Company alone is liable for the compensation which may become due to the Dalmeny Oil Company in consequence of that notice having been given.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I am of the same opinion. In dealing with the landowner the Forth Bridge Company elected to acquire the surface only, and to postpone liability to pay for the minerals until the necessity therefor might arise. On a construction of the words "maintain in good working order" occurring in section 38 of the Act of 1882, I do not think that this species of postponed liability connected with the acquisition of land for the construction of the railway is included in the obligation of maintenance imposed thereby on the North British Railway Company.

The Court answered the second alternative of the question of law in the affirmative.

Counsel for the First Parties—Macmillan, K.C.—MacRobert, K.C.—Dickson. Agent—James Watson, S.S.C.

Counsel for the Second Parties—Gentles, K.C.—Graham Robertson. Agents—Robson, M'Lean, & Paterson, W.S.

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*Friday, March 3.*

## SECOND DIVISION.

[Lord Ashmore, Ordinary.

## PREMIER BRIQUETTE COMPANY *v.* GRAY.

*Company—Shares—Principal and Agent—Authority to Apply for Shares — Sub-Underwriting — Offer and Acceptance—Non-Intimation of Acceptance — Sub-Underwriting Letter Accompanied by Application for Shares in Question — Application Transmitted to Issuing Company—Allotment.*

A sub-underwriter filled up a printed form for sub-underwriting an issue of shares to the extent of five hundred shares of £1 each, and returned it to the underwriters with a form of application for the shares in question addressed to the issuing company, and a cheque for £25, being the application money for the shares. The form bore that the contract and application should be irrevocable on the part of the sub-underwriter. The underwriters filled up a docquet accepting the underwriting of the shares in question, but did not intimate the acceptance of the proposal to the sub-underwriter. They subsequently transmitted the letter of application and the cheque to the issuing company without notice of the sub-underwriting contract, and the company allotted the shares to the sub-underwriter. The sub-underwriter refused to pay the instalments on the shares on the ground that there had been no intimation by the underwriters to him of their acceptance of his proposal, and that therefore they had no right to pass on his application for shares to the company. In an action at the instance of the company against the sub-underwriter, *held* (*diss.* Lord Salvesen) that in the circumstances the dealings of the parties precluded the defender from denying that he knew of the underwriters' acceptance; (2) that the letter of application was a firm application not conditioned by the sub-underwriting letter, and that the company were therefore entitled to allot shares to the full amount applied for.

The Premier Briquette Company, Limited, London, *pursuers*, brought an action against Henry John Gray, advocate, Aberdeen, *defender*, for payment of £225, being instalments due by him on 500 shares allotted to him in terms of letter of application addressed by him to the pursuers. The letter of application had been sent by the defender along with a sub-underwriting contract for 500 shares in the pursuers' company and a cheque for £25, being a deposit for 1s. per share to the Mining, Commercial, and General Trust, Limited, London, who had agreed to underwrite 100,000 shares in the pursuers' company. The sub-underwriting contract was docqueted with an acceptance for and on behalf of the Mining Trust and signed by W. W. Macalister, its managing director, but the acceptance was not expressly intimated to the defender.

The pursuers *pleaded, inter alia*—"1. The pursuers being entitled in terms of the defender's said letter of application to payment by him of instalments on the shares applied for by him, amounting to the principal sum sued for, are entitled to decree therefor as craved."

The defenders pleaded, *inter alia*—"3. Defender's application for shares having been lodged with the pursuers by the said W. W. Macalister without defender's knowledge and without his consent and without any right or authority whatsoever, the allotment following thereon is invalid and the defender is entitled to absolvitor. 4. The defender's letter of application having been signed by defender solely in pursuance of and subject to his proposal to sub-underwrite the shares therein mentioned, and the proposal to sub-underwrite not having been accepted and no intimation of any acceptance thereof having been made to defender, and *separatim* having been withdrawn before allotment, the alleged allotment to the defender is inept and invalid and the defender is accordingly entitled to decree of absolvitor. 5. The defender's application for shares (subject to his underwriting proposal) having been put in the hands of the said W. W. Macalister to hold subject to the said sub-underwriting offer, the said W. W. Macalister had no right in the circumstances to deliver the said letter to the directors of the pursuer company, the allotment following thereon is invalid and the defender should be assoilzied."

On 18th December 1920 the Lord Ordinary (ASHMORE) allowed a proof before answer.

The *facts* of the case and the import of the evidence appear from the opinion of the Lord Ordinary, who on 5th July 1921 decerned against the defender in terms of the petitory conclusion of the summons.

*Opinion.*—"In this case the pursuers, the Premier Briquette Company, Limited (hereinafter referred to as the Premier Company), are suing the defender for payment of calls on shares said to have been applied for by him and to have been duly allotted to him.

"The defence, stated generally, is to the following effect:—That the alleged application for shares was signed by the defender with reference to a sub-underwriting proposal made by him to the principal underwriters, the Mining, Commercial, and General Trust, Limited (hereinafter referred to as the Mining Company); that the Mining Company never intimated to the defender that they accepted the proposal; that, moreover, both the proposal to sub-underwrite and the relative application for shares were withdrawn before the date of the alleged allotment of the shares; that in these circumstances the Mining Company had no authority to deliver to the Premier Company the application for shares; that the allotment of the shares in favour of the defender is inept and invalid, and that in any view the sum sued for is excessive.

"It was explained that this is really a test action intended to determine the liability to the Premier Company, not only of the defender, but also of other three persons to whom allotments of shares were made under similar circumstances.

"Before I deal with the legal arguments it will be convenient to explain in detail the circumstances out of which the present proceedings have arisen.

"On 12th September 1919 the pursuers were incorporated under the Companies Acts with a capital of £125,000 divided into 120,000 preferred ordinary shares of £1 each and 100,000 ordinary shares of 1s. each.

"On 23rd October 1919 the Premier Company entered into an agreement with the Mining Company whereby the Mining Company agreed to underwrite 100,000 preferred ordinary shares of £1 each. In the end of October Mr Boyce, who is the manager in London of a limited company, wrote Mr Crowe, the managing director in Aberdeen of the same limited company, asking Mr Crowe to assist in the sub-underwriting of the shares. Mr Boyce sent with his letter proof prints of the prospectus of the Premier Company, forms of a sub-underwriting letter, and forms of applications for shares.

"Mr Crowe himself signed a sub-underwriting letter and an application for shares, and he got the defender and two other friends in Aberdeen also to sign sub-underwriting letters and relative applications for shares.

"The sub-underwriting letter signed by the defender is dated 3rd November 1919. It is prefaced by a statement of particulars regarding the Premier Company, the name of the company, the date of its incorporation, the share capital, and the fact that the whole of the issue of 100,000 preferred ordinary shares had been underwritten. Then follows the sub-underwriting letter itself. It is addressed to the Mining Company, and it stipulates the following conditions:—(1) I agree to subscribe for 500 shares of £1, and I now hand you (the Mining Company) an application for the shares hereby underwritten by me together with a cheque for £25, being a deposit of 1s. per share payable on the shares. (2) If on or before the closing of the subscription list the whole of the issue of 100,000 shares has been applied for by the public, then no allotment is to be made to me (the defender), and the company is to return to me my cheque or the proceeds thereof. (3) If by the closing of the subscription list less than 100,000 shares have been applied for by the public, I am only to be allotted not more than my proportion of the deficiency between the amount subscribed by the public and the 100,000 shares. (4) You (the Mining Company) are to pay me a commission of 5 per cent. on the total shares hereby underwritten by me. And (5) this contract and my said application shall be irrevocable on my part, and this contract shall notwithstanding any withdrawal on my part, or any repudiation of my responsibility hereunder or under the application form, be sufficient to authorise and empower the directors to allot to me the above-mentioned shares, and enter my name on the register of the members in respect thereof. At the foot of the sub-underwriting letter there is an acceptance which reads, and which is signed and dated as follows:—'We accept the above underwriting on the terms mentioned to the extent of 500 shares. For and on behalf of the Mining, Commercial, and General Trust Limited.—W. W. Macalister, managing director. Dated November 7th, 1919.' Along the margin of the sub-underwriting letter is an unsigned printed form reading as follows:—'I/We desire an allotment of of the shares hereby underwritten by us. Signature, .'

