

This being so, it vitiated the whole petition.

At advising—

LORD PRESIDENT—In determining the question before us we must have regard to the circumstances under which our order of 30th January ordering Mrs Stevenson to deliver up the children became necessary. In her answers to the petition for delivery presented by her husband she admitted that the reason why the children were in England, and not in their father's house, was because she by trick had removed them, alleging the purpose of taking them on a visit while meaning to keep them away permanently.

We are now asked by the father to put the children, pending the appeal, into his house, where they would have been but for their mother's surreptitious removal of them.

I am in favour of granting the prayer of the petition. I should certainly not have acceded to the request if I had had reason to believe the interests of the children would suffer thereby, but all we are told, and that somewhat vaguely, is that they are in delicate health, and are not in a fit state to come to Scotland for what is called "the winter." Colonel Stevenson will no doubt have due regard to his children's health, and will not take them to a climate injurious to it. I do not think we need do more than state what is his manifest duty, and which I have no doubt he will perform.

I have heard no adequate reason against granting this petition, and I think we best respect the *status quo* by restoring the children to the house from which they were surreptitiously removed.

As to the form of the petition, I think the petitioner has adopted a wrong style, and that the latter part of the prayer is only appropriate where search has to be made. This is evident from the reference to judges-ordinary in Scotland and their procurators-fiscal, and to magistrates in England, which indicates that extraordinary measures have to be resorted to. I think the proper course for us to adopt here is simply to follow out our previous order, which it is the defender's duty to obtemper, by granting the first part of the petition, and allowing execution to proceed pending appeal.

LORD ADAM—I think the prayer of the petition is in an unusual form. It professes to be a prayer for execution pending appeal, and is truly so as regards the first portion of it, which I concur in thinking we should grant. We are dealing with a lady who has herself told us that she removed the children from their father's house apparently for a temporary visit but really intending to keep them away permanently.

I have heard nothing satisfying me that it would be prejudicial to the interests of the children to grant the prayer of the petition. I think *ante omnia* they should be restored to their father's house. It is

suggested that their health will suffer by bringing them to Scotland, but doubtless the petitioner will take proper care of them if he gets this order, and it does not necessarily follow that he will bring them down here.

The rest of the petition is not appropriate. The lady should have an opportunity of obtempering the order of the Court. If she should unfortunately refuse to obey our order, she would then be in contempt, and it would be for the petitioner to take any other proceedings he might deem necessary. The remaining part of the petition might in such circumstances be more or less appropriate, but at present we should, I think, only grant the first part, and I hope she will obey the order.

I am of opinion we should grant the first part of this petition and refuse the second part.

LORD M'LAREN—I agree with your Lordship in the chair both as to granting the petition in general and as to the limitations of the order to be pronounced. The only step we can at present take is to allow execution pending appeal to the House of Lords. I think it is incompetent for us at present to go beyond our original order, apart from the undesirableness of granting, unless absolutely necessary, such a prayer as that contended in the latter part of the petition.

LORD KINNEAR concurred.

The Court granted the prayer of the petition so far as it craved execution pending appeal, and *quoad ultra* refused the prayer of the petition as incompetent.

Counsel for the Petitioner—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Respondent—Ure—M'Lennan. Agent—J. Murray Lawson, S.S.C.

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Thursday, March 8.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

SINCLAIR v. PROVIDENT ASSOCIATION OF LONDON, LIMITED.

*Contract—Breach of Contract—Illegal Contract—Claim for Repayment—Lottery Acts.*

A person became a member of a provident society under a contract whereby he agreed to pay certain monthly instalments in consideration of receiving a bond for £500 payable at the end of thirty years. The contract provided that ballots should be held monthly, and that a bondholder whose bond was drawn should be entitled to receive an advance equal to the amount secured in the bond without having to pay interest upon it; and further, that in the event of the bond-

holder dying, or wishing at the end of five years to withdraw, the association would pay the surrender value of the bond provided that no advance had been made upon it. The bondholder having paid the monthly instalments regularly for two and a half years, and no advance having been made on his bond, brought an action against the society for repayment of his instalments or for the surrender value of the bond. He averred that he was not informed that if he withdrew before the expiry of five years he would not receive his money back, and therefore that it was a breach of contract to refuse to repay him, and further, that he was entitled to repayment, as the ballots under which alone he could derive any real benefit were by the Lottery Acts illegal.

