The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court answered the first question in the affirmative and the third and the fourth in the negative, and found that the second did not arise.

Counsel for First Parties — Sol.-Gen. Dickson, Q.C. — Burnet. Agent — James Mackay, W.S.

Counsel for Second Parties — Dean of Faculty Asher, Q.C. — Dundas. Agent — Alexander Morison, S.S.C.

Wednesday, June 9.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BENTON *v.* LIQUIDATORS OF EMPLOYERS' INSURANCE COMPANY OF GREAT BRITAIN, LIMITED.

Insurance—Guarantee Insurance—Insurance of Debenture—Premium—Payment of Premium after Termination of Risk —Insolvency of Debtor before Term of Maturity.

In 1892, by policy of insurance, an Insurance Company guaranteed to the assured payment of the principal sum invested by him with a company on debenture maturing at 1st June 1897, and of interest thereon, "in the event of failure to pay on the part of the debtors." The contract proceeded on the narrative that the assured had paid to the Insurance Company a certain sum as premium for such assurance for one year, and that it had been agreed that that sum should be the future annual premium, and be payable on 1st June in each year. It was a condition of the contract that the policy should be void if the premium were not paid within fourteen days after it became due.

The debtor company went into liquidation in 1893, and in 1894 the assured, with consent of the Insurance Company, accepted, in lieu of his debenture, a debenture maturing in 1904 of a new company, which took over the rights and liabilities of the old one.

The assured paid the stipulated premium down to 1st June 1894, but did not pay the premium due on 1st June 1895. In July 1895 the Insurance Company went into liquidation.

In a question with the liquidator of the Insurance Company, *held* (*rev.* judgment of Lord Stormonth Darling) that the policy of insurance was void in respect of failure to pay the premium.

In 1892 John Benton, farmer, and Alexander Murray, advocate, Aberdeen, lent the sum of £600 to the Equitable Mortgage Company, Limited, on debenture bearing interest at 5 per cent. per annum, and repayable on 1st June 1897.

On 16th June 1892 Benton and Murray insured that investment with the Employers' Insurance Company of Great Britain.

The following are the main provisions of the policy of insurance:—After the narrative that there had been paid to the company the sum of £2, 5s., being the agreed premium for such assurance until 1st June 1893, and that it had been agreed that the sum of £2, 5s. should be the future annual premium of such assurance thereafter, and that the same should be payable on the 1st June each year, the policy proceeded—"Now these presents witness that the company, in the event of failure to pay on the part of the debtors, hereby guarantee to the assured payment of the said principal sum of £600 sterling within four months of the date when the same is repayable as above stated, and of said interest thereon, . . . provided notice is given to the company of such failure to pay . . . Provided always that this policy is subject to the conditions indorsed hereon, which are to be taken as part hereof."

These conditions included the following: "1. This policy will be void . . . (*b*) if the premium is not paid within fourteen days after it becomes due;" (*c*) if the assured does not give the company notice of default on the debtors' part within a specified time; "(*d*) If the assured without the consent in writing of the company, consents to any arrangement modifying the rights or remedies of the assured against the debtors or takes proceedings for recovering the principal sum assured or interest thereon. 2. If the debtors delay payment of any principal or interest for thirty days after the same ought to be paid, or if the debtors stop payment, have a receiving-order made against them, become bankrupt, or are by the company known or believed to be in an unsound position, or if the company is called upon to pay any money under this policy, the assured shall, at the request and cost of the company, give to the company all such information as the assured may possess and the company may require as to the issue of the debentures hereby assured and the circumstances under which the assured took the same and the securities and rights available to the assured, and shall also at the like request and cost and upon payment by the company of the principal remaining due upon the debentures and interest at the rate within specified to date of payment, execute all such deeds and writings in favour of the company or its nominees, and do all such things as may be required by the company for vesting in them or their nominees all rights of the assured against the debtors and any property or person whatsoever, and the company may enforce any such rights or remedies in the name of the assured, but at the cost of the company. . . . 3. This policy shall continue from year to year so long as the assured shall pay the premiums hereunder on the days appointed for payment thereof, or before the expiration of

fourteen days thereafter, but the company shall not be bound to accept any premium payable after the 1st day of June 1897, or in any way to continue this policy beyond the expiration of the period of twelve calendar months from that date."

