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RAILWAY INSURANCE.

I. WHO MAY EFFECT INSURANCE AND WHAT IS INSURABLE.—The general rule is that any one possessing an interest in property or life may procure insurance thereon. The owner of goods in transit may insure them. A railway company may insure its locomotives, cars, depots and equipments generally. Where by statute a railway company is made liable as an insurer of buildings and property adjacent to its line, which shall be destroyed or damaged by fire from its locomotives, it may effect an insurance thereupon. In such a case it is the property in which the railway company has an interest to the extent of its liability for the destruction thereof, and not the liability itself, which is insured: *Eastern Railroad Co.* v. *Relief F. I. Co.*, 98 Mass. 424. As a common carrier a railway company possesses an insurable interest in the goods carried by it which it may insure to their full value, without regard to its liability to the owner of the goods: *Crowley* v. *Cohen*, 3 B. & Ad. 478: *London, &c., Railroad Co.* v. *Flyn*, 1 El. & El. 652; *Chase* v. *Ins. Co.* 12 Barb. 595.

The carrier may insure although the goods are carried in a vessel of which he is not owner, but only a charterer: *Chase* v. *Ins. Co.*, 12 Barb. 595. The carrier may recover the value of his special interest on an insurance effected by him upon the entire subject-matter: *Van Natta* v. *Mut. Security Ins. Co.*, 2 Sandf. 490. A policy which states that the underwriters insure "S., G., C. & Co., on account of the Western Transportation Company," on merchan-

dise by certain specified boats, although it may justify the inference that the assured are common carriers, will not imply that they are the owners of the boats named: *Chase* v. *Ins. Co.*, 12 Barb. 595. It is presumed also that a railway company may effect insurance upon the lives of its passengers or employees.

A policy providing that "all the property hereby insured is on the premises owned or occupied by the Providence and Worcester Railroad Company in Massachusetts and Rhode Island. * * * It matters not whether the property is in motion on the road, at rest, or in buildings," does not make the insurance company liable for loss occurring upon premises used and occupied by the railway company at the time of the loss, but which was not so used and occupied at the time the policy was issued: *Providence and Worcester Railway Co.* v. *Yonkers Fire Ins. Co.*, 10 R. I. 74. Where the insurance was upon cars, and an engine "contained in" certain buildings, it was decided that the words "contained in" in the policy were not intended merely to describe the cars and engine covered by the policy, but were designed to limit the risk of the company to the time during which the car and engine were actually in the buildings, and that insurance could not be recovered for damage done by fire while they were on the railway line: *Annapolis, &c., Railroad Co.* v. *Baltimore Fire Ins. Co.*, 32 Md. 37. An accident policy insured against any personal injury "when caused by any accident while travelling by public or private conveyances provided for the transportation of passengers." The assured, in the course of a journey by connecting steamboat and railway line, fell upon a slippery sidewalk while walking from the steamboat landing to the railway station, as was usual for travellers on that route, and thereby received injuries which caused her death. It appeared that she was so walking while in the actual prosecution of her journey, and the death was held covered by the policy. It was also intimated that the fact that there were hacks by which she might have ridden from the landing to the station, did not affect the case, it being customary for passengers to walk: *Northrup* v. *Railway Pass. As. Co.*, 43 N. Y. 517, reversing 2 Lansing 166. But an accident policy issued against such injuries as *entirely* disable the assured from work will not cover an injury which did not totally disable the assured from work until several days after it occurred, and which, in the meantime, had been aggra-

vated by an additional sprain: *Rhodes* v. *Railway Pass. As. Co.*, 5 Lans. 71.

The contract of insurance is an exception to the rule that denies compensation for injuries of which the party's own negligence or want of care have been the primary cause. It is well settled that carriers may insure against their own negligence. And in *Champlin* v. *Railway Pass. As. Co.*, 6 Lans. 71, it is decided that an accident policy covers an accident caused by the assured getting carelessly upon the rear steps of an omnibus in motion.

II. Form of the Contract. Authority of Agent.—Unless required by statute to be written the contract of insurance may be by parol, and by the general agent of the insurance company. Where an agent agrees to issue a policy to a passenger, but for want of proper blanks or other reason, neglects to do so, equity will decree payment of the insurance according to the conditions of the policy which should have been delivered. The powers of an agent to make a parol contract of insurance are not limited by giving him a blank policy book: *Rhodes* v. *Railway Pass. As. Co.*, 5 Lans. 71.

