[HIGH COURT OF AUSTRALIA.]

ROYAL INSURANCE COMPANY LIMITED . APPELLANT; DEFENDANT,

AND

MYLIUS AND OTHERS . . . . . RESPONDENTS. PLAINTIFF AND DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 5.

SYDNEY, *Dec.* 2.

Isaacs, Higgins, Rich and Starke JJ.

Fire Insurance—Policy issued to owner and mortgagee—Sale subject to mortgage—Right of purchaser to have policy moneys laid out in rebuilding—Imperial Acts Application Act 1922 (*Vict.*) (*No.* 3270), *sec.* 49.*

S., being the registered proprietor of certain land upon which there were buildings, mortgaged the property to certain mortgagees and, pursuant to a clause in the mortgage, procured an insurance company to issue to S. as owner and the mortgagees as such a policy of insurance against loss by fire in respect of the buildings. The property was subsequently purchased by M. subject to the mortgage, but, before the transfer to him was registered and while S. was still the registered proprietor, the buildings were destroyed by fire. The

* Sec. 49 of the *Imperial Acts Application Act* 1922 (Vict.) provides that "It shall be lawful to and for the respective governors and directors of any insurance office or persons granting policies of insurance for insuring houses or other buildings against loss by fire, and they are hereby authorized and required, on the request of any person interested in or entitled to any house or other building which hereafter is burned down demolished or damaged by fire, to cause the money for which such house or building has been insured by the occupier thereof or by any other person to be laid out and expended as far as the same will go towards rebuilding reinstating or repairing such house or other building so burned down demolished or damaged by fire; unless the person claiming such insurance money within thirty days next after his claim is adjusted gives a sufficient security to the governors or directors of the insurance office where such house or other building is insured that the same insurance money will be laid out and expended as aforesaid; or unless the said insurance money is in that time settled and disposed of to and amongst all the contending parties to the satisfaction and approbation of such governors or directors of such insurance office or such persons aforesaid respectively."

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insurance company did not pay the insurance money to anyone, but agreed with the mortgagees to indemnify them against any loss on the realization of their security. Afterwards M., having then become the registered proprietor of the property, gave notice to the insurance company requesting it to cause the insurance money to be laid out and expended as far as the same would go towards rebuilding or reinstating the buildings. The insurance company did not comply with the notice.

Held, by *Knox* C.J., *Isaacs* and *Starke* JJ. (*Higgins* and *Rich* JJ. dissenting), that by virtue of sec. 49 of the *Imperial Acts Application Act* 1922 (Vict.) M. had a right as against the insurance company to have the buildings rebuilt so far as the insurance moneys would go, subject to the provisoes to that section; and that he was entitled in an action against the insurance company to a declaration of that right.

Decision of the Supreme Court of Victoria (Full Court): *Mylius* v. *Royal Insurance Co.*, (1926) V.L.R. 252; 48 A.L.T. 40, affirmed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by Thomas Probyn Mylius against the Royal Insurance Co. Ltd., Albert Augustus Terry, Robert Fulton and Agnes Samuels, by consent of the parties a special case, which was substantially as follows, was stated for the opinion of the Court :—

This action was commenced on 31st March 1925 by writ of summons whereby the plaintiff claimed, as against the defendant the Royal Insurance Co. Ltd. and as against the defendants Albert Augustus Terry and Robert Fulton, (a) payment of the sum of £2,450, (b) reinstatement of a certain building known as Seacombe House, Carrum, (c) damages £2,450; and, by the amended statement of claim herein delivered on 13th July 1925, the plaintiff further claimed as against the defendant the Royal Insurance Co. Ltd., (d) damages for loss of rents and profits from 12th August 1924 to judgment at £14 10s. a week: and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court :—

1. By a policy or contract of insurance in writing dated 23rd July 1922, the defendant the Royal Insurance Co. Ltd. (hereinafter called the defendant Company) for valuable consideration did agree, subject to the conditions and stipulations printed on the back of the said policy or contract, with the defendant Agnes Samuels as owner and the defendants Albert Augustus Terry and Robert

Fulton as mortgagees (thereinafter called the insured) that if the property therein described should be destroyed or damaged by fire or lightning at any time between 23rd July 1922 and four o'clock in the afternoon of 23rd July 1923, or (in case of the renewal of the policy) at any subsequent date during the period for which the same should have been renewed, the defendant Company would pay or make good to the insured the value of the property so destroyed or the amount of such damage thereto to an amount not exceeding in the whole the sum of £2,450. The said policy was, on or about 23rd July 1923, duly renewed for a period expiring at four o'clock in the afternoon of 23rd July 1924.

2. The following was contained among the said conditions and stipulations: "Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, before the occurrence of any loss or damage, obtains the sanction of the Company, signified by endorsement upon the policy by or on behalf of the Company: . . . (*d*) if the interest in the property insured pass from the insured otherwise than by will or operation of law."

3. The property the subject matter of the said contract of insurance was totally destroyed by fire between the hours of midnight on 11th May 1924 and three o'clock in the morning of 12th May 1924.

4. On and after 1st February 1922 and up to and after 23rd July 1922 the said defendant Agnes Samuels was registered as the proprietor of an estate in fee simple in all that piece of land upon which stood the property the subject matter of the said contract of insurance, being a building or buildings at Carrum known as Seacombe House and hereinafter referred to as the said building or buildings.

5. At all times material the said land (with the said building or buildings) was subject to an instrument of mortgage dated 31st January 1922 and registered in the Office of Titles whereby the said defendant Agnes Samuels mortgaged the said land to the defendants Albert Augustus Terry and Robert Fulton (hereinafter called the mortgagees) to secure the repayment of the principal sum of £2,750 and interest thereon, and covenanted (*inter alia*) to insure and so long as any money remained secured by the said mortgage keep

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insured against loss or damage by fire in the name of the said mortgagees all buildings, fixtures or other property for the time being erected on or annexed to the freehold of the said land in the full insurable value thereof, and that the moneys which should be received on account of such insurance should at the option of the mortgagees be applied either in or towards satisfaction of the moneys secured by the mortgage or in rebuilding or reinstating under the superintendence of the architect of the mortgagees the buildings, fixtures or other property destroyed or damaged. The policy or contract of insurance referred to in par. 1 hereof was effected in performance of the said covenant, and was treated by the mortgagor and the mortgagees as satisfaction thereof.

6. On 23rd July 1923 there was owing by the defendant Agnes Samuels to the mortgagees the sum of £2,700 for principal and £104 4s. 10d. for interest. On 12th May 1924 there was owing as aforesaid the sum of £2,700 for principal and £53 9s. 3d. for interest. On the date of the issue of the writ in this action there was owing as aforesaid the sum of £2,700 for principal and £31 10s. for interest.

7. By an agreement in writing dated 1st March 1924, and made between the said defendant Agnes Samuels and Reginald Barlee, it was agreed that the said defendant Agnes Samuels for the consideration and on the terms and conditions in the said agreement set out should sell and the said Reginald Barlee should purchase, subject to the said mortgage to the mortgagees, (*inter alia*) her interest in the said land at Carrum together with the said building or buildings and certain other land.

