Accordingly I agree with the contention advanced by the tenant's counsel on this part of the case, and I think that this compensation is due indefeasibly except in one case only, and that is where damages in excess of a year's rent are found to have been proved. In that case the tenant is not limited to a year's rent but gets the damages proved.

I therefore think that the first question of law should be answered as your Lordship suggested. [*His Lordship then discussed the second question.*]

LORD MORISON—I also agree. As regards the first question in the Stated Case, the whole argument for the appellant seemed to me to turn upon the construction of the words "for the avoidance of disputes" contained in section 10 (6) of the statute. I think the argument submitted proceeded upon a misconception of the effect of these words. In my opinion they afford no justification for the view that in cases where the tenant proceeds to arbitration his compensation shall be limited in amount to that which he can prove. It appears to me that these words are only explanatory of the reason for introducing a fixed scale of compensation. The right to compensation conferred upon a disturbed tenant is an absolute right. Its amount is computed at a sum equivalent to a year's rent, plus the amount of any additional loss or expense which he can prove, but in no event shall the amount of compensation for disturbance exceed the amount of two years' rent. [*His Lordship then discussed the second question.*]

LORD ORMIDALE and LORD HUNTER were absent.

The Court affirmed the Sheriff-Substitute's finding in answer to the first question of law.

Counsel for the Appellant — Aitchison, K.C. — Scott. Agents — Scott & Glover, W.S.

Counsel for the Respondent — Morton, K.C.—Taylor. Agents—W. G. Leechman & Company, Solicitors.

Friday, November 30, 1923.

FIRST DIVISION.

LIQUIDATOR OF CLYDE MARINE INSURANCE COMPANY *v.* HERBERT RENWICK & COMPANY, AND LA SOCIÉTÉ ANONYME DE PERIANDROS.

Contract — Marine Insurance—Validity—Slip — Closing Slip—Liquidation— Whether Liquidator Bound to Issue Policy in respect of Slip—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *secs.* 91, 93 (1) *and* (3)—*Marine Insurance Act* 1906 (6 *Edw. VII, cap.* 41), *secs.* 21, 22, *and* 23.

Company— Voluntary Liquidation— Duties of Liquidator—Marine Insurance—Obligations Binding in Honour—Risk Accepted by Slip before Liquidation — Jurisdiction of Court to Direct Liquidator to Implement.

A marine insurance company which had gone into voluntary liquidation had, before the date of the liquidation, initialled a slip presented to it by an insurance broker containing particulars of a required insurance, thereby showing that the company's underwriter elected to take the risk. After the commencement of the liquidation the broker presented the "closing slip" containing the particulars of the interest to be covered, the effect of its presentation being that the company was bound in honour but not in law to issue a policy in accordance therewith. A question having arisen as to whether the liquidator, who was not carrying on the business of the company to any extent, was bound to issue a policy in accordance with the closing slip, an application was presented to the Court for its determination. At the date of the application it was not known whether there had been any loss in respect of the risk to which the slip applied. *Held* (1) that the company was not under any legal obligation in respect of the slip to issue a policy; (2) that as the liquidator was not carrying on the business of the company he was not entitled to issue a policy and claim payment of the premium even although he considered it in the interest of the creditors and shareholders to do so; and (3) that the Court had no jurisdiction to authorise the liquidator to implement an obligation which was not legally enforceable on the company at the date of liquidation although binding in honour upon it.

Opinion per Lord Sands that where the risk in the slip had run off before liquidation, and the liquidator was satisfied that it would be for the benefit of the company in liquidation to issue the policy and collect the premium, he was entitled to issue it and claim payment of the premium.

Insurance —Marine Insurance—Company —Voluntary Liquidation — Powers and Duties of Liquidator—Risks Accepted by Slip Prior to Liquidation—Policies Executed and Issued by Liquidator Subsequent thereto.

The liquidator of a marine insurance company which had gone into voluntary liquidation, assuming that in accordance with maritime practice and the procedure at Lloyd's he ought to sign and issue policies to all persons holding slips initialled by way of acceptance at the commencement of the liquidation, prepared and executed certain policies, some of which he issued to insurance brokers, debiting them with the premium, and the remainder of which he retained in his own possession, no premium being debited or paid thereon. The liquidator was not carrying on the business of the company. *Held* (1) that it was *ultra vires* of the liquidator to

convert the slips into enforceable obligations in the shape of marine policies, and that no obligation binding on the company was created by their execution or issue; and (2) that it was the duty of the liquidator to cancel the policies which had been issued, and credit the brokers with or refund to the assured the premiums debited or paid.

The Stamp Act 1891 (54 and 55 Vict. cap. 39) enacts — Section 91 — "For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance." Section 93—"(1) A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance. . . . . (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured. . . ."

The Marine Insurance Act 1906 (6 Edw. VII, cap. 41) enacts—Section 21—"A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract although it be unstamped." Section 22—"Subject to the provision of any statute a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards." Section 23—"A marine policy must specify—1. The name of the assured or of some person who effects the insurance on his behalf. 2. The subject-matter insured and the risk insured against. 3. The voyage or period of time, or both, as the case may be, covered by the insurance. 4. The sum or sums insured. 5. The name or names of the insurers."

Eric Portlock, F.C.A., London, liquidator for the voluntary winding-up of the Clyde Marine Insurance Company, Limited, *petitioner*, presented an application under section 193 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) for the determination of certain questions arising in the liquidation.

The petition stated, *inter alia*—"That the Clyde Marine Insurance Company, Limited, was incorporated under the Companies Acts 1908 and 1913 upon the 15th day of June 1915. The registered office of the company is situated in Scotland. The objects for which the said company was incorporated were, *inter alia*, to carry on the business of marine insurance in all its branches, and to carry on all kinds of transit insurance business, and generally every kind of insurance and re-insurance business except the classes of insurance business and granting of annuities to which section 1 of the Insurance Companies Act 1909 applies. The company carried on business for some time, but at the end of June 1920 it ceased to accept or underwrite any further risks. At a general meeting of the company held on the 4th day of January 1921 an extraordinary resolution was passed that the company by reason of its liabilities could not continue its business, and that accordingly the company should be wound up voluntarily, and the petitioner was appointed liquidator. On 4th March 1921 an application was made by the petitioner to your Lordships to give effect to a resolution duly passed by a meeting of creditors held under section 188 of the Companies (Consolidation) Act 1908 for the appointment of Walter Frederick Wiseman, F.C.A., partner in the firm of Gerard Van de Linde & Son, Sidney Allison Tokeley of Sidney Allison & Company, Limited, and Maurice Diaz, underwriter to the National Benefit Assurance Company, Limited, as a committee of inspection, and on the 5th day of March 1921 these gentlemen were appointed by the Court as the Committee of Inspection in the liquidation. The petitioner and the said committee have entered upon their respective duties in the liquidation. In the course of the liquidation questions have arisen on which the petitioner desires the determination of the Court. These questions the petitioner is advised are questions of law, and are appended to the respective statement of facts hereinafter set forth. The cases included in this petition are test cases, and the petitioner desires the opinion of the Court on the questions of law raised thereby not only for his assistance in dealing with these particular cases, but also for his assistance in dealing with many other similar cases in which the facts raise the same or similar questions of law. As a preliminary to the statement of the facts in the particular cases now presented for the determination of the Court it is necessary to state as follows the general course of dealing followed by the company in the transaction of its insurance business:—The company transacted its business of insuring marine risks and placing re-insurance of such risks almost entirely through insurance brokers. In accepting risks and issuing policies thereon the course of dealing between the company and the insurance brokers was as follows — The broker on receiving instructions from a client to place an insurance made out a slip containing the particulars of the required insurance. The broker then presented the slip to the company, and if the company's underwriter elected to take the risk he initialled the slip on its behalf. The result of this transaction was that the assured was bound in law to declare to the company the exact particulars as to amount, &c., of the interest to be covered under the slip, and in pursuance of this the broker would present to the company a 'long slip' or 'closing slip' containing these particulars. On receipt of this the company was bound in honour but not in law to issue a policy in accordance with the particulars on the 'long slip' or 'closing slip.' The policy was never issued until after receipt of the 'long slip,' and often not until

