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mind,' let us not forget the 'conscious mind' still exists; in this emphasis upon the dark, one is apt to forget there is such a thing as *light. Lux fiat!* The recent eclipse of the sun obscured the rays of the solar body for a brief period of time. But why argue that this momentary darkness is a customary or frequent occurrence in bodies planetary." In other words because, on some rare occasions, a judge has been swayed by some *idee fixee,* rather than by principles of law, shall we say that all judges will act in a similar manner. The fallacy is self-evident. There is no more justification in raising the cry of favoritism in labor adjudications than in any other controversies, in many of which the judge may have a set personal opinion. That the courts realize only too well that their decisions are not to be swayed either by popular frenzy or private prejudice is evidenced by the following courageous avowal by our Court of Appeals:[30]

> "We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (Holmes, *J.*, in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400), are not to change their form and content in response to the 'hydraulic pressure' (Holmes, *J., supra*) exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."

Is this the declaration of a judiciary that will permit itself to be swayed by personal opinion?

George F. L. Hentz.

Respective Rights of Mortgagor and Mortgagee to Insurance Funds.

The case of *Savarese et al.* v. *Ohio Farmer's Insurance Co. of Le Roy, Ohio, et al.*[1] recently decided by the Court of Appeals raised

[30] Matter of Doyle, 257 N. Y. 244, 268, 177 N. E. 489 (1931).

[1] 260 N. Y. 45, 182 N. E. 665 (1932).

the interesting question as to the right of a mortgagee to recover under a standard mortgagee clause in a fire insurance policy although the premises were repaired shortly after the fire. In this case, the policy contained the usual standard mortgagee clause, reading as follows: "Loss or damage, if any, under this policy, shall be payable to mortgagee, as interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property," etc. The fire occurred on June 28th and the owner mortgagor repaired the premises so that by September 6th the premises were restored to the same condition in which they were before the fire. The mortgagee did not even have notice that a fire had occurred until after September 6th.

In the absence of an express provision to the contrary, a policy which insures both the interests of the mortgagors and the mortgagees will be avoided as to both parties by a breach of a condition or warranty on the part of the mortgagor, who is, ordinarily, the party in possession and the one who is in a position to cause a breach of the policy.[2] Under the standard mortgagee clause however, the mortgagee is protected against a forfeiture of his insurance by a breach of a warranty or any act or neglect of the mortgagor.[3] This applies to any act or neglect of the mortgagor prior to the effecting of the insurance, as well as to any act or neglect subsequent to the issuance of the policy. From this it would seem that the courts construe the standard mortgagee clause as giving to the mortgagee an insurance policy entirely separate from that of the mortgagor, just as if he himself had taken out a policy of insurance in his own name.[4]

A mortgagee is not the owner of property; he is but a mere lienor. How then can he insure it? Inasmuch as the mortgagee's security depends upon the safety of the property, he has an interest in its preservation, and so has such an interest in it that he may take out a policy upon it against loss by fire, without meeting the objection that it is a wagering contract. The policy, therefore, does not become one on the debt and for indemnification against its loss.

[2] Rosenstein v. Traders' Ins. Co., 79 App. Div. 481, 487, 79 N. Y. Supp. 736 (4th Dept. 1903); Buffalo Steam Engine Works v. Sun Mutual Ins. Co., 17 N. Y. 401 (1858).

[3] Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141 (1878); Eddy v. London Assurance Corp., 143 N. Y. 311, 38 N. E. 307 (1894).

[4] *Supra* note 3. In Heilbrunn v. German Alliance Ins. Co. of New York, 140 App. Div. 557, 559, 125 N. Y. Supp. 374, 376 (1st Dept. 1911), *aff'd*, 202 N. Y. 610, 95 N. E. 823, the Court said: "It [the mortgagee clause] created a new and distinct contract, which places the mortgagee upon another and a different footing from that of a mere assignee or appointee to receive the loss, and removes him beyond the control or effect of any act or neglect of the owner of the property, and renders such mortgagee a party who has a distinct interest separate from the owner, embraced in another and a separate contract. The interest of the owner and of the mortgagee are regarded as distinct subjects of insurance." See, also, McDowell v. St. Paul Fire & Marine Ins. Co., 207 N. Y. 482, 101 N. E. 457 (1913).

In effect, no doubt, it is the debt which is secured.[5] However, it is merely an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt which is a lien on the property, creates that interest.

Thus, since the mortgagee has an insurable interest in the premises and that insurable interest is covered under the policy with the same force and effect as if the mortgagee had taken out a policy in his own name, could a restoration of the property, by the mortgagor, to its former condition defeat a recovery under the policy by the mortgagee? It has been held in this state that the mortgagee may recover although his security under the mortgage is sufficient to cover his lien.[6] Even though he has insured at his own expense, he is not required to exhaust his remedy on the mortgage before enforcing his policy, and he can maintain an action on the policy, although the property undestroyed is equal in value to the amount of the mortgage debt.[7] Therefore, whether a mortgagee is covered under a standard mortgagee clause or whether he takes out his own policy, his right to recover in case of a fire does not depend upon the sufficiency or insufficiency of the mortgage security after the fire. The earlier rule in New York was that where the property has been repaired, the mortgagee under a "loss payable" clause cannot recover.[8] This rule was due, no doubt, to the fact that a recovery by the mortgagee would give to him the insurance money and still leave him with his full mortgage as a lien on the property. However, today, by statute,[9] whatever sum is recovered by the mortgagee is applied to reduce his mortgage debt.

