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Subrogation of Insurers

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Introduction - General Doctrine.

The doctrine of subrogation, like many of the purely equitable doctrines of English jurisprudence, owes its origin to the civil law of Rome. From the imperfect sketches in the Digest and the other compilations of Justinian, enough can be gathered to show that subrogation, or substitution, was considered from two points of view, according as the transfer emanated from the creditor or the debtor. In the former case it was a cession which transfers the claim itself with all its accessories to him by whom it had been paid. In the latter it was no more than the application of the security of the ancient claim to that which arose from the loan. The ancient law of France had to choose between these two; but until the time of Pothier, the doctrine was hopelessly confusing, both to the jurists and the courts. He settled the controversy once for all, and the definition he formulated

(1) Digest L. 36, L. 18
and presented in his treatise on the subject, is substantially the same as that generally accepted now. He says; "Subrogation is a fiction of law by which the creditor is considered to cede his rights, actions, mortgages, and privileges to him from whom he has received his due." The nature of the subrogation is immaterial; whether it is with the consent of the debtor or the creditor, the principle remains the same. In all cases, the one subrogated is considered rather to have bought the creditor's claim, than to have paid it; acquiring not merely the same securities, but the claim itself.

Just when subrogation was first applied, by English courts cannot be told, but it is fair to assume that a principle so firmly established in the civil law, and so much in accordance with natural justice was among the first to attract courts of equity.

However, equity originally had sole cognizance of it, 
though recent times have seen it applied with increasing (2) 
frequency in courts of common law. In this country, the 
doctrine has been further applied and developed than in 
England, due largely to the favor with which Chancellor (1) 
Kent regarded it. As a purely equitable right, the gen-
eral rules of equity apply. Consequently, the extent to 
which it will be recognized depends upon the circumstances (2) 
of the case, and will be granted or refused, as justice (3) (4) 
and good conscience demand, regardless of form and inde-
pendent of any contract between the parties affected by 
it. It cannot be enforced to the detriment of equal or (6) 
superior equities, nor where it would operate to the (7) 
prejudice or injury of others. A suitor must come with (8) 
clean hands, and his right may be barred for laches.

(2) Boyd V. Mc Donough 39 How. 389; Lafarge V. Harter 9 N.Y. 241
(1) 14 N. J. Eq. 234; 43 Pa. St. 518
(2) Matthews V. Aikin 1 N. Y. 595.
(3) Bispham's Eq. Juris. 338; 7 Johns Ch. 213.
(4) 25 N. J. Eq. 2101
(5) 1 N. Y. 595; 52 Pa. St. 522.
(6) Bispham 338. (7) 92 Pa. St. 36
(8) 57 Ill. 24. (9) 57 Ill. 24
Broadly stated the doctrine includes every instance in which one party pays a debt for which another is primarily liable, and which, in equity and good conscience, should have been discharged by the latter. A mere volunteer or stranger, however, cannot by making himself a party to an obligation for the payment of a debt, acquire as against the original debtor a right to be subrogated to the action of the creditor.

Subrogation is confined to the relation of principal and surety, guarantors, to insurers paying losses, and to a person who has been compelled to pay a debt of a third person in order to protect his own rights. Thus the right is very comprehensive in its application, the sole inquiry being—"Is the party claiming it equitably entitled to its exercise?" Therefore, it does not depend upon the doctrine of suretyship alone, as has been supposed, though in most of the cases where it arises, the relation is analogous to suretyship. "The right of subrogation results from the natural justice of placing the charge where it ought to rest."

(10) 28 N. Y. 271; Sheldon Sub. 1.
(11) 14 N. J. Eq. 234.
(1) 73 N. Y. 399.
(2) 66 N. Y. 363; 42 N. Y. 89.
(3) Brant on "Suretyship & Guaranty" 262. Shelton on "Subrogation" 11; 66 N. Y. 366.
(4) Thomas on Mortgages p. 183; 55 N.Y.350. (5) 2 Ld. cases in Eq. 281.
Neither is it dependent upon privity of contract. On the contrary, the party claiming the right, is put in exactly the same position as the assignee of a mortgage— it is, in fact, an "equitable assignment", as Mr. Pomeroy prefers to call it.

Now having briefly stated the origin and general principles of subrogation, the main object of this paper will be to discuss, more or less in detail, its application in the law of insurance; and first, as it is applied to marine insurers in the case of abandonment.

