*Wednesday, January 6.*

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## M'ELROY *v.* THE LONDON ASSURANCE CORPORATION.

*Fire Insurance—Insurance without Policy—Completion of Contract—Agency.*

A pursuer claiming against an insurance company under an alleged contract of fire insurance for loss incurred by fire about the end of May, averred that about the end of April he had insured against loss by fire with X, the agent of the company; that the policy of insurance had been prepared by the company, and that "the premium due thereunder was paid to the said 'X' as defenders' agent, who has remitted the same to them, less the usual commission at 15 per cent. allowed for obtaining the insurance and collecting the premium as the agent of the defenders."

*Held* (*rev.* judgment of Lord Kincairney) that the pursuers' averments were irrelevant, and that the action must be dismissed in respect that the pursuer had averred neither (1) that the alleged payment of the premium had been made before the fire, nor (2) that X was the agent of the company duly authorised to receive the premium and to bind the company.

Catherine, Mary, Annie, and Agnes M'Elroy, Spring Gardens, Kelvinside, Glasgow, raised an action against The London Assurance Corporation for payment of £80 under an alleged contract of insurance against fire in respect of damage caused to their household furniture by fire.

The pursuers averred—"(Cond. 2.) In or about the end of April 1896 the pursuers insured with the defenders' agent Mr Thomas M'Elroy, writer in Glasgow, against loss by fire for one year from that date, the household furniture and personal effects belonging to them within said dwelling-house, for the sum of £700, and a policy of insurance was duly prepared by the defenders, and the premium due thereunder was paid to the said Thomas M'Elroy, as defenders' agent, who has remitted the same to them, less the usual commission at 15 per cent. allowed for obtaining the insurance and collecting the premium as the agent of the defenders."

The pursuers further averred that a fire occurred at their residence in or about the end of May 1896 whereby they sustained loss to the extent of £80, and that though called upon to indemnify them for this loss the defenders refused to do so.

The pursuers also founded upon certain correspondence, of which the following were the most important letters:—

Mr T. M'Elroy to Mr T. S. Brown, District Manager of the London Insurance Corporation.

"*Glasgow, 6th June* 1896.

"Dear Sir—*Spring Gardens*—I send you herewith postal order for 12s., being premium less my commission on this policy, as per your letter of 2nd May.—I am, yours truly, *pro* THOS. M'ELROY, R.M."

Mr T. S. Brown to Mr Thos. M'Elroy.

"*London Assurance Corporation,*
"*Glasgow, 8th June* 1896.

"Dear Sir—*No.* 2 *Spring Gardens*—We are in receipt of your favour of 6th inst., inclosing postal order for 12s., being the amount of premium less commission for the insurance of £700 over furniture in this dwelling-house. We shall forward a policy in a few days; meanwhile pending delivery of that document, we hand you covering note to keep matters in order.—Yours faithfully, "T. S. BROWN, District Manager."

The covering-note referred to was in the following terms:— "*8th June* 1896.

"Misses M'Elroy having this day made a proposal to insure the sum of £700, and having paid the sum of 14s. as premium, the property as described in the proposal shall be held insured by this receipt *for a period not exceeding thirty days from the date hereof*, subject to the usual conditions of the corporation, pending preparation of policy. Should the proposal be declined, the corporation's liability will cease on the decision being communicated to the proposer. "(Signed) T. S. BROWN,
"District Manager.

"N.B.—This receipt will only hold good for the time herein specified."

The defenders denied that Thomas M'Elroy was their agent, and averred that he had made a proposal to the company to insure the pursuers' (his sisters) furniture for £700 on the 29th of April; that a policy was accordingly prepared; that on or about the 2nd May the defenders wrote to Mr M'Elroy stating that the policy was prepared, and that the defenders would be glad to receive payment of the first premium "when the policy, which is the receipt of the first year's premium, will be sent you," and that no covering-note was granted by them. The defenders further averred that payment of the premium had not been made to them at the date of the fire, and that the policy was still in their hands. They also founded on Condition XV. of their policy, which was as follows:—"No insurance shall be conclusive or binding on this corporation unless the premium be previously paid thereon."

The pursuers pleaded—"(1) The defenders having insured said household furniture and effects against loss by fire, and the pursuers having sustained loss and damage to said furniture and effects by fire, the defenders are bound to indemnify the pursuers for said loss and damage as concluded for, with expenses. (2) The defenders are barred by their actings from repudiating liability for the sum claimed."

