Friday, March 19.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LAING *v.* PROVINCIAL HOMES INVESTMENT COMPANY, LIMITED.

Husband and Wife—Personal Obligation of Married Woman—Separate Estate.

"Whatever obligations a married woman may incur in the management and administration of her separate estate are binding upon her, just as if she had been an unmarried woman."

A married woman who had entered into a contract for the investment of her own money, afterwards, in an action for its reduction, pleaded that the contract was null on the ground that when she made it she was a married woman.

Held that the contract was binding.

Contract—Error—Consensus in idem—Parties at Variance as to Interpretation of Terms—Ambiguity—Complexity.

A desiring to purchase the house in which she lived, entered into a contract with an investment company by which she became bound to pay monthly subscriptions for a considerable number of years. She afterwards pleaded that the contract was null and void on the ground that there was no *consensus in idem* in respect (1) that the parties were at variance as to the meaning of certain of its terms, and (2) that owing to its obscurity and complexity she did not understand it.

Held (1) that the contract was binding according to the true construction of its terms as these might be ascertained by the Court; and (2) that A having entered into a written contract could not escape from its obligation by merely alleging her failure to understand the meaning or effect of the terms to which she had expressly assented.

Principal and Agent—Contract—Essential Error—Limitation of Agent's Authority—Alleged Misrepresentation by Agent—Effect of Clause Limiting Agent's Authority.

A married woman who had entered into a contract with an investment company pleaded that she had done so under essential error induced by the representations of the company's agent, and she set forth on record the alleged representations and the difference between the contract and that which she intended to have made. One of the documents constituting the contract, and which she had signed, expressly provided that the company would not be bound by any statements made by their agents inconsistent with the conditions of the contract. In an action for reduction of the contract the company pleaded this proviso.

Held that the pursuer was entitled to a proof or an issue.

Opinions reserved as to the effect of the provision limiting the agent's authority, on the ground that it fell to be construed with exact reference to the facts of the case and the scope of the agent's authority was one of the facts.

Mrs Janet King or Laing, wife of Alexander Laing, labourer, Craigrothie, Fife, with the consent of the said Alexander Laing as her curator and administrator-in-law, brought an action against the Provincial Homes Investment Company, Limited, Glasgow, seeking to recover the sum of £79 odd paid by her to the company, and, so far as necessary, reduction of documents constituting an alleged contract between her and the defenders.

The pursuers pleaded—"(1) The pursuers are entitled to repayment of the sum sued for in respect—(*a*) That there was no *consensus in idem* between the pursuer Mrs Laing and the defenders as to the terms of the alleged contract. (*b*) That the pursuers are in the circumstances stated entitled to resile therefrom. (2) The pursuers are entitled to decree as aforesaid in respect that said alleged contract is null and void as having been entered into—(*a*) by a married woman, and (*b*) without the consent and concurrence of her husband. (3) If, and in so far as necessary, the documents constituting the alleged contract ought to be reduced, in respect—(*a*) That said alleged contract is null and void as having been entered into by a married woman without the consent and concurrence of her husband; and (*b*) that said alleged contract was entered into under essential error as to its nature and effect induced by the misrepresentation and concealment of the defenders' agents."

The defenders, *inter alia*, pleaded—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons."

The *facts* are given in the opinion of the Lord Ordinary (JOHNSTON) (*v. also opinion of Lord Kinnear*), who on 19th June 1908 decerned against the defenders conform to the petitory conclusions of the summons, found it unnecessary to deal with the conclusions for reduction, and decerned.

Opinion.—"In this action the pursuer Mrs Laing, with the concurrence of her husband, seeks to recover from the Provincial Homes Investment Company, Limited, a sum of £79, 17s. 2d., and, so far as necessary to that end, to reduce four documents—(*a*) the special proposal form, No. 12 of process; (*b*) the house property purchase certificate; (*c*) the application for an advance; and (*d*) the special proposal form, No. 13 of process.

"The Provincial Homes Company is a sort of benefit investment and building society in the form of a limited company. In November 1902 Mrs Laing, the wife of a labourer in Craigrothie, near Cupar, Fife, with a view to purchasing the house in which she and her husband lived, and having come in contact with Alexander Kinsman, the company's agent in Cupar,

signed certain of the documents above mentioned in order to obtain the necessary advance from the company.

"The case as presented raises difficult questions as to the capacity of a married woman to contract, the liability of a company which becomes party to a contract for its agent's representations, and as to the relevancy of the pursuer's averments that she was misled fraudulently or otherwise by the representations of Kinsman, the company's agent. But I think that the case admits of being disposed of without going into these questions.