Subrogation of Marine Insurers

As commonly stated, the act of abandonment by the assured, his agents or assigns, when accepted, has, in law, all the effect of a valid assignment. Then the underwriter stands in the place of the assured, becomes the owner of the property abandoned, with the spes recuperandi and all the rights and remedies incident thereto.

(6) 23 Pa. St. 294; 1 N. Y. 595
(7) Pomeroy's Eq. Juris. 1211 - 13
(1) 13 Pet. 337; 104 Mass. 307; 1 Johns 106; Sheldon on Subrogation 221.
The abandonment transfers ipso facto all the interest of the assured to the underwriters, so far as the interest is covered by the policy, and relates back to the time of the loss. The title of the underwriters is perfect when a valid abandonment has been made and accepted.

By that act "the insurer renounces and yields up to the underwriter all his right, title, and claims to what may be saved, and leaves it to him to make the most of it for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that may be saved from destruction." A peculiar right of the insurers, modifying the right to subrogation, is to take possession of the damaged property, restore it to a serviceable condition, and offer it again to the insured, who is bound to accept it, if within a reasonable time, and there is no defect in the repairs; otherwise, the abandonment remains in full power.

(2) 15 Blatchf. 58; 7 Biss. (c. c.) 35
(1) 9 Wall, 461
Both these rights are based on the character of the insurance policy which is essentially one of indemnity; and are not contingent upon the loss having been total, or upon its having been followed by an abandonment. Where the loss is total, recovery may be had on the policy without an abandonment, since where there has been total destruction there is nothing upon which it may operate.

By the act of subrogation, the insurer assumes the burdens as well as the benefits attaching to the property, even though the loss has not been actually paid.

The same principles apply to a policy of insurance on freight as to those on ship and cargo, with such differences as the nature of the subject matter renders necessary. Where the ship and freight are separately insured, the insured, upon abandonment can recover for a total loss of both. The freight earned before the loss occurred, would go to the ship owner, while the freight earned subsequently to the loss would belong to the insurer, who becomes owner by the abandonment.

(1) 15 Mass. 341.
(2) 9 Johns. 186.
(3) 13 Wall. 367.
(4) 18 Wend. 152; Sheldon on Sub. 221; 7 Biss. 35.
(2) 13 Wall. 367; 105 U. S. st 634-5; 125 U. S. at p. 462
There might be question as to the priority of title to the freight money between the two sets of insurers, upon an abandonment; but in any case, the right of the insurer upon the freight is superior to that of the insured claiming in his own right.

Subrogation against Carrier or other Wrong-doer for Tort causing the Loss.

It is well settled, both in marine insurance and in fire insurance upon land, that the insurance company may be subrogated to the assured's right of action against the carrier or other third person responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract, the insurer, when he has paid to the assured the amount of the indemnity, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss.

(3) 11 East 232; Sheldon 228
(1) 117 U. S. 312.
He is entitled to all the rights and remedies which the assured had. The assured has practically a double remedy, either against the carrier for the loss, or against the insured on the contract of insurance. If he accepts the former, the insurers escape; but if he proceed against the insurers in the first place, the latter are entitled to recoup themselves from the carrier. The liability of the carrier or wrong-doer is considered first or principal; that of the insurer, secondary. The insurer is subrogated to the rights and remedies of the assured not by having an independent claim, but solely because he has paid a loss for which the carrier was primarily liable; and the contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the rights which he had against the carrier or other party whose wrongful act caused the loss.

(2) 25 Conn. 265; 3 App. Cas. 279.
(3) Sheldon 223; 25 Conn. 265
(4) 139 Mass. 508
The earliest English precedents in recognition of this subrogation of the insurer against the wrong-doer go back as far as 1748. Lord Mansfield, in Mason V. Sainsbury, an action prosecuted for the benefit of the insurer against the Hundred, held that, payment by the insurer could not avail the defendant as a defense. "The act" he says, "puts the Hundred in the place of the trespasser; and on principles of policy, I am satisfied it is to be considered as if the insurers had not paid a farthing."

Numerous American cases carry out the same doctrine. In the case of Hart V. R. R. Co. subrogation was decreed where a building was destroyed by sparks from defendant's locomotive. Chief Justice Shaw said that the owner and the insurer were "in effect one person, having together the beneficial right to an indemnity.-- If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the insurer." The insured is equitably entitled to but one recovery; but he may make his choice of the wrong-doer or the insurer.

