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SUBROGATION BY THE INSURER TO THE INTEREST OF THE MORTGAGEE.

THE doctrine of subrogation on the part of the underwriter, in cases of loss where the mortgagee insures in his own name, and pays the premium out of his own funds, has already become well-settled law in several of the states. The courts of Pennsylvania, New York, New Jersey and Illinois have repeatedly held that the mortgagee can not, after payment of his debt by the underwriter, enforce his claim against the mortgagor, but that the underwriter is substituted to the rights of the mortgagee.

The main reasons assigned for this ruling are, that to allow the mortgagee to have a double satisfaction would be to ignore the principles of suretyship, to sanction a system of wagers which would be contrary to the policy of the law, and to furnish a dangerous temptation to incendiarism. The contrary doctrine is still the law in Massachusetts, and since the able opinion of Chief Justice SHAW in the case of *King* v. *The State Mutual Fire Insurance Co.*, 7 Cush. 1, has found favor with the courts of that state.

"We are inclined to the opinion," say the court, "both upon principle and upon authority, that where a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to recover the total loss for his own benefit, that he is not bound to account to the mortgagor for any part of the money so recovered as a part of the mortgage-debt; it is not a payment in whole or in part, but *he still has a right to recover his whole debt of the mortgagor.*"

There can be no question that the argument of the chief justice has at least the merit of plausibility. He adds, "What then is there inequitable on the part of the mortgagee toward either party in holding both sums (the debt and the insurance money)? They are both due upon valid contracts made with him, made upon 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." The court further supposes a case in which the mortgagee has paid the premiums on a policy taken out in his own name for twenty years, after which time the buildings burned down—an exaggerated illustration, but one which assists the reasoning of the case—the mortgagee would recover his debt while the underwriter would be, if he could satisfy his claim against the mortgagor, the gainer in the additional premiums. Following the decision of this case is *Suffolk Insurance Co.* v. *Boyden*, 9 Allen 123, where the court held that if the interest of the mortgagee in possession has been insured *eo nomine* at his own expense, the insurers, in case of a loss by fire before the mortgage-debt is paid, can not, upon an offer to pay the loss and amount due upon the mortgage, before the loss, maintain a bill in equity to have the mortgage assigned to them and be subrogated to the rights and remedies of the insured under the mortgage.

The distinctions drawn by counsel between that case and the case of *King* v. *The State Mutual Fire Insurance Co.* were disposed of by Judge HOAR, who held that whether the insurance was expressly made upon the interest of the assured as mortgagee or upon his interest in the property which was only that of mortgagee without disclosing its precise character, the same ruling applied as in the case of *King* v. *The State Mutual Fire Insurance Co.* To the question why the mortgagor should not pay the premiums and be entitled to treat the debt as cancelled, it is answered, "because the insurance is a wholly collateral contract which the law allows the mortgagee to make, with which the mortgagor is not concerned." And in concluding the court say: "The whole consideration proceeds from the mortgagee; if there is no loss by fire he loses the whole amount paid without any claim upon the mortgagor for compensation. The premiums paid are intended to be a just compensation for the sum to be received upon the happening of a contingent event." To the same effect are the cases of *White* v. *Brown*, 2 Cush. 416; *Foster* v. *Mutual Life Insurance Co.*, 2 Gray 216; *Dobson* v. *Land*, 8 Hare 216; *Graves* v. *Hampden Insurance Co.*, 10 Allen 283.

In examining the cases which have upheld the doctrine of subrogation, but few will be found which present the same issues as the case of *King* v. *The State Mutual Fire Insurance Co.*, and many of those which are cited in support of the principle are cases in which the doctrine has been announced as an *obiter dictum*, and not as a final judgment on the question. The case of *Smith* v. *The Columbia Insurance Co.*, 17 Penn. St. 253, may furnish the nearest analogy as one of the early decisions of the courts of that state upon the subject. The principal reasons which induced the court to hold that the insurers were entitled to subrogation, arose out of the nature of the case. There had been prior mortgages effected on the property concealed by the assured, and the insurers were deceived in assuming a risk at a lower rate of premium than they would have done had they known the facts. Upon the question of subrogation, the court cite no authorities, and simply say that "the insurer is entitled to the cession of the security is proved by analogy from marine insurance, from fire insurance in respect of recourse to the hundred, and from the contract of suretyship."

Neither do the cases of *Insurance Co.* v. *Updegraff*, 21 Penn. St. 513, and *Ætna Insurance Co.* v. *Tyler*, 16 Wend. 385, present the question in an analogous light. The main issues here were whether the vendor, having a lien for unpaid purchase-money, had an insurable interest, and it was held that he could recover the whole amount of the unpaid purchase-money, and the vendee could have no interest therein. That the insured was entitled to subrogation was only a collateral issue.

In *Roberts* v. *Traders' Insurance Co.*, 17 Wend. 631, the mortgagor was the insured and the policy was assigned to the mortgagee as collateral security for the debt. It was the insurance effected upon the interest of the mortgagor at his expense and for his ultimate benefit.

In *Carpenter* v. *Washington Providence Insurance Co.*, 16 Pet. 495, s. c. 4 How. 185, the doctrine of subrogation was simply announced as an *obiter dictum*, and was not necessary to the decision of the question, which was, whether a prior policy effected by mortgagor, containing a clause giving him permission to assign it to an undisclosed mortgagee, covered the latter's interest. It was held that it only covered the interest of the mortgagor, and such a policy constituted other insurance by the insured within the meaning of a clause concerning prior insurance, in a subsequent policy taken by the mortgagor from another company.