III. Consideration.—Any valuable consideration will sustain the policy. A reduced rate of transportation is sufficient consideration to sustain a contract by the shipper with the railway company that the latter shall have the benefit of any insurance effected by the former upon the goods while in transit: *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 173.

IV. Liability of Insurance Company and of Railway Company to Shipper.—It is sometimes said that a carrier is an insurer of the property he carries. But this is not true in any sense that makes him merely a co-insurer with an insurance company that has written a policy upon the property; and there is no rule of contribution applied as between the carrier and the insurers in case of loss. This has been very clearly shown by the Supreme Court of the United States, which says: "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 indemnity, 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 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: *Hall* v. *Railroad Co.*, 13 Wall. 367.

The Supreme Court of Massachusetts says: "The liability of the railroad company is in legal effect first and principal, and that of the insurer secondary; not in order of time, but in ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance, and it follows as a necessary consequence that if he first applies to the insurer, and receives his whole loss, he holds his claim against the railroad company in trust for the insurers: *Hart* v. *Western Railroad Co.*, 13 Met. 99. To the same effect, see also, *Hall* v. *Railroad Co.*, *supra.*

Primarily, then a railway company is liable for goods or property negligently damaged or destroyed by it. This is elementary law. The railway company is liable even though the assured has received the amount of insurance from the insurance company: *Weber* v. *M. & E. Railway Co.*, 6 Vroom (N. J.) 409. After recovery from the railway company, the assured will hold for the insurance company, and as its trustee such portion of the amount recovered from the railway company as equals the sum paid by the insurers: Id. *Gailes* v. *Hailman*, 11 Penn. St. 515; see, also, *Hart* v. *Western Railroad Co.*, 13 Met. 99.

V. SUBROGATION OF INSURANCE COMPANY.—It is also well established that an insurance company which has paid the assured

the amount due him on the policy can maintain an action for reimbursement in the name of the assured against the person by whose misconduct or negligence the loss was occasioned. This rule applies to negligent railway companies as well as to others: *Brighthope Railway Co.* v. *Rogers*, 8 Am. & Eng. Railway Cas. 710; *Hall* v. *Railroad*, 13 Wall. 367. And it is not necessary in order to sustain such a suit to show any positive wrongful act by the carrier: *Hall* v. *Railroad, supra*. Especially may the insurance company so recover where the assured assigned to it his claim against the railway company, taking a stipulation from the insurance company that any excess recovered by the insurers beyond the amount paid to him by them, should belong to him: *Bean* v. *A. & St. L. R. Co.*, 58 Me. 82; see also, *Swarthout* v. *C. & N. R. Co.*, 49 Wis. 625.

Generally, and under the common law, such a suit by an insurance company, must be brought in the name of the assured. But in some of the states this has been changed by the code, which allows the insurers to sue in their own name. This is so in Wisconsin; and where the owner of the property and several insurers have rights of action for different portions of the value, all arising from the same wrongful act, they may join in a single action against the wrongdoer: *Swarthout* v. *C. & N. Railroad Co.*, 49 Wis. 625.

An exception to the insurer's right of subrogation exists where the negligent act causes the death of the person for the loss of whose life the insurance is paid. At common law neither a railway company nor any one else is liable to a civil action for damages for negligently causing the death of another. The action is held to have died with the person killed. And since the insurance company must sue in the right of the person deceased, it lost the right to sue by his death. This was decided in *C. M. L. I. Co.* v. *N. Y. & N. H. R. Co.*, 25 Conn. 265.

