LEGAL DECISIONS IN INSURANCE CASES.

COMPILED BY

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Subrogation of Insurance Companies to the Rights of Mortgagee.

HOWES *vs.* THE DOMINION FIRE INSURANCE CO.
KLEIN *vs.* THE UNION FIRE INSURANCE CO.

It is, apparently, a common practice, both in this country and the United States, for Loan Companies to enter into arrangements with Insurance Companies of the following nature: The Loan Company undertakes, so far as it is in its power, to cause properties mortgaged to it to be insured in the Insurance Company under the covenant to insure as collateral security, commonly contained in mortgages.

The Insurance Company, in return for this, agrees to grant the Loan Company what are called "unconditional" policies, and to carry this out, a "subrogation" or "unconditional" clause is included in the policies taken out by or through the instrumentality of the Loan Companies. Such subrogation clauses are worded in some such way as follows:

"It is hereby agreed that this Insurance, as to the interest of the mort-
"gagees only therein, shall not be invalidated by any act or neglect of
"the mortgagor or owner of the property insured, nor by the occupa-
"tion of the premises for purposes more hazardous than are permitted
"by the terms of this policy. It is also agreed that whenever the Com-
"pany shall pay to the mortgagee any sum for the loss under this policy,
"and shall claim that, as to the mortgagor or owner, no liability there-
"fore existed, it shall at once, and to the extent of such payment, be
"legally subrogated to all the rights of the party to whom such
"payment shall be made under any and all securities made by
"such party for the payment of said debt; but such subrogation shall
"be in subordination to the claim of the said party for the balance of
"the debt so secured, with all the interest which may have accrued
"thereon to the date of such payment, and shall thereupon receive
"from the party to whom such payment shall be made an assignment
"and transfer of said debt with all securities held by said party for
"the payment thereof."

The right of the Insurance Companies to subrogation to the right of mortgagees, both when there is and when there is not such a subrogation clause in the policies of insurance, has come before the courts in the United States in several cases, and also before our own, though there appears to be little English authority forthcoming on the subject.

The most recent cases in which the matter has come up in our own Courts are the cases of *Howes vs. The Dominion Insurance Co.*, before Proudfoot, J., noted supra p. 264; and *Klein vs. The Union Insurance Co.*, before Ferguson, J., supra p. 344, neither of which are yet reported in the Ontario Reports.

It may be useful, in connection with these decisions, to state what appears to be the principles which govern the subject referring to such Canadian and American cases as seem most clearly to illustrate them.

The fundamental principle in relation to the subrogation of Insurance Companies appears to be as follows:—(1) Where the Insurance Company stands really in the position of a surety, by reason of the insurance being one merely of the interest of the mortgagee, there, there is always a right of subrogation in favor of the Insurance Company. Thus in *Excelsior Fire Insurance Company vs. Royal Insurance Company*, 55 N. Y. 343 (1873) it is laid down at p. 359:—

"It is settled that when a mortgagee or one in a like position towards
"property is insured thereon at his own expense, upon his own motion,
"and for his sole benefit, and a loss happens to it, the insurer, on
"making compensation, is entitled to an assignment of the rights of
"the insured. This is put upon the analogy of the situation of the
"insurer to that of a surety."

So, too, the same principle is illustrated by *Foster vs. Van Reed* in Appeal, 70 N. Y. 19 (1877), a case specially referredto and discussed by Proudfoot, J., in *Howes vs. Dominion Ins. Co.*, see also per Richards, C. J., in *Reesor vs. Provincial Insurance Company*, 33 U. C. R. 358; and also a number of American cases cited in an article in the American law Register, Vol. 18. p, 737.

(11). But where the Insurance Company does not stand thus in the position merely of a surety, but rather in that of a principal debtor, the insurance being on the property, and so enuring to the benefit of the mortgagor as well as of the mortgagee, there is no right of subrogation in favor of the Insurance Company, *unless a contract to that effect has been agreed to by the mortgagor himself.* Thus in *Waring vs. Loder*, 53 N. Y. 581; and in *Ulster County Savings Institution vs. Decker*, 18 S. C., N. Y. 515, the mortgagor had not consented to or ratified any such agreement, and therefore there was held to be no right of subrogation.

For the general rule is quite clear that the assignee of a mortgagee takes it subject to all equities affecting it in the hands of the mortgagee. *McPherson vs. Dougan*, 9 Gr. 258; *Elliott v. McConnell*, 21 Gr. 276; *Pressey vs. Trotter*, 26 Gr. 154; and it is manifest that, as against the mortgagee, the mortgagor, in the absence of special agreement, is entitled to have the amount paid by an Insurance Company to the mortgagee on a policy effected for his (the mortgagor's) benefit, credited to him on his mortgage, Wood on Insurance, Ed. 1878, sec. 471.

But in *Springfield Fire and Marine Insurance Company vs. Allen*, 18 S. C., N. Y. 389, and in *Klein vs. The Union Insurance Company*, supra p. 345, in which Ferguson, J., specially refers to *Springfield Fire & Marine Insurance Company vs. Allen* as a parallel case; as also, in *Springfield Fire and Marine Insurance Company vs. Brown*, 43 N. Y. 389; and it may be conjectured in *Westmacott vs. Hauley*, 22 Gr. 352, the policy contained a subrogation or unconditional cl use such as is set out above, and it was held that the mortgagor, being priv. to this agreement as to subrogation, *and having done that which avoided the policy as regards himself*, the Insurance Company were, on paying the mortgagee his loss, entitled to be subrogated.

In *Howes vs. The Dominion Insurance Company*, however, the mortgagor had done nothing to avoid the policy, which was a general insurance of the property, and not merely an insurance of the mortgagee's interest, and therefore he was held entitled to be allowed credit on the mortgage in the hands of the Insurance Company for the amount paid by them to the mortgagees on the policy.

For, under the subrogation clause, the Insurance Company is only to be subrogated to the rights of the mortgagees as to payment made on the policy when it can claim that, as to the mortgagor, no liability therefor existed; in other words, when the mortgagor has done something to avoid the policy and the Insurance Company has paid the mortgagee merely because the policy is unconditional as regards him.

Lastly seeing that so much depends, as regards subrogation, on whether the insurance is an insurance of the mortgagee's interest only or of the property generally, and therefore for the ultimate benefit of the mortgagor also, it is interesting to see that in *Howes vs. The Dominion Insurance Company*, Proudfoot, J., observes, *supra* 264, that the unconditional clause itself affords some evidence that an interest in the mortgagor was recognised by the contracting parties, and that the Insurance Company were not merely insuring the debt due the mortgagees.—*Canada Law Journal, November* 1st, 1882.

APPLICATIONS TO PARLIAMENT.

Application will be made to Parliament at its next session for the incorporation of the Federal Life Insurance Company of Ontario.

New Assurance Co.—A new life assurance company called the "Provident Life Assurance Society" is being formed, and will apply to the Quebec Local Legislature for a harter.

The Citizens Insurance Co. give notice of application to Parliament for an act reducing its present capital stock, such reduction to take effect upon the proportion thereof called in and paid up, and to appropriate a portion of the capital stock to the life department and for other purposes.