

as to what the probable result of such an action would have been. I can only say that it would possibly or probably have been a failure, and that Doddrell, on principles of justice and equity—not to speak of considerations of good feeling—might have entirely prevailed. On the action as it stands I am clearly of opinion that it cannot be sustained.

LORD CRAIGHILL—The pursuers here sue for the price of the premises used as a school, first by G. J. Doddrell, and afterwards by the vestry and trustees of St Jude's Church, Glasgow. The title to these subjects was in the name of the defenders, and nothing appears upon the face of the deed to show that they held for others. But the fact is, that they were only trustees, the £800 with which the subjects were purchased having been advanced by the vestry and trustees that the property might be acquired. There is no dispute as to this between the parties. The subjects were acquired in 1869, and as arranged by the vestry and trustees these were sold to the Glasgow School Board for £2500 in 1874. The disposition to the purchaser was signed by the defenders, who on the face of the deed were, as they behaved to be—the title being in their persons—set forth as the disponents, and the defenders there acknowledge that they had received payment of the price. This price is the subject-matter of the present litigation. The whole sum, with corresponding interest, is sued for, but the pursuers now acknowledge that £800 and £263 have been duly accounted for, and their claim consequently has been restricted to £1458, which is the difference between the aggregate of these two sums and the price obtained for the property. The question is, whether that sum remains in the hands of the defenders, which is the assumption upon which this action is laid. The Lord Ordinary has taken this view of the matter—his ground of judgment being that the defenders, as trustees of this fund, permitted it to remain in the hands of their treasurer without taking any step whatever to secure it for the trust-estate. I would agree with the Lord Ordinary if I could take the same view of the facts. But he has, as was admitted by the counsel for the pursuers in the argument upon the reclaiming-note, fallen into error in holding that Mr Doddrell was the treasurer or servant of the trustees. He was not their servant in any sense. They required no treasurer—and never had one—the duties they were to perform not calling for the services of such an officer. Mr Doddrell was the treasurer of the vestry and the trustees of the church, and consequently when money was paid to him in that capacity it truly was paid to the church. Mr Doddrell recognised his position and obligation, and the £2500 was, immediately after he received it, deposited in the bank account kept in his name as treasurer. The pursuers, however, say that he was not entitled to receive the money, and so far and so long as it was left with him, it was at the risk of the defenders. But I cannot adopt this contention. Payment to the treasurer was, I think, in the circumstances of this case, payment to those whom as such he represented, the consequence being that the ground of action in place of being substantiated has been contradicted. Nor is this merely a technical answer to the pursuers' claim, for according to

my reading of the documentary evidence, it appears that they assumed that the price was to come into their treasurer's hands—that they knew after it had been paid by the purchasers of the property that it had come into his hands, and that they were content, so far as not required to meet the £800 advanced by the church, and the £236, which was a debt due to a former treasurer, it should remain where it was till the use to which it was to be applied should be agreed on by all concerned. There was, in these circumstances, no duty in the premises left to be performed by the defenders. The price had passed to the treasurer, and those on whose account, and with whose knowledge, and according to whose arrangement it had been received by the treasurer, are the parties, if supervision were required, by whom that supervision behoved to be exercised. I cannot doubt, therefore, that on the action as laid the defenders must be assolizied. The pursuers, however, now ask leave to amend the record for the purpose of setting forth an alternative ground upon which, as they say, the defenders' liability may be supported. But for the reasons which have been explained by your Lordship, I think that such leave ought not to be granted in the circumstances of this case.

LORD RUTHERFURD CLARK—I also think the defenders should be assolizied. I regard this as an action laid against the trustees of the school only, and in that character it is impossible for it to succeed, so as to make them account for the money which they received when the sale was completed. I think they discharged themselves of the sum which they received or acknowledged they had received and therefore, they are entitled to absolvitor. I do not think there is any further question at all. Whatever claim may arise on any other ground is not here at all, and I say nothing whatever upon it.

The Court refused the pursuers' motion for leave to amend, recalled the interlocutor of the Lord Ordinary, and assolizied the defenders from the conclusions of the action.

Counsel for Pursuers—Mackintosh—Guthrie.
Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders Wakefield and Bousfield—J. P. B. Robertson—Low. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders Lowndes and Cochrane—Mackay—Dickson. Agents—Fraser, Stodart, & Ballingall, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

THE SCOTTISH AMICABLE HERITABLE SECURITIES ASSOCIATION AND ANOTHER v. THE NORTHERN ASSURANCE COMPANY AND OTHERS.

Insurance—Loss by Fire—Contribution—Double Insurance—All Parties not Called.

Premises over which there were several heritable bonds were insured under four

policies with different companies, in name of the preferable creditors, as such, *primo loco*, and of the proprietors in reversion. In each of these policies there was a contribution clause declaring, that if at the time of any loss by fire happening to the property insured there should be any other insurance (whether effected by the insured or by any other person) covering the same property, the company should not be liable for more than a rateable contribution of the loss. The premises were also insured for behoof of postponed bondholders *primo loco*, and the proprietors in reversion, under three policies effected with other companies, and also containing a contribution clause. The proprietors paid the premiums under the whole seven policies. The premises having been damaged by fire, the preferable creditors sued the four companies with which their policies had been entered into for a sum they estimated as the amount of the loss. The defenders, on the ground that the other three companies were bound to contribute a rateable proportion of the loss, pleaded "all parties not called." The Court (*aff. judgment of Lord M'Laren—diss. Lord Young*) *repelled* the plea, holding that "the property" insured with the defenders by the pursuers was their interest in the premises as creditors, with which the three other companies, with whom the pursuers had not contracted, had no concern, and that the pursuers were neither bound nor entitled to raise any question with these companies.

