bound to receive or pay for it, because it is not the thing he agreed to purchase: *Howard* v. *Hoey*, 23 Wend. 351; *Hart* v. *Wright*, 17 Id. 277; 2 Kent's Com. 480; *Chanter* v. *Hopkins*, 4 Mees. & W. (Exch.) 399. * * * But if the article is at the time of the sale in existence and defined and is specifically sold, and the title passes *in præsenti* to the vendee, there will be no implied warranty that the article is merchantable. * * * Where the sale is executory if the goods purchased are found on examination to be unsound, or not to answer the order given for them, the purchaser must immediately return them to the vendor or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods: 2 Kent Com. 480; *Fisher* v. *Samuda*, 1 Camp. 190; *Hopkins* v. *Appleby*, 1 Stark. 477; *Milner* v. *Tucker*, 1 Car. & P. 15; 23 Wend. 352."

ARTHUR BIDDLE.

(*To be continued.*)

RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

CASTELLAIN *v.* PRESTON.

The owners of houses which were insured against fire contracted to sell the property, and reserved power under the contract to name the time for completion. The property was burned, and the insurance company, in ignorance of the contract, paid the vendors for the damage done. The vendors neither reinstated the premises nor handed the insurance money to the purchasers, but they subsequently named a time for completion, and the purchase was eventually completed.

Held, that the insurance company could not recover from the vendors the amount of the insurance money which they had paid.

The fact that an insurance company is ignorant of a contract for sale at the time of payment is, in such a case, immaterial.

The only principle applicable to such a case is that of subrogation in the full sense of that term, and where the right claimed by an insurance company is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance. A contract for sale is not a contract directly or indirectly for the preservation of the buildings insured.

Darrell v. *Tibbitts*, L. R., 5 Q. B. Div. 560, considered.

Semble, the contract must be one which subsists at the time when the claim under the policy has matured.

FURTHER consideration of action.

This was an action brought by the plaintiff as chairman of the

Liverpool and London and Globe Insurance Company against the trustees of a certain will, for the sum of 330*l.* and interest from the 25th of September 1878, or, in the alternative, for declaration that the defendants were trustees for the plaintiff of the same sum and interest.

The said sum of 330*l.* had been paid by the company to the defendants under the following circumstances:—

By an agreement made in July 1878, the defendants agreed with E. Rayner and J. E. Rayner (hereafter called the purchasers) for the sale to them of a piece of land in Liverpool, with a house and workshops erected thereon, for 3100*l.* By the agreement the defendants were entitled to name a day for completion of the contract, and until they named such day were entitled to rescind.

By a notice duly given in March 1879, they named the 6th of May 1879, for completion, which, however, did not take place until December of that year, when the purchase-money was paid.

Prior to, and at the date of the agreement the premises were insured against fire by the defendants with the company; but the agreement contained no reference to the insurance. The policy was in the usual form, and gave the insurers the option of reinstating the property.

In August 1878, the premises were damaged by fire.

On the 25th of September 1878, the company, being then ignorant of the agreement, paid the defendants a sum of 330*l.*, in settlement of all claims between the parties in respect of the fire.

The defendants, after receiving such payment, refused to hand it over to the purchasers or to reinstate the premises. And, therefore, in May 1879, an action of *Rayner* v. *Preston*, was brought by the purchasers against the present defendants for a declaration that they (the then plaintiffs) were entitled to the benefit of the moneys received by the defendants from the company, and to have such moneys paid or allowed to them accordingly, or otherwise to have them laid out towards reinstating the premises.

That action was dismissed with costs by JESSEL, M. R., whose decision was affirmed by BRETT and COTTON, L.JJ., *dissentiente* JAMES, L. J. (L. R., 14 Ch. Div. 297; L. R., 18 Ch. Div. 1; 21 Am. Law Reg. (N. S.) 89), but JESSEL, M. R., during the argument in the court below, and BRETT and COTTON, L.JJ., in the Court of Appeal, expressed doubts whether such an action as the present would not lie.

This action was brought in October 1881, in the Liverpool District Registry of the Queen's Bench Division, but on being opened before CHITTY, J., at the Liverpool Winter Assizes in January 1882, was adjourned for further consideration before his lordship in London.

Charles Russell, Q. C., and *Tobin*, appeared for the plaintiff.

Gully, Q. C., and *Kennedy*, for the defendant.