8. By an agreement in writing dated 1st March 1924, and made between the said Reginald Barlee and one Arabella Adeline Fallon, it was agreed that the said Arabella Adeline Fallon should, for the consideration and on the terms and conditions therein set out, purchase from the said Reginald Barlee his interest in the said land together with the said building or buildings and also his interest in certain other land, and that the said Reginald Barlee should forthwith execute an instrument of transfer of the said lands to the said Arabella Adeline Fallon subject to the said mortgage.

9. By an agreement in writing dated 17th April 1924, and made between the said Arabella Adeline Fallon and the plaintiff, it was

agreed that the plaintiff should, for the consideration and on the terms and conditions therein set out, purchase from the said Arabella Adeline Fallon subject to the said mortgage all her estate and interest in the said land together with the said building or buildings, and that the plaintiff should be entitled to possession of the said property upon acceptance of the title of the said Arabella Adeline Fallon to the said land.

10. The plaintiff's solicitors made requisitions in writing on the title of the said Arabella Adeline Fallon, and the answers in writing to the said requisitions were received by the plaintiff's solicitors in Melbourne by the first post on the morning of 12th May 1924 about the hour of nine o'clock in the forenoon. The said answers were satisfactory to the plaintiff's solicitors, and no reply was made thereto.

11. By an instrument of transfer expressed to be dated 30th May 1924 the defendant Agnes Samuels transferred to the said Reginald Barlee all her estate and interest in the said land together with the said building or buildings. The said transfer was actually signed on or about 17th March 1924, and on or about the said last-mentioned date the defendant Agnes Samuels received the whole of the consideration payable under the said agreement dated 1st March 1924 between herself and the said Reginald Barlee.

12. On 27th June 1924 the said instrument of transfer from the said defendant Agnes Samuels to the said Reginald Barlee was registered in the Office of Titles.

13. On 27th June 1924 an instrument of transfer dated 30th May 1924, transferring all the estate and interest of the said Reginald Barlee in the said land to the said Arabella Adeline Fallon, was also registered in the Office of Titles.

14. On 18th July 1924 an instrument of transfer of all the estate and interest of the said Arabella Adeline Fallon in the said land to the plaintiff was registered in the Office of Titles. The consideration for the said transfer was paid by the plaintiff to the said Arabella Adeline Fallon on or about 1st July 1924.

15. Since 18th July 1924 the plaintiff has remained and he still is the registered proprietor of the said land subject to the said mortgage to the mortgagees.

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16. By notice in writing dated 20th June 1924 and served on the defendant Company on 21st June 1924, the plaintiff requested the said defendant Company to cause the money for which the said building or buildings had been insured by the said contract of insurance to be laid out and expended as far as the same would go towards rebuilding or reinstating the said building or buildings.

17. The said defendant Company has not caused the said money or any part of it to be so laid out or expended, nor has the said defendant Company paid the whole or any part of the sum for which the said building or buildings were insured by the said contract of insurance to the plaintiff nor to the mortgagees nor to the defendant Agnes Samuels nor to any other person or persons.

18. The value of the said building or buildings totally destroyed by fire as aforesaid was not less than £2,450.

19. The said land has been vacant and unproductive since the said fire. The rental value of the said land with the said building or buildings upon it was and would still be £14 10s. per week. A reasonable time for the rebuilding or reinstatement of the said building or buildings would have been twenty-six weeks from the date of the said fire.

20. On or about 13th May 1924 the mortgagees' solicitors wrote to the manager of the defendant Company a letter notifying the burning of the buildings, and stating that as the mortgage debt amounted to £2,700 the whole of the policy moneys must be paid to the mortgagees, and on 23rd May 1924 another letter, enclosing a statutory declaration in support of the mortgagees' claim. On or about 2nd June 1924 one W. A. Ridge, adjuster, wrote on behalf of the defendant Company to the mortgagees' solicitors a letter stating "I am instructed to advise you that the Company will make good to you any loss directly resulting from the fire you might sustain on realizing your security up to the assessed amount of your claim." On 7th June the mortgagees' solicitors wrote to the solicitors of the defendant Company a letter stating that they had received Mr. Ridge's letter and that a default had been made in payment of interest on the mortgage and asking permission of the defendant Company to accept the overdue interest, thereby curing the default. On 14th June 1924 the solicitors for the defendant Company wrote

to the mortgagees' solicitors a letter stating that the Company had no objection to the overdue interest being received and giving authority to receive it without prejudice to any rights the mortgagees might have under the policy. On or about 2nd June 1924 the managing clerk of the plaintiff's solicitors had an interview with Mr. Gubbins, the mortgagees' solicitor, at which interview the managing clerk of the plaintiff's solicitors asked if the mortgagees had made any claim for the fire insurance on the Carrum property. The mortgagees' solicitor replied that he had been in communication with the solicitors for the Insurance Company and that they took the view that the policy was one of indemnity only and that unless the mortgagees could prove some loss they had no claim under the policy. He also said that the Company's solicitors had stated that the Company was prepared to give the mortgagees a bond indemnifying them against any loss. The mortgagees' solicitor said that he was satisfied with this position. On 7th June 1924 plaintiff called on the mortgagees' solicitor and suggested to him that his clients, the mortgagees, should take steps to collect the insurance money on behalf of Mrs. Fallon and himself. The mortgagees' solicitor stated that he considered they had no legal power to do so, but that he would like the point submitted for counsel's opinion at plaintiff's expense.

20A. About February or March 1925 Mr. Kiddle (of the firm of Messrs. Moule, Hamilton & Kiddle) called upon the mortgagees' solicitor, and asked him whether the mortgagees would be prepared either to join with plaintiff in an action against the defendant Company or would allow plaintiff to use their names in such an action. Mr. Kiddle stated that he was advising plaintiff in a friendly and not a professional capacity. The mortgagees' solicitor informed Mr. Kiddle of his conversation with plaintiff on 7th June 1924, and Mr. Kiddle said he would certainly recommend plaintiff and his solicitors to arrange with their counsel to advise the mortgagees as to their legal duty to plaintiff. Pursuant to this conversation plaintiff's solicitor, Mr. Kelley, arranged for a conference with plaintiff's counsel, which was attended by plaintiff's solicitor and the mortgagees' solicitor, and it was arranged that counsel should advise by a written opinion. Immediately after such conference

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the mortgagees' solicitor said to Mr. Kelley: "After you get counsel's opinion, if you want us to do anything write setting out exactly what you want." On or about 24th March 1925 plaintiff's solicitors handed to the mortgagees' solicitor counsel's opinion. After perusing counsel's opinion the mortgagees' solicitor spoke to Mr. Kelley over the telephone. The mortgagees' solicitor said to Mr. Kelley:—"I have read your counsel's opinion, of which you were good enough to give me a copy. The opinion, to my mind, indicates clearly that my clients are not under any duty to your client, and I take it that it puts an end to any further question between you and us." Mr. Kelley said he had not studied the opinion carefully and wished to discuss it with his counsel before replying definitely. The mortgagees' solicitor then said: "Well, if after you have considered it further you wish us to do anything, please let us have a letter asking us." Neither the mortgagees nor their solicitor received any subsequent written or verbal communications from plaintiff or his solicitor relating to the subject matter of this action until after the issue of the writ herein.

