord Advocate argued very powerfully that the truth of that statement involved questions of degree and of opinion, and therefore could not, he argued, be warranted. But the most familiar instance of a warranty (implied in every voyage policy) is that of seaworthiness, involving in it questions of degree and opinion to quite as great an extent as a warranty of temperate habits. I think, therefore, whilst I agree that the burden is on the insurers, and that they must prove drinking carried on before the date of the declaration, 9th November 1881, to such an extent as to amount to intemperance, and so often and continuously as to amount to habits of intemperance, they are not obliged to prove anything more.

The object of the Insurance Company was to know that the life to be insured was not merely not rendered already diseased by drinking, but that his habits were so temperate that there was no unusual risk that he should become a drunkard, and they took the warranty that they might safely dispense with any further inquiry on that point. I think, therefore, that such being the object of warranty, we must take into account the normal habits of people in the class and in the locality where the person insured lives. I think gentlemen in the last century drank habitually a great deal more than they do now, and I do not think a gentleman then would properly have been held to be of intemperate habits (within the meaning of such a policy) though he drank so much habitually that if a gentleman now did so the insurers would reasonably dread he would drink more, and then he would not be held of temperate habits within the meaning of such a policy. And I think it is fair to say that, so far as the evidence enables us to take into account the normal habits of the town councillors of Johnstone, the evidence does not satisfy me that they as a general rule drank as freely as the insured did. He some months after the policy was made was elected Provost, and then he seems to have pulled up. That, as it was after the declaration, is only material as far as it throws light on what had been the case before. And on the 29th July 1882, eight months after the policy was granted, he died. Now the cause of death was in one sense immaterial. If the policy was avoided the Insurance Company would not have been liable though he had been killed in a railway accident, but that would have afforded no evidence as to the state of his habits. But the doctor who attended him in his last illness certified that the cause of his death was hepatitis chronic four months, congestion of the brain four days. Dr Colligan, who certified this, is himself dead; that, according to the Scotch law of evidence, takes his statement out of the rule as to hearsay evidence, though in weighing them we must remember that he is not subject to cross-examination.

Now chronic hepatitis is a disease of the liver which is generally in this climate produced by excessive drinking, over a considerable period, and if it is established that the assured had as early as March 1882 really begun to suffer from such a disease it adds greatly to the force of that evidence, which tends to shew he had been in the habit of drinking too much for some time before November 1881. I do not know that either class of evidence by itself would have in my mind satisfied the burden which was on the appellants; taken together they do. I must therefore advise your Lordships to reverse the interlocutors complained of, with costs.

Lord Watson—My Lords, this appeal raises two questions of some importance, the one of law, the other of fact. The first of these involves the construction of a policy of assurance, bearing date the 25th November 1881, effected by the deceased William Weems upon his own life, with the Standard Company, which is represented in this action by the appellant.

On the 9th November 1881 the deceased submitted a proposal to the company, which was made the basis of the contract of assurance. The seventh question in the proposal was in these terms—(1) Are you temperate in your habits, (2) and have you always been strictly so? And the reply made to it by the deceased was (1) "Temperate" (2) "Yes." It was set forth in the proposal, and it was also made a condition of the policy, that in the event of the foregoing or any other averments made by the assured in his proposal, concerning his age, health, and other particulars, proving to be untrue, the policy was to become null and void, and all sums paid by the assured were to be forfeited.

Mr Weems died on the 29th July 1882, and the

Standard Company declined to pay the sum assured on the ground that various statements made by the deceased in his proposal, including his answer to the seventh question, were in point of fact untrue. The respondents, who had acquired right to the policy, thereupon brought an action for recovery of its amount, which was resisted by the appellant upon the same grounds which had previously been assigned by the company for their refusal to pay. The Lord Ordinary (Fraser) after a proof had been taken gave decree for the respondents, and his judgment was, on a reclaiming-note, affirmed by three of the learned Judges of the Second Division, Lord Rutherfurd Clark dissenting. Although other pleas were discussed by him before the Lord Ordinary, the only defence maintained by the appellant in the Inner House and at your Lordships' Bar was that founded on the alleged untruth of the reply given by the deceased to the seventh question in the proposal for assurance.

