

family were trying to put an unfair pressure on Mr William Millar, and so they paid no attention to remonstrances in themselves reasonable, and they allowed their judgment to be guided or warped by the opinion of a gentleman who was acting, or professing to act, as their law agent, but who was also to their knowledge the law agent of Mr William Millar, and whom therefore they ought not to have consulted on this question.

On the whole, I have no hesitation in agreeing with the Lord Ordinary and the Second Division of the Court of Session that the £12,000 was lent to Mr William Millar upon unsubstantial and insufficient security, contrary to the law and practice of trust administration.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Rigby, Q.C.—C. S. Dickson. Agents—Clarke, Rawlins, & Company, for C. & A. S. Douglas, W.S.

Counsel for the Respondent—Davey, Q.C.—Asher, Q.C. Agents—Fresfields & Williams, for Donald Mackenzie, W.S.

Friday, August 10.

(Before the Lord Chancellor (Halsbury) and Lord Watson.)

WESTMINSTER FIRE OFFICE v. GLASGOW PROVIDENT INVESTMENT SOCIETY.

(*Ante*, July 12, 1887, 24 S.L.R. 691; 14 R. 947.)

Fire Insurance—Right of Postponed Bondholder to Recover when Prior Bondholder has Received a Sum Sufficient to Reinstatement.

The proprietor of certain mills granted bonds over them for £9000, and afterwards a postponed bond for £900. Policies of fire insurance for £7000 were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, effected a policy of fire insurance with another company for £900 in name of the society, and of the owner "in reversion." The policy insured against damage by fire "the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance.

A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of £5668, which was sufficient to reinstate the works, but they applied it in reduction of their debt.

The investment society then raised an action, with consent and concurrence of the owner, against their insurers for declaration that the pursuers were entitled to be indemnified by the defenders for the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground

that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.

Held (affirming judgment of the whole Court) that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.

This case is reported *ante*, July 12, 1887, 24 S.L.R. 691, and 14 R. 947.

The Westminster Fire Office appealed.

By consent of parties the judgment was accepted of two of their Lordships who had heard the case argued.

At delivering judgment—

The LORD CHANCELLOR—My Lords, this action was founded on a contract contained in a policy of fire insurance dated 10th October 1881. One of the terms of that contract was that if the property or any part thereof should be destroyed or damaged by fire the appellants agreed that they would make good the loss to an amount not exceeding £900. The owners of the property insured were Messrs Hay, grain millers of Glasgow. The respondents held heritable securities on the property to an extent not exceeding £900. Other contracts of insurances had been made by other creditors of Messrs Hay, the proprietors of the mills. These other creditors also held heritable securities prior to those of the present respondents.

By the joint minutes of admissions it was agreed between the parties that immediately before the date of the fire the value of the subjects insured was sufficient to cover both the prior bonds and that of the respondents. As a consequence of the fire the value of the buildings is now so reduced that the respondents' bond is entirely uncovered. It appears to me beyond doubt that by the contract of indemnity into which the appellants entered with the respondents the contingency has arisen against which the appellants contracted to indemnify the respondents.

It is difficult to state the argument on the other side, since it seems to me to be founded partly upon an error of law and partly upon a suggestion of fact which seeks to get behind the admission by which the parties are concluded. The error of law, I think, is in the suggestion that a creditor has not an insurable interest in the property of his debtor, upon which property the debtor has given him a heritable security. I should have thought it was too well settled a proposition in insurance law to be susceptible of argument that a creditor under these circumstances is entitled to insure. The error in fact appears to be founded upon the suggestion, more implied than expressed, that more was insured upon the subjects of insurance than their value justified, since, if the property before the fire was good security for the value of the bonds, and is now only good as represented by the insurance paid in respect of it to satisfy the bonds prior to that of the respondents, it is difficult to see that when all these contracts were made, the subject being sufficient to satisfy them, and the fire alone hav-

ing made the difference, yet the respondents are not to be indemnified to the extent of their loss I am wholly unable to understand how other contracts made with other people can affect the question once it is conceded that the property as it originally stood was sufficiently valuable to meet the demands of all. But it is said that, apart from the sums of money received by the prior creditors, and by which they have extinguished the debt which gave them an insurable interest in the premises, they might—or some of them might—have insisted on the reinstatement of the premises. It seems to me that such a proposition would be as reasonable an answer to the respondents' demand as to suggest that if the premises had not been burned down there would have been no loss, and I agree that if the premises had been reinstated there would have been no loss, but as a fact they were not, and, apart from the argument derived from the Statute 14 Geo. III. cap. 78, section 83, that the respondents had no control over the question whether the premises should be reinstated or not, and no terms in the contract to which they were parties gave them an option whether the premises should or should not be reinstated. With respect to that statute I will only say that no such question is suggested upon the record, and inasmuch as there are some questions of fact which would have to be determined before one could affirm the application of that statute, I decline to consider it.