"The undisputed facts are that the pursuer resided in a house at Craigrothie, which was for sale at a price of £200; that partly from a legacy left her and partly from savings, the pursuer was possessed of £58 on deposit-receipt; that, attracted by an advertisement to this effect—'Building Societies not required. The Provincial Homes Company assist you to purchase property. Particulars from Alexander Kinsman, Cupar'—the pursuer went without her husband's knowledge to Kinsman, the company's agent in Cupar, on 11th November 1902, and laid before him her intention to purchase and her desire to borrow; that on that day she signed in her own name the 'Special Proposal Form,' table C. of the Company, No. 12 of process, for a bond for £400, and paid the first monthly subscription of 17s. 4d.; that on or about 18th November she received the house property certificate (table C) of the company, being of the nature of an interim certificate, to be replaced in due course by a bond of the company; that she continued to pay the subscription on her special proposal for 15 months, thus paying to the company £13; that in or about the November following (1903) she signed the application (undated) for an advance of £235 (this document bears to be signed by pursuer's husband, but Mr Laing denies his signature); that she then paid over to Kinsman, on behalf of the company, the proceeds of her deposit-receipt and sundry smaller sums; that it having emerged that pursuer was married, she and her husband were got in November or December 1903 in fact to sign, though Mr Laing disputes the binding effect of his apparent signature, the special proposal form of the company, No. 13 of process, which is undated but is a duplicate of the former one; that when the matter passed into the hands of Messrs Pagan & Osborne of Cupar, the pursuer's agents, and Messrs Alston & Orr of Glasgow, the defenders' agents, for completion of the documents, the defenders' agents failed to make their system intelligible to the pursuer's agents, or to satisfy them that the pursuer was being fairly treated, and that accordingly the transaction was broken off, and the pursuer and her husband demanded back their money, which the defenders have refused to refund.

"The defenders' system is, I have no doubt, honest enough in intention, but it is bewildering in elaboration, and I want no proof to satisfy me that even if an attempt was made to explain it to the pursuer it was impossible she should understand it. Messrs Pagan & Osborne declared they could not understand it, and from their confused replies I am led to doubt whether Messrs Alston & Orr understood it either. I have now given it a good deal of study, and it must be assumed that I understand it; but, as I interpret it, I question whether there were any binding documents making a contract, and I am satisfied that the defenders so departed from the ostensible intended contract that in any view the pursuer was entitled to resile and get back her money.

"I must first refer to the company's prospectus. It is disputed whether Mrs Laing ever saw it, but assuming that she did—What does it tell an intending customer of the company in her circumstances? It tells that 'a perusal of these pages will show that the company supplies a system of investment and of house purchase which is sound and fair dealing, and is worthy of the support given to it by all classes of the community.

"'The business of the company consists in the issuing of certificates which are divided into the following compartments:—

"'(1) Bonus investment certificates, table A; and (2) house property certificates, tables B and C.

"'These certificates secure to the holders thereof the following advantages,' and then there are set forth the following three advantages:—(1) the addition to the subscriptions paid of compound interest at 2½ per cent. per annum; (2) participation in the annual bonus distributions of the company; and (3) the right to certificate holders under tables B and C, at the end of five years, to borrow out of the available funds of the company the full amount for which their certificate has been issued for the purchase of house property, provided the latter is at least equal in value to the amount of the advance required, and approved by the directors. Passing to the explanations of table C on page 7 of the prospectus, it is stated that 'certificates for £50 to £1000 are issued under this table, payable at the end of 30 years, if an advance has not previously been obtained, and the certificate therefor been terminated on the payment of the advance,' at certain weekly, monthly, or quarterly rates of subscription, and there follows an elaborate table of figures. Taking the line appropriate to the transaction attempted to be entered into with the pursuer, this table shows that her monthly subscription of 17s. 4d. meant a capital payment of £312 in 30 years; that compound interest on the subscriptions during that period would amount to £148, 11s. 8d.; and that the sum repayable at the maturity of the certificate, provided it ran its course and was not terminated prematurely by an advance having been obtained and repaid, would thus be £460, 11s. 8d. And the further piece of information is given that the amount of loan obtainable at the expiration of five years by the holder of the certificate, that is the maximum amount, would be £400.

"A little study enables one to understand this table, and the company's scheme, so long as a certificate under table C remains a mere investment transaction and no advance is obtained. There follow tables intended to explain the company's system, when an advance is given at the end of the five years. But I must say that it takes considerable accounting capacity to understand the effect of these tables and this part of the company's scheme in all its bearings. Apparently what it amounts to is this, that the operations contemplated in the first-mentioned table, so long as the certificate remains a mere investment certificate, are to terminate, and a new set of operations to be commenced, adapted according as the customer elects to repay advance in 15, 20, or 25 years from the date of the advance. The customer has to pay quarterly or other payments, which include a sinking fund and interest, the payment to the sinking fund being the same in each year, but the interest gradually diminishing as the payments to the sinking fund are applied in reduction of the advance, credit being duly given for the subscriptions paid during the first five years, and for the interest which these have earned. But the certificate does not necessarily run its 30 years' course. It is terminated when the advance is repaid, either at the end of 20, that is 5 plus 15 years, or at the end of 25, that is 5 plus 20 years, or at the end of 30, that is 5 plus 25 years.

"Apparently, however (page 10), an alternative is given to the customer; either he may elect to do as above explained, stop the normal currency of his certificate and run off his advance in 15, 20, or 25 years; or he may merely pay interest on his advance and continue the subscriptions on his certificate till it matures according to its original conception, the merit of which is stated to be that if he chooses to repay his first advance it will be open to him to re-borrow upon another property, his certificate being still in force. But there is a statement on page 11, which is important, having regard to the facts of the present case, in these terms —'4. Whenever a borrower has a sum not less than a £1 to spare, he may pay it in addition to his usual repayment, and thus reduce the interest payable afterwards.' It is added that, provided repayments are regularly made the advance cannot be called in before the end of the period of repayment chosen, that advances will only be made after a valuation of the property by the company's surveyor, and that legal charges may be added to the amount of the advance. But what is not explained is how the company's system is supposed to work when an advance is obtained of an amount less than the maximum amount which it is provided may be borrowed under a particular certificate. And it is certainly not indicated that on an advance being taken to an amount less than the maximum borrowable sum the certificate must be divided, one portion being appropriated to the repayment of the advance, and the other running its course as a normal investment certificate.