21. The mortgagees have not enforced or taken any steps to enforce against the defendant Company either payment of the said sum of £2,450 or the rebuilding or reinstatement of the said building or buildings by the defendant Company.

The questions for the opinion of the Court were as follows:—

(1) Is the plaintiff entitled, subject to any and what conditions, qualifications or terms, as against the defendant Company under or by virtue of the said contract of insurance or under or by virtue of sec. 49 of the *Imperial Acts Application Act* 1922 or otherwise, (a) to payment of the sum of £2,450, (b) to have the said building or buildings rebuilt or reinstated, (c) to any and what damages?

(2) Is the plaintiff entitled, as against the defendants Albert Augustus Terry and Robert Fulton, (a) to payment of the sum of £2,450, (b) to have the said building or buildings rebuilt or reinstated, (c) to any and what damages?

(3) If any part or parts of question 1 be answered in the affirmative, is the defendant Company entitled to any and what relief against the plaintiff or by way of subrogation

or otherwise over against the defendants Albert Augustus Terry and Robert Fulton and/or the defendant Agnes Samuels ?

The Full Court answered question 1 (b), "Yes, so far as the sum of £2,450 will go in rebuilding the premises," and declared and adjudged accordingly; declared that it was unnecessary to answer question 2 (b); and reserved consideration of the other questions and liberty to apply: *Mylius* v. *Royal Insurance Co.* (1).

From that decision the Royal Insurance Co. Ltd. now appealed to the High Court.

Fullagar, for the appellant. The object of sec. 49 of the *Imperial Acts Application Act* 1922 (Vict.) is the same as that of sec. 83 of 14 Geo. III. c. 78, from which it was taken, namely, to deter ill-minded persons from burning their houses. The section postulates an ascertained sum of money payable by the insurer to the insured, and it effects a statutory modification of the obligation between them. It is not intended to confer any benefit upon a person who is not insured at all: it is intended to cut down the rights of the insured. The request of a person who is not insured, but who has an interest in the building insured, does not give him a statutory right to require the insurer to reinstate the building (*Simpson* v. *Scottish Union Insurance Co.* (2); *Wimbledon Park Golf Club Ltd.* v. *Imperial Insurance Co.* (3)). The original owner, Agnes Samuels, has made no claim under the policy, and if she did the answer would be that she had suffered no loss. The mortgagees are content to rest on their mortgage security and an indemnity by the appellant; so that, under their arrangement, there is no sum of money presently payable to the mortgagees. Until the appellant has in its hands a sum of money available for payment in cash to the insured, the provisions of sec. 49 do not apply. Here there has been no claim made and the loss has not been adjusted. The facts contemplated by the section have not come into existence, namely, a sum of money in the hands of the appellant claimed by and payable to the insured (see *Sun Insurance Office* v. *Galinsky* (4); *Matthey* v.

(1) (1926) V.L.R. 252; 48 A.L.T. 40.
(2) (1863) 1 Hem. & M. 618, at p. 628.
(3) (1902) 18 T.L.R. 815.
(4) (1914) 2 K.B. 545.

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Curling (1); *Welford and Otter-Barry on Fire Insurance*, 2nd ed., p. 332; *Bunyon on Fire Insurance*, 7th ed., pp. 208-210; *Porter on Insurance*, 6th ed., pp. 256-263).

[HIGGINS J. referred to *Williams on Vendor and Purchaser*, 3rd ed., vol. I., p. 485; *Sinnott* v. *Bowden* (2).]

The insurance at the time of the fire was an insurance of the mortgagees' interest and not of the whole value of the property (*Castellain* v. *Preston* (3); *Western Australian Bank* v. *Royal Insurance Co.* (4)), and there was then no building insured within the meaning of sec. 49.

Ham (with him *Tait*), for the respondent Mylius. On the plain language of the section the respondent is entitled to the benefit of sec. 49. The fact that the result of the section may be to increase the rights of persons interested in the property insured is immaterial. There is no condition imposed that the person entitled under the policy shall have made a claim, and the absence of a claim does not prevent the person interested from giving the notice. Even if the mortgagees and the appellant desired to cancel the policy after the fire, that would not prevent the person interested in the building from insisting on the policy moneys being laid out in reinstating them. The policy in form entitled the insured to recover the value of the property up to £2,450. Both the mortgagor and the mortgagees are in the position of being able to enforce that right, and the mortgagor's interest in the property has not so far passed from her that she is no longer unable to enforce that right. But it is sufficient for this case that the mortgagees are entitled to enforce that right. All that is required by the section is that the loss insured against has happened and that the amount of the loss should be ascertained, and it is admitted that the loss covers the full amount of the policy. The right of the mortgagees was not limited to an indemnity, but they were entitled to recover the policy money, subject to the possible limitation that, if reinstatement would have cost less than that sum, they could only recover the lesser sum (see *Bunyon on Fire Insurance*, 7th ed., p. 372, citing *Hanover Fire Insurance Co.* v.

(1) (1922) 2 A.C. 180.
(2) (1912) 2 Ch. 414.
(3) (1883) 11 Q.B.D. 380, at p. 398.
(4) (1908) 5 C.L.R. 533.

Bohn (1); *Hordern* v. *Federal Mutual Insurance Co. of Australia* (2)). In *In re Quicke's Trusts*; *Poltimore* v. *Quicke* (3), it was held that a remainderman was a person interested within the meaning of sec. 49.

Fullagar, in reply. The duty imposed by sec. 49 on an insurer is a public duty and the only remedy for a breach of it is mandamus.

Cur. adv. vult.

The following written judgments were delivered :—

Dec. 2.

ISAACS J. The facts are agreed on in a special case, but to prevent misapprehension as to the nature of the claim made by Mylius, and also to appreciate the effect of existing decisions, the position must be shortly stated.

In 1922, the appellant Company, in favour of one Agnes Samuels, "as owner," and of two of the respondents, Terry and Fulton, "as mortgagees" insured against loss by fire, certain property described as "buildings"—really one building called Seacombe House with outbuildings—being on Samuel's land at Carrum, in the total sum of £2,450. The mortgage debt at all material times was and is more than £2,450. On 12th May 1924, the policy being current, the buildings were totally destroyed by fire. The connection of Mylius with the matter arose in this way :—In March 1924 Samuels sold, subject to the mortgage, all her interest in the land to one Barlee, who at once resold to one Fallon. In April 1924 Fallon resold to Mylius. Samuels received full payment and transferred to Barlee on 17th March 1924, although the transfer bears date 30th May 1924, and the transfer was registered under the *Transfer of Land Act* in June 1924. On the same date a transfer, Barlee to Fallon, was registered; and on 18th July 1924 Mylius became the registered proprietor of the land. At the time of the fire, therefore, Mylius was the equitable owner of the land, and Samuels was registered proprietor of the land without any real interest in it. The value of the building destroyed was not less than £2,450. The

(1) (1896) 58 Amer. St. Rep. 719, at p. 725.

(2) (1924) 24 S.R. (N.S.W.) 267, at pp. 274, 278.

(3) (1908) 1 Ch. 887.

