LORD CRAIGHILL—I also think that the defenders are entitled to be assoilzied. My reasons for this opinion are those which have been explained by Lord Young. With him I doubt whether there is a relevant case set forth in the record. I doubt, moreover, whether if this action had been brought long before the present time, so far as anything appears in the record, judgment must not necessarily have been given in favour of the defenders. But it is an overwhelming consideration that the action has not been raised till the lapse of five-and-thirty years after the arrangement between the parties was concluded by the agreement which has been challenged. If such an action had been timeously raised it would necessarily have involved minute inquiry, and now that such a delay has taken place it is impossible to get the information which would then have been available. On the whole matter it is not possible, in my opinion, that the reasons of reduction urged in this case can be sustained.

LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Reclaimers—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Respondents—D.-F. Mackintosh—Graham Murray—W. Campbell. Agents—H. B. & F. J. Dewar, W.S.

Tuesday, July 12.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GLASGOW PROVIDENT INVESTMENT SOCIETY *v.* WESTMINSTER FIRE INSURANCE COMPANY.

Fire Insurance—Rights of Preferable and Postponed Bondholders to Recover in respect of Damage by Fire to Security-Subjects.

Held, by a majority of the whole Court, that a postponed bondholder is entitled under a policy of insurance effected in his name, and that of his debtor in reversion, over the security-subjects, to recover indemnity in respect of fire damage to the subjects, although a prior bondholder similarly insured has in respect of the same fire already recovered, under the policy effected by him over the same subjects, a sum sufficient to reinstate the premises, but which he has not in fact applied towards reinstating the premises.

A policy of insurance over premises consisting of a grain mill, store, and machinery, burdened with first and second bonds, bore that the "G." Investment Society (who were in fact the second bondholders, though the policy did not so bear) and W. H. (the owner of the premises), "jointly and severally in reversion, hereinafter called the Insured," having paid the insurance company "for the insurance of houses and other buildings, rents, goods, and other property from loss or damage by fire, the sum of . . . for insuring against loss or damage by fire, . . . the property described in the margin hereof," the Company "agrees . . . that if the said property or any part thereof shall be destroyed or damaged by fire," the Company should make good the loss to a specified extent. The property described in the margin consisted of fourteen buildings, &c., set forth by detailed description, the sum applicable to each being placed opposite it. A fire took place which did considerable damage to the insured property. The first bondholders, who were secured under other policies with different offices, raised action against their insurers, and recovered under their policies a sum sufficient to reinstate the damaged property, but the money was not applied to reinstatement. Thereafter the postponed bondholders raised action against their insurers, under their policy, for recovery of indemnity in respect of the same fire damage. *Held*, by a majority of the whole Court (*diss.* Lords Mure, Young, Rutherfurd Clark, and Trayner), that the postponed bondholders were entitled so to recover, but (*per* the Lord President, Lords Shand, Adam, Lee, and Kinnear) that having recovered, the postponed bondholders must give the insurers the benefit for their relief of such portion of their claim against the debtors as might have been satisfied by payment of the indemnity.

Opinions (*per* the Lord President, Lords Shand, Adam, Lee, and Kinnear) (1) that it is not a sound doctrine of insurance law that all the insured persons or interests can never recover more in the aggregate from all the insurers than the amount of the damage by fire; and (2) that although the sum of the values of the separate interests in the subjects insured cannot exceed the entire value of the subject, there may nevertheless be cases where different persons having different interests may each insure for the full value of the property, and where, if the property is destroyed by fire, each may recover upon his own policy to the full extent of his insurance.

Opinions (*per* the same Judges) that the right of the insured creditor to recover under his policy depends upon his interest at the time of the loss by the fire, and not upon the chance of his being ultimately satisfied by the operation of collateral contracts with third persons.

Messrs Hay Brothers, proprietors of the Greenhead Grain Mills, situated at 95 and 123 James Street, Bridgeton, Glasgow, consisting of a site with grain-mills built thereon and machinery in the mills, borrowed certain sums of money from (1) The Scottish Amicable Heritable Securities Association (Limited), (2) James Alexander Robertson, (3) The Glasgow Provident Investment Society, and (4) Thomas Wiseman & Company, and in security for the sums they granted bonds and dispositions in security over the mills, &c., which bonds were of priority and preference according to the foregoing order. In order to insure the premises against fire the bondholders, in conjunction with the Messrs Hay, took out the following policies—(1) The Scottish Amicable Heritable Securities Association, as heritable

creditors *primo loco* and Messrs Hay in reversion, took out policies (*a*) with The Northern Assurance Company for £3165, (*b*) with The Edinburgh Fire Insurance Company for £2210, and (*c*) with The West of England Fire and Life Insurance Company for £1610; (2) James Alexander Robertson, as heritable creditor and the Hays in reversion, took out a policy with the Norwich Union Fire Insurance Society for £500; (3) the Glasgow Provident Investment Society of Glasgow, as creditors *primo loco* and the Hays in reversion, took out a policy with the Westminster Fire Insurance Office for £900; (4) Thomas Wiseman & Company, and the Hays in reversion, had policies with (*a*) The City of London Fire Company for £500, and (*b*) The Fire Insurance Association for £500, and applying to machinery there not insured under No. 3. The bonds to the Scottish Amicable Heritable Securities Association and James A. Robertson amounted *in cumulo* to the sum of £9000.

The policy of insurance taken with the Westminster Fire Office by the Glasgow Provident Investment Society and the Hays in reversion was in these terms:—"This policy of insurance witnesseth that the Glasgow Provident Investment Society of Glasgow and William Home Hay, John James Hay, and Robert Hunter Hay, of Glasgow, grain millers, jointly and severally in reversion, hereinafter called the Insured, having paid the Westminster Fire Office, hereinafter called the Society, for the insurance of houses and other buildings, rents, goods, and other property, from loss or damage by fire, the sum of £10, 2s. 3d. for insuring against loss or damage by fire as hereinafter mentioned, the property described in the margin hereof, the Society hereby agrees with the insured (but subject to the conditions at foot, which are to be taken as part of this policy) that if the said property, or any part thereof, shall be destroyed or damaged by fire . . . . the Society will out of its funds and property, in accordance with the rules and regulations of the Society, subject to which this insurance is made and granted, pay or make good all such loss or damage, to an amount not exceeding, in respect of the several matters described in the margin hereof, the sum set opposite thereto respectively, and not exceeding in the whole the sum of £900." The property described in the margin consisted of fourteen buildings, &c., set forth by detailed description, the sum insured applicable to each part being placed opposite each item, and the whole headed, "The following property, being the 'Greenhead Grain Mills,' situate at 95 to 113 James Street, Bridgeton, Glasgow, as afterwards more particularly described, viz.," &c. The 9th of the conditions referred to in the policy was 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 effected by the insured, or by any other person or persons on his behalf, concerning the same property, the Society shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." The policy also bore this clause on the margin after the list of the subjects, "This office in case of loss will only be liable for the payment of rent for such portion of the said term of one year, as the foresaid buildings respectively may be actually untenantable in consequence of fire."

On 1st August 1882 a serious fire occurred in the mills, and the business previously carried on therein was stopped. The Scottish Amicable Heritable Securities Association and James A. Robertson, with consent and concurrence of the Messrs Hay, as the holders of insurances for the sum of £7485, thereafter raised an action against the Insurance Companies for payment of £6500, or such other sum, more or less, as should be found to be the damage occasioned by the fire. The insurance companies defended the action, and pleaded that the three insurance offices interested in the policies taken by the other bondholders should be made parties to the suit, and that they should not be found liable to pay more than their rateable contribution on the total loss of the fire. This plea was repelled by Lord M'Laren in the Outer House and on a reclaiming-note by the Second Division (*vide Scottish Amicable Heritable Security Association, Limited, and Others* v. *The Northern Assurance Company and Others*, Dec. 11, 1883, 11 R. 287).

The defenders in that action offered to reinstate, and in this the other three offices would have joined, but it was held by the majority of the Court that the offer came too late. The defenders then proceeded to arbitration with the pursuers, in order to fix the amount of the damage actually occasioned by the fire. The oversman in the arbitration found that the damage amounted to the sum of £5668, 16s. 8d., and for that sum the pursuers eventually got decree. The pursuers did not apply it towards reinstatement of the premises.

The present action was raised on 4th March 1885 by the Glasgow Provident Investment Society and Messrs Hay against the Westminster Fire Office for declarator that the defenders were bound to indemnify them for the loss sustained by them through the destruction by fire of the premises, machinery, and others known as the Greenhead Grain-Mills, and on which they had effected an insurance with the defenders, and for decree ordaining them to replace the premises, machinery, &c., as they were before the fire, or otherwise to pay the sum of £565. In Cond. 4 they particularised the subjects damaged by the fire, and the amount to which they were respectively insured under the policy, viz.:—

	£	s.	d.
Barley-mill and counting-house .	£190	0	0
One year's rent thereof . .	120	0	0
Steam-boiler-house	80	0	0
One year's rent thereof . . .	10	0	0
Steam-boiler and connections . .	80	0	0
Smith's shop and furnishing store .	30	0	0
One year's rent thereof . . .	5	0	0
Steam-engine and appurtenances .	50	0	0
In all .	£565	0	0

They further averred that £5668, 16s. 8d. was considerably less than the true amount of damage done by the fire to the security-subjects.

The defenders in answer admitted that loss was suffered through the fire on the first two items to an extent exceeding the amounts insured, and explained that no damage whatever was done to the steam-boiler-house; while with regard to the steam-boiler and connections, furnishing store, and steam-engine and appurtenances, the damage did not exceed the sums of £15, £9, 10s., and £20 respectively. They ad-

mitted that the pursuers had suffered loss to the extent of the rent of the smith's shop and furnishing store, insured at £5, which the defenders had paid. In their statement of facts the defenders stated that the premises and machinery in question, particularised by the defenders as injured by the fire, with the exception of the rent of the smith's shop and furnishing store, had been previously insured by the pursuers in the former action, who, as holding bonds and dispositions in security over the premises insured, were preferable creditors to the present pursuers, and had been paid the whole damage done to them by the fire. They further stated—"(Stat. 3) In the event of the defenders paying to the pursuers the sum sued for, the defenders claim right to require from the first pursuers an assignation to the bond and disposition in security, and bond of corroboration, held by them from the second pursuers over the property in question, but postponed to the balance due to them under said bond, after deducting the payment that may be made to them by the defenders under their fire policy; and the defenders, in any event, claim right to require from the second or concurring pursuers an assignation of all right competent to them under the foresaid Westminster policy." "(Stat. 4) The said sum of £5668, 16s. 8d. is less than the sums contained in the bonds of the said Heritable Securities Association and James Alexander Robertson, which amounted to £9000. The amounts allowed to them in respect of the damage to the buildings and machinery, and the loss of the rents insured by the pursuers in the present action, are less than the amounts insured on the same items by said preferable bondholders. In these circumstances the full amount of loss and damage caused by the fire, except the rent of the smith's shop and furnishing store, which has been paid to the pursuers, falls to be paid to creditors preferable to the pursuers; and there being no reversion, the leading pursuers have not, and never had, any insurable interest, and have not been damnified by the occurrence of the fire, except to the extent of £5, above stated."

The pursuers pleaded—"(1) In respect of the contract of insurance founded on, the defenders are liable to make good the loss sustained by the pursuers in the premises. (2) The subjects insured having been damaged by fire to the amount concluded for, the pursuers should have decree, in terms of the conclusions of the summons."

The defenders pleaded—"(2) In circumstances disclosed, the pursuers, having had no insurable interest, and having suffered no damage from the fire (except to the extent of £5 above mentioned), cannot recover any further sums in respect of the policy sued on. (3) In the event of the defenders making payment to the pursuers, or either of them, of the amount sued for, the defenders will be entitled to an assignation, as set forth in article 3 of the defenders' statement, seeing that a larger sum than the total value of the subjects destroyed or damaged by the fire cannot be got by Messrs Hay in respect of the fire, either in payments to their creditors or to themselves."

A proof before answer of the averments of the parties was allowed by the Lord Ordinary (M'Laren).

Against his interlocutor the pursuers reclaimed, but in the Inner House they practically abandoned their reclaiming-note, and the case was remitted to the Lord Ordinary for proof.

At the proof before any witness was examined, a joint minute of admissions was signed by the parties in the following terms:—"Ure, for the pursuers, stated they admitted that the amount found due and paid to The Scottish Amicable Heritable Securities Association, Limited, in their action against The Northern Assurance Company and others, was sufficient for the re-instatement of the subjects destroyed by fire; and Graham Murray, for the defenders, stated they admitted that the present defenders were willing to contribute with the defenders in said action to the expense of re-instating the subjects damaged by the fire, or to contribute towards payment of the loss as the same should be ascertained, provided such contribution was held as full payment by them of all sums due by them in respect of the policy issued by them."

The import of the proof which was led, as to the values of the different items forming the property insured, fully appears in the minutes of debate (as summarised *infra*) and the Judges' opinions.

The oversman prepared a "tabulated statement of sum insured, claimed, and paid, &c., under the various policies over the Greenhead Grain-Mills, Glasgow," of which the following were the items material to the present report:—

Description of Property Insured.	Amount Insured with Seven Companies.	Statement of Loss against Seven Companies.	Amount Insured with Four Companies.	Statement of Claim against Seven Companies.	Statement of Claim against Four Companies.	Valuation by Insur. Companies or by Clinkskill.	Allowance by Oversman.	Claim in present Action.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1. Building of mill	2390 0 0	1724 5 5	2200 0 0	1724 5 5	1724 5 5	1373 12 1	1610 0 0	190 0 0
2. Rent thereof	553 6 8	553 6 8	433 6 8	553 6 8	433 6 8	....	350 0 0	120 0 0
9. Steam-engine and foundations .	350 0 0	10 0 0	300 0 0	10 0 0	300 0 0	....	20 0 0	50 0 0
14. Building of steam-boiler house .	110 0 0	3 11 1	30 0 0	3 11 1	3 11 1	2 0 0	....	80 0 0
15. Rent thereof	10 0 0	10 0 0	....	10 0 0	....	....	....	10 0 0
16. Steam-boiler and connections .	105 0 0	3 0 0	25 0 0	3 0 0	25 0 0	....	15 0 0	80 0 0
17. Building of store adjoining boiler	50 0 0	10 15 5	20 0 0	10 15 5	20 0 0	7 18 6	9 10 0	30 0 0
18. Rent thereof	5 0 0	5 0 0	....	5 0 0	....	....	....	5 0 0
Totals (including omitted items)	9255 0 0	6344 3 5	7485 0 0	6227 8 10	6221 2 11	....	5668 16 8	565 0 0

On 10th November the Lord Ordinary pronounced this interlocutor:—"Finds (*first*) that the pursuers have sustained damage by fire to the extent of £565, being within the limit of the sum in the policy libelled: Finds (*second*) that the pursuers have not been indemnified for the said damage, or re-instated in the subjects insured against the fire, and they do not hold the obligation of any other company or person for such indemnification or re-instatement: Finds (*third*) that the defenders, by the policy of assurance libelled, have undertaken to indemnify

the pursuers against such damage; therefore decerns against the defenders in terms of the conclusion for payment of the said sum of £565 under deduction of the sum of £5 already paid, with interest as concluded for."

"*Opinion.*—The pursuers are creditors in a postponed bond over the mills and machinery of Messrs Hay Brothers, Bridgeton, Glasgow, which were injured by fire on 1st August 1882. This is the second action which has arisen out of this occurrence. The previous action was instituted by the preferable bondholders against three companies, with whom they had effected insurances, and in it they claimed indemnification for the diminished value of their securities resulting from the fire-damage. The case was heard by me, and afterwards by the Second Division of the Court, and we held that the preferable bondholders were entitled to recover the full amount of the fire-damage, the companies not having elected to indemnify by re-instatement under the powers to that effect contained in the policies.

"In that action a plea was stated by the defenders to the effect that the Westminster Fire Office (the present defenders) were bound to make a contribution towards the indemnification of the first bondholders; but this plea was rejected by a majority of the Court, on the plain ground that the insurance policy issued by the Westminster Fire Office was a policy effected by other parties for their own protection, with which the parties to the first action had no concern. We certainly did not say that the Westminster Fire Office was entitled to repudiate their obligation to indemnify the parties to whom their policy was issued, and to allow the loss to fall upon the postponed bondholders after receiving their premiums. I rather think we had in view that in certain eventualities the Westminster Fire Office might be called on to indemnify the parties to whom they were under obligation, and that their obligation under their policy was the limit of the claims which could be preferred against them.

"The postponed bondholders have now brought their action against the Westminster Fire Office, and I am to consider the claim. It is admitted that the subjects have not been, and are not going to be, re-instated. It is also admitted or proved that in their present condition the subjects do not afford to the pursuers the security which was afforded by the margin of value of the completed subjects on which the pursuers lent their money, and against which they insured their interest.

"The sum insured with the Westminster is £900, but the pursuers are not claiming the entire sum, but only £565, being the amount of their insurance on those parts of the subjects which were destroyed by fire. It is proved to my satisfaction that the value of the pursuers' security has in fact been diminished to the extent of £565; and in these circumstances I conceive that the pursuers are entitled to have their claims against the company constituted by decree.

"My chief difficulty in the case has been to find a stateable argument against the conclusions of the summons; and although I have received valuable assistance from counsel on both sides, I think they have to some extent laboured under the same difficulty. I understand, however, that it is maintained by the defenders that they ought not to be compelled to pay anything to their assured, because it is said sums equal in amount to the fire-damage have been paid by other insurance companies to parties other than the pursuers. It is not said the pursuers have derived any benefit from such payments, and it is the fact that the indemnity paid to the prior bondholders was applied by them towards the reduction of the debt and interest due to them, and not to the re-instatement of the property. I fail to see how the fact of such payments being made is or can be an answer to the present claim.

"Then it is said that it is a universal proposition in the law of insurance that no more can be recovered in the aggregate by the different persons or interests assured than the amount of the fire damage. This is the defenders' proposition, but it is not shown that it has been received into our law, and I see strong objections to its reception.

"There is a rule of law of a more limited nature, that an assured person can in no case recover more than an indemnity for his individual loss. The rule is founded on obvious considerations of public utility and safety, and is but another expression for the proposition that the assured must have an insurable interest to the extent of the sum which he recovers. But the conclusion drawn from this expression—namely, that the aggregate of all the sums which may be recovered under policies insuring different interests cannot exceed the value of the subjects—is, I think, an erroneous generalisation, and one which if acted on must lead to very inequitable results.