I entertain no doubt that according to the law of Scotland the declaration of the assured, taken in connection with the policy itself, in his proposal to the company, constitutes an express warranty that the answer made by him to the seventh question was true. In other words, it is an express and essential condition of the contract that the policy shall be null and void in the event of the averment by the assured as to his habits, implied in his answer to that question, proving to be false. The doctrine of warranty as applied to such stipulations in a contract of assurance is the same in the law of Scotland as in that of England. I am aware that some Scotch Judges have in times past objected to the use of the word "warranty" as having no definite significance in the law of Scotland; but in order to show that such a remark is no longer well founded, I need only refer to the observations made by the Lord President (Inglis) and Lord Mure in the *Scottish Widows' Fund and Life Assurance Society* v. *Buist and Others* (14th July 1876, 3 Session Cases, 4th series, p. 1078), and to the opinions of the Judges of the First Division in the *Life Association* v. *Foster*.

Notwithstanding that the warranty is express, there still remains for consideration what must be held to be the subject-matter of the warranty. That is a point to be determined in each case according to the just construction of the question and answer taken *per se* and without reference to the warranty given. In the present case the seventh question proceeds from the company, being printed on a form of proposal issued by them for the use of persons who may be desirous of effecting an assurance. The question must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal; and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous they must be construed *contra proferentes* and in favour of the assured. For my own part, I can discern no ambiguity in the language of question seventh. I agree with Lord Rutherfurd Clark that the import of the answer is precisely the same as if the deceased had affirmed, "first, that he was temperate in his habits; and second, that he had always been strictly so." In its plain and ordinary sense, that statement is an averment of fact, and not a mere assertion of the opinion or belief entertained by the assured with regard to that fact. It therefore appears to me that, whatever may be the import of the word "temperate" (which is a separate matter), the assured must be held to have warranted, not that the assertion was true according to his sincere conviction, but true in point of fact, and consequently that, in order to establish a breach of warranty, it is not necessary for the appellant to prove that the assertion was morally false.

In the Second Division the majority of the Judges were of opinion that the answer in question was a statement, not of fact, but of the personal belief of the assured. Lord Young (in whose opinion Lord Craighill concurred) referred to the views which were expressed by him (as Lord Ordinary) in *The Scottish Equitable Life Assurance Company* v. *Buist and Others* (4 Session Cases, 4th series, page 1078). In that case the assured had given a warranty very similar to that with which we have to deal, being to the effect that his habits were sober and temperate and had always been so; and the learned Judge, in reference to that warranty, said—"I mean, however, to express my opinion distinctly to this effect, that an insurance office challenging the policy after the death of the assured on the ground of untrue answers to queries, and untrue declaration made by him regarding his health and habits of life, undertakes a heavy *onus* to the discharge of which it must be strictly held. I do not go the length of saying that gross and wilful falsehood must be proved. But, first, the falsehood must be clear, and on a subject which is, or reasonably may be, material to the risk; and second, if not wilful, it must be inexcusable in this sense, that it consists in a blameably reckless or careless assertion or omission of which an honest man giving ordinary attention to the matter in hand would not have been guilty, and which, in fairness to the office which was deceived, cannot be treated or passed over as immaterial or trifling." These observations were not necessary to the decision of the *Scottish Equitable Company* v. *Buist*, because the learned Judge held it to be proved that the statements warranted had been made fraudulently. But his Lordship adopts his *dicta* in that case as expressing the principles which ought to govern the decision of the present case; and consistently with these principles he treats the seventh question as an "appeal to the man himself as to the epithets which he would apply to himself with respect to his habits," and upon that footing he holds that the answer to it cannot be regarded as false. The Lord Justice-Clerk seems to have taken substantially the same view; inasmuch as he states that if he "had thought that the answers given by him were not given in good faith" he would have agreed with Lord Rutherfurd Clark, who was of opinion that the appellant ought to prevail.

I am unable to assent to the principles so clearly enunciated by Lord Young in *The Scottish Equitable Company* v. *Buist*. When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point. As the Lord Chancellor (Cranworth) said in *Anderson* v. *Fitzgerald* (4 House of Lords Cases, 503)—

"Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy." It would, in my opinion, be equally subversive of the contract which the parties make for themselves to hold (as Lord Young apparently does) that there can be no breach of such a warranty unless it is proved that the answer of the assured, being untrue, was made by him either wilfully and in the knowledge of its untruth, or inexcusably, in the sense of its having been a blameably reckless or careless assertion.

An ingenious argument was addressed to your Lordships by the respondents' counsel for the purpose of showing that the seventh question, from its very nature, involved only matter of opinion, and not of fact; and, consequently, that any reply to it must be treated as an expression of opinion, and not as an assertion of fact. It appeared to me that their argument, which turned upon a very fine-drawn distinction between what were termed matters of pure fact and matters of opinion, had really no practical bearing upon the case before us. There are facts innumerable which can only be ascertained by the test of opinion, but they are not the less facts in a legal, whatever they may be in a metaphysical sense. It appears to me to be in vain to contend that the character of a man's habits, temperate or intemperate, is matter of opinion, and not of fact. The second branch of the fourth question in the proposal submitted by the deceased furnishes an apt illustration of that which in the ordinary sense is matter of mere opinion as distinguished from matter of fact. It runs thus—"Do you consider yourself of a sound constitution?" That is a query which obviously relates, not to the soundness of the assured's constitution, but to his own opinion on the subject, and in that respect it presents a marked contrast to the terms of the seventh question.

