

3. Insurance in the name of the mortgagor.

Usually, when mortgaged property is insured, the insurance is effected in the name of the mortgagor, and a clause is inserted in the policy that the loss, if any, shall be payable to the mortgagee as his interest may appear. Under such a clause, it would seem that the mortgagee could give a good discharge for money paid to him only to the extent of his claim as mortgagee, and that as to any surplus the receipt of the mortgagor would be necessary, whereas if the words "as his interest may appear" are omitted, the mortgagee could give a good discharge as to the whole sum paid (n). In any case the mortgagee has an equitable lien upon the policy and its proceeds. (o)

Notwithstanding the insertion of the clause mentioned, the mortgagor is the person assured and may sue in his own name upon the policy (p). Furthermore, apart from a provision in the policy to the contrary (q), a subsequent breach by the mortgagor of any of the conditions of the policy, as, for instance, of a condition avoiding the policy in the event of the assignment of the property without the consent of the insurer, will avoid the policy as against both mortgagor and mortgagee (r).

Whether, in the case of a policy purporting to insure the mortgagor and containing a clause that the loss if any shall be payable to the mortgagee as his interest may appear, the mortgagee may sue in his own name without joining the mortgagor is a question which has been much discussed. The weight of authority in Ontario is in favour of the view that the mortgagee may maintain the action. As against the objection that the contract is between the insurer and the mortgagor and that the mortgagee being a stranger to the contract is not entitled to sue upon it, the clause in question being a mere direction and authority to the insurer to pay the mortgagee instead of the mortgagor (s), it has been held that the effect of the issue of the policy to the mortgagor with the loss, if any, payable to the mortgagee as his interest may appear is to create the relation of trustee and *cestui que trust* between the mortgagor and the mortgagee. The subject of the trust is the right to receive the money payable under the policy and to sue for it, and this right may be exercised by the mortgagee in his capacity as *cestui que trust*, at least to the extent of his interest (t). In some of the cases where the policies were not under seal, emphasis was laid on this fact, but it would seem that the absence of a seal would not assist a third party in an action upon a contract to which he was not a party, and that the presence of a seal would not disentitle the third party from suing if the effect of the contract was to constitute him a *cestui que trust* (u).

(n) *Mitchell v. City of London Assurance Co.*, 1888, 15 O.A.R. 262, at p. 279.

(o) *Chev. Traders Bank of Canada*, 1909, 10 O.L.R. 74.

(p) *Caldwell v. Stadacona Fire and Life Insurance Co.*, 1883, 11 Can. S.C.R. 212; cf. *McQueen v. Phoenix Mutual Fire Insurance Co.*, 1880, 4 Can. S.C.R. 600.

(q) As to the effect of a "mortgage clause" in a policy, see § 4, *infra*.

(r) *Livingstone v. Western Assurance Co.*, 1868, 14 Gr. 461, 16 Gr. 9; *Chisholm v. Provincial Insurance Co.*, 1869, 20 U.C.C.P. 11; *Mitchell v. City of London Assurance Co.*, 1883, 15 A.R. (Ont.) 262; *Haslem v. Equity Fire Insurance Co.*, 1904, 3 O.L.R. 246.

(s) See *Mitchell v. City of London Assurance Co.*, 1883, 15 A.R. (Ont.) 262, at p. 274.

(t) *Mitchell v. City of London Assurance Co.*, 1883, 15 A.R. (Ont.) 262, where the earlier authorities are discussed; *Haslem v. Equity Fire Insurance Co.*, 1904, 3 O.L.R. 246; *Laidlaw v. Hartford Fire Insurance Co.*, 1916, 10 A.L.R. 7, 29 D.L.R. 229.

(u) *Mitchell v. City of London Assurance Co.* was followed in *Agricultural Savings and Loan Co. v. Liverpool, etc., Insurance Co.*, 1901, 3 O.L.R. 127, reversed, without any decision as to the right of the mortgagee to sue in his own name, 33 Can. S.C.R. 94. It is pointed out in 3 O.L.R. at p. 136, that the policy though by deed was not a deed *inter partes* but a deed poll upon which anyone named in it might sue. In this case there was also a "mortgage clause," as to which, see § 4, *infra*.