

think that it at all follows that the defender is to be held liable for that consequence.

LORD KINNEAR—I agree. I think that the case is a very narrow one, but that it must go to a jury. Upon the second point I agree also that it is not in general desirable or in accordance with our usual practice to put to the jury as a question of fact in the issue not only the facts which constitute the ground of a claim but the consequent damage to the pursuer. I am not at all persuaded that it is in general for the interest of the pursuer to do anything of the kind, because if he does he ties up his claim for a verdict upon the main ground of action, with a finding which he might completely fail in establishing without failing to prove his general case. It rather seems to me that in most cases it would be more embarrassing for the pursuer than the defender to have an unnecessary consequence put in his issue.

But I agree that we ought to follow the practice which seems to have been adopted, especially in the case of *Lightbody*, and in the present case I do not think it is likely to do any harm. I think we should approve of the issue.

LORD JOHNSTON—I am of the same opinion, and have nothing to add.

LORD MACKENZIE was absent.

The Court adhered, refused the motion to vary the issue, and remitted to the Lord Ordinary to proceed as accords.

Counsel for Pursuer (Respondent)—Crabb Watt, K.C.—Kemp. Agent—T. E. Gilbert Taylor, Solicitor.

Counsel for Defender (Reclaimer)—Morrison, K.C.—A. M. Mackay. Agents—M. MacGregor & Company, W.S.

Thursday, February 9.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

THE NATIONAL BENEFIT TRUST, LIMITED v. COULTER.

Contract—Offer and Acceptance—Consensus in Idem—Locus Pœnitentiæ—Rei interventus—Payment.

The proposal form of a benefit investment company contained an application "for a bond for £300, the monthly subscription to be thirteen shillings, payable on the first day of each month for a period of thirty years, such bond to be issued in accordance with your usual conditions." An applicant having filled up and returned the form, received in reply "a bond certificate," stating that the holder was entitled to receive a bond "subject to the usual conditions, a copy of which is endorsed hereon, and the same can be had upon application and payment of the stamp duty payable

thereon, all subscriptions payable in the meantime being subject to the same conditions." These conditions provided, *inter alia*, that a register of all bonds or certificates issued should be kept at the company's office, and that the registered holder would be regarded as exclusively entitled to the benefit of the bond. The applicant paid the monthly subscriptions for over seven years and then sought to repudiate the contract. The company having brought an action against him for declarator that a valid and binding contract had been concluded by the offer, certificate, and subsequent payments, held that though the contract might be incomplete, and might have been repudiated by the defender at the time he received the certificate, still by the subsequent payments made by him under the conditions by which he would have been bound if he had received the bond, he had effectually set up the contract.

Laing v. Provincial Homes Investment Company, Limited, 1909 S.C. 812, 46 S.L.R. 616, distinguished per Lord Ardwall.

The National Benefit Trust, Limited, incorporated under the Companies Acts, 1862 to 1886, and having their registered office at 10 Finsbury Square, London, pursuers, brought an action against Charles Coulter, ironmonger, Broxburn, defender, in which they sought declarator that a valid and binding contract had been concluded between the pursuers and the defender in virtue of pursuers issuing to defender, in reply to his application for a bond, a certificate that he was entitled to receive a bond, and by defender accepting the certificate and making monthly payments thereunder for a period of more than seven years. There was also a conclusion that defender was not entitled to demand repayment of the monthly subscriptions already paid by him, or any part thereof, or any sum in respect thereof, until he had made payment of these monthly subscriptions for a period of thirty years as stipulated in the contract.

The pursuers pleaded—"(1) A valid and binding contract having been concluded between the pursuers and the defender as above condescended on, the pursuers are entitled to decree of declarator as concluded for, with expenses. (2) In the circumstances stated, the defender is barred *personaliter exceptione* from disputing the validity of the contract concluded between him and the pursuers."

The defender pleaded—"(3) Decree of declarator should be refused and the defender assoilzied in respect that no valid and binding contract exists or existed between the parties owing to the absence of *consensus in idem*, and to there being no *termini habiles* for the completion of said bond. (4) The defender having only consented to be bound by a bond issued in terms of his said order, and said bond not having been granted and delivered, he is not bound in any way to the pursuers,

and should be assolizied. (5) The defender, upon a true construction of said order and certificate, and whether a valid and binding contract existed and exists between the parties or no, being entitled to demand repayment at any time of all instalments paid by him as aforesaid, decree of declarator thereanent should be refused."

