A STUDY OF SOME OF THE RECENT DEVELOPMENTS AFFECTING INSURANCE *

The people of Canada, like those of the other Allied Nations and of the occupied countries, are studying with an almost pitiful eagerness what must be done to make the Post World War Number II World a better place in which to live. To-day two terms are on everybody's tongue—"Social Security" and "Social Insurance."

The Beveridge Report is entitled "Social Insurance and Allied Services"—a name that was inevitable having regard to the terms of reference under which it was made.

To undertake, with special reference to the inter-relation of the schemes, a survey of the existing National Schemes of Social Insurance and Allied Services, including workmen's compensation, and to make recommendations.

The "Report on Social Security for Canada", prepared by Dr. Marsh for the Advisory Committee on Reconstruction, makes its approach to social security "through social insurance methods."

Basically the "Social Insurance" envisaged by the Beveridge and Marsh reports is not insurance in the sense which insurance has, until comparatively recently, been understood and there is, therefore, a great deal of confusion in public thinking with reference to it.

As Marsh says:

The understanding of social insurance, however, is still confused because too much emphasis is placed on the second word and too little on the first word of the phrase. Social insurance brings in the resources of the state, i.e., the resources of the community as a whole, or in a particular case that part of the resources which may be garnered together through taxes or contributions. It does not mean, more particularly for phenomena subject to such variability as unemployment, that there must be a precise actuarial adjustment of premiums to risk in each individual case. The contributors who do not draw on the fund help to aid the unlucky one who suffer unemployment or some social casualty. Some social insurance provision may have to be frankly viewed as no more than the gathering together of a fund for a contingency whose total dimensions are uncertain, but whose appearance in some form or magnitude is certain. In any circumstances it is better than having no collective reserves at all, or leaving the burdens to be met by individuals in whatever way they can. Of course,

*An address to the Insurance Section of the Canadian Bar Association at its Annual Meeting at Winnipeg, August 25 - 27, 1943.
the more refinement that can be made, in the light of experience, between revenues required and current disbursements, the more systematic and economical for its particular task the social insurance fund becomes. The most important and serviceable of these devices is the provision, now written into all modern legislation, for careful annual review of the finances of the scheme, and their relation to current contribution and benefit rates. This is the real "actuarial" continuity in social insurance arrangements. The basic soundness of social insurance is that it is underwritten by the community as a whole. In the broadest sense, the question is one determining what, in relation to the national income, can or should be made available to deal with certain contingencies and liabilities; and, having decided the scale and quality of the provision by reference to what we can afford and what are justifiable standards for a civilian community, of raising the money and administering it for the purpose concerned.

The word "insurance" has come to have such a connotation of protection and security in the public mind that it is perhaps inevitable that over the last, comparatively, few years the principles of insurance should have been invoked as the best means to attain the "social security" which we all so ardently desire.

But now that another step is about to be taken by which a form of real State Insurance, which adjusted premiums to risks, is being abandoned in favour of something substantially different, it may be unfortunate that some word other than "Insurance" was not used.

"Insurance", as we have hitherto understood it, owed its invention and phenomenal development to the genius of the merchants, traders and explorers of the world. These men, all of individual courage, vision and initiative, early realized the advantage of pooling of risks so as to obtain for each individual the benefit of the average risk.

From the earliest days the underwriters of risks were, as says the first English Assurance Act (Statute of Assurance, 43 Eliz. Ch. 12), "in no small number," and this is even more so today when to the numerous individual "underwriters or syndicates of underwriters, operating on the plan known as 'Lloyds'" as our Insurance Acts put it, are added the shareholders or members of the large number of corporate bodies writing insurance.

Always the primary features of insurance have been the pooling of risks and an intelligent adjustment of premiums to risks. But this involves another principle, early stated and continuously re-stated, that the utmost good faith must be practiced both by insureds and insurers—because it was early realized that in the final event every dishonest claim had to be paid by the insuring public in higher rates and that honest
claims dishonestly evaded falsified the experience upon which premiums were based and in effect fell upon honest insurers and the public alike.

Even as far back as 1601, (43 Elizabeth), the reputation of underwriters stood high and the statute just referred to recited that

Such assurers have used to stand so justly and precisely on their credits as few or no controversies have arisen thereon . . .

And this might properly be recited in any statute today, considering the huge extent of the business and its world wide ramifications.

The problems presented by the Beveridge and Marsh Reports are almost staggering in their number and magnitude. The cost is stated in amounts so large that they impress even a generation which in the last three years has been dealing in figures almost to infinity. As to the cost, suffice it to say that while the scheme is contributory "this only means that citizens paying these contributions irrespective of their earnings will have to pay in addition as taxpayers according to capacity". I quote from an article by S. Murray in 48 Canadian Insurance (February 1943, p.20).

