The Legal News.

Vol. XIV. JULY 25, 1891. No. 30.

COURT OF APPEAL.

London, Dec. 19, 1890.

PULLMAN v. WALTER HILL & Co., LIMITED.

Libel— Publication— Letter copied by Clerk — Letter addressed to partnership firm—Privilege.

An alleged libel was contained in a letter respecting the plaintiffs, two of the members of a partnership, written on behalf of the defendants, a limited company, and sent by post in an envelope addressed to the firm. The writer did not know that there were other partners in the firm. The letter was dictated by the managing director of the defendants to a clerk, who took down the words in shorthand and then wrote them out in full by means of a type-writing machine. The letter thus written was copied by an office-boy in a copying press. When it reached its destination, it was in the ordinary course of business opened by a clerk of the firm, and was read by two other clerks. Held, *that the letter must be taken to have been published both to the plaintiffs' clerks and the defendants' clerks, and that neither occasion was privileged.*

Motion by the plaintiffs for a new trial. At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. & J. Pullman, in which there were three other partners. The place of business of the firm was No. 17 Greek street, Soho. The plaintiffs were the owners of some property in the Borough road, which they had contracted in 1887 to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter:

"Messrs. PULLMAN & Co., 17 *Greek street, Soho.*
Re Boro' Road:

"DEAR SIRS,—We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

"Yours faithfully,

(Signed,) WALTER HILL & Co., LIMITED."

The letter was dictated by the defendants' managing director to a shorthand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17 Greek street, Soho. The defendants did not know that there were any others partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that if there were the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore non-suited the plaintiffs.

LORD ESHER, M. R. Two points were decided by the learned judge: (1) That there had been no publication of the letter which is alleged to be a libel; (2) that if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial it will be open to the jury to consider whether there is a libel, and what the damages are: The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication?" The making known the defamatory matter after it has

been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shown it to you and to no one else." I cannot therefore feel any doubt that if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was therefore in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly she had none. Therefore the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs's firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as in the former case. There were therefore two publications of the letter, and neither of them was privileged. And there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libellous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

LOPES, L. J. I also am of opinion that there should be a new trial. The first question is whether there has been any publication of the alleged libel. What is meant by publication? The communication of the defamatory matter to a third person. Here a communication was made by the defendants' managing director to the type-writer. Moreover the letter was directed to the plaintiffs' firm, and was opened by one of their clerks. The sender might have written "Private" outside it, in order to prevent its being opened by a clerk. The defendants placed the letter out of their own control, and took no means to prevent its being opened by the plaintiffs' clerks. In my opinion therefore there was a publication of the letter, not only to the type-writer, but also to the clerks of the plaintiffs' firm. Assuming then that there was publication, the question next arises, whether the occasion was privileged. A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge, and that question only arises when there has been publication to a third party. If the judge holds that the occasion was privileged, there is an end of the plaintiffs' case, unless express malice is proved. Was the voluntary placing of the letter in the hands of the type-writer a privileged occasion? The rule, I think, is this—that when the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged. So again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. It is impossible to say that in the present case either of those doctrines applies. What duty had the defendants to make the communication to the type-writer? What interest had the defendants in making the communication to the type-writer, and what interest had the type-writer in receiving it? Clearly the defendants had neither duty nor interest, nor had the type-writer any interest. Every ground of defence therefore fails. It is said that our decision will cause great inconvenience in merchants' offices and will work great hardship. It is said that business cannot be carried on, if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter he must write it himself, and make a copy of it himself, or he must take the consequences.

KAY, L. J. It seems to me that this is one of the simplest cases possible, though the ingenuity of counsel has raised difficulties about it. As I understand it, the simple proposition of law is this: If A. writes defamatory matter concerning B., and sends it straight to him, no privilege is needed. But if A. writes to B. defamatory matter concerning C., then he needs privilege to protect him from liability for the libel. In the present case the letter was written to the persons concerning whom the statement was made; but the moment the letter was communicated to another person, that publication would constitute a libel, unless it was protected by some privilege. It is plain that in the present case no such privilege existed. The composer of the letter dictated it to a type-writer, and handed it to a boy to copy. I cannot conceive that there was any privilege between the managing director and the type-writer or the boy. It is said that from the necessity of the case letters written on behalf of a joint-stock company must be written by some agent, and that it is the ordinary course of business to communicate letters so written to another person in order that they may be copied, and by reason of this ordinary course of business it is said that the communication of the letter to the type-writer and to the boy who made the copy was made on a privileged occasion. I have never heard of any authority for such a proposition. The consequence of such an alteration in the law of libel would be this—that any merchant or any solicitor who dictated to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the

ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent. None of the cases cited come up to what has been contended, or anywhere near it.

Order for new trial.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

CHAPTER XVII.

OF SUBROGATION.

(Continued from page 220.)