months after the initialling of the slip, the risk in the meantime having attached, and possibly a loss having occurred, or the risk might have run off without loss. When the policy was issued the company debited the premium to the broker's premium account, and the premium was then regarded as paid as between the company and the actual assured, and the company looked to the broker alone for payment. When a loss occurred the broker, having endorsed the loss as adjusted on the policy, submitted it to the company as a claim, and if the company was prepared to admit the claim, it passed it for settlement by causing the broker's endorsement to be initialled on its behalf. On the claim being thus passed for settlement the company credited the amount to the broker's claims account. The premium account and claims account were settled from time to time, the broker sending the company a cheque for the amount of the premium account and the company giving the broker a cheque for the amount of the claims account. The position between the broker and his client or the actual assured was as a rule unknown to the company, except in so far as it might appear on the policy. A broker may charge his client a *del credere* commission and guarantee that the underwriter will pay the loss. A broker may or may not retain the policy in his possession. If he does he has a lien on it as against his client for the premium if unpaid and for the general balance of his client's underwriting account. Claims in respect of losses are regarded primarily as debts due from the underwriter to the assured, and are credited to the broker as the assured's agent, but if the policy is in the broker's name and he has an interest therein, either because he is a *del credere* agent or has a lien against his client on the policy or on the goods insured, the amount of a claim may be in whole or in part a debt due to the broker as principal and not merely as agent for his client.

"The following are the facts of the particular cases and the questions of law raised thereby and in respect of which the petitioner desires the determination of the Court:—

"*Case* 1.—On the 9th December 1920 the company at its head office in London caused to be initialled a slip which was presented by W. H. Dolphin & Company of 13 Poultry, London, E.C. 2, insurance brokers. The particulars on such slip are as follows:—'Moriner' and/or steamer, Antwerp to Rio de Janeiro or held covered office to office and one month in customs. Francs 262100 on tissues so valued as per schedule. With average, theft, pilferage, hook and fresh water damage and war risk frustration clause. ·625 per cent. (Francs) (262100) 131050 Clyde. 131050 London and Yorkshire. P. 9/12/20.

"On the 24th February 1921 (*i.e.*, after the commencement of the liquidation) W. H. Dolphin & Company presented to the liquidator a closing slip, and by means of such presentation requested the liquidator to issue in the name of the company a policy in accordance therewith. No policy has been issued, but Herbert Renwick & Company of 13 Poultry, London, E.C. 3 (successors to W. H. Dolphin & Company) are pressing the liquidator to issue a policy in accordance with the closing slip so presented. The petitioner has at present no knowledge as to whether or not there has been a loss in respect of the said risk.

"The petitioner as liquidator foresaid desires the opinion of the Court on the following questions:—1. Is the company under any legal obligation to issue a policy to the said Herbert Renwick & Company in accordance with the closing slip? 2. If the answer to the first question is in the negative then—(*a*) May the liquidator issue such policy in the name of the company and claim payment of the premium if he considers such a course to be in the best interests of the company's creditors and shareholders? (*b*) Is it the duty of the liquidator to issue such policy in the name of the company without regard to such interest? 3. If no policy be issued in the name of the company as aforesaid—(*a*) is the company under any legal obligation to pay to the assured any loss or losses which would have been covered by such policy or to compensate the assured in respect of the non-issue of such policy? (*b*) Is it the duty of the liquidator to admit to proof in the liquidation any claim by the assured for any loss or losses which would have been covered by such policy or for damages in respect of the non-issue of such policy?

"*Case* 2.—On his assuming office the liquidator assumed that in accordance with marine insurance practice and the procedure obtaining at Lloyds he ought to sign in the name of the company and issue policies to all persons who at the commencement of the liquidation held an initialled slip, and after the commencement of the liquidation demanded from him the issue of a policy in accordance therewith, and he accordingly prepared and signed a number of policies pursuant to such demands made by the brokers who held the initialled slips. Some of the policies so prepared and signed by the liquidator were duly issued by the liquidator to the brokers who had demanded them. On these the premiums have been debited but not yet paid by the brokers. Others of such policies were not so issued and are still in the hands of the liquidator, he in the meantime having been advised that he was not bound by the practice at Lloyds, and that as liquidator he ought not unless directed by the Court to sign and issue such policies. On these no premiums have been debited or paid. The said brokers on behalf of the assured claim that the policies prepared and signed by the liquidator as aforesaid are valid and binding on the company, and that they are entitled to have such of them as are still in the hands of the liquidator issued to them, and to prove in the liquidation in respect of any loss or losses covered by any of such policies.

"The following are representative cases:—

"(i) Policy signed by the liquidator and issued to the brokers—

Policy No.	Assured named in Policy.	Brokers.	Vessel.	Amount Insured.
25229/22066	La Société Anon. de Periandros	W. H. Dolphin	Ovessant	Francs 8350

"(ii) Policy signed by the liquidator but not issued—

Policy No.	Assured named in Policy.	Brokers.	Vessel.	Amount Insured.
25157/22034	La Société Anon. de Periandros	W. H. Dolphin	Post &/or Parcel &/or Registered Post.	Francs 175

"The petitioner as liquidator foresaid desires the opinion of the Court on the following questions:—1. Is the company or the liquidator under any legal obligation to issue to the brokers or the assured the policies signed by the liquidator as aforesaid but not issued? 2. If the answer to the first question is in the negative, then —(*a*) May the liquidator issue such policies and claim payment of the premiums if he considers such a course to be in the best interests of the company's creditors and shareholders? (*b*) Is it the duty of the liquidator to issue such policies without regard to such interests? 3. Is the company under any legal obligation to pay to the assured any loss or losses which are covered by the policies (*a*) signed by the liquidator as aforesaid but not issued? (*b*) Signed and issued by the liquidator as aforesaid? 4. If the company is not under any legal obligation to pay to the assured any loss or losses which are covered by the policies which have been signed and issued by the liquidator as aforesaid, is it the duty of the liquidator to cancel such policies and credit the account of the brokers with or refund to the assured the premiums debited or paid thereon?"