It was also argued for the respondents that in Scotland it has been long settled by decision that such a question as the seventh, occurring in a proposal made by the assured as the basis of a policy upon his own life, is merely intended to elicit the personal opinion or belief of the assured, and that the deceased William Weems must be presumed to have given the answer now said to be untrue in reliance on that judicial interpretation. It is necessary therefore to examine the two authorities which were cited in support of that proposition by the respondents' counsel.

The first of these authorities is the case of *Hutchinson and Others* v. *The National Loan Fund Life Assurance Company*, which was decided by the First Division of the Court of Session on the 21st February 1845 (7 Session Cases, 2d series, p. 467). A lady of the name of Armstrong had in February 1843 effected an insurance on her own life with the Company, and she died in November of the same year. Her proposal, which was made the basis of the contract of assurance, contained this query, "Has the party an habitual cough, or any disease or symptom of disease?" to which her answer was "No," and also a declaration "that I am now in good health, and do ordinarily enjoy good health." In defence to an action for the amount of the policy the company alleged that the assured was at the date of the insurance of intemperate habits, and labouring under disease of the liver, which resulted in dropsy, of which she died. The Lord Ordinary reported the case upon issues to the First Division, where the argument turned upon the defenders' pleas to the effect that the policy was void by reason of their having been a breach of the warranty that the assured was in good health, and had no disease or symptom of disease. What the Court held is best explained by their interlocutors: "Find that, whatever issues may be granted for trying this case, the proposal of Mrs Armstrong, and declaration herein referred to, form the basis of the contract in the policy of insurance in question, and import a warranty only to the effect that the declarant was, and has been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease material to the risk, and that they do not import a warranty against any latent and imperceptible disease that only could be discovered by post-mortem examination, or from symptoms disclosing themselves at an after period of time." Whatever may be the merits of that judgment, it is beyond question that the main reasons assigned for it by the learned Judges who then constituted the First Division go to the full length of affirming that it would have been *pactum illicitum* had the assured so answered the query as to take upon herself the risk of being affected at the time of entering into the policy by a latent and deadly disease, the existence of which could only be discovered by a post-mortem examination. As might have been expected, the respondents' counsel did not attempt to vindicate the judgment by reference to these reasons, which they were not prepared to maintain, and preferred to rest it upon another and more reasonable ground, which is very clearly indicated in the opinion of Lord Fullerton. His Lordship construed the answer and declaration as together amounting to nothing more than a statement by the assured that she was at the time in good health, and he further held that "good health" in the ordinary sense of the term means the perfect conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them or any symptom of ailment.

The second of these authorities is *The Life Association of Scotland* v. *Foster and Others* (31st January 1873, 11 Session Cases, 3d series, p. 351). In that case the Association brought an action to reduce a policy which had been effected with them by the deceased Mrs Mary Foster upon her own life, in respect of an alleged breach of warranty. The proposal for assurance contained a declaration by the deceased, "that I am at present in good health, not being afflicted with any disorder, external or internal," and an agreement by her that if any untrue statement were made therein or in the answers to questions by the society's medical officer in reference to this proposal, "the assurance should be null and void." A number of questions were put to Mrs Foster by the medical officer. The fourth of these was, "Are