This was an action at the instance of the Scottish Amicable Heritable Securities Association (Limited), and James Alexander Robertson, C.A., Edinburgh, with consent of Messrs R. H. Hay & Brothers, grain-millers, Glasgow, against (1) the Northern Assurance Company, (2) the Norwich Union Fire Insurance Society, (3) the West of England Fire and Life Insurance Company, and (4) the Edinburgh Fire Insurance Company, to have it declared that the defenders, jointly and severally, or severally according to their respective liabilities, were bound to indemnify the pursuers for loss through destruction by fire of premises belonging to Messrs Hay, upon which the pursuers had effected insurances with the defenders. The pursuers concluded for £6500 as the amount of the loss. The pursuers were creditors of R. H. Hay & Brothers, of the Greenhead Grain Mills, Glasgow, and held heritable bonds over these mills for £9000 as first bondholders. It was a condition of granting the loans that the premises should be insured against loss by fire in name of the pursuers or their nominees. The policies of insurance so effected by or for the association were—(*First*) policy of the Northern Assurance Company for the sum of £3165; (*second*) policy of the Edinburgh Fire Insurance Company, for the sum of £2210; (*third*) policy of the West of England Fire and Life Insurance Company for the sum of £1610; and (*fourth*) policy of the Norwich Union Fire Insurance Society for the sum of £500. The first three policies mentioned were in name of the pursuers the Scottish Amicable Heritable Securities Association as heritable creditors *primo loco*, and R. H. Hay & Brothers in reversion, and the fourth was in name of the pursuer J. A. Robertson as heritable creditor *primo loco*, and R. H. Hay

& Brothers in reversion. Mr Robertson was manager of the other pursuers' association.

A fire occurred in the mills on the 1st August 1882, by which, according to the pursuers' statement, damage was done to the premises and machinery to the extent of not less than £6500. The pursuers immediately intimated the loss to the several defenders, who deputed assessors to act for them, with full powers to adjust the loss; but it was found impossible to agree on the amount of the loss, and this action was raised. The defenders set forth that in addition to the policies set forth by pursuers there were in force over the subjects at the date of the fire in question—(1) policy of the Westminster Fire Office for £720 in name of the Glasgow Provident Investment Society and Messrs Hay jointly and severally, dated 13th October 1881; (2) policy of the City of London Fire Company for £500 in name of Thomas Wiseman & Co. as heritable creditors *primo loco*, and R. H. Hay & Brothers, proprietors in reversion, dated 21st March 1882; (3) policy of the Fire Insurance Association for £500, dated 8th April 1882, in the same terms as the last-mentioned policy. They also set forth that—"One of the conditions of the policy of the defenders, the Northern Assurance Company, is in the following terms:—'The Company may, if it thinks fit, reinstate or replace property damaged or destroyed, instead of paying the amount of the loss or damage, and may join with any other company or insurers in doing so in cases where the property is also insured elsewhere.' Another of said conditions is in the following terms:—'If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.' Another of said conditions is as follows:—'In all cases where any other subsisting insurance or insurances (whether effected by the insured or by any other person) covering any property hereby insured, either exclusively or together with any other property in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.' Conditions similar to these already quoted exist in all the said policies." The defenders also averred that the premiums on these and on the four other policies were paid by Messrs Hay.

The defenders did not dispute their obligation to contribute rateably, but maintained that not four only, but the whole seven, companies were bound to contribute rateably to the said loss. They offered to reinstate the property destroyed by fire. In the event of their paying the loss, they claimed right to require an assignation to the pursuers' securities postponed to the balance due under the securities, after deducting any payment that might be made under the policies.

They pleaded—" (1) All parties are not called. (3) The defenders being willing, and having offered, to reinstate in terms of the said policies, they should be assolvizied from the conclusions of the present action; or otherwise, the defenders

being entitled, and having offered, to reinstate, the present action should be dismissed. (4) In terms of the policies founded on, the defenders are only bound to contribute rateably to the amount of loss along with the other three companies named in the defences, all conform to the amounts insured by their respective policies."

The Lord Ordinary (M'LAREN) on 26th May 1883 repelled the defenders' first and fourth pleas, and appointed the cause to be put to the roll for further procedure.

"*Opinion.*—The pursuers are heritable creditors holding a preferable bond over certain grain-mills at Bridgeton which were injured by fire on 1st August 1882, and they have instituted this action against four insurance companies with whom they had effected insurances against fire. These insurances were effected in the name of the pursuers *primo loco*, and of Messrs R. H. Hay & Brothers, the proprietors of the mills in reversion. The main defence, and the only one which I propose to consider at this stage, is the defence founded on the clause or condition set forth in the defenders' second statement. This condition, usually described as a contribution clause, is as follows:—'If at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.' It appears that at the time of the fire there were three other policies in force for insuring the mills against fire. The three policies referred to were effected by postponed heritable creditors in favour of themselves *primo loco*, and of the proprietors of the mills in reversion. The defenders contend, under their first plea-in-law, that the three companies named in the defences ought to be made parties to the action, and they contend under their fourth plea that they are only bound to contribute rateably along with the three other companies to the indemnification of the pursuers.

"I do not find in the circumstances of the case any sufficient reason for the calling of additional parties. The pursuers have no right of action against the three companies named in the defences. They are not insured with these companies, nor are the three companies referred to in danger of being made to pay a larger sum to the persons who have insured with them by reason of any decision that may be pronounced in this case. They cannot be called as proper defenders, because no decree can pass against them, and they ought not to be called for their interest, because they have no interest in the subject-matter of the action.

"It remains to be considered whether the four defendant companies can maintain their contribution clauses to the effect for which they contend—whether, for example, the Northern Assurance Company is liable to contribute only as one of the seven contributing companies, or whether it is liable to contribute as one of four contributing companies. The hypothesis of the contribution clause is, that there shall be subsisting insurances 'covering the same property.' The defenders say that the three insurances effected by the postponed bondholders are insurances covering the same property, and that their value

is to be added to that of the others for the purpose of reducing the contribution of the Northern Assurance Company. The pursuers contend on the contrary, that the words 'covering the same property' mean the same proprietary interest, and that as the three policies in question are not available for their indemnification (they having been effected by the postponed bondholders for their own protection), the policies in question are not within the scope of the contribution clause.