"So far for the prospectus, which, as I have said, is extremely difficult to understand, and, I venture to add, is far beyond the capacity of the ordinary rustic customer, such as a labourer's wife in Craigrothie.

"I now turn to the 'special proposal form.' This document is certainly not intelligible in itself. After giving a skeleton form for the name, address, and occupation of the proposer, it contains a space for the 'amount of bond, £ '; but there is no indication of what is meant by bond, whether bond to be granted by the company or bond to be granted by the proposer. But having regard to the document next to be mentioned, it must be intended to mean bond granted by the company. At the foot of the first page there is a notice 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. . . . For the protection of investors the directors particularly request that the conditions of issue printed on every certificate issued shall immediately upon its delivery be carefully read by the certificate holder, as the company is bound only by the conditions printed on the certificate, and no other.' This appears to me to be a very blindfold method of dealing, for the proposer, who must pay his first subscription with his proposal, is thus to be bound by conditions which he has never seen and never can see till the certificate is issued. The proposal form winds up with this docquet, to be signed by the proposer before one witness, an inept mode of execution, viz.—'I have read the above notice and the conditions printed on the back thereof.' I cannot find that the endorsement referred to in the docquet contains any conditions at all. It contains rather an advertisement which, after an incidental reference to the ordinary conditions of the prospectus (and the prospectus is not otherwise imported into the alleged contract), informs customers that 'to meet the requirements of persons who may be able to find a portion of the purchase money themselves, the directors have decided to grant to certificate holders under table C, who have made application for the certificate upon the special proposal form, advances in accordance with the regulations stated below.' The so-called regulations stated below are merely an intimation that 'the holder of a certificate duly endorsed for the special benefits' shall, in respect of approved house property inspected by the company's surveyor and assessed by the directors to be at least equal in value to the amount for which the certificate is issued, be entitled to an advance of 70 per cent. of the amount of the certificate after one year, 75 per cent. after two years, 80 per cent. after three years, 90 per cent. after four years, and the full amount at the end of five years. But if the amount of the valuation be less than the amount for which the certificate is issued, an advance only of the proportion

of the valuation will be made. If anything is made abundantly clear it is this, that if an advance is asked at the end of one year, as 70 per cent. of the assessed value only would be advanced, the proposer must find, and is assumed to be able to find, a portion of the purchase money, amounting to 30 per cent., himself.

"The next document in order is the 'house property certificate,' table C. I note in the first place that it does not bear to be 'duly endorsed with the special benefits.' I note in the next place that it refers to a bond by the company not by the proposer, and to a bond for quite a different sum from that contained in the special proposal form. It proceeds, 'Whereas Mrs Alexander Laing of Braefoot, Craigrothie, Cupar, Fife (hereinafter called the certificate holder), whose age is stated not to exceed 53 years, has made a proposal to the Provincial Homes Investment Company, Limited (hereinafter called the company), for a house property bond under table C adopted by the company, now this is to certify that the said Mrs Alexander Laing has applied for the said bond to secure to her the sum of £312 at the end of thirty years from the date hereof, together with the accrued compound interest calculated at the rate of 2½ per cent. per annum, and such bonus additions, if any, as the directors of the company may from time to time determine,' conditionally upon her paying to the company a monthly subscription of 17s. 4d. during the said period of thirty years; 'and that in accordance with such application, and subject to the regulations endorsed hereon,' she has been duly registered in the books of the company as the holder of a bond for the above amount. Then at the foot there is a note that the amount secured is £312, that the interest added is £148, 11s. 8d., making a total of £460, 11s. 8d. Neither the principal nor the cumulo of principal and interest corresponds with the £400 of the proposal. This certificate therefore is not, and the bond to which it refers if issued would not be, 'in accordance with such application,' that is, with the proposal. I think I can guess at the explanation, though it does not help to set up a valid contract. It looks very much as if the company's agent, not understanding the company's system much better than anybody else, had inserted in the proposal form not the amount for which the company was to grant bond but the maximum amount which the certificate holder would be entitled to borrow at the end of five years under the certificate or the bond, if and when granted. No bond has been granted to Mrs Laing, and I understand no bond has ever been granted by the company, for when asked they could not even produce a form. Endorsed upon the certificate is a long series of the regulations to which it refers. I do not propose to examine them in detail as that is not necessary in the view I take of the case. They are pretty much an embodiment of the scheme foreshadowed in the prospectus, but have no reference to the 'special house purchase benefits' proposed to be given under the special proposal form.