Answers were lodged for Messrs Herbert Renwick & Company, holders of the slip referred to in Case 1, and by La Société Anonyme de Periandros, holders of slips referred to in Case 2.

Both respondents denied that the Insurance Company was not bound in law to issue a policy in accordance with the particulars on the closing slip.

Messrs Herbert Renwick & Company maintained — "(1) That the company is bound to issue to the brokers or to the assured a policy in name of the assured in accordance with the 'long slip' or 'closing slip'; (2) that the company is bound to pay to the assured any loss or losses which would have been covered by such policy (whether issued or not) or to compensate the assured in respect of the non-issue thereof; and (3) that it is the duty of the liquidator to admit to proof in the liquidation any claim by the assured for any loss or losses which would have been covered by such policy, or for damages in respect of the non-issue thereof."

La Société Anonyme de Periandros maintained—(1) That the company or the liquidator is bound to issue to the brokers or to the assured the policies signed by the liquidator; (2) that the company is bound to pay to the assured any loss or losses which are covered by the policies signed by the liquidator whether such policies are issued or not; and (3) that if the company is not bound to pay to the assured any loss or losses which are covered by the policies which have been issued by the liquidator, it is the duty of the liquidator to cancel such policies and credit the account of the brokers or refund to the assured the premiums debited or paid thereon."

Argued for the petitioners—*Case* 1—The respondents now admitted that the slip was not itself a policy of marine insurance, but maintained that there was in respect of the slip a contract which though not legally enforceable was binding in honour upon the company, and which the Court could direct the liquidator to implement. That contention was erroneous, for the statutes not merely excluded the slip from being treated as a policy or as constituting a legally enforceable contract—*Ionides* v. *Pacific Insurance Company*, (1871) L.R., 6 Q.B. 674, *per* Blackburn, J., at p. 685, 1872, 7 Q.B. 517, *per* Kelly, C.B., at p. 525; *Fisher* v. *Liverpool Marine Insurance Company*, (1873) L.R., 8 Q.B. 469, (1874) L.R., 9 Q.B. 418; *Home Marine Insurance Company* v. *Smith*, [1898] 1 Q.B. 829, *per* Matthew, J., at p. 834, [1898] 2 Q.B. 351, *per* Rigby, L.J., at p. 357; *Mackay* v. *Scottish Boat Insurance Company*, 1903, 40 S.L.R. 675; *Glenforsikrings Aktieselskabet* (*Scandinavia Reinsurance Company of Copenhagen*) v. *Da Costa*, [1911] 1 K.B. 137—but rendered the slip as a contract null and void. That was the meaning of "invalid"—Stamp Duties on Sea Insurance Act 1795 (35 Geo. III, cap. 63); Customs and Inland Revenue Act 1867 (30 Vict. cap. 23), secs. 3, 7, 9; Stamp Act 1891, secs. 91, 92, 93, 95, and 97; Marine Insurance Act 1906, secs. 1, 22, 23, 24, 30, 52, and 53; *Ionides* v. *Pacific Insurance Company* (*cit.*); *Fisher* v. *Liverpool Marine Insurance Company* (*cit.*). The Act of 1906 was not intended to derogate from the Stamp Acts. Section 23 was not a definition, but merely carried the requisites of specification in a policy a step further. So that what was valid as a contract under the Stamp Acts might be inadmissible in evidence under the Act of 1906. This was illustrated in the case of *Edwards* v. *Aberayron Mutual Ship Insurance Society*, (1875) 1 Q.B.D. 563. It was clear too from the provisions as to stamping—Stamp Act 1891, sec. 14 (4)—which would otherwise have been unnecessary, that there was an intention to differentiate the contract of marine insurance from other contracts of insurance. There was therefore no legal contract at all. (Reference was also made to Commercial Laws of the World, vol. xiii, p. 508). If that was so, the liquidator was not entitled to waive legal nullities and implement obligations binding only in honour without regard to the interests of creditors and shareholders—Thoms on Judicial Factors, p. 99; Companies (Consolidation) Act 1908, secs. 186 and 208—nor had the Court jurisdiction to authorise or direct

him to do so. The English decisions relied on by the respondents did not apply. The principle upon which they proceeded was that where assets which did not belong to a bankrupt came into his trustee's hands he was not entitled to retain them—*Ex parte James*, (1874) L.R., 9 Ch. 609, at p. 614. It was otherwise where the assets came into the bankrupt's hands before bankruptcy. It had never been held that in such circumstances the trustee could be authorised to return such assets. The Court had gone too far in *In re Thellusson*, [1919] 2 K.B. 735, and had checked the extension of the principle in *In re Wigzell*, [1921] 2 K.B. 835; *Scranton's Trustee* v. *Pearse*, [1922] 2 Ch. 87, *per* Astbury, J., at p. 93, Sterndale, M.R., at p. 119, and Younger, L.J., at p. 132. In *In re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67, a case regarding contracts void by statute, the principle was not applied. Further, the doctrine of *Ex parte James* had not been applied in Scotland, and in England had only been applied to officers of Court. A voluntary liquidator was not an officer of Court—*In re Hill's Waterfall Estate and Gold Mining Company*, [1896] 1 Ch. 943, at p. 953; *In re London County Commercial Reinsurance Office* (*cit.*), *per* P. O. Lawrence, J., at p. 84; Companies (Consolidation) Act 1908, sec. 173. Questions 1, 2 (*b*), and 3 (*a*) and 3 (*b*) fell to be answered in the negative. Question 2 (*a*), however, fell to be answered in the affirmative, at all events to the effect of allowing the liquidator where a risk had run off before the date of the liquidation without loss to issue a policy and claim the premiums. That was merely ingathering debts due at the date of the liquidation, and was not carrying on business contrary to section 184 of the Companies Act. The Court might have power to authorise this under section 193 of the Companies Act—*Crawford* v. *M'Culloch*, 1909 S.C. 1063, 46 S.L.R. 749. *Case* 2—It followed from the argument in Case 1 that the liquidator by issuing a policy when he was not legally bound to do so had acted *ultra vires*. This was the case even if he had a discretion in the interest of the creditors, for he had issued the policy, not in the exercise of any such discretion, but owing to mistake as to his legal position. It was therefore the duty of the liquidator to cancel the policy which had been issued. The argument was still stronger in the case of the policy which had not been issued. Something more than mere execution of the policy, *e.g.*, delivery, or at all events the debiting or payment of the premiums, was necessary to constitute a legally binding contract—*Xenos* v. *Wickham*, (1867) L.R., 2 H.L. 296, *per* Lord Chelmsford, L.C., at p. 320. Questions 1, 2 (*a*) and (*b*), and 3 (*a*) and (*b*) therefore fell to be answered in the negative. On the other hand the petitioner conceded that if it was his duty to cancel the policy which had been issued, he was bound to repay or credit the premiums which had been paid or debited. Question 4 should therefore be answered in the affirmative.