you now, in your own opinion, in perfect health?" to which her answer was "Yes;" and the sixth was in those terms, "Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of chest, or any affection of the urinary organs?" to which she answered "No," To those questions and answers there was appended a declaration by the assured, setting forth that "the above statements were faithful and true." The assured died of rupture on the 30th November 1871, six months and a half after the date of the proposal. A proof was led, from which it appeared that at the time when she made that proposal, and for some months previously, the assured had a small swelling on her groin, which caused her no inconvenience and did not affect her general health. That swelling, as subsequent events shewed, was due to hernia, but there was no reason to suppose that deceased knew that she was affected with hernia, or that the swelling in question indicated to her the existence of that disease. The First Division of the Court, before whom the case depended, held that there had been no breach of warranty, and assoilzied the defenders. It is of importance to observe that the pursuers in the reduction did not plead the untruth of any statement made by deceased in her proposal for assurance. The only statements upon which they relied as untrue, and therefore constituting a breach of warranty, were those made by the assured in reply to the questions put by their medical officer. Upon this point the Lord President (Inglis) says—"It is not alleged by the pursuers that there is any untrue averment in the words of the declaration itself. They admit that Mrs Foster was, within the fair meaning of the words, in good health, and not afflicted with any disorder, internal or external. The controversy between the parties was therefore narrowed to the single issue whether the assured by her sixth reply to the medical officer had asserted that she was not at the time affected by latent disease, such as rupture or any of the other diseases specified in his question. It appears to me to have been rightly decided by the learned Judges that the assured did not make an assertion to that effect. The assured was in my opinion entitled to assume that the object of the doctor who put the questions to her concerning her health, in the course of his medical examination, was to elicit from her such facts as were within her knowledge for his own information and guidance, and to my mind the terms of the sixth query indicate that it was addressed to her for no other purpose. The assured had already told him, in reply to query fourth, that in her own opinion she was at the time in perfect health; that was followed up by the sixth query, which does not ask, 'Have you at present rheumatism, gout, rupture,' etc., but 'Have you had these diseases, or any of them?' The query relates not to present time but to the past, and whilst it can be reasonably construed as referring to every form of active disease of which the assured must have been previously conscious, I think it would be unreasonable to hold that the query was meant to refer to antecedent latent disease of which the assured was unconscious."

I am accordingly of opinion that *The Life Association of Scotland* v. *Foster* has really no bearing upon the doctrine in support of which it was cited. A very different question would have arisen for decision in that case if the assured had, in the proposal which she submitted as the basis of assurance, affirmed that she was not "at the time" affected with hernia. As for the case of *Hutchinson* v. *The National Loan Fund Life Assurance Company*, it is impossible to assent to the general principles upon which it was decided, and to my mind it is not clear that the decision could be justified upon other grounds. But it is unnecessary to consider that question, because, assuming these cases to have the effect contended for, they do not appear to me to give the least support to the respondents' case. Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect until he is *in extremis* or it may be until life is extinct, and the only point arising for decision was whether a particular query or statement was so expressed as to include latent and unknown as well as apparent and known diseases. But intemperate habits are certainly not in any sense latent disease only discoverable on a post-mortem examination.. Such habits may in some instances be occult, but as a general rule the knowledge of them is not confined to their owner; indeed it may happen that their outward manifestations are more readily appreciated by bystanders than by the man himself. The purpose for which such a query as the seventh question in this case is addressed to intending insurers is to elicit the fact and not the opinion of the assured, and if he chooses to give a satisfactory answer he must take the risk of its being true. If his answer is hesitating or unsatisfactory the insurers are put upon their guard, and have the option of declining the assurance or seeking information from other sources, or of charging a higher premium.

I now come to the second question in this appeal, which, as I have already said, is a question not of law but of fact—Was the late William Weems, on the 9th November 1881, and had he previously been, a man of temperate habits, as he then asserted? If that question must be answered according to the truth and not according to the personal belief of the deceased, two of the Judges of the Second Division, the Lord Justice-Clerk and Lord Rutherfurd Clark, were of opinion that he was not. It does not clearly appear what view of the evidence would have been taken upon that assumption by Lords Young and Craighill, but I think the Lord Ordinary was prepared to hold, and did hold, that the deceased was in point of fact a man of temperate habits within the meaning of the seventh question. I entirely agree with many of the observations which were made by the Lord Ordinary in regard to what ought, for the purposes of this case, to be considered as constituting temperate habits, although upon the evidence before us I am unable to come to the same conclusion as his Lordship. I am disposed to think that the learned Judge must have attached undue weight to the case of the *Knickerbocker Life Assurance Company of New York* v. *Foley* (26 Albany Law Journal, 70, also reported 15 O. Ho. Supreme Court U.S. Reports), in regard to the rubric of which his Lordship says the law there stated is that which the Lord Ordinary adopts, and which he has endeavoured to apply in his present judgment. Now, as I read the rubric and report, there was no law laid down

in that case. An American jury had found that a man was of temperate habits although it had been proved at the trial that he had an attack of *delirium tremens*, and the Court refused to disturb the verdict, the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence, to the effect that in the case of an intemperate man *delirium tremens* is occasioned by abstinence from drink, and in the case of a temperate man by indulgence in liquor. Even if it had been laid down as a matter of law, I should hesitate very much to adopt such a standard as that. A man suffering from *delirium tremens* occasioned by recent drinking may possibly be more temperate than another man who is similarly afflicted in consequence of his having abstained from his usual potations, but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits. It is, however, perfectly clear that a mere finding of fact by a jury cannot, although the Court may have declined to set it aside and grant a new trial, form any precedent for the guidance of a court of law.