"The proposition only holds true when the indemnity is given by reinstating, because this is specific performance, and is an indivisible act, the benefit of which accrues to every holder of an interest in the subjects whether he is insured against fire or not. But where compensation is made in money by the different companies for the benefit of the interests which they have respectively insured there is no indirect benefit to anyone. Each of the assured creditors or owners settles his claim with his underwriter on such terms as may be agreed on, and nothing is more likely than that the sum of all the separate payments under such agreements should exceed the amount of the fire damage. This is in fact a very disadvantageous mode of settlement for the insurance companies, but it is not in my view inequitable or unfair, because it is always to be remembered that each of the companies receives in premiums the full equivalent for risks which they respectively undertake, and the actuarial value of each insurance is in no way altered by the circumstance that other insurances have been effected for different interests. The more economical arrangement for the companies obviously is, that they should reinstate, and this they can always do by agreement amongst themselves, because the election to reinstate lies with the companies. If the insurance companies do not reinstate, each pecuniary claim by a bondholder or interested party must, in my opinion, be settled just as if no other person had insured his interest in these subjects. This, I conceive, to be the principle of the decision in the previous action—*Scottish Amicable* v. *Northern Assurance Company*, 11 R. 287, and I see no difference in

principle between the two cases.

"My view of the present case may be summed up in this proposition—An insurance against fire by a postponed bondholder is virtually an insurance against the risk, that in case of fire occurring, prior insurances may not be available for his benefit, or if available *pro tanto*, may not be sufficient to protect him against loss. I have assumed as a condition of the question, that at the date of the fire the pursuers had an insurable interest in the property to the extent of £900—in other words, that the property if exposed for sale would have produced a sum sufficient to meet prior incumbrances as well as the £900. Mr Pearson for the pursuers stated that he did not propose to lead evidence on the question of the value of the property, because insurable interest was to be presumed. In this contention I think he was well founded. The Dean of Faculty for the defenders adduced no evidence in disproof of the assumed value of the property, and for the purposes of the present case I have held that the property was a good security for the sum of £900, and that to the extent of £565 the pursuers have lost the benefit of their security through fire. The sum of £5 having been paid by the defenders the decree will be for £560."

The defenders reclaimed to their Lordships of the Second Division. On 16th January 1886 the Lords, having heard parties in respect of the importance of the question submitted for decision, appointed them to prepare minutes of debate thereon for the opinion of the whole Court on the said question.

The parties by minute of admissions agreed to admit—"1. That immediately before the date of the fire mentioned on record, viz., 1st August 1882, the value of the site, buildings, and machinery of the Greenhead Grain Mills was sufficient to cover not only the prior bonds but also the pursuers' bond. 2. That the value of the site of the said Mills, and the salvage thereon of buildings and machinery after the fire, did not exceed, according to the pursuers' valuators, £3500, and according to the defenders' valuators £6900; and was not sufficient to meet the bonds prior to that of the pursuers, the prior bonds amounting to over £8600. 3. That the insurable subjects, viz., the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers. 4. That of the items insured by the pursuers, and in respect of which they claim—(*a*) Building of mill, item 1, building of boiler-house, item 14, and building of store adjoining boiler, item 17, of tabulated statement, joint appendix A, were fully insured by the prior bondholders; and if the full sums insured by the said prior bondholders had been recovered they would have been sufficient to reinstate said subjects in the event of a total loss. (*b*) Steam-engine and foundations, item 9, and steam-boiler and connections, item 16, of said statement, were not fully insured by prior bondholders; and (*c*) Rent of steam-boiler-house, item 15, and rent of store, item 18, of said statement, were not insured at all by the prior bondholders. (*d*) For values of rents reference is made to the evidence."

The following were the arguments stated in the minutes of debate:—

For the reclaimers—The questions raised by his Lordship's judgment seemed to be two—(1) Whether any sum was due to the pursuers? (2) If any, then what sum? The first question depended upon the affirmance or the reverse of this general proposition which the defenders submitted to be true, viz., that under a contract of fire insurance of subjects specifically described, no more money could in the aggregate, however many policies of insurance there might be, be recovered than a sum representing the total damage done by a fire. The question had not been concluded by direct authority either in Scotland or in England, but the defenders' proposition was the opinion of Lord Young in the former case. The Lord Ordinary stated that he saw no distinction between the former and the present case, the principle in each being in his opinion that if the insurance companies did not reinstate each pecuniary claim by a bondholder must be settled just as if no other person had insured his interest in the subjects. If that was the former decision it was erroneous. The question, however, really raised in the former case was one of procedure. The Court decided that, upon the case as put before them, there was no necessity for calling either the postponed bondholders or the three companies, but that was only on the admission that the sums contained in the prior bonds were greater in amount than the whole sum claimed in respect of the loss. The present case must be decided just as if the Court had taken the opposite view and called all parties in the first action, it being no part of the defenders' case that the sums recovered in the former action were wrongly paid to the prior bondholders, they having been indeed willing to make their contribution those sums. The Lord Ordinary was of opinion that the doctrine as to the aggregate of different interests on which the defenders founded here held good where the indemnity was given by way of reinstatement, but not otherwise. Surely it was a strange result that the rights and liabilities of parties under the two modes of giving indemnity, of which reinstatement was one and money payment the other, should be entirely different. The Lord Ordinary admitted that there was a "rule of law that an assured person could in no case recover more than the indemnity for his individual loss." But by the Lord Ordinary's decree the Messrs Hay, who were parties to all the policies, were enabled by destruction of premises worth £5668, 16s. 8d. to pay off £6228 of debt—a new way of paying old debts. The pursuers would not have received, as the Lord Ordinary contended, the equivalent for the risks in premiums, those charged being those for an ordinary risk of the class, on the understanding that no more could be recovered than the actual fire damage assessed in the ordinary way as in the former action. Suppose buildings worth £1000 to be destroyed by fire. It might be conceived that if ten insurances were effected in the names of ten creditors upon separate bonds for £1000, each would be entitled to recover the £1000 of loss in respect of the same fire. It was no answer to such a case to say, that in that event it would be possible for the insurance companies to allege and prove that the bondholders had "no insurable interest," for if that could be defined as the Lord Ordinary defined it, "that the property if exposed to sale would have produced a sum sufficient to meet the whole incumbrances," it was only necessary to suppose that

the site was worth £10,000 to make each bondholder have an "insurable interest." The Lord Ordinary was wrong in holding that "insurable interest" was to be presumed—*vide* Arnould on Marine Insurance (5th ed.) p. 125; *Cousins* v. *Nantes*, May 25, 1811, 3 Taunton 513; *Lucena* v. *Craufurd*, 1806, 2 Bosanquet & Puller, New Reports, p. 269. The *onus probandi* lay on the pursuers and they had failed to discharge it. As a matter of fact there was no margin of value to be insured in the case of the mill, boiler-house, and store (*vide* items 1, 14, and 17 of tabulated statement), for it was admitted by their own witnesses that the value of these buildings was less than the sums for which they were insured by the preferable bondholders. The witness Livingstone stated that the amount required for the restoration of the mill and counting-house (one building, item 1) was £1373, 12s. 1d., and of the store £7, 18s. 6d., and that the value of the remains for restoration was £309, 11s. 11d. and £8, 10s. 11d. respectively. Thomson and George Laird concurred with Livingstone, and Taylor valued the boiler-house at £20. The total values were therefore—mill, &c., £1683, 4s.; boiler-house, £20; and store, £16, 9s. 5d.; and the sums insured by the preferable bondholders £2200, £30, and £20. The defenders believed that there was no margin on the other buildings either. The question must be decided on the terms of the contract. In it the property described in the margin consisted of the various buildings, &c., insured set forth by actual description and with the sum insured applicable to each put opposite to each item. These terms clearly constituted a separate insurance of each item independent of the others, and were not intended merely as a description of the component parts of an *unum quid.* Were the bondholders entitled to treat the contract as one with themselves alone, and to shake themselves free entirely of the interests of the proprietor in whose name also the insurance was taken? The Hays could not themselves have recovered twice over in respect of the same fire injury—the same subjects—simply because they had effected insurances under more than one policy. The interests of the bondholders were necessarily derivative from those of the Hays. The owners' interest in the property after granting the first bonds was in the reversion only, and the reversion was in reality the only subject conveyed in security to the postponed bondholders. What was insured as regarded any particular item by the second set of policies was just the margin of value existing upon that particular item remaining uninsured under the first set of policies. The way in which the items into which the whole sums insured by the postponed policy were apportioned was directed by a consideration of what particular portion of the buildings, &c., were not already insured under the preferable policies or were supposed to be not already insured up to their full value. Take, *e.g.*, the building of the mill (tabulated statement, item 1). The amount insured with the first four companies upon that item was £2200. The amount insured by the policy founded on in the present action was £190. This £190, the defenders submitted, was merely to meet the contingency which was possible—viz., that the depredation by a fire upon the building of the mill should attain to a sum exceeding £2200. As a matter of fact the allowance by the oversman on this head was £1610, and his allowances on all the items insured under the pursuers' policy were less than the sums for which they were insured under the preferable policies. The sums so allowed were, by the admission already quoted of the pursuers, sufficient to replace the loss. The postponed policy accordingly never came into play, except in the case of the store rent, which was not insured under the preferable policies, but at the same time it might have done so if the subjects had been of sufficient value and the loss of sufficient extent, and this quite irrespective of whether the loss or expense of reinstatement exceeded the first bondholders' debt. The contingency thus provided for, and the defenders' offer to contribute to the damage along with the other companies in terms of the policies, was an answer to any argument based upon the supposed inequity of the insurance company receiving the premiums in respect of this postponed policy. If the second insurance were to be regarded as effected in the interests of the postponed bondholders apart from the owners, then it was an insurance against a contingency which had not occurred, and nothing was recoverable. If it was regarded as practically a further insurance by the owners, then only a contribution was recoverable by the owner, or rather in this case by the other companies which had already paid the amount of the loss. The next question was, What was insured by this policy? In reality the pursuers' contention amounted to this, viz., that what was insured was not the buildings but the debt. But that was not the contract in the policy, nor one which by the constitution of the Society the defenders could enter into. What was insured was "the property described in the margin hereof." The Lord Ordinary had decided in favour of the pursuers' contention in the former case that the word "property" was equivalent to proprietary interest, but the word in that case occurred not in the body of the policy with the appendage of a material description, but only in the contribution clause. The Court proceeded on the case of *The North British and Mercantile Insurance Company and London Insurance Company* v. *The London, Liverpool, and Globe Insurance Company*, April 11, 1877, L.R., 5 Ch. Div. 569; but the opinions on the meaning of the word "property" were *obiter*, and the judgment of Lord Justice-Mellish, pp. 583 and 584, did not bear out the result reached by the Lord Ordinary. The key to the opinion of the Lord Justice lay in the expression, "that the same property cannot in value belong to two people at the same time." That was the contention of the defenders here—*vide* also *Nicol & Company* v. *The Scottish Union and National Insurance Company*, December 18, 1885 (not reported in any of the regular reports, but printed at the end of the defenders' minute of debate), and *Menzies* v. *North British Insurance Company*, February 13, 1847, 9 D. 694; Arnould on Marine Insurance (5th ed.) pp. 117 and 118; Bunyon on Fire Insurance, pp. 130, 131, and 133. If the principle on which these cases were decided was correct, the decision in the action by the preferable bondholders was wrong, and all the offices insuring should have been admitted to

contribute to the loss and the insured ranked on the sum contributed according to their preferences and policies as contended for by Lord Young. (2) On the assumption that above argument was ill-founded, what sum were the pursuers entitled to recover? Even in this view the Lord Ordinary's interlocutor fell to be altered. With regard to the last item but one, viz., £5, there was no controversy, and payment of it was made as acknowledged by the pursuers. With regard to the first item, viz., £190, in respect of the barley-mill and counting-house, it was admitted that damage to an extent greater than that sum was done by the fire, and consequently if the defenders were wrong in their general argument and could not in any way found upon the payments already made by the other offices, they had no defence upon this item of £190. The same result followed as regards the next item of £120 for the rent of the said mill, under this qualification, that as the policy specially bears the following clause, "This office in case of loss, will only be liable for the payment of rent for such portion of the said term of twelve months as the foresaid building may be actually untenantable in consequence of fire," and as the oversman in the arbitration fixed eight months as the period which might fairly be taken to be the time necessary for restoring the mill, and as the pursuers have led no contrary evidence, the said sum of £120 would fall to be reduced by one-third, *i.e.*, to the sum of £80. The next item was that of the steam-boiler-house, in respect of which the pursuers claimed £80, and £10 for the rent, being the full sums insured. But the steam-boiler-house was not injured by the fire at all. The pursuers had admitted (minute of admissions) that the amount found due by the oversman, and paid in the former action, was sufficient for the reinstatement of the subjects destroyed by fire. But the oversman allowed nothing in respect of the building of the steam-boiler-house (*vide* tabulated statement, item 14,) and he could not have allowed anything for the rent if he had been called on to decide in regard to it (which he was not, as it was not insured under the preferable policies), for the building was evidently not untenantable in consequence of fire in terms of the rent clause above quoted. In the same way the item steam-boiler and connections, for which the pursuers claim the sum insured of £80, was according to the oversman only injured to the extent of £15, and the engine for which they claimed £50 (item 9), was only injured to the extent of £20, while the store for which they claimed £30 was injured to the extent of £9, 10s. (item 17). The pursuers did not attempt to contradict these statements, as in the face of their own admission they could scarcely do so, but in fact affirmed them by their witnesses, *e.g.*, John Turnbull, who said—"There is no reason to believe that the boiler was injured by the fire." "The boiler suffered nothing by the fire, it was merely thrown out of use;" and John Normand said there was no fire near the boiler. The way in which the pursuers sought to prove their case upon this point is this—they estimated the difference of value between the various items as part of a going concern, and their breakup value for removal as old iron or old material, and the difference in value being more than the sum insured, they contended they were entitled to recover the whole sum. *E.g.*, J. B. A. Mackinnell said—"The steam-boiler and connections for removal are worth £150. The engine and appurtenances I put at £100 for removal. Assuming the mill to be restored, the engine and boiler might be worth near £800." The case of *Johnston* v. *The West of Scotland Insurance Company*, 7 S. 53, quoted by the pursuers, had no application whatever to this line of reasoning. The damage there recovered was truly incidental damages necessarily resulting from the fire or the operations undertaken to extinguish it. The defenders submitted that this method of proof and the reasoning on which it proceeded, which has been sustained by the Lord Ordinary, was entirely fallacious. It allowed the pursuers to recover in respect of each item, not the loss which had occurred by reason of fire damage to that item, but the loss which had occurred through the effect of fire damage to other items, and subjects of great value, as, for example, the engine and boiler were treated as total losses although they were at most very slightly injured. The effect of this was *first*, entirely to destroy the effect of the specification of the items contained in the contract, and to turn the insurance into a catholic instead of a specificated insurance. In the *second* place, it entirely reversed the principles upon which the loss was made good, and it was here assumed, rightly made good in the prior case, and allowed the postponed bondholders' loss to be assessed in a different way from that of the preferable bondholders and owners, with the effect of enabling them to recover on the same items greater sums than the preferable bondholders and owners could. In other words, the prior bondholder was paid in respect of the damage done to what the fire has consumed. The postponed bondholder was paid in respect of the consequential damage done to what the fire had not consumed but left untouched. It was quite evident that if the element of a going concern was to be taken into view, then in the case of a manufactory containing two buildings, A and B, the operations of which were dependent each upon the other, the one of which, A, was insured, while B was uninsured, it would be possible to recover in respect of A the damage suffered in consequence of a fire which consumed B. It was no doubt true that if the mill in this case had not been burnt, the boiler and engine would have been useful as parts of a going concern, but it was presumed that even upon the pursuers' own contention they could not go beyond the terms of their own policy to ask reinstatement of the machinery, which, as will be seen by looking at items 3 and 4 on the table, though insured in former policies, was not insured in the pursuers' policy at all, and the boiler and engine would be just as useless without machinery to drive as they would be without a mill in which that machinery could be placed. The defenders therefore maintained that in any view the pursuers could not recover more than the sums allowed by the oversman in the last action, which by the minute of admissions, they had admitted to be sufficient for the reinstatement of the property.

The pursuers replied—Indemnity was sought as it was undertaken under the contract to be

given either by reinstatement or by payment of loss. If the latter alternative was selected by the defenders, the sum claimed was £565 as the measure of the extent to which their security over the property, described and assured by the policy, had been impaired by the fire. It was not disputed that they were as creditors entitled to insure, nor that they had an insurable interest, *i.e.*, that there was a sufficient margin of value to meet their bonds after the prior creditors were paid. The defenders now seemed to suggest that they intended to raise upon record the question whether or not at the date of the fire there was a margin of value, and hence an insurable interest; and they maintained that the pursuers could not prove that the insured subjects, apart from the ground, would leave any reversion after satisfying the preferable bonds, but no such defence was raised on record, nor could it easily be proved. The defence virtually amounted to a denial that the pursuers had suffered any loss by the fire. It was said that the fire had not extended its ravages beyond the limits of the property dedicated to meet the prior bondholders' claim, and never touched the margin of value on which the pursuers relied for payment of their debt, and that thus the Hays' interest being limited after the prior bonds were granted to the reversion merely, this reversion was in reality the only right conveyed in security to the postponed bondholders. What therefore was insured by them in the case of any particular item was simply the margin of value uncovered by prior insurance. Even assuming this to be sound, the defence laboured under the fallacy of assuming that what was insured was not an *unum quid*—a mill and its machinery—but a mass of fungibles from which, if a certain portion were taken away, the value of what remained was unimpaired. The defenders' argument was based on the assumption that the damage by fire had merely affected the "first end" of the value, so to speak, that portion of the value on which the prior bondholders relied, and which was held in security by them, and that the margin, on the security of which the pursuers lent, was left unaffected. The fire damage had unquestionably impaired the sufficiency of their security, and each item having been, as a whole, affected, it was vain to draw artificial division lines marking off the particular portion of each item dedicated to prior and postponed bondholders respectively. To illustrate this argument, let it be assumed that the property injured were a set of valuable books. If one was destroyed, the whole set was spoiled—a few shillings might suffice to replace the volume destroyed. But if the volume were not replaced—if the set were allowed to remain imperfect—if the few shillings were not expended—then it could not be maintained that the difference in value between the complete and the incomplete set was measured by the sum which would purchase a new volume to replace that damaged. Wanting the volume, the set might be—in some cases that might be figured—almost worthless; with the volume, on the other hand, and so complete, it might be of great value. And so, in the present case, the extent to which the security over the mill was impaired by the fire is not represented by the sum which would, if expended on rebuilding, suffice to reinstate it. One witness, Mr James Thomson, valued the old building material at £318, 2s. 10d., on the footing that there was to be restoration. But if there was to be no restoration, it was not worth, he said, more than £50. Another witness, Mr Robert Taylor, said that he valued the building material on the ground at £250, on the footing that the building was to be restored, and at £60 on the footing that it was not to be restored. Another witness, Mr Laird, valued the building material as it stood at only £40. So with regard to the engine. Mr Norman, an engineer of great experience, valued it, as part of a going concern, at £750, but if restoration did not take place, the engine as it stood would not in his opinion realise £30. And in like manner he thought that £320 and £50 or £60 would accurately express the value of the boiler, for restoration and as it stood respectively. So was it with all the other component parts of the mill as insured by the policy. The sum which, if expended on restoration, would suffice to reinstate fell very far short of expressing the difference in value of the property insured before and after the fire. If the defence were sound, then an insurance company with which a postponed bondholder had effected a policy could never be called upon to pay until a fire had occurred so extensive that to restore the property against its effects would require a larger sum than the amount of the prior bondholder's debts. The postponed bondholder would even then only be entitled to recover the amount by which the expense of reinstatement exceeded the first bondholder's debt. And yet it was apparent that such a sum would be utterly inadequate to indemnify him for the loss. It was said that if the pursuers' claim was sustained they as postponed bondholders would fare much better than the prior bondholders. This might be so, and was not inequitable. If the prior bondholder preferred to apply the sum of money, which was confessedly sufficient to put him in as favourable a position as he was the day before the fire, in part-payment of the debt due to him rather than in reinstatement of the security-subjects, that was a matter entirely in his own hands. The defenders perilled their case on the broad argument that in no case and under no condition could the insurance money recoverable in consequence of a fire "exceed the amount requisite to completely reinstate the damaged property." There was no authority for this either in Scots or in the English law. It was only true when the money recovered was actually expended in reinstatement. Neither the passage in Arnould on Marine Insurance nor the English case printed by the defenders were in point. The defenders pleaded that all the policies taken out by all the insurers over the mills were in precisely the same position as if all were in name of the Hays, the proprietors, and of them alone. But the terms of the policies in this and the former case and the decision in it precluded this. In that case the Court held that this identity of interest did not exist—*vide* opinions of Lord Craighill, p. 294, and the Lord Justice-Clerk, p. 302. The proposition that the amount necessary to reinstate was in all circumstances the measure of the loss, violated the most elementary principles of the law of contract, and would, if received, work out most inequitable results. Thus, suppose a house worth £2000 was bonded to the extent of £1500, there being three creditors, each with a