The Equitable Mortgage Company went into liquidation on 30th August 1893.

In May 1894 the Equitable Securities Company was formed to take over its rights and liabilities. Assenting creditors of the Equitable Mortgage Company received debentures of the new company on giving up their claims against the old company, and the remaining assets of the latter passed into the hands of the new company.

In July 1894 Benton and Murray, as specially authorised by the Employers' Insurance Company, assented to this arrangement, and subsequently exchanged their debenture of the old company for one of the new company maturing in 1904, and bearing interest at 4 per cent.

Benton and Murray paid a premium on their policy of insurance in June 1894, but did not pay a premium in June 1895. The Employers Insurance Company paid them the interest assured under the policy down to 1st December 1894.

In July 1895 the Employers Insurance Company went into liquidation, and in December 1895 Mr Murray for himself and Benton lodged an affidavit and claim with the liquidators for £603, 13s. 8d., being the principal sum insured under the policy *plus* the difference in interest between the rate paid by the old company and that paid by the new from 1st December 1894 to 13th July 1895.

Upon this claim the liquidators pronounced the following deliverance:—"The liquidators reject the claim in respect of the claimants' failure to renew the policy in June 1895."

The assets of the company realised sufficient to pay the claims of creditors in full.

The liquidators having on 25th August 1896 presented a note to the Court for approval of deliverances, &c., Benton & Murray lodged answers and objections thereto, in which, after narrating the facts, they craved the Court to direct the liquidators to issue a deliverance admitting their claim to an ordinary ranking, and to authorise the liquidators to pay them twenty shillings in the pound on their claim.

The liquidators lodged replies to these answers and objections, in which they admitted that a sum of £2, 18s., representing interest from 1st December 1894 to 1st June 1895, was due to the respondents.

On 14th May 1897 the Lord Ordinary (Stormonth Darling) pronounced an interlocutor disapproving of the liquidators' deliverance, and otherwise granting the crave of the objectors.

Opinion.—"At the close of the argument in this case on 5th February I asked the parties to ascertain and inform me at what date the Equitable Mortgage Company, Limited, was, as stated in the objections for Benton, 'wound up and dissolved.' It was an American company, and therefore I could not construe the statutes for myself, as I would have done if it had been a British company. I have waited three months for the information, and it is not forthcoming. I therefore propose to decide the case without it.

"The question is, whether the respondents have forfeited their rights under the policy of assurance dated 16th June 1892, by failure to pay a premium of £2, 5s. on 1st June 1895. That depends on whether there had been 'failure to pay' on the part of the Equitable Mortgage Company within the meaning of the policy prior to that date.

"I think there had been. The principal sum of £600 advanced by the respondents to the Mortgage Company was not repayable by the latter till 1st June 1897; but circumstances might quite well occur before that date making it impossible for the debtors to discharge their obligation when the due date arrived. During the argument it seemed to me that no circumstance could have that effect more clearly than the dissolution of the Mortgage Company, and therefore I asked for the date of dissolution. But I think there is enough in the admitted facts to enable me to say that whatever was the precise date of dissolution there had been 'failure to pay' on the part of the company before 1st June 1895.

"It is admitted by the liquidators that the Mortgage Company had gone into liquidation prior to June 1894. Probably that circumstance did not by itself constitute 'failure to pay,' though it gave the Insurance Company a right under the second condition endorsed on the policy to make immediate payment of the principal with interest to date, and to demand an assignation of all the rights of the insured. But the liquidators further admit the respondents' statements regarding what is called the 'reconstruction of the Company.' These statements are that in March 1894 a new Company called the Equitable Securities Company, Limited, was projected to take over the assets and liabilities of the Equitable Mortgage Company under a reconstruction scheme; that in July 1894 the respondents were authorised by the Insurance Company to accept, and did accept, ten debentures for £60 each from the new Company, repayment being deferred till March 1904, and interest reduced to 4 per cent.; and that the Insurance Company expressly agreed that the respondents' acceptance of these new debentures should be without prejudice to their claim under the insurance of their original debenture with the Mortgage Company. This latter and most material point is amply borne out by a letter from the Insurance Company dated 23rd July 1894. The effect of this transaction, to which the Insurance Company became a party, was to create a slightly altered debt and an entirely new debtor. The Equitable Mortgage Company, even if it continued to exist for some time afterwards, could no

