

In the principal case the general holding is in accord with the weight of authority. The dictum in the case to the effect that had there been collusion between the insured and the agent, the former could not recover, can be reconciled with the above statute, although the court makes no mention of it, as the age provision in this case was probably such a condition as to take the case out of the statute.

CARL R. BULLOCK

SUIT BY MORTGAGEE, AFTER FORECLOSURE, ON A POLICY WITH THE USUAL MORTGAGE CLAUSE

The plaintiff was a mortgagee of real property which was insured by the mortgagor under a fire insurance policy which contained the New York standard mortgage clause stating that in case of loss payment was to be made to the mortgagee as its interest might appear and that this interest should not be invalidated by any act of foreclosure or other proceedings or notice of sale relating to the property. The house burned down and thereafter the plaintiff foreclosed and became the purchaser of the property under the mortgage. Subsequently, the plaintiff brought an action against the insurance company. Held: The mortgagee had no cause of action on the fire insurance policy. *Aetna Ins. Co. v. Baldwin County Building & Loan Ass'n.*, 163 So. 604 (Ala. 1935).

This case was tried on an agreed statement of facts and there was no showing that the plaintiff either had notice of the loss at the time it occurred, or at the time of the foreclosure sale. The attitude of the Alabama Court was that the plaintiff was not injured and that it had already received, through foreclosure, all that could ordinarily be expected from the mortgage transaction. However, if the value of the property in its present depreciated state is not equal to the amount of the mortgage debt plus the interest due thereon, the plaintiff is bound to suffer a loss. Such an injury is the very loss against which the defendant Insurance Company agreed to insure the mortgagee. *Perretta v. St. Paul F. & M. Ins. Co.*, 177 N.Y. Supp. 923, 188 A.D. 998 (1919); *Seccombe v. Glenn Falls Ins. Co.*, 45 Cal. App. 611, 188 Pac. 305 (1920). See, also, Couch on Insurance, Vol. 5, P. 4405.

A contract of insurance has been defined as, "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils." This is the definition set forth in *State ex rel. Sheets v. Pittsburgh, Cinn., Chicago, and St. Louis Ry.*, 68 Ohio St. 9, 67 N.E. 93 (1903); *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 37 (1922); and is substan-

tially the same as the statutory definition in the California Code Section 2527 which has been extensively copied in the codes of many other states. Since this is a contractual relationship, the recovery is made on the contractual agreement and the only concern of the court should be: Is the plaintiff a party who can recover on the contract and is the liability of the defendant established under the policy?

It is quite generally held that a fire insurance policy which includes therein the standard mortgage clause creates an independent contract of insurance for the separate protection and benefit of the mortgagee and under such a clause the mortgagee may maintain suit in its own name for the loss. *The Central Trust & Safe Deposit Co. v. Dubuque Fire & Marine Ins. Co.*, 1 Ohio App. 447 at p. 450, 112 N.E. 1081 (1913); *The Farmer's Nat'l. Bank v. The Delaware Ins. Co.*, 83 Ohio St. 309 at pp. 319 and 326, 94 N.E. 834 (1911); *Aetna Ins. Co. v. Willys Overland, Inc.*, (D.C. Ohio) 288 Fed. 916 (1922); *Gattavara v. General Ins. Co. of Am.*, 166 Wash. 691, 89 Pac. 2nd. 241 (1933). See also Vance on Insurance (2nd ed.) p. 658. Therefore it follows that the plaintiff, when it was mortgagee, could have recovered for the loss. Does it lose this position of vantage through the subsequent change of position from that of mortgagee to that of owner where the loss occurred after the purchase on foreclosure?

Whether or not a cause of action arose in favor of the plaintiff depends upon its relationship with the defendant insurance company at the time of loss, at which time the plaintiff was the mortgagee described in the insurance policy and as such entitled to recover according to its interest under the insurance contract. The liability of the insurance company becomes a present one when, by its provisions, the policy becomes payable, namely, at the time of the loss. *Aetna Ins. Co. v. The Stambough Thompson Co.*, 76 Ohio St. 138, 87 N.E. 173 (1907); *Gattavara v. General Ins. Co. of America*, 166 Wash. 691, 89 Pac. 2nd. 241 (1932). See also Ohio General Code, Section 9361. There is considerable authority holding that the mortgagee under a similar insurance clause who purchases at the foreclosure sale may recover on the policy as mortgagee for a loss which occurs after foreclosure but before the termination of the period of redemption. These cases hold that the interest of the mortgagee continues until the delivery of the deed. His interest is not merged or destroyed at the time of the loss, and damage before he acquired title is a direct damage to his interest as mortgagee, since it reduces the value of the property which, in case of non-payment, he may take in satisfaction of the mortgage debt. *Beverly Heights et al. v. The Continental Ins. Co.*, 92 N.E. 51, 101 Am. Dec.

500 (1883); *M. D. Reynolds v. London & Lancashire Fire Ins. Co.*, 129 Cal. 16, 60 Pac. 467 (1900). These cases stress the time at which the loss occurred as establishing the right of the insured and the liability of the insurer. The plaintiff in the present case is in an even more favorable position. The loss occurred at a time when there was no question about the plaintiff's status as a mortgagee and his interest as such was injured. Therefore, the plaintiff's right and the defendant's liability are established and any subsequent change of position between the plaintiff and the mortgagor, who is not here concerned, should not release the defendant from liability, nor preclude the plaintiff from suing on his cause of action.

The Alabama Court, in holding as it did above, is consistent with the majority of the Alabama cases which have any bearing on the present question. But in attempting to be consistent and to keep the plaintiff from recovering after foreclosure the court has lost sight of the real issue of the case, namely, that the liability of the insurer became fixed at a time when the insured could claim under the policy. Since the mortgagee may recover only its interest in the policy as such interest may appear, namely, to the extent of the deficiency judgment, the insurance company would lose nothing by the court's permitting this action.

EVA MAE PARKER

INTERPLEADER

LIMITATIONS ON STATUTORY INTERPLEADER

The plaintiff sued the defendant to recover a real estate commission based on a written contract. The defendant without answering moved for an order of interpleader under section 11265 Ohio G.C. The defendant alleges in his affidavit that a third party claims the commission for the same sale. The latter's claim is on an implied contract. The interpleader was denied because the contracts were not of the same nature and there might be liability on the part of the defendant to each of the claimants. *The William V. Ebersole Co. v. Julius Payton*, 31 O.N.P. (N.S.) 190 (1933).

Section 11265 of the Ohio General Code provides: "Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a *third party, without collusion* with him, *has or makes a claim* to the subject of the action, and that he is *ready to pay or dispose of it*, as the court directs, . . . shall be allowed to become defendant in the action, in lieu of the original defendant, who