The defenders pleaded—"(1) The action is incompetent as laid, or otherwise, *separatim*, the action is excluded by the arbitration clause in the policy. (2) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the defenders

should be assoilzied therefrom. (4) The defenders never having received any premium from the pursuers, and not having issued or delivered any policy or covering-note to the pursuers, and having come under no obligations of indemnity or assurance to them, are entitled to absolvitor."

On 4th December 1896 the Lord Ordinary repelled the first plea-in-law for the defenders, and allowed a proof before answer.

*Opinion.*— . . . "The defenders pleaded that the action was incompetent, because there was no conclusion for declarator that the subjects had been insured, and because the amount of the damage fell to be ascertained by reference. I see no necessity for a declaratory conclusion, and think it sufficient that the contract of insurance should be averred on record. It may be that the amount of the damage must be referred to arbitration, and the pursuers had no objection that it should be so ascertained; but it must, in the first place, be decided whether there was a completed contract of insurance, and if that be decided in the affirmative, then it may be that the amount to be paid may be adjusted by agreement. I am therefore of opinion that the defender's first plea is bad.

"As to the relevancy, I have more difficulty, but think that the safer course is to allow a proof before answer. I might not have done so but for the letter of the defenders' manager, printed on record. He there accepts a premium. The defenders say that that was a premium for a new policy about to be made out, and not for the policy which had been made out in the beginning of May. That, however, seems to involve a question of fact."

The defenders reclaimed, and argued—(1) The action was incompetent. It proceeded upon the footing that there was a completed contract of insurance. But that was precisely what the defenders denied. The proper form of action would have been a declarator that there was a contract of insurance, or that the defenders were bound to issue a policy to the pursuers. (2) In any event, the action was irrelevant. No policy had been issued to the pursuers and no premium had been paid by them to the defenders or accepted by them. There was no relevant averment of payment of the premium, for the statement in article 2 was only to the effect that payment had been made to Mr M'Elroy, and there was no distinct and explicit averment that he was the defenders' agent entitled to receive money on their behalf and to bind them, and, moreover, from anything that appeared in that statement, the payment averred might have taken place after the date of the fire. The Lord Ordinary had misunderstood the correspondence, which plainly showed that the payment tendered by Mr M'Elroy on 6th June had been accepted by the defenders as the premium of an entirely new policy, to run from the date when the covering-note was issued. A proof was therefore unnecessary, for by condition 15 of the policy the parties were still in the region of negotiation, and would not have entered that of contract until the first premium was paid.—*Sickness and Accident Assurance Association, Limited* v. *General Accident Assurance Corporation, Limited*, July 12, 1892, 19 R. 977, and *Canning* v. *Farquhar*, 16 Q.B.D. 727, *per* Lord Esher, M.R. 731.

Argued for the pursuers — The Lord Ordinary was right. It was admitted that the acceptance of the premium would complete the contract of insurance, and the premium had been accepted.

LORD ADAM—The pursuers of this action aver that they insured the furniture in their dwelling-house against loss by fire with the defenders—the London Assurance Corporation,—that a fire took place causing damage to the extent of £80, and that they have raised this action to recover that sum. The defenders meet their claim with sundry objections, the objection giving rise to the most serious consideration being set out in the defenders' second plea-in-law, viz., that the pursuers' averments are irrelevant.

The only material averment bearing on this question is contained in Cond. 2 [*quotes it*].

I agree with the comment which has been made on that averment, that it is clear that the alleged policy was never delivered to the pursuers. There is no averment that it was. All that is said is that a policy was duly prepared by the defenders. I infer from that that it was not delivered. Arising from the fact that there is no averment of delivery, a subsidiary objection was taken by the defenders to the form of action. They maintain that the action should not have been a simple petitory action for a sum of money, but that it should have been for delivery of a policy, and failing delivery for damages. I understand, however, that the defenders do not now desire to press that objection, as the result, whatever was the form of action, would be the same.

Taking the averments above quoted, even though the policy were still in the hands of the corporation, I should be disposed to take a more favourable view of the pursuers' case if there were any relevant or proper averment that payment had been made by them of the premium to Mr M'Elroy as agent for the defenders and duly authorised to receive such premium, and that the payment had been made before the fire took place. But that is where the blot on this record lies. There is no such averment. If it be the fact that a premium was so paid, then it is a fact entirely within the knowledge of the pursuers, and they were bound to make a clear averment of it.

