

Insurance--Effect of Mistatement of Ownership on Rights of Mortgagee under Standard Mortgagee Clause

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basic difference between a presumption of law and an inference. A presumption of law is an inference that the jury *must* make,¹⁴ viz., they must presume the defendant is innocent, but while so presuming they *may infer* that the deceased committed suicide. But the mere fact that such inference may be made does not of itself entitle the defendant to a charge that they, the jury, must so infer.

The use of a presumption of suicide would also be contrary to the fundamental reason which prompted its introduction into the law of evidence. Human experience has taught us that when certain facts are shown to exist, we may presume the existence of other facts which are known generally to be concomitant with the first facts.¹⁵ The universal knowledge of the love of life has led to the presumption that one does not commit suicide.¹⁶ What facts are within our knowledge which would lead us to presume that a person would commit suicide? There are none, indeed the evidence is all to the contrary, and the only argument for it proceeds from another presumption, that of innocence. If a jury is not permitted to draw inferences from inferences, it should not be ordered to build presumptions on presumptions.

THOMAS M. McDADE.

INSURANCE—EFFECT OF MISSTATEMENT OF OWNERSHIP ON RIGHTS OF MORTGAGEE UNDER STANDARD MORTGAGEE CLAUSE.

The primary purpose of insurance under a mortgagee clause is to insure the equitable interest of the mortgagee, who, in practically all instances, does not occupy the insured premises. The ownership of the premises may be transferred without his consent. While a mortgagee can take out a separate policy on his interest, insurance companies have prepared mortgagee clauses to protect the interest of the mortgagee. In the recent case of *Goldstein v. National Liberty Insurance Company of America, et al.*,¹ the Court of Appeals was confronted with the problem of deciding whether or not a mortgagee under a mortgagee clause would be prevented from recovering for a fire loss, where the ownership of the premises was misrepresented in a policy which provided for its voidance if the interest of the insured were other than unconditional and sole ownership.

¹⁴ *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. ed. 337 (1882); *Platt v. Elias*, 186 N. Y. 374, 79 N. E. 1 (1906); (1926) 11 CORN. L. Q. 20. For a critical analysis of this definition see Thayer, *Presumption and the Law of Evidence* (1889) 3 HARV. L. REV. 148 *et seq.*; HAYES, CASES ON EVIDENCE (1898) 79.

¹⁵ *Supra* note 14.

¹⁶ *Supra* note 10.

¹ 256 N. Y. 26, 175 N. E. 359 (1931).

In that case, the mortgagee of real property brought an action against the insurer to recover for a fire loss to the demised premises. A prior owner of the premises executed and delivered to plaintiff's assignor a mortgage in the principal sum of \$25,000. The mortgage was assigned to plaintiff on November 24, 1926. Thereafter and on March 4, 1927, the premises were conveyed to Abraham B. Schlowsky, and on August 9, 1927, at the instance of the owner, a policy of fire insurance was issued by the National Liberty Insurance Company of America, in which policy the buildings were described as "in course of construction" and the owner of the demised premises was stated to be Abraham B. Schlowsky, Inc. Attached to the policy was a standard mortgagee clause, as follows:

"Loss or damage, if any, under this policy, shall be payable to M. J. Goldstein, as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein *shall not be invalidated by any act or neglect of the mortgagor or owner* of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, *nor by any change in the title or ownership of the property*, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same."

The policy also contained a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership." From the evidence adduced at the trial, it appeared that the corporation, Abraham B. Schlowsky, Inc., stated to be the owner in the policy of insurance, was controlled by Abraham B. Schlowsky, who owned 98% of the stock therein, and that he, his wife and his secretary were the sole officers, directors and stockholders of the corporation. The trial Court dismissed the complaint,² holding that the policy was void by reason of breach of the warranty that the buildings were in "course of construction," as represented in the policy. The Appellate Division reversed the decision of the trial Court³ on the ground that "there were facts presented which required the submission of the case to the jury." On appeal, the Court of Appeals affirmed the order of the Appellate Division which reversed the judgment of the trial Court, holding that a policy of fire insurance in the standard form, which is void as to the owner because of his breach of warranty as to ownership and occupancy, may under the standard mortgagee clause be valid as to a mortgagee.