Argued for the respondents—*Case* 1—Although the slip was not itself a policy of marine insurance, it was a contract of marine insurance which but for the disability attached to it by the statutes would have been legally enforceable—*Ionides* v. *Pacific Insurance Company* (*cit.*), *per* Blackburn, J., at p. 684. The disability prevented the slip from being admissible in evidence, and was merely for the purpose of securing the stamp duty—*Thompson* v. *Adams*, (1889) 23 Q.B.D. 361. The Marine Insurance Act 1906 sec. 22, did not alter the law. The statutes contemplated the pre-existence of a contract. The effect of the execution and issue of a policy was merely to remove the disability. Further, the contract was apparently still enforceable against the assured to the extent of binding him to supply the particulars for a policy. There was therefore still a contract which was binding in honour upon the company—*Fisher* v. *Liverpool Marine Insurance Company* (*cit.*). The English Courts had jurisdiction to order an officer of Court to implement such a contract—*Ex parte James* (*cit.*); *Ex parte Simmonds*, (1885) 16 Q.B.D. 309, *per* Lord Esher, M.R., at p. 311; *In re Tyler*, [1907] 1 K.B. 865, *per* Farwell, L.J., at p. 871; *In re Thellusson* (*cit.*); *In re Wigzell* (*cit.*), *per* Horridge, J., at p. 844, and Sterndale, M.R., at p. 857; *Scranton's Trustee* v. *Pearse* (*cit.*), *per* Younger, L.J., at p. 131—and although there did not appear to be any Scottish case in point, there was no reason why the Scottish Courts should not do so. The Court should therefore authorise the liquidator to carry out the honourable obligations in respect of the slip. An underwriter would never think of disclaiming these obligations—Buckley on the Companies Acts (9th ed.), p. 365; Lindley on Companies, p. 968; Williams' Bankruptcy Practice, p. 229; Palmer's Company Precedents (12th ed.), Part ii, 292—and the Court could never say that a liquidator, who was more in the position of a director than that of a trustee in bankruptcy, should do so. Otherwise the position of creditors might be actually improved by the liquidation. Analogous cases arose in connection with the Weights and Measures Acts (5 Geo. IV, cap. 74), sec. 15, and 5 and 6 Will. IV, cap. 63, sec. 6—*Cuthbertson* v. *Lowes*, 1870, 8 Macph. 1073—and under Leeman's Act (30 and 31 Vict. cap. 29)—*Seymour* v. *Bridge*, (1885) 14 Q.B.D. 460, *per* Matthew, J., at p. 464; *Perry* v. *Barnett*, (1885) 15 Q.B.D. 388, *per* Bowen, L.J., at p. 397—and in connection with betting transactions—*Read* v. *Anderson*, (1884) 13 Q.B.D. 779. Further, although a voluntary liquidator was not an officer of Court, the principle could surely be applied when he came to Court asking for directions as to what he ought to do. Section 193 of the Companies Act did not limit the directions to questions of law. Questions 2 (*b*) and 3 (*b*) should therefore be answered in the affirmative. *Case* 2.—By executing the policies the liquidator had done all that was necessary to remove the statutory disabilities attached to the slips and make the contracts in respect of the slips legally enforceable. It was not necessary that the policies should be issued—*Xenos* v. *Wickham* (*cit.*), *per* Lord Chelmsford, L.C., at p.

319; Arnould on Marine Insurance, sec. 27; Ersk. Inst., iii, 2, 44; *Cormack* v. *Anderson*, 1829, 7 S. 868. The policy was held by the liquidator for the assured. Section 52 of the Marine Insurance Act 1906 did not mean that the policy required to be issued. The case was still stronger where the policy had been issued. It would be intolerable in view of the practice in marine insurance if after a marine policy had been issued in respect of the obligation in honour evidenced by a slip the Insurance Company could cancel the policy. Questions 1, 3 (*a*), and (*b*) should therefore be answered in the affirmative.

At advising—

LORD PRESIDENT (CLYDE)—The Clyde Marine Insurance Company was incorporated in 1915 to carry on, *inter alia*, the business of marine insurance in all its branches. In 1921 it passed an extraordinary resolution that by reason of its liabilities it could not continue its business and should be wound up voluntarily. The liquidator presents this petition under section 193 of the Companies Act 1908 (8 Edw. VII, cap. 69) for the determination of certain questions which have arisen in the winding-up. The questions are addressed to us in the form of two actual cases.

Of these the first arises out of the fact that prior to the date of the voluntary liquidation the company had initialled a slip presented to it by an insurance broker, and had received from the latter the usual closing slip, but had not so far executed the policy which in the ordinary course of business it would have signed and issued to the broker. The main questions under this case are whether the liquidator should now sign and issue a policy in respect of this slip; or, if not, whether he may sign and issue a policy if he thinks it would be beneficial for the interest of the creditors and shareholders to do so? A further question as to the liability of the company to pay losses which would have been covered by such policy notwithstanding that no policy was actually executed, or to pay damages in respect of the non-issue of such policy, was included in the petition, but both parties agreed that this question is not susceptible of any but a negative answer.

The second case arises out of the fact that after the liquidation had commenced the liquidator did sign two marine insurance policies in favour of the holder of two of the company's slips, one of which was issued to such holder before any doubt as to the propriety of this course had occurred to him. The main questions under this case are (*First*) with regard to the signed but unissued policy whether the liquidator should now issue it, and, if not, whether he may now issue it if he thinks it would be beneficial to the creditors and shareholders to do so; (*Second*) with regard both to the policy which has been signed and issued and to that which has been signed only, whether the company is liable in payment of any losses which have occurred; and (*Third*) if it be held that the company is not so liable whether the liquidator should cancel the issued policy and repay the premium.

The respondents interested in the first case conceded that their slip does not constitute a marine policy within the meaning of the Marine Insurance Act 1906 (6 Edw. VII, cap. 41). While it undoubtedly reflects a concluded verbal contract of marine insurance made between the company as insurers and the broker as representing the assured, it is inadmissible in evidence under section 22 of that Act unless and until embodied in a written marine policy. It necessarily follows from this that the slip cannot even be regarded as evidence of a contract to sign and issue such a policy. Moreover, by section 93 (1) of the Stamp Act 1891 (54 and 55 Vict. cap. 39) contracts for sea insurance—such as that of which the slip is a memorandum—are invalid unless expressed in a policy of sea insurance. This is no new feature of the business of insuring marine risks. In Bell's Commentaries (7th ed. vol. i, pp. 649-650) the slip is described as "nothing more than the proposal of terms preliminary to the contract"—it is in the language of Scottish lawyers merely an instrument of negotiation, and it remains such notwithstanding that it may accurately reflect the whole of a concluded verbal contract of sea insurance—which is perfectly possible if the clauses of the contemplated policy are settled in practice and so known to both broker and underwriter. The result is that the holders of the slip referred to in the first case are destitute of any claim enforceable at law against the company. It is nothing to the point that if the slip had been embodied in a marine policy it would have become admissible in evidence for certain purposes, for example, to fix the date at which the contract embodied in such marine policy must be deemed to have been concluded (Marine Insurance Act 1906, section 21).