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insurance money has not been paid, although the mortgagees claimed it from the Company the day after the fire. On 2nd June 1924 the Company expressed to the mortgagees its willingness to make good their loss upon realizing their security up to the assessed amount of claim. By arrangement, 14th June 1924, between the Company and the mortgagees, the latter were permitted to receive overdue interest, and let the mortgage continue until 31st January 1925. Mylius, however, on 20th June 1924, as a person interested in or entitled to the building burnt, requested the appellant Company "to cause the money for which the same was insured to be laid out and expended as far as the same will go towards rebuilding or reinstating such building so burned down." That was, on the very face of it, a request pursuant to sec. 49 of Act No. 3270, because of the character in which Mylius claimed and the terms of his claim. The Company has not complied, and a reasonable time for compliance elapsed in November 1924. Mylius's action was commenced on 31st March 1925. The questions stated for the opinion of the Supreme Court were whether Mylius had rights as against (1) the Company and (2) the mortgagees, and as to each whether those rights were to have (a) payment of the £2,450 insurance money, (b) rebuilding or reinstatement, that is, up to £2,450 and by the Company (c) damages.

Naturally the pecuniary liability of the Company in favour of Mylius, either by way of direct payment or of rebuilding or reinstatement, cannot exceed in amount its liability under the contract. It is suggested that the pecuniary liability of the Company is limited by the events to indemnification of the mortgagees against eventual loss in recovering their debt. This is arrived at by first eliminating Samuels and then, on principle, confining the mortgagees' right as stated. First, as to Samuels:—Among the conditions and stipulations of the policy was this: "Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, before the occurrence of any loss or damage, obtains the sanction of the Company, signified by endorsement upon the policy by or on behalf of the Company . . . (d) if the interest in the property insured pass from the insured otherwise than by will or operation of law." The Company contends that its liability is

limited in amount for the following reasons:—It says: (1) that Samuels had, by virtue of the recited condition, ceased to be insured, and (2) that consequently its only liability was to the mortgagees; (3) that such liability, being indemnity only, means liability against loss in recovering their debt; (4) that, if the debt here is ultimately recoverable by realizing the security as it stands, there is no liability. If this were correct, there would be at once an end of the matter, and no necessity would arise to discuss any further question. But it is not correct, because, accepting the first and second steps in the reasoning, the third step is fallacious.

1. *The Mortgagees' Insurance.*—Where mortgagees insure tangible security against the risk of fire "as mortgagees," they insure, not their *debt*, but their *security*; and they insure it, not as mere creditors of the debtor, but as holders of the security for the debt. It is all-important not to slide, so to speak, into error by overlooking this fundamental distinction. There have been some cases where this error was made. But in the case of *Hancox* v. *Fishing Insurance Co.* (1), where property on which a lien existed was insured against loss at sea, *Story* J. reduced the matter to principle. He said:—"It has been suggested that the plaintiff has in fact sustained no loss, because for anything that appears he may still recover the debts due to him from the seamen, and if he does so he has sustained no loss. The question is not in cases of this sort, whether the party has actually lost his debt, which if caused by the insolvency or death of the debtor would not be a peril within this policy, but the question is: *Whether he has lost the security* for that debt by the perils insured against which the underwriters agreed to assume upon themselves. A mortgagee or consignee of property, may recover his insurance, if the property mortgaged or consigned is lost in the voyage, although the mortgagor or consignor still remains his debtor and is solvent." In the present case the only property insured as security was the buildings, and they have been totally destroyed by the peril insured against. But total destruction is not essential to recovery to the extent of diminution of security. It is well said by *Folger* J., for the Court of Appeals of the State of New York, in *Excelsior Fire Insurance Co.* v. *Royal Insurance Co. of Liverpool* (2):—"The

(1) (1837) 3 Sumner 132.

(2) (1873) 55 N.Y. 343, at p. 359.

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undertaking is that the property shall not suffer loss by fire ; that is, in effect, that its capacity to pay the mortgage debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgage debt has been affected ; it is not so well able to pay the debt which is upon it. The *mortgage interest*, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance." (See also *May on Insurance*, 4th ed., vol. I., p. 208, for other cases to the same effect.) No doubt the interest of a mortgagee, and the amount he can recover in case of the security being destroyed by fire, cannot exceed the amount of the mortgage debt. But, having insured his security, he has a right, not exceeding the amount insured, to maintain it at its value, so long and so far as the debt remains. The amount of liability to the mortgagees may therefore be taken at £2,450 ; and the questions as stated consequently remain to be answered. The first alternative claim of Mylius to payment of the insurance money *eo nomine* cannot be sustained. It was based on the mesne assignments which placed him in the situation of Samuels in relation to the property. But it is well established that that alone gives him no contractual standing with respect to the policy, and there is here nothing more (*Rayner* v. *Preston* (1)). His second alternative claim, however, resting simply on sec. 49 of the Act No. 3270, is substantial. It has been stoutly contested, and requires very careful examination. The section presents some verbal differences from the corresponding English section, but, except that they make clear what is meant by insurance money, they are not for present purposes important. The section is a very definite enactment of public policy, and, as it overrides contractual obligations, it is incumbent on any person invoking its provisions—in this case Mylius—to bring himself within its terms. So far as material, they are : (1) a request to cause the money for which such house or building has been insured by the occupier thereof or by any other person to be laid out and expended as far as the same will go towards rebuilding or reinstating it ; (2) that Mylius in making the request

(1) (1881) 18 Ch. D. 1.

was a person interested in or entitled to the house or building. Both those conditions are satisfied by the facts narrated. Then two questions arise, namely, as to the nature of the Company's statutory duty, and as to the proper remedy if the duty is not performed. These, besides the preliminary question of the mortgagees' interest, are really the points of serious contest in this appeal.

2. *The Insurer's Duty.*—The statutory duty laid on the "persons" granting fire policies for insuring buildings against loss by fire is comprised in the two phrases: (a) "It shall be lawful to and for" them and "they are hereby authorized and required" (b) "to cause the money for which such . . . building has been insured . . . to be laid out and expended as far as the same will go towards rebuilding reinstating or repairing" it, unless one of two events occurs. The first phrase indicates that, notwithstanding any contractual or other legal obligation to the contrary and notwithstanding any individual rights to the contrary, the "persons" indicated are clothed with full authority and obligation to do what is comprised in the second phrase, on receiving the stipulated request. The second phrase states the exact nature of the duty commanded by the Legislature. As Sir *Francis Jeune* said in *The Uskmoor* (1), "of course the word 'required' is clear enough." The duty is thus explicitly defined, and, shortly stated, it is a duty to restore the building burnt substantially as it was before the fire, so far as the money owing by the insurer will allow that to be done. The object of the Legislature is, as stated by *Parker* J. (as he then was) in *Sinnott* v. *Bowden* (2), "to deter fraudulent people from arson, and not to provide a solution of difficulties arising out of rival claims to the policy moneys." This is to be borne in mind when considering either the duty or the remedy.