"The last document is the 'application for an advance.' This as filled in by the company's agent is not, as far as I can read it, consistent with the terms and conditions in the documents already referred to. Like the proposal, it states that Mrs Laing's certificate was for £400; that the amount of loan required was £235 including legal fees, and that the purchase money of the property was of the same amount. It seems to have been assumed that Mrs Laing could borrow this sum, being less than 70 per cent. of the sum in her certificate, whereas she could only borrow 70 per cent. of the assessed value of the property, which, as it was common ground that the purchase price was £200, would at best have been £140, and that she must find the balance out of her own funds. While on these documents it is not easy to see what the contract between Mrs Laing and the company was intended to be, and still less to say that the documents would have made a binding contract, where I think the case of the company hopelessly breaks down is here: there is nothing to establish that there was any consent on the part of Mrs Laing to a contract under which her certificate was to be broken up into two, and one part appropriated to the proposed advance, which might be brought to an end whenever she chose to pay off the advance, and the other carried on as a separate investment certificate which must run its full thirty years. But further, there was no consent on Mrs Laing's part to the company appropriating the contents of her deposit-receipt, and instead of allowing them to be applied on the conception of her special proposal to pay the portion of the purchase money of the property which the company would not according to their system advance, applying them at their own hand as they insisted on doing, five-eights to the reduction of their advance and three-eights to payment in advance on the balance certificate. This is not in terms of the head of their prospectus above quoted from, and which I shall quote again—'4. Whenever a borrower has a sum not less than £1 to spare, he may pay it in addition to his usual repayment and thus reduce the interest payable afterwards.'

"Now, when the papers got into the hands of Messrs Pagan & Osborne and Messrs Alston & Orr, the latter, as directed by their clients the defenders, insisted on breaking up the certificate and dealing with Mrs Laing's cash payment as above indicated, and the former maintaining that that was not what Mrs Laing had agreed to. I think that Messrs Pagan & Osborne were quite entitled to maintain the attitude they took up. If there was any contract it was broken by the defenders refusing to carry it out, and the pursuer is *either* entitled to compel its being carried out in its terms or to let it go and recover any consideration already given. But I prefer to say there was neither that *consensus in idem* which is essential to a contract, nor

any reduction of such contract to intelligible and consistent and binding documents.

"I think therefore that I may be relieved of the difficult questions which I adverted to at the beginning, and the parties of the expense of the proof which some of these at any rate would entail."

The defenders reclaimed, and argued—(1) The fact that the pursuer was a married women was immaterial, for this was not a case in which her husband's consent was required. The contract in question was not an "obligation" in the strict sense of the term, for there was no personal obligation here on which she could be sued. The contract was analogous to an insurance policy on which the company could not sue for premiums, their remedy being to terminate the policy. In any event the pursuer had separate estate, and had contracted *quoad* it. To that extent she was bound—*Biggart* v. *City of Glasgow Bank*, January 15, 1879, 6 R. 470, 16 S.L.R. 226; *Burnett and Others* v. *British Linen Company*, February 9, 1888, 25 S.L.R. 356. (2) It was irrelevant to say the contract was unintelligible, for the pursuer must be held to have understood it when she entered into it. Having voluntarily entered into it she was bound by its terms as these might be construed by the Court—*Peel's* case, (1867) L.R., 2 Ch. App. 674. (3) The company were not bound by their agent's representations, so far as these were inconsistent with the contract, for the conditions of the contract so provided. A principal was entitled so to limit his agent's authority—*Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510; *Brownlie* v. *Miller*, June 10, 1880, 7 R. (H.L.) 66, 17 S.L.R. 805. The agent's authority here was distinctly limited, whereas in *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469 (relied on by the respondent) it was unlimited. Moreover, the representations in question were not the inducing cause of the contract, for the agent had merely given advice, and in fact had acted as the pursuer's agent in the matter—*M'Millan* v. *Accident Insurance Company, Limited*, 1907 S.C. 484, 44 S.L.R. 334. In any event his representations were immaterial, for they had been superseded by the written contract. The action was therefore irrelevant and should be dismissed. Reference was made to the cases of *Maplethorpe* and *Hill* v. *Provincial Homes Investment Company*, decided by the Court of Appeal in England on 15th January 1909; see *The Times* newspaper, 16th January 1909.

Argued for respondent—The Lord Ordinary was right—(1) *Esto* that the respondent did not require her husband's consent to render her obligation valid, she was entitled to resile on other grounds, *e.g.*, (2) The contract was unintelligible, for the conditions in the certificate were not in accordance with the prospectus. The prospectus said "that a certificate holder might repay the whole amount outstanding at any time, the subscriptions paid before borrowing being credited towards the repayment," whereas the certificate stated that these subscriptions were to be accumulated till the end of the period for which the certificate had been issued. There was therefore no *consensus in idem* here and accordingly no contract—*Richardson, &c.* v. *Rowntree*, [1894] A.C. 217. (3) The misrepresentations of the reclaimers' agent had induced the pursuer to enter into the contract. She was informed by him that it was essential she should take out a £400 certificate. This was erroneous, and whether the statement was made innocently or not it was a wrong statement inducing the contract. The pursuer was therefore entitled to have the contract reduced—*Stewart* v. *Kennedy* (*cit. supra*); *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, 30 S.L.R. 530; Pollock on Contracts, 7th ed. 566, *et seq.* The reclaimers were bound by their agent's representations, for a principal could not claim the benefit of his agent's contract and at the same time repudiate his statements—Addison on Contract, 10th ed. 310; *Redgrave* v. *Hurd*, (1881) L.R., 20 C.D. 1. The cases of *Hill* (*cit. supra*) and *Maplethorpe* (*cit. supra*) were not in point, for they were judgments on ascertained facts, not on relevancy. The respondent, therefore, was entitled either to a proof or to an issue.