bond for £500, ranking according to the dates of infeftment. Each creditor insures for £500, and a fire occurred which did damage to the extent of £750. The first bondholder claimed under his policy the full sum insured, £500; the second did the same, and so also the third. The result was that £1500 of insurance money was recovered in respect of a fire, the effects of which could be remedied by an expenditure of £750. If the defenders' contention were sound, then the first bondholder would recover £500, the second only £250, and the third would get nothing, the amount necessary to reinstate having been paid to others having rights preferable to his. And so a payment by a company, with which they had no contract of any kind, to a person with whom they had equally no contract—a payment from which their assured derived no benefit whatever—would enable the insurers of the second and third bondholders to evade their obligations, however long they might have pocketed their premiums. The Court avoided this in the former case by holding that each bondholder's policy was separate, and not to be affected in any way by other insurances effected to protect other interests. It was not unfair, because the companies might reinstate instead if they pleased in order to avoid any disadvantage. The limit to the amount which might be recovered from insurers was set by the application of the rule that the assured must have an insurable interest at least to the extent of the sum he sought to recover. If the bondholder—as it was not disputed here—had a margin of security at the date of the fire, then the companies insuring would not be free from the obligation to indemnity. These considerations were sufficient to dispose of the defenders' most prominent argument, that if the pursuers' claim here were sustained the result would be that the Hays would by the destruction of premises which, it was conceded, were worth £5668, 16s. 8d., become relieved of debt to the amount of £6228, 16s. 8d. It was not conceded that the premises were worth only that sum, and it was not the fact that they were. That was merely the sum which in the opinion of a valuator would if expended in repairs suffice to reinstate the premises after the fire. The fallacy in the defenders' proposition here lay in the ambiguous use of the word "worth." If it were meant to signify the value of the property as it stood intact prior to the fire, then the answer was plain. The Hays would not be so enabled to pay their debts; for then, to the extent of the difference between the two sums mentioned there would be a want of insurable interest, and thus the saving principle referred to in the Lord Ordinary's judgment would be called into operation. If, on the other hand, the defenders meant that a fire sufficient to destroy premises to such an extent that an expenditure of £5668 would restore them, might give rise to claims under insurance policies amounting to £6228, then the pursuers freely conceded the proposition and pointed to the option given of reinstatment as sufficient to remove from it all inequitableness. But, said the defenders, the case might be put much higher, and they went on to figure a building worth £1000 with ten bonds each for that sum over it, and each creditor claiming in case of fire the full amount of his bond under his insurance policy. The obvious answer that "no insurable interest" might be pleaded against nine of the ten creditors, might, the defenders said, be got over by assuming the site to be worth £10,000. What then? Was each bondholder to recover his insurance money? The answer was, of course—that in the case supposed no loss is suffered—not because the bondholders had nothing to lose, there being no margin, but because the margin is *ex hypothesi* so broad that the fire never reached it. If the insured disputed the fact, and the pursuers were sufficiently blind to their own interests not to restore, then there was no injustice in compelling the companies to pay. The pursuers therefore founded upon their contracts as independent of and unaffected by any other contracts entered into by persons holding different interests in the mills—persons between whom and the pursuers there was confessedly no privity of contract. That the pursuers were entitled to take up this position followed, as had been shown, inevitably from the decision of the Court in the action between the prior bondholders and their insurers, and the only question which remained to be settled was the amount of their loss. The defenders did not dispute the principal items of the claim—damage done to the mill and counting-house and loss of one year's rent, amounting together to £310. They did dispute the claim of £80 for damage done to the boiler-house, and said that it was left untouched by the fire. This was true, for the injury to that building was due to operations undertaken for the extinction of the fire. This however was plainly incidental damage within the policy — Bell's Prin. sec. 511; *Johnston* v. *West of Scotland Insurance Company*, 7 S. 53 — though to repair the damage would only take £2 as Mr Livingstone deponed. But, further, if it were not repaired along with the other property insured in the policy (and there was no offer by the defenders to reinstate) then the boiler-house was totally useless, and had been rendered so by the occurrence of risks within the policy. If so, the pursuers would be entitled to £80, being the amount set against it on the margin of the policy, along with one year's rent, £10. The next item was the steam-boiler and connections. The sum set against it on the margin of the policy, £80, was claimed. The defenders said that an expenditure of £15 would remedy all the fire damage it had suffered. Even if that were so immediately after the fire, there was no proposal for reinstatement, and it was the fact that the boiler as it stood was not worth more than £100, according to Mr M'Kinnell. Before the fire the boiler and connections were worth £350, according to Mr Hay. In like manner, with regard to the steam-engine and appurtenances, for which £50 was claimed, it was said by the defenders that £20 would suffice to restore it against the effects of the fire. But again, the pursuers answered that no proposal to reinstate had been made, and that whereas before the fire the engine was worth £800, according to Mr Hay and Mr Turnbull, now as it stood it was only worth £100. With regard to the last disputed item, £30 for damage to the smith's shop and furnishing store, the defenders said that an expenditure of £9, 10s. would suffice to remedy the fire damage. But it had not been, and was not to be remedied, and whereas prior to the fire

they were worth £30 at least, now they were absolutely useless, as Mr Hay said. The sum claimed for one year's rent of this building, £5, was not disputed, and had been paid by the defenders. With regard to all the items above mentioned, constituting as they did the component parts of the property insured in the policy, whilst it was quite true that sums sufficient in amount to reinstate them had been paid to the prior bondholders, they had not been, and it was conceded that they were not to be, reinstated. It was plain therefore that the sums awarded fell very far short of the loss sustained by the pursuers. These sums were, as had been shown, trifling in comparison with the diminution in the value of the security-subjects consequent on the fire. Now, it was this diminution in value which the defenders by their contract undertook to make up to the pursuers, either by paying the money value of the diminution or by reinstating the insured property, and they now refused to do either. The pursuers therefore maintained that it had been proved that the security for their debt had been impaired to the extent for which they claimed indemnity in this action, and consequently that the payment which in that event the defenders undertook by their contract of insurance to make was now prestable.

Before the consulted Judges returned their opinions the case was further heard in presence before the whole Court.

The following opinions were returned by the consulted Judges:—

Lord President, Lord Shand, Lord Adam, Lord Lee, and Lord Kinnear:—We are of opinion that the interlocutor of the Lord Ordinary is right in so far as it finds that the pursuers, who are postponed bondholders over the subjects injured by fire, have sustained damage by the fire and have not been indemnified; and therefore that they are entitled to recover an indemnity from the defenders. The owners of the subjects, who concur in the action, have been fully indemnified already, and are, in our judgment, entitled to no farther indemnity. But the question considered by the Lord Ordinary, and the only question upon which we understand the opinion of the consulted Judges to be required, is whether the present claim at the instance of the postponed bondholders can be sustained, notwithstanding that the loss has been made good to the prior bondholders, and to the owners.

It does not appear to us to create any serious difficulty, that the owners and creditors are insured by the same policy. For by the terms of the obligation the right of the insured is not joint, but joint and several. A security over buildings cannot be regarded as giving an effectual real right if the bondholder's interest be not directly secured by insurance recoverable by himself, for a fire destructive of the premises would leave the lender the personal security of his debtor only. The policy in question was accordingly taken out by the bondholders themselves. Mr R. H. Hay says, "The manager of the Provident Society effected the policy and arranged for it." The policy so effected was taken in name of the society to secure their interest as bondholders,—with the addition that it was taken in name of the owners "in reversion." This necessarily gives the bondholders the right and title on the occurrence of a fire to recover for loss in respect of the injury to their security or interest as bondholders. They have, therefore, a separate right, upon which they are entitled to sue independently of the owners; and their legal position in an action upon the policy to recover to the extent of their own loss, appears to us to be precisely the same as if they had insured for their own interest alone, without mention of the reversionary interest of the owners. The questions for consideration in the one case, as in the other, must be Whether they have suffered loss by fire, and Whether they have been indemnified?

It cannot be disputed that the postponed bondholders had an insurable interest, or that they have suffered loss by the damage done by fire to the subject of their security. They had an insurable interest, as creditors infeft in security; and the value of their security has been diminished by the fire. The only question therefore is, whether they have been in fact, or whether they must be held in law, to have been indemnified. It is admitted, on the one hand, that sums equal to the amount of the fire damage have been paid by other companies to preferable bondholders; and, on the other, that these sums have not been so applied as to put the postponed bondholders in the same position as if the fire had not taken place. For it is admitted that before the fire the subjects of security were sufficient to cover the pursuers' bond as well as the prior bonds; and that after the fire the value of the site with the salvage of the insurable subjects was not sufficient to meet even the prior bonds. The admission in article 1 of the joint-minute, that "the value of the site, buildings, and machinery of the Greenhead Grain Mills was sufficient to cover not only the prior bonds, but also the pursuer's bonds," excludes any argument to the effect that the bondholders had no insurable interest. The subject of the insurance was the property—the particular buildings and machinery specified in the policy were all parts of the property—the machinery having been built into or permanently attached to the ground, and the value of the security depended on the unity of the subject—site, buildings, and machinery. The insurance was one over a composite subject, the sum insured being allocated over the particular buildings and machinery enumerated in the policy, and the injury to these by the fire, inasmuch as it not only destroyed the particular buildings and machinery, but greatly depreciated the composite subject, destroyed also the security for the protection of which the insurance was effected. The pursuers, the bondholders, have had no indemnity. It is true that the indemnity paid to the prior bondholders was applied towards the reduction of their debt; and this might have resulted in a practical indemnity to the postponed creditors also if it could have been shown that the reduction of the prior debt was in fact an equivalent for the damage by fire. But it is admitted that the damaged subjects do not in fact afford as good a security for the diminished debt as the entire subjects afforded for the whole debt before the fire. Whether the insured have been indemnified is not a question of law or of legal

inference, but a question of fact; and we take it to be conclusively established by the admissions of parties that the postponed bondholders have not in fact been indemnified.

The question therefore comes to be, Whether the payment of an indemnity by other insurers to other bondholders affords an answer to the action of the postponed bondholders who have not been indemnified upon their separate policy? If the question be considered, as we think it ought to be, between these bondholders, as suing for their own interest and their insurers, we are unable to see any reason why they should not be entitled to recover. They have made an insurance in their own name and for their own benefit, and it is no answer to a claim upon their independent contract that other persons have insured other interests by contracts upon which they have no title to found. The only ground upon which the insurer can plead that other contracts must be taken into account is that there has been, in substance if not in form, a double insurance. But it cannot be said that there is a double insurance if the same persons are not to have the benefit of both policies. The principle is very clearly stated by Lord Mansfield in the case of *Godin* v. *The London Assurance Company*—"Two persons may insure two different interests, each for the whole value—as the master for cargo, the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods or the same ship."

It is true that the pursuers might have derived an advantage from the execution of contracts to which they were not parties if the insurers had exercised their option of reinstating. But that would have been an incidental advantage arising from their interest in the property, and not from their interest in the policy. As the Lord Ordinary points out, it is an advantage which they would have equally obtained whether they had been insured or not; and the possibility that the insured might have benefitted in an event which has not happened, by the performance of a contract to which he was not a party, can afford no answer to the insurer in defence to an action upon a policy. In another passage of his judgment Lord Mansfield points out that if the insured "is not to have the benefit of both policies in all events, it can never be considered as a double insurance." And it is just because a postponed creditor will take no benefit from the insurances of prior creditors, except in an event which may or may not happen, and which he has no power to bring about, that he takes the precaution of insuring separately for himself.

For the same reason, we think it clear that the defenders have no answer upon the 9th clause of the conditions of their policy, where it is stipulated 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 effected by the insured or by any other person on his behalf, covering the same property," the society shall be liable only for a rateable proportion. If the owners alone were suing for their own interest this contributory clause would come into effect. But the other policies were not effected by the postponed bondholders, or by any person on their behalf. The difficulty which arose in the case of the *North British Insurance Company* from the wording of the policies does not arise.

But it is said that to allow either pursuer to recover would be contrary to a well-established doctrine in insurance law, viz., that all the insured persons or interests can never recover more in the aggregate from all the insurers than the amount of the damage by fire. We know of no authority for this proposition, and we agree with the Lord Ordinary in thinking it unsound. It may be that in the practical explication of the various rights and liabilities of insurers and insured the whole number of insurers will not in general be require to pay more among them than the amount of the damage. For it is certain, on the one hand, that none of the insured can recover more than full indemnity; and, on the other, that the sum of the values of the separate interests in the subject insured cannot exceed the entire value of the subject. But there nevertheless may be cases where different persons having different interests may each insure for the full value of the property; and where, if the property is destroyed by fire, each may recover upon his own policy to the full extent of his insurance. If a house, for example, is burdened with debt to the full extent of its value, the owner and the heritable creditor may each insure in his own name and for his own benefit, for the full value of the house; and we know of no rule of law which will prevent either from recovering under his own policy in the event of a total loss. No doubt the insurers of the creditor's interest, if they are called upon to pay, will be entitled, as an incident of the contract of indemnity, to be assigned into his rights as against the debtor; and if the latter be solvent, they may recover from him the sums which they have paid as indemnity to his creditors. This is the case explained by Lord Justice Mellish in the *North British Insurance Co.* v. *The London and Globe Insurance Co.* (5 L.R., C.D. 583), in a passage of his opinion which appears to have been misunderstood. The Lord-Justice points out that "where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainder-man;" and in that case, "they would recover from their respective insurance companies the value of their own interests, and those values added together would make up the value of the property." But he adds, there "may be cases where, although two different persons are insured in respect of two different rights, each of them would recover the whole, as in the case of mortgager and mortgagee." And he goes on to explain that "wherever that is the case it will necessarily follow that one of these two has a remedy over against the other," either in respect of a debt secured over the subject, or upon some collateral contract. In such a case the company which has insured the creditor will be entitled to succeed to his remedy against the debtor. But each of the insured persons will have right to recover the full value of the property from the office with which he has insured, although one of them may be obliged in the result to recoup the office

which has insured the other, or to make over for that purpose his claim against his own office. If the remedy which falls to be assigned is made good to the assignee, there will be no practical violation of the rule alleged by the reclaimers. But it may turn out to be of no value, from the insolvency of the debtor; and in that case we think it clear that the supposed rule will afford no answer to the creditor's claim upon the policy which he has effected for his own benefit. It may happen that the insolvent owner of a house which has been destroyed by fire may have recovered the full amount of its value from his own insurers. But that will afford no defence to an action by a heritable creditor, upon a separate contract of insurance with a different office. It is just because a debtor may become insolvent that a creditor has an interest to insure the subject of his security. And yet the result of the action may be that the sums paid by the two insurance companies together will exceed the amount of the damage. But the solvency or insolvency of the debtors of the insured can make no difference in his right to recover upon the contract of insurance. Nor does it appear to us to be of any consequence to the claim of a heritable creditor upon a policy in his own name to inquire whether the owner has been insured and indemnified, or whether he has not been insured at all. The only importance of the illustration we have suggested is, that it tests the operation of the doctrine to which we are asked to give effect; and we think the doctrine unsound, because in the only cases in which it would be of any practical value it would operate to withhold an indemnity from the insured.

The true principle is that fire insurance is a contract of indemnity. We assent to what is said by the learned Judges in the Court of Appeal in the case of *Castellain* v. *Preston* (11 L.R., Q.B. 386), that this is "the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law;" and we entirely assent also to what Lord Justice Brett adds as to the necessary consequence of the fundamental principle, viz., that "this contract means that the assured, in case of a loss against which the policy has been made, shall be fully idemnified, and shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give the assured more than a full indemnity—that proposition must certainly be wrong." But this does not mean that the aggregate of the sums paid to different policy-holders upon a number of policies can never exceed the damage. It means that the assured upon every separate contract of insurance must be entitled to indemnity, and to nothing more than indemnity; and it follows that the question whether other insurances over the same subject are to be taken into account is not to be solved by any absolute rule at variance with the principle laid down, but must depend upon the benefit which the assured may be entitled to take, or may have in fact derived from those other insurances.

The application of this principle to the present case appears to us to be clear, if we are right in thinking that the heritable creditors who sue this action have not been indemnified by the payments already made to the prior creditors for the damage done by fire to the subject of their security. By the damage so done they have suffered the loss against which they have insured; and they must therefore be entitled to recover to the extent of the loss, because that will give them indemnity under their contract, and nothing more than indemnity. It is no answer that they may recover their debt from the owners, and in that event will suffer no less: because we take it to be well-settled law that the right of the insured creditor to recover under his policy depends upon his interest at the time of the loss by fire, and not upon his chance of being ultimately satisfied by the operation of collateral contracts with third persons. If the debt had been already paid, that would of course have been a good defence, for the creditors would have had no interest at the time of the fire. But they still stand infeft in the damaged subjects, in security of a debt which they may or may not be able to recover; and that is precisely the loss against which they have insured. The insurers may be entitled to an assignation of the debt for their relief, if that can be given without prejudice to the insured. But in the meantime they are bound to pay in terms of their contract. The case of *Godin* appears to us to be a distinct authority to this effect, and the same principle is recognised in the two later cases already cited.