longer be called on to pay the old debt, for the parties had agreed otherwise, and it could not pay by any possibility, because it had parted with all its assets. There was therefore on its part from that moment 'failure to pay' the principal sum, though payment could not have been demanded till 1st June 1897. The risk, which is the characteristic feature of a contract of indemnity, was at an end, for it had become a certainty. The insured had acquired an indefeasible right to recover from the insurer. I fail to see how the respondents could forfeit the right which had thus vested in them by any subsequent act or default of theirs. It was enough that they had kept the policy in force up to the time when the liability of the Insurance Company arose. After that the company may have had the right (instead of paying up at once and ending the matter) to wait for the stipulated date, paying interest in the meantime. But during that interval there was, so far as I can see, no obligation on the part of the insured to pay premiums. It would, I think, require very special words in a policy of insurance to make premiums payable after the claim had emerged and become indefeasible, and I find no such words in this policy.

"It follows that the liquidators' deliverance cannot be sustained."

The liquidators reclaimed, and argued—(1) The contract here was to ensure the debenture upon condition of getting five years' premium. The amount of premium was calculated upon that footing, and the respondents were really seeking to get the benefit of the policy for three years' premium only. Though the Equitable Mortgage Company had been wound up, failure to pay in the sense of the contract did not emerge till the debenture matured, and by that time the policy had lapsed—*Laird* v. *Securities Insurance Company, Limited*, March 12, 1895, 22 R. 452; *Dane* v. *Mortgage Insurance Corporation*, 1894, 1 Q.B. 54; *Finlay* v. *Mexican Investment Corporation* [1897], 1 Q.B. 517; *Simpson* v. *Mortgage Insurance Corporation*, 38 Sol. Journal, 99. The logical result of the respondents' argument was that payment could have been demanded by the assured the moment the debtor company was replaced by the new one. (2) The respondents' theory of compensation in respect of the interest due in the Insurance Company's hands was nowhere suggested in the claim, which was on the contrary fatal to it, and it was in any event unsound—*Cowan* v. *Gowans*, January 25, 1878, 5 R. 581.

Argued for the respondents—The Lord Ordinary was right. (1) There could be failure to pay before the date of maturity. Once it was ascertained that the debtor could not pay when maturity should have arrived, the risk emerged, or rather became a certainty; and after that nothing could void the Insurance Company's liability. (2) In any event the amount of interest due on the debenture and in the Insurance Company's hands in June 1895 was more than sufficient to pay the premium then due, and should have been applied for the purpose.

LORD PRESIDENT—The two gentlemen who are respondents in this reclaiming-note held a debenture of the Equitable Mortgage Company, which was repayable on the 1st of June 1897, and during the currency of which interest was payable at the rate of five per cent. per annum. The respondents insured payment of these debentures with the Employers Insurance Company of Great Britain, now in liquidation, and the obligations of the Insurance Company and the insured are set out in a policy of assurance which is before us. As I have said, the obligation of the original debtor was to repay the sum lent on 1st June 1897—then and no sooner—and it is natural to suppose, and in fact it is expressed in the policy, that the insurance company were simply to make good this obligation. They "guarantee to the assured payment of the said principal sum of £600 (sterling) within four months of the date when the same is repayable, as above stated." They also engage, during the currency of the debenture, that is, up to that period, to guarantee interest thereon at the rate of five per cent., within three months of the date when the same falls due from time to time. As the price of this undertaking by the Insurance Company, it is set forth that the sum of £2, 5s., being the agreed premium for such assurance for the period from 26th May 1891 to 1st June 1893, has been paid to the company, and that "it has been agreed that the sum of £2, 5s., shall be the future annual premium of such assurance thereafter, and that the same shall be payable on the first day of June in each year." Now, it seems perfectly clear that the words of the policy necessarily relate to the original obligation of the original debtor and to the parallel or identical obligation of the insured. I read this therefore as an agreement that, in return for these annual payments down to 1st June 1897, the insurers will see the principal sum then payable paid or pay it themselves, and so with regard to the interest falling due during the currency of the same period. The decision of the Lord Ordinary and the contention of the respondents is, that because long before June 1897 the resources of the debtor became practically exhausted, there occurred a "failure to pay" in the sense of the policy. It would be much more accurate to say that it became apparent at that earlier date that a failure to pay was inevitable, but then it seems to me that the argument of the Lord Ordinary and the respondents ought to go the length of saying that the manifest impossibility of the debtor company being able to pay the amount of the debenture when it became due precipitated the obligation of the Insurance Company. The respondents, however, shrink from saying that, and accordingly they are forced to say that while the contract of insurance continued down to June 1897 so

