Tuesday, January 14.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

PETER FORBES & COMPANY *v.* BORDER COUNTIES FIRE OFFICE.

Policy of Insurance—Voidance of Policy—Trading Company—Name of Firm—Partnership.

"Peter Forbes & Co." insured their premises against fire. There was one partner in the firm, with an option to two other persons at any time to become so. *Held* (1) that the policy was not voided, in terms of a clause therein contained, by the exercise of this option and subsequent retirement of the original partner; (2) that *de facto* all were partners from the first in the sense of the policy.

This case came up under reclaiming note against Lord Ormidale's interlocutor of 5th November 1872. Messrs P. Forbes & Company, Port Dundas Oil Works, Port Dundas, insured their property by a policy with the defenders, dated July 15th 1871. The total amount insured was £1500, and the following clause was to be found in the policy immediately after the specification of the buildings, &c., insured.—"Warranted that no naphtha be stored in any of the aforesaid buildings, and that the 'flash point' of the burning oil is not below 100 degrees, and also that the gas lights in numbers 1 and 2 be enclosed in gas lanterns." Endorsed on the policy, moreover, there were the following conditions:—"(1.) Any material mis-description of any of the property proposed to be hereby insured, or of any building in which property to be so insured is contained, and any mis-statement of, or omission to state, any fact material to be known for estimating the risk, renders the policy void as to the property affected by such mis-description, mis-statement, or omission respectively. (2.) If, after the risk has been undertaken by the Company, anything whereby the risk is increased be done to property hereby insured, or to, upon, or in, anything in which property hereby insured is contained, or, if any property hereby insured be removed from the building or place in which it is herein described as being contained, without, in each and every of such cases, the assent or sanction of the Company, signified by endorsement hereon, the insurance as to the property affected thereby ceases to attach." And "(4.) the policy ceases to be in force as to any property hereby insured, which shall pass from the insured to any other person otherwise than by will or operation of law, unless notice thereof be given to the Company, and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed hereon by or on behalf of the Company."

A fire occurred at the pursuers' Port Dundas Oil Works on the night of the 19th December 1871, which was not extinguished until mid-day on 21st December. By this fire, which, it was maintained, was a risk within the meaning of the policy, certain property duly described was destroyed or damaged, and the pursuers thereby suffered loss to the extent of £840 sterling. The particulars of the pursuers' loss were set forth in a claim rendered by them to the defenders, dated 7th February last. Due notice of the fire was given to the defenders, who declined to pay.

The Lord Ordinary's interlocutor and note were as follows:—

"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds, as matters of fact—(1.) that by the policy of insurance libelled it was expressly conditioned that the policy should cease to be in force as to any property thereby insured which should pass from the insured to any other person other than by will or operation of law unless notice be given to the Company (the defenders), and the subsistence of the insurance in favour of such other person be declared by a memorandum endorsed on the policy by or on behalf of the Company; and (2.) that the property insured by said policy had, on or before the 18th of December 1871, when the fire by which it is alleged to have been damaged or destroyed occurred, passed from the insured to some other person or persons otherwise than by will or operation of law, and that the subsistence of the insurance in favour of such other person or persons has never been declared by a memorandum endorsed on the policy by the company; Therefore, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, reserving the question whether any, and what, modification thereof, should be made, until the Auditor's report has been seen: Allows the defenders to lodge an account of their expenses, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The only defences ultimately attempted to be supported were—1st, That the warranty in the policy referred to in the defenders' answer to the first article of the pursuers' condescendence, to the effect that no naphtha be stored in any of the buildings embraced by the insurance, and that the 'flash point' of the burning oil was not to be below 100 degrees, had been contravened; 2d, That the condition of the policy set out in the defenders' answer to the second article of the condescendence, and referred to in the interlocutor now pronounced, had not been complied with; and 3d, That, at any rate, the amount of loss claimed by the pursuers is excessive. All the other points in defence were given up at the debate.

"1. The Lord Ordinary not being satisfied on the proof that there was any breach of warranty referred to, has not sustained that defence. The *onus* of proving that there was a breach lay upon the defenders, and this being so, the question is, not whether the evidence is such as to make the matter doubtful, but whether it clearly and conclusively establishes that there was a breach of the warranty. The Lord Ordinary has been unable to satisfy himself that the proof has done so. It may, he thinks, be taken as established that during the time the pursuers' works were in full operation from three to five barrels of spirit were daily manufactured, and that in the general case there was a removal of the spirit from the premises once only in three days, when the barrels of spirit had accumulated to twelve or thirteen. The pursuers contended this being in accordance with the fair and ordinary mode of business in such works, it could not, in the true sense of the warranty in the policy, be said that there was any storing of the stuff; and the pursuers have also contended that the spirit manufactured by them was not 'naphtha.' Now, while the Lord Ordinary thinks that these are not unreasonable views of the matter, he finds it unnecessary to rest his judgment on them exactly as so stated, inasmuch as it appears

to him that the defenders have failed to prove with sufficient clearness that there had been any such storing of the stuff, whether it is to be taken as naphtha or not, at the time the fire took place, as to amount to a breach of the warranty in the policy, and thereby render it void. The defenders did not, in reference to this matter, examine on their side any of the workmen or others who had been engaged in carrying on the operations in the pursuers' works. They relied on the statements of the pursuers themselves, and of their witnesses. But, according to the statement of Mr Townsend, who says he was at the work almost the whole day which preceded the night on which the fire occurred, and left it only at half-past six in the evening, there could not be more than a barrel and a-half, or at most two barrels, of spirit in the premises at the time, and it had been run into a tank for the purpose of being barrelled afterwards. The Lord Ordinary can find no contradiction of this statement, and he is not satisfied that it can be held to substantiate what it lay upon the defenders to make clear, that there was any storing of naphtha in the true sense of the warranty of the policy when the fire occurred.