But it is said that if the defenders are called upon to pay, the benefit will ultimately accrue to the indebted owner, who will thus receive more than full indemnity. If that were so, it would, in our judgment, afford no answer to the creditor's claim upon his separate right, unless it could be shown that he also would be more than indemnified. But the true answer appears to us to be, that since the insured is entitled to no more than indemnity, he must assign any remedy which would have enabled him to make good the loss by action against his debtor. The principle is laid down by Lord Cairns in *Simson* v. *Thomson*, 3 L.R., App. Cases, 279—"On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." But then it is only in so far as his retention of these remedies for his own benefit would operate to give him more than full indemnity that the insured can be compelled to assign them; and where the amount insured is not equal to the debt, he will be entitled to enforce all his rights to the effect of recovering full payment, and cannot be required to assigned to his own prejudice. We express no opinion, therefore, as to whether the third plea-in-law for the defenders can be sustained, because we have had no argument, either in the written or oral pleadings, as to the defenders' claim for an assignation, or as to the conditions upon which the bondholders may be required to assign. But we are of opinion, in the first place, that the defenders are under obligation to pay to the creditors the amount insured by their policy, and secondly, that the creditors having received such payment, will not be entitled either to recover the whole debt for their own benefit, or to give their debtors the benefit of their insurance by discharging any

part of it, but must in whatever form give the insurers the benefit for their relief of such portion of their claim against the debtors as may have been satisfied by payment of the indemnity.

We have considered the case as if the policy had been taken out in name of the creditors alone, because by the terms of their contract they have a separate and independent right, and a defence which may be good against the owners will therefore be of no avail against them unless it could have been maintained as effectually if the owners had had no interest in the policy. But the fact that the owners are joined in the policy may have a very important bearing on the questions that may arise as to the defenders' claim to an assignation. It is clear that as the owners also are insured, the insurers could acquire no right to enforce the debt against them unless they had been already indemnified. And since it is to prevent their being more than fully indemnified that the defenders will recover, if they do in the result recover a part of the debt due to the other pursuers, questions of contribution may be raised as between them and the other offices. But the possibility of such questions arising cannot affect the right of the insured creditors to recover upon their policy as soon as the loss occurs. They are not bound to wait for the settlement of questions of contribution that may arise upon contracts to which they are no parties.

While we concur with the Lord Ordinary in his opinion as to the right of the creditors, we think it follows from what we have said that the interlocutor should be so qualified as to make it clear that the other pursuers, Messrs Hay & Brothers, are not to have the benefit of a declarator that they are still entitled to indemnity from the defenders. Their concurrence in the action may probably import nothing more than their assent to the payment of the insurance money to their creditors. But it is possible that a decree in terms of the declaratory conclusion might be construed to mean that they were to be indemnified by the payment *pro tanto* of their debt; and we think the interlocutor should be so expressed as to exclude this inference. It is an inference which would be exactly in accordance with the rights of parties if the owners had not been indemnified already. But in the admitted circumstances of the case it appears to be essential to distinguish between the rights of the insured who have been indemnified under other polices over the same subjects, and those of the insured who had no interest in these policies, and have received no indemnity.

We do not understand that our opinion is desired upon any question as to the amount payable under the policy, assuming the right of the pursuers to recover.

Lord Mure—In the circumstances of this case as the facts are now ascertained I am of opinion that decree of absolvitor should be pronounced in favour of the defenders.

When the fire in question occurred, the Messrs Hay, the proprietors of the mills which were burned, had borrowed large sums of money upon the security of their property, and had granted bonds for the amount; and in conjunction with the various creditors in those bonds they had from time to time effected policies of insurance over the property with seven different insurance companies for the aggregate sum of about £9200. These policies were all taken in substantially the same terms in favour of the respective creditors in the bonds, and of the proprietors Messrs Hay in reversion, and were, as I understand, effected under the obligation usually imposed upon proprietors in such cases, to insure their property at their own expense and pay the premiums as they became due. The premiums in the policy here in question were paid by the Messrs Hay, as explained by one of themselves in his evidence in this case, and he also states that he furnished the information of the particulars on which the policy sued on was effected, as specified on the margin of the policy.

Shortly after the fire certain creditors who were the holders of the first four of these policies, and whose securities were preferable to that of the present pursuers, brought the action to which we have been referred (11 R. 287) against the insurance companies with whom their policies had been effected for payment of the sums due in respect of the damage done by the fire. That action was raised with the consent of Messrs Hay, who are also the pursuers in the present case, and after a variety of procedure, and an arbitration entered into to ascertain the amount of the loss and damage occasioned by the fire, the total loss so occasioned was found to amount to £5668, 16s. 8d., for which decree was pronounced in favour of the pursuers of that action which was brought with concurrence of the Messrs Hay.

That this sum was the full amount of the damage done by the fire, and recoverable under the policies then sued on, is very clearly proved by Mr M'Kinnell, who acted as oversman in the arbitration, and was examined in this case on the part of the pursuers, who says—"I was oversman in the reference between the Scottish Amicable, the first bondholders, and the first insurance companies: I awarded the sum which I found the companies liable to pay as the sum that would be required to restore the place. . . . I think the allowance I awarded for buildings, machinery, and rent were the full value of the loss. It was upon that footing that I awarded them. . . . (Q) Even if the insurances had been higher, would you have given more for the machinery, or have you given its full value?—(A) I gave its full value. The sums I gave were sufficient to reinstate the mills as a first-class job."

The sum therefore which was so awarded under the first action was the amount of the whole loss occasioned by the fire, and the full measure of the indemnity recoverable from the insurance companies in respect of that fire; and it went to relieve the Messrs Hay to the extent of £5668 of the debt which they owed to the creditors with whom they were conjoined as pursuers of that action. That there was no further sum, in the shape of loss caused by the fire, available for distribution either among those preferable creditors, or among the holders of any of the other policies, is, I think, clear from the evidence I have quoted, when taken in connection with article third of the admissions, recently adjusted, which bears "that the insurable subjects, viz., the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers'." That the site or area is not an insurable subject is distinctly

laid down by Mr Bell in his Commentaries (vol. i. p. 628), where he says—"The loss is estimated on the destructible parts; or the whole value of the house, as it would have sold in the market, is taken, deducting the value of the area."

Such being the result of the arbitration, and of the admission of parties as to the value of the insurable subjects, it seems to me to be pretty clear that when the policy now sued on was effected in October 1881, the present pursuers were mistaken in supposing that there remained any margin of insurable property belonging to the Hays, over which a good additional insurance could be effected, after satisfying the claims that might be made under the policies which were then held by the preferable creditors of the Hays, and which covered the whole insurable subjects. Upon the evidence there was no such margin. So that if the pursuers were to obtain decree for the sum now claimed, they would be paid £560 more than the full value of the insurable subjects destroyed, over part of which their policy is said to have been effected, and the Messrs Hay would in this way be relieved of debt to the extent of £560 more than the fair value of the property they were entitled to insure in October 1881, and so to obtain from the defenders £560 more than the value of what was lost by the fire.

Now, if such a claim as this had been made by the Messrs Hay, the owners of the mills, upon policies effected by them as proprietors on their own account, it must, as I conceive, have as a matter of course been rejected. It is trite law, as I have always understood, that no man is entitled to recover under a fire insurance policy more than the value of the subjects insured which are destroyed by the fire. This is distinctly stated in most, if not in all, text writers on the subject; and it is very clearly laid down by the late Lord Moncrieff in various parts of his charge to the jury in the case of the *Hercules Insurance Company*, July 1836, 14 S. 1137, and more particularly where he says (p. 1142)—"The rule is that you can get nothing but indemnification for the thing lost, and that you can get nothing more than the value of the thing lost."

It is accordingly, as I understand the case, not disputed in argument for the pursuers that if the Messrs Hay had themselves effected all these policies, or had effected one policy for the gross amount, and endeavoured to recover more than the amount of the actual loss occasioned by the fire, they would not have been entitled to succeed. But it is said that this is not the position of matters to be here dealt with; that it is the Investment Company who are the real pursuers, and that the Messrs Hay are nothing more than mere concurrers for their interest. I am unable to accede to this view. It appears to me, on the contrary, that the Messrs Hay are substantially the effectors of the policy sued on, and the parties most materially interested in the result of this action. They are the proprietors of the subjects, and although they have had to borrow largely upon the property, the reversionary or radical right is still in them, and they had the material interest to insure it. Under the arrangement between them and the investment company, moreover, they were bound to insure the property, and to keep it insured.

The usual course in such cases, I believe, is for the proprietor to insure, assigning the policy to his creditor, in order to enable him to take such steps as may be necessary for keeping up the policy, and securing the sum due under it, if he has any reason to think the proprietor may fail in his duty in that respect. Instead of doing this, however, in the present case the policy has by arrangement been here taken in the joint names of the parties. But it was still essentially the Messrs Hay's insurance, and, as explained in the evidence, the whole premiums have been paid by them. By means of the first four of the policies, their debts to the extent of £5668 have been paid; and should a further recovery be made under the present action, the sum recovered will go to relieve them still further of their debts. The policy is therefore essentially their policy, and I cannot look upon the other pursuers in any more favourable light, or in any different position than that of the holders of an assignation to a policy effected in name of the proprietors of the property insured. In that case the assignees would, as I apprehend, be in law in the precise same position as their cedents as regards their right to enforce payment of the sum claimed under the present action, which appears to me to amount substantially to a claim for a double or excessive insurance of a considerable amount. To allow the Investment Society in such circumstances to recover the sum sued for would in effect be to allow the Hays to obtain payment under the name of the Society of a claim which, under their own name, and as in their own right, they would not have been entitled to enforce.

But even assuming that the Investment Society had here some kind of interest to insure separate from that of the Messrs Hay, I am of opinion that they are not entitled to recover the sum claimed in this action. Because I concur in the opinion expressed by Lord Young in the case of the Scottish Equitable Company, to the effect that where various parties or interests are insured over the same subjects, the insurances taken together must not exceed the fair insurable value of those subjects, and that if insurances in excess of value are effected, no more can be recovered in respect of those policies, in the event of fire, than the value of the loss caused by the fire.

It is said there is no authority for this proposition; and there is, I believe, no decided case to that effect. Neither is there any direct decision to the contrary; and having regard to the fact that the rule is express, that where a variety of policies are effected in one name over the same subjects in excess of the insurable value, no more than the actual loss, or, in other words, than the value of the property destroyed by the fire, however large the interest may be, can be recovered on the policy, it rests I think with the pursuers to show that it has been decided that a different rule applies where a variety of parties and of interests hold policies over the same subjects in excess of their insurable value. But this has not been done; and in so far as authority apart from actual decision goes, there are, as it appears to me, some very decided indications of opinion in writers of reputation on this branch of the law, both in this country and in England, in favour of the views contended for by the defenders.

The passages, for instance, which are quoted from Arnould on Insurance in Lord Trayner's opinion in this case, in which opinion I substantially concur, are quite distinct, to the effect that "although there may be co-existing liens to a greater extent than the value of the subjects, there cannot be co-existing insurable interests to an aggregate amount beyond that value." And it is added—"If this be so, then beyond such insurable interest the policy ceases to be a contract of indemnity, and the amount thus in excess is irrecoverable." That passage is taken from the 4th edition of the work, but in the 5th and last edition it is repeated in equally decided terms; and there are other passages to the same effect (vol. i. pp. 117-119). There are also passages pointing to the same result in Mr Bunyon's work on Fire Insurance, referred to in the defenders' minute of debate (p. 11).

The only writer of authority who deals with this question in Scotland, in so far as I am aware, is the late Professor Bell, who in his Commentaries (vol. i. p. 626, 5th ed.) says—"It is not, however, strictly necessary, in order to constitute an insurable interest, that the insured should hold the absolute property of the effects insured. A creditor may have a policy on the house or goods of his debtor, over which he holds a security. A trustee or agent, having the custody of goods for sale on commission, may insure them, provided the nature of the property is distinctly specified, and that all the insurances taken together upon the same property shall not exceed the full value of it"

This seems to me to be a pretty distinct authority, in principle at all events, for the proposition contended for by the defenders. Policies without an interest, or taken in excess of the insurable value of the subjects, were not uncommon in the early days of insurance, and were described as being not insurances but mere wagers; so that it became necessary for the Legislature to interfere to put a stop to them. In the passage preceding the one I have quoted from Mr Bell he explains that when fire insurances were introduced it was considered essential, on grounds of public policy, to extend the operation of the rules of the statutes to fire insurance. For it appears to have been felt that such insurances required to be at least as strictly guarded and dealt with in the matter of insurable interest as marine policies, and to be strictly limited as to the amount for which they might be effected over the property insured; and I am disposed to think that the rule laid down in the passage quoted must have proceeded and been framed on that footing

When several policies are effected on the same subjects to an amount exceeding the fair insurable value of those subjects, the insurance is, I think, without an interest in so far as regards the excess. Now that, as I read the evidence, was the position of the pursuers with regard to the policy in question. Mr M'Kinnell says that the value of the whole insurable articles destroyed by the fire amounted to £5686, and that sum was awarded by him, and paid to the prior bondholders whose policies covered the whole subjects. It is now admitted that the insurable subjects, apart from the site, which is not insurable, were never sufficient in value to meet the bonds preferable to that of the pursuers. In these circumstances I am unable to see that at the date when the pursuers' policy was effected there was any margin of insurable subjects available to meet the pursuers' bond over which a valid policy could be effected. The insurance therefore was, in my opinion, in excess of the insurable value of the subjects, to the extent of the sum here claimed, and the pursuers had not therefore any proper insurable interest at the date of the fire, or even at the date of their insurance.

On the whole, therefore, I have come to the conclusion that the pursuers are not entitled to succeed in the present action.

Lord Fraser—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to, with the qualification suggested in the opinion signed by the Lord President, Lord Adam, Lord Lee, and Lord Kinnear.

Insurance against sea risks has been long known, but this contract of fire insurance is one of comparatively modern origin; and even in a recent case in England there was a controversy as to whether it was merely a contract of indemnity, or that and something more—*Castellain* v. *Preston*, L.R., 8 Q.B.D. 613, and 11 Q.B.D. 380. Erskine has not a sentence upon fire insurance. Pothier has an elaborate disquisition upon maritime insurance, and incidentally he mentions as a novelty that in 1754 it was proposed to establish at Paris a company for the insurance of houses against fire; and he adds that he had learnt that this was carried into execution by the formation of the company—"Traité du Contrat d'Assurance,' chap. 1., sec. 1. The latest editor of Pothier, writing in 1847, says that as contracts of fire insurance have not been in use in France for more than thirty yeas, the French Code is silent on the subject.

In 1774 Parliament (14 Geo. III. c. 48), while enacting that no person shall be entitled to insure a life unless he has an interest in it, does not refer to fire insurance expressly, although the Courts have construed the Act to apply to these insurances. The enactment is, that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest." Both in England and in Scotland the words "event or events," here employed, are held to apply to insurance against fire—Bell's Comm. i. p. 626, and Smith's Maritime Law, p. 414. This statute further enacts "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." It is clearly implied, however, that the insured shall recover up to the amount insured the full value of his interest.

Now, then, there may be a number of persons who may have an interest in the house—(1) the fiar, (2) the liferenter, (3) the holder of a ground-annual, (4) a bondholder, (5) the tenant. Each of these persons is entitled to insure his own interest; each has a distinct interest from the other. What each insures is not the house, but

the risk which he runs of losing his own special interest. In the case of *Castellain* the point is stated thus by Bowen (L. J.)—"It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance." No doubt the insurance company may discharge their obligation by re-erecting the house, this being the ordinary clause in the policy. If, however, this is not done, each insurance company who has insured these five different interests must pay up to each of the insured the value of the interest that is lost by the fire. It is no good answer to this to say that one of the insurance companies has indemnified one of the insurers up to the amount of the damage caused by the fire. This is not compliance with the obligation to indemnify the other insured. The obligation of the insurers is absolute; to pay to every one of the assured a sum of money on a certain event happening, viz., the destruction of the insured's interest by fire, and this without the slightest regard to the fact that the whole fire damage has been made good to one of the assured. It is a contract of wagering, but wagering which the law, for wise reasons, sanctions, under the condition only that the insured shall have a pecuniary interest in the subject of the insurance.

The contract is undoubtedly merely a contract of indemnity, but then the question is, Who is entitled to be indemnified? Indemnification does not mean the payment of the whole fire damage to one of several classes of persons interested in the property. It means indemnity to all those who have effected a lawful insurance. Each can claim no more than to the extent of his own interest, however large may be the sum contained in his policy. But to that extent he is entitled to demand payment, limited only by the value of the property, and if he does not receive it the contract of indemnity *quoad* him is broken.

Now, all that remains to be ascertained is whether the pursuer of this action had such an interest. He was a bondholder, and the property on the morning before the fire was of sufficient value to carry all its burdens. The admission by the parties is, "that immediately before the date of the fire mentioned on record, viz., 1st August 1882, the value of the site, buildings, and machinery of the Greenhead Grain-mills was sufficient to cover, not only the prior bonds, but also the pursuers' bond."

Lord M'Laren—I am of opinion that the interlocutor under review ought to be affirmed, with the variation proposed in the joint opinion signed by the Lord President and other Judges.

The argument addressed to me as Lord Ordinary did not suggest to my mind the possibility of any claim at the instance of the proprietor in reversion, and therefore in the interlocutor under review no reference is made to his interest. But as the opinions of the Judges have been called for on the general question of the right of a second bondholder to recover to the extent of his loss, without reference to the payment previously made to a prior bondholder under his separate contract, it has been proposed that our judgment should be so expressed as to make it clear that we should not under any circumstances sustain a duplicate claim by the same person or persons suing in the same right. In the justice of this reservation I entirely concur.

While referring to my individual opinion delivered as Lord Ordinary in the case, I desire also to express my concurrence in the views expressed by the majority of the consulted Judges, and in their interpretation of the cases bearing upon this important question.

Lord Trayner—In August 1882 a fire occurred in the Greenhead Grain-Mills, by which the mills and machinery were seriously damaged. The pursuers, the Messrs Hay, the proprietors of the mills, had, previously to the fire, borrowed money from several persons, in security of which they had conveyed the mills and machinery to the several lenders. Each lender, in conjunction with the Messrs Hay, had effected an insurance or insurances over the mills and their contents, so that at the date of the fire the mills and their contents were insured under policies issued by the seven different insurance companies mentioned in the defenders' minute of debate. The pursuers, the Glasgow Provident Investment Society, were creditors of the Hays to the extent of about £800, and in October 1881, they, along with the Hays, insured the mills and their contents for the sum of £900 with the defenders, whose policy (on which this action is grounded) is in name of the Glasgow Provident Investment Society, and the Hays "in reversion." The whole seven policies of insurance were, as regards the statement of the insured, expressed in practically the same terms. Of these seven policies, four were held by two heritable creditors, whose claims upon the mills were preferable to the claim of the pursuers. The debts due to these two creditors at the date of the fire amounted to about £9000, and the four policies held by them represented insurance to the amount of £7485. Some time after the fire the two heritable creditors I have referred to, with the consent and concurrence of the Hays, raised an action against the four offices with which they were insured for payment of the amount of damage occasioned by the fire, and in that action decree was pronounced against the defenders therein for the sum of £5668, 16s. 8d., which (by arbitration) had been ascertained and fixed as the amount of the whole of such damage. That amount has been paid. Notwithstanding of such payment the pursuers (the Glasgow Provident Investment Society, with consent and concurrence of the Hays) now claim from the defenders, with whom they had effected their insurance, the sum of £560, as the amount of the loss which they had sustained through the injury done to the mills and machinery by the foresaid fire. The question is, Whether the pursuers are entitled to decree for the sum sued for, or any part thereof?