"The application for shares referred to in the sub-underwriting letter is addressed to the directors of the Premier Company, is signed by the defender, and is dated 3rd November 1919.

"It bears, *inter alia*, that having paid to the company's bankers the sum of £25, being a deposit of 1s. per share on application for 500 shares of £1 each, the defender requests the directors to allot to him that number of shares, and then proceeds as follows:—'I hereby agree to accept the same or any less number that you (the Premier Company) may allot to me.'

"The defender's cheque for £25, referred to in the underwriting letter, is not produced, but according to the evidence it was in favour either of the Premier Company or its bankers.

The defender handed the sub-underwriting letter, the application for shares, and the cheque for £25 to Mr Crowe. Mr Crowe sent them on to Mr Boyce, and Mr Boyce in turn handed them over to Mr Macalister,

the managing director of the Mining Company.

"Besides being managing director of the Mining Company Mr Macalister was the vendor to the Premier Company. Mr Macalister deponed that on 7th November he, as managing director of the Mining Company, accepted the defender's offer to sub-underwrite 500 shares by signing the acceptance form to that effect at the foot of the sub-underwriting letter.

"The public subscription list opened on Monday, 10th November, and closed on Monday, 17th November.

"The defender heard nothing regarding his offer to sub-underwrite or his application for shares until he received from the secretary of the Premier Company a letter of allotment, dated 20th November 1919, intimating that 'in response' to his application for 500 shares the directors had allotted him 500 shares, and asking for a remittance of £100 as the balance of calls due 'after crediting £25, the amount already paid by you' (the defender).

"On 2nd December 1919 the defender replied to the secretary of the Premier Company expressing surprise at the receipt of the allotment letter. The defender's letter then proceeds as follows: — 'The application I made was covered by a sub-underwriting letter signed by me and dated 3rd ulto., under which I was only to be allotted not more than my proportion of the deficiency between the amount subscribed by the public and 100,000 shares. . . . I must, therefore, ask you to let me know how many shares were applied for by the public so that I may know the exact proportion which should have been allotted.'

"It is noticeable, in view of the position taken up by the defender in this case, that in his letter acknowledging intimation of the allotment he takes exception only on the ground that the shares allotted exceeded the proportion of shares contemplated in his sub-underwriting letter.

"On 4th December 1919 the secretary of the Premier Company wrote stating, *inter alia*, (*a*) that he had found that a mistake had been made in allotting 500 shares to the defender, (*b*) that had those shares and others similarly applied for been excluded from the list of public subscriptions the liability of the defender and these other subscribers would have been only 92 per cent., and (*c*) that the Mining Company (the principal underwriters) 'are willing' that the liability of the defender should be reduced by 50 shares to 450 shares, representing 9-10ths of the 500 shares in the defender's application. He accordingly enclosed a transfer for 50 shares in favour of the Mining Company for signature by the defender, and sent a cheque for £12, 10s., representing the proportion of the instalment effeiring to the 50 shares on the footing of the defender transferring the 50 shares and paying the balance of the instalments due on the 450 shares.

"I think that I may omit the details of the further correspondence and merely summarise its purport as follows:—On 9th December 1919 the defender replied to the secretary of the Premier Company explaining that he would write later after hearing what Mr Boyce had to say, and meantime not acceding to the proposal contained in the secretary's letter of 4th December.

"On 10th December the defender wrote further that Mr Crowe had reported that Mr Boyce had informed him that the sub-underwriting proposals made by Mr Crowe's nominees (including the defender) had been withdrawn before the allotment was made.

"On 12th December the secretary replied that the defender had been misinformed and that none of the underwriting proposals had been withdrawn.

"On 22nd December the solicitors of the Premier Company wrote to the defender asking for a remittance on the footing either of his taking only 450 of the shares allotted to him and transferring 50 to the Mining Company or of his taking up the whole 500 shares.

"On 29th January 1920 the solicitors of the Premier Company having received no reply from the defender wrote that they assumed that he was prepared to accept the whole 500 shares, and they asked a remittance of £225 on that footing.

[*His Lordship then dealt with the evidence as to the alleged withdrawal by the defender of his sub-underwriting offer and relative application for shares.*]

"In the second place I think that the evidence of what passed at the meeting of the directors of the Premier Company held on 20th November 1919 goes far to support Mr Macalister's testimony that there had been no intimation of withdrawal on the previous day.

"The minute of the meeting bears, *inter alia*, that Mr Boyce was in the chair, that 10,000 shares had been applied for by the public, and that the applications for these 10,000 shares 'as per allotment sheets produced' were accepted.

"The oral evidence as to what passed at the meeting is certainly conflicting. On the one hand Mr Boyce deponed that no applications for shares by any applicants, and in particular no applications by Mr Boyce himself, or by the defender, or by the other Aberdeen applicants, and no application sheets, were put before the meeting, and that the names of the applicants were not read over, and that the name of the defender was never mentioned.

"On the other hand there is a body of testimony to the opposite effect. Mr Knapp, the secretary of the Premier Company, deponed that the original applications were produced by him to the meeting and also application sheets; that the whole of the names on these sheets (including those of the defender and his Aberdeen friends) were read over by Mr Macalister, and that Mr Boyce on hearing the name of one of the Aberdeen applicants remarked, 'That is one of my Scotch friends.'

"Mr Cairns, who is a director of the Premier Company, and who is by profession a barrister-at-law, corroborates generally Mr Knapp's evidence, and in particular spoke to his having been led, when the applications were being read over, to examine the

application sheets himself, doing so in consequence of a remark made by Mr Boyce on hearing the name of one of his Scotch friends.

"Mr Macalister, now a director of the Premier Company, was present at the meeting of 20th November as the vendor to the company and also as representing the Mining Company. He deponed that at the meeting he read out the names in the application sheets and that Mr Boyce remarked on the name of one of the Aberdeen applicants being mentioned, that that was one of his Scotch friends.

"I think that I have sufficiently indicated the state of the facts, and I proceed now to deal with the inferences which ought to be drawn and with the legal aspects of the case with special reference to the contentions urged for the defender.

"I begin with the question of the alleged withdrawal of the defender's offer to sub-underwrite and his relative application for shares.

"On the disputed question of fact as to whether before the allotments were made on 20th November Mr Boyce had intimated to Mr Macalister that the defender's offer and application were withdrawn, I am of opinion that the fact of such an intimation being made has not been established on the evidence adduced.

"Assuming, however, contrary to the opinion which I have expressed, that intimation of the withdrawal before the allotment of shares on 20th November has been proved, I am further of opinion that in law such an intimation would be ineffectual, in view of the express stipulation in the sub-underwriting letter signed and delivered by the defender to the effect that it and the relative application for shares should be irrevocable.