The opinion of the court was delivered by

CHITTY, J.—This case raises an important question on the law of fire insurance. [His lordship then stated the facts, and continued:—] I pause here for a moment to say that the circumstance that the insurers were ignorant of the contract for sale is immaterial. It is clear that the vendors could have recovered, notwithstanding the contract for sale. That point was decided in *Collingridge* v. *Royal Exchange Assurance Co.*, L. R., 3 Q. B. Div. 173, where a suggestion was made by the learned judges who decided it that in such circumstances the vendors might be trustees of the amount recovered for the purchasers. Acting possibly on that suggestion, the purchasers brought the action of *Rayner* v. *Preston* in the Chancery Division. [His lordship then referred to the doubts above referred to and expressed by the judges in that case, and continued:—] There is no English authority directly in point, and the question must be decided on principle.

The plaintiffs contend that the contract of insurance is merely a contract of indemnity, and unless they recover in this action the defendants will receive double satisfaction. Undoubtedly it is settled law that a contract of insurance is a contract of indemnity. The principle of subrogation applies to fire insurance, whether the subject-matter of the insurance be chattels or buildings annexed to the soil. The law on the subject is ably stated in the judgment of the Master of the Rolls and of Lord Justice MELLISH in the *North British Fire Insurance Case*, Law Rep., 5 Ch. Div. 569, and also by Lord CAIRNS in *Simpson* v. *Thomson*, Law Rep., 3 App. Cases 279, where he says, "I know of no foundation for the right of the underwriters, except the well-known principle of law, where one has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected

himself against or reimbursed himself for the loss." What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against. Familiar instances may be put. Where the owner of a building insures, and the building is destroyed by a riot, the insurers, on payment, are subrogated to their right against the hundred. Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeed to the rights of the landlord against his tenant. The same law applies in the case of mortgagee and mortgagor where the mortgagor is under the obligation to keep the buildings in repair.

In marine insurance there are the familiar instances of capture and re-capture, the case of reprisals, such as in *Randal* v. *Cockran*, 1 Ves. Sen. 98, but a limit was marked in those cases by the decision of *Burnand* v. *Rodocanachi*, L. R., 6 Q. B. Div. 633. There the underwriters, under a valued policy of the ship, which was destroyed by *The Alabama* cruiser, paid as on a total loss. The American government, under a treaty with the British government, provided a fund out of which the insured received a sum in respect of the destruction of the ship, and the question was whether that sum was part of the salvage (that point was put very clearly by Lord Justice BRAMWELL in his judgment), and it was held that it was not; that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him. As I say, that case marks the limit.

An obvious distinction exists between the case of marine insurance and of insurance of buildings annexed to the soil. In the case of marine insurance, where there is a total constructive loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil. Although the buildings annexed are destroyed, there cannot be a cession of the right to the soil itself. This, however, creates no difficulty; and the principle of subrogation applies as in the case of a partial loss under an ordinary fire insurance for loss of goods, and the principle was applied by the Court of Appeal in *Darrell* v. *Tibbitts*, L. R., 5 Q. B. Div. 560. This case was mainly

relied on by the plaintiff, and requires to be carefully examined. The facts are simple. The landlord insured and had a covenant with his lessee, under which the lessee was bound to rebuild or reinstate in the event of damage by fire. The lessee had his remedy over against the Brighton Corporation, but that circumstance was immaterial, and was so treated by the Court of Appeal. After the insurers had paid the landlord for his loss the tenant repaired, and the question was whether the insurer was entitled to recover the amount he had paid. The court held that he was. The case, when examined, turns out to be one of subrogation. If the lessees had not repaired, the insurers, undoubtedly on payment, would have, on that principle, been entitled to bring an action on the lessees' covenant which related to the subject-matter of insurance and its preservation. The only difference was one rather of form than of substance arising from the circumstance that the landlord had, by reason of the reinstatement of the building, actually received for the loss the benefit of the covenant to repair, and consequently no right of action on the covenant remained. This difficulty the court surmounted, the judges using various modes of expression in formulating technically the plaintiff's right to recover; but all resulted alike in the affirmation of the principle that the insurers were subrogated to the position of the insured in relation to the covenant to repair. I will refer to some passages in the judgments with a view to make good that position. Lord Justice BRETT refers to the judgment in the case of the *North British Company*, and says, "If the tenant had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord who had insured with them, but would have had a right to bring in his name an action against the tenants, and recover from the tenants what they had paid to the landlord; in other words, a policy of fire insurance is a contract of indemnity similar to that which is contained in a policy of marine insurance. That case seems to me further to show that if the landlord had sued the tenants before he received payment from the insurance company, he must have recovered from them, for it would have been no answer by the tenant that the landlord was insured. That case seems to me also to decide this, that if the landlord had recovered damages from the tenant equivalent to the injury done him by the refusal of the tenant to repair, he could not afterwards sue the insurance company. The landlord was paid by the insurance com-

