the insurance company may have no conduct of the criminal prosecution.

At common law in England every man was bound to keep his fire so as not to injure others. But to limit the hardship a statute (6 Anne) was passed, prohibiting action by third persons against a person in whose house or chamber fire accidentally began. 14 Geo. III enacted more comprehensively, adding stable, barn or other building, or "on whose estate," to the words of 6 Anne. But it is held that fires by negligence are not to be considered *accidental*. Actions for negligence are common, and, therefore, for negligence railway companies are frequently condemned, but go free where they "have resorted to all known means of precaution." P. 206 Bunyon, 2nd ed., 1875.

Where a fire has been wilful, felonious, before the party injured can seek civil redress, the crime must be prosecuted. The justice of the country must be first satisfied in respect of the public offence. Forfeiture for felony is abolished now in England since 1870; so the insured is not obliged to resort to petition of right to get paid after conviction of felony.

§ 281. *Setting fire by insured while insane.*

An insured went mad, then set fire to his house. Has the company to pay the loss? Yes; so ruled in France in 1870, Cassn., January, J. du P. The fire in this case was assimilated to *force majeure* or *cas fortuit*, and the madman was held in no fault. 1148, 1382 C. N. Yet if a man be insane merely from drink, and when drunk burn the insured premises, it would be held that he and his estate must bear the loss, and not the insurance company. Just as much liable are insurers for loss by fire of insured, mad, as of his servant mad, says the note on p. 243 Journ. du P. of 1870.

§ 282. *Fire occurring through negligence.*

Mere negligence, whether of the insured or his agents or servants, constitutes no defence for the insurers. In *Shaw* v. *Robberds* Lord Denman, C. J., thus expresses himself:—"One argument remains to be noticed, namely, that the loss here arose from the plaintiff's negligent act in allowing the kiln to be used for a purpose to which it was not adapted. There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others, and therefore the simple fact of negligence has never been held to constitute a defence; but it is argued that there is a distinction between the negligence of servants or strangers and that of the insurer himself. We do not see any ground for such a distinction, and are of opinion that in the absence of all fraud the proximate cause of the loss only is to be looked to."[1]

Art. 2578, C. C. of L. C., as to fault of insured, puts on the insurer all losses other than those caused by fraud or gross negligence of the insured.[2] And in *Austin* v. *Drew* Lord Tenterden said:—"Certainly the circumstance that the fire happened through the negligence of the plaintiff's servant furnishes no answer to the action."

Walker v. *Maitland*[3] is against the insurer, and makes him pay, though the insured be guilty of gross negligence. Kent thinks this to be the better opinion. 2 Arnold, § 285. The bursting of a boiler is from gross negligence, yet Kent says the insurer is liable. (Men fall asleep and the vessel is wrecked.) But, of course, the negligence (even in Lower Canada) must not be remote. It ought to be the cause of the loss, close cause. It was held in *Chandler* v. *Worcester Mut. Fire Ins. Co.*[4] that the negligence of the insured may be so gross and culpable that the law will presume fraud, and the insurers will be discharged, though there be no positive proof of an actual design on the part of the insured to burn the property.

If there be gross negligence the policy will be void. What is such? In *Campbell* v. *Monmouth Fire Ins. Co.*[5] gross negligence was defined by the judge to be "the utter disregard of those precautionary measures which men of ordinary prudence would adopt in such a case."

[1] See also *Austin* v. *Drew*, 6 Taunton. The Irish Q. B. said this case was not to be sanctioned; "that the loss was by the negligence of the assured is not fatal."—*Jamieson* v. *Royal Insurance Co.*, 1873, 5 Bennett, p. 565.

[2] 3 Kent. 374, note c, cited. See Stuart's Rep., p. 148.

[3] 5 B. & Ald.

[4] 3 Cushing, 328.

[5] 5 Bennett, 395, Supreme Court, Maine, 1871.