"2. The Lord Ordinary has arrived at a different opinion in regard to the second point relied on by the defenders. He thinks it has been sufficiently established that the property insured had, between the date of the policy and the occurrence of the fire, passed from the insured to another person or persons, and that the subsistence of the insurance in favour of such other person or persons was not declared by a memorandum endorsed on the policy by or on behalf of the defenders. It is not pretended that any memorandum such as that referred to was ever endorsed on the policy, but the pursuers contended that the property insured cannot, in the circumstances, be held to have passed to any other person or persons than the insured, and that, if the contrary could be held, then this was sufficiently made known to the defenders, whose fault it was, and not the pursuers', that the necessary memorandum was not made in the policy.

"In regard to the latter branch of this contention, the Lord Ordinary need merely remark that it appears to him to be not only without support in the proof, but altogether inconsistent with the evidence adduced for the pursuers themselves, and their whole reasoning and pleas on the subject, which were to the effect that in truth and substance there had been no change in the ownership of the property after the insurance was effected. This, then, is the question the Lord Ordinary has had to deal with under the second head of the defence. The parole testimony of the pursuers' witnesses on the point is, in the opinion of the Lord Ordinary, far from satisfactory, being, indeed, in many respects glaringly inconsistent and contradictory. The Lord Ordinary has, therefore, considered it fortunate that he has had before him written documents of a description quite sufficient in his judgment, independently of the parole evidence, to support the conclusion he has arrived at.

"The policy of insurance itself bears that the insured are 'Peter Forbes & Company,' and that the property mentioned in the policy is the 'insureds' own.' Who, then, were the 'insured' on the 18th of July 1871, the date of the policy? And did the same person or persons continue to own the property insured when the fire occurred on the 18th of December 1871? These are the questions which the Lord Ordinary has had to consider and determine. The pursuers' contention was, that in truth and substance there had been no change of ownership of the property insured between the date of the policy and the date of the fire. It was not said that if, in the circumstances, it could be held that there was such a change, it had been effected by 'will, or operation of law.'

"The only conclusion the Lord Ordinary has been able to come to on the written evidence, taken in connection with the statements and admissions of the pursuers themselves, which they of course cannot be heard to disclaim, is that, while according to the terms of the policy the property insured must be taken to have belonged at its date to the firm of Peter Forbes & Company, and the then only partner of that firm, no such firm or partner existed at the date of the fire, and that consequently and necessarily it follows that the property insured had, at or before that date, passed to some other person or persons, who, the Lord Ordinary thinks, must be held to be Joseph Townsend and James Burgess Readman, both or either of them trading under the name and firm of 'The Port-Dundas Oil Company.' There is no question (1) That the individual Peter Forbes was, if not the sole at least the managing partner of Peter Forbes & Company, on 15th July 1871, the date of the policy; and it is not altogether unimportant to keep in view, that according to the evidence in the case, Peter Forbes had been educated and brought up as a practical chemist; that he had experience in such works as those in question, and that he had the chief if not the sole management of them. It may not unreasonably be assumed that the defenders on accepting the risk, and granting the policy in question, had it in view that the property insured belonged to, and was to be under the care and control of such a person as Peter Forbes, or at least some person well qualified from practical knowledge and experience to manage so very perilous and risky a subject with due skill and caution. Accordingly, the Lord Ordinary observes that in the present case, the report, No. 35 of process, made on the works in question to the defenders when the insurance was applied for, expressly bears 'that the work is tidily kept, and the management is first class.' But (2.) The individual Peter Forbes, it is not disputed, and at any rate is sufficiently established, ceased to be a partner of Peter Forbes & Company, and owner of the property insured, some time before the fire occurred. This is stated distinctly by himself and is not contradicted by any one. It is, besides, put beyond all doubt by the Gazette notice of 15th December 1871, three days before the fire, set out in the fourth article of the defenders' Statement of Facts; and that notice, it will be observed, was subscribed not only by Peter Forbes, but also by Joseph Townsend, and James Burgess Readman, who, of all others, must have known best how the matter truly stood. (3.) This Gazette notice appears to be also conclusive, to the effect that at and after its date, 11th December 1871, which was a week before the fire, the business of Peter Forbes & Company was thereafter to be carried on, not under that firm, but the firm of 'The Port Dundas Oil Company.' And (4.) the very formal agreement (No. 200 of process) entered into and subscribed by Peter Forbes, Joseph Townsend, and James Burgess Readman, makes it also clear that, prior to the 20th November 1871, when Peter Forbes retired, and Peter