far as the obligation of the Insurance Company was concerned, the other party was set free by the certainty that that obligation would be prestable, and that while up to 1st June 1897 the one party was bound, the other was to cease paying premiums. It seems to me that that would be clearly contrary to the reciprocal obligations to the policy, and the language used as to the risk having ceased and a certainty having occurred seems to me to have no relevancy to the construction of the contract. There is nothing unintelligible or irrational in the particular contract to pay after the risk had been turned into a certainty. It may be illustrated as well by the case of a life policy as by any other. Suppose a policy of insurance binds the insurer to pay a certain sum at a certain date in the event of a particular person failing to survive it, and binds the insured to pay annual premiums down to that date. If the person named in the policy dies before the date in question arrives, it becomes quite certain that the insurer will have to pay on its arrival, but the other party to the contract will none the less have to continue paying the premiums falling due at this date.

Accordingly I think that the Lord Ordinary is wrong.

With regard to the argument on compensation, I think it fails on several points. In the first place, it is directly contrary to the theory and terms of the respondents' claim, which is a demand for payment of money which they now say has been applied with their consent in payment of the premiums due under the policy. Then it is not pleaded in their answers, and there are other reasons which seem to strike with equal force against this contention. I am of opinion that the Lord Ordinary's judgment should be recalled and the deliverance of the liquidators affirmed.

Lord Adam concurred.

Lord Kinnear—I also entirely concur. I think this policy is a contract by which the company gave a positive undertaking to pay the sum of £600 on the 1st of June 1897 if the debtor company failed to pay upon that date, and provided the creditor paid certain specified annual premiums as the consideration for the insuring company's obligation. That seems to me the plain and obvious construction of the words of the contract, and it is made clearer by a further and more specific statement of the conditions upon which the policy is to be void, one of which is that it becomes void if the premium is not paid within fourteen days after it becomes due.

Now, I agree with your Lordship that the arrangement made between the creditor and the debtor with the consent of the Insurance Company had no effect either in accelerating the liability of the insurers to pay this sum so as to make it exigible before 1st June 1897, or in discharging the corresponding obligation of the insured to continue to pay the premiums if they desired to retain their right to demand payment. The insurers are barred by their consent to the new arrangement from maintaining that it relieves them of their liability. But they made no new contract with the insured. They are liable under their original contract according to its conditions, and not otherwise. I therefore quite agree in the result arrived at by your Lordship.

Lord M'Laren was absent.

The Court recalled the interlocutor of the Lord Ordinary and affirmed the deliverance of the liquidators.

Counsel for the Respondents—W. Campbell—M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Liquidators—Sol.-Gen. Dickson, Q.C.—Lorimer. Agents—Melville & Lindesay, W.S.

Thursday, June 10.

FIRST DIVISION.

EARL OF LAUDERDALE'S TRUSTEES *v.* HOGG AND OTHERS.

Superior and Vassal—Entry—Casualty—Corporation.

By charter of resignation a superior confirmed certain lands "to and in favour of the managers" of a corporation, incorporated by royal letters-patent, with power to buy and sell lands, "and their successors in office, for the use and behoof of the said hospital and their disponees heritably and irredeemably."

In a question with the disponees of the managers of the said corporation, *held* that the superior was not entitled to a casualty of composition from them on the grounds (1) that the entry was the entry of the corporation, which was still in existence, and (2) that, even assuming that not to be so, the entry was not an entry in favour of individual managers upon whose death, and upon the consequent entry of whose successors in office, a casualty of composition would become payable, but an entry of a perpetual succession of managers for the corporation.

Hill v. *Merchant Company*, January 17, 1815 (F. C.), and *Campbell* v. *Orphan Hospital*, June 28, 1843, 5 D. 1273, *followed.*

The Orphan Hospital and Workhouse, Edinburgh, was constituted into a legal incorporation in 1742 by Royal Letters-Patent, which declare that the said corporation "shall have full power and be able and capable in law to purchase, take, hold, and enjoy in fee, heritably and irre-