§ 312. *Illustrations of subrogation.*

In England it was held that where a riotous demolition by fire had taken place and the office paid the loss to the insured even without suit, it had a right to stand in the place of the insured, and to proceed against the hundred in the name of the insured. *Mason* v. *Sainsbury*, 2 Marsh. Ins. 796, 3rd ed., was an action brought against the hundred on the 1 Geo. I, to recover satisfaction for damage sustained by the plaintiff by the demolition of his house in the riots of 1780. There was a verdict for the plaintiff, with £259 damages, subject to the opinion of the Court on a case, which stated in substance that the plaintiff had insured his house in the Hand in Hand Fire Office; that the office had paid the loss without any action being brought against them; and that this action was brought against the hundred in the plaintiff's name, and with his consent, for the benefit of the insurance office, and to reimburse them the loss they had paid. The question was, whether, as the plaintiff had already received a satisfaction, this action could now be maintained against the hundred on behalf of the insurers. It was contended, on the part of the hundred, that it was the policy of the act, besides the inducement to suppress riots, to divide the loss, and prevent the ruin of individuals; but there could be no reason of policy or justice to extend this beyond the party himself to bodies or individuals who have wilfully put themselves into this danger; that though it was true that a man, having different remedies, might pursue either, and it was no defence to the one that he might have pursued the other, yet, when he has recovered by one, he shall not afterwards seek a second satisfaction by the other; but the Court was unanimously of opinion that the office had a right in this case to recover against the hundred in the name of the insured. Lord Mansfield said: "Though the office paid without a suit, this must be considered as without prejudice; and it is, to all intents, as if it never had been paid. The question comes to this Can the owner of the house, having insured: it, come against the hundred under this Act? Who is first liable? If the hundred be first liable, still it makes no difference; if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured put in the place of the insurer. In abandonment it is so, and the insurer uses the name of the insured. It is an extremely clear case. The act puts the hundred in the place of the trespassers; and, on principles of policy, I am satisfied that it is to be considered as if the insurers had not paid a farthing." Mr. Justice Willes said: "I cannot distinguish this from the case of an escape. If the sheriff pays, he has his remedy over against the party. Though the hundred is not answerable criminally, yet they are not to be considered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Justice Ashhurst said: "At all events the plaintiff is entitled to a verdict to the amount of the premium, having had no compensation as to that. But, on the larger ground, I am of opinion that the hundred is liable in this action for all the damage sustained by the plaintiff." Mr. Justice Buller said: "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of anything out of the record. The contract with the office, if strictly taken, is a wager; literally, it is an indemnity. But, on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted that the hundred is put in the

place of the trespassers. How could the trespassers have availed themselves of the satisfaction made by the office? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is that the insured and insurer are as one person, and in that light the paying before or after can make no difference."

The statute 1 Geo. I has since been repealed.

A carrier loses property of A. A is insured, yet he may sue the carrier.[1] So the latter cannot plead that in defence.[2] If the insurance company pay A, they sue in the name of A.[3]

A's ship is destroyed by a wrong-doer, valued at £6,000, and assured at that; but only £5,000 was recovered from the wrong-doer. The insurers, paying the £6,000, were held entitled to all the £5,000, though the ship was really worth £9,000.[4] But ought not the difference between actual loss, £9,000, and the insurance, £6,000, to be first taken by the assured? Sir G. Jessel seems to hold so in note on p. 573, vol. ix, Eng. Rep. Albany edn.

In *Yates* v. *White*[5] it was held that where the insured recovers from the wrong-doer, the insurers paying him can recover from the insured.

If A sue the wrong-doer for £9,000, he must be left in the conduct of his case. The insurers cannot claim to prevent him going on; and he goes on till paid in full, and, *semble*, ought to be held trustee for assurers only of what he gets over and above the £9,000.

In *Newcomb et al.*, plaintiffs in error, v. *The Cincinnati Ins. Co.* (plaintiffs in Court below), respondents,[7] the plaintiffs in error succeed on appeal. The assured got paid by the insurance company. Where a loss covered by insurance is occasioned by a wrong-doer, the underwriter, after paying, is entitled to be subrogated to the right of the assured against the wrong-doer. *Randall* v. *Cochran*, 1 Vesey, Senr.

In the case of partial insurance, the insured and insurer have each a substantial interest in the case against the wrong-doer.

If the insured (partially) sustains a loss in excess of what he gets from the insurer, he has a right to have it paid by the wrong-doer. If he get more than will fully reimburse him, he ought to account to the insurer, who has right in equity to subrogation.

But the assured cannot be asked to account for more than the surplus which may remain in his hands after satisfying his own excess of loss in full and costs in and about its recovery.

North v. *Armstrong*, 5 Q. B. 244 (England). A ship destroyed by a wrong-doer was valued at £6,000 and insured for that. The insured got paid. He sued the wrong-doer and got £5,000. The insurers were held entitled to the whole, though the insured said his ship was worth £9,000.