If, however, we are entitled to assume that the payment of the premium was not made before the fire took place, then I am of opinion that the defenders were quite within their right to resile from the proposed insurance.

The Lord Ordinary, I gather, would have taken that view but for a certain letter written by the defenders' district manager to Mr M'Elroy. That letter is referred to on record, and when we examine it we find

that it is plainly not an acceptance of the premium in question. On the contrary, the district manager accepts the sum enclosed, but at the same time sends a covering-note which shows quite clearly that he accepts the premium for a new risk running from the 8th June. It may be that the manager had no right to accept and keep the money sent to him on these terms on the ground that it was not sent to him for that purpose. But if that be so, it only means that he is bound to return it when asked. Accordingly, as there is no averment that the premium was paid before the fire took place, I am for recalling the interlocutor of the Lord Ordinary and dismissing the action.

LORD M'LAREN—Under this action the pursuers sue an insurance company on a claim to be indemnified for loss arising from fire, and the question which we have to consider at this stage of the case is, whether there is set out a relevant statement of a contract of indemnity under which the pursuers are entitled to sue.

As I have always understood—indeed I think it is perfectly settled in the law of Scotland—a contract of insurance can only be made in writing. It is true that in the somewhat parallel case of cautionary obligation a practice had grown up of allowing parole evidence in proof of mercantile guarantees—a practice which was afterwards corrected by statute. But there was no such practice in regard to insurance, and no argument or decision was offered to the contrary. Either a policy or some informal writing, followed by *rei interventus*, is requisite. A policy is the proper mode of constituting the contract, and I rather think that as such a policy is a stampable instrument, the interest of the Revenue makes it necessary that there must always be a policy. But the parties may be bound by a preliminary contract in terms of the formal deed which is afterwards executed. If the insurance company delivers a policy without requiring immediate payment of a premium, they incur responsibility for the risk, because having delivered the policy they are held to have given credit for the premium. That is constantly done, *e.g.*, in marine insurance a running account is kept by the brokers in which the premiums are noted on one side of the account and the losses on the other. But then the company are not bound to deliver a policy without payment of the premium. If they accept a premium before delivering a policy, I should be disposed to hold that the acceptance of the premium and the delivery of a receipt therefor was sufficient to create the obligation to issue a policy. The question is not likely to occur, because, as I understand, the practice is, whenever a premium is paid in advance to issue what is called in this branch of insurance a covering-note—a slip as it is called in marine insurance—by which the party is insured until the insurers have time to consider whether they will accept the risk. It is then essential to a relevant averment of a contract under which this company can be made liable that it should be stated either that a policy was delivered, credit being given for the premium, or that the premium was paid and unconditionally accepted. I do not find either statement in this record. There is only a general statement that the pursuer is insured. There is also a statement that a premium was paid, but then that statement is consistent with the hypothesis (I do not say the fact) that the payment was made subsequently to the fire, and that the premium was declined. The Lord Ordinary apparently was induced to allow a proof only because of the letter of 8th June, to which we have been referred, because he says, "I might not have done so but for the letter of the defenders' manager printed on record. He there accepts a premium." That letter—it was explained to us from the bar—is the letter of 8th June. I think the Lord Ordinary must have proceeded on the view that writing of some kind was necessary to constitute the contract, but when we examine the letter it is impossible to put the construction on it which the Lord Ordinary has done. The letter bears to be the acceptance of a premium under reference to a covering-note, and when that note is read it is seen to have reference to a new insurance commencing at a date subsequent to the occurrence of the fire. We had the same element in the case of *The Sickness and Accident Assurance Association* (19 R. 977), in which one insurance company sued another for contribution. The question in the case was whether the insurance had been completed before the casualty occurred. The party proposing to be insured sent the premium, but the letter was not received until two days after the accident, and in answer to the letter sending the premium the defendant company accepted the payment as for an insurance commencing the day after the accident occurred. We held that while the company might not be entitled to alter the conditions of the proposed contract, as the parties were not agreed as to the terms, there was no contract. So when we examine the letter of 8th June along with the enclosed "covering-note," we find that it is absolutely contradictory of the pursuer's averment. The effect of it, if any, would be to create a contract which the pursuer repudiates, and not to support the conclusions of the present action. I concur with Lord Adam in holding that the action should be dismissed.