The pursuers maintain that the result of the judgment pronounced in the action I have referred to, at the instance of the prior bondholders, with consent of the Hays, established "the principle upon which the claim in the present action rests." The same view is expressed

by the Lord Ordinary in the judgment under review, and he states very precisely what that principle, in his view, is. He says—"If the Insurance Companies do not reinstate, each pecuniary claim by a bondholder, or interested party, must, in my opinion, be settled just as if no other person had insured his interest in these subjects. This I conceive to be the principle of the decision in the previous action, and I see no difference in principle between the two cases." I venture to think that no such "principle" was determined in the previous case, although probably such a principle might be deduced from some of the opinions there delivered. For my own part, I dissent from any such principle, because I regard it as not only unsupported by any authority, but as contrary to and subversive of a principle of insurance law which is well established, and to which I shall have occasion afterwards to advert. It is not necessary for me to examine here minutely what was the question raised or the decision given in the previous case, for I do not suppose it is contended that that decision was conclusive of the question now to be decided. In my opinion the two cases differ materially. In the former case it was decided that the owners of the mills and their heritable creditors were entitled to decree for damage done by fire against which they were insured without the necessity of calling as parties to their action other bondholders or their insurers, and were entitled to judgment apart from all considerations of the liability of other insurers than their own to contribute to the loss sustained. In the present case the question is, Whether the whole loss occasioned by the fire having already been paid, any further claim on account of that loss can be maintained? I therefore approach the consideration of this case as one involving a question still open, and not affected favourably or unfavourably by the previous decision.

The first matter which I shall consider is, who were the insured under the policy in question; for if it can be shown that the Hays were the insured, and not their creditors, I think it clear that the present action cannot be successfully maintained. The policy is issued in name of the Glasgow Provident Investment Society and the Messrs Hay "in reversion," and sets forth that they had insured the property there described against loss or damage by fire. But these words by themselves do not instruct that the Investment Society were the insured. On the contrary, they show that some other interest than theirs was involved, and that both were insured. It is plain enough, however, that both the Society and the Messrs Hay could not have the same insurable interest in the same subjects at the same time, "because the same property cannot in value belong at the same time to two different persons" (*per* Mellish, L.J., in *N. B. and Mer. Insur. Co.* v. *London, L. and G. Co.*, 5 Chan. Div. 583). Other considerations, then, must be regarded in ascertaining who were the insured under the policy. And, first of these, what was the property insured, and to whom did it belong? The property insured was the mills and machinery therein, not the debt due to the Investment Society, nor the solvency of their debtors. The mills and machinery were the property of the Messrs Hay—not the less their property that the debts due to their several creditors had been secured over it. The real security held by the creditors was not a right of property, but a right over the property by which they could in certain circumstances obtain payment of their debt out of it. The property, therefore, being that of the Messrs Hay, the interest to secure it against loss by fire was theirs. And if the property which was theirs—and as property theirs alone—was fully insured by them, there was no further interest in the property insurable. Standing such an insurance, it appears to me more than doubtful whether the Investment Society could validly insure the property on any interest which was in them. But whether or not the Investment Society could validly have insured the mills while they were fully insured by the owners, it is clear enough that such additional insurance was unnecessary, because any benefit derived by the owners under their insurance would enure to the Investment Society as creditors for whose benefit (at least to the extent of their debt) the mills had been insured. If it be asked, why in such circumstances the name of the Investment Society was inserted in the policy, the answer is not far to seek. If their name had not appeared on the policy, and a claim under the policy had arisen, the Insurance Company would have been entitled and indeed bound to pay over the amount of the claim to the Messrs Hay. But the insertion of the name of the Investment Society prevented the Insurance Company making payment of any such claim to the Hays, without the consent, or at all events without notice to, the Society, who were thereby secured that no money would be paid to their debtors out of the security-subjects without their having an opportunity of attaching it if circumstances made that reasonable or necessary. In short, they were placed in the same position (but no better position) as if the Hays had insured the subjects in their own names, and assigned the policy in security. Such an assignation would not have placed the society who held it in the position of the insured under the policy, although it would have secured to them, preferably to the Hays, who were the insured, payment of any money which might be exigible in respect of any claim arising under the policy so assigned.

2. Another consideration in favour of the view that the Hays were the insured is this, that theirs was the primary and most important interest to secure. Any claim arising under a policy insuring their interest in the property could be made available to their creditors; but if the creditors' interest alone was insured, a loss might arise for which no claim under the policy could be enforced. I do not elaborate this view, because it is made very clear by the learned Judges who decided the case of *Nichols & Co.*, in whose opinions I concur.

3. If during the currency of the defenders' policy the debt due to the Investment Society had been paid off, the insurance would still have remained good, so long as the Hays were the owners of the mills. The paying off the debt would not have affected their insurable interest, on which the policy was based.

4. Further, the insurance in question was effected by the Hays. They were (in accordance with general practice) taken bound by their bond to the Investment Society to insure the

subjects, and they did so. The whole premiums of insurance were admittedly paid by the Hays.

On these considerations I come to the conclusion that under the policy in question, the Hays, and not the Investment Society, were the insured. On the same grounds, I am of opinion that the Hays must be regarded as the insured in the whole seven policies effected over their mills, current at the date of the fire. The whole policies stand *in simili casu* so far as the statement of the insured is concerned.

Assuming, then, that the Hays are the insured under the policy in question, What is the extent of their claim? I take it to be an elementary principle in the law of insurance that the insured cannot under any circumstances recover more than the amount of his loss. "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it—that is to say, which will either prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong" (per Brett (L.J.) in *Castellain* v. *Preston*, 11 Q.B. Div. 386). It is not difficult to apply this rule of law to the present case. The damage done to the insured by the fire insured against is ascertained to be £5668, 16s. 8d. That money has been paid to the insured, the Messrs Hay. I say paid to the Messrs Hay, because it is not the less paid to them that it has gone into the pockets of some of their creditors. It was paid to the persons with the concurrence of the Hays, and it has reduced their debt to that extent. That which goes to reduce their debt makes them so much the richer, or so much the less indebted, which is the same thing. But if the Hays have already received the full amount of the damage done by the fire, what further claim can they have in respect of alleged damage done by the same fire? The Lord Ordinary in this case has decerned in favour of the pursuers for £560. If that amount be added to what has already been paid, then it appears that the assured will receive the sum of £6228, 16s. 8d. in respect of the damage done by the fire being just £560 in excess of the whole damage sustained. I venture to think that a judgment producing that result "must certainly be wrong." If the principle of that judgment was sustained, and there were a sufficient number of separate insurances, the Messrs Hay might easily find themselves very largely enriched by the burning of their premises. But that would not be in accordance with the view that an assured "shall be fully indemnified, but shall never be more than fully indemnified."

The Lord Ordinary admits the rule of law "that an assured person can in no case recover more than an indemnity for his individual loss." He would therefore agree with me, I suppose, that the present claim could not be enforced if the Hays were the only persons who were insured, seeing that they have received payment already of the whole loss occasioned by the fire. But holding that there are here several persons insured, he reaches the conclusion given effect to in his judgment on the principle I have already alluded to, namely, that where several persons insure the same subjects, having different interests, each is entitled (where there has been no reinstatement) to claim, "just as if no other person had insured his interest in these subjects." Consistently with this view the Lord Ordinary disputes the proposition as "a universal proposition in the law of insurance, that no more can be recovered in the aggregate by the different persons or interests insured than the amount of the fire damage"—a proposition which he says has not been shown to have been "received into our law." I concede that there is no decision reported in our books which affirms the proposition thus disputed; but equally there is no decision which negatives it. The question does not appear to have been presented for decision before this time, which is somewhat surprising (for the case must have happened before) if the proposition is unsound—not surprising, however, if the proposition has hitherto been recognised as sound, and it is perhaps worth observing that the proposition was conceded by the counsel for the insured in the previous case (11 R. 296). There is some authority, however, for the proposition. "A mortgager and mortgagee of the same ship may each effect an insurance on the same vessel, and, if he pleases, each may cover the vessel to her full value. The sum recoverable under each seems to be such an amount as, when added to the other, would equal the full value of the vessel and no more" (Arnould on Insurance (4th ed.) p. 107). "Although there may be co-existing liens to a greater amount than the value of the subjects, there cannot be co-existing insurable interests to an aggregate amount beyond that value. If this be so, then beyond such insurable interest the policy ceases to be a contract of indemnity, and the amount thus in excess is irrecoverable" (*ibid.* p. 107). "Whilst policies like liens may overlie the subject in numbers to an aggregate amount exceeding indefinitely the value of it, the right to recover on all of them together in respect of any one loss is restricted by the principle of indemnity that underlies the contract to the ascertained or agreed worth of the subject" (*ibid.* p. 109). Or if the destruction of the subject be partial instead of total (it is of total loss the author quoted is evidently speaking), then the whole loss can only once be recovered, no matter how many are the liens or policies that overlie it, for the principle of indemnity is the same whether the loss is total or partial. The same principle is recognised by Lord Justice Mellish in the case I have already cited (5 Chan. Div. 583). He says—"Where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainder-man. Then, if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course those values added together would make up the value of the whole property." "But then there may be cases where although two different persons insured in respect of different

rights, each of them can recover the whole, as in the case of a mortgager and mortgagee." (Obviously the learned Judge meant that either of the parties in the case supposed could recover the whole, and not both, for he adds)—"But whenever that is the case, it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons." These authorities are no doubt authorities on English law, but I know of no difference between the law of England and the law of Scotland on the subject of fire insurance.

It is difficult to see why the broader proposition, which the Lord Ordinary disputes, should not be accepted as sound in law equally with the more limited proposition which he admits. A single insurance is a contract of indemnity under which no more can be recovered than the amount of the actual loss. This is admitted. Why should the contract be more than a contract of indemnity because seven persons have been insured instead of one? The number of contracts can scarcely alter the essential character of the contract; they are all the same kind of contract.

I suppose it cannot be disputed that the whole possible interests in an insurable subject cannot in the aggregate exceed in value the value of the subject itself. Let therefore the subject be totally destroyed, the whole sum recoverable under fire insurance cannot exceed the whole value of the subject, "be the insurances" (as observed by Lord Young, 11 R. 296) "ever so numerous, and the interests of the insurers ever so various." Is a different rule to be applied where the destruction has only been partial? If, instead of being wholly destroyed, the subject has only been injured, or a distinguishable part only destroyed, is more to be given than the value of the part, or full compensation for the injury done to the whole? I can find no authority or principle for dealing differently in this respect with partial and total destruction. If the whole is destroyed, the whole value must be given; if a part is destroyed, the whole value of that part must be given; and in either case, the whole value of that which is destroyed represents the whole possible insurable interests therein. It could not (whether whole or part) be validly insured for more than its whole value. What the respective interests of the various insured may be in the sum paid in respect of damage is a totally different question, and one with which the insurers have no concern.

Again, the increased liability of the insurers and the enlargement of the rights of the insured (where there are several persons insured) depends, according to the Lord Ordinary's view, upon the fact that the "companies do not reinstate." The companies have the option to reinstate or pay the damage. If they reinstate they pay only the actual loss—that is, they expend so much as, and no more than is necessary to repair the loss. But if they elect to pay the amount of the damage to the insured instead of disbursing it themselves in the work of reinstatement, they may be called on to pay twice the amount of the loss or more. So that where a debtor has a definite obligation which he is bound to solve, and has two modes in which to solve it, the amount of the obligation (otherwise definite) may be indefinitely enlarged just as he adopts the one mode of fulfilment rather than the other. I confess I cannot see the principle on which that result is reached. Apart from other objections to this mode of dealing with the obligations of the insurer, it appears to me to result in great injustice. Take the case put by the pursuers to test this. A house worth £2000 is burdened with three bonds, each for £500. Each bondholder is insured separately, and a fire occurs by which damage is done to the extent of £750. Each bondholder claims from his own insurance company the full amount of his insurance, and gets it. The pursuers say, "Yet there is in that nothing inequitable," and the Lord Ordinary expresses the same opinion. What does such a transaction come to? That the debtor, through a fire which damaged his property to the extent of £750, gets rid of £1500 of debt—that is, gets payment of £1500. If he had not been so needy (or so cunning) as to borrow £1500, but had only borrowed £750 from one lender or more, he would have been none the better by the fire, but none the worse. But because he had overburdened his property, and each lender had effected a separate insurance, he is enriched by the calamity which befell his property. That is certainly more than full indemnity. For a loss amounting to something over one-third of the value of his property he receives payment of three-fourths of its value. Take the illustration one step farther. The property being worth £2000, might have valid insurances over it to that amount; if another bondholder be added for £500, the result is, that for damage to the extent of about one-third of the value of the subjects, the owner (through his creditors) gets the full value of his subjects.

I come therefore to the conclusion that the pursuers cannot prevail in the present case, because the assured have already received full payment of the amount of the damage done by the fire against which they were insured.

The pursuers, however, maintain that although the full sum necessary for reinstatement has been paid by the insured, yet, as reinstatement has not been made, they have suffered loss by the fire which the payment already made does not compensate. That money, they contend, has gone to pay another creditor, and no part of it has gone to them, either by way of payment or in repair of the subject over which their insurance was effected. But this argument is, I think, fallacious. (1) It is not said, and cannot be said, that the amount of the damage done has been paid to persons who had no right to it—that is, right to it preferably to the pursuers. The right which the prior bondholders held over the subjects in question was preferable to any right held by the pursuers; and if the money paid by the insurers is regarded as a surrogatum for that which has been destroyed by fire, then the prior bondholders were also preferable on that to the pursuers. If the prior bondholders had sold the property under their bond, with a resulting loss to the postponed bondholders, the effect would have been the same. But apart from that (2) the insurable interest of the pursuers was only over the margin, if any, left uninsured by the prior bondholders and insurers. Their insurance over the subject destroyed exceeded the value (as

ascertained) of the whole damage, and therefore in the thing destroyed there was no margin to insure, and consequently no good insurance. What I have said about payment to the bondholders might at first sight be regarded as inconsistent with my previously expressed view that the Hays were the assured, and that payment had been made to them. But it is not so. Taking the bondholders in the position of assignees of the Hays' policy of insurance (which I think was practically their real position), the seeming inconsistency disappears. The Hays were entitled to payment under the policy, but their creditors got the money as the Hays' assignees. In this view, that the pursuers had no insurable interest in the subject destroyed, their claim is not maintainable.

Assume, however, that the Investment Society (and not the Hays) were the assured, and that they had a valid insurance so far as insurable interest is concerned. It is necessary to their success in the present case that they shall establish that they have, in point of fact, suffered loss through the fire. Upon this subject it is not necessary to do more than consider the admissions made by the parties. The pursuers rely on the 1st and 2d articles of the minute as instructing their loss. It is there admitted (1) that the value of the site, buildings, and machinery of the mills was sufficient at the date of the fire to cover the pursuers' bond as well as all prior bonds; and (2) that after the fire the site "and the salvage thereon of the buildings and machinery" were not sufficient to meet even the prior bonds. This, the pursuers maintain, is proof of their loss. I do not take this view. It will be observed that in the valuations—a comparison of which is said to show the loss—the site is taken into account. That site might rise or fall in value from a variety of circumstances not in the least connected with the fire. It might have been greatly more valuable the week after the fire than the week before if demand had arisen for vacant ground in that locality. But the site was not insured, and therefore rise or fall in its value has nothing to do with the case. The loss which the pursuers must show to have been sustained is a loss on the insurable and insured subject. Now, upon this matter, the 3d article of the admission is important. It is there admitted "that the insurable subjects—viz., the buildings and machinery, apart from the site—were never sufficient in value to meet the bonds prior to the pursuers'." Suppose, then, that the insurable subjects had been sold as at the date of the fire, the whole price would have been absorbed in payment of the debts preferable to the pursuers'; the pursuers would have got nothing. What was worth nothing to the pursuers as at 1st August 1882 was not made more valuable because it was burnt and not sold—consequently they have not suffered any pecuniary loss through the fire. Even on another view the pursuers have not suffered any loss. Whatever the subjects were worth at the date of the fire they were then burdened with more than £8000 of debt preferable to the pursuers'. The subjects were injured by fire to the extent of £5668, which has been paid to the prior bondholders, whose debt and preferable claim over the property has to that extent been extinguished. If the property is now worth less by £5668 than it was the day before the fire, it is still as valuable to the pursuers, who, if they get a subject now worth less by £5668 than it was before the fire, get it with just that amount less of preferable burden. The margin of value on which the pursuers lent their money is not diminished.

Take the property before the fire at the value of		£10,000
Bonds prior to the pursuers' . .		8,000
Margin of security to pursuers . .		£2,000
After the fire the value of . . .		£10,000
is reduced by the sum of the injury .		5,668
		£4,332
But the prior claim of .	£8,000	
is reduced by payment of .	5,668	
		2,332
Leaving margin, as before, of . .		£2,000

available for pursuers' security.

It is objected by the pursuers that the subject they can now get is damaged to a greater extent than the amount of damage directly done by the fire, inasmuch as a site with a wreck upon it is not so available or so good a security as a site with a good building or a good going mill upon it. The answer to that objection seems to me to be twofold. (1) All that the insurer is liable for is the damage caused by fire, and not for any damage of a purely consequential character. The damage done by the fire has been fixed at £5668, and that is the limit of the insurer's liability. (2) The objection really amounts to this, that in existing circumstances the pursuers will find it more difficult to realise their debt than they would have done before the fire. But the insurer has no concern with the realisation of the debt, whether it be easy or difficult, and if the Hays are solvent (their solvency has never been questioned) the difficulty of realising the debt is imaginary, as the fire has not affected their personal obligation to pay it.

On the whole matter I am of opinion that the interlocutor reclaimed against should be recalled and the defenders assoilzied.

At advising—

LORD JUSTICE-CLERK—I agree with the majority of the consulted Judges. I shall content myself with a short summary of my views on this important case.

The pursuers of this action are the Glasgow Provident Investment Society, suing with consent and concurrence of Messrs Hay, who are proprietors of certain mills in Glasgow. The pursuers hold a bond and disposition in security over these mills for £900, and in 1881 they effected a policy of fire insurance with the defenders over the premises for that sum. The policy bears to be in favour of the pursuers and Messrs Hay, "jointly and severally, and in reversion." The policy also contains an allocation of the value assured on the separate portions of the premises.