² 134 Misc. 90, 234 N. Y. Supp. 40 (1928).

³ 228 App. Div. 833, 240 N. Y. Supp. 883 (2nd Dept. 1930).

In 1881 the Court of Appeals, in the case of *Graham v. Fireman's Insurance Company*,⁴ held that a mortgagee could not recover under a mortgagee clause where there was a misrepresentation as to ownership in the policy of insurance. The Court refused to apply that rule to the instant case. The rule in the *Graham* case was applied correctly there, because the owner of the insured premises was an infant three years of age with no general guardian, and it follows that a misrepresentation as to the ownership of the insured premises was not an act or neglect of the mortgagor or owner of the property, within the meaning of the mortgagee clause, which clearly contemplated a case where the owner could act or could neglect, and not a case where the policy was issued in the name of an infant, who by reason of its incapacity, could not furnish any protection to the company. In the instant case, we have the *act of the owner of the property* in taking out the insurance in the corporate name instead of his own name, and such act comes clearly within the language of the mortgagee clause. But there is even a more cogent reason for refusing to apply the old rule. In the *Graham* case, the representations as to ownership of the property were made by the *agent of the mortgagee*, who applied for the policies of insurance, and not by the insured. In the instant case, the obligation of the owner to protect the mortgagee's interest in the property by insurance did not constitute the owner, who appears to have been an insurance broker, the agent of the mortgagee in procuring the insurance, and any misrepresentations that were made in procuring the insurance were not in effect made by the mortgagee.

Omitting for a moment consideration of the contract between the insurer and the mortgagee, we find authority for the view that even as to the insured there was no breach of the warranty of "unconditional and sole ownership." In a case before the Texas Commission of Appeals,⁵ where the property insured was owned by an individual who held 98% of the stock of the company named in the policy as the insured, it was held that there was no breach of the "ownership interest" provision in the policy. Another case decided in the same state⁶ held that the insured could recover for a fire loss sustained, although the conveyance to him was not by the corporate owner, but by the owner of substantially all the stock. The New York Court of Appeals has held⁷ that a policy was not invalidated, where from the facts it appeared that insurance was taken out in the name of a partnership, the policy containing a provision that the insurance would be void if the interest of the insured should be other than unconditional and sole ownership, and where

⁴ 9 Daly 341, *aff'd*, 87 N. Y. 69 (1881).

⁵ *Pacific Fire Insurance Co. v. John E. Morris*, 12 S. W. (2d) 971 (1929).

⁶ *Phoenix Assurance Co. et al. v. Deavenport*, 16 Tex. Civ. App. 283, 41 S. W. 399 (1897).

⁷ *Wood v. American Fire Insurance Co.*, 78 Hun 109, *aff'd*, 149 N. Y. 382, 44 N. E. 80 (1896).

it appeared that before the insurance in question was written, one of the members of the firm had made an assignment for the benefit of creditors and the assignee had assigned the partnership interest to a third person. It is of interest to note in this connection that policies have been held valid although no particular person was named therein as insured,⁸ the validity of contracts of insurance being upheld even under such circumstances.