(1) Randall V. Cockran 1 Ves. Sr. 98
(2) 3 Douglas 61; also 2 B. & C. 254; 4 Bing. N. C. 272.
If he elects to receive damages from the wrong-doer, the amount so received will be applied pro tanto in discharge of the policy; but if he applies first to the insurer, and receives his whole loss, he holds his claim against the wrong-doer in trust for the insurers, and is bound to make an equitable assignment to the latter, or, on failure, the insurer can recover in the name of the assured.

If the insurer after payment of the damages caused by the wrong-doer to the assured, voluntarily pays the policy, he cannot, in N. Y., maintain an action against the wrong-doer. But the carrier cannot set up the payment by the insurer, as satisfaction, in whole or in part, of the claim, nor can he call upon the insurer for contribution.

And if the wrong-doer pays the assured, after payment by the assurer, with knowledge of that fact, it is a fraud upon the latter and will not relieve the wrong-doer from liability to him. In Illinois it is possible to restrain the insured, at the suit of the insurer, who had paid the loss, from making a settlement of his claim against the wrong-doer.

(1) 73 N. Y. 245
(2) 13 Met. 99; 8 Johns 245; Pa. St. 515.
(3) 73 N. Y. 245.
(4) 11 Pa. St. 515.
(5) 73 N. Y. 245; 13 Met. 99; 16 Wend. 397.
(6) 2 Bradw. 609.
At common law, in United States Courts, and the courts of many of the States, the insurer's right of action against the wrong-doer, must be brought in the name of the assured; but in states having the reformed procedure, the action is brought in the name of the real party in interest.

Effect of Stipulation in Bill of Lading.

There is no settled rule as to the effect of a stipulation in the bill of lading that the carriers shall have the benefit of the insurance obtained by the owner against loss or damage to the goods for which the carrier would be liable. The first case in this country giving to the common carrier, by special contract, the right to limit, restrict, or modify, his common law liability as an insurer of the transportation of goods, was Merchantile Mut. Ins. Co. v. Calebs (1859) The court stated the rule as follows:— "That such an agreement neither changes nor interferes with any rule of law, and does not affect public morals nor conflict with public interests. If the owner chooses to take upon himself part of the risk of transportation, and thereby induces the carrier to convey for a less rate of compensation, who has any right to complain?

(1) L. R. 3 App. Cas. 279; 111 U. S. 584; 13 Wall. 367; 11 Pa. St. 515
(2) 73 N.Y. 399; 49 Wis. 625; 41 Fed. R. 643 (Ark.)
(3) 20 N.Y. 173.
It is a matter entirely between themselves, unless it is the result of a scheme to defraud third persons. It has long been determined, both in England and in this country that such an agreement is valid and binding, and in the absence of fraud can at all times be enforced." But while the U. S. courts, and most of the State Courts enforce a similar doctrine, varying the common law liability of carriers, they do not carry it to the same extent. In N.Y. the carrier can stipulate for exemption from all liability whatsoever, not excepting cases of gross negligence; but the U. S. courts and most of the state courts repudiate this view of the case, holding that it is against public policy so completely to exempt the carrier, particularly as he occupies a position of advantage, and is able to dictate whatever terms he pleases to the shipper. The better rule limits the right of exemption to cases involving only ordinary negligence. But the substantial correctness of the doctrine cannot be disputed; and it is now almost universally admitted that the right of the insurer to subrogation does not exist where there is a previous contract between the assured and the carrier, giving to the latter the benefit of the insurance upon payment of the loss.

(1) 17 Wall. 357; 89 U.S. 123; 93 U.S. 174; 129, U.S. 397; 24 N. W. C. (Pa.) 335.
The opinion of Justice Gray in Phoenix Ins. Co. v. Erie
Tr. Co., is generally regarded as stating the correct
doctrine. He says, "the title of the insurer arises out
of the contract of insurance, and is derived from the as-
sured alone, and can only be enforced in the right of
the latter, x x x The right of action against another
person the equitable interest in which passes to the in-
surer, being only that which the assured had, it follows
that, if the assured had no such right of action, none
passes to the insurer; and that, if the assured's right
of action is limited or restricted by lawful contract
between him and the person sought to be made responsible
for the loss, a suit by the insurer, in the right of the
assured, is subject to like limitations or restrictions." Such a stipulation then, cuts off the right of the insurer
to damages whether by virtue of the doctrine of subroga-
tion or by express assignment. It has even been held that
it is not necessary to insert the stipulation in the bill
of lading, but that it would be "equally valid when clear-
ly proved to exist by extrinsic evidence."

