

"to recover satisfaction therefor from any other person, town or other corporation." *King v. State Ins. Co.* cited by the Court in giving judgment and maintained. 7 Cushing. And *per Curiam*: Insurance by a mortgagee of his interest in mortgaged premises is not an insurance of the debt, but the debt is measure of his interest.

The proprietor of a house is not responsible to an insurance company subrogated in tenant's rights (having paid the tenant), because of the fire having been caused by a defective chimney, say having crevices in it, which landlord did not know of. 1721 C. N., Jour. du. Pal. of 1870, p. 228. *Defaut d'entretien* is not a *fait volontaire*.

Where a mortgagee insures it is but an insurance of his debt claim. Upon paying him insurers may demand an assignment of the debt from him, and hold it against the mortgagor. The mortgagor is not discharged from his debt by the insurer paying the mortgagee; his creditor only is changed.<sup>1</sup>

Mortgagee insuring his interest and getting paid after a fire, must subrogate the company into his mortgage claim. Note to p. 494, Am. ed. of 1850, of Smith's Merc. Law.

Where A's house, which was insured, was injured by a fire communicated by a locomotive engine of a railroad corporation, and the underwriters paid to A the amount of his loss, for which the railroad corporation was also by law responsible to him, it was held that such payment did not bar A's right to recover also of the railroad company, and that A by receiving payment of the underwriters became trustee for them, and, by necessary implication, made an assignment to them of his right to recover of the railroad corporation; and that the underwriters, on indemnifying A, might bring an action in his name for their own benefit against the railroad company, and, moreover, that A could not legally release such action. (*Hart v. Western R. Corporation*, 13 Metcalfe 99.) In this case of *Hart* it seems to me that Shaw, Ch. J., was right, but wrong in *King v. State Mutual A. Society*.

Can the man who recovers the insurance

sue the author of the fire? Yes, says Addison.

§ 313. *Goods destroyed while in custody of carrier.*

Goods *in transitu* on land are insured by A, the owner. They are lost by fire while in the carrier's custody. A gets paid by the insurance company. But here the insurance company is like a surety; so it, paying, shall have all the rights of A, to be sued for in A's name, against the carrier primarily liable.

Does *Mason v. Sainsbury* agree? A is injured by a town defective highway; gets damages. A has an accident insurance policy. Can the city claim that its amount shall be deducted to reduce the damages? No, for the town is primarily liable. 6 Alb. L. J. 286.

§ 314. *Remedy against railway company for loss caused by sparks from locomotive.*

In *Hart v. Western Railroad Corporation*<sup>1</sup> the plaintiffs were burnt out by sparks communicated from a locomotive. They got paid by the insurance company. The company then sued in the name of the plaintiffs. After the action was commenced the plaintiffs signed an instrument, declaring to have been paid by the insurance company, and that they had no claim against defendant, and releasing any claim against defendant. The insurance company before suit tendered plaintiffs indemnity from costs and to save them harmless in reference to the suit. The question was whether insurers who have paid a loss caused by fire can come in and recover of the railroad corporation, in the name of the insured, such loss. *Per Shaw, Ch. J.*: *Mason v. Sainsbury* was such an action by consent of plaintiff. After payment by insurer the assured becomes trustee for the insurer, and, by necessary implication, makes an equitable assignment to him of the right so to recover. 8 Johns. 245. By accepting payment of the insurers the assured do implicitly assign their right of indemnity from a party liable to the assured. This authorizes assignee to sue in the name of assignor for his own benefit, and the assignor will be restrained from defeating it by a re-

<sup>1</sup> 16 Peters, 501.

<sup>1</sup> 13 Metcalfe Rep. (Mass.), p. 106.