The premises were consumed by fire in 1882. It appears that they were covered by other and preferable securities, some of the creditors in which had insured in other offices, and that the sums in these policies have been paid. But none of these creditors are before us in this action, in

which the question is, whether the Investment Company are entitled to recover, and if so, what is the amount of their claim?

Prima facie the case is a very simple one. It is not disputed that the pursuers hold the security on which they found; it is not disputed that the debts which this security was intended to cover remain unpaid; neither is it disputed that by the terms of the policy the defenders undertook to the pursuers, along with Messrs Hay, their debtors, to indemnify them to the extent of the sums in the policy for any injury they might sustain through the loss of the subject of their security by fire, or that the loss, if suffered, was caused by perils within the intent and inception of the obligations contained in the policy.

But it is maintained—1. That at the date of the policy, and at the date of the fire, the pursuers had no insurable interest;

2. That they never did insure the premises as principals, and that they acquired no rights against the defenders under this policy, which only covered the interest of the owners;

3. That as the total value of the injury done to the premises by the fire has already been paid away to other insurers by other insurance offices, all claim under the present policy has been extinguished thereby; and

4. That the pursuers have proved no loss by reason of the fire.

I am of opinion that all of these propositions are unfounded, and I shall shortly explain the grounds on which I reach that conclusion.

I think I may assume it as certain in the law of fire insurance, that the holder of an heritable security over his debtor's premises has an interest in the premises which is insurable. I know no reason for doubting that general proposition, and certainly the defenders saw none when in the full knowledge of the pursuers' position, they promised to reimburse them, and were paid for doing so. In all the cases which have been cited that proposition has been assumed, and especially in the very interesting remarks of Sir G. Jessel in the case of *The North British and Mercantile Company*, 5 Ch. Div 569.

It appears equally indisputable that the pursuers might insure for their own interest only, and acquire by so doing a direct right of action against the defenders, without any regard to the separate interest of the owners of the premises. It is no doubt true that when a creditor insures his debtor's premises his interest will terminate if his debt terminates. It is also true, although quite irrelevant to this matter, that any increase in the debtor's funds by insurances or otherwise, may increase the creditor's chance of payment. But these considerations are quite apart from any question we have here. The obligation in the policy is distinct, and is precisely the same as it would have been although the owners had been no parties to the contract. That the latter are only parties for the reversion seems clear enough on the terms of the instrument, and the reversion means what remains over when the creditor has been indemnified.

But it is maintained, *secondly*, that even if the pursuers had an insurable interest, they did not insure it by this policy; that it conferred no right on the pursuers, and imposed no direct obligation on the defenders; that it was a contract solely for the interest of the owners, and that any interest the pursuers might have in it was incidental and subordinate to the paramount right of the Messrs Hay.

I can find nothing like this in the terms of the contract; on the contrary, I find words of obligation utterly inconsistent with any such construction. The policy says "jointly and severally, and in reversion," but it seems not subject to doubt that the owners became parties only for the reversion, after any claim of their creditor was satisfied, and accordingly they are the pursuers in this action, but only give their consent and concurrence to it.

What seems to have suggested this plea is the fact--a very usual one in such cases—that the owners undertook to pay the premiums on the policy as they fell due. This undertaking was of course to the advantage of the creditors, as improving their security. But with that the defenders had no concern. That obligation was the subject of a contract between the bondholders and their debtors, to which the defenders were no parties, and in which they had not the slightest interest. The contract of insurance was contingent on payment of the premium, and it was wholly immaterial to any interest of the defenders which of them paid it. There is nothing in this consideration which in any degree alters the relation of the Investment Company and the defenders as respectively creditors and debtors under the policy.

Apart from this, the struggle to represent the Messrs Hay as the sole insurers seems to me baseless. The Investment Company had the same rights against the defenders which they would have had if the Hays had been no parties to the policy. The latter could not have dealt or transacted in any way with the interest of the Investment Company without their consent, except indeed by paying their debt. The owners could not have interposed between their creditor and the obligation of the Insurance Company; neither could they have discharged it. They joined in the policy for the same reason as that for which they consent to and concur in this action—to secure, in the first instance, indemnity to their creditor.

The third argument maintained by the defenders is one which alone has an aspect of novelty. It is contended that even admitting that this policy was entered into by the Investment Company, and that they had an insurable interest, they have no right to recover, because the debt constituted by the policy has been already paid. It is said that another insurance company, under a contract with a third party, has paid to that third party the full insurance value of the premises insured by this policy; and that thereby the obligation incurred by the defenders has been fulfilled.

This is hardly a satisfactory mode of payment for the pursuers. It means that in this, which is called a contract of indemnity, the pursuers, although they prove their loss, are not to receive a single shilling, while the defenders, the obligees, are to keep the premiums. The categories to which the defenders try to assimilate this case furnish no analogy. We are referred to the rules, quite equitable in themselves, introduced to prevent over-insurance, or over-recovery, when the same risk has been insured by the same person

more than once. Thus, when the same interest is insured in different offices, the insurance office which has paid the indemnity to the policy-holder has, or may have, a right of contribution against the others who have not paid. Here, of course, there is no such case, as the Investment Company held no second insurance. In like manner, if the assured, having received full indemnification, retains any separate or collateral right in diminution of the loss, the insurer who has paid him may claim to stand in his place as regards such rights, on the ground of subrogation. But these rules can only be applied to cases in which indemnity has been paid. Their *rationale* implies that while the contract is one for securing full indemnity to the assured, it is not in accordance with the good faith on which it proceeds that it should be so used as to give the assured more than indemnity. But I am at a loss to see how either of these principles can avail the defenders here, when neither restitution nor compensation has been made, and the defenders are to retain all the premiums which have been paid, while their creditors are to receive nothing in return. No decision has been referred to, and I know of none, which could give countenance to a result so manifestly inequitable.

Under the policy the defenders had the option, of which they have not availed themselves, of reinstating the premises. If they or the combined offices had chosen, as they very reasonably might, to adopt that course, they would have recompensed all concerned, insured or uninsured; and it is both good law and good sense that a man should not be paid for an injury the whole effect of which has been effaced and obliterated. But it does not seem to be good sense, and I do not think it is law, that when there has been no reinstatement and no indemnification—when the alleged loss remains unrepaired and unrecompensed—it shall be assumed, contrary to the fact, that the sufferer has been indemnified because someone else has paid someone else under contracts entirely separate a sum sufficient for reinstatement, which has not been so applied.

It seems to be supposed, rather fancifully, that in a question about fire insurance the ordinary incidents of contract are superseded, and that the creditor rights of the assured can be affected by transactions to which they are not parties. I had occasion to indicate my view of this doctrine in the case of the *Northern Insurance Company* which was lately before us. I still retain those views, and I am glad to find so much confirmation of them in the opinions of the majority of the consulted Judges. It is not, in my opinion, reasonable to consider the aggregate value of the injury done by the fire as a specific and limited fund to be divided among the assured, however varied and separate their contracts and their interests; or to assume that when this aggregate sum has been exhausted by payment by any insurance company to any policy-holder, all other contracts under which the same premises were assured must be held to be fulfilled. I agree with the opinion of the majority that there is neither authority nor principle for this view. The defenders are sued on their obligation, and they must answer on it in the usual way.

On these general views I concur in the results at which the majority of the consulted Judges have arrived It remains to come to a conclusion on a question with which the consulted Judges who form the majority have not dealt,—the amount due to the pursuers on the footing that these views are sound.

If I understand the argument for the defenders aright, they maintain that, even on that assumption, there is nothing due to the pursuers. It seems to be alleged that the prior securities burdening the property would have left nothing for the pursuers, even if the fire had not taken place. But the fact is otherwise. It is admitted by the minute of admissions that before the fire the value of the buildings, including the site, machinery, &c., was sufficient to have met all the burdens on them; and that they have only been reduced below that value by reason of the effect of the fire on the buildings and plant. The indemnity therefore stipulated in the policy means the reparation of the loss so sustained, subject of course to the conditions of the policy. That the site was not insured or insurable does not affect this result in any way. The interest which the pursuers have under the policy is, that this portion of the subject of their security which has been destroyed or damaged by the fire shall be replaced either specifically or by payment.

It is quite true that the policy contains a specification of the different portions of the premises to which the insurance applies, and an allocation of the values attributable to each. I do not understand the pursuers to dispute that they are bound by this allocation; and accordingly their summons does not conclude for the whole sum assured, but for a sum of £565, considerably short of it. Their claim therefore must be held to be, not for the whole amount of their debt, £900, but for the value of those portions of the premises which are specified in the policy and which were destroyed or actually affected by the fire, and that at the value allocated on them in the policy. Of these, two items, of the value of £120 and £190, are admitted in the answer to the 4th article to be rightly claimed. The Lord Ordinary has sustained the amount demanded in the summons to the extent of the full sum of £565. I have not been able to follow the views by which he arrives at that result. The only further sums which are admitted are three items contained in the second last column of the valuation printed in Appendix A, which I understood to have been held as evidence. These amount to about £40, which I propose we should admit, making the amount due £350; and with this qualification I am for adhering to the Lord Ordinary's interlocutor.

The consulted Judges have expressed an opinion that the Messrs Hay are not entitled to any individual decree, and our interlocutor will so bear.

The defenders have pleaded that for any sum to be found due they are entitled to an assignation as against the Messrs Hay. On that, if they desire it, they will be heard.

LORD YOUNG—In the case of *The Scottish Amicable*, 11 R. 287, I formed and expressed the opinion that when property is burdened with debt no more can be done by fire insurance (in the common and familiar form) for the indemnity of the owner and his creditors against damage by fire than will be effected by a policy in name of

the owner with a provision satisfactory to the creditors that payment shall be made to them according to their rights and preferences. I thought it immaterial to the insurers' liability whether the creditors are conjoined with the owner in the policy or not, being of opinion that in any question with the insurers the interests of the owner and of his creditors are indistinguishable. Creditors have no right or interest in their debtor's property except what he has given to them to the exactly corresponding diminution of his own. When therefore a proprietor contracts debt, and gives security over his property, which is forthwith insured against fire by him and his creditors in conjunction, I could not regard the policy by which such insurance is effected as differing in legal character or in the liability which it imposes on the insurers, from a policy in similar terms and for the same amount to an unburdened proprietor. Had this opinion prevailed the seven fire policies which the Messrs Hay in conjunction with their several creditors had effected upon their mill and machinery would, with the parties thereto, have been brought together into Court, and if re-instatement was not ordered, which (the insurers desiring it) I rather think it would have been as the fairest thing to all concerned, the amount of the fire damage due by the insurers would have been ascertained, and paid and distributed according to the rights and preferences of the insured *inter se*, with which obviously the insurers had no concern. It did not prevail, however, the majority of the Court being of opinion that each of the seven policies was an individual independent contract, and that there was no legal connection or relation amongst them. The parties insured by four of the seven policies were pursuers in that case, and had decree for the money value of the whole fire damage to the property thereby insured.

The action now before us is upon another of these seven policies—the fifth that has been sued on. The parties insured by this policy are the Messrs Hay (the proprietors) and the Glasgow Investment Society, a creditor of theirs, holding a security from them over the property thereby insured. Its terms are indistinguishable from those of any of the four policies formerly sued on, and I am unable to resist the pursuers' argument that it is as independent of these four as they were of it, or to put the proposition, as indeed the pursuers do, quite distinctly—that in dealing with the claim under this policy we have, according to the principle of our former decision, no concern with the four policies previously before the Court, and can take no account of anything done or paid under them. In the former case we assumed—I daresay truly in point of fact—that the creditors insured (along with their debtor) by the four policies then sued on were prior and preferable to those insured by the other three. But, as I pointed out at the time, we had neither parties nor materials, nor even averments on record, to enable or entitle us to give a decision to that effect, and the principle of the judgment would, in my opinion, have led to the same result had the creditors then suing been postponed creditors, or even not creditors at all, for had they been strangers the consent of the owners of the burnt property (and they were parties to the policies and also to the action on them) entitled them to decree for whatever sums the insurers were owing under these policies.

We thought it fitting that the principle on which we (by a majority) proceeded in the former case—that of *The Scottish Amicable*—should be re-considered, with the assistance of all our brethren, in this case, which involves the practical application of it, and the extent to which it must be carried if admitted at all. In the former case the contention of the Scottish Amicable Association was that as first, and so preferable, creditors to an amount exceeding the fire damage they were entitled to the whole without reference to subsequent and postponed creditors, who, according to the rules of law which govern the rights of creditors *inter se*, could not compete with them. I have indicated why I thought that we could not regularly sustain this contention, either in fact or law, in the absence of the creditors alleged to be subsequent and postponed, and so excluded from participation. But in this case the Glasgow Investment Society, admitting that they are subsequent and postponed creditors, contend that they have no concern with the prior and preferable creditors or with the fact that the whole fire damage has been paid to them. This contention obviously involves important questions beyond that which we had to consider in the former case.

And I venture in the outset to say that I am averse to waste time by considering the quite fanciful case of a fire insurance effected on property by a creditor independently of his debtor the owner. Such an insurance probably never has existed, and I should think never will, although it is sufficient to say that we have none such to deal with now. The policy before us is to the Glasgow Investment Society (the creditor) and the Messrs Hay (the owner) in conjunction, payable to the former primarily and to the latter in reversion, and thus subsisted from the first, and subsists now according to its terms, quite irrespective of the debt of the Investment Society, which the insurers have, so far as I see, no title whatever to inquire into. A creditor may possibly or certainly lawfully insure against any special risk to which he (as distinguished from his debtor and other creditors) is exposed, but this must be by a special insurance proposed to and accepted by the insurers. So also an owner may insure specially against special risks, such as, for example, the stoppage or destruction of his business, liability in damages for breach of contracts which a fire may disable him from performing. A familiar instance of such special insurance—so familiar that it occurs in most fire policies—is *rent*, which is interpreted to mean the loss from deprivation of the use of premises from the time of a fire till they can be made fit for occupation again. This loss, although always accompanying a fire, is, I need not say, not included by implication, but must be specially insured. We have here to deal with a common fire policy on combustible property, without anything special in it, except only the now all but universal special insurance of *rent*.

It seems to me reasonable to impute to the insurers knowledge of the fact that the Messrs Hay were the owners in actual occupation of the insured premises in which they carrried on business, that being such a fact as all fire insurance offices look to, inasmuch as it affects the risk.

But what occasion had they to concern themselves with the relation between the Messrs Hay and the Glasgow Investment Society? They probably assumed it to be that of debtor and creditor, it seemed so likely; but it was no concern of theirs what it was, or whether it should continue or not. I only notice this in passing, for I shall not dwell on the topic, but I am quite unable to see how the existence or extent of the liability of the insurance office by virtue of the policy could be dependent on or affected by the relation subsisting between the Investment Society and the Messrs Hay at the date of the policy, or anything transacted or done between them subsequently. Whatever should become due by the policy was to be paid to the Investment Society (and you might substitute A B) *primo loco*, and to the Messrs Hay in reversion. It was to the office matter of indifference to whom they paid, and I can find no reason for thinking that the amount payable by them could be different according as the demand was made by the one or the other.

In the former case (that at the instance of the Scottish Amicable Association) four policies in four offices were sued on, but were, I think, properly dealt with exactly as one policy in one office would have been, in so far as regarded the amount of fire damage due and payable. One of them (for £500) was in name of J. A. Robertson, the manager of the Association, but it was represented to us, I presume truly, that it was really to the Association. So taken, the Scottish Amicable Association were creditors of the Messrs Hay for £7485, and held first and preferable securities to that amount over their mills and machinery at Greenhead. By the four policies to which I have referred they were insured to that amount against fire on the subjects of their securities—that is, such of them as were so insurable, viz., the combustible parts which were inventoried, and the several parts separately valued in the policies.

In their action on these four policies (in conjunction with the Messrs Hay) they had decree for £5668 as the ascertained amount of the whole fire damage, the several offices agreeing among themselves as to their contributions. The fire occurred on 1st August 1882, and the pursuers in this case (the Glasgow Investment Society and the Messrs Hay) claim as due to them on their policy from the defenders (the Westminster Fire Office) the damage by the same fire to certain property thereby insured. Had this property not been included in the insurance by the Scottish Amicable (and the Messrs Hay), and had the damage to it by the fire of 1st August not been paid to them as owners and prior and preferable creditors, there could have been no defence to the present action except upon the amount demanded. But it was so included, and the fire damage to it so paid. The question then occurs, Whether when property is insured by the owner and one of his creditors, being a first and preferable creditor, and the whole damage to it by a certain fire has been paid to them, and the same property is insured by the same owner in conjunction with another creditor, being a postponed creditor, anything, and if so, how much, is recoverable under the latter insurance in respect of the same fire?

The case is not one of double insurance in any sense. It is not alleged—and there is no reason for thinking—that the Messrs Hay's property was in whole, or with respect to any item of it, insured beyond its fair insurable value when all the insurances were added together. Their system seems to have been to insure to the amount of each debt as it was contracted or adjusted and security granted for it, and if therefore the property fairly carried the debts it was fairly insurable to the aggregate amount of the debts. Had one policy been substituted for the seven, insuring the same amount on each item of property, and the aggregate of all the items been the same, viz., £9255 (the amount of debt on the property, and which it fairly carried), there could have been no suggestion of double insurance. Whether the creditors were named or not in this (supposed) policy for £9255, they would have been primarily interested in it according to their rights *inter se*, and with interests which could not have been defeated or baffled anyhow without fraud on the part of their debtor and gross neglect on their own.

The general question is interesting, and having been thought of sufficient magnitude to be submitted to the consideration of all the Judges, and to be argued before them both in writing and orally, I hope to be pardoned if, in explaining the grounds on which I am compelled to differ from the views of the great majority of my brethren, I venture to begin by submitting some very general and comprehensive propositions in the law of fire insurance which I regard as elementary, but which I think have been, some of them overlooked, and others violated by my learned brethren. The difference between their views and mine is fundamental, and I should desire to bring the difference to the test of as close and exhaustive reasoning as I can.

The primary obligation of insurers by a fire policy is a money obligation. It is to pay in money to the assured the damage by fire to the property insured. There is indeed usually a stipulation for an option to re-instate, but that is a mere precaution against fraudulent or exorbitant claims, and when not exercised does not affect the money obligation, which must be measured and fulfilled exactly as if there were no option.

To this money obligation there are three limits, viz., 1st, the sum insured on the property; 2d, the damage to the property by fire; and 3d, the damage suffered in consequence by the assured. And the liability of the insurers can in no case exceed the least of the three. It cannot of course exceed the sum insured, while it may and must fall short of it to the extent that the fire damage falls short of it. Further, it cannot exceed the fire damage to the property, while it may and, on the principle of indemnity, must fall short of it to the extent that the consequent loss or damage to the assured falls short of it. This principle of indemnity may thus limit the liability of the insurer to pay within the two limits—of sum insured and fire damage—(or even extinguish it), but cannot possibly extend it beyond the least of them.