The facts of the case appear from the opinion of the Lord Ordinary (MACKENZIE), who on 19th March 1910 found, declared, and decerned in terms of the conclusions of the summons.

Opinion.—"This is an action at the instance of the National Benefit Trust, Limited, against Charles Coulter, ironmonger, Broxburn, for declarator that a valid and binding contract was concluded between the pursuers and the defender—(1) by the defender delivering to the pursuers a proposal, (2) by the pursuers issuing to the defender a certificate, both in the terms quoted in the conclusions of the summons, and (3) by the defender accepting the certificate and in accordance with the conditions expressed therein making payment to the pursuers of a monthly subscription of 13s. from the 1st of April 1902 to the 1st of November 1909, and that the rights and liabilities of the pursuers and defender are regulated by the terms of the proposal and certificate and the conditions endorsed on the certificate, and in particular, that the defender is not entitled to demand repayment of the monthly subscriptions already paid by him, or of any sum in respect thereof, until he has made payment of these monthly subscriptions for a period of thirty years as stipulated for in the contract.

"The first point taken by the defender is that there was no valid and binding contract between him and the pursuers owing to the absence of *consensus in idem*, and to there being no *termini habiles* for the completion of a bond.

"In April 1902 the defender filled up and sent to the pursuers a proposal form in the following terms:—

"To the

"NATIONAL BENEFIT TRUST, LIMITED,

"10 Finsbury Square, London, E.C.

"Please issue to me a BOND for £300, the Monthly Subscription to be 0 Pounds, 13 Shillings, and 0 Pence, payable on the first day of each month for a period of THIRTY years, to commence from the first day of April 1902. Such Bond to be issued in accordance with your usual conditions.

"Full Name, Mr Charles Coulter.

"Address, Main Street, Broxburn.

"Occupation, Ironmonger.

"The first Month's Subscription of 0 Pounds, 13 Shillings, and 0 Pence, I send herewith.

"Signature of Applicant: Charles Coulter.

"Received the above sum of £0 13s. 0d.

"Agent, David Chalmers.

"Address, 117 Dalry Road, Edinburgh.

"Date, April 1902."

In answer to this the pursuers issued to the defender a certificate in the following terms:—

"THE NATIONAL BENEFIT TRUST,
LIMITED.

"Incorporated under the Companies Acts, 1862 to 1886.

"Chief Offices: 10 Finsbury Square,
London, E.C.

"BOND CERTIFICATE, £300.

"This is to Certify that Charles Coulter, of Main St, Broxburn, N.B., or other, the holder hereof, is entitled, provided no Subscription is unpaid, to receive BOND No. 42,148 in the above Company, subject to the usual Conditions, a copy of which is endorsed hereon, and that the same can be had upon application and payment of the Stamp Duty payable thereon, all Subscriptions paid in the meantime being subject to the same Conditions.

"Subscription: Thirteen Shillings per Month (*see* Prospectus). Term: Thirty Years, to date from the First day of April One Thousand Nine Hundred and Two.

"Ledger Folio 1 N.B. 118.

"S. F. Gandell, *Secretary*.

"Ent^d. J. Woodfoord."

There were endorsed on the certificate the conditions which are set out in the conclusions of the action.

[These conditions included, *inter alia*—
"2. A register of all bonds or certificates issued will be kept at the registered office of the company, wherein shall be entered the names, addresses, and descriptions of the registered holders, and particulars of the bonds or certificates held by them respectively. 3. The registered holder will be regarded as exclusively entitled to the benefit of this bond, and the company shall not be bound to enter in the register notice of any trust, or to recognise any right in any other person save as herein provided."]

"The defender admits that he received this certificate, and that he thereafter made payment to the pursuers at the rate of thirteen shillings per month from April 1902 till 1st November 1909.

"It appears to me that in these circumstances the certificate must be treated as an acceptance by the pursuers of the proposal made to them by the defender. It may be that on receipt of the certificate the defender might have been entitled to refuse to treat it as an acceptance, on the ground that he had asked the pursuers to issue to him a bond, and that they had not done so but had issued to him a certificate. The defender, however, did not do so, but has paid for more than seven years the subscriptions stipulated for. I am therefore of opinion that he must be held to have done so on the faith of there being a binding contract between himself and the pursuers—the terms of which are contained in the proposal, the certificate, and the conditions endorsed thereon.