*Held* (1) that by the terms of the written contract the pursuer was not entitled to withdraw until he had subscribed for five years; (2) (following *Wallingford v. Mutual Society*, 1880, L.R., 5 App. Cas. 685) that the provision with regard to the holding of ballots did not render the contract illegal under the Lottery Acts, and action dismissed as irrelevant.

*Observed* by the Lord Ordinary (Wellwood) and by Lord Adam, that even if this contract came under the Lottery Acts, it did not follow that the pursuer was entitled to have his money repaid.

William Sinclair, provision dealer, 351 Leith Walk, Edinburgh, upon 14th July 1887 became a member of the Provident Association of London, Limited, incorporated under the Companies Acts 1862-83, and carrying on business in Edinburgh, and received the following certificate bearing that he "having subscribed for a bond of five hundred pounds, payable by subscription of £1, 1s. 8d. per month during a period of thirty years in accordance with the terms of the prospectus issued by the company dated 1st May 1884, and having paid the first subscription in respect thereof, as per official receipt, has been duly registered in the books of the company as a bondholder of the Provident Association of London, Limited, in respect of a bond to be issued and numbered No. 49,664. The bonds issued by the company are subject to the conditions endorsed hereon."

The conditions were, *inter alia*, as follows:—"3rd—The company will from time to time hold ballots, and if this bond is drawn at any such ballot, and the registered bondholder for the time being of this bond shall have paid all monthly instalments for the time being payable to him, and this bond shall not previously have been drawn in the ballot, then the registered holder of this bond, upon executing to the company an assignment of this bond, and giving to the company such security for payment of the future monthly instalments payable in respect of this bond as the directors of the company may approve, will be entitled to receive an advance equal to the principal monies hereby secured, such advance to be

repayable without interest at the time appointed for payment of the principal monies hereby secured. 4th—If the registered holder of this bond shall die before the time appointed for payment of the principal monies hereby secured, and if he shall have paid all monthly instalments for the time being payable by him in respect of this bond, and no advance shall have been previously made to him by the company, and if he shall not in any way be indebted to the company, then the company will, at the request of the executors or administrators of such registered holder, upon being released from this bond, and upon delivery of the same to the company, pay to such executors or administrators the value of this bond at the date of such release, such value to be ascertained in accordance with the rules of the company for the time being in force for the valuation of such bonds, or in the absence of any such rule, in accordance with any resolution of the board of directors of the company for the time being in force; provided, however, that this condition shall not apply to any bond which has been previously transferred, and shall not apply to a trustee or trustees holding the bond in trust for another person. 5th—After the expiration of five years from the date of this bond, if the bondholder shall have paid all monthly instalments for the time being payable by him in respect of this bond, and if no advance shall have been previously made to him by the company, and if he shall not in any way be indebted to the company, then the company will, at the request of the registered holder thereof, upon being released from this bond, and upon delivery of the same to the company, pay to such registered holder the value of this bond at the date of such release, such value to be ascertained as in the last preceding condition mentioned." By the prospectus which was referred to in the certificate, it was declared that the ballots mentioned in condition 3rd would be held monthly.

Sinclair paid the monthly instalments regularly until January 1890, at which date he had paid in all £33, 11s. 8d., and in 1893 he requested the society to repay him said sum with interest thereon from 1st February 1890. Upon their refusing to do so he brought an action against the association to enforce payment, in which he averred (Cond. 3) that Mr Mackie, their agent at the time he joined the association, "represented to pursuer that in respect of payment of £1, 1s. 8d. monthly for thirty years he would be entitled to receive £500 at the end of said time, and as a further inducement to pursuer he stated that an advance free of interest would be made to him at any time he desired it in order to purchase a dwelling-house, and that if pursuer was successful in obtaining a draw in the ballot his said monthly payments would cease to be payable, and that if he did not get a draw within five years the money he had paid in would then be repaid to him. Pursuer was not informed that if he withdrew from the society before the expiry of five