These are familiar rules, and I have thought it proper to express them only because I think some of the learned Judges have not had them sufficiently in view in considering this case. It

occurred to me at least that the language which they use indicates an impression that the principle of indemnity may extend the insurers' liability beyond the fire damage to the property insured. The decisions and judicial *dicta* regarding this principle which these Judges refer to all relate to claims within the admitted amount of fire damage to the property, and which were resisted only on the ground that the assured had not been damaged up to that amount, or at all; as does also some judicial language to the effect that it is really not the property but the interest in its preservation that is insured — language which has a quite sensible meaning for the purpose for which it was used, but is grossly misunderstood if supposed to signify that insurers may be liable beyond the amount of the fire damage to the property where the assured has suffered damage beyond that amount, which is a very common case indeed.

The first thing to be done when insured property is damaged by fire is to ascertain the amount or just estimate of the damage in money. The consequent injury to the assured, which may limit or extinguish his right to recover, is generally a subsequent question—and indeed always, except in the rare case where the assured has so obviously sustained no loss, having no interest in the property at the time of the fire, that it would be idle to inquire about the extent to which it had been damaged.

Now, I venture to assert that the money value or estimate of the damage by a given fire to any given property cannot be affected by the character or extent of the assured's interest in it, but must be absolutely the same for anybody and everybody. The right to payment is another matter, and will, as I have said, be affected by the interest of the assured and the damage thereto consequent on the damage to the property, which it can never exceed although it may fall short of it to any amount.

The rule for estimating fire damage to property is quite fixed. In the case of total destruction it is the market value at the date of the fire, and in the case of partial damage it is the depreciation of that market value by the action of the fire (or of the means used to extinguish it), or, which amounts to the same thing, the sum necessary to repair the damage. This is what the insurer of property against fire by a common fire policy, for I speak of no other, undertakes to pay, but always within the limits I have already expressed, viz., 1st, the sum insured, and 2d, the damage to the interest of the assured.

Where each of a catalogue or inventory of subjects or articles of property is insured for a distinct sum, nothing can be allowed in respect of any one of them beyond the fire damage to it estimated according to the rule, although the value of the others may thereby be depreciated.

It may happen, and often does, that a fire occasions damage to the assured, no matter what the character of their interest, greatly in excess of the amount recoverable under a policy whereby the property burnt is insured up to its full insurable value. This is very apt to occur, and probably always does, when the property insured consists of the buildings and machinery of premises where a manufacturing business is carried on. A serious fire in such premises may wreck not only the property, but also a valuable business, to the utter ruin of the trader, and with serious consequences to his creditors also. In the case we have to deal with the business of the Messrs Hay appears to have been not merely paralysed and suspended for a season in consequence of the fire, but killed; at least we are told that although five years have since elapsed it has not been resumed, and that their manufacturing premises continue now in the state of wreck and ruin in which the fire left them. The Messrs Hay must of course suffer without indemnity this destruction of their business, with, very possibly, liability in damages for broken contracts which the fire, by destroying their buildings and plant, disabled them from fulfilling to an amount in excess of the value of the whole property. But the value of the property itself, including the site, may have been, and no doubt was, depreciated by this destruction of the business carried on there. It is not only an intelligible idea, but a familiar fact, that manufacturing premises, where a really or apparently extensive and thriving business is being carried on, will be valued even by money-lenders and their advisers at a larger sum than similar premises closed and unoccupied through the recent ruin (from whatever cause) of the trade that had been carried on there. I should think it not only probable, but certain (looking to the admission that has been so much relied on), that the Messrs Hay's property has been thus depreciated to a considerable extent beyond the fire damage covered by the policies. For if it was depreciated only to the amount of the fire damage, it follows that if you add the value of that to the site and salvage you obtain the original value. The postponed creditor can indeed say, and does with some simplicity (as an argument), that the fire damage has not been paid to him. But the question I am now considering is, not to whom the fire damage ought to be paid, but what is the amount of it. Assume that the property is depreciated only by the fire damage, then if you value that and also value the site and salvage, the sum of the two values must give you the original value of the property. But if there is a further depreciation of the property from the wrecking of the business, so that it cannot profitably be resumed, and in fact is not, that further depreciation is not covered by a fire policy (in common form) any more than the destruction of or damage to the business whereby it is caused. What might be done by special insurance I have no occasion to consider.

It is clear, I think, from what I have said, that no *property* can be availably insured against fire beyond its fee-simple value, and I should respectfully invite anyone who thinks otherwise to try to specify for what beyond this it can be insured. If you think of the various interests that can exist in any subject of property you will find that their value is limited by the fee-simple value of the property, and that any interest beyond it, if conceivable, must be nominal and worthless. No property can carry interests beyond its fee-simple value. The owner may transfer, divide, and share his interest in his property as he pleases, but he cannot multiply it or add to it. When the owner contracts debt and pledges the property to his creditor, a partition of interest

is effected, the interest of the owner (as it previously existed) being diminished to the exact amount to which an interest is given to his creditor, the creditor taking all that the owner parted with (by giving it to him), but just as certainly taking no more. Whatever he confers on another, he himself parts with, so that adding what he parts with to what he retains, you have exactly the value of his original estate. Nor is the fact varied by speaking of what is retained and parted with as insurable interests. The insurable interest retained *plus* that parted with are together of the exact value of the original insurable interest as it existed entire in the owner before the partition. Of course the indebted owner does not necessarily part absolutely and for ever with the interest which he confers on his creditor, but he does part with it so long as the creditor lawfully retains it. The contingency of possible or probable return, in whole or in part, may be called "reversion" or "remainder." I have spoken in the singular, of a creditor, but the case will not be varied by speaking in the plural. Whether an indebted owner pledges his property to one creditor for £10,000, or to two creditors for £5000 each, the result must be the same. In either case the owner has parted with exactly the same amount of interest in his property, although in the former case there is one recipient, and in the latter two. The total of the retained and the transferred interests is the exact equivalent of the unity before partition, and indeed must be, unless there is some miraculous generation in the process of partition.

If these views are true—and I think they are elementary and indisputable—a fire office to which a common fire risk on property is proposed need have no concern with the debts upon it, or with the owner's pecuniary circumstances, and I should indeed be surprised to hear that a fire office required a search of incumbrances or troubled itself about the pecuniary circumstances of the owner of property proposed for insurance.

I have already said that I speak only of common fire policies on articles or subjects of property, and I may here notice that the exigencies of the case before us do not require the consideration of any insurable interests therein, except those of the owner and his creditors (one or more) to whom he has pledged it, that is, transferred his interest in it to a certain extent for a certain purpose. There may be others, of which the case of *The Northern Insurance Company* (5 Chan. 580) affords a striking example. That case was cited to us in *The Scottish Amicable Association* v. *Northern Assurance Company* (11 R. 287), and is greatly relied on by the majority of the learned Judges in the present case. I did not think it in point in the case of *The Scottish Amicable*, and do not think it in point in this case, but as there is weighty opinion to the contrary, I must explain my views.

In that case goods, the property of a merchant, were in the custody of a wharfinger (at his wharf), under a contract whereby the wharfinger was bound to the owner to make good to him any loss or damage which the goods might sustain (by fire or otherwise) while in his keeping. The goods were fully insured against fire by the merchant in one office, and by the wharfinger in another. A fire occurred at the wharf and the goods were burned. There was no question as to the amount of the fire damage or the right of the merchant (the owner of the goods) to receive it. It was accordingly paid to him by arrangement between the insurance offices, who both acknowledged liability to him—the one directly and the other mediately through the wharfinger. The question before the Court was whether or not the wharfinger's insurer, who made the payment, was entitled to demand contribution from the merchant's insurer, and it was decided in the negative, on the ground that as the wharfinger's insurable interest was his contract liability to the owner, the payment to the owner by the wharfinger's insurer was equivalent to payment by the wharfinger himself in implement of his contract obligation, which, had he made it, would clearly have given him no claim for contribution from the owner's insurer. It was pointed out by the Master of the Rolls that had the merchant got payment from his insurer, as he might, he must have assigned his contract claim against the wharfinger, through which his insurer who had paid him would have recovered full relief from the insurer of the wharfinger. These views, if sound, and they were the grounds of the judgment, were of course conclusive against the claim for contribution there in question.

But although the decision in this Chancery case is not in point to the case before us, or to the case of *The Scottish Amicable*, I am far from thinking that it may not be usefully referred to. I think, on the contrary, that a right understanding and appreciation of it will serve to remove some erroneous views which seem to me to have influenced the opinion of a majority of the consulted Judges. There was in that case no question whatever as to the mode of estimating the fire damage to the property insured. It was estimated in the usual way, according to the rule which I have stated, and to the satisfaction of all concerned. Nor although the same property was fully insured in each of two offices, each of which received full premium, did the notion (extravagant as I regard it) occur to anyone that double payment, or more than single payment, could be exacted. It was postulated that the wharfinger was under contract obligation (by his contract of custody as wharfinger) to make good to the merchant any damage to the goods while in his custody, including damage by fire, and that this contract obligation was not diminished or affected by the circumstance that the merchant held a policy on them from a fire office. If he fulfilled his contract obligation to the merchant by paying to him the fire damage, the merchant in that case sustained no damage by the fire to be made good under his policy, and it was and could be of no significance to either the merchant or his insurer where the wharfinger got the money with which he paid the amount due by him. If he did not fulfil the contract, the merchant as the creditor in it was bound to assign it to his own insurer on payment by him under the policy. On this assignation the merchant's insurer was clearly in a position to demand from the wharfinger, not a contribution, but full payment of his contract obligation, and if he held an unpaid policy in his own name on which he was in a position to demand what would enable

him to meet his contract obligation, it was not doubtful—at least the Court of Chancery so held—that recovery could be had under that policy by the merchant's insurer—not at all by way of contribution, but of total relief due by the insurer of the primary and ultimate obligant for the damage. This was of course absolutely inconsistent with the notion of contribution by the two insurers. There might, indeed, have been a double payment of the fire damage had the wharfinger contrived secretly to obtain payment from the insurer and embezzled the money, but in no other event that I can imagine.

I return to the case of burdened property insured by the owner for behoof of his creditor (or creditors) and of himself in reversion. And to make the case quite precise and definite, let us suppose that the debt is £9000, that this is as much as the property will carry, that it is all held by one creditor—say the Scottish Amicable Association—that this creditor has security therefor (indistinguishable in character from the security of the present pursuers, The Glasgow Investment Society), and that the insurance on the property, to the amount of £9000, is by a policy indistinguishable, except in names and sums, from that now sued on—the property being inventoried on the margin of the policy with a distinct sum insured on each article—the aggregate being £9000, and the insurance being to the Scottish Amicable Association and to the owners—(say the Messrs Hay) in reversion. Let the policy be in any fire office you please, say the Westminster. During the subsistence of this policy the fire of 1st August 1882 occurs, whereby damage is done to the property insured to the amount of £5668, estimated at what would suffice to repair it completely, including nine months' rent as the damage for the premises being incapable of occupation and so idle during the time ascertained to be necessary to make the repairs. On these assumed facts what sum would be recoverable from the Westminster Fire Office under the policy, and by whom? Or are these facts insufficient to enable you to judge of the amount? I assume that the facts are sufficient, that the amount recoverable would be £5668, and that it would be recoverable by The Scottish Amicable leaving no reversion for the Messrs Hay. I do not argue the matter, this being exactly how The Scottish Amicable were dealt with in their action as creditors to the amount of £7485 and similarly insured. My suppositions really make no change beyond increasing the amount of their debt by £1515. Property and security the same, fire and consequent damage the same, only the debt and insurance larger by £1515. Is it conceivable that this addition to the debt and sum insured would increase the fire damage to the property insured, or the claim of the assured? If anyone can conceive it, I should like to be favoured with his estimate of the amount of increase, and his distribution of it over the several items in the schedule or inventory of the damaged property.

But taking the articles of property to be exactly as they in fact were, and the fire damage to each to be exactly as it was ascertained to be, giving a total of £5668, it is obviously impossible that more than this would have been recovered under an insurance for £9000 (adding together the sums insured on the several items) to a creditor in a debt of £9000, and to the owner in reversion, unless the insurance covered something *ultra* the fire damage to the property. What is that something *ultra* supposed to be? Nothing *ultra* is specified in the policy. What is there besides the fire damage to those specified items to be taken account of? The answer, as I collect it from the opinions of the majority of the consulted Judges is, depreciation of the creditor's security considered as existing over the whole property regarded as a composite subject and consisting of site, buildings, and machinery, so that after crediting the sum of £5668 paid as the fire damage to the property specified in the policy, the site and salvage after the fire does not afford as good security for the balance of his debt as the whole property before the fire did for the whole debt.

The objections to this certainly novel idea are I think insuperable. At present, however, I desire only to point out that if it will hold good in the case of a postponed creditor (among any number of creditors you please to think of), it must equally hold good in the case of one creditor who holds the whole debt on the property. Taking the whole debt at £9000, and supposing it to be held by one creditor who accordingly receives £5668 as the whole fire damage, his position is that of an unpaid creditor for the balance of £3332 with the depreciated security of site and salvage which is assumed not to be as good security for it as the entire property was for £9000. His case is indistinguishable from that of a postponed creditor for that amount, or any less amount, on the assumption on which the notion is based, that the security therefor has been depreciated by the fire.

It must of course also hold good in the case of a preferable creditor, and there is indeed something paradoxical, if not absurd, in the notion that a postponed creditor can be in a better position than a preferable creditor. But why, then, did the Scottish Amicable under their insurance for £7485 receive only £5668? Their debt was thus left unpaid to the amount of £1817 with the depreciated security of site and salvage. It is, indeed, true that they made no claim in respect of depreciation of security *ultra* the fire damage to the several items of property insured – I should have thought for the sufficient reason that their policies covered nothing *ultra*. But then neither does this Glasgow Investment Society make any claim for such depreciation of security. Their policy is in the same terms as the policies to The Scottish Amicable, and their claim is made on the same footing exactly. This novel idea of a claim for depreciation of composite subjects had not been thought of when the case of *The Scottish Amicable* was decided, or even when the record in the present action was closed.

I have, I hope, made it clear that taking the debt at any amount you please, the number of creditors who hold it cannot affect the estimate of fire damage payable on a common fire policy to the creditors and their debtor (the owner) in reversion. Nor can the number of policies by which, or of fire offices in which, the insurance is effected signify. I assume that no concealment or trickery is intended, or indeed could be successfully practiced by going to several offices, and that the only purpose in doing so is distribution of business or

greater security. The insurable interests of creditors (one or more) cannot be increased or diminished according as they are insured in one office or in more than one, and plainly the damage to the same property by the same fire, and the consequent suffering of the assured, must be quite independent of the number of policies or offices. I may here again point out that the insurances to the Scottish Amicable (and their debtor in reversion) for £7485 were by four policies in four offices, which were all, I think, most properly regarded and dealt with as one. If property will fairly carry £9000 of debt, and is fairly insurable to that amount, it cannot affect the estimate of fire damage, or the amount recoverable by fire insurance, whether the debt was contracted and the insurance effected all at once or piece meal. If the whole debt is held by one creditor he must necessarily suffer the whole damage which the fire could possibly do to any number of creditors among whom it might be divided, and his suffering will be the same whether he lent £9000 at once and in one sum, or on two occasions in sums of say £8100 on the first and £900 on the second, and whether he holds one policy for £9000 or two policies for £8100 and £900 respectively. Again, if you assume, say two policies, one for £8100 and the other for £900 over the same property and in the same terms, but in different offices, to say that the sums recoverable under them in respect of the same fire will be different according as they are both to the same money-lender or each of them to a different money lender (in conjunction with the debtor), appears to me to be almost, or I should say quite irrational. The damage to property by a given fire, and recoverable under a common fire policy, must be independent of the amount of debt on it or the number of creditors by whom it is held, and it must indeed be startling to fire offices to hear that their risk and liability under policies is or may be increased or diminished according to the indebtedness of the owner of the property insured, and that they are concerned to inquire into the position of anyone to whom they are directed by the policy to pay *primo loco* what may become due under it—to inquire whether he is a creditor, as to the amount and validity of his debt and security, and whether he is a preferable or postponed creditor, and the "composite subject" over which his security extends—their liability under the policy depending on these facts. I think this will be news to the oldest and most experienced fire offices in the kingdom, although what they are to make of the news when it breaks upon them, and they try to realise it and find out what exactly it practically means I have myself no conception, beyond this, that something to be ascertained somehow in excess of the fire damage to the property insured will have to be paid preferably to postponed creditors in case they should otherwise be left without indemnity by the fact, which has heretofore been regarded as common and familiar enough, that the whole fire damage has been properly claimed by and paid to preferable creditors.

It is, I assume, certain that the position of the Glasgow Investment Society, as creditors of the Messrs Hay in a debt of £900, with a security therefor over their mill and machinery, has been prejudiced or worsened by the fire of August 1882, although I should myself find it impossible to estimate the extent, and bring it within this action, and am not surprised that my learned brethren shrank from the task. The general view which my learned brethren find irresistible seems to be that this Society, holding a fire policy over the property, the burning of which prejudiced their position as creditors holding a security for debt upon it as part of a "composite subject," they must have something out of the policy, and that this something must be estimated at what will indemnify them for their suffering—indemnity being the great leading and governing principle of the law of insurance. But indemnity, according to the law of insurance, must be paid with money, which the same law of insurance produces, and I have indeed laboured in vain if I have not shown that the law of insurance will produce no money out of a fire policy on property beyond the damage done to the property by fire, estimated by the rule of what will completely restore or repair it. If that will indemnify those who have suffered—whose position has been prejudiced or worsened—by the fire, it is indeed well. If not, there must of necessity be a residue of suffering without indemnity. I need hardly repeat that I do not refer to insurances of special risks and interests (which may conceivably be infinitely various, although I do not happen to have met with an instance of any such) distinctly proposed and accepted, and therefore specified and paid for.