"The defender's contention was that the parties to the contract, its duration and its terms, could not be ascertained. As regards the parties there can be no doubt. The proposal is addressed to the National Benefit Trust, Limited, and is signed by Charles Coulter. The certificate bears that Charles Coulter is entitled, on certain conditions, to receive a bond of the National Benefit Trust, Limited. The terms of the

contract appear to me also sufficiently distinct. The request is to issue to the applicant a bond for £300—the monthly subscriptions being 13s., payable each month for a period of thirty years—‘Such bond to be issued in accordance with your usual conditions.’ The reply contained in the bond certificate is that Charles Coulter is entitled to receive bond No. 42,148, subject to the usual conditions which were endorsed on the certificate. ‘All subscriptions paid in the meantime being subject to the same conditions.’ There is also in the certificate an intimation that the bond can be had upon application and payment of the stamp duty payable thereon. The certificate contains a note that the subscription is to be 13s. per month, and that the term is to be thirty years, to date from 1st April 1902.

‘The applicant was placed on the register of the company as the holder of this certificate in accordance with the terms of article 2 of the conditions referred to. Article 3 provides that the registered holder will be regarded as exclusively entitled to the benefit of this bond. By this I think is meant the registered holder of a certificate as well as of a bond, and that what he is entitled to is the specific bond, No. 42,148, mentioned in the body of the certificate.’

‘I am therefore of opinion that the defender’s fourth plea-in-law, which is in these terms—‘. . . (quotes, v. sup.) . . .’ is not well founded. He could have had delivery of bond No. 42,148 at any time upon application and payment of the stamp duty. There is, therefore, in my opinion, a binding contract between the defender and pursuers.’

‘The fifth plea-in-law for the defender is in these terms—‘. . . (quotes, v. sup.) . . .’ This, in my opinion, cannot be maintained in view of the fact that the conditions of the contract contain elaborate stipulations as to the circumstances under which the defender is to be entitled to receive any payment or get any advance from the company. There is no provision which entitles him, under existing circumstances, to demand repayment of the subscriptions already paid, and the terms of the conditions preclude the idea that he has any such right under the contract.’

‘I am of opinion that, although upon certain points there is a difference between the terms of the documents in the present case and those under discussion in *Laing v. Provincial Homes Investment Company, Limited*, 1909 S.C. 812, 46 S.L.R. 616, there is no room for distinguishing the one case from the other, and that the judgment of Lord Kinnear in *Laing’s* case is applicable to the present. His Lordship says—‘The effect of all this appears to me to be this, that the pursuer made an offer to the company which was capable of being turned into a binding undertaking by the company’s acceptance; that the company accepted by issuing a certificate in the terms which I have just mentioned; and that the pursuer, in her turn, accepted that certificate as a conclusion of the contract between them,

by proceeding, as she avers that she did after its delivery to her, to make payment of certain monthly subscriptions in accordance with its terms.’ In the present case I consider the granting of the obligation by the company to issue a bond was treated by the defender as an acceptance of the offer contained in the original application. Lord Kinnear then proceeds—‘The effect of the whole contract so constituted appears to me to be this, that the pursuer became bound to make certain monthly payments to the company by way of investment.’ . . . ‘She could not resile from that obligation or cease from making payments, and in return for that she received an obligation from the company to pay to her a certain sum of money—£312—with compound interest at the rate of 2½ per cent. at the end of the period of thirty years.’

‘The same conclusions should, I think, be reached on a true construction of the documents in the present case, and accordingly I am of opinion that the pursuers are entitled to have decree in terms of the conclusions of the summons as craved.’

The defender reclaimed, and argued—There was here no *consensus in idem*, and the acceptance did not meet the offer. The proposal forms, in the company’s words, bound them to issue a bond, and it was no answer to defender’s offer to issue a bond certificate which did not bind the company to give a bond, and which merely contained a statement that the defender was entitled to receive a bond on certain conditions. Even if there was an obligation to issue a bond, it was only an indefinite future obligation, and if anything happened to the company in the meantime the defender might never get the bond, and would have no liquid document of debt on which he could sue. The conditions in question attached to a bond, and were not binding on defender. The case of *Laing v. Provincial Homes Investment Company, Limited*, 1909 S.C. 812, 46 S.L.R. 616, was distinguishable from the present, because there the proposal distinctly stated that acceptance would take the form of a certificate, and the conditions were set forth on the back of the proposal form. With receipt of the certificate the proposer became a registered bondholder, while in the present case he was not a registered bondholder. The subsequent payments made by defender would not cure the initial defect in the contract, (1) because there was here no ambiguity which the acts of the parties could be said to explain; (2) because the continued payment of the money was in no way more consistent with pursuers’ interpretation of the contract than with defender’s, viz., that he was to receive a bond and not merely a certificate. These payments did not constitute either *rei interventus* or personal bar—*Buchanan v. Duke of Hamilton*, January 29, 1878, 5 R. 588, 15 S.L.R. 333.