"I think that the pursuers' argument is well founded, and I am prepared to repel the defenders' fourth plea for the following reasons:—(First) The clause of contribution could have no other object or purpose than, in the case supposed, to reduce the liability of the subscribing companies to that of underwriters—that is, a liability under which the assured should be entitled to recover the full amount of his claim in payments from the several contributories, but should not be entitled, in case of a partial loss, to throw the loss upon one or more contributories to the exclusion of the others. My interpretation of the clause carries out this object. Under the defenders' contention the pursuers would not recover the full amount of their claim, because their view involves the division of the loss into seven shares, of which the pursuers would only recover four. The divisor to be applied to the sum assured by the Northern Company (if the contract is a fair one) must be the ratio of the aggregate liability of the contributories to the actual loss. The defenders' proposal is to increase the divisor by adding to it the liability of persons who are not contributories. It is, I think, a good reason for rejecting their construction that it would enable insurance companies to evade fulfilment of their obligations. Another reason for rejecting it is, that under it the right of the assured would be liable to be diminished by the subsequent acts of parties not under their control. In the present case, for example, it is said that the second bondholder by effecting his insurances has diminished the claim of the first bondholder to a proportionate extent. A third reason against the defenders' contention is, that in the case of a total loss it leads to this result, that the indemnity is to be shared between the first and second bondholders in proportion to the amount of their insurances, although in equity the first bondholder, if covered by insurance, ought to recover to the extent of his bond, and the second bondholder ought only to recover the difference between that sum and the worth of his property, that difference being evidently the limit of his insurable interest. All these inequitable consequences are avoided by interpreting the word 'property' in the sense of proprietary interest insured against. This construction was approved by the Court of Appeal in England in a cognate case—*North British v. London and Liverpool Insurance Company*, 5 Ch. Div. 580. I refer more especially to the opinion of Lord Justice Mellish, in which I concur entirely. I think, moreover, that the construction which I decide against was not at all in the view of the parties to the policy. They did not mean 'property' in the generic sense as including a variety of interests, but the property, the particular security, estate, or interest which the insurance was to protect, and no other.

"I shall therefore repel the defenders' first

and fourth pleas, and appoint the case to be enrolled for further procedure."

Thereafter the Lord Ordinary heard counsel on a plea for the defenders to the effect that in terms of the policies the pursuers were bound to have the question settled by arbitration, and on their offer to reinstate. His Lordship pronounced this interlocutor:—"Finds that the defenders by negotiating with the pursuers for a reference of the question of damages to arbitration under the arbitration clause of the policy, have elected to make compensation in money, and are not now entitled to exercise the power of reinstating: Finds that the parties are now bound to enter into a reference in terms of such arbitration clause, and continues the cause in order that, if necessary, decree may be pronounced in terms of the arbiter's award, and grants leave to reclaim."

The defenders reclaimed, and argued—(1) *As to contribution*—"Property" meant a chattel, not interest. It was the premises and not their debt that the bondholders insured. And the insurers were not bound to pay except rateably if policies subsisted granted by other companies over the same subject. Insurance was a contract of indemnity, and nothing more. (2) *As to election between compensation and reinstatement*—When no settlement could be come to, arbitration was proposed. On this falling through, matters were simply on their original footing. Hence there was no undue delay and no election. If there was election the Court could restore against it.

Argued for the pursuers—(1) *As to contribution*—They could not have availably called the other companies, for they had no contract with them. The position of the bondholder apart from the proprietor was not doubtful, and the proprietor was secondarily insured as reversioner only. The subjects insured were perfectly distinct. It was only on payment of the first that the other interest emerged. The postponed creditors were postponed to £9000, and accordingly suffer no loss from fire, for that loss amounted only to £6500. A demand for partial assignation was illegal and inequitable, for it put the company in a better position than the proprietor, and it would make the pursuers rank *pari passu* instead of preferentially. (2) They had made election—Matters had gone so far as a minute of reference, in which, of course, only money compensation was in question. The position of the pursuers had been prejudiced by delay.

Defenders' authorities—(1) *Castellain v. Preston and Others*, April 4, 1882, 8 Q.B.D. 613—*rev.* March 12, 1883, 11 Q.B.D. 380; *North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company*, April 11, 1877, 5 Ch. Div. 569.

After the hearing in the Inner House the defenders obtained leave to amend their record by adding this statement:—" (Stat. 5) The three companies mentioned in statement 1 are quite willing to contribute with the defenders to the expenses of reinstatement, or they are willing to contribute towards payment of the loss as that shall be ascertained, provided such contribution shall be held as full payment by them of all sums due by them in respect of the loss by the fire under the policies issued by them."

At advising—

LORD CRAIGHILL—Of three questions decided by the interlocutors submitted to our review, I propose to consider, first, Whether the defenders are still entitled to exercise the power of reinstating? I adopt this order because were the Court to find on the affirmative the necessity of giving judgment on the others would be superseded.

My opinion is, that this point has been well decided by the Lord Ordinary. The correspondence between the parties satisfies me that the defenders elected to settle in money for the loss covered by the policies, and the result necessarily is, as the Lord Ordinary has determined, that they are bound by this election, and consequently cannot, despite the pursuers' opposition, betake themselves to the alternative which they by the terms of the policies might originally have adopted, of rebuilding and refitting the portion of the premises which the fire destroyed.

The second question for consideration is, Whether all parties concerned with the subject-matter of suit, and who as so interested ought to have been called as defenders, have been called? This is the subject-matter of the defenders' first plea-in-law. Those who have been called are the four insurance companies who granted the policies sued on. The pursuers, as they say, have no contract with, and prefer no claim against, any other company. They say they have called their only debtors for the loss caused by the fire, and having done so, the calling of others would have been an abuse of process. The defenders, on the other hand, maintain that the three companies named in their statement of facts ought to have been made parties to the suit, because they are obligants under policies, over the same subjects, granted in name of postponed heritable creditors *primo loco*, and of R. H. Hay & Brothers in reversion. This point, also, has, for the reasons he has given, been in my opinion well decided by the Lord Ordinary. But the sufficiency of these reasons depends upon the view which may be taken of the third of the questions upon which he has given judgment. If the fourth plea-in-law for the defenders has been rightly repelled (the contention as to this being the third of the questions submitted to review on the present occasion), there cannot be a doubt that the first of the pleas for the defenders was also properly overruled.