At advising—

LORD KINNEAR—The pursuer in this action seeks to recover a sum of £79, 17s. 2d. from the defenders, a limited company, which the Lord Ordinary says is a sort of benefit investment and building society, and for the reduction of a contract in execution of which the money was paid. The Lord Ordinary has given decree for the amount, without disposing one way or another of certain pleas which I think we are nevertheless bound to consider, and the first of these is a plea by the pursuer that the contract is null and void in respect that she is a married woman. I say this plea is the first to be considered because your Lordships are asked to decide that the contract was null *ab initio*, or, in other words, that there never was any contract at all, and if that were so it would be quite superfluous to consider what the import and effect of the documents alleged to form the contract may be. But then I think that plea is without foundation.

The law as to the rights, powers, and obligations of a married woman in making contracts was settled in the case of *Biggart* v. *The Liquidator of the City of Glasgow Bank*, 6 R. 470, where it was unsuccessfully maintained that a married woman who had bought shares was nevertheless not liable to be put upon the list of contributories. That was a contract which necessarily involved very heavy obligations and was found by the Court to carry this obligation with it; but the law settled in that decision, as I understand it, is that whatever obligations a married woman may incur in the management and administration of her separate estate are binding upon her, just as if she had been an unmarried woman. The pursuer is still protected as a married

woman against obligations which do not affect her separate estate, against personal obligations with which her separate property is not concerned. But that will not enable her to declare the nullity of a contract made by herself in the investment of her own money. I think that is enough for the disposal of this plea, because she sets out that she had property and she proposed to invest it and did invest it; and it is on that footing that it is now maintained that the agreement she made for that purpose is not binding. It is true that we have no materials before us for determining what the extent of her separate estate was or in what manner she came to have separate estate; but it is enough for the question of relevancy that she says she made a contract investing money belonging to herself. It is not immaterial that her husband, who is a party to this action for her protection, does not maintain that the transaction, which she seeks to set aside, is bad because she was disposing of his estate without his authority, which would be the natural inference from an averment that it was not separate property in her. On the contrary, he comes to support her complaint that in the administration of her own property she has been induced to enter into a contract which ought to be set aside. What weight may be given to her position as a married woman, or what may be the practical effect of allowing the contract to subsist as regards its enforceability against her own estate, are not questions which we can decide at present. We know nothing whatever of the subject except the pursuer's own averments, and it is enough I think to say that these averments do not support her plea, and therefore, so far as that plea goes, it cannot be sustained.

But then if that plea is not sustained, the next question is whether the alleged contract between this pursuer and the defenders' company is *prima facie* a valid contract, so that it must stand unless it can be set aside upon some sufficient ground of reduction. The Lord Ordinary, without disposing of the reductive conclusions at all, has discerned in the pursuer's favour for the immediate repayment of the money. His general view is that the alleged contract is neither intelligible nor self-consistent, that it cannot be binding from the obscurity of its own terms, and that it is impossible that this pursuer could have understood what it meant. I must say I have some sympathy with the Lord Ordinary's view of the complexity and obscurity of the contract, and also with the sense of equity which leads him to hold that it would not be just to allow an unlearned woman to be bound by an obligation which was perfectly unintelligible to her. But I am afraid that the justice to which we are bound to have regard is justice according to law, and the law does not allow anyone who has executed a written contract to get rid of the liability it imposes by his own bare assertion that he did not understand the meaning of the words to which he put his name. Therefore I think it is necessary for the proper disposal of this case that we should look a little further, both into the actual terms of the alleged contract itself and into the pursuer's statements as to the way in which she came to make it.

Now what she says upon that point is that she was tenant of a property consisting of a house and garden at Craigrothie in Fife, that she was desirous of buying the property, that she had noticed an advertisement by the defenders' company in the following terms:—"The Provincial Homes Company assists you to purchase property. Particulars from Alexander Kinsman, Cupar." The company make this advertisement, and they hold out Alexander Kinsman of Cupar as the person who will give to any inquirer particulars upon which a contract may be made. In consequence of the advertisement she says she called upon Mr Kinsman and explained to him what she wanted, telling him that she was desirous of purchasing the house at Craigrothie in which she lived, that the purchase price was about £200, and that in order to enable her to purchase the house she required to obtain a loan of from a £100 to £150. She had money enough to provide part of the purchase price herself, but she desired the assistance of a loan to the extent she mentioned. Then she says that Kinsman told her that in order to enable her to obtain such a loan from the defenders' company it would be necessary for her to take out a £400 certificate, that by doing so she would be enabled to obtain the loan required much earlier than by taking out a certificate for £200, and that she could take up at her option the whole or any part of the £400 certificate as she might find convenient, that she could pay the advance made to her at any time she desired, and that the sooner she paid up the advance the sooner she would be clear of the defenders' company. Then she goes on to say that her sole object in proposing any transaction to the defenders' company at all was to enable her to obtain a loan of the amount mentioned for the purpose of purchasing the property, that she made this object perfectly well known to Mr Kinsman, and that it was only upon his representation—that in order to enable her to obtain such a loan it was necessary to take out a certificate for the sum of £400, that she could take up the whole or any part of that amount, and that it was open to her at any time to repay any advance made to her by the defenders' company and terminate her connection therewith—that she signed the document.

