HALL & LONG *v.* THE RAILROAD COMPANIES.

An insurer of goods, consumed and totally destroyed by accidental fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show any positive wrongful act by the carrier.

ERROR to the Circuit Court for the Middle District of Tennessee.

Hall & Long allowed this suit in their names, *for the use of certain insurance companies*, against the Nashville and Chattanooga Railroad Company, to recover the value of cotton shipped by them on the road of the defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by Hall & Long against loss by fire, in the companies for whose use the suit was brought, and these companies had paid the amount insured by them, respectively. On demurrer the question was whether the underwriter who insures personal property against loss by fire, and pays the insurance upon a *total loss* by accidental burning, while in transition, can bring an action in the name of the owner, for his use against the common carrier, based upon the common-law liability of such common carrier. The court below adjudged that he could not, and the plaintiffs brought the case here on error.

Mr. Henry Cooper, in support of the judgment below:

The case is not one where the defendant has been guilty of any positive, wrongful act, resulting in loss to the owner. The defendant's liability, if it exist at all, grows out of the rigid rules of the common law, that a common carrier is liable for accidents, and against all acts but the acts of God and the public enemy.

In marine insurance, by a supposed analogy to suits in which this action has probably been brought, whenever a

demand is made for payment under a policy, as for a total loss, the insurance company is subrogated to all the rights of the assured to the property insured. This is brought about by what is technically called an *abandonment*, which *must*, in all cases, be made by the assured.* The insurer thus becomes subrogated to all the title of the assured, in the goods, or in what may be saved of them, and the abandonment goes so far as to include the *spes recuperandi* where there is anything to be recovered.

But the doctrine of subrogation, in marine insurance, can have no application to the case now before the court, because: (1st) there is no such thing as abandonment in fire insurance on land, and (2d) there was here a total loss, and nothing, consequently, upon which a cession could operate.

It has generally been supposed that the insurer was entitled to subrogation to the rights of the assured where the insurance was of a mortgage debt; and, until recently, the doctrine was so laid down. But this was based upon a dictum of Judge Story's, in *Carpenter* v. *Providence Washington Ins. Co.*,† and has now been overruled by courts. In *King* v. *State Mutual Fire Insurance Company*,‡ Shaw, C. J., speaking for the Supreme Court of Massachusetts, says:

"We are inclined to the opinion that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own fund, *in case a loss occurs before his debt is paid*, he has a right to *receive a total loss for his own benefit;* that he is not bound to account, to the mortgagor, for any part of the money he 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 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 equity*, the money of the insurer who has thus paid the loss, or money paid to his use. . . . What is there inequitable on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate consideration paid by himself. There is nothing inequitable to the debtor, for he pays no more than he

* Tunno *v.* Edwards, 12 East, 488. † 16 Peters, 501. ‡ 7 Cushing, 1.

originally received in money lent; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent."

The same conclusion has been reached, on a mortgagee's attempt to charge the mortgagor with the premiums of insurance, by Vice-Chancellor Wigram, in England, in *Dobson* v. *Land*,* and it has been had also in American cases.†

In equity, the insurance company could have no claim to subrogation until it had fully reimbursed the merchant, not merely the actual loss, but the premiums previously paid. The truth is, there is more intrinsic equity in the railroad company's claim to the benefit of subrogation against the insurance company, which has been fully paid for the risk it has assumed, than in the claim of the latter to be subrogated to the rights of action of the assured against the railroad company, if indeed he have any.

The English case of *Mason* v. *Sainsbury and another*,‡ and one or two American authorities, based upon that decision, which might be cited for a view opposed to ours, if they can be sustained at all upon principle, rest upon the doctrine of punishing the wrong-doer. But here the defendant has been guilty of no wrongful act by which loss has accrued. The loss is purely accidental, and that loss has been paid by the real plaintiffs upon a contract based upon a sufficient consideration. To allow them to recover, in the name of the owner, would be to give them the benefit of the premium without any risk. It would be, in effect, to legalize champerty. For what they claim is the right to have a right of action assigned them. It may be that where there is an equity growing out of the facts of the case the claim might be sustained; as, for example, if the cotton had been maliciously burned by the company, or lost by wilful neglect. But there can be no equity growing out of inevitable acci-

* 8 Hare, 216.

† White *v.* Brown, 2 Cushing, 412; Carter *v.* Rockett, 8 Paige, 437; and see Insurance Company *v.* Updegraff, 21 Pennsylvania State, 519.

‡ 3 Douglas, 61.

dent, and that accident expressly insured against for a valuable consideration. The railroad company and the insurance company, for whose use this suit is brought, were, so to speak, both insurers of the property lost against the risk which occurred. They both became liable by independent contracts upon independent considerations. Both are liable to the shipper, and he may recover at his election from either. But there is no equity in the premises, and each must abide by his contract with the shipper, and stand where he chooses to leave him.

Mr. W. Atwood, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine pre-

vails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, sec. 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.

In *Gales* v. *Hailman*,* it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart et al.* v. *The Western Railroad Company*,† it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release

* 11 Pennsylvania State, 515.

† 13 Metcalf, 99.

the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers.* And such is the English doctrine settled at an early period.†

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance: and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of in-

* Rockingham Mutual Fire Insurance Company *v.* Bosher, 39 Maine, 253; Peoria Ins. Co. *v.* Frost, 37 Illinois, 333; Connecticut Mutual Life Ins. Co. *v.* New York and New Haven Railroad Co., 25 Connecticut, 265.

† Mason *v.* Sainsbury, 3 Douglas, 60; Yates *v.* Whyte, 4 Bingham, New Cases, 272; Clark *v.* Blything, 2 Barnewall & Cresswell, 254; Randal *v.* Cockran, 1 Vesey, Sr., 98.

demnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

JUDGMENT REVERSED, and the cause

REMANDED FOR FURTHER PROCEEDINGS.

SALT COMPANY *v.* EAST SAGINAW.

1. A law offering to all persons and to corporations to be formed for the purpose, a bounty of 10 cents for every bushel of salt manufactured in a State from water obtained by boring in the State, and exemption from taxation of the property used for the purpose, is not a contract in such a sense that it cannot be repealed.
2. Such a law is nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the State, dependent for its continuance upon the dictates of public policy, and the voluntary good faith of the legislature.
3. General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks, or other advantage, are always under the legislative control, and may at any time be discontinued.

ERROR to the Supreme Court of Michigan; the case being thus:

The East Saginaw Salt Manufacturing Company filed a bill in the court below against the city of East Saginaw, in Michigan, to restrain the city from levying and enforcing any tax on certain real estate owned in the said city by it, and for a decree establishing the exemption claimed. The company founded its exemption on an act passed by the legislature of Michigan, on the 15th of February, 1859, for encouraging the manufacture of salt. The act was as follows:

"SECTION 1. The people of the State of Michigan enact, that