

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 Olgie, 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

£4 per annum from the date of the child's birth, 30th October 1867, until he should attain the age of sixteen or be able to earn his own subsistence, and also for payment of £1, 10s. as inlying charges. The claim was made under deduction of £10 paid to account by the defender on 8th July 1880.

The child was born on 30th October 1867, and the pursuer averred that he had been all along in a weak state of health, unable to earn his own maintenance, and that he had been and still was supported by the pursuer. The defender admitted the paternity, but made these averments in defence, viz.—After the birth of the child the pursuer agreed not to demand aliment from the defender until he should be able to pay her, as he was then a farm-labourer, and in poor circumstances. When the child reached the age of seven the defender offered to take him, and made a demand to this effect. The pursuer, however, refused to give him up, still repeating that she would not claim aliment from the pursuer until he should be able to pay her. In 1878 the defender offered the pursuer the aliment for which he was liable, but the pursuer refused to accept it, stating that as the defender had enough to do with his money at that time she would not insist upon payment, but would give him notice when she required it. Early in 1880 the pursuer through a law-agent made a demand for the aliment of the child, and the defender subsequently offered £30, payable in three equal instalments during the years 1880, 1881, and 1882, for a settlement of her claim. The pursuer accepted this offer in full compromise, settlement, and discharge of her whole claims against the defender in respect of the child, and the defender paid to her, also through her law-agent, the first instalment of £10 in or about the month of July 1880. Shortly after March 1881 the pursuer made a demand through another law-agent for a larger amount of aliment, ignoring the agreement before mentioned. The defender offered to carry through the arrangement, but the pursuer would not accept payment under the same.

The proof, which was taken by the Sheriff-Substitute, was to this effect—Nothing was said as to aliment until the 27th December 1869, when the defender called on the pursuer. On that occasion the pursuer's father wrote out the following line in duplicate, the pursuer and defender signing the same—“Isabella Dunnnett is agreeable to take from John Campbell, Claredon, any sum of money that he can give in support of his child from this date.” With regard to this interview the defender deponed—“After birth of child had talk about child. I said I had no money. They told me they wanted no money from me, and would wait till I could pay, and that they would not pursue me. 14 [*i.e.*, the writing above quoted] was written by pursuer's father, and is signed by me. Nothing was paid then.” In 1878 the defender again called on pursuer. With regard to this visit he deponed—“Before entering on my farm I got money and cheque from my father to settle the aliment in full. I went to her father's house, and saw pursuer and her father and mother. They refused to take the money, saying that as I was entering on a farm they would take nothing from me then, and would not pursue me. Her father said he would give me a receipt for what money I gave. I wanted them to name the sum

they wanted. They would not name any, and refused money. I paid nothing. They said they would give me notice when they wanted money.” He further deponed that before this last interview he had offered to the pursuer, her father, and mother, to take the child, but they refused to give it. The defender's father also stated that he had offered to take the child. These statements were denied by the pursuer and her father.

A doctor who attended the child in September 1870, deponed as to his health—“Weak, and in critical state for some time. He is not a robust boy. Not able to earn a living by out-of-door labour.” The pursuer stated—“He is not a strong boy. He never worked except for about three months five years ago; then he herded cattle. He was ill for thirteen months after that, about four years ago.”

On 15th January 1880, Mr Keith, the pursuer's agent, wrote to the defender making a claim for aliment. With regard to this the defender deponed—“In 1880 I had a letter from Mr Keith about child. I went to him and tried to settle with him. He recommended me to offer £25 for full settlement, and asked me to call again and he would let me know if pursuer would take it. Called again, and he said she would take no less than £30 paid down. I told my father of all this, and gave him Keith's letter. He called on Keith and told me that he had settled with him for £30 in three instalments, and that he had paid £10 to account. He said Keith was wanting expenses, and that he told Keith if pursuer would not take £30 to return the money. Heard no more from Keith, and thought the matter settled.”

The pursuer deponed—“In beginning of 1880 I called on my agent Mr Keith. Defender had paid me nothing up to that time. I wanted proceedings taken against defender. My agent told me when I called a second time that defender's father had offered to pay me £30 in instalments. I did not agree to that, but said to my agent that I would take £30 in cash down, and the expenses. Called on my agent again, and got payment of £10 from him, and I gave him a receipt for it.”

On 24th May 1883 the Sheriff-Substitute (SPITTAL) pronounced this interlocutor—“Having considered the process and heard parties' procurators, Finds (1) that in October 1867 the pursuer gave birth to an illegitimate male child, of which the defender is admittedly the father; (2) that for several years the defender was not asked to pay, and did not pay, anything to the pursuer for inlying expenses and aliment; (3) that in 1880 the pursuer, through her agent, Mr Keith, made a demand on the defender for aliment, and that after some negotiations an arrangement was made between the defender and his father on the one hand, and Mr Keith, as agent for the pursuer, on the other, whereby the defender was to pay to the pursuer in full of her claims the sum of £30 by three yearly instalments, whereof the first was paid on 7th July 1880; (4) that the remaining instalments are still unpaid: Decerns against the defender for the sum of £20 sterling: Further, in respect that the failure timeously to carry out the said arrangement, and to pay the remaining instalments, is not due to the defender but to the pursuer, finds the defender entitled to expenses, &c.