years he would not receive his money back, or that the society would in that event forfeit and retain any portion of it. No such condition was stated to pursuer either verbally by said agent or in any of the printed documents he received, and pursuer would not have agreed to become a member had he been informed of such a condition. . . . In regard to said representations by defenders' agent Mackie, it is believed and averred that defenders authorised and instructed him to make them. . . . He is therefore now entitled to repayment of the sum sued for. He has received no benefit in any form from defenders' society, but the defenders have had the use of pursuer's money paid in since 1887 and of the interest thereon. . . . In reference to the ballots said to be held and advances made by defenders, pursuer believes and avers that the number of bonds drawn in the said ballots is quite insignificant in proportion to the number issued by defenders. In the ordinary case the members are bound to pay their periodical subscriptions, and in the event of their obtaining a loan on security satisfactory to the company, interest at five per cent. per annum thereon in addition to said subscriptions. The pursuer never received any notice that his bond was to participate in or had participated in any ballot. The defenders gave no consideration to pursuer, and never incurred any risk in respect of his bond. Further, even in the event of pursuer's bond having been drawn in a ballot, it is averred that defenders would incur no obligation or risk until and unless said bond was deposited with or assigned to the defenders, and security found by pursuer satisfactory to the directors of defenders' company and accepted by them for payment of the future instalments in respect of said bond, and the titles of any property purchased by pursuer with the loan granted to him by defenders taken in favour of said directors or deposited with the company. Further, it is believed and averred that defenders use said ballots, the result of which depend on chance, to determine the right of members to apply for advances, and that said ballots are illegal."

The pursuers pleaded, *inter alia*—“(1) The defenders having violated the terms of their contract with pursuer, he is entitled to payment of the sums paid in by him, and decree should be pronounced as craved with expenses. (2) Defenders not being entitled, in terms of the contract between the parties, to retain any portion of pursuer's money deposited with defenders, pursuer is entitled to decree with expenses. (5) Defenders having granted to pursuer no consideration, and incurred no risk in respect of pursuer's bond, they are not entitled to retain or forfeit the moneys paid in by him and now sued for. (6) *Separatim*, The ballots held by defenders being for the purpose of determining the rights of members to participate in the alleged benefits of the society by applying for advances, and being dependent solely on chance, are illegal.”

The defenders pleaded, *inter alia*—“(1) No relevant case stated.

On 27th October 1893 the Lord Ordinary (WELLWOOD) sustained the first plea-in-law for the defenders, and dismissed the action.

“*Opinion*.—In this action the pursuer demands from the defenders the Provident Association of London, Limited, repayment with interest of certain monthly premiums amounting in all to £33, 11s. 8d., paid by him between June 1887 and January 1890 for one of the bonds issued by the defenders' company, No. 8 of process is a certificate dated 14th July 1887, certifying that the pursuer had subscribed for a bond for £500 payable by subscription of £1, 1s. 8d. per month during a period of thirty years, ‘in accordance with the terms of the prospectus issued by the company, dated 1st May 1884.’ The certificate bears:— ‘The bonds issued by the company are subject to the conditions indorsed hereon.’

“The action is not rested on fraud or misrepresentation. The pursuer avers that he was induced to subscribe by certain representations made to him by the defenders' agent in Edinburgh, Mr J. Mackie; but he does not plead that those were misrepresentations; and although his attention has been repeatedly called to the absence of such a plea he declines to add one. The pursuer's case is based on breach of contract. He maintains that the representations made by the agent formed part of the contract with the defenders. The answer is that the pursuer's contract with the company is embodied in the documents, and is to be found in the conditions engrossed on the certificate given to the pursuer, and in the prospectus as incorporated by reference.

“The pursuer's statements as to Mackie's representations are as follows:—“He represented to the pursuer that in respect of payment of £1, 1s. 8d. monthly for thirty years he would be entitled to receive £500 at the end of said time.’ That seems to be a correct statement.

“The pursuer adds—‘As a further inducement to pursuer he stated that an advance free of interest would be made to him at any time he desired it, in order to purchase a dwelling-house, and that if pursuer was successful in obtaining a draw in the ballot his said monthly payment would cease to be payable.’ That seems to be nonsense, and it is hard to believe that any man of ordinary intelligence would have accepted the statement if made.

“The pursuer then proceeds to say that Mackie represented ‘that if he did not get a draw within five years the money he had paid in would then be repaid to him.’ This statement tells against the pursuer, because it appears from it that if Mackie made any such statement he must have led the pursuer to understand that he would not get his money back unless he subscribed for five years; and it is further to be observed that the statement was in substance correct, because, as will be seen, the company undertook to give any member withdrawing after five years surrender value for his bond.