The third question is, Whether the defenders, as they contend in their fourth plea-in-law, are only "bound to contribute rateably to the amount of loss along with the other three companies named in the defences, all conform to the amounts insured by their respective policies?"

This plea has been repelled by the first of the interlocutors reclaimed against; and I again concur in the judgment of the Lord Ordinary.

The contention of the defenders is maintained on the strength of a condition endorsed on the four policies forming the ground of action, whereby it is provided that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." This is admitted to be a condition of the contract; and the pur-

suers in the shaping of their action have recognised its obligation. The debt due to them, secured over the property which was in part destroyed, was £9000; the sums covered by the four policies sued on amounted to £7485, and the loss as valued by the pursuers is £6500, which is less by £985 than the aggregate of the sums assured. They, however, have not sought to throw upon any one of the companies more than its proportion of the loss, measured by the sum covered by its policy. All four are convened, but only that by the four, according to their several liabilities, the loss suffered by the pursuers may be made up. Had there been other assurers under contract with the pursuers they also would have been sued, but as the policies issued by the four companies, who are defenders, are the only contracts by which the pursuers have been assured, the claim for indemnification was made against them, and against them only. The defenders, however, argued that the clause of contribution has not been fully appreciated by the pursuers, and, in particular, that the words "covering the same property" have been overlooked or disregarded. But as I think the error is on the side of the defenders, the word "property" has not an inflexible meaning, but is of varying import, representing that which according to *naturalia* of the contract must reasonably be taken to be the thing which it was intended to represent. On this subject I content myself by referring to the judgment of the late Master of the Rolls (Sir George Jessel), affirmed on appeal in the case cited by the Lord Ordinary (*N.B. and Mercantile Insurance Company v. London and Liverpool Insurance Company*, 5 Ch. Div. 580), which, as I think, is ample authority for the opinion which I have come to entertain on this part of the case. I therefore read, as the Lord Ordinary has read, the word "property" in the clause in question as meaning proprietary interest or the interest of the assured in the subjects insured. This reading is decisive of the controversy now under consideration, because the interest of the pursuers is only such an interest in the subjects covered by the policies on which they sue, as is necessary for the security of the debt—for the security of which the property was conveyed and insured—and it is certain that no other policies covering the same proprietary interests or interest as the pursuers possess in the subjects assured have ever been granted. The truth is, that the argument raised by the defenders on the clause of contribution is inconsistent with their acknowledgment of the pursuers' rights. They admit that the pursuers are entitled to be indemnified to the full extent to which the property constituting their security has by the fire been depreciated or destroyed, and yet they say that they, who are the only parties who have undertaken to indemnify the pursuers, are bound for no more than a contribution. From whom is the deficit to be recovered? The defenders point to the other three companies by whom a postponed heritable creditor was assured. But there is no privity of contract between the pursuers and these companies, nor have they undertaken to do or to pay anything for the pursuers' indemnification. The obligation of the three companies is to indemnify the postponed creditor should he suffer from the consequences of a fire, and if this creditor does not suffer loss, there cannot be brought against them any claim

for indemnification. They are to make up loss to the party whom they have assured; they are under no obligation to indemnify or to enter into arrangements for indemnifying a preferable heritable creditor. The defenders meet this by saying that the three companies have agreed to contribute to make up the loss of the pursuers, and this appears to be the fact. Upon what view of their obligation, or of their interests, they have so consented, cannot easily be even conjectured. This, however, is probably immaterial on the present occasion. But they have not consented unconditionally. On the contrary, they have agreed to contribute only on the proviso that "such contribution shall be held as full payment by them of all sums due by them in respect of the loss by the fire under the policies issued by them." Their agreement was safe indeed upon this stipulation, for who could think it possible that the holders of their policies would regard as satisfaction of their rights a sum paid to make up the loss suffered by a preferable heritable creditor? But whatever the disposition of the postponed creditor may be, who has a title to approach him on such a mission? Not the pursuers, for they have no claim upon him, and he is not bound to submit to a sacrifice that their loss may be indemnified. And surely not the three companies, for their duty is to indemnify their assured, and not to propose that their assured should abandon his rights that a prior creditor assured by other companies might be fully indemnified. Than the stipulation for such a condition there could not be clearer demonstration of the unsoundness of the contention maintained by the defenders upon the terms of the clause of contribution.

Any plausibility with which the case of the defenders may be invested is due to the fallacy that the pursuers, the heritable creditors and the Messrs Hay, the proprietors of the premises conveyed in security, are in this matter one and the same. There could not be a greater misconception. The pursuers are suing for themselves, and not for Messrs Hay. The former have suffered loss, and under their contract they are entitled to indemnification. Their loss is the destruction or depreciation by fire of the subjects which constituted their security. This was an insurable interest. The insurance was effected, and it was no condition of the contract, according to its sound interpretation, that they were to be affected by the act or deeds of the Messrs Hay, or of others deriving their rights from them. The right of the pursuers was to have the property restored to the condition in which it was in before the fire, or to have the depreciated value compensated in money. This last, as already shown, is now the only form in which indemnification can be offered. It may be that the Messrs Hay will benefit by the indemnification to be rendered to the pursuers. But this is immaterial. The policies were in name of the pursuers *primo loco*, and in name of the Messrs Hay only in reversion. The pursuers are suing only for what is theirs, and for nothing reversionary, and fulfilment of the contract requires that what is necessary for their indemnification should be given whether benefit or prejudice may accrue to the Messrs Hay. For these reasons, as well as for those presented by the Lord Ordinary, I think that a judgment finding them entitled to

such a sum as may be fixed by arbiters to be appointed under the contract, which is in substance the import of the Lord Ordinary's last interlocutor, ought now, by an affirmance of that interlocutor, to be pronounced by the Court.