pany at a time when they could not resist his demand, as they were bound by their contract to pay." Then referring to damage and the liability of the Corporation of Brighton he says, "I think, however, that the case stands in the same position as if the tenants had executed the repairs with their own moneys." Then presently he says, "If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would be not merely indemnified, he would be paid twice over." Then he deals with the technical difficulties: "A technical difficulty arises in my mind as to the ground upon which the landlord can be held liable in this action, but it is a difficulty which ought to be surmounted." Then (without reading through the rest of his judgment), he refers to various grounds on which he considers the plaintiffs might be entitled to recover the sum of money. He says, in one part, the court had a right to imply a promise on the part of the landlord to the insurance company at the time of payment by them that, if the lease should be afterwards made good by the tenants, he would repay the money which he had received from the insurance company. Then he refers to marine insurances, and says, "The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by the reason of the peril insured against." I will not proceed to read further, but I take it the substance of these judgments is that the plaintiffs were in the particular case subrogated to the rights of the landlord against the tenant. Lord Justice COTTON, at the commencement of his judgment, places the insurers in the position of a surety. It would be too long to read through all these judgments, but I will read, towards the bottom of page 564, what the learned Lord Justice says: "Under these circumstances, no doubt, there is some difficulty in saying what is the ground upon which the money is to be obtained from the landlord. I do not think that technically the company have a right to recover

back the money which they have paid, but they have a right to the benefit of what the assured has received"—I will mark these words particularly—"in respect of a contract referring to the loss, by which he was entitled to receive compensation in damages, and which they might have called upon him to enforce for their benefit; when he has received that benefit, they can treat him as being under an obligation to use it as they may direct." Presently he speaks again of the contract relating to the loss. Lord Justice THESIGER divides the case into the question of substance and the question of form, and his judgment is very much to the same effect, although the expressions which he uses are somewhat different. He says, at page 567, that he is "by no means prepared to say that there may not be some contracts so entirely independent of the subject-matter of the insurance as to put the assured in the position of being more than indemnified in the event of a loss." Then when he deals with the question of form he uses, as I have already said, various modes of expression in order to surmount and get over the technical difficulty which pressed upon him.

In the present case I am asked to go far beyond the principle of that decision. It is admitted on the part of the plaintiffs that the principle of subrogation cannot apply here. It was felt impossible to contend that the insurers on payment of the loss were entitled to bring, either in their own names or in the names of the vendors, the defendants, an action to enforce the contract of sale, or even to compel the vendors to complete. The contract of sale was not a contract either directly or indirectly for the preservation of the buildings insured. The contract of insurance was a collateral contract wholly distinct from and unaffected by the contract of sale.

The attempt now made is to convert the insurance against loss by fire into an assurance of the solvency of the purchasers. The position of the vendors in equity at the time when the fire occurred was this: they had no right of action against the purchasers at the time, but on giving notice fixing the day, they were entitled to recover the purchase-money after that day had passed, and the land and buildings in the meantime constituted their security under the doctrine of vendor's equitable lien for the payment of the purchase-money. Now the security was impaired by the fire. It was said that the purchase-money having been legitimately paid, the vendors in the result suffered no loss.

I will try the proposition asserted by one or two illustrations

which occur to me. Take the case of a landlord insuring and the tenant under no obligation to repair, a case which I had before me the other day, where, under an informal agreement, evidently drawn by the parties themselves, the large rent of 700*l.* was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent. I stay here to say that a lease, as has been often held, is but a sale *pro tanto*. Now, assume that the building in such a case was ruinous and would last the length of the term only, could the insurers recover a proportionate part of each payment of the rent as it was made, or could they wait until the end of the term, and then say, in effect, You have been paid for the whole value of the building and, therefore, we can recover against you? Or, to vary the case somewhat, again, suppose the building at the end of the term was only half the value, could the insurers then recover half the sum they had paid? I think not. I think all these questions must be answered in the negative, but, if the plaintiffs are right in their contention, then the insurers could recover in all those cases.

