P. 383. 2 Alauzet. Payment once made by assurer cannot be *répété* unless fraud of assured have caused it to be made. A mere good ground to refuse payment before made will not entitle to recover it back after made. Boudousquié, No. 304, says that the assurer who pays without reserve losses claimed cannot *répéter* the money paid, founding himself on exceptions which he did not know, unless he prove that the assured's acts were the cause that he was ignorant of the means he might have opposed to the demand for the loss, and unless he prove that the adversary by fraud obtained the amount of the policy to be paid.

In *Pearson* v. *Lord*,[1] one of several owners of a vessel and cargo took a policy in his sole name (he intended the insurance for all). On a loss the insurers paid insured more than considering his individual interest he was entitled to, and insurer was declared entitled to recover back the excess, as paid in ignorance of fact.

If the insured sell the subject insured and the policy lapse, so, and the subject be burnt afterward, and after the fire the original insured get paid on demand (insurers ignorant of the sale) semble, they can recover back the money paid.

"If the facts were all known, but the law of the case mistaken," says Bell, "claim of insurer cannot be sustained." P. 602, Vol. 1, 5th edition.

If a man get paid more by an insurance company than his interest entitled him to get, *assumpsit* for money had and received will lie against him for over payment in favor of those who overpaid him.[2] In *Irving* v. *Richardson*, the defendant insured £1,700 with A and £2,000 with B on a ship valued (in both policies) at £3,000. The ship was lost and he received both sums, B paying not being aware of the earlier payment by A. B afterwards sued for £700 excess of amount paid above the value declared, and was held entitled to recover; as defendant was not entitled to more than the valuation in the policy, though the ship really was worth £3,700.

[1] 6 Mass. R.

[2] *Irving* v. *Richardson*, 2 B. & Ad., 1 M. & Rob., (A.D. 1831.)

Money had and received to plaintiff's use is the action, 1 Salk., 22; 1 Show., 156.

In the United States the only remedy in such a case is in a Court of Equity, and even there, no relief will be granted unless the complainant clearly shows that his failure to avail himself of the fraud, or other legal defence, did not arise from his default or negligence, *Duncan* v. *Lyon*, 3 *Johnson Ch. R.* 351; *LeGuen* v. *Gouverneur*, 1 *Johns. Cases* 494; *Smith v. Lowry*, 1 *Johns. Ch. R.* 320.

In Massachusetts where there is no Court of Chancery, it was held that an insurer could not recover back the amount of a loss recovered of him in a former action on a policy, which was discovered, after the judgment, to have been fraudulently procured by the insured. *Homer* v. *Fish*, 1 *Pick.* 435.)

If by fraud is meant *moral* fraud, in distinction from *legal* fraud, on the part of the defendant, this position can hardly be sustained. It seems to be sufficient, in order to enable the plaintiff to recover back the money, to show that it was paid by him in innocent ignorance of some circumstance constituting a legal defence, and it is not necessary that this circumstance, or the plaintiff's ignorance of it, should result from the moral or intentional fraud of the defendant.

§ 249. *Option to replace things lost or damaged.*

"In case of any loss on, or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and equal goodness; and to rebuild or repair the building or buildings within a reasonable time; giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company." (Ætna clause.)

Sometimes the clause is this: "Option, however, being retained by the company either to pay said sum or to supply the insured with the like quantity of goods of the same kind and of equal goodness with those destroyed or damaged by fire." (See *subject insured*, ante.)

Such clauses only operate obligations facultative; between them and obligations alternative there is a world of difference. The