"In other words, it seems to me that on the particular question of revocation now under consideration this case is governed by the principles given effect to in such cases as *Pole's* case, 1920, 2 Ch. 34, and *Carmichael's* case, 1896, 2 Ch. 643, and that it is to be distinguished from the case on which the defender's counsel specially founded, viz., *Stark's* case (*In re Consort Deep Level Gold Mines, Limited*), 1887, 1 Ch. 575.

"In *Pole's* case, for example, the sub-underwriting letter was identical as regards its terms with the sub-underwriting letter in this case; but in *Pole's* case the applicant Mr Pole, contrary to the statement contained in the letter, had not signed and handed to the syndicate of underwriters, to whom the letter was addressed, any separate application for shares, although he did give to the syndicate, along with the sub-underwriting letter, a cheque for the application money. The syndicate having applied for an allotment of the proportion of shares to be taken by Mr Pole the company made the appropriate allotment.

"Thereafter Mr Pole, before receiving intimation of the allotment, wrote the company withdrawing his application for shares, and on the company insisting on the validity of the allotment Mr Pole applied to have the register rectified by the removal of his name. It was held, however, that the authority which he had given to the syndicate to apply for shares was a continuing and irrevocable authority, coupled with an interest which he was not entitled to withdraw.

"In the present case the conditions which constitute a continuing and irrevocable authority coupled with an interest are as conspicuous as in *Pole's* case. I refer to the fact that the defender's sub-underwriting letter bears to be granted for a valuable consideration, viz., the payment by the Mining Company to the defender of a commission of 5 per cent., and that the commission was to be paid in respect of the defender undertaking to relieve to the extent of 500 shares the Mining Company of their own underwriting obligation for the total issue of 100,000 shares.

"With regard to *Stark's* case, it is really not in point on the question now under consideration. It is clearly distinguishable both from this case and from *Pole's* case by reason of the very different terms of the underwriting letter in *Stark's* case. The following are the outstanding differences:—(*a*) Mr Stark's offer to the Mines Company was to subscribe for 10,000 shares 'or such less number as may be accepted by you' (the Mines Company); (*b*) Mr Stark's offer bore that it was only in the event of his failing to comply with the terms of his letter that he authorised the Mines Company themselves to apply for shares in his name or on his behalf. I may add that in addition to the differences in the terms of the underwriting letter the two cases differ materially in other respects, *e.g.*, Mr Stark had not signed and handed to the Mines Company any separate application for shares or any cheque for the application money. The decision of the Court of Appeal was that the underwriting letter in *Stark's* case did not authorise the Mines Company to apply for shares in Mr Clark's name until (*a*) he had been informed by the Mines Company of the number of shares for which they accepted his offer, and (*b*) until he had failed himself to apply for that number. That decision proceeded on the special circumstances in *Stark's* case, and in my opinion has no bearing on the question now under consideration in this case.

"For the reasons which I have given the argument for the defender so far as based on the alleged withdrawal of authority is unfounded alike in fact and in law.

"Another ground of defence which calls for special notice was put as follows:—It was maintained for the defender that the defender's sub-underwriting letter was a mere offer, that to become binding contractually therefore it was necessary not only that it should be accepted, but that intimation of the acceptance should be duly intimated to the defender, that in point of fact no such intimation was given at any time, that in these circumstances the Mining Company had no authority and no right of any kind to apply for shares on behalf of the defender, and that the allotment in fact made on 20th November was in law inept and invalid.

"For the pursuers it was contended that in the circumstances of this case no intimation of acceptance was either expected or required, that the defender dealt with the Mining Company on the footing of leaving them simply to carry out the terms of the sub-underwriting letter without further communication, and that the actings of the defender himself both before and after the allotment on 20th November were inconsistent with the position now taken up by him as to the need for any intimation of the acceptance of his offer to sub-underwrite. The pursuers' counsel emphasised the complete absence of any communication from the defender or from Mr Boyce indicative of expectation of any intimation of acceptance between the sending in of the sub-underwriting letter of 3rd November and the allotment on 20th November, and the terms of the defender's letter of 2nd December certainly show that the defender regarded the allotment as all right except only as regards the number or proportion of shares allotted.

"On this aspect of the question the pursuers' counsel founded on the opinion of Mr Justice Chitty *In re the Bulfontein Sun Diamond Mine Limited*, 9th June 1896, 12 T.L.R. 461.

"If this question of non-intimation of acceptance had arisen between the defender and the Mining Company and concerned them only, my impression is that the failure to give intimation might have raised a serious difficulty in the way of a contention by the Mining Company that notwithstanding non-intimation of acceptance the defender was bound on 20th November by the terms of his sub-underwriting letter.

"The Mining Company, however, are not parties to this litigation, and in the view which I take no question between the defender and the Mining Company can be properly determined, and no such question need be considered, in this case between the Premier Company and the defender.

"In my opinion the defence based on the non-intimation by the Mining Company of their acceptance of the defender's offer is not available to the defender as an answer to the claim made by the Premier Company in this case.

"I base my opinion to that effect on the following considerations: — (*a*) The defender, by the terms of the underwriting letter, and in particular by signing and handing to the Mining Company his application for shares addressed to the Premier Company and the relative cheque for the application money, authorised, or at least must be held to have authorised, the Mining Company to apply as they did for an allotment of shares, and (*b*) the defender having put the Mining Company in the ostensible position of acting for him in the applying for the shares, is barred as in a question with the Premier Company from disputing the authority of the Mining Company to make the application.

"In *Pole's* case above cited, in which, as I pointed out, the underwriting letter was in the same terms as that under consideration in this case, but in which no separate application for shares had been signed and delivered, the Master of the Rolls (Lord Sterndale), referring to the handing by Mr Pole to the syndicate (the principal underwriters) of the sub-underwriting letter and the relative cheque, said that in effect that meant — 'Use these two documents — this sub-underwriting letter and this cheque— for the purpose of carrying out the terms of the letter and of the agreement which I have made with you.' His Lordship also expressly adopted Mr Justice Lawrence's opinion to the effect that the authority conferred by Mr Pole on the syndicate 'extended not only to the making of the application (for shares), but also to the maintenance of the application when made as an effectual application down to the date of its final acceptance by the company.'

"The opinions which I have been quoting seem to me to be apposite in the present case, and to justify the view that as in a question with the Premier Company the Mining Company were either authorised or must be held to have been authorised by the defender to apply for shares by him. Even if in a question between the defender and the Mining Company the Mining Company had no authority, express or implied, to apply for shares for the defender, I think that the defender is not entitled to dispute the right of the Premier Company to act upon the authority which the defender had apparently entrusted to the Mining Company.

"On the face of the documents the Premier Company at the date when the allotment was made found the appropriate *indiciæ* of the defender having authorised the Mining Company to submit the defender's application for shares for an allotment of 500 shares in the defender's favour. I say so because (1) the Mining Company produced the application for 500 shares signed by the defender and addressed to the Premier Company, and (2) the defender's cheque in favour of the Premier Company or their bankers for the application money in respect of 500 shares had been handed by the Mining Company to the secretary of the Premier Company, and had been paid into the Premier Company's bank account on or before 15th November.

"In the circumstances I think that the well-known rule of *Pickard* v. *Sears*, 1837, 6 Adol. & Ellis, 469, 45 R.R. 538, as explained in *Freeman* v. *Cooke*, 1848, 2 Ex. 634, 76 R.R. 711, is applicable in this case, and that the defender is personally barred as in a question with the pursuers from disputing the authority which he had ostensibly given to the Mining Company.