VI. SUBROGATION OF RAILWAY COMPANY.—Ordinarily a railway company has no right to the insurance money paid or due to a shipper. The contract of insurance is not made with it or for its benefit. But, as has already been said, a railway or other common carrier may procure insurance upon the property it carries. It may do this directly by contract with insurance companies, or indirectly, as has been decided, by contracting with shippers that in

case of damage or loss of goods for which the carrier would be liable, the carrier should have the benefit of any insurance effected by the shipper or owner: *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 173; *Phœnix Ins. Co.* v. *Western Trans. Co.*, 12 Chi. Leg. News 89. Such stipulations are common in marine bills of lading and are coming to be inserted in railway bills of lading. There does not seem to be anything against public policy in such a stipulation as this, provided it be fairly and honestly made. But before the railway company can claim the benefit of any such insurance, it must pay over any sum for which it is liable to the assured. It cannot claim and collect the insurance and then litigate the claim of the assured for damages caused by its negligence. This has already been decided: *Cin., H. & D. R. Co.* v. *Spratt*, 2 Duv. (Ky.) 4; wherein the assignee of a bill of lading sued the carriers for a negligent loss of goods in transit. The carriers answered, relying upon a provision in the contract of affreightment entitling them, in the event of their own liability for damage against which the consignor had obtained an insurance to recover the amount from the underwriter. They averred he (the underwriter) had agreed to pay the loss and that the suit was prosecuted for his benefit. The court *held*, "Where a contract of affreightment contains a provision entitling the carriers, in the event of their own liability for damages, against which the consignor had obtained an insurance, to recover the amount from the underwriter, the carrier must pay the damage before he can claim such right.

"In such case the consignor may sue either the carrier or underwriter; and a judgment in favor of the carrier against the underwriter, or *vice versa*, would not bar the right of the consignor to recover against the carrier.

"Had there been no such contract for substitution, the appellee would have had a legal right to sue, either on the policy or on the bill of lading, and the underwriter without actual *payment* of the damage would not have been entitled, by subrogation to sue the carriers; nor could the latter recover against the former without some special agreement for that purpose with the assured. (2d ed. Arnould on Ins., 1178–80; 3d ed. of Phillips on Ins., 1707–11), and without some special agreement the carrier would not be entitled, even after payment, to substitution against the underwriter. (2 B. & C. 254; 4 Bing. N. C. 272.) And according to the same principle the special contract, as alleged in the second paragraph of

the answer, would not entitle the carriers, before payment of the damages, to recover from the underwriters by action. The appellants have not pleaded the ulterior liability of the underwriter to them as a counter claim or set off. And their allegation that the suit is prosecuted for his benefit did not make him a party. The demurrer, tacitly admitting that allegation did not conclude or affect him as to that fact, and it could not availably be litigated as against him, unless he had been a party. But had he been made a party, the facts pleaded could not have bound the appellee's right to recover damages from the appellants. He elected to sue them, and no judgment which they might recover against the underwriter would bar his action or pay to him the damage he may have sustained by their delinquency.

"Wherefore, the second paragraph in the answer was insufficient, and the appellants were properly remitted to their independent action, in which it might be decided whether any agreement between a carrier and the assured can make the underwriter liable to the carrier:" *C., H. & D. Railway Co.* v. *Spratt*, 2 Duv. (Ky.) 4.

VII. DEFENCES.—It has been decided that the liability of a railway company to respond in damages for an injury occasioned by an accident to a passenger on the road is not discharged *pro tanto* by the payment of any sum on account of such injury by an accident insurance company, the primary liability being upon the railway company: *P., C. & St. L. Railroad Co.* v. *Thompson*, 56 Ill. 138; *Kellogg* v. *N. Y. C. Railroad Co.*, 79 N. Y. 72. But where the contract of insurance against accident provides upon condition of forfeiting all claim that full particulars of the accident and injury shall be furnished to the insurer, without suppression of any material fact, a failure to disclose injuries happening subsequently to the accident by which the original injury was aggravated is not a suppression of a fact within the meaning of the contract, such fact not relating *directly* to the accident: *Rhodes* v. *Railway Pass. As. Co.*, 5 Lans. 182, and the intemperance of the assured being subsequent to the injury and not contributing to it, is wholly immaterial: Id. It has been held that where the insurance company stipulates for subrogation against the carrier in case of loss it is relieved from liability by an agreement of the shipper with the carrier that the latter shall have the benefit of the insurance: *Carstairs* v. *Mechanics, &c., Ins. Co.*, 18 Fed. Rep. 473, and see *Rintoul* v. *N. Y. Cent., &c., R. R.*, 23 Am. Law Reg. (N. S.) 294, and note.

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