“The pursuer does not say that Mackie told him that he would get his money back

if he withdrew within five years. All that he says is that he was not told that he would not get it back in that event.

"Whatever the agent's representations may have been, the rights of parties fall to be regulated by the certificate and prospectus which the pursuer had in his possession for nearly three years and must have been familiar with.

"I think it clearly appears from the conditions on the certificate and in the prospectus, that in the event of a bond being drawn in the ballot, and in that case only, an advance would be made repayable without interest, and also that such advance would only be made on condition that the future monthly instalments were regularly paid. This appears both from the prospectus and certificate. The third condition is in the following terms—[quoted above]. As to the repayment of premiums or payment of surrender value the conditions are to the following effect—First (Condition 4)—[quoted above]. Condition 5 is as follows—[quoted above].

"It is quite true that it is not expressly conditioned that a member withdrawing within five years shall not be repaid any part of the instalments paid by him. But the conditions which I have quoted are absolutely inconsistent with the notion that a member who withdraws within the five years shall be repaid any part of the instalments paid by him. The pursuer has not subscribed for five years, and accordingly, as I read the conditions of the contract between him and the defenders, he is not entitled to any repayment.

"Again, the pursuer pleads that he is entitled to get his money back, because the defenders ran no risk. The first answer to this is, that by agreeing to the conditions he agreed that he should be repaid in the event of withdrawal only in the case and in the manner therein provided. But further, apart from other advantages, the pursuer has all this time had a chance of being drawn in the monthly ballots and obtaining an advance free of interest. If the pursuer had averred that these ballots were a fraud, or were unfairly conducted, there might have been a case for inquiry. But all that is said in the addition made for the pursuer is that he believes and avers that the number of bonds drawn in the ballots is quite insignificant in proportion to the number issued by the defenders. The whole scheme disclosed in the prospectus, and conditions to which the pursuer must be held to have assented, is absolutely inconsistent with the right of members to withdraw at any time and receive repayment of the instalment in full. Such a right would make it impossible for the company to make advances to those members who were successful in the ballots. The case is entirely different from those cases of fire and marine insurance in which the risk not having begun, premiums paid were held to be returnable.

"Lastly, it is said that such ballots are struck at by the Lottery Acts. The decision in the House of Lords in *Wallingford v. The Mutual Society*, L.R., 5 App.

Cas. 685, seems to be an authority directly to the opposite effect. Apart from this the pursuer is *in petitorio*, and if the ballots are illegal it does not follow that he is entitled to repayment. On the contrary, the general rule is that the Court will not assist either party to an illegal contract to recover money paid under it. The scheme to which the pursuer agreed may or may not have been an advantageous one for subscribers. Of this I have no means of judging. All I decide now, is that if it is to be impugned with success, it must be assailed on other and stronger grounds than those stated in this record."

The pursuer reclaimed, and argued—(1) He was entitled to a proof of his averments that the defenders had run no risk, and had given him no consideration. The society stood to gain and never to lose, for even if advances were made they could demand security for the payment of future instalments, and they were to be the judges of its sufficiency. If this were so, there was no valid contract, and he was entitled to demand back his money. (2) There had been breach of contract, because nothing being said about his not being allowed to withdraw, the contract was to be construed against the company if there was ambiguity. He was therefore entitled to repayment, or at least to the surrender value of the bond. (3) At the end of thirty years he would merely get back his own money. He could only benefit under a system of lottery, and that was illegal. He was not seeking to benefit by the lottery, and therefore was entitled to plead the Lottery Acts, and to ask for repayment. The case was different from that of *Wallingford (below)*, because there all participated, and only the order was determined by ballot. Here only those successful in the lottery were benefited. This was a lottery in the plain dictionary sense of the word, and that was the proper definition of the term—see *Taylor v. Smetten*, 1883, 11 Q.B.D. 207; see also *Sykes v. Beadon*, 1879, 11 C.D. 170 (Jessel M.R.); *Barclay v. Pearson*, L.R., 1893, 2 Ch. 154.

