

insurer.¹ And see, *post*, *Notman et al. v. The Anchor Ins. Co.*

Every affirmation of a fact written in the policy is a warranty—but when the statement relates not to facts but to expectations or belief, it can't be thus construed, says Duer, *lect. XIV.*

In the case of *Kimball v. Ætna Ins. Co.*,² the policy issued on a dwelling house (in consequence of a promise that it would be occupied). A condition of the policy was that, "if in any written or verbal application for insurance the assured makes an erroneous representation, materially increasing the risk, the company not to be liable."

The insured had said: "The house would be occupied; that he had a man in view who was going to occupy it." The promise was not carried out, the house remaining empty. The insurance company cited: 1 Duer, *Ins.* 657, 665, 721, 749, etc.; 1 *Phill. Ins.* § 553. *Edwards v. Footner*, 1 *Camp.* The insured cited *Bryant v. O. Ins. Co.*, 22 *Pick.*, etc. It was held that failure to carry out promise, (no fraud being proved) did not avoid the policy, though the risk was increased. This case (says Gray, J.) has been controverted and criticized; but is well founded, and supported by judgments in England and the United States. Oral representation as to a future fact honestly made can have no effect. It is mere statement of an expectation; subsequent disappointment will not prove it untrue.

Dennistoun v. Lillie, 3 *Bligh*, is the strongest case showing that an oral representation promissory may be set up to defeat a written policy; but examination will show that the representation in this case was in no sense promissory, or relating to anything after execution of the policy. The representation was an untrue statement of a past fact. The vessel had sailed, 23rd April, and yet it was represented that she was to sail at 1st May, a future date. She was lost shortly after the date at which she was stated as "to sail."

At the worst, all that could be said against

¹ *Catlin v. Springfield Fire Ins. Co.*, 1 *Sumner*, 434; *Bryant v. Ocean Ins. Co.*, 22 *Pick.* 200.

² *Allen's Rep. Jan.* 1865.

Kimball was that he was bound to occupy in a reasonable time (*per Gray, J.*)¹

Intention expressed the insured may depart from, says Duer; but he ought to give some evidence of good faith, says Duer. But query, and see generally *Warranty, post.*

If mere intention by the assured be stated, the risk of change of intention is on the insurer. 3 *Kent, Comm.* (284.) See also 2 *Duer.*

Positive representations of future facts material to the risk will, if false, avoid the policy, *Arnould*, p. 509.

It has been contended by an able jurist, that there is no such thing as a *promissory* representation. See opinion of Chancellor Walworth in *Alston v. Mechanics' Mut. Ins. Co.*, 4 *Hill* 329.

SOME SCOTTISH JUDGES.

In a sketch of "The College of Justice and its Members," the *London Law Journal* has the following about Lord Rutherford Clark:

Lord Rutherford Clark is the son of the late Rev. Thomas Clark, D.D., Edinburgh. He was admitted to the Scotch bar in 1849, rapidly gained a professional status similar to that which Mr. Baron Huddleston held in the days of his forensic eminence, was sheriff of Inverness, Haddington, and Berwick successively, Solicitor-General for Scotland and Dean of the Faculty of Advocates, and then took his seat in the Second Division of the Inner House.

We have passed thus hurriedly over those facts in the life of Lord Rutherford Clark, which are accessible to everybody, in order that we might have space to deal with the two most important, yet least widely known, events in his career—his defence of Jessie MacLachlan in 1862, and his defence of Dr. Pritchard in 1865. The *Sandyford Murder Case* is one of the *causes célèbres* of Scotland. On the night of July 7, 1862, Jessie Macpherson, the housekeeper of a Mr. Fleming, an accountant, residing in Sandyford Place, Glasgow, was murdered in her bedroom with a hatchet or cleaver. Her dead body was

¹ *Bilbrough v. Metropolis Ins. Co.*, 5 *Duer*, is disapproved by *Gray, J.* In this case the declaration of an intention to do an act materially affecting the risk was treated as an engagement to do it.