Notwithstanding all this, in the practical conduct of marine insurance business the slip plays a part of the greatest importance. It is by means of the slip that the actual business of the broker and underwriter is done; and although there is no obligation to pay the premium except against issue of the policy, or to issue the policy except against payment of the premium (section 52 of the Act), yet the honourable obligations *hinc inde* between underwriter and broker to carry through the piece of insurance business to which the slip refers are of the highest kind, and are sanctioned by the penalty of exclusion from professional intercourse which brokers and underwriters alike mete out to anyone who fails in the strict observance of them. But while such exclusion may be no more unlawful than the contracting of the honourable obligations themselves, both those obligations and their sanction are wholly extra-legal.

What then ought the liquidator to do? Like the trustee in a sequestration he has, with regard to contracts made by the company prior to liquidation, the option of taking over performance of them or of submitting to a ranking in respect of damages for their breach. But this option is necessarily confined to contracts which

are enforceable against the company either in performance or in damages, and the honourable obligations arising out of verbal contracts of marine insurance are not enforceable in either form. Again the liquidator, being a voluntary liquidator, may carry on the business of the company so far as may be necessary for the beneficial winding-up thereof—Companies Act 1908, section 151 (1) (*b*), and section 186 (iv). I see no difficulty in the application of this power to a company whose business is conducted largely through the medium of honourable as distinct from legally enforceable obligations, so long as there is nothing unlawful about it. The business is placed under the liquidator's administration *talis qualis* as the company conducted it, and, as has been seen, the conduct of a marine insurance business in this country necessarily involves both the undertaking and the strict performance of purely honourable obligations. If, therefore, the liquidator were to carry on the business to any extent it might become his duty to observe each and all of the honourable obligations already incurred by the company or incurred by himself in so carrying it on, because *ex hypothesi* such carrying on of the business would be necessary for the beneficial winding-up, and if he did not do so he might be removed. It might be said that in this way there resulted an indirect legal sanction for both the performance and the enforcement of these honourable obligations. At any rate it is clear enough that if the company had a goodwill to be preserved or salved, and if the business was carried on, more or less, in order to enable that goodwill to be realised, it would be a *sine qua non* that the liquidator should scrupulously protect the mercantile honour of the company and its business, which he could only do by compliance with the professional rules regulating the conduct of brokers and underwriters *inter se*. But in the present case the company admittedly has no goodwill to be preserved or salved. What is more, the liquidator does not profess to be carrying on the business of the company to any extent or to desire to adopt that course. The question put to us is whether in liquidating the company's assets and liabilities he is entitled to pick and choose among the slips initialled by the company prior to the liquidation, issuing a marine policy in the case of those slips the risks contemplated in which can be ascertained to have run off, and repudiating all obligation to issue a marine policy in the case of those which would or might involve liability for loss in the event of the issue of a policy. Whatever may be thought of this leonine interpretation of the liquidator's rights and powers, it would, in my judgment, be impossible to bring such a course within the description of carrying on the business of the company to any extent whatever, no matter how much it might conduce to the beneficial winding-up thereof. If the business of the company is to be carried on to any extent, that must be done in accordance with the nature of the busineas as placed under the liquidator's administration; and to pick and choose among the honourable obligations incurred by the company in the ordinary course of its business—on the principle of "heads I win, tails you lose"—would be a course of proceeding totally at variance with the nature of the company's business. It would be altogether inconsistent with the principles on which alone such a business could be carried on at all.

The conclusion to which this reasoning, if sound, seems to me inevitably to lead is that the liquidator is not entitled to issue a marine policy in respect of the slip referred to in the first case.

Whether that conclusion be right or wrong it is undoubtedly distasteful to be compelled to discriminate between the moral and legal qualities of obligations originally undertaken in good faith by the company and relied on in good faith by the broker's clients. But the company may have creditors other than the broker's clients whose debts are legally enforceable debts of the ordinary kind, and it certainly has legal creditors under issued marine policies. Honour and law usually go hand in hand until an Act of Parliament, and more particularly a Revenue Act, steps in to separate them. In the present case the alternative seems clear. Either we must equiparate honour with law in spite of the Marine Insurance Act 1906 and the Stamp Act 1891, or we must allow the law as laid down in these statutes to take its course. The respondents interested in the first case pressed us strongly to take the former course, and found support in a train of English decisions beginning with *ex parte James In re Condon*, (1874) L.R., 9 Ch. 609, and ending with *Scranton's Trustee* v. *Pearce*, [1922] 2 Ch. 87. The principle illustrated by these decisions is shortly and clearly stated by Mr Justice Salter *In re Wigzell ex parte Hart* ([1921] 2 K.B. 835, at p. 845) thus—"The Court of Appeal, however, have repeatedly decided that where a bankrupt's estate is being administered by the trustee under the supervision of a Court, that Court has a discretionary jurisdiction to disregard legal right, and that such jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice." In the present case the liquidator is a voluntary liquidator, and so far as I am aware a voluntary liquidator has never been regarded in Scotland as an officer of Court unless the liquidation has been placed under judicial supervision. Apparently in England a trustee in bankruptcy is, or is regarded as being, under supervision. But I do not go upon that, because in the present case the liquidator has come to the Court under section 193 of the Companies Act 1908 in order to ascertain what is his duty in certain matters arising out of the liquidation, and if the aid of the Court is invoked in this manner, it seems to me difficult to say that the liquidator ought to be told to act in one way if (had he been actually under supervision) it would have been the duty of the Court to tell him to act in another. I prefer to put my judgment on the fact that this Court has no jurisdiction

of the kind described by Mr Justice Salter. Any court will be astute to find grounds in law to bring ethics and justice into harmony, and I have sought means of doing so in the present case. But I am bound to regard my search as being limited to the contents of the Marine Insurance Act 1906 and the Stamp Act 1891, and to such considerations as are consistent with their provisions. In the result I have found none.

With regard to the second of the two cases submitted to us it appears to me, for reasons which have been already indicated, that the liquidator had no power to sign or issue policies with respect to either of the slips therein referred to unless in pursuance of his power to carry on the business of the company. The liquidator, however, has not exercised this power to any extent, and it was therefore *ultra vires* of him to convert the slips into enforceable obligations in the shape of marine policies. I see no difference in this respect between the policy which was signed and lay in the company's office for delivery when called for and the policy which was actually handed to the broker.

We are informed in the petition that the cases submitted to us are test cases. But we have no means of knowing whether or how far parties other than those who have lodged answers and joined issue with the liquidator in debate have agreed to be bound by our judgment in this petition. I propose therefore that we should answer the questions put to us as follows:—With regard to the slip dated 9th December 1920 referred to in Case 1, we answer all the questions in Case 1 in the negative, and with regard to the policies 25229/22066 and 25157/22034 mentioned in Case 2, we answer all the questions in Case 2 except the fourth in the negative and the fourth question in the affirmative.