"The only other question to which I need refer is that relating to the number or proportion of shares allotted to the defender. The defender's counsel argued that the allotment of 500 shares was absolutely invalid. I think, however, that the argument is not well founded. It is necessary to keep in view the terms of the defender's application for shares. It requests the Premier Company to allot 500 shares and then proceeds, 'and I hereby agree to accept the same or any less number that you (the Premier Company) may allot to me.'

"What happened was that the company, in good faith, allotted 500 shares in terms of the defender's application, whereas as in a question between the defender and the Mining Company the allotment applied for should have been only for 450 shares.

"As appears from the correspondence, however, the secretary of the Premier Company wrote the defender explaining that the Mining Company were willing to relieve the defender of 50 of the shares allotted to him. The defender did not acquiesce in this proposal, and when later the Premier Company's solicitors put before the defender the choice of either holding the 500 shares or giving up 50 the defender still maintained a negative position. Then, although the pursuers in their pleadings in this case offer to give effect to the defender's rights against the Mining Company by reducing the amount concluded for, the defender has given no response on the subject.

"I think that in the circumstances the pursuers are entitled to hold the defender to the allotment of 500 shares which was made in terms of his application. This will not prejudice any claims for relief or otherwise which may be competent to the defender against the Mining Company.

"It follows that I must repel the defences and give decree for the sums of principal and interest as concluded for."

The defender reclaimed, and argued—The pursuers sued on contract. They must therefore establish contract either (*a*) by offer and acceptance, or (*b*) by the doctrine of estoppel or personal bar. There were in the present case three distinct parties, viz., (1) the pursuers, (2) the Mining Trust, and (3) the defender. But to bind the defender in a question with the pursuers the defender must have dealt with the pursuers direct or through an authorised agent. On the evidence there was nothing to show that the defender came directly into contact with the pursuers, and therefore the letter of application and the cheque were the only means of establishing this relationship. These were put into the pursuers' hands by Macalister acting as intermediary, but he had no authority from the defender to do so as the latter's agent. There had been no intimated acceptance of the original sub-underwriting contract by Macalister to the defender, who was entitled to know where his obligation under that contract commenced. Until that acceptance had been intimated Macalister had no authority to act for the defender as his agent or to pass on the application for shares to the pursuers. The extent of the authority given in the sub-underwriting letter referred to a number of shares not ascertainable, and therefore that letter required acceptance. *In re Hannan's Empress Gold Mining and Development Company, Carmichael's Case*, [1896] 2 Ch. 643, *per* Lindsay, L.J.; *In re Bulfontein Sun Diamond Mine, Limited*, 1896, 12 T.L.R. 461; *In re Consort Deep Level Gold Mines, Limited, Stark's Case*, [1897] 1 Ch. 575; *In re Olympic Fire and General Reinsurance Company, Limited*, [1920] 2 Ch. 341. There could be no case on negligence or personal bar till agency had been established. The onus on a person getting a contract through an agent was either to prove agency or bar by estoppel—*Pole* v. *Leask*, 1863, 33 L.J. (N.S.) Ch. 155, *per* Lord Cranworth at p. 161; Rankine on Personal Bar, p. 217. Intimated acceptance, however, of the sub-underwriting letter was necessary to constitute agency—*Brogden* v. *Metropolitan Railway Company*, 1877, 2 App. Cas. 666, and *per* Lord Blackburn at pp. 691, 692, and 697. *Carlile* v. *Carbolic Smoke Ball Company*, [1893] 1 Q.B. 256, was a quite exceptional case. The cases of *In re Bulfontein Sun Diamond Mine, Limited*, 1896, 12 T.L.R. 461, and *Ex parte Stark*, [1897] 1 Ch. 575, showed that the general law applied to sub-underwriting contracts. In *In re Henry, Bentley, & Company* and *Yorkshire Breweries, Limited, ex parte Harrison*, 1893, 69 L.T. 204, founded on by the pursuers, the point of non-acceptance was not taken, and the case was decided on holding out raising an objection of bar or estoppel against the defender. In that case the company saw the agent's authority and dealt with it on that footing. In the present case the pursuers saw no authority or application, and therefore they had no right to put the defender on their list. It was said, further, that *esto* that there was no acceptance, still the letter of application could be taken by itself and treated as an irrevocable mandate to apply for shares. This, however, was not possible, and was conclusively answered by *Carmichael's Case, In re Hannan's Empress Gold Mining and Development Company*, [1896] 2 Ch. 643. Only direct contract between pursuers and defender could give the former authority to use the letter of application and the cheque as they did. *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173, and *Fry* v. *Smellie*, [1912] 3 K.B. 282, were not in point, as they dealt with the effect of limiting an agent's authority in dealing with third parties who were not aware of the limit. The argument against defender on this question proceeded solely on the doctrine of estoppel—a purely English rule involving artificial distinctions not known to the law of Scotland, and which could not be equiparated to personal bar in Scotland—*Swinburne* v. *Western Bank of Scotland*, 1856, 18 D. 1026. There was further no averment or plea to personal bar in the pleadings. Estoppel in any event was not a plea which would readily be given effect to—*Baxendale* v. *Bennett*, 1878, 3 Q.B.D. 525, *per* Bramwell, L.J., at p. 529; *Dixon* v. *Muckleston*, 1872, L.R., 8 Ch. App. 155, *per* Selborne, L.C., at p. 160. On the evidence there was neither holding out in the sense that an agent had been clothed with apparent authority, as illustrated in the case of *Ex parte Harrison*, nor was there either negligence on the part of the defender which could be said to be the proximate cause of the pursuers' action, nor any duty owed by the defender to the pursuers in the matter—*Young* v. *Grote*, 1827, 4 Bing. 253; *Orr & Barber* v. *Union Bank of Scotland*, 1854, 1 Macq. 513; *Governor and Company of the Bank of Ireland* v. *Trustees of Evans'*

*Charities in Ireland*, 1855, 5 H.L.C. 389; *British Linen Company* v. *Caledonian Insurance Company*, 1861, 4 Macq. 107, *per* Lord Cranworth at p. 114; *Baxendale* v. *Bennett*, 1878, 3 Q.B.D. 525; *Wallace's Trustees* v. *Port-Glasgow Harbour Trustees*, 1880, 7 R. 645, 17 S.L.R. 447; *In re Cooper*, 1882, 20 Ch. D. 611; *Schofield* v. *Earl of Londesborough*, [1896] A.C. 514; *London Joint Stock Bank, Limited* v. *Macmillan & Arthur*, [1918] A.C. 777, 56 S.L.R. 367.