(1) 117 U. S. 312; See also 120 U. S. 397 (1889); 108 N.Y. 353
63 Tex. 475; 139 Mass., 508.

(1) 23 Fed. R. 88.
But the owner of the goods lost may still recover from the carrier, notwithstanding the stipulation in the bill of lading, if he has not actually realized anything from the insurer.

Effect of Warranty in Policy.

The effect of this right of the carrier to stipulate for the benefit of the insurance, is to throw the burden of the loss almost entirely upon the insurer; the carrier being liable only for the damage beyond the amount of the policy. To protect themselves in such a case, the insurance company now generally incorporate in their policies a clause of warranty, that the insurance "shall not inure to the benefit of any carrier." The validity of such a stipulation can no more be questioned than the corresponding right of the carrier to stipulate for the benefit of the insurance. "The insurance company was under no legal obligation to issue a policy at all, but, if it did, it had a right to place a provision in the policy such as it did, and in doing so it neither contravened any public policy, nor restrained trade." The whole question rests upon the contract rights of the parties.

(2)129 U. S. 123
If the assured enters into a contract with the carrier in conflict with a provision in a policy that the insurance company shall be entitled to subrogation, and that the insured will make no agreement, nor do any act, whereby his rights of action against the carrier for losses shall be released, the insured cannot recover on the policy.

In Carstairs v. Mechanic's and Traders Ins. Co., the stipulation in the policy was only for subrogation to all claims against the transporter of merchandise. The court held, "The insurance company being practically in the position of a surety, and having a right to subrogation, and the plaintiffs, having by terms of the bill of lading under which they claim the goods, defeated the right they cannot be allowed to recover in the action." So, where the policies contained subrogation clauses, and the bill of lading also stipulated for the benefit of the insurance, and the shipper brought suit against the carrier, it was held that the policies could not be made available for the benefit of the carrier as a condition precedent to the shipper's recovery.

(1) 118 N. Y. 324
(2) 18 Fed. R. 88
(3) 129 U. S. 128.
It has further been held in Pennsylvania that where a policy contained a condition requiring an assignment of the assured's cause of action, that any release on his part which made "performance of the covenant to assign either impossible or useless, would relieve the insurance company of its concurrent covenant to pay;" but the right to subrogation must be express.

It appears, however, that notwithstanding these stipulations in policies and bills of lading, the insured still retains his right of action against the carrier, though he forfeits all claims upon his policy. In the cases just mentioned, the stipulations in the policies antedate the contract with the carrier, and there has been no decision rendered in a case where the policy was issued subsequently to the bill of lading; but there seems to be no reason to suppose that the contract rights of the parties would be changed.

It should not be forgotten that in all cases the right to subrogation depends upon the insurer having paid in full the liability which gave rise to such right.

123 Pa. St. 516.
123 Pa. St. 523
6 Watts. (Pa.) 221.
Insurer's Subrogation to Rights of a Mortgagee.

A much-mooted question affecting the doctrine of subrogation is, whether an insurance company can, upon payment of loss to a mortgagee, compel an equitable assignment to it of the latter's rights and remedies against the mortgagor. The discussions of this fruitful topic rest mainly in dicta and proceed on its analogies to suretyship and abandonment, as though subrogation grew out of those doctrines, whereas, in truth, it is as old or older than either of them, and derives its force and effect solely from consideration of equity and good conscience. "What are the rights of the parties," is the determining question in all cases, and unless it can be shown from all the circumstances in the case, that the insurance company is equitably entitled to subrogation, it will not be decreed. It is well settled that where the policy expressly provides for such subrogation and assignment the insurer's right is unquestionable.