Forbes & Company ceased to exist as a firm, Peter Forbes had been the sole partner of Peter Forbes & Company. This agreement expressly says so, and by the first head of it, Peter Forbes, 'with the consent of the third party,' that is, James Burgess Readman, 'transfers and makes over to the second party (Mr Townsend), the business carried on by the first party (Peter Forbes), under the firm of Peter Forbes & Company, and the whole assets and goodwill thereof, and his right and interest in and to the said works; as also the right to use, in such manner, and in connection with such business, as the second party may think proper, the name or firm of Peter Forbes & Company, and the first party shall abstain from using the said name or firm of Peter Forbes & Company in any manner of way. And, as from and after the said 20th day of November 1871, the first party shall retire from, and the first and third parties shall cease to have any connection with, the said firm of Peter Forbes & Company, or the said business.'

"The Lord Ordinary has found it impossible, in the face of the writings which have now been noticed, to decide differently from what he has done. He cannot take it from the defenders, or any of them, that they subscribed and became parties to such writings without reading them. Nor can he, upon that or any other ground suggested in the parole proof, deny to these writings their legitimate effect. He conceives it would be most dangerous, and contrary to all sound principles, to do so, or on that footing to hold that the conditions in the policy in question, or any of them, are to be disregarded and denied effect to.

"3. In the view, as now explained, which the Lord Ordinary has taken of the defence just noticed, and which the Lord Ordinary has held to be sufficient of itself to entitle the defenders to absolvitor, it is of course unnecessary to enquire whether the only remaining plea which was relied on by the defenders, to the effect that the pursuers' claim is excessive, or if excessive at all to what extent it is so, is maintainable. He may remark, however, that, were it necessary to go into this enquiry, he is not satisfied that the pursuers' claim could be maintained to its full extent. He may say, in particular, that, according to the admission of Peter Forbes himself, the 'hydro extracter,' for which the pursuers claim £100, was not covered by the policy.

"In regard to the matter of expenses, there can be no doubt of the defenders' right to them generally, but whether subject to any and what modification in respect of the numerous pleas taken by the defenders in the record as closed, some of which were ultimately given up, is a question which the Lord Ordinary has thought it right to reserve until after the Auditor's report has been made."

For the pursuers it was argued that all through Townsend was a partner. With whom did the Insurance Company contract? Undoubtedly with "Peter Forbes & Company,"—not with any named individual partners. The clause founded on in the policy was only intended to protect the Border Counties Fire Office against the interposition of a new partner—against a *stranger* coming into the firm—and it must be recollected that, even supposing Townsend were not at the earlier period a partner, there can be no doubt that he had all through the option of becoming one at any moment.

For the defenders, it was maintained that "Peter Forbes & Co," the firm who entered into the contract, and the firm at the date of the fire, were not the same persons. The individuality of the company and of the partners is quite a different matter. There can be no doubt that in the event of its having been a pure case of warranty, the position of parties would have clearly been that which the defenders have maintained. Further, the storage of naphtha had in itself infringed the absolute conditions of the contract.

Authorities quoted—Mercantile Law Amendment Act, 1856, § 7; Philips on Insurance, 107; Parsons on Insurance Contracts, pp. 355, 451.

At advising—

The Lord Justice-Clerk—In this case, which turns upon the construction of a policy of fire insurance, the Lord Ordinary has found—[His Lordship proceeded to quote the interlocutor of the Lord Ordinary.] I somewhat doubt whether, even if the view which the Lord Ordinary has taken of this clause and of the facts be right, that would have been the appropriate finding, for I think it would have been necessary for the Company to prove, and consequently for the Court to find, to whom the property had passed, before the clause could come into operation. But I am of opinion, on the whole matter, that the Lord Ordinary has mistaken the state of the fact in this case. It does not appear that the property which was insured had passed to any other person than the original insurer in the sense of that clause; and I shall very shortly go over the facts and state the grounds on which I arrive at that opinion.

An argument was addressed to the Court for the purpose of showing that the clause in question would not have operated, even if the subject of the insurance had been parted with, provided the policy followed the transference of the property. It was contended that a clause of that kind operated an entirely different effect from a prohibition of an assignation of the policy itself; and, if I understood the argument rightly, it was this, that the policy remained assignable, and that consequently the assignee was the insured in the sense of the clause, and, therefore, as long as the property and the policy went together, into whose hands soever they came to be, the clause would not apply. This certainly is not the way in which I should have read the clause on the first impression of it, but in the view which I take of the case it is not necessary that we should give any specific opinion upon that somewhat ingenious argument. In my opinion the partners of Peter Forbes & Company at the date of the insurance were substantially the same persons that were partners when the fire took place, or at all events Townsend, who was evidently the person mainly interested in this matter, and who held the title of the property which was insured, in his own name, but under a back letter in trust, was truly the party interested, and is entitled to recover. This is quite clear upon a short review of the circumstances under which the insurance was effected. Peter Forbes was a chemist, and the holder of a patent for the purpose of manufacturing paraffin oil, or the products of paraffin oil. This patent apparently was the main capital which he had to put into this concern. Mr Townsend was a person with considerable funds, and Mr Readman appears to have been a young man with considerable chemical knowledge, and he was conjoined in this project. In 1869 an agreement was entered