As regards the contract with the mortgagee, it is submitted that the insurance contract would not be forfeited or invalidated if the interest of the insured named in the policy was not sole and unconditional, for it is provided in the mortgagee clause that the mortgagee's interest shall not be invalidated by any act or neglect of the owner or mortgagor. In view of this provision of the mortgagee clause, it is apparent that the insurer in covering the risk as to the mortgagee under the mortgagee clause did not intend to make the character of the ownership of the insured named in the policy a condition of the contract with the mortgagee. The ownership and possession of the premises when the policy was issued were of no more importance to the insurer than the subsequent ownership and possession. They are conditions of liability as to the owner, but plainly none of them was intended to affect the mortgagee. The mortgagee made no representations as to the ownership of the property, and the insurer in issuing the policy accepted the ownership recited in the policy. The representations as to the ownership contained in the policy proper should not be read into and made a part of the contract of insurance with the mortgagee contained in the mortgagee clause. This view has been adopted by a Federal Court,⁹ which held that although there was a breach of the warranty of sole and unconditional ownership which rendered the policy void as to the individuals named as insureds in the policy, yet the policy was not invalidated as to the mortgagee under a mortgagee clause. The standard mortgagee clause creates an independent contract of insurance for the separate benefit of the mortgagee which if valid and enforceable in its inception so continues until rendered invalid by a subsequent act or neglect of the mortgagee.¹⁰

The mortgagee clause is prepared by the insurer, and if the unconditional and sole ownership of the insured premises by the party named as insured in the policy is to be a condition precedent to the contract of insurance with the mortgagee covered by the mortgagee clause, the insurer should so provide. The insurer should not be allowed to avoid liability upon a technical ground which in no way pertains to the risk insured under the mortgagee clause.

⁸ *Clinton v. Hope Insurance Company*, 51 Barb. 647, *aff'd*, 45 N. Y. 454 (1871).

⁹ *Syndicate Insurance Co. v. Bohn*, 65 Fed. 165 (C. C. A. 8th, 1894).

¹⁰ *Grosvenor v. Atlantic Fire Insurance Co.*, 12 Super. (5 Duer) 517, *rev'd*, 17 N. Y. 391 (1858).

In the instant case we find no inconsistency between the provisions of the policy issued to the insured and those of the attached mortgagee clause, but if any inconsistency exists, the interpretation which is more favorable to the mortgagee will control.

In the case of *Hastings, et al. v. Westchester Fire Insurance Company*,¹¹ cited with approval by the Courts over a span of years,¹² and recently used as authority by the Court of Appeals in a decision written by that Court,¹³ it was held that the mortgagee clause operated as an independent insurance of the mortgagees' interest, giving the mortgagees the same benefit as if a separate policy of insurance had been procured, free from the conditions imposed upon the owner.

There is no weight to the contention that the mortgagee clause is predicated upon a policy valid in its inception and does not apply to a policy void as to the insured by reason of breach of warranty as to ownership or nature of occupancy. That there is sufficient consideration for a separate and independent contract of insurance between the insurer and the mortgagee contained in the mortgagee clause attached to the policy, even though as to the insured the policy may be invalid for breach of warranty as to the sole and unconditional ownership of the property, is borne out by a number of decisions¹⁴ touching on the subject. It has been held in all jurisdictions¹⁵ that any act or neglect of the mortgagor or owner after the issuance of the policy covering the interest of the insured will not invalidate the insurance contract covering the mortgagee's interest in the mortgagee clause. The Courts have held in any

¹¹ *Hastings, et al. v. Westchester Fire Insurance Co.*, 12 Hun 416, *aff'd*, 73 N. Y. 141 (1878).

¹² *Cole v. Germania Fire Insurance Co.*, 99 N. Y. 36, 1 N. E. 38 (1885); *Eddy v. London Assurance Corp.*, 65 Hun 307, *aff'd*, 143 N. Y. 311, 38 N. E. 307 (1894).

¹³ *Matter of Aioss v. Sardo, et al.*, 223 App. Div. 201, 227 N. Y. Supp. 708, *aff'd*, 249 N. Y. 270, 164 N. E. 48 (1928).

¹⁴ *Syndicate Insurance Co. v. Bohn*, *supra* note 9; *Planters' Mutual Insurance Assn. v. Southern Savings Fund & Loan Co.*, 68 Ark. 8, 56 S. W. 443 (1900); *Insurance Company of N. A. v. Martin*, 151 Ind. 209, 51 N. E. 361 (1898); *Peoples Savings Bank v. Retail Merchants Mutual Fire Ins. Co.*, 146 Iowa 536, 123 N. W. 198 (1909); *Reed v. Fireman's Insurance Co.*, 81 N. J. L. 523, 80 Atl. 462 (1911); *Germania Fire Insurance Co. of N. Y. v. Bally*, 90 Ariz. 580, 173 Pac. 1052 (1918); *Hastings, et al. v. Westchester Fire Insurance Co.*, *supra* note 11.