“*Note.*—This case, in the view I take of the evidence, is a most unfortunate case of litigation. The defender all along admitted the paternity of the pursuer's child. But as the defender was only a labourer on his father's farm, and the families of the pursuer and defender were on friendly terms, the defender was never pressed for payment of aliment, and indeed was encouraged by pursuer and her friends not to pay any aliment so long as he remained dependent on his father. When defender's father put him into a small farm the pursuer seems to have thought that he should then be made to pay, and she accordingly sent word to him to that effect through a law-agent. The pursuer wanted £30, ‘cash down.’ The defender and his father were willing to give the £30 in three yearly instalments, but objected to give expenses in addition. At that time the expenses cannot have been more than a few shillings. The negotiations ended at that time in the defender's father paying £10 to the pursuer's agent as the first instalment, and, as he says, on the footing that if the pursuer could not take the £30 in this way the money was to be returned. The money was not returned, but was paid over to the pursuer by her agent. On this matter I adopt the defender's version of the story, and I therefore think that all that remains due by the defender was the remaining two instalments of the £30. This £30, it may be noticed, is almost exactly equivalent to the inlying expenses and aliment of the child up to the age of seven years. The pursuer now repudiates this agreement, and seeks to have the defender found liable in aliment beyond the seven years, on the ground that the child is weakly and not able to work. On this point, too, I adopt the view stated by the defender. I incline to think (1) that the defender did offer to take the child after it had attained the age of seven, and that his offer was refused; and (2) that there is no sufficient proof of the child's inability to contribute something to its own maintenance. The pursuer, I think, has been ill advised in the matter, and must bear the expense of the litigation.”

On appeal the Sheriff (THOM) adhered.

The pursuer appealed, and argued—There was no proof here of a compromise, and the pursuer was therefore entitled to her legal rights—*Hardie v. Leith*, October 31, 1878, 6 R. 115; *Shearer v. Robertson*, November 29, 1877, 5 R. 263.

The respondent argued—The agreement had been proved here. The defender's offer to take the child when seven years of age barred any further claim for aliment. There was no proof of the delicacy of the child, and the aliment might not be allowed for a longer period than ordinary—*Corrie v. Adair*, February 24, 1860, 22 D. 897.

At advising—

LORD PRESIDENT—There are numerous peculiarities in this case. One of them is, that the defender alleges there was a special compromise of the claim as set forth by the pursuer. No doubt there is a compromise very definitely stated in the statement of facts for the defender. Now, all of your Lordships, I think, in the course of the argument agreed with me in holding that the agreement and discharge averred upon record have not been proved. Another point which is brought forward by the de-

fender, and which it is desirable should be cleared away is, whether or not he has proved that he had offered to take the child after it was seven years old. I think this, too, is not proved, or at least that there is no satisfactory evidence on the point. These two things being cleared out of the way, we have to fall back upon the general rule in such cases, which is, that the father of an illegitimate child has to contribute one-half to its support till it is the age of seven, or perhaps in some cases till the further age of ten. The reason for that rule is, that during these years it is proper that the child should be left with its mother, and it is not able to do anything for its own support. After that age a great deal depends upon the condition of parties, and if the woman chooses to go on keeping the child without asking for more money, or asking the father to take the child, then if she thinks fit to bring an action for aliment of the child at the end of two or three years she may be held to be debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody and charge of the child, then is the time for him to offer to take it, and if the mother does not offer to keep the child the father will have to support it until it is fourteen, or till it is able to do for itself.

Such are the well-known general rules. This, however, is a very peculiar case. The father contributed nothing from the time when such contributions generally begin—I mean the birth of the child—and nothing was done for two years thereafter. The pursuer understood that the father was not able to contribute anything, and there was therefore no use making a claim, and this understanding at last took shape in the letter of agreement of 27th December 1869. I do not read that agreement as an abandonment of her claim. It would be a very hard and unnatural reading of it to say that because knowing him to be unable to pay she did not press him for money or take any action in the matter, she is thereby to be barred from putting in a claim at an after date. But although the agreement cannot bear the construction put upon it by the defender, it sufficiently explains what followed. At the expiry of the seven years the pursuer still goes on without making any claim, or asking the father to take the child off her hands. The agreement is quite sufficient to account for her course of conduct. I do not think her claim is now barred by her not asking for anything after the seven years, and by her not having got anything before the expiry of that term. I think her claim is not barred by any of these circumstances, and looking to the condition of the child and its health, as spoken to in evidence, I think we must hold that it required to be supported till it reached the age of twelve, or at any rate that it was not able to do anything for itself until that age. Therefore the obligation to contribute remained with the father until that date. It is shown that for thirteen months antecedent to that period the child was in a very critical and bad state of health, and unable to do anything for itself. That date brings us down to about the age of twelve, and it is not to be assumed that a child who was weakly from the beginning, and whom we know to have been in a delicate state of health afterwards, was able to do anything for itself between the ages of seven and ten and a-

half. In the whole circumstances, therefore, I think the father should be held liable to contribute to the age of twelve and no longer.