LORD SKERRINGTON—As this case was originally presented to us both in the written pleadings and also in the oral arguments, the respondents' counsel maintained that a slip or covering note in the form customary in the business of marine insurance is, in the eye of the law, an unstamped policy of marine insurance; or, alternatively, that such a slip embodies or evidences a contract which imposes upon the insurer a legally enforceable obligation either to issue a policy in accordance therewith or to pay damages for the non-issue of such a policy, or to settle with the assured in case of a loss in the same manner as if such a policy had actually been issued. In the course of the debate, however, counsel stated (very properly, as I thought) that they had decided to abandon all these contentions as being unsound in law. They then proceeded to claim relief for their clients upon a principle for the existence of which some support is to be found in English decisions, but of which so far as appeared no trace is to be discovered in any Scottish text-book or decision. It was said that a liquidator in a voluntary winding-up is an officer of Court, and that, in the case of such officers, the Court has jurisdiction to direct, or at least to authorise, them to be "as honest as other people." It followed, according to the argument, that in the winding-up of a marine insurance business the liquidator should be directed or authorised by the Court to show as much respect for the merely honourable obligations of the company as he would for obligations on its part which had been embodied in a stamped policy of insurance, and were therefore legally enforceable against it. From the decisions cited to us it appears that much difficulty has been felt by eminent Judges in regard to the application of the principle to which I have referred. Opinions may differ as to whether a certain line of action on the part of an officer of Court deserves to be stigmatised as dishonourable. Even if the principle were held to form a part of the law of Scotland, it is not obvious that a liquidator acts dishonourably if he refuses to attribute to a particular contract a force and effect which the makers of it intended that it should not possess. None of the decisions cited appeared to me to lend any support to the view that the Court ought to authorise a liquidator to admit the validity of a claim against the company which, without that admission, was not legally enforceable. While it would be rash to affirm that in novel and extraordinary circumstances this Court may not be entitled to exercise powers which are novel and extraordinary, I see no justification in the present case for the suggestion that we ought (even if we possessed the power) to authorise the liquidator to act otherwise than in accordance with the ordinary principles and practice applicable to the distribution of the assets of an insolvent. Of course if a surplus should emerge at the end of the day there is no reason why a shareholder of full age and subject to no legal incapacity should not direct the liquidator to apply his portion of the surplus towards discharging the honourable obligations of the company. On the other hand, there is every reason why the Court should refrain from converting a debt of honour into an ordinary debt at the expense of persons who, if they were consulted, might reply that they were legally unable or personally unwilling to exhibit so much generosity.

The next question is whether the liquidator may, "if he considers such a course to be in the best interests of the company's creditors and shareholders," issue a policy and claim payment of the premium in accordance with a slip initialled by the company on 9th December 1920, and a closing slip dated 24th February 1921, whereby the assured's broker (now represented by the respondents Herbert Renwick & Co.) "requested the liquidator to issue in the name of the company a policy in accordance therewith." The winding-up commenced on 4th January 1921, when the company passed an extraordinary resolution to the effect that by reason of its liabilities it could not continue its business. No explanation is given in the pleadings as to how it came about that the company initialled the slip in question at a time when, as we are

informed in the petition, it had ceased to accept or underwrite any further risks. In the present circumstances, so far as we know them from the statements in the petition, it would clearly be *ultra vires* both of the company and of its liquidator to issue a policy in accordance with the slip above referred to. While I have difficulty in figuring a change of circumstances which would justify the issue of such a policy, I think that the negative answer to Case 1, question 2 (*a*), should be qualified so as to make it clear that it is not intended to apply to circumstances which are future and hypothetical. Subject to this qualification the questions in Case 1 should be answered in the negative.

Case 2 refers to a large number of policies, which were signed by the liquidator. In some cases a policy so signed was issued to the broker who asked for it, the broker being debited with the premium. In other cases the policy was not issued, but it remained and still remains in the possession of the liquidator. In these cases the premium was not either paid by or debited to the assured's broker. It is stated that the liquidator signed all these policies because he assumed that it was his duty to do so, thus implying that he did not consider the question whether this course was necessary for the beneficial winding-up of the company. No facts are stated which would justify the inference (*a*) that any such necessity did in fact exist, or (*b*) that the policies so far as not issued are held by the liquidator as trustee or agent for the assured. Nor is there any statement in the petition that the law of England differs from that of Scotland in regard to the delivery of such documents. So far as regards the two representative policies which were expressed to be in favour of the respondents La Société Anonyme de Periandros, I see no answer to the argument that both policies were *ultra vires* of the company and of its liquidator, and that one of the policies is open to the further objection that it was neither delivered to the respondents nor held for their behoof by the liquidator. It follows that the liquidator ought to cancel the policy which he issued to the broker for these respondents, and that the premium should be credited to the broker or refunded to the assured.

While it is probable that all the policies referred to in Case 2 are in substantially the same position as the two which have been specially referred to, I think that our answers to the questions should be so framed as not to apply to persons who, so far as appears, have not agreed to be bound by the judgment to be pronounced in regard to the two representative policies. Moreover, the answer to question 2 (*a*) in Case 2 should, I think, be qualified in the same way as our answer to question 2 (*a*) in Case 1, so as not to apply to future and hypothetical circumstances. Subject to these qualifications the questions in Case 2 should be answered in the negative, except question 4 which should be answered in the affirmative.

LORD CULLEN — Under the Companies Acts a liquidator in a voluntary liquidation has power, without the sanction of the Court, to carry on the business of the company so far as may be necessary for the beneficial winding-up thereof. It is, however, common ground between the parties to the present application that in the case of this particular company it cannot be predicated that the carrying on of its business is necessary for a beneficial winding-up, and that the liquidator, accordingly, is not and has not been so carrying on. This is, I think, a material element to be kept in view in considering some of the questions submitted in the application.

Turning to Case 1, one finds that it has to do with a projected policy of marine insurance which had not been issued or executed when the winding-up took place, the dealings between the company and the brokers not having advanced beyond what may be called the initialled slip stage. And the first question submitted is whether the company is now under any obligation to issue the policy. I am unable to discover grounds for such a legal obligation. The ground at first advanced by the respondents, that the initialled slip is itself a policy, was afterwards expressly disclaimed by Mr Macmillan. It follows, therefore, that under the statute law the company never did enter into a legally valid contract of marine insurance, and, if it did not do so, I am unable to see how the company can be under legal obligation to issue a policy which would make for the first time a valid contract of marine insurance whereby it would be bound. Indeed, after the withdrawal of the contention as to the initialled slip being a policy, little stress was laid on this question by the respondents Mr Macmillan stating that the case he desired to urge was raised by question 2 (*b*). I am of opinion that question 1 should be answered in the negative.