Argued for respondents—(1) No provision of the Lottery Acts had been cited making this contract illegal. Besides, these were penal statutes which made no provision for repayment of money—*Paterson v. Maquene & Kilgour*, March 17, 1866, 4 Macph. 602; *Howard v. Refuge Friendly Society*, 1886, 54 Law Times, 644. If the pursuer's argument were sound, anyone who had taken a raffle ticket during the last four year might demand repayment of his money. The ballot here was merely incidental to the contract, and therefore not illegal—*Wallingford v. Mutual Society*, 1880, 5 App. Cases 685. Even if illegal it did not render the whole contract nugatory. (2) There had been no breach of contract. The contract was to pay in thirty years, and in certain circumstances to make an advance. These stipulations they were prepared to implement. There was clearly by necessary implication no right to withdraw at will. The pursuer was not entitled

to repayment merely because he had come to think the bargain a poor one.

At advising—

LORD PRESIDENT—I am entirely satisfied of the soundness of the interlocutor, and of the reasons given by the Lord Ordinary.

By the contract in question the pursuer agreed to pay to the defenders £1, 1s. 8d. each month during thirty years, the defenders binding themselves, on the other hand, to pay to the pursuer £500 on the expiry of the thirty years. This is the main part of the contract, but the pursuer was also to be entitled to a chance of getting an earlier payment of his £500, and, if he desired it, to a loan of money.

The pursuer has come to think—and this may for all I know be a very sound opinion—that he has made a bad bargain, and he begins by saying that it is illegal. This contention is founded on the Lotteries Acts. The plea-in-law does not conduct the argument to the necessary conclusion that the pursuer is entitled to get back the moneys which he has paid, for it ends with the assertion that the contract was illegal. Even this abstract proposition, however, seems to me to be unsound. All that is done by lot under this contract is to settle which of the bondholders shall get paid before the normal period. The claimer made only a very general reference to the provisions of the Lotteries Acts, and did not come to close quarters with them. I am not aware that there is any statute which forbids all and any resort to lot in all and any money matters. Nor do I see how the present contract is nearer the Lotteries Acts than the contract in the case of *Wallingtonford*, and even assuming there to be some margin of difference, the degree of remoteness is not substantially reduced. In *Wallingtonford* Lord Selborne pointed out that there was no gambling transaction and no lottery office at which the public were invited to pay for lottery tickets; and having done so his Lordship says—“No case, therefore, in my judgment was made worthy of a moment's consideration in support of the contention that these were illegal transactions under the Lottery Acts.”

Well, then, if this bargain be not illegal, and as the pursuer admits that he cannot have it reduced on any other ground, how stands his present claim? The defenders, standing to this valid contract, are willing when the time comes to fulfil the obligation which they granted to the pursuer to pay him £500. The pursuer's plea that his money has been paid without consideration is contradicted by the fact that he holds this obligation of the defenders. Nor does the contract bear out his argument that it either leaves him or permits him this remedy. It is quite plain that these moneys are not deposited with the defenders; the nature of the business forbids the idea. They are paid to the defenders for their own behoof and are necessarily used by them to provide for other cases as well as for this. Apart from express stipulation for a return of the

moneys paid by the bondholder on his option, it would be hard to infer from the main part of the contract what is really a right to rescind it, but I agree with the Lord Ordinary that the 5th article by expressing the condition of matters in which a return of the moneys might be required, by implication excludes that demand in other circumstances.

LORD ADAM—Upon the construction of this contract I have nothing to add to the opinion of the Lord Ordinary. I think it is clear upon the contract that the pursuer is not entitled to have his money back.

But the pursuer says the contract is illegal because the defenders ran no risk. I do not understand that if it be true the defenders made a particularly good bargain, that is a ground for setting aside the contract. There is nothing in that argument. But the pursuer further says the contract was illegal because of the condition in the third head that there should be a ballot so many times a-year for the purpose of determining the bonds, the holders of which were to be entitled to certain loans. It is said that that makes the contract illegal because it amounts to a lottery. We heard a good deal about the Lottery Acts, but there was no citation of them.

Assuming this was a lottery, it does not thereby follow that the pursuer is entitled to succeed. I know of no Lottery Act saying that if anyone has paid money to a lottery he is entitled to get it back. On that matter, therefore, I also agree with the Lord Ordinary.

But it does not follow that even if one condition were illegal, the whole contract must go. I do not think so at all. Even if a contract contains a condition that cannot be enforced, that will not necessarily invalidate the whole contract.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Orr—Hunter. Agent—T. M. Horsburgh, S.S.C.

Counsel for the Defenders and Respondents—W. Campbell—Chree. Agents—Mackenzie & Fortune, S.S.C.