LORDS DEAS, MURE, and SHAND concurred.

The Court recalled the interlocutor of the Sheriff-Substitute of 24th May 1883 [quoted above], and all subsequent interlocutors; found that in October 1867 the pursuer gave birth to an illegitimate male child of which the defender admitted that he was the father; that the defender had not paid the pursuer the inlying expenses, or any aliment for the said child, with the exception of a sum of £10 paid on 5th July 1880; that the agreement and discharge alleged in the defender's statement was not proved; that it was not proved that the defender at any time offered to take charge of the said child and maintain it himself; that the said child was by reason of weak health unable to do anything for his own subsistence until he was twelve years of age in October 1879; therefore found in law that the defender was liable to the pursuer in £1, 10s. of inlying expenses, and in twelve years' aliment at £4 per annum with interest at 5 per cent. on the said sum of £1, 10s., and on each term's aliment from the time at which it fell due until payment, under deduction of the said £10 paid to account with corresponding interest; decerned against the defender for £49, 10s. with interest as aforesaid to the pursuer, under deduction of £10 as aforesaid with corresponding interest; found the pursuer entitled to expenses in both Courts, &c.

Counsel for Pursuer (Appellant)—M'Lennan.
Agents—Sutherland & Clapperton, W.S.

Counsel for Defender (Respondent)—Campbell
Smith—Lyell. Agents—Horne & Lyell, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

MACKIE v. MACKIE'S TRUSTEES.

Husband and Wife—Antenuptial Marriage-Contract—"Goods in Communion"—General Term followed by Enumeration of Particulars.

By an antenuptial contract of marriage the spouses disposed to the survivor, in liferent only, and to the child or children of the marriage in fee—"All and sundry goods in communion, household furniture, silver plate, books, and bed and table linen, sums of money now belonging or due and addebted, or that may be acquired by the contracting parties by their own industry during the subsistence of the marriage, and which shall belong to them at the dissolution thereof," but excepting from the generality the paraphernalia, watch, jewellery, and clothes of the wife, upon which she might test as she might see proper. The marriage was dissolved by the death of the wife, leaving one son. On the husband's death, a question hav-

ing arisen between the son and his father's trustees as to the meaning of the clause—held that on a sound construction of it, the term "goods in communion" with which it began was not limited by the enumeration of the particulars which followed, and that therefore the son had right to the moveable estate which his mother acquired *stante matrimonio* by donation and succession.

By antenuptial contract of marriage (dated 23d September 1845) between the Rev. Philip Jervis Mackie and Mrs Margaret Glas or Mackie, his spouse, the parties with mutual advice and consent disposed "to and in favour of each other, and the longest liver of them in liferent, for their joint liferent and the survivor's liferent use only, and to the child or children to be procreated of their marriage in fee, according to such proportions as the said Philip Jervis Mackie may appoint by writing under his hand, and failing his doing so, share and share alike, All and sundry goods in communion, household furniture, silver plate, books, and bed and table linen, sums of money now belonging or due and addebted, or that may be acquired by the said contracting parties by their own industry during the subsistence of the marriage, and which shall belong to them at the dissolution thereof, excepting from the said generality the paraphernalia, watch, jewellery, and clothes of the said Margaret Glas, upon which she may testate as she may see proper." The *jus mariti* was excluded from the wife's "interest in the means and estate of the said marriage." The marriage was dissolved by the death of Mrs Mackie; she died on 21st July 1874 intestate, and her husband was decerned executor-dative to her *qua* surviving spouse, and an inventory of her personal estate amounting to £1826, 19s. 9d. was given up by him.

There was one child of the marriage, Andrew Mackie.

In 1877 the Rev. Mr Mackie contracted a second marriage. By antenuptial contract he bound himself, within five years of this marriage, to convey to the Rev. James M'Donald and others, as trustees, £1500, of stocks or other funds of that value, also to insure his life for £500 and assign the policy to them. In the event of his second wife surviving him, and there being no children of this marriage (which events happened), these sums of £1500 and £500 were to be paid to her. In terms of this obligation he conveyed securities to the value of £1506, and assigned a life policy for £500. He died in April 1882, leaving a trust-disposition, dated 7th January 1882, whereby he disposed to and in favour of the Rev. James M'Donald and others, as trustees, his whole means and estate, heritable and moveable, then belonging or which might belong to him at the time of his death, directing them after payment of debts, &c., to hand over to his wife, who survived him, the whole free residue of his estate, to be used by her as her own absolute property. The trustees entered on the management of the deceased's estate.

Andrew Mackie raised this action against these trustees and his father's widow, claiming an account of the means and estate which belonged to his mother at the dissolution of the marriage, in order that the sum due to him at his father's death under the antenuptial contract might appear and be ascertained; also for an account of the