It seems to be thought too dreadful to be contemplated with equanimity that the Glasgow Investment Society, though sufferers by the fire, should take nothing by the policy sued on, and that the Westminster Fire Office, which received a premium, should pay nothing. But I have to point out, first, that although according to my view of the law the Investment Society take nothing by this policy, *i.e.*, nothing which, as it happens, they would not have taken had it not existed—they do take as much as creditors in their position can possibly take by fire insurance, viz., the extinction of preferable debts to the full amount of the fire damage; and second, that it is not according to my opinion that the Westminster shall escape without payment, inasmuch as I think they are right in the view which they take and avow of their position, viz., that they are liable to contribute proportionally to the payment of the fire damage by the payment of which the assured with them have benefited. It will not, I think, be disputed that all the bondholding creditors of an insured owner will, even without being named in his policy, take preferably to him all that may become due under it, and that (named in the policy or not) their rights *inter se* will be governed by the priority of their securities. I do not know whether this result is admitted in what may be regarded as the typical case, viz., that of the owner and his creditors being all insured together in one policy to the full insurable value of the property and their interests; but it seems to me so clear that I venture to assume it. In such a case let me assume that there is one creditor (or two creditors—the number is immaterial) prior and preferable to the others, and that the fire damage does not exceed his debt. Is it thought doubtful that he will take the whole of it to the exclusion

of the others? And if he does, as he certainly will, is it true that the others—that is to say, the postponed creditors—take nothing by the policy? I should say that they take all that postponed creditors can take by insurance when the money value of the fire damage is exhausted by the claims of preferable creditors, viz., clearing the property of the preferable debts to that amount, the whole benefit of the clearance going to them. How does the principle of indemnity entitle them to more, unless, indeed, they are to be indemnified for more than the depreciation of their security by the damage covered by the policy? It may indeed, as I have shown, be depreciated in excess of this damage (as by stoppage and destruction of business, whereby undoubtedly the property value of business premises may be depreciated), but that excess is not covered by the policy. The depreciation so covered is measured by the fire damage to the property, and if prior and preferable securities are reduced to that exact amount, the postponed creditors are fully indemnified so far as insurance law permits under a common fire policy on property. If they are to have more, a fund must be found out of which they are to get it—a fund consisting of money *ultra* or in excess of the fire damage to the property insured, and which they are to have as compensation for the depreciation of the property *ultra* or in excess of the fire damage to it. This is perplexing, and I must, with great respect to others who think differently, say extravagant.

I have dealt with the case of one policy whereby all (owner and creditors) are fully insured up to the insurable value of the property, and whereby the whole insurable interest of each insurer is comprehended. I must refer to what I have already said to show that the rights and liabilities, *hinc inde*, of assured and insurers cannot be affected by the number of policies whereby the same property is insured in the same terms to the same amount, and to the same parties having the same insurable interests. It would be scandalous and a reproach to the law if it were true that while an insurance on property to its full value, for behoof of the owner and his creditors, will produce only the actual fire damage to the property if effected by one policy in one fire office, it will produce more if effected by two polices in two offices. And how, I should like to know, are you to measure the excess of productive power by this contrivance. You begin with the fire damage to the property, if you have one policy covering all interests up to the value of the property. If you are to increase this as you multiply policies with individual creditors named along with the owner in each, what is the rule for the increase?

I am aware that the learned Judges from whom I differ think that the Westminster Fire Office is not liable as a contributory for the fire damage paid to the Scottish Amicable, although the assured with them benefited, as I have shown, by that payment. But have they not overlooked the circumstance that this office incurred the risk of having to pay the whole £900 insured by their policy. Had the fire damage exceeded, as it might, the sums insured to the Scottish Amicable, the Westminster would have been liable for the excess up to the £900 insured by them, of course within the limits which I have already specified, viz., 1st, the damage to the property specified in their policy, and 2d, the damage to the interest of those assured by them, which (the owner being assured) must have equalled the first. Their position with respect to liability is obviously the same as it would have been had their policy been to the Scottish Amicable and the Messrs Hay in reversion. In that case the amount of fire damage being what it was, the Westminster would simply have contributed with the other four offices to meet it, and would no doubt have been sued in the same action with these four offices. By the Westminster policy, taking it as it is, the insurance on the property (that is, the property specified in it) was increased by £900, and the fire and consequent damage might have been (although it happened not to be) extensive enough to require payment by them of the whole amount. In that case the five policies, producing enough to pay both the preferable and postponed creditors, the Glasgow Investment Society would have received this £900 as their share.

By the policy sued on fourteen distinct items are insured, each for a specified sum, the total being £900. Eight of these only (including three items of rent) are alleged to have been damaged by fire, and the pursuers' claim is therefore limited to them. We can take account of no others. The claim is distinctly stated in Cond. 4, and the result of it is that the claim in respect of each item is the full sum insured on it, the total being £565, which accordingly is the sum sued for.

It follows from what I have stated that if these items, or any of them, were damaged by the fire of 1st August 1882, beyond the amount insured on them respectively to the admittedly preferable creditors (the Scottish Amicable) such excess would in my opinion be recoverable under this policy. But with the exception of one item (of £5, which has been admitted and paid) it is conceded that the whole were individually insured to the preferable creditors to an amount exceeding the fire damage to them, singly and in the aggregate, the whole of which has accordingly been properly paid to the preferable creditors.

It will suffice to take one item, and I take the first and largest—the "barley mill and counting-house," which was insured by seven policies to the aggregate amount of £2390. By the fire it was admittedly damaged to the amount of £1610 exactly, so that the insurance was, as it happened, superfluous to the extent of £780. The insurance on this building to the prior creditor being in excess of the damage (it was so by £590) the whole was paid to the prior creditor. Was this proper and in accordance with the prior creditor's right? It admittedly was so. The prior creditor was not necessarily, and probably not in fact, indemnified in the popular sense by this payment, but it was all the indemnity he could get, although his insurance was for £590 more. It was, I think, suggested that he might have re-built or repaired the mill, but he certainly could not. He had an absolute right to the money, but none to re-build or repair his debtor's mill, which might, and probably would, have been a foolish and ruinous proceeding for both. I am myself of opinion that the insurers by all the seven policies were and are liable to

contribute proportionally this sum of £1610, and they are themselves quite agreed that they are. I think it clear that all the parties assured by these seven policies take benefit by the payment in exact proportion to the value of their respective insurable interests. The prior creditor gets his debt paid to that amount; the postponed creditors get the preferable security discharged to that amount; and the owner gets his debt paid and his property unburdened to the same amount. I do not doubt that this is exactly what was intended by all the parties, whether insurers or assured, and am not impressed by the view, which I think fanciful, that "it is just because a postponed creditor will take no benefit from the insurances of prior creditors except in one event (re-instatment) which may or may not happen, and which he has no power to bring about, that he takes the precaution of insuring separately for himself." If "a postponed creditor" wishes to insure for himself in such terms, that if the insurers do not exercise their option to re-instate, but elect to pay the whole fire damage to the preferable creditors, he shall be dealt with, not merely as if he were one of them, which would only give him a *pari passu* share with the others, but as if he were the sole creditor, and as such entitled to the fire damage up to the amount of his insurance—I should require him to specify his meaning in his proposal, and should be surprised if any fire office accepted it.

I have taken this item of the barley mill and counting-house as a specimen. The other items specified in Cond. 4 (laying aside the three for rent) are similar, and subject to the same observations.

The majority of the learned Judges seem to think that the Investment Society's security, or the property over which it existed, is the subject insured by the policy, and that the question is, what loss they have suffered "by the damage done by fire to the subject of their security?" And by "the subject of their security" I understand the learned Judges to mean the property specified in their bond to be ascertained by an inspection of it. They say—"The subject of the insurance was the property—the particular building and machinery specified in the policy were all parts of the property, the machinery having been built into or permanently attached to the ground, and the value of the security depended on the unity of the subject—site, buildings, and machinery. The insurance was one over a composite subject, the sum insured being allocated over the particular buildings and machinery enumerated in the policy, and the injury to these by the fire, inasmuch as it not only destroyed the particular buildings and machinery but greatly depreciated the composite subject, destroyed also the security for the protection of which the insurance was effected."

I must, with all due respect, say that in my opinion all this is erroneous. I doubt if a creditor ever submitted a proposal for such an insurance as is here imagined (for it is quite imaginary), and I more than doubt if any fire office would accept such a proposal. It would involve a very special risk indeed, viz., of liability not only for the damage by fire to the property specified and insured, but for the consequential depreciation of a "composite subject" outside and beyond it, and not specified at all. If you are not to travel outside and beyond the specified and insured property, but confine your inquiry to the damage to it by the fire, it is obviously idle to refer to any other; and if you are to go beyond and inquire about other property, it must be with a view to extend the insurer's liability to the depreciation of property not insured by them, and which may very possibly (though this is immaterial) be the subject of insurance by other policies.

I must further respectfully observe that the insurance in question is not an insurance of the value of the Investment Society's security, but simply of (I quote from the policy) "the property described in the margin hereof" for the sums set opposite the respective items. The insurance office had no concern at all with any other property, and even with respect to that specified were not concerned to inquire (and probably did not) whether there was debt on it or not.

Nor are we in this action concerned with all the property described in the policy, but only with the eight items of it specified in Cond. 4. Three of these are for rent (one of them paid), and so there are only five items of property, the insurance of which and the damage to which we have any occasion to inquire about, and with respect to them I venture to think that the case is simple and easily soluble on familiar principles of insurance law and familiar rules governing the relations of debtor and creditor and of creditors *inter se*.

What was the position of the owners (the Hays) with respect to these articles of property when they granted security over them to the Glasgow Investment Society? They had previously pledged them by a valid and subsisting preferable security to the Scottish Amicable Association, and insured them to that Association to the amount of £2575. What interest in them remained to themselves either to retain or bestow on the Glasgow Investment Society; or, if you please to put it so, what insurable interest remained to them in these five articles of property to retain or bestow? The answer is plain—the residue or reversion (if any) after satisfying the preferable claim of the Scottish Amicable. This (or something within it) they bestowed on the Glasgow Investment Society, who accordingly, having no other author, can have nothing more. The Messrs Hay had no more to give, and the Investment Society certainly knew it. What in these circumstances was the purpose of the policy with the Westminster, which is for £430 over those five items, which were already insured for £2575. The only legitimate purpose, and therefore I assume the true purpose, was to cover a reasonably estimated excess of insurable value beyond £2575. In that view it was a prudent measure, and had the fire damage exceeded £2575, the excess up to £430, would all have been payable under this policy, by which alone it was covered. It in fact amounted to exactly £1654, 10s., and so the insurance with the Westminster turned out to be a superfluous precaution, just as the insurances by the policies to the Scottish Amicable were, as it happened, superfluous to the amount of £921, 10s. In other words, the fire damage to those five items fell short of the sums insured on them by £1351. Now, take their full market value on

the eve of the fire at any sum you please, that value was reduced or depreciated by the fire (for I take no account of depreciation from any other cause) to the extent of £1654, 10s., the property so depreciated being left extant for whom it may concern, according to their legal rights in it. The property as it stood on the eve of the fire was of higher market value by £1654, 10s., exactly, than the same property as it stood after the fire. That this is true is certain on the assumption that the damage to it by fire was rightly estimated, which is admitted. It follows that the Investment Society have sustained no damage by the fire. The residuary value, after satisfying the claims of the Scottish Amicable, is so far from being reached, that their preferable claim upon the property remains outstanding to a considerable amount. And as I have already pointed out, the depreciation of the property by the fire damage, and the reduction of the preferable security by the payment to the prior creditor, are exactly commensurate.

I hesitate to consume time by referring to the rent item, the insurance of which, according to established rule, and an express note on the policy before us, covers only "the payment of rent for such portion of the said term of one year as the foresaid buildings respectively may be actually untenantable in consequence of fire." This in the case of the "barley mill and counting-house" was found to be nine months, and the Scottish Amicable were accordingly allowed the full rent of this building for that period, viz., £350. How is the Glasgow Investment Society to have £120 in addition? Is it because the untenantable condition of this building for nine months has "depreciated the composite subject" to that exact amount? I ought not perhaps to wonder if the answer is in the affirmative, for a great majority of the learned Judges to whom we appealed for aid have informed us distinctly that in their opinion depreciation of composite subject is relevant and fitting to be considered in deciding upon the pursuers' claim as specified in Cond. 4, being the only claim before us, which seems to imply that we may and ought in respect of it to allow something upon each or some of the eight items of claim, and why not £120 upon the claim for rent of barley-mill and counting-house? This is no doubt as sensible as it is, on the same consideration of depreciation of composite subject, to allow £80 on a steam-boiler-house, which was admittedly not damaged at all, the fire not having reached it, or a like sum of £80 on a steam-boiler and connections which was admittedly damaged only to the extent of £15. It seems to me, although with such a weight of authority against me I speak with much diffidence, that it is idle to speak of depreciation of "composite subject" unless you can somehow make it yield a definite sum of money, which can be judicially awarded to the pursuers under some or all of the eight heads of their claim. I have found it impossible without any materials whatever—and there certainly are none—to fix upon a sum as the depreciation of "composite subject," and if I try provisionally to surmount this preliminary difficulty by pitching upon any sum within the amount covered by the policy, I am utterly unable to divide it into parts to be awarded under all or any of the heads which I find in Cond. 4—"The subjects and others under named were damaged by the said fire to the extent after mentioned, being the amount to which they were respectively insured." I cannot find room for depreciation of "composite subject," although with the opinion which I have that the idea is futile, I may very likely exaggerate the difficulties attending the practical application of it.

After what I have said it is perhaps unnecessary to add that I altogether dissent from the views of the majority of the Judges, to the effect that the insurers here will, on making payment to the Investment Society, be entitled "as an incident of the contract of indemnity" to demand an assignation of their debt against the Messrs Hay. They say—"This is the case explained by Lord J. Mellish in *The North British Insurance Co.*, L.R. 5 Chan. Div. 583, in a passage of his opinion which appears to have been misunderstood." I have already noticed this case at some length, and it will be seen from what I have said that I also think it has been misunderstood. I think I understand that case, and also the case of *Simson* v. *Thomson*, L.R., 3 App. Ca. 279, and if I do they have no bearing on this case.

According to the import and exigency of the policy, in my opinion the insurer's liability is the same exactly whether the demand is made by the Investment Society or by the Messrs Hay. So that the former can demand no more in the first instance on their right to take *primo loco* than the latter would be entitled to receive if the right of the former were cancelled.

My opinion is that the whole fire damage to the property insured by the policy sued on having been properly paid to the Scottish Amicable Association, who had right thereto preferably to the pursuers, the pursuers have no right to recover anything in respect of that damage for which they have been indemnified by the extinction, to the amount of it, of the preferable debt. I think no account can be taken in this action of any damage except damage by fire to the property specified in Cond. 4 of the record, and in particular that no account can be taken of depreciation of the composite subject of the Glasgow Investment Society's security.

Lord Craighill—I concur in the opinion delivered by your Lordship, and refer to it and to the opinions of the majority of the consulted Judges, for the reasons for which I think the judgment proposed by your Lordship ought to be pronounced.

Lord Rutherfurd Clark—I wish to give a short explanation with reference to my judgment in the former case. I concurred in the decision that was pronounced, and am glad to see that that decision has not been impeached. Indeed it was not disputed, nor is it disputed now, that the pursuers were entitled to prevail. Nothing more was maintained than this—1st, That the postponed bondholders should be called as parties; and 2d, That the sum representing the amount of the loss should be brought into Court by the whole insuring companies, in order that it might be distributed in a multiplepoinding. I did not think that it was necessary to call persons who were admittedly postponed bondholders, and whose claims were admittedly postponed to

the claims of the prior bondholders. Nor did I think that the question of right should be tried in a multiplepoinding raised by all the companies For it appeared to me that this would put the prior bondholders to a disadvantage, inasmuch as it was, to say the least, doubtful whether they could claim the whole fund, seeing that it was to be contributed in part by companies with whom they had no contract. But be that as it may, it is very satisfactory to know that in this case it has not been maintained that our decision was wrong, or that the prior bondholders were not entitled to the sum for which they obtained decree.

In this case I agree with the minority of the consulted Judges and Lord Young.

The Court pronounced the following interlocutor:—

"The Lords of the Second Division of the Court, along with and in presence of all the other Judges of the Court, having considered the minutes of debate for the parties, and heard counsel thereon, and on the whole cause, Find, in conformity with the opinions of the majority of the consulted Judges, that the defenders, the Westminster Fire Insurance Office, are bound, under the policy of insurance libelled, to pay to the pursuers, the Glasgow Provident Investment Company, the amount of loss sustained by the said pursuers by reason of the fire in the premises of the Messrs Hay founded on in the record: Find that the amount of such loss is £350: Find that the Messrs Hay are not entitled in respect of their consent and concurrence in this action to any separate or individual decree in their favour: Ordain the said defenders to make payment to the pursuers of the said sum of £350, with interest thereon from 31st August 1882 till paid: With these alterations, adhere to the interlocutor of the Lord Ordinary of 10th November 1885, and refuse the reclaiming-note for the said defenders: Find the pursuers entitled to additional expenses," &c.

Counsel for Pursuers — Pearson — Ure. Agents—Smith & Mason, W.S.

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

Saturday, July 16.

SECOND DIVISION.

[Sheriff of Stirlingshire.

STANFORTH *v.* THE BURNBANK FOUNDRY COMPANY.

Reparation — Master and Servant — Defective Machinery—Contributory Negligence.

A workman while engaged in polishing a piece of metal upon a wheel revolving at a great speed was dragged over the wheel and suffered severe injuries. In an action of damages at the instance of the workman, it was proved that the condition of the wheel was defective in some respects, and that this was known to the employers, who had obtained materials to have the defects remedied, but had delayed the carrying out of the work of repair. The workman was a man of experience, who had been for several years accustomed to the work in question. *Held*, in the absence of any direct evidence as to the immediate cause of the accident, that as the wheel was known to be defective, and no negligence was proved on the part of the workman, the presumption was that the accident occurred through a defect in the machinery, and that the defenders were liable in damages.

William Stanforth, residing in Grahamston, raised this action against the Burnbank Foundry Company, to recover damages for personal injuries sustained by him while working in the defenders' employment. The pursuer, who had been thirteen years in the company's employment and was a steady workman, was engaged at his ordinary work on the 25th July 1886 in polishing a railway signal segment upon the left wheel of a machine called a "glazer" in the defenders' works. This segment was a curved plate of metal about 32 inches long and weighing about 22 lbs., the particular piece of the segment which had to be polished being a rectilinear or rectangular projection 11½ inches long, ⅝ of an inch wide, and ¾ of an inch high. In polishing this piece of metal the workman held one end of the segment in his hand, resting it against either of his thighs, and changing it as might be necessary. The following description of the "glazer" is taken from the note of the Sheriff:—"It consists of an iron framework on a stone foundation supporting two wheels on the same axle a few feet apart, which are set in motion by a common driving belt. The wheels are of iron, covered with wood, over which is stretched a strip of walrus hide. Their diameter—iron, wood and leather all included—is about 27 inches, and their width 6 inches, while their greatest height above the stance to which the machine is bolted, is about 3½ feet. The leather made use of in such machines is usually about ⅞ of an inch thick when first laid on. It is fastened to the wood underneath, first with glue, and then with wooden or leather pegs. On the defenders' machine wooden ones are used. Those pegs are inserted in rows of four, placed straight across the face of the wheel, recurring every three or four inches. The surface of the leather is naturally rough, and consequently after being fastened to the wheel, it has to be shaved or pared with a turning instrument so as to remove irregularities and give it the same thickness throughout. After being turned, the leather is coated with glue, and this covered with powdered emery, and the wheel is then ready for use."

While the pursuer was engaged in this operation of polishing, by some means or other the segment caught in the wheel, and the pursuer was dragged over the wheel and sustained severe injuries. The pursuer maintained that the left-hand wheel of the machine was in very bad order and dangerous to work at, that not only was the leather generally worn down to about ⅜ of an inch, but that it was even thinner at the edges, that it was loose upon the tire, that its surface was not smooth and equal, but irregular, that in some places it was soft, and in