As to the rent, I am of opinion that there was no loss in respect of it. The £120 awarded by the Inner House in respect of the rent seems to me not to be maintainable—Messrs Hay themselves occupied the premises. This was an occupation to which the respondents could not under the circumstances have been entitled, and the loss, if it can be called a loss, to the actual occupiers has been paid for to the persons entitled to it. It is not a loss to the respondents, who never had it, and could not be entitled to it. I am therefore of opinion that the judgment must be reduced by the sum of £120. It does not appear to me that that alteration of the amount substantially affects the question as to who has been successful in the litigation, and I therefore think that the appellants ought to pay the costs both here and below, and I move your Lordships accordingly.

My Lords, I am not entitled to read to the House as a judgment the opinion of the noble and learned Earl (the Earl of Selborne) who was present during the argument in this case, but as a part of my opinion I am entitled to read it to your Lordships, and I propose to do so. What follows is that which the learned and noble Earl would have said if he had been here.

The questions to be decided on this appeal are two—First, whether the respondents are entitled to recover at all against the appellants? and secondly, whether they are entitled to recover for loss of rent? If the respondents have suffered any loss by the destruction of the insured buildings which were destroyed by fire, it follows necessarily that they are entitled to recover to the extent of that loss in this action. If they have suffered no such loss they are of course not entitled to any indemnity. The case therefore of the appellants upon the first question depends upon the contention (difficult in the face of the

admissions upon the record) that the respondents have suffered no such loss.

The respondents were insured in the appellants' office for £900 by a policy dated in 1881, on which the premiums were duly paid. The subjects insured against fire consisted of the Greenhead grain mills and machinery (at Glasgow), belonging to Messrs Hay Brothers, who had given the respondents a heritable security by bond on those premises for the sum of £1000, of which £917, 11s. 6d. remained due when the fire occurred. The amount of that insurance was apportioned over different parts of the subjects insured, of which the barley mill and counting-house were damaged to the full amount at which they were insured, viz., £190, and damage, estimated at £40, was also done to parts of the machinery insured to a greater amount. Under the judgment of the Inner House now appealed from the respondents have recovered these two sums (making together £230), and also £120 for one year's rent of the barley mill and counting-house—in all £350.

There were prior securities also given by Messrs Hay Brothers to other creditors upon the same premises, and those other creditors had insured in other offices. All the securities, including that of the respondents', covered the ground or site on which the mills stood, which (being a subject indestructible by fire) was not insured either by the respondents or by the prior incumbrancers.

It was admitted between the parties that "immediately before the date of the fire the value of the site, buildings, and machinery of Greenhead grain mills was sufficient to cover not only the prior bonds, but also the pursuers' bond." The interest therefore of the respondents at the time of the fire was more than equal to the amount which they have recovered in this action. It was also admitted that "the value of the site of the mills, and the salvage thereon of buildings and machinery after the fire, was not sufficient to meet the bonds prior to that of the pursuers'." The pursuers therefore have actually lost by the fire the whole amount of that interest in respect of which they were insured, and they have *prima facie* a clear right to the extent to which that loss is covered by their contract with the appellants so to be indemnified. I reject (as in my judgment fallacious) the argument that part of the loss ought to be ascribed to depreciation in value of the site or ground on which the barley mill and counting-house stood, or of other parts of the site of the mill premises. The site remains at whatever may have been its value apart from and independent of the buildings which stood upon it. Any greater value which it had when the buildings which have been destroyed stood upon it was entirely due to those buildings, and as they were insured and have been destroyed by fire the contract of indemnity covers in my opinion the whole of that difference, less salvage only.

What, then, is the ground on which the respondents' claim to indemnity is now resisted? Simply this, that the prior incumbrancers have recovered from and have been paid by the other offices in which they were insured (under contracts to which neither the appellants nor the respondents were parties or privies) £5500, being (subject to certain reserved questions affecting a sum of £168, 16s. 8d., with which the respon-

dents are in no way concerned) the amount which had been awarded by the witness Mr Kinniel (oversman in a reference between the prior bondholders and those offices) as sufficient for the reinstatement of the premises. But the premises were not in fact reinstated. The whole amount so awarded went into the pockets of the prior incumbrancers. If it had been applied in reinstating the premises the respondents would no doubt have had the benefit of the reinstatement, and the appellants might then have been entitled to say that they had suffered no loss. But it was not so applied, and the respondents derived no actual benefit from the payment to the prior incumbrancers, because although the debt due to those incumbrancers was (so far) reduced, the balance still remaining due to them was more than sufficient to exhaust the whole remaining value of the property included in their securities.