Assuming such a negative answer to question 1, question 2, under head (*a*) thereof, asks whether the liquidator may issue the policy and claim the premium if he considers that course to be in the best interests of the company's creditors and shareholders. Now, the issuing of the policy by the liquidator would mean his taking it on himself, as an incident in the winding-up, to make the company a party to a contract of marine insurance which the company while carrying on business did not legally enter into. *Ex hypothesi*, however, the liquidator is not carrying on the company's business in marine insurance. And if he is not, I do not see how he can otherwise derive power, in conducting the winding-up, to enter into a particular venture in marine insurance merely because he considers that it would be a favourable speculation from the company's point of view. I therefore think that head (*a*) of question 2 should be answered in the negative.

Under head (*b*) of question 2 the question asked is whether it is "the duty" of the liquidator to issue the policy without regard to the interest of the company. As already mentioned the assumption of the question

is that the company is under no legal obligation to issue the policy. Now the result of issuing the policy, if effective, would be to create a contingent creditor capable of claiming in the winding-up and who, without the policy, would have no legal status or ground of claim as a creditor. I confess that the suggestion of such a duty on the part of the liquidator, as distinguished from an obligation incumbent on him, sounds strange to my ears. According to Scottish law and practice I conceive that a process of distribution in a company winding-up, as in a bankruptcy process outwith the Companies Acts, falls to proceed strictly in accordance with the independent legal rights of the parties claiming to be included in the class of creditors entitled to participate in it. Neither a liquidator nor a trustee in bankruptcy has any right or duty that I ever heard of to admit to competition with those having legal grounds of claim others who have none, or gratuitously to create for the benefit of the latter vouchers or grounds of claim which they do not independently possess. And I know of no jurisdiction possessed by this Court whereby it is empowered to direct or authorise a liquidator or a trustee in bankruptcy so to act. We were referred to various English cases beginning with *ex parte James*, L.R., 9 Ch. 609, which have no counterpart in our law. If these cases mean, which I doubt, that in such a case as we have now under consideration it would be in accordance with English law that the Court should direct a liquidator to issue an effective policy to a party having no legal right to obtain it, I respectfully decline to follow them. I am of opinion that head (*b*) of question 2 should be answered in the negative.

In accordance with the answers to questions 1 and 2 above given, question 3 in both branches should be answered in the negative.

Case 2.—This part of the application has to do directly with (1) a policy in name of the compearing respondents La Société Anonyme de Periandros, which, after the winding-up, was issued by the liquidator to the brokers, and the premium on which was debited in account but has not yet been paid; and (2) a policy in name of the said respondents which after the winding-up was merely signed by the liquidator.

I am of opinion that the liquidator had no power to issue or sign these policies. *Ex hypothesi* he had no power to carry on the business of the company and was not doing so. If he had had this power, and had been exercising it, matters would have stood in a different position. As it was, he issued or signed the policies in question on a different footing—that is to say, because he "assumed that in accordance with marine insurance practice and the procedure obtaining at Lloyds, he ought to" do so.

If I am right in the view I have above expressed as to the liquidator's want of power, then, as regards the policy which he merely subscribed, I am on the facts stated unable to see how he can be under legal obligation further to exceed his powers by issuing it.

As regards the other of the two policies which was not merely signed but issued by the liquidator, the just conclusion, on the facts stated, appears to me to be that it is not an effective policy in the hands of the said respondents. *Ex hypothesi* of the view I have expressed, it was *ultra vires* of the liquidator to issue it. The only facts we are told of regarding it are that it was issued for the reason on the liquidator's part already mentioned, and that the premium was debited in account but has not yet been paid. We must take these to be all the facts relevant to the issue. So taking them, I am unable to see that they afford any sufficient ground for a plea on the respondents' part that the policy is an effective policy in their hands binding the company notwithstanding that the liquidator had no power to issue it.

It is to be noticed that the questions under Case 2, as stated, are not confined in their scope to the two specified policies in name of the said compearing respondents but extend to a large number of policies, issued or subscribed, in the names of other people. Now I venture to think it objectionable that we should be asked to deal in this application with these other policies. The persons interested in them, other than the company, are not parties to the application. They are all possible claimants in the winding-up, whatever their claims may be worth, and there is nothing to evidence that they will be bound by any determination we here arrive at. There may, perhaps, be some agreement between them and the liquidator on the subject, but we do not know as to that. I think, therefore, that the questions under Case 2 should be treated as confined to the two specified policies in name of the respondents who have here compeared to join issue with the liquidator, and so treating them, I am of opinion, in accordance with the views which I have expressed, that questions 1, 2 in both branches, and 3 should all be answered in the negative. As regards question 4, the parties were agreed that it should be answered in the affirmative.

LORD SANDS—It appears in this case that the company in liquidation had at the date of liquidation initialled by way of acceptance a number of insurance slips which had not yet been followed up by the issue of a policy. It is common ground that this created no legal obligation to issue a policy, although it imported an honourable understanding to do so. The first and leading question in the case is whether the liquidator is now bound to issue such a policy in conformity with the slip. I say bound, because I can find no authority in the law of Scotland in support of the proposition that a liquidator or a trustee in bankruptcy may voluntarily subject the estate which he administers to legal liabilities unless he finds that it would be to the advantage of the estate that he should do so. There is authority in the law of England that in certain circumstances a liquidator or trustee in bankruptcy must fulfil obligations arising out of something happening after the appointment which would be honour-

ably incumbent upon a party acting in his own personal interest, even although he may deem it disadvantageous to the estate that he should do so. There is also some authority for the proposition that in certain cases this may extend to honourable obligations incumbent upon the bankrupt company or person at the date of the bankruptcy, but this has been doubted. (Compare *In re Thellusson*, [1919] 2 K.B. 735, with *In re Wigzell*, [1921] 2 K.B. 835.) But for this latter doctrine, at all events, there is no authority in the law of Scotland. The reports abound in hard cases where the contrary view has been given effect to. I need only refer to the cases in which it has been held that the administrator of a bankrupt estate or even a fiduciary executor must plead the rule that trust can be proved only by writ or oath, even in cases where it was not doubtful, and could have been abundantly proved by parole, that the estate the title to which stood in the name of the bankrupt or the deceased was held by him in trust, and could not honourably have been appropriated by himself for his own purposes.

In the present case there was no legally enforceable obligation upon the company at the date of liquidation to issue the policy, and I am quite unable to hold that any such obligation emerged upon liquidation.

The liquidator then not being under any legal obligation to issue policies, may he issue such policies as he is satisfied would, as matters turned out, be beneficial to the company? May he pick and choose? I have formed the opinion that he may not. I exclude, however, from this conclusion policies where the risk had run off before liquidation and the liquidator is satisfied that the issue of the policy and the collection of the premium will be to the benefit of the company in liquidation. I see no reason why the company should be deprived of this benefit. It would be as reasonable, as it seems to me, to maintain that when at the date of liquidation a company had an option of a property or stocks for which the liquidator had now a higher offer with no attendant risk, he should not exercise the option and secure the profit for the company.