Lord Young—When the fire occurred, the premises (Hay's Mills) and contents were insured with seven fire offices by seven policies, in all of which the owners of the property, Messrs Hay, were parties, although not the only parties. In three of them, the pursuers, the Scottish Amicable Heritable Association (a loan company), were associated with the owners as parties insured, being creditors of theirs with a bond over the property. In one of them the other pursuer, James Alexander Robertson, was similarly associated for the same reason. These four policies were in fact taken out, and the premiums on them paid by the owners. Leaving aside, for a moment, the three other policies, with this remark only, that they are of exactly the same character, I point out the position of the pursuers. One of them, the Scottish Amicable, is a party to three of the four policies sued on, and which are to the aggregate amount of £6985. The other, Robertson, is a party to the fourth, which is for £500. These two pursuers in conjunction, and with the concurrence of the owners, their debtor, sue the four insurance offices, concluding for decree against them jointly and severally for £6500, as the alleged amount of the damage done by the fire. I notice in passing that it would have been in accordance with the pursuer's argument to us, and the Lord Ordinary's judgment, had the Scottish Amicable sued alone on their three policies, which are for an amount exceeding the damage by £488. According to that argument, they have no title to sue the Norwich Union, with which they are not insured, nor has Robertson any title to sue the Northern Assurance, the Edinburgh Fire Insurance, or the West of England Fire Insurance, with none of which is he insured. But this by the way. The defenders, of course, take no objection on this head, inasmuch as they admit, and indeed contend, that when the owner of property insures it in several offices for himself, and his creditors holding securities over it, the whole insurers must contribute rateably in the event of a fire.

In consistency with this view, they are so far from stating any objections as to the conjunction of pursuers or defenders that their case and argument is, that the other offices who insured the same property against the same fire, and the insurers with them, ought also to have been called. It so happens that the three insuring offices not called admit their obligation to contribute, for although they are not parties to the cause, their admission is put before us in such a way that we cannot doubt it. They properly ask to be protected against the risk of doing more than contribute, by affording the insurers with them an opportunity of showing, if they can, that they are entitled to share in the money, without which these insurers might afterwards say that the money had been paid to the pursuers behind their backs, while they could have shown that they were entitled to a share.

The insurance offices being thus agreed about their obligation to contribute, it is certainly remarkable that we should have had a serious argu-

ment on the question, the pursuers maintaining the negative. For the question whether there is such an obligation or not cannot possibly concern the insured, but only the insurers.

It was conceded on both sides, and so I suppose it is clear, that whether the premises are insured against fire with one or several offices, or by one or several parties, no more can be got than the value of the damage done by fire, it being impossible that the value of all the interests in the premises added together should exceed the whole value of the premises. This consideration is obviously the same whether the destruction by fire is total or partial, and I take the case of total destruction only for simplicity. In that case I venture to say that it cannot signify to the insured, let them be as numerous and their interests as various as you please, whether the loss is paid by contribution or not, any more than the case of reinstatement, whether it is made by contribution or not. Accordingly, any case about contribution which has hitherto occurred has been between insurers, the insured taking no interest in it.

But as might be expected from the ready admission of the obligation by the insurance offices here concerned, there is, so far as I can see, no room for doubt about it—for the owners of the property are insured with them all. That they had creditors, and that their creditors were named in the policies, seems to me immaterial, for it cannot, I would think, be contended that the insurance offices are bound to contribute or not according as the owners of the insured property shall pay their debts or not, or that their obligation *inter se* depends on the conduct of the insured to one another in their relation of debtor and creditor.

The case may possibly have occurred, though I have never met with it, of a heritable creditor insuring the subject of his security for his own independent interest. The owner is the proper insurer, and if there is a full insurance in his name with a solvent office, I venture to assert that no creditor can benefit by a separate insurance of his interest as a security-holder. For the owner's insurance covers the whole property, and is available to his creditors for their interests in it claimed from him. I should think that it is so without any special agreement to that effect; but with such agreement, which is of familiar occurrence, there can be no doubt about it. The agreement is usually made by a clause in the security of each creditor to the effect that the debtor shall keep the property fully insured at his expense, so that in case of destruction by fire it shall be reinstated or the value paid in money. It is, I think, impossible to conceive that more than this shall be effected by fire insurance. If there is reinstatement under the owner's insurance, it is obvious that a creditor who had effected an independent insurance for his own interest could thereby take nothing, and equally as if an equivalent for reinstatement is paid in money. For in neither case can more be got by insurance in respect of the fire, be the insurances ever so numerous, and the interests of the insured ever so various.

It is therefore plain that a creditor has no inducement to insure independently for his interest, provided he has contracted with his debtor to keep the subjects insured for his behoof, and taken

the usual precautions against the insurance money being lost in the debtor's hands. That the rights and interests of heritable creditors *inter se* whether in the reinstated premises or in the money equivalent for reinstatement, must be governed by the amount and quality of their debts and securities, and cannot be affected by the terms of any fire insurance whatever, is really too clear to be disputed.