Now, by way of further test, I put two other cases which have actually occurred and been decided, and, as I think, rightly decided, in the American courts. The first is the case of *King* v. *State Mutual Fire Insurance Co.*, 7 Cush. 1. The mortgagee there sought to recover the amount of the insurance from the insurers, and they claimed to be entitled to an assignment of the proportionate part of the mortgage debt, and it was held by the Supreme Court that he was not bound to make any such assignment. The judgment of the Chief Justice contains a full and masterly exposition of the law on the subject. It is too long for me to quote at length, but there may be one or two passages which I can select. "The contract of insurance," he says at page 4, "with the mortgagee 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: of course, as a contract of indemnity, it is not broken by the non-payment of the debt, or saved by its payment. It is not, strictly speaking, an insurance of the property, in the sense of the liability for the loss of the property by fire, to anyone who may be the owner. It is rather a personal contract with the person having a proprietary interest in it that the property should sustain no loss by fire within the time expressed in the policy." At page 5 he says, "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 mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he cannot, it seems *à fortiori* that the insurer cannot claim to charge his loss on the mortgagor, which he would do, if he were entitled to an assignment of the mortgage debt either in full or *pro tanto.*" At the bottom of the page he put it thus: "So, if an owner insure his house, which is burnt within the time limited; if he has sold his house in the meantime, he has no legal claim to recover." He evidently means there that the house at the time when the loss has occurred has been not merely sold but conveyed. At page 8 he says, "But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible and requires consideration. Let us examine it. Is it a double satisfaction for the same thing, the same debt or duty? The case supposed is this: a man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years." That is an illustration that had occurred to me, and I think it is an excellent one. "He gets insurance on his own interest as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor, and discharges his mortgage. Has he received double satisfaction for one and the same debt? He surely may recover of the mortgagor because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency. He had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee. But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration paid by himself, that on a certain event, to wit, the burning of a particular house, they will pay him a sum of money

expressed." Then, at the bottom of page 9, he says, "What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due on valid contracts with him, made on adequate consideration paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; 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." Then he mentions that the court is aware that there were respectable authorities opposed to the view of the law that was taken, and he mentions particularly the case of *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385, and says this being the judgment of the whole court, that "looking to the analogies and illustrations on which the reasoning of the learned Chancellor was founded, it may be a question whether he has not relied too much on the cases of marine insurance, in which the doctrine of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurance against loss by fire." Then at the end, on page 14, he says, "On a view of the whole question, the court are of opinion that a mortgagee who gets insurance for himself, when that insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use." The position of the unpaid vendor in equity is analogous, although I will not say it is precisely the same as the position of a mortgagee.

The other American case is that of *Suffolk Fire Ins. Co.* v. *Boyden*, 9 Allen 123. In that case a bill in equity was filed, and it was held that where the interest of the mortgagee in possession had been insured *eo nomine* at his own expense, the insurers, in case of a loss by fire before the mortgage debt is paid, cannot, upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them, and to be subrogated to the rights and remedies of the insured under the mortgage. It was said in argument that in the case of *King* v. *State Mutual Fire Ins. Co.*, 7 Cush. 1, it was not necessary to decide the point to which the greater part of the judgment was devoted, and this case of *The Suffolk Fire Insurance Company* was brought, raising the point neatly for judgment.

But the court held that the principles which were laid down in the case of *King* v. *State Mutual Fire Insurance Company* were correctly laid down, and in substance adopted them. I think it unnecessary to read any portion of the judgment in that case, because, in substance, the judgment proceeds upon identically the same principles as those of the former case which I have already mentioned.

Now, I will put a case also by way of testing the principle which the plaintiff asserts. Supposing the mortgagor or the tenant are under no obligation to repair, and they repair voluntarily, according to the decision of *Burnand* v. *Rodocanachi*, that would be a gift on behalf of the mortgagor or the tenant to the landlord, and there would be no subrogation.

Well, the conclusion I arrive at is, that I should not be justified, either by principle or by authority, in carrying the doctrine of subrogation beyond the limits which I have mentioned, and the short ground of my decision is, that the only principle applicable is that of subrogation as understood in the full sense of that term, and that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance which entitles the insurer to have the damages made good. And although this point is not necessary for my judgment, I think the contract should be one which subsists at the time when the claim under the policy of insurance has been matured.