The earliest material judicial authority, as to the exigency of the duty, was in 1821. In *Vernon* v. *Smith* (3) the Court of King's Bench expressed some very decided opinions on this point. The question was whether a covenant to insure a house within the operation of the Act 14 Geo. III. c. 78 was a covenant which ran with the land. It was held that, adding to the tenant's mere

(1) (1902) P. 250, at p. 254. (2) (1912) 2 Ch., at p. 420.
(3) (1821) 5 B. & Ald. 1.

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covenant to insure the insurer's obligation in case of insurance to apply the insurance money in rebuilding or repairing, the covenant did run with the land, because it was in effect a covenant to repair to the extent of the insurance money. Obviously that could not be so held against the tenant unless he could compel the insurer to perform the statutory duty explicitly. *Abbott* C.J. says (1): "The effect of that statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises." *Bayley* J. and *Holroyd* J. both said the money must in law be laid out on the premises. *Best* J. (2) said that the "request" was "compulsory on the directors" (see also *Smith's Leading Cases*, 12 ed., vol. I., p. 77). As stated by *Wood* V.C. in *Simpson* v. *Scottish Union Insurance Co.* (3), the object of the statute is *in the interest of the public.* It is not *merely* in the individual interest of the person empowered to make the request, though his individual right under the statute is also protected and must be given effect to, if only as a means of carrying through the wider object of the legislation. The Vice-Chancellor agreeing with the argument of Sir *Hugh Cairns* that the rebuilding —of course apart from the relieving conditions—must be done by the office in order to prevent frauds, indicated by his reference to mandamus, how fully he understood the absolute nature of the insurer's obligation. So in *Ex parte Gorely*; *In re Barker* (4), in the following year, Lord *Westbury*, with *Simpson's Case* before him, so far from questioning what was said, used language which, in my opinion, supports it. The Lord Chancellor said: "And having arrived at the conclusion that the 83rd section of the Act of 14 Geo. III. c. 78 applies to the present case, it follows that I must hold the insurance money upon this particular house applicable, for the benefit of the *lessor, to the purpose of reinstating the premises.*" It must be observed as to *Gorely's Case*, as pointed out in the note (1) to *In re Quicke's Trusts*; *Poltimore* v. *Quicke* (5), that, though the money had been paid by the office, it had been paid under an arrangement reserving the rights of the parties, so that a possible

(1) (1821) 5 B. & Ald., at p. 5.
(2) (1821) 5 B. & Ald., at pp. 8, 9.
(3) (1863) 1 Hem. & M., at pp. 628-629.
(4) (1864) 4 DeG. J. & S. 477, at p. 481.
(5) (1908) 1 Ch., at p. 893.

question whether the Act applied after payment did not arise. Consequently the direct point as to compelling the insurer so to apply the money did not arise. But the opinion of the Lord Chancellor is not left in doubt. He says (1), as part of his reasoning in differentiating the fixtures from the building, that the section "gives to the insurers the *right*, and puts them under the *obligation*, of applying the money in the 'rebuilding, reinstating or repairing' of 'houses or other buildings.'" In *Rayner* v. *Preston* (2) *Cotton* L.J. said that, where it applied, "the Act only gives *a right to insist on the money being so applied.*" In 1902, in *Wimbledon Park Golf Club Ltd.* v. *Imperial Insurance Co.* (3), *Wright* J. gave what at first sight might appear to be a decision inconsistent with what is so far said, both as to the duty and the remedy. It was much relied on, though it may be regarded as the least authoritative of all the relevant decisions. On careful examination—which, in the circumstances, it must have—that case will be found to be no authority against the views already expressed. There were, as *Wright* J. says, two distinct grounds of claim: the first, as to the sufficiency of Straker's bond under the statute; the other, as to a mandamus against the insurance company. Straker had covenanted with his tenant, the plaintiff company, to keep the main walls and timbers, and the outside of the clubhouse in good order during the term. The plaintiffs had covenanted to keep the interior in good repair—damage by fire excepted. Straker had insured the clubhouse against damage by fire in £4,000. The tenant, that is, the plaintiff company, had proceeded under the section to compel the insurance company to reinstate up to £3,750. It is clear that, according to previous authorities here cited, the company was bound to reinstate the old building, that is, to replace it as it previously was, unless the Golf Club gave a security to do it. But on the principle of *Vernon* v. *Smith* (4) Straker was, as between him and the Golf Co., bound to apply the money to reinstatement. Consequently, as apparently he was willing to undertake that duty instead of the insurance company, and, as both he and the company agreed to some departure from the old building, it became a mere question of

(1) (1864) 4 DeG. J. & S., at p. 482.
(2) (1881) 18 Ch. D. 1, at p. 7.
(3) (1902) 18 T.L.R. 815.
(4) (1821) 5 B. & Ad. 1.

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sufficiency of security; and it may be, this was the opinion of the learned Judge. On the other hand, so far as mandamus was concerned, the potent fact was that no one desired simple replacement, but they wished to have some different sort of building, though they could not agree on what should be built, and, therefore, no one desired a mandamus for simple replacement of the old building. Obviously that was a case outside the statute as far as mandamus was concerned. It is difficult to see how on that basis the question of Straker's security could be considered as within the statute, for, if the request was for simple reinstatement, the obligation existed and the reasons given for refusal were inapplicable, and, if for something else, then the security was, strictly speaking, beside the question. But the important branch of the case is the mandamus branch; and as to that it turns on the difference between the building destroyed and the building desired. *Wright* J. says (1): " Neither party wished to have a similar building erected; there was no agreement as to what should be built " &c. Clearly, except for the mere purpose of replacing the old building, the insurance company could have no authority to enter on the land and effect alterations that either the landlord or the tenant did not want. As to that part of the case he therefore decided, as he was bound to decide, against the plaintiff. As to the security it stood over, probably to enable the matter to be placed definitely on a statutory footing. The case cannot be regarded as weakening the previous decisions, which say that if the conditions predicted by the statute exist, the obligation of the insurer is absolute and can be enforced by mandamus. In *Sun Insurance Office* v. *Galinsky* (2) the *Wimbledon Park Golf Club Case* was referred to. *Vaughan Williams* L.J. expressed no opinion, but stated the decision of *Wright* J. in what, with deep respect, appears to be an incomplete way. Lord *Wrenbury* (then *Buckley* L.J.) also declined to express an opinion about it, but used words which show the real point of the matter. His Lordship said (3) it was a very serious question whether in the circumstances mentioned a lessor could by notice under the section enable the insurance company to enter on the lessees' premises " and there execute such works as the insurance

(1) (1902) 18 T.L.R., at p. 816. (2) (1914) 2 K.B. 545.
(3) (1914) 2 K.B., at p. 557.

company may think right and proper." *Kennedy* L.J., however, did more closely examine the case. He thought that the special circumstances may have influenced the decision. As already said, the special circumstances did apparently influence the decision. *Kennedy* L.J. quoted *Simpson's Case* (1), and, as one would infer, with a belief in its accuracy. Its authority is unshaken. On the whole, it is very plain that, while the person whose interests are or may be injured by the fire is given by the statute the right to protect his interests by making the "request," yet that is the only way contemplated by the statute. He is not empowered to compromise with the other parties by dividing the insurance moneys, unless that compromise is "to the satisfaction and approbation" of the insurer also. And the company is not permitted to refuse its duty and substitute performance of some agreed course of conduct outside the enactment. So that, both on independent interpretation and on authority, the statutory duty is, not only explicit, but it is in law exigent, unless one or other of the two specifically named exculpating events come into existence. The first of those events is a mere substitution of personality to perform the same duty—restoration; the second is regarded as a sufficient safeguard both against individual loss by fraud, since the injured person must agree (see *Sinnott's Case* (2)); and against public wrongdoing, since the insurer, though unable to actually prove fraud, must positively assent to the distribution of the money. Apart, then, from displacement by one or other of those two events, the command of the Legislature must be followed, and cannot be commuted or bartered for damages. To prevent misapprehension, it should be added that, if as between themselves (the contending parties) the position is that one has no rights, he may be disregarded (see *Reynard* v. *Arnold* (3)). The obligation of the Insurance Company on the facts before us is primarily absolute and imperative to comply with the request of 20th June 1924, and that is subject only to the qualifying conditions of the section.