into by which this company was started under the name of Peter Forbes & Company, Peter Forbes the only ostensible partner, but Mr Townsend, who had alone the main bulk of the funds, was to advance the money necessary to start it. There was a provision in the 4th article that Peter Forbes was to be allowed £200 a-year, and that Mr Readman was to be allowed £100 a-year; that no profits whatever should be drawn from the concern down to the 1st of October 1870, and that both Townsend and Readman should have the option at that date of becoming partners. Now the meaning of that is perfectly plain. Townsend was unwilling to risk his capital in the capacity of partner, by which he would have been liable for all the debts that might have been incurred by the concern, until he saw what the nature of the concern was to be and the amount of success which it might command. But no profits were to be drawn by any one, and Forbes in reality was simply a salaried manager during the tentative period which was to elapse. But I think it is as clear as possible that when October 1870 came round, Mr Townsend saw his way sufficiently to become a partner. There is no regular deed of co-partnery, nor was it necessary that there should be. But we have the disposition by Parker to Townsend on 12th November and 20th December 1870, by which the title of the property occupied by the company, and at that time in the possession of Peter Forbes, or at least used by him for the purposes of the concern, was made over absolutely by Parker to Townsend. There is also a back letter, dated 20th December 1870, in which Mr Townsend, referring to the disposition, acknowledges that the property so conveyed—"is held by me as trustee for behoof of the firm of Peter Forbes & Company, oil manufacturers, Port Dundas, of which you and I are partners, and that I shall be bound when required to grant all deeds necessary for vesting said property in you and me as trustees for behoof of said firm," and that is addressed to Forbes and Readman. The correspondence which is produced necessarily leads to the same result. There is a variety of letters which can only be read on the footing that Townsend then became a partner. For instance, on 13th November 1869, which is before the date of the back letter, he writes to Mr Pallison,—"I may state to you that the firm will be carried on in the name of Peter Forbes & Company. The partners thereof will be Mr Forbes, Mr Readman, and myself, so that in sending letters or invoices as so connected with the business, please address as above." And in a variety of letters to his business friends he goes on to speak of the firm and the conduct of the business as a matter in which he, along with his partners, was directly interested as a proprietor, and in no other capacity. So stood matters when the insurance was effected on the 15th July 1871. The title to the subjects stood in the name of Mr Townsend. Further it is proved that Mr Townsend had advanced not merely the amount which he originally undertook to advance, but that he was, at the date of this insurance, in advance to the extent of something like £20,000. Mr Readman had made a partial advance, I think of £500, and Mr Forbes had put nothing into the concern. Therefore at the date of the insurance I cannot doubt that Mr Townsend had a substantial interest in the insurance, and it does not occur to me that if a fire had taken place at that time any one would have drawn the insurance money except Mr Townsend. His advances were not replaced; he was proprietor of the subjects, holding them no doubt first for the company, but I rather think he would have been entitled to hold the whole concern until these advances had been replaced. The fire took place in December 1871, and the Company object that they are not bound to pay under their obligation, because there had been an agreement which in fact they had nothing whatever to do with, and of which they had no cognisance necessarily, by which there was a new arrangement of the firm of Peter Forbes & Company. If that had been fully carried out I should not have thought that it made any difference upon the question that we are now discussing, because my opinion is that Mr Townsend himself was substantially the insured. I have no idea that the mere change of firm, or even the change of interest of the partners in the firm, would bring that clause into operation upon any construction of it. Certainly if the firm had been dissolved altogether, so that it no longer existed as an operative *persona*, the interests of the partners in the concern would subsist, and they would substantially be individually the insured, or the firm subsisting at the winding up would be entitled to recover the amount insured. In the present case however, I should have doubted whether the transfer was complete before the fire under any circumstances. There is an agreement no doubt, dated in November, under which Mr Forbes undertakes to transfer and make over to the second party the business carried on by the first party under the firm of Peter Forbes & Company, and the whole assets and goodwill thereof, and his right and interest therein. He undertakes to do that, and in consideration of the obligations undertaken by him, the second party (that is to say, Mr Townsend) has made payment to the first party of the sum of £400 sterling, and he undertakes to relieve the first party of all the debts and liabilities contracted by the first party under the firm of Peter Forbes & Company. I rather think from what we see that that still remains to be done. The obligations amount to over £20,000, and Mr Townsend, before he could have the benefit of this agreement, or demand his transfer, must show that he has implemented that part of the agreement, and cleared the business of the debts that were upon it. The matter is not complete. The fire takes place in December and before this has fully come into operation. No doubt there was a Gazette notice that the firm was dissolved, but the firm would still continue until the conditions of this agreement had been fully implemented. But putting that aside altogether, and supposing that this had been an operative agreement from the first, my opinion would still remain that Mr Townsend was substantially the insured; that he continues to have the substantial interest in the policy; and that the property which was thereby insured has not been in substance passed from the insured to any other party, and that therefore the clause does not apply.