That is a perfectly distinct statement of what she desired to do, and of the representation of the defenders' agent Mr Kinsman—that if she entered into the contract which he proposed to her she would be able to borrow from the company the amount that she desired, and to pay it up when it was convenient and so put an end to her relations with the company altogether. What followed upon this interview between the pursuer and Mr Kinsman was that he presented to her for her signature an offer

to be transmitted to the company. It was an offer upon a form prepared by the company, and issued by the company to be presented to persons desiring to contract with them. In the first place it sets out the name in full of the applicant, her address, her occupation coachman's wife, age next birthday 53, amount of bond £400, and the amount of the subscription 17s. 4d., payable monthly. Then there follows a notice, which says that within three weeks of the date of this proposal reaching the office a certificate setting forth the conditions thereof will be issued if the proposal is accepted. There is further a request to the person who makes the offer to read carefully certain conditions of the issue which are printed upon it; and I think all that is important in these conditions is the statement that "The system of the company is intended to supply the needs of persons without capital in the purchase of house property by the issuing of certificates under the ordinary conditions of the prospectus. But to meet the requirements of persons who may be able to find a small portion of the purchase money themselves, the directors have decided to grant to certificate-holders under table C, who have made application for the certificate upon this special proposal form, advances out of the available funds before the end of five years, as follows":— Then follow certain percentages applicable to advances in the first, second, third, or fourth year after the contract is made. Then comes the final term as to the advancement of money:— "At the end of five years all certificate-holders under the house purchase branch are entitled to an advance of the full amount of the certificate upon property certified to be of the equal value to the amount for which the certificate is issued." The offer which was signed by the pursuer also contained this declaration—"I have read the above notice and the regulations printed on the back hereof;" and therefore it must be taken that the pursuer signed this offer with due notice of these conditions which are printed upon the same form.

That offer was presented to the company, and was accepted by what is called "the house property certificate." This certificate narrates the offer contained in Mrs Laing's proposal, and then proceeds to certify that Mrs Laing has applied for a bond to secure to her "the sum of £312 at the end of thirty years from the date hereof, together with accrued compound interest calculated at the rate of 2½ per cent. per annum, and such bonus additions, if any, as the directors of the company may from time to time determine, conditionally upon the registered holder of the said bond paying to the said company a monthly subscription of 17s. 4d. on the first day of each month during the above-mentioned period of thirty years." Then it sets out that the person above named has been duly registered in the books of the company as the holder of a bond for the above amount. There follows upon this printed form the recital of a number of regulations with reference to the payment of the subscription and other matters, which I do not think it is necessary to consider in detail. There are, however, two of them which it is proper to mention as materially affecting the question to be decided. The first is the sixth article of the regulations, which contains a limitation of the authority of the company's agents. It says that "the authority of the agent is limited to the collection of the monthly subscriptions in respect of this certificate and to the giving of a receipt for all subscriptions so collected by him." Then there follows in the seventh and following articles the list of what are called the "borrowing privileges" to which the certificate holder will be entitled, and the material one is—"After the expiration of five years . . . . the certificate holder, providing the subscriptions payable hereunder shall not be more than three calendar months in arrear, and that he shall not have received any advance in respect hereof from the company, shall, subject to the regulations of the company for the time being in force, and to such terms of repayment as shall be agreed upon, be entitled to receive out of the available funds of the company an advance equal to the amount stated on the face of this certificate upon the security of house property approved by the directors of the company." There follow a number of regulations describing what are to be the consequences of such advances being made, and I rather agree with the Lord Ordinary that they are expressed in terms of considerable obscurity; but I do not think it is at all necessary for present purposes to consider their exact effect.

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 the 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. 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 became bound to make payment to them of a subscription of 17s. 4d. monthly, and she was bound to continue making these monthly subscriptions until the lapse of the period for which it is specified her obligation should last. She could not resile from that obligation or cease to go on making payment, 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.

That appears to me to be the only complete contract that was made between the pursuer and the company, and it is a contract which stands complete in itself without any further agreement for making

advances at all. All that is said about advances of money for the purpose of effecting a purchase is that, when the contract is completed one of the benefits which the certificate-holder will enjoy will be the right to obtain such advances—not an absolute right, but a right to obtain advances subject to the regulations for the time being in force, subject to such terms of payment as may be agreed upon, and subject to this also, that the directors are to be satisfied of the validity of the security which she offers in respect of the advances. Therefore there is no binding obligation upon the directors to make an advance at all. But she did make a binding contract to pay monthly subscriptions, and to go on paying until her right to her stipulated return had matured, and in addition to that she has what is called the privilege of asking for an advance upon terms to be arranged. I do not think it doubtful that she obtained a certain contract right, but to this effect only, that the directors were bound to consider reasonably and in good faith proposals which she might make to them for an advance; but there was no absolute obligation binding them to make such an advance, if upon reasonable grounds they did not think fit to do so.

Now the pursuer goes on to allege that after receiving this certificate she made certain monthly payments for a certain time, and that then she made a proposal for an advance. That was a proposal that she was quite entitled to make, although it was made before the lapse of five years from the date of the certificate, because the conditions attached to her original offer made provision for advances up to a certain amount in favour of persons like herself who were prepared to provide for themselves part of the purchase money of the house. Upon her proposals for an advance, the agents of the company proceeded to discuss with her agents the terms upon which an advance should be made, and in particular the terms of repayment. There was a good deal of correspondence between these two agents. They differed very materially as to the true construction of the printed conditions upon which, according to the company's scheme, advances were to be made, and after the correspondence had lasted some time without their coming to an agreement upon that matter, the pursuer intimated through her agent to the defenders' agent that in respect of her dissatisfaction with the proposals of the company she declined to recognise the alleged contract as binding, and demanded repayment of the money which she had already subscribed.