(1) N. Y. 595; Sheldon 93
(1) Ill. 221; 71 Mo. 567; 10 Mo. App. 376; 43 N. Y. 389
70 N. Y. 19; 71 Pa. St. 234.
But if there is neither any provision in the policy nor any actual assignment, the insurer's right to demand it, is not so clear. Decisions either way bearing directly upon the point are rare; but the decided preponderance of opinion is in favor of the insurer's right upon paying the loss, and if necessary, the balance due on the mortgage with interest. All the cases holding this way assign for reasons that, to allow the mortgagee to have a double satisfaction, to the payment of the insurance and the mortgage debt, would be to ignore the principles of suretyship, to sanction a system of wager which would be contrary to the policy of the law, and to furnish a dangerous temptation to incendiaryism. In many cases also, the right of subrogation is based upon the alleged inequity of permitting the mortgagee to receive and retain both sums. Massachusetts is the only state in the Union which distinctly lays down the rule that a mortgagee is entitled to both sums, where the policy was taken in his own name and for his own benefit, whether the policy expressly provides for subrogation or not. That side of the controversy is upheld solely by the able arguments presented by Chief Justice Shaw in King v. Ins. Co.[1]

(2) 17 Pa. St. 253; Thomas on Mortgages pp 183-4
(3) 17 N.Y. 428; 43 N.Y. 389; 55 N.Y. 348; 2 Dutcher 541
(1) 7 Cush. 1.
unnecessary to the decision of the case, it is true, but consistently followed in other decisions of the same court especially in Suffolk Ins. Co. v. Boyden. The learned Chief Justice says; "We are inclined to the opinion, both upon principle and authority, that when a mortgagor causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And, so on the other hand, when the debt is thus paid by the debtor, the money is not, in law or in equity, the money of the insurer who has thus paid the loss, or money paid to his use. -- There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor; but each has a separate and independent contract with the mortgagor. Thus, he goes on to argue, that if the mortgagor cannot claim the insurance money, it seems a fortiori, that the insurer cannot claim to charge his loss upon the mortgagor which he would do, if he were entitled to an assignment of the mortgage debt, either in full or pro tanto.
Unquestionably this argument is open to grave criticism in that it might with equal justice be applied in case of a surety claiming under his principal. It will be noticed also, that in this case the insurance company tried to enforce the assignment of the mortgagee's claims before paying the loss under the policy. Even those courts which uphold the doctrine of subrogation, make that a condition precedent to a right of compelling an assignment of the mortgage. On this ground the opinion of Chief Justice Shaw, where it discusses the right of subrogation, is mere dictum; since by all the authorities, the right could not arise until at least the amount of the policy (1) was paid. This is equally true in marine insurance, and in actions against a carrier or wrong-doer, as has already (2) been discussed. In Suffolk Ins. Co. v. Boyd, however, while the same argument is employed as in 7 Cushing, 1., subrogation was denied, even though an offer was made by the insurer to pay the loss and amount due upon the mortgage. To the question why the mortgagor should not pay the premiums and be entitled to treat the debt as cancelled, it is answered, "because the insurance is a wholly collateral contract which the law allows the mortgagee to make, with which the mortgagor is not concerned."

(1) Roosevelt J., 17 N.Y. 435, 441, 442; 8 S.E. (Va.) 719 (1880)

(2) Watts (Pa.) 221.

(3) Allen 123.
And in concluding the court say: "The whole consideration proceeds from the mortgagee; if there is no loss by the fire he loses the whole amount paid without any claim upon the mortgagor for compensation. The premiums paid are intended to be a just compensation for the sum to be received upon the happening of a contingent event."

The cases upholding the doctrine of subrogation are numerous, but few are directly in point. In the opinion of Chancellor Walworth in Aetna Ins. Co. v. Tyler, the point came up collaterally. The case of Smith v. Columbia Ins. Co. furnishes a close analogy to the case under discussion. The principal reasons which induced the court to hold that the insurers were entitled to subrogation, arose out of the nature of the case. There had been prior mortgages effected upon the property concealed by the assured, and the insurers were deceived in assuming the risk at a lower rate of premium than they otherwise would have done. The right of the insurers to the cession of the securities was, however, based strictly upon the doctrine of subrogation. In Carpenter v. Ins. Co

(1) 9 Allen 123; 8 Hare 216; 10 Allen 233.
(2) 16 Wend. 397; also 21 Pa. St. 513.
(3) 17 Pa. St. 253.
(4) 16 Pet. 405.
Not so, however, the case of Ins. Co. V. Woodruff, in which the insurable interest of the defendant was in the shape of collateral securities, held as a lien upon certain property of the mortgagor for the payment of a debt. The case presents an able discussion of the right of the insurer to be subrogated, not only to the mortgage, but to any collateral by which the debt is secured, and forcibly criticizes the opinion of Chief Justice Shaw in King V. Ins. Co. (supra.) Among the later cases supporting this doctrine, is Honore V. Ins. Co., where the insurance was upon 74 barrels of whiskey by the mortgagor. The case was dismissed on the ground that to give the mortgagor a right to enforce his claim against the mortgagor, after payment by the insurance company, would be to favor wager policies, and to furnish a dangerous temptation to incendiarism. In Norwich Ins. Co. V. Boomer, the mortgagor paid the premiums and was the beneficiary.