3. *The Remedy.*—In *Bradford Corporation* v. *Myers* (4) there was stated a very fundamental proposition in a very few words. Lord

(1) (1863) 1 Hem. & M. 618.
(2) (1912) 2 Ch. D., at p. 420.
(3) (1875) L.R. 10 Ch. 386.
(4) (1916) 1 A.C. 242, at p. 263.

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Shaw said : " If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising." His Lordship proceeds to illustrate the proposition appositely to this case. The principle was clearly stated by Lord *Hall* (*Anon* (1)). Then the right being established, the maxim of the law is *Ubi jus ibi remedium*. " If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice " (per Viscount *Haldane* for the Privy Council in *Board* v. *Board* (2)). " The right," then, not some substitute for it, must, on general principles and apart from authority, be enforced as the Legislature intends for the double object of protecting private and public interests. It is clear that the object of the enactment might easily be frustrated, if, for instance, the company could refuse to comply and leave the requesting party to recover damages as if the Act were a mere personal covenant. Apart from the possible difficulty of proof of the quantum of damage where an interest is fractional or not immediately enjoyable, it would involve the payment over of the balance of the insurance money in specie to the possible incendiary, for the company could not keep it and no one else might have any claim to it. It is consequently a question of applying the appropriate remedy. If the attitude of the insurance company were one of flat refusal to discharge its duty, mandamus or its equivalent, a mandatory order, would be the appropriate remedy to apply at once. In *R.* v. *Wheeler* (3) Lord *Hardwicke* C.J., speaking of mandamus, said : " The reason why we grant these writs is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's charter, and never as a private remedy to the party." That is to say, it is not granted where it would be merely a private remedy. But where the private remedy is the means of compelling performance of a public duty, as, for example, by " the execution . . . of some statute," mandamus is the proper remedy. Examples of this, illustrating the distinction, are found in such cases

(1) (1703) 6 Mod. 27.
(2) (1919) A.C. 956, at p. 962.
(3) (1735) Cas. *temp.* Hard. 99.

as *R.* v. *Bank of England* (1), *Benson* v. *Paull* (2), *Norris* v. *Irish Land Co.* (3) and *R.* v. *Bristol Dock Co.* (4). The last-mentioned case is an instance very apposite to the present case. An Act of Parliament enacted "that it should and might be lawful for the directors of the Bristol Dock Company, and they were thereby authorized and required" to form a sewer. The operative words were identical with those in the section now under consideration. Notwithstanding a request to perform the duty the company declined, and, before the Court, resisted on various grounds, one being that no specific alteration was requested. The Court (*Abbott* C.J., *Bayley* and *Holroyd* JJ.) awarded a peremptory mandamus to construct the sewer, leaving the manner of doing it to the company's discretion, because the Act had so left it. *Wood* V.C. in *Simpson's Case* (5) was clearly right in stating the remedy as mandamus. The basic principle that, where there is a specific legal right and either no specific legal remedy or no adequate remedy, mandamus supplies all defects of justice, applies to its statutory equivalent the mandatory order which it is in the power of the Court to make in an action. One or the other is essential, if it were found necessary to compel obedience to the law. But it does not appear that there is any final refusal on the part of the Company to comply with the statute. Apparently the parties seek merely to know their rights. A declaration under the Rules of Court is, therefore, at present sufficient. The declaration of the Supreme Court is right. Every order for declaration of right carries with it liberty to apply, and, if the defendant acts contrary to it, the Court on a proper application, and on proper notice may enforce it (per Lord *Macnaghten* in *Fischer* v. *Secretary for India* (6)).

The appeal should, therefore, be dismissed, and the judgment of the Supreme Court stand, as framed, the judgment being interpreted as leaving it open to adopt either of the qualifying alternatives of the section, so far as they respectively are still open consistently with its provisions.

(1) (1819) 2 B. & Ald. 620.
(2) (1856) 6 E. & B. 273.
(3) (1857) 8 E. & B. 512.
(4) (1827) 6 B. & C. 181.
(5) (1863) 1 Hem. & M. 618.
(6) (1898) L.R. 26 Ind. App. 16, at p. 29.

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KNOX C.J. and STARKE J. concurred in the judgment of *Isaacs* J.

HIGGINS J. The Insurance Company appeals against an answer made by the Full Supreme Court to a question asked in a special case stated. The question is : " Is the plaintiff " (Mylius) " entitled . . . as against the defendant," the Royal Insurance Co. Ltd., " under or by virtue of the said contract of insurance or under or by virtue of the . . . *Imperial Acts Application Act* 1922 or otherwise . . . to have the said building or buildings rebuilt or reinstated ? "

The answer of the Full Court is, " Yes—so far as the sum of £2,450 " (the amount of the fire policy) " will go in rebuilding the premises." Now, this answer affirms that Mylius has a certain right as against the Company under (a) the contract of insurance, or (b) the Act, or (c) otherwise. I shall confine my attention to (a) and (b), because it is not suggested that Mylius has this right otherwise than under the contract or the Act.

(a) So far as contract is concerned, there was in fact no contract between Mylius and the Company. The contract was between the Company and the insured persons—Agnes Samuels, who owned the land at the date of the contract, and Terry and Fulton, her mortgagees. Mylius was not one of the persons insured by the policy ; and the policy was not assigned to him, either with or without the Company's consent. He is merely the transferee of the land subject to the mortgage. There is no principle of law or of equity under which the transferee of the land is entitled to any benefit of the policy as against the insurer. As *Brett* L.J. said, in *Rayner* v. *Preston* (1), of a contract of fire insurance, " it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it." Therefore, Mylius has no right against the Company under the contract of insurance.

(b) So far as the Act is concerned (sec. 49), it merely provides that if a person interested in the property request the insuring company not to pay the money payable under the policy but to rebuild (to the extent of the policy money) the company must

(1) (1881) 18 Ch. D., at p. 11.

rebuild, not pay. The object of the provision was obviously to discourage frauds on insurance companies by insured persons; but there is nothing in the Act imposing an obligation on the Company, as between itself and Mylius, to satisfy the policy at all. Mylius could not enforce the policy; but the insured—Samuels and her mortgagee—could. The insured could refuse to enforce it, if they choose; and Mylius would have no cause of action. He is a stranger to the contract.