It is, nevertheless, insisted that the payment so made by strangers to the contract on which this action was brought to other strangers with whom the respondents had nothing to do was, not as between those parties only, but also as against the present respondents, the full and absolute measure of the respondents' interest, and of the whole loss for which any number of insurance companies could possibly be answerable by way of indemnity to any number of persons, under any contracts whatever, in respect of this fire; and that, this having been paid to the prior incumbrancers, and having been insufficient (by more than the amount now in question) to discharge their debt, the whole interest of the respondents in the subject-matter of the action was thereby extinguished. Why should this be so? As between themselves and the prior incumbrancers it was the right of the other insurance companies to satisfy their contracts of indemnity by reinstating the premises which the fire had destroyed, or (which amounts to the same thing) to pay those prior incumbrancers the amount necessary and sufficient for that purpose. This they have done. The claims of the prior incumbrancers on their insurances were in that way satisfied, and it is in my judgment immaterial, as between the present parties, that they might have been entitled under their securities to receive and retain more, if more had been recoverable under their policies. But if the amount of the actual loss by the fire, with which alone the respondents are concerned (as the premises have not been reinstated, and the appellants have not offered to reinstate them), is greater than the amount which would have been sufficient to reinstate them, and which the prior incumbrancers have accepted, why should this latter amount be treated as the measure of the loss as between these parties? Nothing less than some statutory or other binding authority could establish in the appellants' favour a false and arbitrary measure of the actual loss. No such authority applicable in these circumstances, and as between these parties, was cited to your Lordships. The sum necessary to reinstate is one thing; the loss, if there be no reinstatement (which is the present case) is another. On this point the evidence of the witnesses Livingstone and Thomson is demonstrative, and in my judgment conclusive.

It was further contended that the respon-

dents, under a certain Statute (14 Geo. 3, cap. 78, sect. 83), might have intervened before the settlement between the other insurance companies and the prior incumbrancers, and might have required the money which was in fact paid to those prior incumbrancers, to be applied in reinstating the premises. I am by no means sure that they could, assuming (as for this purpose I do assume) that the section of the statute relied upon is operative beyond the Bills of Mortality (see *ex parte Gorely*, 4 De G. J. & S. 477), and that the Scottish Courts, in which no similar question has yet been raised, would hold it to be applicable to Scotland. It has not, as far as I know, ever been decided that it applies as between mortgagor and mortgagee, or (which is the same thing in effect) as between prior and puisne incumbrancers. The concluding words of the section are sufficient at least to suggest grave doubts whether it ought to be so applied. But I do not think it necessary for your Lordships to decide that point, because no question upon that statute has been raised in the pleadings between these parties, as (in my judgment) it ought to have been, if anything was to be founded upon it. There is nothing to show that the appellants knew that they had the right which the statute is supposed to have given them, much less that they were bound, as between themselves and the appellants, to put it in force. It is not even shown that they knew what other insurances there were, or that they could practically have intervened before the settlement between the other insurance companies and the prior incumbrancers was completed. Certainly it does not appear that they were ever called upon by the appellants to exercise that supposed right; and if they were not, the appellants ought not in my opinion to be heard to complain that it was not done. So far therefore as my judgment is concerned nothing turns in this case upon the Statute 14 Geo. III. cap. 78.

The question of rent remains; and as to this I think the respondents fail, and that the sum awarded to them by the Inner House ought to be reduced by £120. The mills were in fact occupied by the mortgagors Messrs Hay, and not by any tenant paying rent. Taking the £120 as representing one year's value of their occupation to Messrs Hay (who were joint insurers), the occupation rent could only be lost to the persons entitled to receive it; and when paid to or settled with them it could not be lost over again to any other person. The rent of the barley mill and counting-house was included in the securities of the prior incumbrancers; it was also insured by them; they, according to their priority, and not the respondents who stood behind them, were entitled, if they thought fit, to claim it, or the insurance money payable for its loss. In the settlement between them and the offices in which they were insured they actually did so, and it was allowed to them for eight months, the period which the oversman thought it would have taken to restore the property and to put the mill in full working order. This could only be on the principle of treating them as, through their mortgagors, virtually in possession or in receipt of rents and profits; the mortgagors, as joint insurers, were parties to that settlement. I am unable to see how, consistently with this, there could be another actual

loss of the same rent for those four months of the year during which it was treated as not lost to those prior incumbancers. I think therefore that the amount recovered in the action ought to be reduced to £230.