The right of the insurer to subrogation has come up so many times collaterally in N. Y., N. J., and Pa. and has been so thoroughly discussed, that it is doubtful if any direct decisions will ever change it.

(5) 2 Dutcher (N. J.) 541

(1) 51 Ill. 400
(2) Ill. 442; see also 80 Ill. 532
In the cases in N. Y. which hold that a stipulation in a policy for subrogation can be enforced, the courts are unanimous that it can be decreed without such stipulation. A late case in N. Y., Thomas V. Montauk Ins. Co., entitles the insurance company to subrogation without a stipulation in the policy to that effect, citing as authorities,

(1) Aetna Ins. Co. V. Tyler, Kernochan V. Ins. Co.,
(3) and Excelsior Ins. Co. V. Royal Ins. Co. These two last cases give an exhaustive discussion of the right of the insurer to subrogation. In the former Strong J., says: "It is a mere equity to be put in the place of the insured as to that sum, in regard to the bond and mortgage, whatever his rights may be. This equity does not arise out of the contract of insurance, but from all the circumstances of the case."

A strong argument in favor of the insurer and one usually employed is, that the contract of insurance is an indemnity against the loss of the debt by a loss or damage to the property mortgaged; and, therefore, as Judge Folger so well expresses it; "If the mortgaged property is, after the loss occurs, still enough in value

(1) 70 N. Y. 19; 43 N. Y. 382; 66 N. Y. 363.
(2) 43 Hun. 213 (1887)
(3) 16 Wend. 385
(4) 17 N. Y. 442
(5) 55 N. Y. 359
to pay the debt, there has been in effect no loss; that
the insurer, having paid the mortgage, is entitled to the
(1) mortgaged property." The mortgagor is not taken into
account in this argument; nor does there seem to be any
good reason why he should be, if subrogation amounts to
anything. The equities of both the mortgagee and the
insurer who succeeds to his rights, are superior to those
of the mortgagor. All the text-books and the cases in
every jurisdiction where the subject has come up, hold
that the mortgagor has no right to have the insurance
money go in discharge of the debt where the insurance is
effected by the mortgagee himself in his own name, and
(2) paid for by himself with his own funds. The question
then rests between the mortgagee and the insurer; as to
whether the former by virtue of so-called independent
(3) contract is entitled to both sums; or whether the latter
upon securing the mortgagee from all losses, and by virtue
of his contract of indemnity is equitably entitled to an
assignment of the mortgage. The latter, it appears to me,
is the better doctrine. Certainly it harmonizes better
the interests of all parties.

(1) 55 N. Y. 343, 355.

(2) Wood, on F. Insurance 471; 7 Cush. 1; Dush. 541;
s. c. 26 N. J. 541.

(3) 7 Cush. 1; O Allen 123.
The mortgagor only has to pay his debt as in the other case; the mortgagee receives his debt or its equivalent, the premiums paid on the policy and interest if necessary, so that he has secured that which he wished to secure by the policy; and the insurance company simply becomes the creditor of the mortgagor in place of the mortgagee, as he might have become by means of an express assignment of the mortgage or other securities.

The mortgagor also has ample means of protection; for if the policy is taken out in his name, or if it is taken out in the name of the mortgagee and the premiums paid by the mortgagor, or if, by virtue of an agreement between the two, the mortgagor is the beneficiary party, then the right of the insurer to subrogation is cut off, and the insurance money goes in liquidation of the mortgage-debt.

Is the Insurance by the Mortgagee of the Property or of the Debt?