Argued for the pursuers and respondents —As between the pursuers and the defender there was a concluded contract constituted by the letter of application and the allotment. In making the allotment the pursuers' directors did not proceed on anything said or done by Macalister, and were not affected by any error made by him. The forgery cases had no application. By putting the Mining Trust in possession of the letter of application, which was complete on the face of it, the defender was precluded from averring that the former should not have passed on the application. There was a fundamental fallacy in the defender's argument as to the underwriting letter which really included two things, viz., an underwriting contract pure and simple, and a separate contract as to the shares constituted by delivery of the letter of application and cheque. As to the former this expectation was that the subscriber would not have to take up the shares. From this point of view no cheque was necessary till the liability was determined. In so far as the underwiting letter stood alone it might require acceptance. But the legal relation constituted by delivery of the application form and cheque to the underwriter made him agent for the particular purpose of the deposit which was to be used in paying the subscription to the pursuers for shares. This was independent of the sub-underwriting letter and its acceptance. The circumstances here were preciselyanalogous to those in *Ex parte Harrison* and *Brocklesby* v. *Temperance Building Society*. The defender having entrusted to his agent the application form and cheque for the purpose of handing them to the pursuers, and the pursuers having received them, he was not entitled to plead that the authority given was limited by an agreement entered into between the underwriter and the sub-underwriter—*Brocklesby* v. *Temperance Building Society*; *Fry* v. *Smellie*; Story on Agency, p. 143; Bowstead on Agency, art. 82. The doctrine of the English cases, as summarised in Bell's Prin., 27 (*a*), was good also for Scotland. A plea of bar was not necessary, and there were no facts that the pursuers could have averred. The agent here had apparent authority to apply for the shares — *Pole's Case*; *In re Olympic Fire and General Reinsurance Company, Limited*, [1920] 1 Ch. 582, *per* Lawrence, J., at p. 591. Under article 5 of the sub-underwriting letter the application for shares was irrevocable. The present case was just one of the general types of agency known to the law of Scotland, and nothing short of an averment of forgery or fraud would disentitle the pursuers from relying on the application received. It was the custom for sub-underwriters to make firm applications for shares, and it was natural for the application to come through the underwriter, and the pursuers had no constructive knowledge of the sub-underwriting letter such as could prevent them dealing with the application—*Muir's Executors* v. *Craig's Trustees*, 1913 S.C. 349, *per* Lord President Dunedin at p. 355, 50 S.L.R. 284. Even if the application was to be read as subsidiary to the sub-underwriting letter, still the latter as far as acceptance was concerned did not require intimation. Even assuming that knowledge of acceptance required to reach the defender, still such knowledge did reach him perfectly well. Intimation might be made inferentially—*Chapman* v. *Sulphite Pulp Company, Limited*, 1892, 19 R. 837, 29 S.L.R. 755. There was no fixed time within which knowledge must reach him. The retention of the letter was sufficient to raise a presumption of acceptance — *Ex parte Harrison*; *In re Bulfontein Sun Diamond Mine, Limited*; *Ex parte Stark per* Lindley, L.J., at p. 591, referring to *Carlile* v. *Carbolic Smoke Ball Company*. If the defender repudiated the contract he should have taken prompt steps to have his name removed from the register—*First National Reinsurance Company, Limited* v. *Greenfield*, [1921] 2 K.B. 260. [On the necessity of a plea of bar the LORD JUSTICE-CLERK referred to *M'Gregor's Executors* v. *Anderson's Trustees*, 1893, 21 R. 7, *per* Lord Kinnear at p. 12, 31 S.L.R. 4.]

At advising—

LORD JUSTICE-CLERK—The defender was approached by one of his friends with a view to his becoming a sub-underwriter of shares in the pursuers' company about to be issued in the fall of 1919. The whole issue—100,000 shares of £1 each—had been underwritten by the Mining, &c., Trust, Limited, who desired to reduce their risk as underwriters. The defender was never approached on behalf of the pursuers or by anyone representing them, for Mr Boyce, I think, so far as the sub-underwriter was concerned, only dealt with Mr Macalister as a representative of the Mining Trust, and he handed all the papers to him as a director of the Mining Trust. The defender in October or November 1919 obtained what is called a sub-underwriting letter, which he signed on 3rd November 1919, and by which he agreed to sub-underwrite 500 shares. At the same time he received from those acting in the interests of the Mining Trust a form of application for shares in the pursuers' company which was in common form, and this he signed on the same date, 3rd November 1919. The sub-underwriting letter was addressed to the Mining Trust. The application for shares was addressed to the directors of the pursuers' company. The defender at the same time signed a cheque for £25, being the amount of the deposit payable on application for the foresaid 500 shares. This cheque was payable to the pursuers or their bankers. These three documents duly signed by the

defender ultimately reached, as the defender intended they should, the Mining Trust or their managing director Mr Macalister. Mr Macalister was the vendor to the pursuers' company of the property in question and was to join the pursuers' board after allotment, as he did. Mr Macalister on receiving the said three documents—viz., the application for shares, the cheque, and the sub-underwriting letter—retained, as I hold it was intended he should, the sub-underwriting letter as evidencing a contract between the defender and the Mining Trust, and handed over the cheque and the application for shares, as I hold it was intended he should, to the pursuers through their secretary Mr Knapp, who says that the cheque and the application were pinned together when he received them. Mr Knapp paid the defender's cheque into the pursuers' bank account and it was duly cleared through the defender's bank. The exact date when the cheque was paid and cleared is not distinctly brought out in the proof. Mr Knapp says he paid it into the pursuers' bank account on 15th November 1919, and the defender in Answer 3 of the record says —"The defender's cheque for £25 was ultimately passed through the pursuers' bank account although the pursuers never obtained the right to do it, and the defender counter-claims for the said sum of £25 with interest thereon as from the date of payment, namely, 3rd November 1919."

The pursuers' prospectus bore that the subscription list would open on Monday, 10th November 1919, and close on the following Monday. The defender's application for shares is addressed to the pursuers' directors and is in these terms—[*His Lordship quoted the application*].

With regard to that document I make the following observations:—(1) It narrates payment to the pursuers' bankers of the application money (£25) for 500 shares. (2) It contains a request for allotment of 500 shares by the pursuers. (3) It contains an agreement to accept that or any less number of shares which the pursuers' directors might allot to the defender. (4) It refers to the pursuers' prospectus, memorandum, and articles of association. (5) It makes no reference to underwriting or sub-underwriting or to the Mining Trust. (6) It contains an agreement to pay the balance of 19s. per share to the pursuers in terms of the pursuers' prospectus. (7) It authorises the pursuers' directors to put the defender's name on the register of the members of the pursuers' company as holder of the shares allotted to him.

As to this application form, Mr Macalister's evidence is—"(Q) Can you suggest any purpose for which the application form for 500 shares and the cheque for £25 which you received from the defender should be used?—(A) I cannot. (Q) Except to be handed over?—(A) Clearly, I cannot suggest any purpose in filling it up unless it was to be used." *By the Court*—"That is as a firm application. It was not addressed to the Mining Trust. It was addressed to the Briquette Company, and had to be handed over by me to the representative of the company, the secretary." Mr Knapp and Mr Macalister deponed that at the meeting for allotment they regarded the application as a "firm" application and dealt with it as such. On the face of it it was a firm application.

On the sub-underwriting letter I make the following observations—(*a*) This sub-underwriting letter is signed by the defender. (*b*) It is addressed to the Mining Trust. (*c*) It was intended to be and was duly delivered to that Trust. (*d*) By it the defender agrees with the said Trust to subscribe at par or to procure responsible subscribers to the Trust's satisfaction for 500 of the pursuers' shares, and to pay for them in terms of the pursuers' prospectus. In consideration therefor the Trust was to pay him a commission of 5 per cent. in cash on the 500 shares thereby underwritten. (*e*) The defender handed to the Trust the foresaid application for the 500 shares sub-underwritten along with a cheque for the application deposit for 500 shares in pursuers' company. (*f*) The pursuers were to return the cheque or proceeds thereof if the shares of the company were fully applied for. (*g*) Defender was only to be allotted his proportion of shares unapplied for by the public. (*h*) Finally it was declared that "this contract and my said application shall be irrevocable on my part and this contract shall, notwithstanding any withdrawal on my part and/or any repudiation of my responsibility thereunder, or under the said application form, be sufficient to authorise and empower the directors to allot to me the above-mentioned shares and enter my name on the register of members in respect thereof."

The following note appeared on the margin of the sub-underwriting letter—"I/we desire an allotment of . . . of the shares hereby underwritten by us."—(Signature). It was explained in the proof that this note was intended to be utilised by the sub-underwriter if he wished to make a firm application for any of the shares sub-underwritten by him. Some of the sub-underwriters took advantage of this provision, but the defender did not.