The case before us is the familiar one of an indebted owner insuring his property at his own cost for himself and for creditors having security over it, in fulfilment no doubt of his obligation to them respectively. Two of these creditors are the pursuers of this action, with the owner's concurrence. I have already pointed out their position generally, and now do so more particularly. The pursuers, the Scottish Amicable Association, hold three policies in which they are named along with the owner, the insurance offices agreeing to pay to them *primo loco*. These policies are— with the Northern Assurance Company for £3168; with the Edinburgh Fire for £2210; with the West of England for £1610—in all £6988. The other pursuer, James Alexander Robertson, holds a policy for £500 with the Norwich Union in similar terms. The four offices are conjoined as defenders, and concluded against conjointly and severally, or severally according to their interests, for the whole damage done by the fire. Suing with the concurrence of the owner, the pursuers properly made no averment regarding their debts and securities beyond a general statement of the aggregate of the debts of both together. The insurance offices had no occasion to inquire as to these, or to concern themselves about them in any way, for the owners' interest was necessarily sufficient to support the insurances to the full value of the property, and the offices could have no possible objection to agree to pay whatever liability they might incur to any persons he directed. The pursuers are, as far as I can see, in no more favourable or different positions than if they held policies in the owner's name on an onerous assignation. The four offices thus sued aver that besides the four policies sued on there were three other policies over the same subjects in force at the time of the fire for behoof of the owners and creditors holding securities over them. These are—(1) policy with the Westminster Fire Office for £720; (2) with the City of London Fire Office for £500; (3) with the Fire Insurance Association for £500—the Glasgow Provident Investment Society being associated with the owner in the first, and Thomas Wiseman & Company in the second and third.

I assume at present the truth of this statement, for not only was it admitted at the bar, but the question regards its relevancy to support the pleas of contribution and all parties not not called, which are founded on it. I am of opinion that it is relevant to support both of these pleas, and as regards contribution I have already explained my reasons for thinking that the case is one for contribution, as indeed the only parties interested to dispute it admit that it is.

But the pursuers contend that the policies on which they sue are individual independent insurance contracts, which must be fulfilled according to their terms without reference to the other three

similar contracts, with which they have no concern. I have perhaps said enough already to show why I think the contention erroneous, and I shall resume the subject only so far as necessary to point out how the views which I have expressed are illustrated by the facts of this individual case so far as we know them.

If the four policies sued on are insurance contracts independent of the three policies referred to in the defenders' first statement, and so not to be affected thereby, there is the same reason exactly for holding that the three policies are insurance contracts independent of the four, and so not to be affected thereby. There may be a vast difference in favour of the one or the other, but at present we know of none, for all we are told is that the Messrs Hay insured the premises against fire by each of the seven policies in favour of themselves and certain alleged creditors named therein respectively, and that a fire occurred which did damage to the amount of £6500. Now, does anyone contend that under any of the policies, or all of them taken together, we can, either at once or piecemeal, order more to be paid than £6500? I assume not, for both parties before us conceded that we could not. But that sum does not enable us to deal with the seven policies as insurance contracts independent of each other, for, so regarded, they show contracts to the amount of £9205. But if, under contracts to the amount of £9205 there is to be paid only £6500, the difference of £2705 must come off some of the contracting parties, if not all of them. So far as we know at present, there is no reason for reducing the sum payable to one any more than that payable to another, below the sum insured, if not in excess of the £6500. But as the fund is limited and will not admit of this, there must be a rule according to which we may do justice to all parties interested, and that rule must be founded on the consideration that £6500—assuming that to be the whole damage by fire—represents the value of all the interests concerned, as indeed it must, for all the suffering by the damage, however numerous the sufferers, cannot exceed the whole of it. We know that, laying the owner out of view, this damage to the value of £6500 has been done to the pursuers, to the Glasgow Provident Investment Society, and to Thomas Wiseman & Company, or some of them, or we have at best no knowledge or reason to think that any others are interested in the damaged premises, and need take account of no others. Their respective interests—amounting in the aggregate to £6500—we have no means of determining. They must clearly, I should think, be determined according to the value and priority of their respective debts and securities, of which we have no knowledge, and cannot possibly decide without having them all—and they are only two besides the pursuers—before us. The only other course is to take each policy as an independent contract of insurance, and award the amount of it if within the damage done by the fire—and this is the pursuers' contention. But if good for them, it is equally good for the insured by the three policies referred to by the defenders, and an action by them against the offices whose policies they hold, if now before us, would now have to be decided as the Lord Ordinary has decided this, of course with the result that the fire insurances on these premises should yield £1720 in excess of the

damage done by the fire, which is absurd. It does not occur to me that the legal position and rights of the insured creditors would have been different in any respect had the seven policies by which they are respectively insured been all with one and the same insurance office, being in the same terms exactly as they are. The observation that no creditor was a party to or concerned with the insurance of another of which he was probably or certainly ignorant, so frequently made in this case, would, have been equally applicable, and of equal value as an argument. But would it in that case have been listened to for a moment? The insurance office would have paid the full damage done by the fire, but to whom? Surely not to the first comers holding policies to the amount of that damage, unless indeed the other insured assented to it, as they might, if satisfied that the first comers were the only sufferers by the fire. In the case of seven or any number of such policies with one office, the form of process would have been very simple; for a multiplepounding in name of the insurance office would have brought all the insurers into Court to compete for the money value of the damage by the fire as the fund *in medio*, supposing they could not adjust the matter among themselves. And this suggests that the most proper way of calling before the Court all the parties interested in the present dispute is a multiplepounding, which may be raised in name of seven offices as well as of one. In such a multiplepounding the amount of the damages due may be settled as a question regarding the amount of the fund *in medio*, to which it is right that all who are interested shall be parties. Had the case been presented to the Court in such a process, I venture to think that we should have had no question about contribution, for it would have been manifest that those who claimed the funds placed in the hands of the Court for distribution according to their rights, were in no way concerned with the question whether it had been contributed or not, and equally so that the insurance offices had no concern with the competition—if the insured chose to compete—and indeed were not entitled to interfere with it. It would also, I venture to think, have been evident that such competition must have been determined by the same rules which govern a competition for the price, or part of the price, of burdened property if realised in any other legitimate manner—at least to the best of my opinion, as at present advised, these rules being applied would show exactly the extent to which insured creditors are respectively damaged by a fire, whether it has destroyed the subject of their securities utterly or partially.