A frequent question in the cases bearing on this subject is whether the insurance by the mortgagee is of the property or of the debt. The right of the insurer to subrogation is granted in either case; but it might be regarded by some as more justifiable and logical if the

(1) 43 N. Y. 389
(2) Wood, on Insurance 471.
insurance is of the debt simply. Nearly or quite all of
the early cases favor this view, even though the policy in
express terms provided that the mortgagee's interest was
(1) insured to cover specific property. Judge Story says;
"Where the mortgagee insures solely on his own account, it
is but an insurance of his debt, and if his debt is after-
wards paid or extinguished, the policy ceases from that
(2) time to have any operation." In Insurance Co. V. Woodruff
the court says; "That the insurance by the mortgagee was
necessarily an insurance of the debt because he has no
other interest." Again, Judge Gibson says; "It is not
the specific property which is insured, but its capacity
(1) to pay the mortgage-debt, in effect, the security is insured.

On the other hand, the later, and now generally
accepted rule is, that laid down in the Massachusetts and
later New York cases. Chief Justice Shaw, in King V.
(2) Insurance Co., says; "The contract of insurance is not
an insurance of the debt or of the payment of the debt;
that would be an insurance of the solvency of the debtor."

(1) Pa. St. 253; 16 Wend. 335; 4 How. (U. S.) 185.
2 Dutcher (26 N. J. L.) 541; 548; also Angell on
Insurance 59.

(2) 4 How. (U. S.) 185
(3) 2 Dutcher 541.
(1) 17 Pa. St. 253.
(2) 17 Cush. (Pa.) 1.
In Kernohan V. Ins. Co., Strong, J., gives a full discussion of the vexed question, showing plainly the effect of an insurance upon the debt, were it possible. While admitting the insurance has respect to the debt, that the mortgage-lien is the basis and extent of the right of the mortgagee to insure, he still claims that the insurance is upon the property the subject of the lien.

The most forcible exposition, however, is that of Judge Folger in Excelsior Ins. Co. V. Royal Ins. Co. He says; The insurance is upon the property in its character as a security for the mortgage-debt. The contract of the insurer is that, the property which constitutes the security, shall suffer no deterioration by a loss by fire during the term of the insurance. If any such loss happens, the insurer is liable, and it is no concern of his whether the security remains sufficient to answer the debt or not — "To say that it is the debt that is insured against loss, is to give to fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against fire; they are not privileged to guarantee the collection of debts. If they are, they may (1) insure against the insolvency of the debtor."

(3) 17 N. Y. 435.
(4) 55 N. Y. 343.
(1) 55 N. Y. 343; see also 43 Hun, 220.
It seems plain that the mistake made by the courts in the early decisions was due to the fact that the insurable interest of the mortgagee is limited to the amount of his debt, and, while both they and the later tribunals meant the same thing, the latter were more accurate in expression. It may be, however, that the mortgagee was formerly regarded as having no property in the subject-matter, sufficient to obtain an insurance upon it.

**Insurable Interest—Conclusion.**

In the discussion thus far the insurable interest of the mortgagee has been taken for granted; that such an interest exists has been so long settled, as to seem a work of supererogation to speak of it further.

All that is necessary to be known of it in treating of subrogation is the root principle of insurance, already mentioned, that the loss is payable only to the extent that the insured has an insurable interest; which means, in the case of the mortgagee, the amount of the mortgage-debt, and in the case of the mortgagor, the value of the property.

(1) But see for full discussion 1 Hall (U.S. Sup. Ct.) 94, 115.

(2) 8 Ins. L. J. 177; Wood on Ins. 257; 23 N.J. L. 541; 55 N.Y. 343; 51 Ill. 509; 16 Pet. 495; 17 N.Y. 435; 10 Mo. App. 384; 43 Hun. 220;
So also there has been no attempt to treat of the insurer's right to subrogation as it effects the interests of vendor and vendee, lessor and lessee, debtor and creditor. The same principles and reasoning which apply to the case of mortgagor and mortgagee, apply also to them. The right to subrogation in each case, is based on the fact that the person who pays the debt stands in a position analogous to that of a surety, or is compelled to pay to protect his own interests.

Subrogation of insurers in case of life insurance, is disconterenced by the courts as contrary to the policy of the law.

Fred. Wells Hargreaves.

(3) 9 I. E. D. 613.
(1) May on Ins. 458; Thomas on Mortgages p. 183;
55 N. Y., 359.
43 N. J. Eq. (1837) at p. 260; s. c. 11 Atl.R. 681, 683.
(2) Sheldon on Subrogation, and case cited.