A second plea was taken, that the policy had been infringed by storing the naphtha on the premises.

There is no such plea on record. It would be competent still no doubt for the parties to add to the plea. They say the matter came out on the proof, but of this we must be satisfied. Now, I have read the proof, and I am very clearly of opinion that no storage in the sense of the provision

in the policy ever took place. All that is said is that they went on keeping the naphtha in barrels for two days, or three at the most, until a cart-load had been obtained, and then it was sent away. I don't think that that was storing in any reasonable reading of this clause in the policy. Here there was nothing but the reasonable and ordinary convenience of manufacturing, and not any violation of the provisions of the policy.

On the whole matter, I have come to be of opinion, in the first place, that there had been no transference of this property from the insured to any third party, and, in the second place, that there was no storing of naphtha in the sense of the provision of the policy.

Lord Cowan—On the second point to which your Lordship has adverted, I entirely concur in the views stated by the Lord Ordinary, and by your Lordship. The other question which has been raised involves a matter of great importance as affecting policies of insurance against fire. As a condition embodied in a natural contract, that condition is entitled to fair reasoning in its construction, and when it is clearly proved not to have been complied with it will receive the legal effect to which every condition in such a contract is undoubtedly entitled. The Lord Ordinary has fairly put the question whether or not the condition in question has or has not been shown to have been brought into operation so as to effect the subsistence of the insurance in favour of the pursuers. That is a question not of law, but of evidence; and my view on a clause of this kind is, that it must be shown in any action brought under the policy that the condition was not clearly fulfilled in order to liberate the Insurance Company. But the Insurance Company are entitled to have the matter put in issue whether or not the facts come up to the statement that is necessary to be established in order to bring this provision of the policy into operation. I cannot enter into the nice distinction attempted at the outset of the argument by Mr Campbell, in reference to the difference between the policy and the condition here, as applicable simply to the transfer of the property. I think it very clear that, assuming that the condition has been shown to have been brought into operation, we have nothing more to do with the question as to the supposed possible non-assignation of the policy and its subsistence, although that condition has been fully shown to have been brought into operation by the transfer of the property. Was the Company, at the date of the policy in July 1871, composed of parties who were substantially, and to all real effects, the same as at the date of the fire? That is really the question, and I cannot avoid the conclusion that the creditors of this company would have been entitled to claim payment of their debts from Mr Townsend, as the party principally interested in this concern. I think he could not have resisted the claim of the creditors, and I think he must have been dealt with as a partner not only in July 1871, because after considering the original agreement in 1870, when an option was given to him in October 1870 to declare whether he would be a partner or not, and finding that he did declare himself to be a partner under these documents, had it been necessary for the determination of this cause my view would have been to have dealt with him as a partner *ab initio*, he having adopted the contract and became therefore interested in the business, not merely at July 1871, when the policy was opened, but as having been a partner all through, and liable to the creditors of the Company. I assume that the Lord Ordinary is wrong in thinking that the only partner at the date of the policy was Forbes. On the grounds which your Lordship has so fully explained, I think Mr Townsend was the principal partner, although Mr Forbes was also a partner. But it is said that Forbes retired as in November 1871, a few weeks or days before the fire. Now, the question is, Whether the agreement in November 1871, in which Forbes advertised himself out, should affect the interests of the Company, composed mainly of Townsend, in recovering the value of the buildings under the policy, when the fire took place a few days afterwards. On this my opinion is that the substantial interest having been in Mr Townsend throughout, any arrangement among the partners by which Forbes went out could not affect the substantial legal right of Townsend as a partner to insist on payment of the sum insured when the fire took place. The Lord Ordinary observes that the subsistence of Forbes as a partner was the essence of this contract, because he was the man who had the practical knowledge of the business, while Townsend was only the man of capital. There may be a great deal of reason in that; and had the condition in the policy been that Forbes, being a man of skill, was to remain as a partner, I could have felt the force of the argument on his retirement as substantially affecting the insurance. But there is no such condition in the policy. It is merely suggested that Forbes was a man of more skill than Townsend, and that his retirement greatly increased the risk of the Company. I cannot take that off the hands of the Insurance Company, for I don't see anything in the policy entitling them to plead it, though it may be made the subject of observation.

On the whole matter, I concur in the views of your Lordship.

Lord Benholme—I concur generally in the views that your Lordship has expressed. I think that at the date of the policy Mr Townsend was in fact the substantial owner of this concern. He was the moneyed man. Originally, he had not in point of form been a partner; he seems to have withheld his name in a formal way until a certain period, but at that period he had a right to become a partner, and there is sufficient evidence that he declared his acceptance of that position before the date of the policy.

The only objection seems to be grounded upon the supposed irritancy of the insurance on the retirement of Forbes. Now, I agree with your Lordship in thinking that the retirement can hardly be held to have been completely effected, but I don't think that sufficient to bring this insurance under the irritancy of that clause. Here was a company at the date of the policy, and the substantial partner was Mr Townsend; he remained so at the date of the fire, and, considering the kind of interpretation which we must apply to so stringent an irritancy as this, it cannot, in these circumstances, be held that the right to the subject in the policy had been alienated and transferred in terms of that clause.