I do not, however, think that the determination of this point in the appellants' favour ought to make any difference as to costs. Considering the position of the parties, and the nature of the larger question raised by the appeal, my opinion is that all the costs, here and below, ought to be paid by the appellants.

LORD WATSON—My Lords, I have had the opportunity of considering a print of the opinion of the noble and learned Earl (the Earl of Selborne), and I concur in it.

The reasoning of the learned Judges who constituted the minority of the Court of Session depends upon two propositions, which are in my opinion equally fallacious. One of these is, that separate fire policies covering the same subjects, effected without privity by independent incumbancers, for the protection of their several interests, must all be treated as if they had been effected by the owner of the subjects, if he is made a party to each policy in respect of his right of reversion only, and undertakes to pay the premiums of insurance. The other is, that payment to a first incumbancer of a sum which does not represent the difference between the insurable value of the subjects and their value after deterioration by fire, but is sufficient to reinstate them, must necessarily be regarded as full indemnity to a postponed incumbancer in any question with his own insurers, although the sum so paid is pocketed by the insured and is not expended on reinstatement.

The Act 14 Geo. III. cap. 78, section 83, was not pleaded in the Court below, and it is not referred to in the appellants' case, although it was founded on in the argument addressed to your Lordships. Having regard to the preamble of the statute, and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England, beyond the Bills of Mortality, the decision in *ex parte Gorely*, 4 De G. J. & S. 447, would require to be carefully considered. In my opinion the Act was not intended by the Legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments, and the remedies which these provide, appear to me to indicate that they were not meant to be administered by Scottish Courts.

I am also of opinion that the respondents have failed to show that they had an insurable interest in the rent of the subjects embraced in their security, but I agree with the Lord Chancellor that their failure upon that subordinate point ought not to prejudice their right to the costs of this appeal.

The House affirmed the judgment appealed against with a variation deducting the amount given for the alleged loss of rent, the respondents not having an insurable interest in rent for which an allowance had already been made to prior bondholders. Appeal dismissed with costs.

Counsel for the Appellants—Finlay, Q.C.—Wood Hill. Agents—Dawes & Sons, for H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Rigby, Q.C.—J. Gorell Barnes, Q.C.—J. Hurst. Agents—Lindo & Company, for Smith & Mason, S.S.C.

Monday, July 30.

(Before the Lord Chancellor (Halsbury), Lords Watson, Herschell, and Macnaghten.)

(*Ante*, March 4, 1887, 14 R. 544; 24 S.L.R. 377.)

HUNTER AND OTHERS *v.* NORTHERN MARINE INSURANCE COMPANY, LIMITED.

Harbour—Insurance—Marine Insurance—River—Fairway of Navigable Channel.

Held (aff. judgment of First Division) that in a policy of insurance on a ship for the voyage, and "while in port thirty days after arrival," the meaning of the term "port," as applicable to the port of Greenock, did not include the fairway of the navigable channel of the river Clyde ex adverso of the harbour works.

This case is reported *ante*, March 4, 1887, 14 R. 544, and 24 S.L.R. 377.

Hunter and others, owners of the "Afton," appealed.

At delivering judgment—

THE LORD CHANCELLOR—The question whether the barque "Afton," insured under a policy while she was in port, suffered a misfortune which entitles her owners to recover against the underwriters, depends, first, upon the construction to be given to the word "port," and secondly, when the meaning of that word has been ascertained, upon whether the accident is proved to have happened within the limits contemplated by the contract.

The word "port" is undoubtedly ambiguous. Not dealing with a policy of insurance, then, no doubt what is meant by the word "port" is what Lord Esher, in the *Garston Ship Company v. Hickie*, 15 Q.B.D. 580, describes as what shippers of goods, charterers of vessels, and shipowners would mean by a port—that is to say, that a legal port might be, according to the general understanding of the classes of persons described by Lord Esher, either restricted or enlarged by mercantile usage. There are, however, some well-received elements which, I think, according to any usage one would expect to find. I do not know that these ordinary elements are anywhere more concisely set forth than in that treatise ascribed to Sir Matthew Hale. "A port is an haven, and something more—1. It is a place for arriving and unloading of ships or vessels. 2. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as will be shewn. 3. It hath a ville or city or borough, this is the *caput portus* for the receipt of mariners and merchants, and the securing and vending of their goods and victualing their ships, so that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may con-