Argued for the pursuers—The issue of a bond certificate constituted a valid contract. The bond certificate stated that the applicant would get his bond the moment

he paid the stamp duty, and this meant that his rights and liabilities would be exactly the same under the certificate as under the bond. The condition of payment of stamp duty was a "usual condition." If the company went into liquidation the applicant would be precisely in the same position as with a bond, because the conditions attached to the bond were the same as those attached to the certificate. Payment of stamp duty was not a new term introduced into the contract. If defender wished to raise this point he should have rejected the certificate at the time he got it, on the ground that this was a new condition, but he had gone on paying for seven years. If there was any hiatus between offer and acceptance it had been cured by the payments. The defender had accepted the receipts for the monthly payments as implementing his offer. Defender could not demand back these payments—*Sinclair v. Provident Association of London, Limited*, March 8, 1894, 31 S.L.R. 501. But if there was no right to repetition, then there was a contract. The present case was ruled by the case of *Laing v. Provincial Homes Investment Company, Limited, cit. sup.*, both as to the terms of the contract and the subsequent payments.

LORD JUSTICE-CLERK—That there was some arrangement between the parties to this case at the time at which payments by the defender began is not, I think, doubtful. The arrangement may have been ambiguous and in part possibly objectionable to the defender, but what was his action? He made no demur, he proceeded on the footing that he had bargained to pay a sum of thirteen shillings a month and he accepted receipts on that footing, and he did so from April 1902 to November 1909, and received the receipts on the footing that the pursuers were obliged to give him certain benefits. I cannot read the case as it is presented in any other light.

The pursuers could not have refused to grant a bond at any time on the defender paying the stamp duty, and the question is, Can the defender, after seven years' dealing, and without any objection on his part during those years, refuse now to proceed further, on the footing that he never was bound to the pursuers at all? I cannot so hold. The case of *Laing v. Provincial Homes Investment Company*, is no doubt in point, but there are differences between that case and the present. These differences do not, however, affect my opinion, because even without any precedent I would have no hesitation in the circumstances of the case in affirming the interlocutor of the Lord Ordinary.

LORD ARDWALL—I agree that the Lord Ordinary's interlocutor ought to be affirmed.

I shall state how the case strikes me. We heard a forcible and I consider a sound argument so far as the documents were concerned to the effect that the so-called acceptance of the proposal which was the sending of a certificate was not a proper acceptance of the offer or proposal made,

for what was proposed to be taken was a bond of the company for £300, and what was sent was merely a certificate that the holder of that certificate was entitled, provided no subscription was unpaid, to receive a bond. Now I cannot hold that the sending of that certificate properly met the order or offer or proposal, or whatever we may call it, for I think there is a very great distinction, and it might turn out in certain circumstances, such as a liquidation, a very serious one, between a bond which would be instantly enforceable and a mere obligation *ad factum præstandum* to deliver a bond.

I think this case can be differentiated from the case of *Laing*, certainly so far as offer and acceptance is concerned, because in *Laing's* case, as appears on page 813 of the Session Cases, 1909, the notice in the proposal was that—"Within three weeks of the date of this proposal reaching the office, a certificate setting forth the conditions thereof will, if the proposal is accepted, be issued, and if not then received, the company must be immediately notified." So in that proposal the proposer agreed to accept a certificate as an acceptance of her proposal, and accordingly a certificate was sent, so that the acceptance met, and completely met, the offer, which, for the reasons I have already stated, I do not think it does in this case. But the matter does not end there, because we have to consider, that in the case either of an incomplete offer or an offer that is not properly accepted, there is *locus penitentiæ*, unless something of the nature of waiver or *rei interventus* follows. In my opinion when the defender got this certificate, he might quite well have said—"That is not what I wanted; and in particular I am not going to pay any stamp duty to get my bond. I asked a bond, and a bond means a properly stamped bond, the granter of a bond, as a general rule, being the person who should pay for the stamp." And therefore I think he would have been entitled to say then and there—"Give me a properly stamped bond, and nothing else," and if he did not get it he might have resiled from his proposal. But he did not do that. He got a certificate which is not a bond, but which was not so far removed from a bond as that it might not be regarded as a temporary substitute for it. Now what did he do when he got it? He did not return it; he kept it. He kept it as his own deed, and as a substitute for the bond which he had ordered, and treated it as a valid acceptance of the offer he had made in the proposal. I think that by doing so he must be held to have waived any objection on the ground that the acceptance did not meet his offer, or that the document sent was not the document he had ordered. And the matter does not rest there, because, as your Lordship has pointed out, the defender from 2nd April 1902 till 1st November 1909 made payments to the pursuers at the rate of 13s. per month, and he did this without making any demand for any other document beyond the certificate which had