I also agree with your Lordship as to the storing. I think in substance there was no storing.

Lord Neaves—I have arrived at the same conclusion with your Lordship. I must confess that when this case was opened to us I was very much impressed with the strange aspect of the pursuers' case, because there seemed to be a very great unwillingness to grapple with the facts, and a very great desire to get the case decided upon an alleged plea of relevancy which was stated and supported by a number of American authorities, as was said. I never could understand that plea, and upon thinking it over repeatedly I have arrived—with some modesty, no doubt—at the conclusion that the reason why I have been unable to understand it is, that it is unintelligible. Some clauses were founded on as in use in America, which are not the same as this clause, and because this clause was not that clause it was said this is irrelevant. Now, it appears to me—and it is only because the plea was stated that I think necessary to advert to it—that there is no foundation whatever for assailing the first part of this agreement.—I mean the stipulation that the policy of insurance is to cease to be in force in a certain event. If the event contemplated has occurred, the words that are used are explicit and unambiguous; and I must take the liberty of repeating what I formerly said—that there is no room for construction at all unless there is ambiguity. It is only when there is some ambiguity that construction comes into play. That is distinctly laid down by all the authorities, and by none more clearly than by Mr Erskine. Words may be so plain that they don't admit of construction. Now, if anything can be plain, it is that condition in the first part of the policy, that the policy ceases to be in force if a certain event occurs, with reference to certain property there described—can anything be plainer than that? What room is there for construing these words, "the policy ceases to be in force"? There is none whatever, and the argument as to its only preventing something that was not attempted to be done, was unintelligible to me then, and is so still. Therefore the question arises in the way in which your Lordship put it, viz., whether the case has arisen in which the policy ceases to be in force from the property having passed from the insured to any other person. If it has not so passed the clause does not apply. I think it is quite plain on the documents how the matter stood. The original agreement gave Townsend and Readman an option at a certain time, viz., in October 1870. They were then to intimate to Forbes their intention of withdrawing the capital, or, in their option, claim the right of being assumed as partners, in which case (if they claimed that right) it was a right to be partners from the commencement of the company. In December 1870 it appears to me that Mr Townsend did declare that option.

He did not withdraw his capital, on the one hand, and, on the other, he declared that he and Mr Readman were then partners of the concern in the most explicit terms. He bought the property, and granted a backletter in which he declared that it was held by him as trustee for behoof of the firm of Peter Forbes & Company, "of which you and I are partners," that is, of which you, Forbes and Readman, and I, Townsend, are partners, "and that I shall be bound, when required, to grant all deeds necessary for vesting said property in you and me as trustees," &c. Now, if that did not complete the exercise of the option contained in the agreement, I do not see what would have done so. In subsequent documents Forbes is spoken of as sole partner. It may have been that he was the sole acting partner—the ostensible partner,—but that will not alter the fact that at that time, by a solemn deed—the deed which regulates the right to this subject,—it was declared that the property was held for them. That means that Townsend was a partner from the first, and the principal partner—the person who held the property and was mainly interested. The premium of insurance must be held as having been paid by him: it came out of his pocket, and all the changes in the interest of these partners afterwards do not appear to me to bring this case under the very peculiar words of the clause which declares that the condition is only to take effect then as to any property which shall pass from the insured to any other person. Now, the insured appears to me to include Townsend, and, in my view, the property did not pass to any other person, for the withdrawal of Forbes could not have been a thing contemplated by that clause, in my opinion.

With reference to the storing of the naphtha, I agree in what your Lordship has said.

Lord Justice-Clerk—Then we shall give judgment in terms of the conclusion of the summons; but there is some question as to the amount.

After hearing Counsel on this question, which arose from the fact of the pursuers having written to the defenders on 30th December 1871 in the following terms—"We, Peter Forbes & Company, insured by policy No. 2143 with the Border Counties Fire Office, Dumfries, agree to accept the sum of £500 sterling in full discharge of our claim for loss by fire, which occurred on the 18th December 1871, against the company; and we further agree to indemnify said company against all expenses arising out of this claim for loss, and also against any claim which the Port Dundas Oil Company should prefer against the company as the new firm owning the works. We also surrender our policy No. 2143 to the company for cancelment, Peter Forbes & Company retaining the salvage."