I take, however, as I have indicated, a different view as regards the case where the risk was current at the date of the liquidation. A contract of insurance is completed when a policy is issued. But the policy is a unilateral deed. No insurer can make another person a party to a policy of insurance by simply sending him a policy. But what binds the insured? What act or writing on his part makes him a party to the contract? Clearly I think the presentation of the slip. Now the question as to the exact nature of the quasi-contract, or inchoate contract, or honourable contract, which is involved in the presentation and initialling of the slip is a matter of difficulty, but this I think is clear, that whatever else may be involved, there is here an offer by the insured which is accepted with binding effect when the policy is issued. The insured is bound by his offer if it is accepted. Now what does the offer import? It seems to me to import an offer of payment of a premium on condition that from the date stipulated the insured shall be held *indemnis* from losses, and that the insurer shall issue a policy drawing back to that date. I figure a case theoretically possible, if commercially extremely unlikely, where an insurer who has initialled a slip intimated to the insured—"I am not going to issue a policy until I see how this voyage turns out. I will issue one only if I find that the premium more than covers the losses." In such circumstances it appears to me that this would bring the matter to an end. The insurer has not given the insured the consideration which he stipulated for in his offer, viz., the protection of an honourable understanding fortified by commercial credit. He has in effect declined the insured's offer, and he cannot thereafter close with it by issuing a policy. That is not exactly what has happened in the present case, but it appears to me that similar considerations apply. The insured whom the liquidator selects for the issue of a policy may reply—"My offer implied in the presentation of the slip to pay a premium was conditional upon my receiving protection during the currency of the voyage. I will prove by your own actings that I did not receive this protection and therefore I have not received the consideration which I stipulated for when I presented the slip. You would not have issued the policy if there had been a loss. The basis of my offer and of the inchoate agreement which was to be given legal validity by a policy was that the company were to indemnify me for losses whatever happened, and you departed from that agreement."

It may be that the foregoing considerations carry one further than the mere question of picking and choosing, and negative the right of the liquidator to issue a policy to any insurer after liquidation even though he does not discriminate. If there is no honourable obligation or sanction of commercial credit affecting the liquidator, and the issue of a policy is purely discretionary, has not the consideration on the understanding of which the offer was made failed, and is not the other party released from any honourable obligation to pay a premium or any legal liability under a policy, the issue of which he does not invite? The question, however, does not arise in that form in the present case. It may be that if it were *intra vires* of the liquidator to issue policies to all the holders of slips and he timeously intimated an intention of doing so, thus surrogating himself as liquidator in all respects in the commercial obligations of the company, the considerations I have indicated would be inapplicable.

This leads, however, to the question whether it is *intra vires* of the liquidator to issue policies against all the slips if he thinks that upon the whole, though there is no question of carrying on the business to conserve goodwill, it would be in the interest of the company to issue all the policies for which slips have been accepted and take the bad ones with the good ones.

I have formed the opinion that it would be *ultra vires* of the liquidator to do so. The duty of the liquidator is to wind up the company and to avoid all fresh business commitments. As I have already indicated, the liquidator is under no obligation to enter into contracts of insurance by issuing policies. This view must be consistently given effect to. Accordingly, I am of opinion that the issuing of policies when the risks had not run off, or the result had not been ascertained, would be ultroneously entering into new business of a speculative character. If it be accepted that there is no legal obligation to issue the policy, I cannot distinguish this case from that of the liquidator issuing a policy for which at the date of liquidation there was no slip embodying an inchoate arrangement or antecedent understanding if he thought that the risk was a favourable one and likely to result in a profit. That is not within the province of the liquidator. I have already cited the case of an option and indicated that, in my view, a liquidator might exercise an option when the profit was manifest and immediately realisable without risk of loss. It is the liquidator's duty to make the winding-up as favourable as possible without incuring risks, and an option of this kind is a potential asset which it is his duty to realise. But one may figure the case of a company with a number of current options to purchase land. A liquidator is appointed. He thinks the prices are such that if he exercises the options he will probably make a profit. The matter is, however, speculative. In these circumstances, as it seems to me, it would be *ultra vires* of the liquidator to exercise the options and embark the company in liquidation in speculative new contracts. Marine insurance is a speculative business, and, in my view, it would be *ultra vires* of the liquidator to embark the company in a series of contracts of marine insurance where risks were still current, or the balance of profit and loss had not been ascertained.

A further question in the case is whether, seeing that the liquidator has issued a number of policies under a mistaken belief that he was bound to do so, he should now cancel a certain one of these policies. In my opinion this question falls to be answered in the affirmative if I am right in thinking that it was *ultra vires* of the liquidator to issue such policies. But if I were wrong in this view, and it was *intra vires* of the liquidator to issue the policy, then it may well be he cannot now cancel it on the ground that he issued it, not in the exercise of a discretion but owing to an error in law. If it was *intra vires* of the liquidator to issue the policy on behalf of the company in the exercise of his discretion, it may be that the insured was entitled to assume that this discretion had been exercised. He had, so far as appears, no reason to know anything about an error in law as to whether it was obligatory to issue them. In such circumstances a policy which it was *intra vires* of the liquidator to issue on behalf of the company might be binding against the company.

There is a final question as to a policy which the liquidator executed but did not issue. This is covered by the view I have already expressed as to the policies actually issued. Were it otherwise, I should have great difficulty in holding that a policy had any validity or was more than "a scrap of paper" until it was issued. It would be remarkable if a binding contract were completed by a unilateral document signed in the privacy of one's own chamber and entirely under one's own control. If one changed one's mind about issuing it and put it in the fire, could the other party if apprised of the fact by a treacherous typist bring a proving of the tenor and then sue on the document? Fortunately this question does not arise.

I am for answering the questions in the manner proposed by the Lord President.

The Court pronounced this interlocutor—

"With regard to the slip dated 9th December 1920 referred to in Case 1, mentioned in the petition, answer all the questions therein in the negative, and with regard to the policies . . . mentioned in Case 2, answer questions 1, 2, and 3 therein in the negative, and answer question 4 in the affirmative."

Counsel for the Petitioner—M'Gillivray—Keith. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Respondents—Macmillan, K.C.—Brown. Agents—Shepherd & Wedderburn, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, December 15.

[Police Court at Saltcoats.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

BLAIR *v.* SMITH.

Justiciary Cases—Statutory Offence—Burgh — Magistrates — Powers — Boathirer's Licence—Condition—Whether ultra vires —Prohibition of Letting Boats for Hire on Sundays—Discretionary Power to Consider Local Circumstances—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 304 (1).

The Burgh Police (Scotland) Act 1892 enacts—Section 304—"Where and in so far as the seashore and strand of the sea, or of any tidal river so far as the tide flows, are within the boundaries of the burgh, subject to the rights of the Crown, with consent of the Board of Trade, and to any existing rights of property, the following enactments shall be applicable to the burgh :—1. No boat or vessel shall be let for hire by any person for the purpose of sailing or rowing for pleasure from the seabeach or any pier or jetty within the boundaries of the burgh except under licence from the magistrates, who shall have power to require that every boat or vessel let for hire as aforesaid shall be