been handed to him. It was maintained for the pursuers that on the faith of these subscriptions made by the defender and others in similar positions, the pursuers entered into engagements and incurred liabilities which have more or less altered their position. I think this may be assumed to be more or less a fact arising from the nature of the company and the business they carry on, and in view of that these payments may without much difficulty be regarded as constituting *rei interventus* to the effect of depriving the defender of the *locus penitentie* he might have had if he had timeously and without making payments under the alleged contract taken the objection that there was no properly constituted contract at all in respect that the acceptance did not meet the offer.

On the whole matter, I think it is now too late for the defender to take up the position which was very ably stated by his counsel, and which, as I have already said, might have been impregnable had he taken it up on or shortly after the receipt of the certificate in return for the proposal. I accordingly have come to be of opinion that the pursuers are entitled to the declarator and decree for which they conclude in the summons, and that we ought to affirm the judgment of the Lord Ordinary.

LORD DEWAR—I agree.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court adhered.

Counsel for the Pursuers (Respondents)—M'Lennan, K.C.—Lippe. Agent—Isaac Fürst, S.S.C.

Counsel for the Defender (Appellant)—Mercer—Normand. Agents—Allan, Lowson, & Hood, S.S.C.

Saturday, February 11.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SCOTSTOUN ESTATE COMPANY & ANOTHER v. JACKSON.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule (15) and Regulations of June 27, 1907, Article 20—Medical Referee.

The Workmen's Compensation Act 1906, Second Schedule (15), enacts—“Any committee, arbitrator, or judge, may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration.” The Regulations of 27th June 1907 provide—Article 20—“Before making any reference the committee, arbitrator, or Sheriff, shall be satisfied, after hearing all medical evidence tendered by either

side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter.”

A workman while engaged in carrying joists for a house fainted, and subsequently died. Medical witnesses for the workman gave it as their opinion that death was due to rupture of the heart caused by the work on which he was engaged, while medical witnesses for the employers gave it as their opinion that death was due to heart disease. The Sheriff, acting as arbitrator, in consequence of said conflict of evidence, remitted to a medical referee to examine the evidence led and to report whether during the carrying of the joist the workman was injured by a rupture of the heart caused by the work and died therefrom, or whether he died of heart disease. The medical referee reported that the workman died from disease of the heart. Thereafter the Sheriff found that the workman died from a rupture of the heart caused by the strain of the work.

Held that the arbitrator was not bound to accept the medical referee's report as conclusive of the question which the Sheriff-Substitute had, as arbitrator, to decide, and that as there was some evidence to justify the award, it must stand.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II (15), and Regulations of June 27, 1907, art. 20, are quoted *supra in rubric*.

The Scotstoun Estate Company, South Whiteinch, Glasgow, and W. Talbot Crosbie, the only partner thereof, appealed by way of stated case from a determination of the Sheriff-Substitute of Lanarkshire (BOYD) at Glasgow, acting as arbitrator under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in an arbitration between the said company (*defenders*) and Mary Wardrop or Jackson, widow of the deceased Hugh Jackson, joiner, and Agnes Jackson, daughter of the said Hugh Jackson (*claimants*).

The Case stated—“The claim or demand of the pursuers was ‘for an award of compensation under the Workmen's Compensation Act 1906, in respect that the said Hugh Jackson, husband of the pursuer Mary Wardrop or Jackson, and father of the pursuer Agnes Jackson, had been a joiner in the defenders' employment, earning a weekly wage of £1, 18s., and upon whose earnings the pursuers were wholly dependent, and know of no other dependents, and whilst engaged as a joiner at the erection by the defenders of cottages in Darnley Avenue, Scotstoun, on 6th October 1908, he, by accident arising out of and in the course of his employment, was injured, by the rupture of a blood vessel caused by lifting and carrying joists, in consequence of which he died on said 6th October, and the question which has arisen between the