The Lord Justice-Clerk said—I do not feel any difficulty on the main question raised, viz., whether there is a concluded agreement as to the value of the loss on 30th December 1871. It is utterly impossible to read the letter of that date on that footing—on the assumption that there was reserved to the Company right to contest the claim—because the very terms of the letter are utterly inconsistent with that. The provision in regard to the "expenses arising out of this claim for loss" is entirely inconsistent with the idea that a long litigation was impending, and assumes that the expenses had been already incurred. In the same way, the agreement to surrender the policy for cancelment necessarily excludes the party from suing upon it. The way in which I read the agreement—and I have not the least doubt that was the meaning of it—is that the Company said, "we are not satisfied that we are liable, but, on the footing of our giving up our objection, we will settle now the amount that we are to pay;" and that was accepted. The Company were not bound to abandon their objection, although, if that were a concluded agreement, that would perhaps be a more plausible contention than the other; but they are not foreclosed, and, in my opinion, that is entirely out of

the case. In regard to the rest of it, it is very unfortunate that we have not more precise information on this matter. I suppose, in taking possession of the salvage, P. Forbes & Co. thought that the Insurance Company would not be as good as their threat, all the more that they made the proposal by Mr Langley. But they take possession. and they obliterate all traces of the loss, and when they come to the proof, a year afrerwards, it is found utterly impossible, except by the statement of the parties themselves, to come to any precise conclusion on the matter. On the other hand, the Insurance Company have taken no means whatever to ascertain what the real amount of loss was, but they contented themselves with that document, which they drew out and the pursuers signed. In these circumstances, we must do the best we can with the evidence before us; and, reading the evidence of Binnie and Carsewell on the one hand, and the evidence of the three partners on the other, the balance of evidence is clearly to the effect that £840 is within and not beyond the amount of the damage. Therefore I am for decerning in terms of the libel.

Lord Cowan—I arrive at the same conclusion. The letter of 30th December 1871, founded on as a concluded and final agreement contingent on liability, is not to my mind evidence to that effect so as to debar the claim for loss on the part of the insured. The Company don't accept the letter, and they never founded on it till the close of the action. On the record they take no notice of it as a concluded settlement, and I cannot hold it to be so. They might have offered to pay the £500 and have done with all questions under the policy, but they did not follow that course.

They say they left the salvage in the hands of the insured, but that is done in every case of a partial loss. When a man says to an insurance company "I am insured for £1000, and I have lost £500 by fire," it is understood that the salvage remains with him, and he gets his £500. To guard against the possibility of the insurance company being imposed on, they are entitled to enter into possession, and see that the loss is to the extent claimed. The Company had that option here, but they did not exercise it. On the whole matter, they acted in such a way as to satisfy me that the question of the extent of the loss was left entirely open in the event of liability being found.

Lord Benholme—I cannot entertain a doubt on this point. The question between the parties was this only,—Whether there was a definite agreement accepted as to what should be the value in case of after litigation? That is not the object, and is not the meaning, of the document in question. It is plain to my mind that this is just an attempt at an agreement out and out between the insured and the insurers to settle the case. "I will take this and be done with it, and pay whatever expense you have already incurred, and we shall have an end of this dispute." I should say that in the case of such a document or attempted agreement as this, it would be absolutely necessary that the condition should be inserted that "this is not to prejudice my contesting the validity of your claim." I think that would be necessary to be inserted as a condition, and where it is not inserted as a condition, I must look on it as just an attempt on the part of insured and insurers to settle out and out the whole case.

Lord Neaves—I am entirely of the same opinion. The point raised is, What is the meaning of the letter of 30th December 1871? The one party says it was a proposal for a total settlement out and out; the other says it was a reservation of the full right on the part of the Insurance Company to resist the claim on its merits, but a mutual agreement between the insured and the office that the amount of the claim should then be fixed, in the event of success, at £500, neither more nor less. Now, in the first place, I think that is a very special claim,—a claim that is not a total compromise, but a partial settlement, and a reservation of other things. I agree with Lord Benholme that it ought to have been explicitely stated that that was intended if that was what was meant. But, apart from that, what is the conduct of the parties? After this alleged settlement on 30th December 1871, this action was brought in February 1872, concluding for the loss, raising the question on the merits, and specially concluding for £840, with interest from 1st January 1872, and referring to a claim of the same amount that had been lodged with the Insurance Office on 7th February, nearly three weeks before. Now, when that claim for £840 was sent in, if the Insurance Company *bona fide* believed that they held an agreement that the utmost amount in the case of success was to be £500, and still more when, in the end of February, an action is brought for £840, Why did it not occur to the Insurance Company to say, This is a gross breach of faith and breach of bargain. This matter is settled between us; it is not in dispute; the question of general liability under the policy is in dispute, but the sum was settled, and you are acting wrongfully, and in bad faith, to claim £840? A special plea in defence ought to have been stated to that effect—and I venture to say would have been stated—if it had been believed to be true. But nothing of the kind is done, and the parties go to proof without any allegation being made as to this so called agreement. Looking at the conduct of the parties, I think it is conclusive that this was only a proposal for a settlement out and out, and it not having been accepted, the pursuers were at liberty to claim as they did claim.

That being so, I think there can be no doubt that the pursuers have provided enough to support their case. As to the salvages, where there is only a partial loss the insured retains what he had, but as it is diminished in value he is entitled to get what will put him in his former position, up to the amount insured. I have only farther to remark, that the validity of the claim as to its extent is supported by the view that this was a proposal to settle the matter out and out; because if there was this question of irritancy hanging over the parties, it may be fairly presumed that they were willing, as in a compromise, to give up part of their just claims, showing that their just claim was not £500, if they were right on the merits, but something more.