How the pursuers on the one side, and the Glasgow Provident Association and Thomas Wiseman & Co. on the other, if indeed there are only two sides, may stand with regard to their interest in the burned premises, and so with regard to the damage done to them respectively by the fire, we have absolutely no means of judging, if indeed we could judge of the matter without having them before us, which we clearly cannot. There is not a statement on record bearing on the subject, and no evidence has been exhibited. But it is enough that the parties interested are not here. If they can agree extrajudicially, the insurers can have no objection to pay accordingly. But if not, the

insurers who fulfil their obligation by payment are entitled to insist that the question which (if they cannot agree) must exist among the insured shall be decided among them in a case to which they are all parties, the insurers having just as little concern with how it is decided as with how they may settle it amicably, and being necessarily ignorant of the facts on which it depends, and with no right to judge of it, or duty to form an opinion upon it, and so no call upon them to inquire into the facts or ascertain the law applicable to them.

I have read with some interest the note which the Lord Ordinary has appended to his interlocutor, and I must own with some surprise. His Lordship deals with it as a question of proprietary interest and obligation to contribute, which, as I have already pointed out, can only be a question among those who are liable to pay—the insurance offices. He says—“Under the defenders’ contention the pursuers would not recover the full amount of their claim, because their view involves the division of the loss into seven shares, of which the pursuers would only recover four.” That, I humbly think, exhibits a manifest misunderstanding of the case. There was no such contention by the defenders. Nothing of the kind. The defenders do not say that the true creditors who were insured by the three policies not before us would recover a shilling, or that the pursuers of the present action would not be able to sue the whole and recover all. It is a total misapprehension of the argument to say that according to the defenders’ contention the pursuers could not recover the full amount of their claim because their view involves the division of the loss into seven shares. It involves no division of loss. It merely involves that the parties interested should be before the Court, and that if they are not agreed upon it, it shall be determined which of them are the sufferers by the fire—it may be one, two, or three, or the whole. He goes on—“The divisor to be applied to the sum assured by the Northern Company (if the contract is a fair one) must be the *ratio* of the aggregate liability of the contributories to the actual loss.” What that means puzzles me I must confess. “The defenders’ proposal is to increase the division by adding to it the liability of persons who are not contributories.” There is no question about a division—a large or a small one. “It is, I think,” his Lordship continues, “a good reason for rejecting their construction that it would enable insurance companies to evade the fulfilment of their obligations.” How? They admit liability to pay the whole amount of damage done by the fire, and it is conceded that their liability cannot be possibly larger than that. “Another reason for rejecting it is, that under it the right of the assured would be liable to be diminished by the subsequent acts of parties not under their control.” Is there any significance in the word “subsequent?” “Prior” is just as good. We do not know the dates of the policies. Some of them are prior to those which are sued on here. But the question of their rights—that is to say, the extent to which they have respectively suffered damage by the fire—cannot depend on the dates of the policies. His Lordship proceeds—“In the present case, for example, it is said that the second bondholder by effecting his insurances

has diminished the claim of the first bondholder to a proportionate extent." I never heard that contended. But be that as it may, do we know who is the first bondholder, or who is the second? We have seen no bonds. We have not before us the parties who were interested in that question. I repeat there is not a statement on the record as to which bond is first and which is second—not one. The creditors in the bonds said to be postponed, who are the insurers along with the owners of the premises in the three policies which are not here, may be able to show that they are the first bondholders for anything I can tell, and that the bonds of the pursuers of the present action are said to be first in competition I think not worth to consider at all. The insurance offices are not interested in that question. It is a question among the creditors *inter se*, but they are not here to contend among themselves, and we have no statement of fact upon this record which would enable us to decide or give an opinion on the question if they were here. A third reason, the Lord Ordinary says, "against the defenders' contention is, that in the case of a total loss it leads to this result, that the indemnity is to be shared between the first and second bondholders in proportion to the amount of their insurances." There is no such contention as that here, but the Lord Ordinary's note goes on in that view, and I must therefore conclude that the Lord Ordinary has proceeded upon a misconception of the case of the defenders, against whom he has decided.

Since I wrote the first part of my opinion I have added a *precis* to it, which, with your Lordships' permission, I will take the liberty of reading, as it brings within a pretty narrow compass the view of the case which occurs to my mind, and on which my judgment is founded. We have here seven offices and seven policies. We shall consider the question with greater simplicity, and therefore more satisfactorily, by taking the number of offices as two instead of seven. I venture, then, to put this case. The proprietor of a factory worth £10,000 insures against fire with one office—say the North British—by two policies of the same date (or of different dates), each for £5000, the one in name of A (an alleged creditor) and himself, but the insurance money being payable to A *primo loco*, and the other in name of B (an alleged creditor) and himself, but the insurance money being payable *primo loco* to B. A fire occurs whereby damage is done to the extent of £5000. Is the insurance office bound to pay more than £5000 in all? If not, who is entitled to the money? It can hardly, I think, depend on the accident whether A or B sues first, or which policy is prior in date. But if not, there must be some other principle on which the question depends. What is it? The parties interested in the question are the proprietor, A, and B, and if they are agreed upon it, the insurance office cannot possibly have any interest in it. If not, how can the question be decided with safety to the interest of the office (which is only that they shall pay to the party or parties entitled) without having them all in Court?

Again, suppose that the policies are with different offices—say one with the North British and the other with the Northern—will this circumstance affect either the amount payable in all in respect of the damage done by the fire, or the question who is entitled to receive it? If so,

to what extent, and on what legal principle, will either question be affected?

1. It seems to me quite impossible that more should be got by fire insurance, however numerous the policies and offices and parties, than reinstatement, or failing that, the full amount in money of the damage by fire, whether the destruction be total or partial.

2. If this be sound, it follows that it is impossible to do more for secured creditors, or for such creditors to do more for themselves by means of fire insurance, than to produce reinstatements or the full money's worth of the damage done by the fire. If the money is sufficient to pay them all there will of course be no question; but if not, who is to be the recipient, or among whom and how is it to be distributed? And if this question cannot be decided by priority of policies or action—which plainly it cannot—the whole parties interested must somehow be brought into Court, that the value, validity, and priority of their securities, in respect of which alone they are respectively sufferers (or not) by the fire may be considered. That they cannot, taken all together, have suffered more by the fire than the whole damage done by it, is, I should think, too clear to be disputed.