Upon that position taken up by the pursuer two questions seem to arise. The Lord Ordinary has held, without inquiry into her allegation of misrepresentation, that she was entitled to set aside the contract upon the construction of the documents alone, and he suggests two grounds upon which he thinks she was so entitled. In the first place he says, although I do not think he puts this ground with great confidence, that it may be held that there was a breach of contract on the part of the defenders' company by reason of their insisting upon terms of advance and repayment which were not in accordance with the true construction of their contract; and, in the second place, he says that apart from that there was no *consensus in idem* between the parties, because the contract, taken according to its terms, is not intelligible, and the pursuer could not have understood it.

Now as to the first of these two grounds it appears to me that it is impossible that it should be sustained. There can be no breach of contract until the terms of the contract have been finally ascertained and agreed to. There can be no breach of contract so long as the terms are still under negotiation, and there was no final obligation undertaken by the company to make any advances at all. I have said that to my mind there might probably be a good action for breach of contract if a person in the pursuer's position could show that the company had no honest intention of making advances upon any reasonable terms, but were refusing arbitrarily to give her the benefit of the privilege which they had expressly held out to be one of these to which she would be entitled. But that is not the ground of the present action. It is not a ground which could possibly be sustained upon mere comparison of competing drafts prepared by the agents of the parties respectively. It could not be sustained except upon conclusive evidence that as matter of fact the company were refusing to perform their obligation honestly. But even if the obligation to make an advance were to be treated as final and binding, the controversy between the two parties to the contract as to the proper terms on which it should be carried into execution can never amount to a breach of contract until it is authoritatively ascertained that the one is right and the other is wrong. The parties were in fact in the course of carrying out the contract to make an additional agreement for an advance; and a dispute as to the terms of the advance is not a breach of contract on either side. The Lord Ordinary says that the terms in which the contract is to be finally expressed are unintelligible. That is a question of construction. When contracting parties bind themselves to certain terms that are put in writing, that means that they are bound according to the true construction of these terms as they shall be ascertained by the Court, if they themselves differ about it.

I think the other ground upon which the Lord Ordinary proceeds is also insufficient. His Lordship says—and I think this is the point to which he attaches greatest weight in his judgment—that this unlearned woman did not understand what she was doing; that she could not have understood the contract as it was presented to her; and therefore that she was not bound by it. But no one who has made a written contract can escape from its obligations by the

mere allegation of his own failure to understand the meaning or effect of the terms to which he has expressly assented.

But then the question arises whether this pursuer has not made a perfectly relevant averment of misunderstanding induced by the defenders themselves or their agent which she should be allowed to prove if she can. I think that the law upon both of these two points—first, the inefficacy of a mere statement of misunderstanding by itself, and, secondly, the force of an averment of misunderstanding induced by the other party—is settled by the case of *Kennedy* v. *Stewart*, 17 R. (H.L.), 25, in the House of Lords. It was decided, first, that the erroneous belief of one of two contracting parties in regard to the nature of an obligation which he has undertaken is not sufficient to give him a right to rescind the contract, unless such belief has been induced by the representation, fraudulent or not, of the other party to the contract; and secondly, these representations made by the other party's agents would afford a good ground for setting aside the contract if a jury were satisfied that such representation had been made and had induced the consent of the other party. It appears to me that decision is directly applicable to the circumstances of this case. The pursuer has made a perfectly clear averment of representations made to her as to the nature and effect of the contract and as to the benefits which she would be entitled to receive, which induced her, according to her own statement, to enter into it; and there can be no question that the contract she actually executed was in essential particulars totally different from that which she was led to believe she was making. If these representations were false and she entered into the contract in reliance upon them, then, upon the authority of the case I have cited, I think she will be entitled to have the contract set aside.

There is, however, a separate point raised by the defenders which is not touched by *Kennedy* v. *Stewart*, 17 R. (H.L.) 25, and that is the plea founded upon the condition of the contract by which the company announce that they are not to be bound by the representations of their agents. It was maintained on behalf of the pursuer that this clause was not binding upon her because she did not read it and was not bound to read it, and the argument was founded upon decisions such as that in the well known case of *Stevenson* v. *Henderson*, 2 R. (H.L.) 71, that, where an offer in plain terms is made by one party to the other and accepted, the other will not be bound by conditions added to the offer, not on the face of the document which forms the contract, but added in such a form that they may escape the notice of the person making the contract. But that has been held only in cases where the contract on the face of the written or printed paper is complete in itself, and where it is proposed to add something to it which is not ostensibly connected with the contract set forth on the face of the document. But in this case the condition was in the printed paper, the whole of which must be read by anybody intending to contract on the terms which it sets out. I cannot say, therefore, that the case cited appears to me to be in point. But then this clause is just part of the contract which she seeks to set aside. And although it sets out in perfectly clear terms that no agent of the company has any authority to vary the terms or conditions of the contract, it does not follow that the defenders are entitled to hold a contract which has been induced by the misrepresentation of their agent. I do not think it desirable to express, and I do not express, any decisive opinion as to the effect which ought to be given to this stipulation in the course of further procedure in this case, for I think it is necessary that the stipulation should be construed with exact reference to the actual facts of the case when they are ascertained. It may be that the agent has no authority to waive or alter the terms of the contract, because he is not an agent for the purpose of making the contract at all. The contract is made *ex hypothesi* by the company, and the agent is employed only to bring the company and the persons contracting with it into communication with one another. And yet there may be an agent employed to obtain business for the company, and it may be within the scope of his authority for that purpose to make statements which may or may not tend to induce people to contract with the company. It is material to observe, in the first place, that the company does hold out this agent as a person who is to give particulars to any intending subscriber, and, in the next place, that these documents which they issue are documents which do not explain themselves. What was the scope of this agent's authority is a question of fact, and I think the pursuer is entitled to show—if she can—that he was acting in the course of the business for which he was employed when he made the representation which she alleges.