In *Home Insurance Co.* v. *Western Transportation Co.*, 4 Rob. 267, the question was mainly decided upon principles of marine insurance.

Among the later cases supporting this doctrine is *Honore* v. *Lamar Insurance Co.*, 51 Ill. 409, where an insurance was effected on seventy-four barrels of whiskey, by the mortgagee. The court dismisses the case with the remark that to give the mortgagee a right to enforce his claim after payment of his loss by the insurance company against the mortgagor, would be to favor wager policies, and to furnish a dangerous temptation to incendiarism.

In *Norwich Fire Insurance Co.* v. *Boomer*, 52 Ill. 442, the mortgagor had paid the premium, and was the beneficiary party.

In *Springfield Insurance Co.* v. *Allen*, 43 N. Y. 389, and *Foster* v. *Van Reed*, 70 N. Y. 19, though it was stipulated in the policy, that the insurer should be subrogated to the rights of the assured on payment of loss, it was contended that such a clause had no effect, and that the mortgagee, notwithstanding, should enforce his claim against the mortgagor.

With the exception of Massachusetts, it is believed that no state has sanctioned the rule giving the mortgagee his remedy against the mortgagor, on payment of loss by the insurer. While the courts have generally held that where the mortgagee insures his interest and there is a loss, the premiums having been paid out of his own funds, he is not bound to account to the mortgagor, nor to apply it in payment of his debt (*King* v. *State Mutual Fire Insur- Co.; Ætna Insurance Co.* v. *Tyler; Carpenter* v. *Washington Providence Insurance Co.*, above cited; *White* v. *Brown*, 2 Cush. 412; *Russell* v. *Southard*, 12 How. 139; *Concord Fire Insurance Co.* v. *Woodruff*, 45 Me. 354), they have not denied the right of the insurer to take the place of the mortgagee when they have compensated him for loss.

Whether the insurance of the mortgagee's interest was an insurance of the debt or of the mortgaged property, seems to have long been a disputed question, and the majority of the cases which have supported the doctrine of subrogation have held that the mortgagee in insuring his interest insured the mortgage-debt simply. While this would depend considerably upon the nature and the terms of the policy, it seems that even where the policy in express terms provided that the mortgagee's interest was insured to cover specific property, the debt alone was considered as being insured: *Smith* v. *Col. Insurance Co.; Ætna Fire Insurance Co.* v. *Tyler; Carpenter* v. *Providence Insurance Co.* Judge STORY, in the latter, case says, "Where the mortgagee insures solely on his own account, it is but an insurance of his debt, and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation." In *Insurance Co.* v. *Woodruff*, 2 Dutch. (N. J.) 541, the court say, "That the insurance by the mortgagee was necessarily an insurance of the debt, because he had no other interest, and that the insurers were entitled to be subrogated not only to the mortgage-debt, but every other collateral security by which the debt was secured."

In Angel on Insurance, sect. 59, it is said: "The insurance of the mortgagee is an insurance of the debt, and if his debt is afterwards paid or extinguished, the policy from that time ceases to have any operation; even if after that the premises are destroyed by fire, he has no right to recover for the loss if he has sustained no damage thereby." Judge GIBSON, in 17 Penn. St. 253, states that, "The mortgage insures not the ultimate safety of the whole property but only so much of it as may be enough to satisfy his mortgage. *It is not the specific property which is insured but its capacity to pay the mortgage-debt, in effect the security is insured.*"

On the other hand, this doctrine is denied in *King* v. *Mutual Fire Insurance Co.*, where the court say, "The contract of insurance 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. It is not broken by the non-payment of the debt nor saved by its payment." And in *Kernochan* v. *N. Y. Bowery Fire Insurance*, 17 N. Y. 428, the policy in that case insured the mortgagee against loss or damage by fire to the amount of $6000, such loss or damage not to exceed in amount the sum insured, as shall happen by fire to the property during the term of one year.

"The contract," say the court, "is in the nature of an insurance of the property, and not of the mortgage-debt. If the insurance was of the debt there should, to warrant a recovery, be a loss as to the debt which has not occurred and cannot take place, as the mortgaged property still far exceeds in value the sum unpaid and the debtors are solvent. Regarding the insurance as of the debt, no risk has been insured by the defendants, the policy was not only of no possible benefit, but worse, it has been a source of constant expense."

And, finally, in the case of *The Excelsior Fire Insurance Co.* v. *The Royal Fire Insurance Co. of Liverpool*, 55 N. Y. 348, the judge on this question, says: "To say that it is the debt which is insured against loss, is to give to fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire: they are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor."

The principle of these cases is based, no doubt, upon the view which the courts have taken of the nature of a mortgage. In Massachusetts, as well as in the other New England states, the mortgage-deed is held to create a seisin of an estate in the premises, in the mortgagee, with the incidents belonging thereto at common law, such as a right of possession, to be enforced, if need be, by ejectment or other suit at law, as well as the right upon the failure of the mortgagor to redeem, to become, by a process of foreclosure, the absolute owner of the premises. While in other states, among which are New York and Illinois, it is assumed that the mortgage-deed creates an interest in the mortgaged premises answering to an estate in the mortgagee, his rights and remedies in respect to the same are limited to such as the rules of equity prescribe and may not be enforced by suit at law.

It is generally held now, that an insurance by the mortgagee is an insurance of the mortgaged property, and though the doctrine of subrogation prevails, it owes its existence to those cases which have held that the insurance of the mortgagee's interest is solely an insurance of the mortgage-debt.

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