Apart from what is said by Mr Boyce in the course of his evidence, the proof does not, I think, disclose how these documents reached the Mining Trust or Mr Macalister, and there were no conditions attached to any of them or to the delivery of any of them except what appeared on the face of them.

The defender had no direct communication with Mr Macalister or Mr Boyce at any time prior to the allotment by the pursuers of the 500 shares. The defender avers that the directors of the pursuers "proceeded to deal with the said letter of application as if it were a letter sent to and delivered to the pursuer company, as it was not, and as a substantive and unconditional application for shares by the defender. They accordingly purported to allot to the defender the whole 500 shares." Much of this seems to be established by the proof. So far as the sub-underwriting by the defender is concerned, the pursuers' company was no

party to the sub-underwriting letter. The pursuers' company took the defender's application as a firm application according to its terms, having previously cashed the defender's cheque which accompanied it, and at once, on 20th November, issued a letter of allotment to the defender for 500 shares. On 7th November 1919 Mr Macalister accepted the defender's sub-underwriting letter by signing the docquet appended to it. So far as the dealings with the documents or the methods of allotting the shares are concerned there is, in my opinion, no proof of any *mala fides* or fraud on the part of the pursuers or the Mining Trust or anyone for whom they are responsible.

The allotment, as I have said, was intimated to the defender on the same day as that on which it was made by the letter of 20th November 1919, which informed him, as was the fact, that he had already paid £25 on the 500 shares. That was the amount due on application, as I have already explained. This letter of 20th November was not acknowledged by the defender until 2nd December 1919. The defender in his letter of that date took no such objection as is now put forward. On the contrary, as I read that letter it proceeds on the view that the defender's application had been duly lodged with the pursuers, and only cavils at an allotment of all the shares applied for (500), refers to a sub-underwriting arrangement, and says—"I must therefore ask you to let me know how many shares were applied for by the public so that I may know the exact proportion which should have been allotted. Meantime I retain the letter of allotment." The defender's name has been on the register of members of the pursuers' company since 20th November 1919, and no proceedings have been taken to correct the register. But no point was made as to this by the pursuers. On receipt of that letter the matter was further inquired into by Mr Knapp, the pursuers' secretary, and Mr Macalister, who, as already stated, was managing director of the Mining Trust, and had after allotment become also a director of the pursuers' company. On behalf of the pursuers and the trust they agreed, as correspondence with the defender shows, that in the circumstances they would settle with the defender on a 90 per cent. basis of his application for 500 shares, thereby treating the defender as if he had only applied as a sub-underwriter for 450 shares. The defender replied by letter of 9th December, and again his only point of complaint is the small amount of public subscription (8000 shares) "after the very glowing representations made by Mr Boyce to the party in Aberdeen (Mr Crowe) who induced me to take an interest." The defender followed this up by his letter of 10th December, in which he says that he has now learned that Mr Boyce had withdrawn all his nominees for a sub-underwriting before allotment and returned his allotment letter for cancelment. In point of fact there had in my opinion been no such withdrawal. So far as the underwriting with the Mining Trust is concerned everything had been completely arranged before the allotment, and so far as we know the arrangements have been duly carried out. The defender is not in my opinion entitled to object to what was done with his letter of application, or the relative cheque for £25 which was paid into the pursuers' bank and duly met and accepted by the defender's bankers as a proper debit entry against him.

In my opinion, on the face of the documents the proceedings of the pursuers have been in order to the effect of warranting the entry of the defender's name on their share register for 500 shares. After what took place at the allotment Mr Macalister or the Mining Trust, in my opinion, could not have withheld from the defender any benefit to which a valid sub-underwriting of 500 shares would have entitled him.

It was urged that the whole allotment to the defender was radically vitiated because the acceptance of the underwriting had never been intimated to him. In my opinion any such defence fails on two grounds—(1) in law, because it is not open to be pleaded against the pursuers. The letter of application cannot in my opinion as in a question with the pursuers be held to have been conditioned by the sub-underwriting letter. The letter of application was on the face of it free from all conditions, and was in fact at first dealt with by the pursuers as a firm application, and I think was so dealt with in perfect *bona fides*. In my opinion as in a question between the pursuers and the defender it was a firm application. (2) On the facts, and having regard to article 5 of the sub-underwriting letter, while Mr Macalister says intimation is never made in cases where the application is followed by the passing and payment of the cheque, the letter of allotment and the subsequent correspondence with the defender were in my opinion sufficient intimation to the defender of the contract between him and the Mining Trust. In any event the terms of the sub-underwriting letter, and particularly article 5 thereof, precluded the defender from objecting to the directors of the pursuers' company allotting the 500 shares to him and entering his name on the register in respect thereof. The letters from the defender himself, particularly those of 2nd and 9th December, are not consistent with the defence now set up, and whatever may have been the legal rights of the pursuers there is in my opinion no difficulty in reducing the actual holding of shares by the defender to 450 instead of 500, as the pursuers and the Mining Trust have always since 4th December been ready and willing to do, as is explained on the record.

I do not think that it is necessary to appeal to the doctrine of personal bar or estoppel so far as the pursuers are concerned. There was in my opinion as in a question with them no misrepresentation requiring an appeal to that doctrine. The documents issued by the defender exactly and amply warranted what was done as between the Mining Trust and Mr Macalister and the pursuers in connection with the defender's application for shares in the pursuers' company. To use Lord Cran-

worth's language, I think Macalister had in that matter "the authority he assumed to exercise," and the pursuers did not require to rely on estoppel. I would further add that with regard to the question of constructive knowledge I agree with the views expressed by Lord President Dunedin in *Muir's Executors*, 1913 S.C. 349. On the disputed questions of fact, and particularly as to what passed at the meeting of 20th November, I prefer the evidence for the pursuers to that led for the defender, and I do not think that it has been proved that what I shall call the Automobile Club letter was ever forwarded to Mr Macalister if it was ever written. I think that the defender has failed to show that his name has been entered on the company's register without sufficient cause.

In my opinion the reclaiming note should be refused.

LORD SALVESEN—The questions submitted for our consideration in this case are questions of law; for I think in the end it appeared obvious that the material facts are not in controversy. The first and most important turns upon the construction and effect which is to be given to the sub-underwriting letter which the defender signed and which ultimately found its way into the hands of the Mining, Commercial, and General Trust, Limited, to which it was addressed. On this point we obtain most definite guidance from the numerous authorities cited to us from the English reports. On a careful study of these authorities I have come to be of opinion that this letter must be construed as an offer which had no binding effect upon the defender unless and to the extent to which it was accepted on behalf of the Mining Trust. The fact that the letter bears upon the face of the printed form the words "We accept the above underwriting on the terms mentioned to the extent of shares" shows clearly that it was in the option of the underwriters to accept the sub-underwriting letter to the full extent of the shares which the sub-underwriter offered to subscribe, or to any less extent that they might choose, or not to accept it at all.