¹⁵ *Syndicate Insurance Co. v. Bohn*, *supra* note 9; *Fire Assn. of Philadelphia v. Evansville Brewing Assn.*, 73 Fla. 904, 75 So. 196 (1917); *Peoples Savings Bank v. Retail Merchants Mutual Fire Insurance Co.*, *supra* note 14; *Magoun v. Fireman's Fund Insurance Co.*, 86 Minn. 486, 91 N. W. 5 (1902); *Bacot v. Phenix Insurance Co.*, 96 Miss. 223, 50 So. 729 (1909); *Burns v. Insurance Co. of Pennsylvania*, 224 S. W. (Mo. App.) 96 (1920); *No. British & Mercantile Insurance Co. v. Bohn, et al.*, 49 Neb. 572, 68 N. W. 942 (1896); *Reed v. Fireman's Insurance Co.*, *supra* note 9; *Federal Land Bank v. Atlas Assurance Co.*, 188 N. C. 747, 125 S. E. 631 (1924); *Smith v. Union Insurance Co., et al.*, 25 R. I. 260, 55 Atl. 715 (1903).

number of cases¹⁶ that the mortgagee's contract of insurance under the mortgage clause is not invalidated by breach of warranty by owner or mortgagor committed before or at the time the policy was issued, although such breach voided the policy as to the insured. In the *Hastings* case, Rapallo, *J.*, in his concurring opinion, referring to the mortgagee clause, said:

"Although the clause might be construed so as to exempt the mortgagees from the consequences only of acts of the owners done after the making of the agreement, I do not think, in view of its apparent purpose, that any such distinction was intended."

One of our foremost writers¹⁷ on the law of insurance holds that the mortgagee clause, making the mortgagee the payee and stipulating that the insurance should not be invalidated by the mortgagor's acts, constitutes an independent contract between mortgagee and insurer, and in such case, the subject matter of insurance is the mortgagee's insurable interest, and not the real estate; and the risk will not be avoided by any acts of the mortgagor, whether done prior or subsequent to, or at the time of the issuance of the policy.

The decision of the Court of Appeals is founded not only on good law but sound reason. If it were not for the holding in the instant case, what safeguards would a mortgagee have, if unknown to him, a policy covering his interest could be avoided by an insurer for misrepresentations or concealments by an owner? Surely, it cannot be said that a mortgagee is under obligation constantly to follow the acts of an owner so as to inform himself and the insurer of any breach by an owner of his warranties or representations in the policy between him and an insurer. Under a mortgagee clause, the contract is primarily between a mortgagee and an insurer, and acts of an owner should not be allowed to vitiate or interfere with such a contract.

HELEN L. BROTMAN.

WORKMEN'S COMPENSATION ACT—EMPLOYER'S LIABILITY TO CONTRIBUTION FOR SUBSEQUENT ACCIDENT.

The right of an employee to receive compensation from his employer depends upon whether the injury resulted from accident arising out of the employment. Frequently the accident results from

¹⁶ *Allen v. St. Paul Fire & Marine Insurance Co.*, 167 Minn. 146, 208 N. W. 816 (1926); *Hanover Fire Ins. Co., et al. v. Bohn*, 48 Neb. 743, 67 N. W. 774 (1896); *Federal Land Bank v. Globe & Rutgers Fire Insurance Co.*, 187 N. C. 97, 121 S. E. 37 (1924); *Fayetteville Building & Loan Assn. v. Mutual Fire Insurance Co.*, 105 W. Va. 147, 141 S. E. 634 (1928).

¹⁷ 2 JOYCE, INSURANCE (1918) §2795.