I am of opinion, therefore, that the other offices ought to be made parties here before we decide anything whatever, even upon the question of reinstatement—even upon this question of individual independent insurance contracts—the parties to the one policy having no concern with the parties to the other. I do not touch upon the question of reinstatement. But what is to hinder the three offices who insured by policies which are not here from reinstating the premises? The present pursuers could not interfere upon the doctrine of which we have heard so much, for they are not parties to the policies here, and the holders of the three policies cannot be affected or prejudiced in any way by what is done behind their back—namely, the taking out of the four policies here sued on. The premises might be reinstated under those three policies, and then what would the claim of these pursuers be? In short, we are attempting to make independent insurance contracts of a very simple matter indeed—namely, the owner of premises, who has creditors with securities over them, insuring them against fire at his expense for behoof of himself and his creditors. These are not independent insurances in any sense. They are altogether dependent, very much concerning the parties one with another. And I have probably said enough—or more than enough—to point out that without great risk of injustice they cannot be dealt with in the way proposed.

LORD JUSTICE-CLEEK—This is a case of some novelty in the aspect in which it has been now presented; and in some of the points which have been raised and argued, of very great importance. Lord Young was good enough to allow me to read the opinion he has delivered, but after fully considering it I have been unable to perceive the difficulties which he apprehends. I agree with the opinion of Lord Craighill, and with the views which the Lord Ordinary has expressed. But as my brother Lord Young has explained his views in some detail, it may be right that I should

shortly advert to one or two of the points which he has mentioned.

I think much of the difficulty raised in the case has its origin in not attending accurately to the facts on which alone the action is founded. It is an action raised by the policy-holders under four policies of fire assurance, three of which are in favour of the Scottish Amicable Heritable Securities Investment Association, and the fourth in favour of Mr Robertson. The premises insured were a mill and machinery near Glasgow, the property of Messrs Hay. The pursuers hold bonds over the property, and the policies are all in the same terms, the Messrs Hay being parties to all of them "for their reversionary interest" but not otherwise. The premises and machinery were destroyed by fire, and this action has been raised to recover the amount of the loss from the four companies, and the proprietors, Messrs Hay, are parties to the suit, but only for their reversionary interest.

I may remark in passing that it is a mistake to suppose that this action is raised "with consent" of the proprietor, or that his consent is an element in the case. These bondholders simply sue on their contract with the defenders, and as creditors under the policies; and the Messrs Hay sue only for their reversionary interest, after the claims of the bondholders are satisfied. It is true, although in this matter immaterial, that the proprietor was bound to effect these insurances in the names of the bondholders, and to pay the premiums as they fell due. But this only proves the more distinctly that the bondholders are the direct and primary creditors of the defenders under the policies, and, as far as their interest is concerned, are alone entitled to demand payment or discharge on receiving it.

It is not said in defence that anyone else has a claim against the defenders in respect of these policies, or the pursuers' interest therein. The bondholders are not insured anywhere else; and it is plain enough that there will be no reversion to the proprietor. In point of fact no such claim exists in any quarter; and in these circumstances the Lord Ordinary has followed the only course open to him, and directed an inquiry into the amount of loss sustained.

To the demand made in the summons, which arises directly on the terms of the written contract, the only defence which seems now to be insisted on is that other persons ought to have been made parties to this action; and that these other persons are either other creditors of the Messrs Hay or other companies with whom these other creditors are insured. But as the pursuers have nothing to demand from these other creditors or companies, and are not indebted to them in any way, it is hard to see why they should be impeded in recovering their debt from the defenders by proceedings in which they have and can have no interest.

No doubt as regards the four companies sued in this case the principle of contribution will be brought into play, and quite rightly so. That principle, or rather that rule of practice, depends on the doctrine—one not of law only but of common reason—that a man who insures his interest in property against loss by fire, whether that interest be that of a proprietor or that of a creditor, cannot recover from the insurer a greater amount than he has lost by the contingency in-

sured against. So in the case of double insurances of the same interest with different insurance companies, the assured will not be entitled to recover more than the full amount of the loss which he has suffered. It might, on strict legal principle, have been thought that in such cases the assured might select the debtor from whom that amount should be demanded—with the result, to him, of extinguishing all further claim. But for obvious reasons, both of private right and public policy, in cases of double insurance this rule of practice has been carried somewhat further, and common insurers of the same interest, over the same property, may make their right to rateable contribution available in a question with the common creditor. But the doctrine goes no further, as was very clearly ruled by Sir George Jessel when Master of the Rolls, and by Lord Justice James, in the case of the *North British and Mercantile Company* which was quoted from the bar. It was then emphatically decided that the rule only applied to common insurances of the same interest. It would lead to endless confusion were it otherwise.

I only remark, in conclusion, that there is no special privilege attaching to insurance against fire. It is a contract belonging to a very ordinary class, by which the insurer undertakes, in consideration of the payment of an estimated equivalent beforehand, to make up to the assured any loss he may sustain by the occurrence of an uncertain contingency. It is a direct, not an accessory obligation, like that of a surety, and is fulfilled and terminated by payment of the loss.

LORD RUTHERFURD CLARK concurred in Lord Craighill's opinion.

The Court adhered, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuers—Solicitor-General (Asher, Q. C.)—Pearson. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders—Trayner—Graham Murray. Agents—H. B. & F. J. Dewar, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Sheriff of Caithness.

DUNNETT V. CAMPBELL.

Parent and Child—Aliment of Illegitimate Child—Period for which Father Liable.

Circumstances in which the father of an illegitimate child was held liable for inlying expenses, and also for aliment at the rate of £4 per annum until the child was twelve years old, although no claim was made by the mother until the child was past that age.

This was an action in the Sheriff Court of Caithness at Wick, at the instance of Isabella Dunnett, residing at Murkle, in the parish of Olgig, Caithness, against John Campbell, farmer, Claredon, in the parish of Thurso, Caithness, for payment of aliment for an illegitimate child, of which she alleged the defender was the father, at the rate of