It further appears from the opinions of the judges in the authorities cited that in the regular course of business the acceptance of the underwriter, if he desires to enter into a contract between him and his sub-underwriter, must be made before the date of the public issue of the shares, and that such acceptance is of no avail unless it is intimated to the sub-underwriter. If it were otherwise the underwriter would be in a position to hold his sub-underwriter bound only when he ascertained that the public issue was not likely to be fully subscribed, or, indeed, after he had ascertained as a fact that it had not been fully subscribed. Conversely, when he knew that the issue had been fully subscribed he could refuse to accept the sub-underwriting contract and so deprive the sub-underwriter of the consideration in respect of which he made his offer, to wit, the commission on shares which he was not required to take up. There are expressions of opinion by some of the judges to the effect that in some cases the mere retention of the sub-underwriting letter may operate as an acceptance. But it will be found that these expressions of opinion relate to an offer in a different form from that which we have here, and which did not contemplate that the underwriter would have the option not merely of refusing to accept but of qualifying his acceptance to any extent which he pleased. Where the sub-underwriting letter is so expressed as to show that the subscriber did not contemplate any other option than that of refusal to accept, then it may be that the continued retention of the sub-underwriting letter, more especially if it was accompanied by a cheque which the underwriter cashed, would imply acceptance and would authorise the sub-underwriter to sue for the consideration expressed in the letter although the whole public issue had in fact been subscribed. But the opposite inference falls to be drawn where the offer contained in the letter is so expressed as to contemplate the filling up of the printed clause of acceptance. When that is duly done and intimated to the sub-underwriter a contract is completed between the parties which either can enforce against the other, and which, at all events in Scotland where no consideration is required to support a contract, would be irrevocable by the sub-underwriter without the clause of irrevocability which forms the subject of article 5 of the letter.

In the present case it is matter of admission that the acceptance which appears upon the face of the letter, and is dated 7th November 1919, was not intimated to the defender either verbally or in writing. This being so the acceptance by the Mining Trust did not, according to the authorities as I read them, complete the contract so as to make it binding upon the defender.

The next question, and perhaps the more difficult, is whether the defender is barred (for I prefer our own term to the English term of estopped) as in a question with the pursuers from maintaining that he had in fact not authorised the Mining Trust or Mr Macalister, who acted on their behalf, to apply for shares in his name. Now it is undoubtedly the fact that the defender had placed Macalister in the position of being able to mislead the directors of the pursuers' company so that they might in good faith, assuming them to have no knowledge of the true facts, mistakenly put him upon the register of shareholders to the full extent of the 500 shares in respect of which he had filled up the underwriting letter. Not merely had he subscribed the sub-underwriting letter but he had also filled up an application addressed to the pursuers for 500 shares, and entrusted to the Mining Trust a cheque addressed to the pursuers' bankers for 5 per cent. of his liability on the shares assuming that these were duly applied for. If, then, he had constituted the Mining Trust as his agents to any effect or intent to apply for shares on his behalf it seems to be settled by authority (and I refer especially to the decision of the House

of Lords in the case of *Brocklesby* ([1895] A.C. 173) that the pursuers would not be affected by any secret limitation that he had imposed upon his agents' authority to act for him. But I gather from the same decision that if a person has merely been entrusted with the *indicia* of title without any authority to transact on behalf of the owner, the mere possession of such which the self-constituted agent may use without authority so as to mislead third parties will not infer liability against the depositor. Now if that is a true view of the basis on which the numerous decisions to which we were referred, including *Brocklesby*, proceeded, then it appears to me that the defender must necessarily succeed. Here Macalister having no contract with the defender had no authority at all to act on his behalf. It was his duty as in a question with the defender to have returned the sub-underwriting letter and the relative application and cheque just as he would have done if on its receipt he had expressly refused to accept the proposal contained in the letter. The fact that he retained it under the mistaken belief that his acceptance, which I assume was written on the date that it bears, was sufficient without intimation to complete the contract is of no moment if in fact he had no authority to act. To my mind the position is precisely the same as it would have been if Macalister had simply removed the documents in question from the defender's desk, for the possession of the documents would have enabled him to have misled the company as readily as he was able to do in the present case. The doctrine that where one of two innocent parties must suffer for the fraud of a third it must be he who enables the third party to commit the fraud does not appear to me to have any application to the present case. The pursuers had the Mining Trust, represented by Mr Macalister, bound to them for the whole issue of the shares except in so far as it had been subscribed by the public, and when it appeared that a mistake had been made in allotting the shares to the defender instead of to the Mining Trust (such mistake being induced by the act of the Mining Trust) there would be no difficulty in rectifying the mistake. The question here seems to be simply, Did Macalister have authority to use the defender's application and cheque so that the defender could not complain if he was placed upon the register of shareholders for the whole amount which he had offered to sub-underwrite? If he had no authority of any kind I cannot see how the defender is in any sense barred by the mere fact that he entrusted these documents to Macalister, when in fact by failing to accept the sub-underwriting letter Macalister had no authority from the defender to act on his behalf.

It is not to be overlooked in this connection that Macalister's position in relation to the pursuers' company was a very peculiar one. He was to the knowledge of the board the promoter of and vendor to the company. He was also to their knowledge the managing director of the Mining Trust who underwrote the whole issue, and he was himself to join the board immediately after allotment. The secretary of the pursuers' company was an employee of Mr Macalister, and the registered office of the company was the same as the office where Mr Macalister conducted his other business. The secretary was aware that the defender was not amongst the applicants for the public issue of the shares. These applications were entered in the books of the company at the instigation of Macalister, and he seems to have taken the chief part in the meeting at which the allotment of shares was made. Now the board must have been quite aware that Macalister might have obtained these applications either on the footing of a firm allotment (for which a special form was provided on the margin of the underwriting letter), or on the footing of the allotment of shares being made only in proportion to the deficiency between the 100,000 shares issued for subscription and the amount subscribed by the public, or on the footing that they had simply been entrusted to Macalister in connection with a proposed underwriting contract which had never been completed by him. No inquiry was made by any member of the board of Mr Macalister as to the authority which he had for presenting the defender's application for shares. They simply trusted his statement that these shares had been applied for on the same terms as applications sent by the public in response to the issue of the prospectus. Their secretary was quite aware that the application form signed by the defender had been received as relative to a sub-underwriting letter subscribed by him, although he says that he assumed that the defender had intimated his desire to have a firm allotment of these shares. In my opinion the observations of Lord Justice Rigby in the case of *Stark* apply to the present case. The directors are not entitled to rely upon their ignorance of the true facts when they could have obtained information from Mr Macalister, who to their knowledge had the chief interest in inducing the liability of his own company under the underwriting contract. They admitted afterwards that a mistake had been made, and that if they had insisted upon seeing the sub-underwriting letter, as they were entitled to do before accepting Macalister's statement, they would not have allotted the full number of shares contained in the application but only 450 of these shares. If they had further inquired whether the acceptance of 7th November had been intimated to the defender they would have ascertained that no such intimation had ever been given, and that Macalister had accordingly no authority from the defender to place before them the application for shares which he had signed.

I would only add that it seems to me that the letter which the defender wrote on 2nd December 1919 does not prevent him, in my judgment, from maintaining the position that he has formulated in the defences to the present action. That letter proceeded, no doubt, on the view that the sub-underwriting letter had been duly accepted by the underwriter to whom it was addressed.

But at the time it was written the defender did not know whether such intimation had been made to either of the two intermediaries Mr Crowe and Mr Boyce, through whom the letter ultimately reached Mr Macalister. When he did ascertain the facts and his true legal position he was, I think, quite entitled to take up the attitude that he has now done. Nothing that passed in correspondence prior to the raising of the action can be construed as an acceptance by him of the allotment to any extent. His letter of 2nd December is an inquiry as to the amount of the public subscriptions, and in his letter of 10th December he returned the allotment letter for cancelment, although he did so on a ground which he is not able to substantiate.