LORD KINNEAR—I agree. The pursuers' case is that although no policies were issued, a valid insurance was effected by reason of the pursuers having tendered and the defenders having accepted payment of a premium in performance of a contract to insure. I assume that that may be a good ground of action, but to entitle us to sustain the action on that ground it must be relevantly averred, first, that the premium was paid to and accepted by the company before the fire took place, and second, that it was paid to and accepted by the company, or by an agent duly authorised by

the company to accept it, and so to bind them. I find neither of these averments on record.

There is no specific averment of the date when the premium was paid, but it is said that we can gather on a fair construction of the statements that the pursuers intend to say that the premium was paid in the end of April. I do not think the pursuers are entitled to ask the Court to draw an inference with regard to such a matter, for this fact, which is indispensable to support their case, is within their own knowledge, and they should have no difficulty in setting it out in clear and unambiguous terms. Even assuming that it is reasonable to get at the facts by way of inference, I am hardly able to draw the conclusion that the pursuers did so intend, for all I find stated is [*quotes*]—I see no suggestion there from which I should infer that the premium had been paid before the occurrence of the fire.

The second material fact is not averred sufficiently by the mere use of the word "agent" as describing M'Elroy. That is an extremely vague and indefinite word, and may cover many varieties of authority. What it was really necessary to aver was that M'Elroy had due authority to accept the premium, and to bind the company.

I agree that the attention of the Lord Ordinary seems not to have been sufficiently directed to the exact terms of the letter which his Lordship refers to, for the Lord Ordinary reads that letter as if it were an acceptance by the company's manager of a premium for a policy about to be issued as from the 30th April, whereas it is clear, when the letter is read along with the covering-note to which it refers, that the risk was to run from the 8th June. The matter appears to me to involve not a question of fact, but the construction of correspondence, and on that I think no doubt can arise.

The Court recalled the interlocutor of the Lord Ordinary, found that the averments of the pursuers were not relevant to support the conclusions of the summons, and dismissed the action.

Counsel for the Pursuers — Watt — Maclaren. Agents — Patrick & James, S.S.C.

Counsel for the Defenders—Ure—Clyde. Agent—J. A. Cairns, S.S.C.

---

*Wednesday, January 6.*

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## FLEMING AND OTHERS *v.* LIDDESDALE DISTRICT COMMITTEE OF THE COUNTY OF ROXBURGH AND OTHERS.

*Local Government—Lighting—Burgh Police Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 99—*Oil as an Illuminant.*

Section 99 of the Burgh Police Act 1892 empowers the local authority to make provision for lighting their district by means of lamps, and to light the said lamps "by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending or superseding the same, as they may find expedient."

*Held* that the use of oil as an illuminant for that purpose was not excluded by the terms of the section.

This was a note of suspension and interdict presented by John Fleming, farmer, and others, occupiers within the parish of Castleton, against the Liddesdale District Committee of the County Council of Roxburgh, and the Lighting Committee of the Special Lighting District of the parish of Castleton, to have the respondents interdicted from "lighting, or entering into contracts, or otherwise making provisions for the public lighting, of the special lighting district of the parish of Castleton or any part thereof by oil lamps, or by lamps other than gas lamps, or lamps lit by means of light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending the same."

The complainers averred that in consequence of a requisition from the Parish Council of Castleton the Liddesdale District Committee, on 11th February 1896, formed the parish of Castleton into a special lighting district, appointed a Lighting Committee, and resolved that sections 99, 100, 101, and 105 of the Burgh Police Act 1892 should be adopted within the special district.

Statement 5—"The respondents the said Lighting Committee, with the sanction and approval of the said District Committee, do not propose to light any part of the said special district except the said village of Newcastleton, to which they have resolved to confine the lighting scheme, notwithstanding the fact that the village alone will benefit, while the whole proprietors and occupiers throughout the special district will be liable to assessment. All objections competent to the complainers on this head are reserved meantime. The respondents, however, propose to carry out their lighting scheme by means of the same oil lamps which have been in use for the last fifteen years in the village. For this purpose they have acquired by donation, or for a merely