I shall assume, in favour of Mylius, that as the consequence of his request made under the Act the Company would be guilty of a misdemeanour if it satisfied the policy by payment to the insured instead of by rebuilding. I shall even assume (what seems to me doubtful) that Mylius would have a right of action for damages against the Company if the Company failed to perform its statutory duty, if it satisfied the policy by payment instead of by rebuilding; and if he be injured, damaged, by that failure—on the principle stated in *Groves* v. *Wimborne* (1) and in other cases. But the statutory duty imposed is not to satisfy the policy, but if it be satisfied, not to satisfy it otherwise than by rebuilding. It is true that Mylius here is, as it were, a hinge upon which the machinery of the Act turns. It is only on the request of someone interested in the house demolished by fire that a duty becomes fastened on the insurance company to rebuild, not to pay. But that duty is not imposed for the benefit of the persons interested in the property; it is rather imposed for the benefit of the insurance company and of the public generally by taking away a temptation. As stated by *Wood* V.C. in *Simpson* v. *Scottish Union Insurance Co.* (2), "the object of the provision is, in the interest of the public, to prevent persons from fraudulently setting fire to their houses." This object would appear clearly if the words of the English Act (14 Geo. III. c. 78, sec. 83) were copied fully, not partially, by the draughtsman: "In order to deter and hinder ill-minded persons from wilfully setting their house or houses . . . on fire, with a view to gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it . . . enacted . . . or upon any grounds of suspicion that the owner or . . .

(1) (1898) 2 Q.B. 402, at pp. 415-416.

(2) (1863) 1 Hem. & M., at p. 628.

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occupier . . . or other person . . . who shall have insured such house . . . have been guilty of fraud, or of wilfully setting their house . . . on fire . . ."

As this is an Act for the application of Imperial Acts, I should infer that the draughtsman did not mean to change the Imperial Act in character, but that he regarded—and regarded rightly—the Act as bearing on its face the same purpose as is expressly stated in the Act of Geo. III.

We start with the position that there are no words in this sec. 49 that give expressly any right, or right of action, to the persons interested in the house demolished. But it is clear that under certain circumstances the Court finds a right implied. As stated by *Vaughan Williams* L.J. in a passage (*Groves* v. *Wimborne* (1)) which has often been quoted with approval, "where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons *for whose benefit and protection the statute imposes* the duty is injured by failure to perform it, prima facie, *and, if there be nothing to the contrary,* an action by the person so injured will lie against the person who has so failed to perform the duty."

Now, (1) the duty imposed by the Act to rebuild and not to pay is not, in my opinion, imposed for the benefit of those interested in the house; (2) there has been as yet no failure to perform the duty, and (3) the general scope of the Act and the nature of the statutory duty and the circumstances negative the prima facie rule, even if (1) and (2) were decided in favour of Mylius.

As to (1), apart from the inherent improbability that the Legislature would confer a right against the insurance company in favour of those who have not insured, it should be observed that not all of the class of persons interested in the house would benefit by sec. 49. A lessee under a covenant to repair would benefit, but not the lessor (if the lessee be amply able to carry out his covenant); a mortgagee who finds that his security is worth little or nothing might actually lose by rebuilding rather than payment. A mortgagee whose security is ample even without the house would be indifferent—as actually happens in the present case. Therefore it is that the

(1) (1898) 2 Q.B., at pp. 415-416.

Act does not require a request from *all* the persons interested in the property; the request of one person will suffice. The device is very ingenious—but its purpose is not to benefit those interested in the property, although in many cases persons interested in the property may gain, without loss to the insurance company.

As for (2), there is no right implied unless in favour of one who has been actually injured by the breach of the statutory duty—that is to say, the misdemeanour (disobedience of the Act by payment) must have already occurred. No instance has been adduced (or can, I think, be adduced) of the Court ordering a man in a civil action to obey an Act, affirmatively, simply because not to obey it would be a misdemeanour. I do not refer to mandamus, which is based on quite different grounds. Mylius cannot be said to be "entitled as against the Company" to have the building rebuilt.

As for (3), there have been numerous cases in which a duty has been imposed for the benefit of a class of persons, and yet it has been held that the Act confers no right on a member of the class to require performance of the duty. The leading authority on this subject is *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1), where Lord *Cairns* L.C., *Cockburn* L.C.J. and *Brett* L.J. concurred. A waterworks company was under a statutory duty to keep its pipes charged with sufficient water for the extinguishment of fires, and it failed in this duty; but a ratepayer, one of the class for whose benefit the duty was created, had no right of action against the company for the failure, although owing to the failure his house had been burnt down. As Lord *Cairns* said, all depends on the purview of the particular Act and the language there employed. We must look at the scope of the Act and find out what was the intention (*Vallance* v. *Falle* (2)). The Court in each case has to determine whether the right is implied or not. There was some provision for penalties in the Act discussed in *Atkinson's Case*; but *Brett* L.J. said there was no rule that if the penalty is to go to the person injured there is no action, and no rule that if the penalty do not go to the person injured there is an action. The ordinary remedy for contravention of a statute is indictment, or information at the suit of the Attorney-General, in the interests of the public;

(1) (1877) 2 Ex. D. 441. (2) (1884) 13 Q.B.D. 109.

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and the burden lies on those who affirm a right of an individual as against the offender to show that the right exists. That burden has not, in my opinion, been discharged here. How is Mylius, as a private individual, " entitled " to *anything* as against the Company ?

No case has been cited in which any such action as the present has been sustained. In *Simpson* v. *Scottish Union Insurance Co.* (1) no request had been made under the Act. The insurance company had therefore paid the insured, the tenant ; the landlord had rebuilt ; and he claimed the cost from the insurance company as having paid the wrong person ; and his claim was dismissed. In the case of *Ex parte Gorely* ; *In re Barker* (2), the insurance company was not even a party to the proceedings. It was an appeal from the decision of the Court of Bankruptcy on a special case, and the question was who—landlord or assignee in bankruptcy of the tenant—was entitled to the moneys already paid by the insurance company under the policy, and in particular as to a policy over fixtures. As appears from a note in *In re Quicke's Trusts* ; *Poltimore* v. *Quicke* (3), the money had been paid into the office under an agreement reserving the rights of the parties—landlord and assignee. In *Rayner* v. *Preston* (4) the purchaser of a house was held not to be entitled to the benefit of policy moneys as between himself and the vendor, as he was not the insured, and had not contracted for that benefit. *Cotton* L.J. refused to give any opinion whether the purchasers could insist on the policy money being spent on rebuilding. " *Even if they were so entitled*, the Act only gives a right to insist on the money being so applied " (5). But one mode of insistence is the threat of a prosecution. The case of *In re Quicke's Trusts* ; *Poltimore* v. *Quicke*, was merely an originating summons taken out by trustees of a will, the tenant for life and the remaindermen being the sole defendants, as to £7,000 policy moneys which had actually been paid to the trustees. It was first decided that the trustees were at liberty under their trusts to apply the moneys towards rebuilding the house burnt ; and it was, on a subsequent application, decided that the tenant for life, out of whose income

(1) (1863) 1 Hem. & M. 618.
(2) (1864) 4 DeG. J. & Sm. 477.
(3) (1908) 1 Ch., at p. 893.
(4) (1881) 18 Ch. D. 1.
(5) (1881) 18 Ch. D., at p. 7.

the premiums had been paid, was not entitled to the policy moneys and had no charge on them for the amount expended on the premiums. As for *Wimbledon Park Golf Club Ltd.* v. *Imperial Insurance Co.* (1), a decision of *Wright* J., there are certain parts of the reasoning which have been doubted by subsequent Judges. I shall not attempt to explain them. It is sufficient to say that it was not an action such as the present: it was an application for a mandamus made by a tenant, in reliance on the Act of Geo. III.; and the application failed. The case does not appear in any other report. It is, perhaps, unnecessary to say that the grounds on which mandamus will be granted are wholly different from the grounds on which an action can be supported (see *Halsbury's Laws of England*, vol. x., pp. 77, 83, 98-99).