Is the wrong-doer exposed to several suits or must there be only one?

Yet, *semble*, if sued by several suits, it is for him to require all to be united. 1 L. C. Rep., p. 235. But he must not under a mere general denial or general issue pretend such right. It is a defence he has; several suits may be.

In *Quebec Fire Insurance Co.* v. *Molson & St. Louis*,[1] the Quebec Fire Insurance Co. paid what they had insured for, but the loss of the insured was in excess of that; nevertheless the company paid what it was liable for, and got subrogation into insured's rights against the wrong-doers for portion of the damages that wrong-doers had done to the insured, and sued and recovered.

Such subrogation may be granted by the insured when getting paid, and, indeed, such subrogation may be required by the party paying. Even in the absence of a convention for such a subrogation, the insured in

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[1] *Merrick* v. *Brainard*, 38 Barbour R.

[2] *Clarke* v. *Wilson*, 103 Mass. R., 105 Mass R.

[3] *Hart* v. *W. Railroad Co.*, 13 Metcalfe; *Home Ins. Co.* v. *W. Transportation Co.*, 33 Howard.

[4] *North* v. *Armstrong*, 5 Q. B. Rep.

[5] 4 Bing. N. Cases; *Randal* v. *Cochran*, 1 Vesey, Sr., cited.

[6] See *Commercial Union Ins. Co.* v. *Lister*, 9 English Rep. (A. D. 1874).

[7] 10 Am. Rep. Ohio, Dec., 1872.

[1] Privy Council, March, 1851.

Lower Canada must grant subrogation. *Semble*, payment by the insurer does not in Lower Canada, without subrogation, give him right against the wrong-doer. In their own right, as insurers, no legal cause of action to them is against wrong-doer, says the Court of Appeals, Quebec, March, 1846, and the Privy Council seem not to disapprove.

In *Hicks* v. *Newport, etc., R. Co.* (3 Doug.) Lord Campbell told the jury to deduct a sum received from an accident insurance company from the damages.

If a loss under a fire policy occurs by the wrongful act of a third person, the insurance company upon paying is subrogated into the rights and remedies of the assured, and may maintain action against the wrong-doer.

If the assured receive indemnity from the wrong-doer before the insurer has paid him, the amount so received will be applied *pro tanto* in discharge of the policy.

The wrong-doer, after payment by the insurance company, he knowing of the payment, cannot go and settle with the assured. This would be fraud on the insurance company. 24 Engl. R., p. 212, citing *Com. F. Ins. Co.* v. *Erie, etc.*, 73 N. Y. Rep.

In *London Assurance Co.* v. *Sainsbury*, in which the judges were two against two, it was held that an insurance company paying the insured for loss by a mob could not sue the hundred.

Is not the remedy different now in England? See *Clark* v. *Inhabitants of Hundred of Blything*, 3 D. & Ry.

In *King* v. *The State Mutual F. I. Co.*[1] the plaintiff insured his interest in a barn (occupied by a man who owed him $400). His interest was not particularly stated. *Per* Shaw, J.: If the plaintiff should hereafter, after getting paid by the insurance company, get paid from the mortgagor, any claim of the insurance company against the plaintiff must yet be merely equitable, and that insurance company can have no claim at all till such money be recovered. The plaintiff paid the premium from his own funds. He has no account to give the mortgagor for what may be gotten from the insurance company. It is not payment in whole or in part of *the mortgage debt.* After the loss and before suit defendants notified plaintiff that they were ready to pay him if he would assign his mortgage interest to extent of the amount offered or gotten by him from insurer defendant.

This subrogation ought to be favored for other reasons, to prevent gaming.

Up to 1746 regular gaming by marine insurances used to be. See *Harman* v. *Van Hatton*, for instance.[1] (Like King's case.)

In 1746, 19 Geo. II was passed; but it only applied to ships and goods in them. Afterwards 14 Geo. III was passed, prohibiting all insurances without interest; fire insurance comprehended.

In *London Assurance Co.* v. *Sainsbury*[2] it was held that an insurance company, after paying the insured, could not sue the hundred but in the name of the insured, because a man cannot transfer his right to a chose in action. Any insurer assignee must sue in name of assignor. The defendant argued that it would be intolerable, if there were a dozen or fifty insurers, that the hundred should have to support a dozen or fifty actions. The plaintiff argued that if the insured should refuse his name, the insurers would be without remedy. (And so, it seems they are; it is for them by policy to stipulate to get assignments with right to use name of insured.) So, in Upper Canada, it was held that generally the assignee of a policy must sue in the name of the original insured. (Not so in Lower Canada.) A mortgagee might have maintained an action under Act of Geo. I.