I believe it to be useless to attempt a precise definition of what constitutes "temperate habits," or "temperance," in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks, that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life and the habits of the class to which he belongs must, in my opinion, always be taken into account, because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man who would be generally regarded as of intemperate habits, ought to escape from that imputation because he is no worse than his neighbours. In the present case the evidence clearly establishes that the assured was a most able and estimable man, but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. I shall not dwell upon the details of the proof, of the import of which I take very much the same view which is clearly and succinctly expressed in the opinion of Lord Rutherfurd Clark. It seems to me to be the fair result of the evidence that the assured was in the habit of taking more drink than was good for him; that he was frequently affected with drink, on occasions when all except himself were sober; that this indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject; and that, instead of repudiating the charge, he admitted it, and promised amendment. These facts appear to me to be fully proved, and they are in my opinion altogether inconsistent with the truth of the assertion that he was on the 9th November 1881 of temperate habits, and had always been so. I cannot, in considering this part of the case, leave out of view the cause of the assured's death as certified by the late Dr Colligan. The statement in his certificate was made by Dr Colligan in the ordinary course of his professional duty, and in compliance with the statutory enactment. There is nothing to suggest that the statement was made dishonestly, or even negligently, and it is in my opinion good *prima facie* evidence of what the medical attendant of the assured judged and believed to be the cause of his death. Of course it is not conclusive evidence that death was due to chronic hepatitis—it may be rebutted, but the testimony of Dr Hunter is not in my opinion sufficient to displace it. That gentleman saw the assured at Bridge of Allan about a month before his death, but he did not examine the assured or visit him professionally until within a few days of his decease. After congestion of the brain had set in, the witness had not the same opportunity of determining what was the primary disease as the medical attendant of the patient who visited him daily for a fortnight before brain symptoms supervened; and the facts certified by Dr Colligan are strongly corroborated by the other evidence in the case.

I therefore agree with your Lordship that the interlocutors appealed from must be reversed, and the cause remitted, with directions to assoilzie the appellant. I think that the appellant ought to have the costs of this appeal as well as his expenses of process in the Courts below.

Lord Fitzgerald—My Lords, I also am of opinion that the answers of the assured to the questions (1) Are you temperate in your habits? and (2) Have you always been strictly so?—Answer (1) Temperate, (2) Yes—formed parts of the basis of the contract of assurance, and that the assured warranted those answers to be true. By "true" I mean true in fact, without any qualification of judgment, opinion, or belief. I confine my observations to the very answers now before us. If they are untrue in fact the policy is void and the persons cannot recover. The law of Scotland is on this subject identical with that of England. The inquiry for your Lordships is whether the evidence is sufficient to satisfy you that the assured had been, prior to the effecting of this policy, intemperate in his habits. "Temperate in habits" is a sentence to be interpreted, and though not to be taken in the Pythagorean sense of "total abstinence," yet seems to import abstemiousness, or at least moderation. I gave, in the course of the argument, what I think is the best definition, viz,—"The rule of not too much, By temperance taught."

I am, my Lords, inclined to adopt a fair and liberal interpretation, having regard to the position of the individual, the habits of the locality, and even the peculiarities of the local municipal authorities in adjourning to neighbouring public-houses "to continue the debate;" but notwithstanding all these allowances, I am coerced to come to the conclusion that the evidence is sufficient to establish that the assured was not a person of temperate habits. On the contrary, his habits of intemperance had been repeatedly observed at the town council and on other public occasions. He has been shewn at times to have been incapable of transacting business or taking care of himself. He was remonstrated with by friends, and does not seem to have

denied the impeachment; and finally, there is evidence that he was elected Provost in the hope that the reponsibilities of office might produce reformation of habit. The evidence for the defenders is not in my judgment displaced by the negative evidence led for the pursuers. The cause of death, too, is confirmation strongly of the assured having fallen into that fatal habit which produces "All the kinds of maladies that lead to Death's grim cave, Wrought by intemperance."

It was against this danger the insurers sought protection.

My Lords, I entirely concur with the noble Lord opposite (Lord Watson) in his reasons and in his criticisms on the Scotch decisions.

Interlocutors appealed from reversed with costs, and cause remitted to the Second Division of the Court of Session, with directions to assoilzie the appellants (the defenders), and to find them entitled to their expenses of process before the Lord Ordinary and in the Inner House.

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END OF VOLUME XXI.