The truth seems to be that Mylius has no right of action of any kind. This position is obscured by the fact that the question comes before us in the form of a special case with a definite question. It is, of course, our duty to deal on this appeal with the question asked, and with that alone. But, reverting to the question as asked, I have no hesitation in saying that the plaintiff is *not* "*entitled as against the Company* to have the building or buildings rebuilt or reinstated." No one, indeed, can foresee the ultimate results to insurance companies if persons who have not paid the premiums, persons with whom the insurance company is not in any contractual relation of any kind, are treated as being entitled to rights against the insurance company.

In my opinion the appeal should be allowed. My function ends here, strictly; but it may not be improper for me to say what I think has to be done under the circumstances. The Insurance Company has no right to take up the attitude which appears in the letter of 2nd June 1924 in which the Company's loss adjuster says to the mortgagee that the Company will make good to the mortgagee any loss sustained by the mortgagee on realizing his security (up to the assessed amount of the claim). This insurance is not an insurance against loss on the mortgage debt, but (as the policy says expressly) "against loss or damage by fire" to the "*property*." The Company has agreed to pay or make good to

(1) (1902) 18 T.L.R. 815.

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the insured "the value of the *property so destroyed* or the amount of such damage thereto" to an amount not exceeding £2,450. Then so much of this money as has been expended in rebuilding will have to be credited to the mortgagor (or his transferee Mylius) in the mortgage accounts.

RICH J. The whole case depends upon what is meant by the words in sec. 49 of the *Imperial Acts Application Act* 1922, "to cause the money for which such house or building has been insured by the occupier thereof or by any other person to be laid out and expended as far as the same will go towards rebuilding reinstating or repairing such house or other buildings so burned down demolished or damaged by fire." What is the money for which "such house or building" has been insured? It cannot mean the amount expressed in the policy, for this is only the limit of the insurer's liability to indemnify. The section in question is speaking both of demolition and damage. The damage may only be equal to a very small portion of the amount expressed in the policy. The words I have quoted must be understood to describe a sum of money which the persons upon whom the section operates are liable to pay over in respect of the demolition or damage. The initial words of the section relating to governors and directors, &c., together with the final provisions of the section, show that the Legislature was speaking of a sum of money in the hands of the officers of the insurer awaiting disposition and was directing how it should be disposed of. The Legislature speaks of the claim being adjusted. This must mean a net sum which has been or must be unconditionally appropriated to answer the damage. In the case of the insurance of a mortgagee, which the insurance in question has come to be, no such sum can arise. The true liability of the insurer, when finally worked out, is to indemnify the mortgagee against the loss of his mortgage debt by destruction of part of his security (see *Excelsior Fire Insurance Co.* v. *Royal Insurance Co. of Liverpool* (1)). The insurer may be liable to appropriate a sum of money to answer the loss of part of the security for the mortgage debt. But the provision of this sum gives the insurer a corresponding equitable interest in the debt, and the amount of the mortgage debt

(1) (1873) 55 N.Y. 343; 14 Amer. Rep. 271.

is a limit on its liability so to do. It is the debt which gives the assured his interest in the property, and that interest is the very thing to which the insurance relates. Again, the insurer is not liable upon the express terms of the policy in question (condition 15) to answer the loss by fire to the extent of the mortgage debt unconditionally, but only upon condition that it receives the mortgage debt *pro tanto* in exchange for satisfying its indemnity. "If the mortgagee should recover on the policy, the owner will not be advantaged, as the insurers will be subrogated as against him to the rights of the mortgagee" (*P. Samuel & Co.* v. *Dumas* (1); *Brady v. Land Commission* (2)). The indemnity to the mortgagee is not against depreciation *simpliciter* of an interest in the destroyed or damaged property. His interest may be depreciated to nil, and, although the insurer may at once be required to place an equivalent in money in his hands, yet, unless his mortgage debt or some part of it is lost, the insurer has really done no more than acquire a corresponding interest in equity in the rights of the mortgagee. The latter's contract of indemnity entitles him to receive payment of the amount by which his security is deteriorated. But this right is merely to keep him fully protected in respect of his debt, and consequently its exercise is necessarily accompanied by an equitable interest in the mortgage debt (and the security) being imparted to the Company (the insurer). "The contract being one of mere indemnity, the plaintiffs, the assurers, upon payment of the loss became entitled to all the rights then vested in" (the assured) "in respect of the destroyed property" (*Phœnix Assurance Co.* v. *Spooner* (3)). In the case of a mortgagee's insurance there must be substituted in this statement, for "destroyed property," "the mortgage debt as secured by the destroyed property." The mortgagee is entitled to receive a sum of money from the insurers equivalent to the value of the destroyed property, but not because this is what he has lost. He is entitled to receive such sum as representing his potential loss of his mortgage debt by reason of the destruction of the property, and only in exchange for a corresponding equitable interest in his rights in the mortgage (personal covenant and estate) which is thereby

(1) (1924) A.C. 431, at p. 445.
(2) (1921) 1 I.R. 56, at p. 67.
(3) (1905) 2 K.B. 753, at p. 756.

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imparted to the insurers. Lord *Selborne's* observations in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1) were, I think, directed to this. Although his Lordship used the expression "as between mortgagor and mortgagee," he referred only to the case in hand, namely, where the mortgagor sought to have the mortgagee's indemnity applied to restore the security. The criticisms of *Parker* J., as he then was, in *Sinnott* v. *Bowden* (2), were directed to the mortgagee's claim to have the mortgagor's indemnity so applied. "The subject matter of the insurance"—to quote his phrase—over which "the contending parties" are at variance in the case of the mortgagor's insurance is undoubtedly the property destroyed. In the case of the mortgagee's insurance it is his potential loss of the mortgage debt as a result of the destruction. In that the mortgagor has no interest. He has a duty to pay only. In my opinion a mortgagor cannot avail himself of the legislation in question to require the expenditure of the mortgagee's insurance upon replacement.

In any event I doubt whether the section affords the plaintiff the relief he has sought and obtained.

For these reasons I think the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *F. G. Smith & McEacharn.*

Solicitors for the respondents, *Macpherson & Kelley*; *F. R. Gubbins*; *S. A. Ralph.*

B. L.

(1) (1888) 13 App. Cas. 699, p. at 714.

(2) (1912) 2 Ch., at p. 420.