On the whole matter I am of opinion that the Lord Ordinary's judgment is erroneous, and that the defender is entitled to absolvitor. I may add that I have difficulty in understanding how the Lord Ordinary reached the conclusion that he was unable to correct what the pursuers had themselves admitted to be a mistake in the number of shares which they allotted to the defender. I should only add, with reference to an observation which your Lordship has incidentally made, that there was no argument addressed to us on the footing that the questions of law we have to dispose of in this case could not be decided in this action just as appropriately as if there had been a petition for rectification of the register of shares. There was no plea to that effect, and if such a plea had been stated it would have been very easy, if there was any substance in the argument at all, for the defender to have brought such an application in England, and meanwhile have got the present action sisted. I therefore think that the circumstances must be treated exactly on the same footing as if the defender had brought such an application for rectification of the register of shareholders, and had sought to support it by the allegation that Macalister, who professed to tender his application for shares as agent, had in fact no authority of any kind, but was really in breach of trust in utilising either the applications or the shares as in a question with his principal.

LORD ORMIDALE—The determination of the present question depends, in one view of it, on whether or not, in order to make the sub-underwriting letter a concluded and binding contract, express intimation of its acceptance by the underwriters required to be made to the defender. The date of the letter is 3rd November 1919. It purports to have been accepted on 7th November. It is not disputed that it was accepted on that date. Equally it is not disputed that the acceptance was not expressly intimated to the defender. It was said by Mr Macalister that in cases like the present intimation is never made, and looking to the terms of the letter and the circumstances in which it came to be signed by the defender that is very likely, and I am further satisfied that the defender never expected to receive any such intimation. These considerations are not, however, conclusive.

But the defender was aware that the Mining Trust had underwitten the whole issue of the Premier Company's shares, and that he and his friends were being asked to sub-underwrite in order to relieve the liability of the underwriters, and it was in that knowledge that he signed the sub-underwriting letter. By the first article thereof he agreed for the consideration stated below—viz., that he was to be paid "a commission of 5 per cent. upon the total shares hereby underwritten by me"—to subscribe for 500 shares, no more and no less, and handed to the Mining Trust not only an application for the stated number of shares but also a cheque for £25, being a deposit of a 1s. a share payable to the company on application. There was no option, it seems to me, given to the company to accept for any smaller number of shares than 500, as there was in *Stark's* case—*In re Consort Deep Level Gold Mines, ex parte Stark* ([1897] 1 Ch. 575)—and if the Mining Trust accepted at all they were bound to accept for the whole 500 shares. Accordingly I attach little weight to the special wording of the accepting note printed at the foot of the letter. To accept to a smaller extent than 500 shares would be to accept a proposal that had not been made. This being an offer therefore which fell to be refused or accepted *in toto*, the retention of the letter together with the application for shares and the cheque was sufficient, in my judgment, to notify the defender that his offer was accepted. And indeed, even if the underwriters had the option to accept to a smaller extent, the retention of the application for the total number along with the cheque inferred acceptance of the full number. The cheque, which was not post-dated, and the application were handed over by the Mining Trust to the secretary of the pursuers on or before 15th November. The cheque appears to have been passed through their bank in ordinary course, and it is certain from the terms of the sub-underwriting letter that the defender expected that it should do so. Obviously the defender's one anxiety was that in no event was he to receive less than the stipulated amount of commission on the 500 shares sub-underwritten by him whatever might be the number in fact allotted to him, careful provision being made in articles 2 and 3 for the number of shares relatively to the number applied for by the public to be allotted to him. It is to be noted further that he became aware of the acceptance of his proposal on receiving an allotment shortly after 20th November, and that while surprised at the number allotted he retained the allotment letter. In the case of *Stark* the sub-underwriting letter was in totally different terms, and terms which very clearly necessitated an intimation of the extent to which it was accepted. In *Ex parte Harrison* (69 L.T.R. 204), on the other hand, no intimation of acceptance was made, and such was the fact also, as I read the report, in *Pole's* case,

[1920], 1 Ch. 582, and 2 Ch. 341. There, as here, the underwriters appear to have done no more than endorse their formal acceptance at the foot of the letter after it had been handed to them by Mr Pole, and the terms of the letter there were almost identical with those of the letter here. I adopt what was said by Chitty, J., in the case of *In re the Bulfontein Sun Diamond Mine Limited* (12 T.L.R. 461), and come to the conclusion that the true inference from the circumstances in the present case is that by the retention of the letter without objection the Mining Trust signified their acceptance of it, that the defender so understood the business, and that therefore a contract was concluded between him and the Mining Trust in terms of the letter.

That the defender understood that he was bound is clear from the terms of the correspondence which followed the allotment to him of shares. His objection in the first place was, as I have already observed, not to an allotment having been made but to the number of shares allotted, and he retained the allotment letter. He next endeavoured to escape from an allotment to any extent on the ground that his sub-underwriting offer had been successfully withdrawn. That impossible attitude he appears to have assumed in reliance on erroneous information which had filtered through from Mr Boyce. Still later he pleads that as other sub-underwriters had been allowed to cancel their contracts he does not see why he and his friends should be held. "We shall resist any attempt to hold us while others are allowed to evade liability." That is entirely inconsistent with the view that no liability at all had been incurred because no intimation of acceptance had been made. Obviously the ground of defence now adopted is an afterthought, and while the defender may none the less be entitled to propone it, the fact that it is what one might call a deathbed discovery is not without significance.

If I am right in holding that the sub-underwriting letter was a concluded contract, then it follows that the Mining Trust were put in possession of the *indicia* of title for the purpose of laying them before the pursuers. The decisions in *Brocklesby* ([1895] A.C. 173) and *Fry* ([1912] 3 K.B. 282) are applicable, and not the law of *Martinez* v. *Cooper* (2 Russ. 198) and *Perry Herrick* v. *Attwood* (2 De G. & J. 21), referred to in *Brocklesby* by the Lord Chancellor (Herschell). The purpose for which the application for shares along with the cheque fell to be handed to the Premier Company may have been limited by the terms of the sub-underwriting letter, but the Premier Company had no notice of that limitation and were entitled to deal with the application, as I think they did in good faith, as a firm application. I see no reason for preferring the evidence of Mr Boyce to that of Mr Cairnes, Mr Knapp, and Mr Macalister as to what occurred at the meeting of the pursuer's board on 20th November.

It was maintained that the directors should have made definite inquiries as to the source of the application to the company and the channel by which it had been transmitted, and that if they had they would have discovered that it was an application by a sub-underwriter, but that his proposal to sub-underwrite had not been duly accepted. The authorities do not, in my opinion, warrant the inference that any such duty was imposed on the directors in the ordinary case, and there was nothing special in the present case to put them on their inquiry. Further, if the sub-underwriting letter had been before them, as I think it ought to have been, and they had examined it, they would have seen that it purported to have been accepted, and they would have been entitled to conclude that it had been duly accepted (*ex parte Harrison*).

In the view that I take it is not necessary to consider the question whether, assuming that express intimation of the acceptance was necessary to complete the contract between the Mining Trust and the defender, the latter is barred from maintaining that Mr Macalister was not in fact authorised to apply for shares in his name, but I may add that I agree with your Lordship and the Lord Ordinary, for the reasons stated by your Lordship, that as in a question between him and the pursuers it is not open to him so to contend.

On a strict application of the law applicable to the circumstances disclosed in the evidence the Lord Ordinary's interlocutor is in my judgment right. But the pursuers were, and as I understand still are, prepared to admit that there was a mistake on Mr Macalister's part in separating the application for shares from the sub-underwriting letter and to allow that mistake to be corrected by restricting the number of shares allotted to the defender to 450. That offer was made to the defender from the first, but he has consistently declined to consider it. If that is still his attitude then the Lord Ordinary's interlocutor must stand.

The Court adhered.

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