Interest of a mortgagee in possession, insured *eo nomine* at his own expense. Fire before mortgage debt paid. The insurance company can't, offering to pay him his insurance and balance of mortgage money, ask in equity that mortgage be assigned to them and that they get subrogation. *Suffolk F. I. Co.* v. *Boyden* (1864), 9 Allen's Rep. (Mass.) The policy contained a clause, "Whenever "this company shall pay any loss, the "assured agrees to assign over all his rights

[1] 7 Cushing's R., p. 1. Decided in 1851.

[1] 2 Vernon, decided in 1716. Marshall, Insurance, p. 100.

[2] 3 Doug.

"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.[1]

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*[1] 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-

[1] 16 Peters, 501.

[1] 13 Metcalfe Rep. (Mass.), p. 106.

lease. Judgment for plaintiffs against railroad corporation. This ought to have led Ch. J. Shaw to a different judgment in the *King* case.

A note on p. 168, Smith on Contracts (ed. of 1853) says: A man insured, who receives the amount of his mortgage claim or other debt, cannot claim the amount of the insurance too; and *Goodall* v. *Boldero* is cited; and also *Irving* v. *Richardson*, 2 Barn. & Ad.

In the United States, where the vendor of property, by an executory contract of sale, has effected an insurance thereon for his own benefit, and, after its destruction by a peril insured against, has recovered of the insurer the amount due him upon the contract from the vendee, the insurer is entitled to his claim upon the vendee, and may use the vendor's name in an action against the other party to recover the amount which is still due. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385.

So, also, the insurer of the interest of a mortgagee, on paying to the insured after the destruction of the property the amount of the mortgage debt, takes an equitable assignment thereof, and may recover it of the mortgagor in the name of the mortgagee. *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters, 501; 2 Phillips Ins. 248 and 399. But see contra *King* v. *State Mut. Ins. Co*, 7 Cushing 16.

A mortgagee insures on his own account. After loss by fire, at payment of mortgagee by insurer, this insurer may claim assignment from him and may recover debt from mortgagor. Payment by the insurer changes the creditor. *Carpenter* v. *The Prov. Wash. Ins. Co.*, 16 Peters.

Therefore it will be seen that the insured frequently has two means of obtaining compensation for his loss, one by an action against the wrong-doer occasioning it, or, in the case of the insurance of the mortgagee's or vendor's interest, against the debtor, and the other, by a suit on the policy against the insurer; and he may elect of which of the two he will avail himself. But since insurance is purely a contract of indemnity, the law will suffer him to recover no more than is sufficient to indemnify him for his actual loss. Therefore, if, before payment by the insurer, the insured receives anything from any other party on a claim connected with the subject matter of the insurance, and which goes to diminish the amount of the loss he has sustained, his right of recovery against the insurer will be diminished *pro tanto*. (*Pentz* v. *Ætna Ins. Co.*, 9 Paige Chan. R. 568.) But if, after payment by the insurer, he receives anything on such a claim from a third party, who can never set up as a defence to his own liability the payment by the insurer, he will hold it as the insurer's trustee to be surrendered to him at his request.

But the basis of the payment by the third party must be a legal claim belonging to the insured on that party, which the law will enforce; a simple gratuity received by the insured to compensate for his loss, or a payment to him under a mistaken supposition of an obligation to indemnify him, will not discharge or diminish the insurer's liability. (*Lucas* v. *Jefferson Ins. Co.*, 6 Cowen 635.)

GENERAL NOTES.

COUNTY COURT JUDGES AND THEIR SONS.—We are certainly disposed to agree with the opinion expressed by the bar committee at their annual meeting that the sons of County Court Judges should be discouraged from practising before their fathers. It is obviously not in accordance with the best traditions of the bar that they should do so. Such a practice must of necessity give rise to a suspicion of partiality on the part of the judge, and although the suspicion may be perfectly groundless, it would seem most undesirable to make it possible to entertain it.—*Law Journal.*

HOW HE PAID HIS LAWYER'S FEE.—"My first case in San Francisco," said Attorney James K. Wilder, was the defense of a young fellow charged with stealing a watch belonging to a Catholic priest. I was appointed by the court, because the prisoner said he had no money.

"The jury returned a verdict of not guilty, and as the defendant was leaving the court-room I called him back, and, just as a joke, handed him my card and told him to bring me around the first fifty dollars he got.

"Next day he walked into my office and planked down two twenties and a ten.

"'Where did you get all that money?' I demanded, as soon as I got over my surprise enough to speak.

"'Sold the priest's watch,' he replied, as he bowed himself out."

AN ADVOCATE, seeing that there was no longer any use in denying certain charges against his client, suddenly changed his plan of battle, in order to arrive at success in another way.

"Well, be it so," he said, "my client is a scoundrel, and the worst liar in the world."

Here he was interrupted by the judge, who remarked, "Brother B——, you are forgetting yourself."