There were certain minor points raised in the case by the pleadings of the defendants, but they were all very properly abandoned at the bar, and the case was argued on the substantial question which I have decided. It was argued also that in this case the plaintiffs were seeking to recover for the benefit of the purchasers on an indemnity, but that, in any view of the case, would be wholly immaterial, because the plaintiffs were suing on their own rights if any rights they had. In the same way it was said the defendants, being trustees, were bound to defend the action, but trustees who are defendants in defending an action, defend it just in the same way as any other ordinary defendants. The result therefore is that I think the claim fails; and there must be

Judgment for the defendants.

The precise question involved in the principal case where the assured has made an absolute sale of the premises insured, does not seem to have been decided in

our courts; but the somewhat analogous case of a mortgage has frequently arisen; and the views entertained by eminent tribunals are so different that it can not be considered a settled question. On the one hand it has been held after elaborate examination that if insurance is effected by a mortgagee on his own interest, and for his own benefit, an insurance company which pays the loss to the mortgagee, though to the full amount of his mortgage debt, is not thereby entitled to an assignment of the mortgage in the absence of any stipulation to that effect; but notwithstanding the payment of the loss to the mortgagee, he may still recover his mortgage debt of the mortgagor, and so in one sense have a double compensation for the same debt. Undoubtedly the leading case in supporting that view is *King* v. *The State Mutual Fire Ins. Co.*, 7 Cush. 1 (1850), one of Chief Justice SHAW'S ablest opinions. This has been followed in the same state by *Suffolk Ins. Co.* v. *Boyden*, 9 Allen 125; *Haley* v. *Manufacturers' Ins. Co.*, 120 Mass. 296. And see *Ins. Co.* v. *Stinson*, 103 U. S. R. 28; *State Mut. Fire Ins. Co.* v. *Updegraff*, 21 Penn. St. 513. On the other hand the weight of authority, numerically, seems to be that the insurance company having paid a loss to the mortgagee, equal to his full mortgage debt, is in equity entitled to subrogation, and to have the benefit of the mortgage in reimbursing itself. This view is more or less supported by the cases of *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 397; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495; *Sussex Co. Mut. Ins. Co.* v. *Woodruff*, 2 Dutch. 555; *Honore* v. *Lamar Fire Ins. Co.*, 51 Ill. 414; *Kernochan* v. *New York Bowery Fire Ins. Co.*, 17 N. Y. 429; *Springfield Fire & Mar. Ins. Co.* v. *Allen*, 43 Id. 393; *Norwich Fire Ins. Co.* v. *Boomer*, 52 Ill. 442; *Foster* v. *Van Reed*, 70 N. Y. 24.

The question was raised though not decided in *Concord Mut. Ins. Co.* v. *Woodbury*, 45 Me. 452; *Reesor* v. *Provincial Ins. Co.*, 33 Up. Can. Q. B. 357. And see *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343; *Provincial Ins. Co.* v. *Reesor*, 21 Grant's Ch. R. 296.

It will be seen that the right of an insurance company which has paid a mortgagee, to an assignment of his mortgage, is quite different from the right of the mortgagee to collect his full debt of the mortgagor, notwithstanding the payment by the insurers: for it is quite generally agreed that the mortgagor can not avail himself of such payment, when the mortgagee has himself for his own benefit, and at his own expense, taken out a policy in his own name, and on his own interest solely. See *White* v. *Brown*, 2 Cush. 413; *Cushing* v. *Thompson*, 34 Me. 496; *Clark* v. *Wilson*, 103 Mass. 221; *Stinchfield* v. *Milliken*, 71 Me. 567; *Archambault* v. *Galarneau*, 22 Low. Can. Jur. 105 (1877).

While therefore the mortgagee may recover his full mortgage debt of the mortgagor, notwithstanding a full payment by the insurers of a loss fully equal to the mortgage, is the converse equally true? Can the mortgagee recover on his policy, if after the fire and before suit brought, the mortgagor has fully paid the mortgage debt. Does such payment terminate his interest in the policy, so that his right to recover is thenceforward gone?

That it would be terminated by full payment before the loss is quite clear; and it is generally agreed that a mortgagee who has insured only his interest in the premises can not recover if before the fire the mortgage debt has been fully paid; for it is elementary law that the insured must have an interest at the time of the loss, as well as at the time of insurance, and payment of the debt terminates a mere mortgagee's interest. But where the loss occurs before the debt is paid, and while the interest of the assured still continues as at the issuing