The Court pronounced the following interlocutor:—

> "Recall the interlocutor complained of, and decern against the defenders in terms of the conclusions of the summons: Find the pursuers entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuers—Solicitor-General (Clark) Q.C., R. V. Campbell, and Readman. Agent—T. F. Weir, S.S.C.

Counsel for Defenders—Millar, Q.C., and Mackintosh. Agents—Philip, Laing & Monro, W.S.

Saturday, January 18.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

LEDDY *v.* GIBSON & CO.

Reparation—Injury to Person—Fellow-Servant.

In an action of damages brought by a seaman against the ship-owners, on the ground of his having been injured through the fault of the captain of the ship—*Held* (1) That the ship-owners were not responsible; (2) That the captain of a ship is a "fellow-servant" of his crew in questions with the owners.

The pursuer in this action, Terence Leddy, was on 16th March 1871 in the employment of Messrs George Gibson & Co., shipowners, Leith, as a seaman on board their steamer "Osborne," and raised the present action for the purpose of recovering damages from them, on the ground that he was injured in his person through the fault of the captain or master of the "Osborne," for whom the defenders, as owners thereof, were responsible.

The pursuer avers that, in the course of the return voyage from Rotterdam to Leith, the "Osborne" required, as usual, to be turned from the river Maas into the canal running to Helvoetsluys, and that Mr James Johnston, the captain of the Osborne, directed a rope, called a *spring-rope*, which was not fit for the intended purpose, to be used in checking or turning the steamer into the canal, and that he ordered the pursuer and other seamen to pay out or ease off, at the timberheads, near the bow, the rope, one end of which was fastened on shore. Also that this spring-rope was of insufficient length—that the pursuer was obliged, and was ordered, on account of its shortness, to let it go, while there was a heavy strain upon it—and that in consequence the end of the rope struck the pursuer before he could get clear of it, and broke one of his legs, and severely hurt the foot of the other. It is further set forth that the pursuer was thus injured by the gross fault and negligence of Captain Johnstone (who was in command of the vessel, in virtue of the powers conferred upon him by the defenders) in not using, or ordering to be used, a fit, sufficient, or suitable rope for the purpose, or, at all events, in not stopping the steam-boat from proceeding before the rope was nearly all paid out, which it was the duty of Captain Johnstone to do.

The pursuer pleaded—That having been injured in his person by and through the fault of Captain Johnstone, for whom the defenders are responsible, as above mentioned, he was entitled to decree for reparation and damages.

The defenders pleaded—That the statements of the pursuer were irrelevant, and insufficient in law to warrant the conclusions of the summons, and his injuries having been occasioned by his own fault, or at all events he having contributed to the accident by his want of care and inattention to the warning given to him; or otherwise, the said injuries having been occasioned by the fault of the pursuer's fellow-servants, the defenders were not liable in any damages on this account, and ought to be assoilzied.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 1st November* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, sustains the second plea in law for the defenders; dismisses the summons, and decerns; finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report."

In the Note appended to this interlocutor, the Lord Ordinary, after narrating the circumstances of the case, continues—"The Lord Ordinary is of opinion that the pursuer has not set forth in his summons a good or sufficient cause of action. The pursuer does not aver that the Captain of the steamer did not possess the statutory certificate of competency, or that he was not fit and competent for the duties of his office. There is no allegation that the defenders had failed to furnish the steamer with ropes of sufficient length, and fit for the purposes of checking or turning the steamer into the canal. On the contrary, it is averred in the summons that the mode of turning the steamer into the canal was by means of a *check-rope*, and that there were on board the vessel two check-ropes used for this purpose to suit the state of the tide; and the pursuer's complaint is, that these ropes were not used, but that the captain ordered a rope 'called a *spring-rope*, which was not of sufficient length, or fit or intended for the purpose,' to be used. The sole ground of action, therefore, is the fault of the captain of the steamer in using this insufficient spring-rope, and in not using one of the two check-ropes on board the vessel, or some other rope fit and sufficient for the purpose.

"The pursuer at the time was not a stranger, but the servant of the defenders. So also was the captain. The captain and the pursuer were, the Lord Ordinary considers, fellow-servants engaged in one common employment, namely, the navigation of the vessel. No doubt they had each different duties to perform, and the pursuer was under the command of the captain. But, as observed by Lord Cranworth in the case of *Wilson* v. *Merry and Cunningham*, 'Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow-labourers under a common master, as has been more than once decided in England, and on this subject there is no difference between the laws of England and Scotland.' The pursuer and the captain being fellow-servants, the defenders, as their masters, are not responsible for an injury sustained by the pursuer through the fault of the captain, because the pursuer, when he entered the defenders' service, must be held to have done so in the knowledge that he was exposed to the risk of injury through any fault on the part of the captain while acting as the defenders' servant, and on the footing that as between himself and his masters he would run that risk. Such a fault as the pursuer complains of is just one of the ordinary risks of a seaman's service, for which the masters, the owners of the vessel, are not, the Lord Ordinary thinks, liable in reparation. The pursuer may sue the captain for the consequences of his fault, but he has no ground of action against the defenders, whom he does not allege to have committed any wrong.—*Wilson* v. *Merry & Cunning-*