My opinion, therefore, on the whole matter is, that the pursuer must be allowed a proof of her averments, or else must be allowed an issue to go to a jury. In one form or another the facts on which the plea of misrepresentation is founded must be ascertained before it is possible for the Court to give judgment between the parties.

I should add that our attention was called to two decisions of the Court of Appeal in England with reference to contracts in exactly the same terms with two litigants in that Court. So far as these decisions involve matter of law they are very high authority, but then they are decisions upon matters of fact which had been ascertained by the verdict of a jury, and therefore they are not authorities for holding that a different question of fact ought not to be sent to trial before any decision is pronounced at all.

LORD PRESIDENT—I concur, and only desire to say one word, because it was

argued to us by the defenders that if we agreed with the judgment which was quoted to us of the Court of Appeal in England we were bound to find the pursuer's statements here irrelevant; and it is only because of the great respect I have for the learned Judges who composed that tribunal that I say anything about it. I would first remark that in the case which was quoted to us there had been a full inquiry into the facts, and accordingly anything which their Lordships said must be taken as having reference to the facts which in that case had already been proved. I say, secondly, that although they pronounced certain opinions as to the nature of the company's contract, I do not think the Court of Appeal laid down any such doctrine as this—that it is possible for any company or any person by a general declaration *ab ante* to say that they will not be liable for the misstatements of agents, and yet be able to keep the contract which, *ex hypothesi*, the misstatements of the agents procured. I am far from saying that is the case here; I do not know whether it is the case or not. But even if it were the case I do not think there is any doctrine laid down by the English Court to that effect.

LORD M'LAREN—I concur in the opinion of Lord Kinnear, and I only add, in a single sentence, that I think it is plain on the admitted facts of the transaction that this lady entered into an improvident bargain—not the bargain that she intended when she went to the company's agents. She only wanted to get a certificate that would entitle her to borrow £200, but was persuaded to get one which would enable her to borrow the amount of £400, for which she had no need; and therefore the obligation to pay interest and instalments was greater than she had intended. In such a case, where it is plain enough that a mistake has been made, I should be unwilling to determine any question relating to a wrong for which one of the contracting parties is said to be responsible, without having the facts before us. I think it is much better that the facts should be investigated, and then we should be in a position to decide whether this agent acted within his powers, or whether he acted in excess of his powers and so as not to bind the company, or again, whether the lady was really imposed upon. I say nothing more, except that I agree with Lord Kinnear's reasoning, which leads to the conclusion that the pursuer is entitled to prove her case.

LORD PEARSON—I also agree with Lord Kinnear's opinion.

The Court pronounced this interlocutor—

"Recal said interlocutor and remit the cause to the Lord Ordinary to allow the pursuer an issue as to whether in entering into the contract embodied in the proposal form and the certificate, the female pursuer was under essential error as to its import and effect induced by Alexander Kinsman acting as agent for the defenders in Cupar," &c.

Counsel for Pursuers (Respondents — Watt, K.C.—F. C. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for Defenders (Reclaimers) — M'Lennan, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Thursday, March 18.

SECOND DIVISION.

[Sheriff Court at Perth.

BUTTER *v.* M'LAREN.

Parent and Child—Evidence—Bastard—Filiation—Intercourse with Man other than Defender about Time of Conception.

In an action of filiation, where intercourse with the defender about the time of conception was proved, but, in spite of the pursuer's denial, intercourse with another man about the same time was also proved, *held* (Lord Ardwall *dissenting*) that the pursuer, not being a credible and reliable witness, had failed to establish her case.

Per Lord Low—"Although the fact that the pursuer in an action of filiation has been proved to have had connection with two or more men about the time when the child must have been procreated will not necessarily bar her from obtaining decree against him whom she alleges to have been the father, it is a relevant and material circumstance to which due weight must be given in determining whether or not the pursuer has proved her case."

Per Lord Dundas—*Question* "whether or not the result would have been different if the pursuer had admitted connection with M. contemporaneously with the defender, and had been otherwise a credible and consistent witness?"

Bell's Principles, sec. 2061, and Fraser's Parent and Child, p. 166, *commented on* and *disapproved*—Authorities *reviewed*.

In 1907 Catherine Butter, residing at Countlich, by Ballinluig, Perthshire, raised an action of affiliation and aliment in the Sheriff Court at Perth against Archibald M'Laren, farmer, Ballintuim, Guay, by Ballinluig.

The pursuer averred that in or about the months of March, April, May, and August 1906, and particularly on or about 10th March, 1st April, 18th May, and 10th August 1906, the defender had sexual connection with her, with the result that she gave birth to an illegitimate child on 2nd December 1906. The defender denied the pursuer's averments and averred that during the months from January to May 1906 the pursuer had frequent carnal connection with one Roderick Mann.

On 19th October 1907 the Sheriff-Substitute (SYM), after a proof (for a review of the evidence *v.* the opinions *infra* of Lord Low and Lord Ardwall), granted decree as craved.