Under the policy in the principal case, the insurer was given the right to pay the loss or to repair the premises within a reasonable time. The company, however, did not exercise this option to repair and elected to repay the loss. The mortgagor having repaired the premises, can the insurer now claim that he acted for the company? The owner did not act as the company's agent when he undertook to repair without the knowledge or consent of either the

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[5] Smith v. Colonial Ins. Co., 17 Pa. St. 253.

[6] See Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428, 435 (1858). The Court there said: "The loss against which the plaintiff [mortgagee] is insured, is, by the very language of the contract, 'to the property insured'; the destruction in whole or in part of the value of the property by the total or partial burning of the property. In case of such loss it is stated that it is to be paid within sixty days after due notice and proof thereof by the assured, in conformity to the policy. Whether the loss by diminishing the mortgage security endangers the collection of the debt, or the security remains ample, is not by the contract made of any importance; in either case it is insured against and the amount of it is to be paid."

[7] Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 (1873).

[8] *In re* Moore, 6 Daly 541 (N. Y. 1876). See, also, Friemansdorf v. Watertown Ins. Co., 1 Fed. 68 (1879); Foster v. Equitable Mutual Fire Ins. Co., 2 Gray 216 (Mass. 1854).

[9] N. Y. REAL PROPERTY LAW §254.

insurer or the mortgagee. Under the standard mortgagee clause, no act of the mortgagor can invalidate the mortgagee's rights under his separate contract of insurance with the insurance company. If the mortgagor can wipe out the rights of the mortgagee under the policy without the latter's knowledge or consent, how long can the owner take in making the repairs. The insurance company is given the option to repair within a reasonable time and must elect to do so within that time or the right to repair is lost. However, there is no such limitation placed upon the mortgagor; and so if he restores the property to its former condition at any time before an action is brought, the mortgagee can claim no loss,[10] even though this action on the part of the mortgagor would abrogate his rights. The mortgagee clause, however, provides that no act of the mortgagor shall be binding on the mortgagee and so he has the right to disregard the repair of the premises and ask that the insurance monies be paid to him.

Granting the mortgagee an insurable interest in the property and a right of recovery in case of a loss, to what amount is he entitled? The policy contains the New York standard average clause providing: "This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to eighty per cent (80%) of the actual cash value of said property at the time such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon." For instance: If property worth $10,000 is insured for $6,000, and a loss of $2,000 takes place, the insured can recover $1,500. The process is best expressed thusly: the amount of recovery equals the amount of insurance divided by eighty per cent of the value of the property, result multiplied by the amount of loss. This computation, however, applies to one who has a full interest in the property, such as the owner. The mortgagee's interest is limited to the amount of his mortgage debt. Therefore his recovery is limited in amount to the ratio that his lien bears to the actual value of the property, since under the standard mortgagee clause the loss is payable to him only "as interest may appear." In the principal case, one of the judges dissented as to the amount of recovery by the mortgagee. He argued that inasmuch as the standard mortgagee clause created a separate policy of insurance between the insurer and the mortgagee, the mortgagee should be allowed to recover the full amount of the damage. The separate contract of the mortgagee, though, only provides that his rights shall not be destroyed by any acts of the mortgagor. It does not relieve him from the other provisions of the policy. The terms of the policy bind him, and though the courts will spell out a separate contract for him, they will not go so far as to give him a contract altogether different from that of the owner. To hold otherwise would be to give to the mortgagee, in certain cases, more

[10] Huey v. Ewell, 22 Tex. Civ. App. 638 (1900).

than he is entitled to receive. For instance, if his mortgage were a small one in proportion to the value of the property, he would collect the full amount of the damage even though it greatly exceeded his lien on the property. That would obviously be unwise and unfair.

A recent Massachusetts decision would seem to sustain the majority decision in the case at hand.[11]

Thus it will be seen that a mortgagee may recover when his interest is insured in a policy taken out by the mortgagor, paid for by the mortgagor, and which may be cancelled by the mortgagor. The courts, in allowing him to recover, proceed not on the ground of indemnity but rather on the theory that the insurance company is bound by contract to pay the amount of the loss to him. Indeed it would be difficult to justify the recovery on the grounds of indemnity.

RUDOLPH L. LONDNER.

IS AN ENGAGEMENT RING AN ABSOLUTE GIFT?

If a ring is presented to a woman after an engagement is entered into and the woman refuses to marry the man, can he recover the ring? This proposition was before the court in *Beck* v. *Cohen*, an Appellate Division decision, First Department, reported in the *Law Journal* March 16, 1933. In that case the plaintiff pleaded that in consideration of the defendant's promise to marry him, he agreed to marry her and delivered to her an engagement ring in anticipation of their marriage and conditioned upon the fulfillment by the defendant of her agreement to marry him. After having plighted her troth and received the ring, the defendant refused to marry him, although he stood ready and willing to perform the agreement, and she has declined to return the engagement ring to him upon his demand and continued to retain it to his damage. The plaintiff met with a dismissal of his complaint on the ground that it does not state facts sufficient to constitute a cause of action. On appeal, he was allowed, in a three-two decision, to recover his ring. The consequence of that decision is that new law has been laid down reversing the leading case on the subject, *Rosenberg* v. *Lewis*.[1]

In that case, the facts of which are substantially the same as the principal case, except that valuable pieces of jewelry were given and not an engagement ring in particular, the Court said:

> "Assuming that there was a promise of marriage and that relying upon that promise plaintiff presented gifts to defen-

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[11] Silver v. United States Trust Co., Mass. Adv. Sh. 1589, 182 N. E. 372 (1932).

[1] 210 App. Div. 690, 206 N. Y. Supp. (1st Dept. 1924).