But two matters should be especially referred to. The first is Assumption C. The Beveridge Report makes three Assumptions, the third of which, (C), is:

Maintenance of employment that is to say, avoidance of mass unemployment. (p. 120, s. 301)

but Sir William also says "Discussion of the methods and conditions of satisfying Assumption C. . . . falls outside the scope of this report."

The importance of this reservation is so great that its implications should be brought home to lawyer and layman alike, and this is not being done. Before any plan of the magnitude of the Beveridge Plan can even be instituted with any hope of success the Governments of the world must solve the unemployment problem. But there is much more to it than that. They must solve the unemployment problem and at the same time carry out the pledges of the Atlantic Charter one of which is:

—to bring about the fullest collaboration between all nations in the economic field with the object of securing for all, improved labour standards, economic advancement and social security.
In effect, the plan is based upon a maintenance at present levels of national income in countries such as Canada, and at the same time aiding to feed and restore the stricken countries and to raise their living standards up to our own.

These objectives can only be achieved by an informed nation, made to realize that it must solve these preliminary problems before it can attain social security in this manner, and that its goal can not be attained by any system of insurance alone. Only by taxation nearly as heavy as that now imposed can the desired result be achieved and only a people fully informed of the magnitude of the sacrifices they must make, can carry out the plan. Whether they will is another matter. The Gallup poll of Canada shows that fewer people were willing in 1943 to pay a small part of their monthly incomes in order to secure medical and hospital care when needed than were willing in 1942. The results in 1942 and 1943 were respectively

<table>
<thead>
<tr>
<th></th>
<th>April 1942</th>
<th>May 1943</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willing</td>
<td>75%</td>
<td>69%</td>
</tr>
<tr>
<td>Unwilling</td>
<td>18%</td>
<td>16%</td>
</tr>
<tr>
<td>Undecided</td>
<td>7%</td>
<td>15%</td>
</tr>
</tbody>
</table>

The realities of the situation must be brought home to the citizens of Canada.

The second matter to be specially referred to is the Third Principle of the Report (p. 6, s. 9):

The Third Principle is that Social Security must be achieved by cooperation between the State and the individual. The State should offer security for service and contribution. The State in organizing security should not stifle incentive, opportunity, responsibility; in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family.

This principle must be read in the light of the proposals in the Report (a) to abolish workmen's compensation insurance; (b) to promote a system of funeral grants for everyone; (c) to abolish Approved Societies (those independent bodies which administer the present English National Health Insurance Scheme; to allow some Friendly Societies and Trade Unions to administer the new scheme but not any Insurance concern or body associated with it); (d) to abolish Industrial Life Insurance Companies and Societies. (See Murray, loc. cit. p. 13)

The limitations of a paper such as this will not permit me to discuss the reasons why the State should interfere as little
as possible with the existing system of writing insurance of all kinds, or to deal with the vexed subject of State Insurance. That can be the basis of a further study. But bearing in mind the words of the Third Principle, particularly the following:

In establishing a national minimum it (the State) should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family,

a few comments are in order.

It is only reasonable that all premiums paid by a man for insurance that forms part of his own individual “social security” programme should be deductible from his income before he pays income tax. For some years the province of Manitoba permitted such deductions up to a certain percentage of the income of the insured but as the need for revenue became greater the exemption was abolished. The Dominion Act gives some concessions in respect of a certain proportion of payments to superannuation or pension funds and since 1943 has made provision for offsetting against the compulsory savings portions of income taxes a proportionate part of the amounts paid for insurance and annuity premiums, or for superannuation and pension. There would seem to be no good reason why any such limitations should be put upon the amount so exempted. The question of taxation of money payable under insurance policies, I shall deal with later.

I have said enough, I believe, to justify the statement that the public will need, and is entitled to, all such assistance as can be given to it toward understanding just what Social Insurance involves. I believe that no body can be so qualified to help as this Section.

Let us look at those qualifications for a moment. The lawyer is trained to be his client’s adviser and his advocate. As the adviser better and better fulfils his duty, his services as advocate are less and less frequently required. But whether as adviser or advocate the lawyer is trained to know that facts are all important and that he must approach all his problems objectively, that is he must ascertain and face the realities of his problem and that spirit is all too rare to-day.

Each volume of the Cambridge Modern History has a title—the titles of the last two are “The Growth of Nationalities” and “The Latest Age”. When the volume dealing with our times comes to be written I suggest it should be called “The Dawn of Thought”.

The lawyers are trained to be his client’s adviser and his advocate. As the adviser better and better fulfils his duty, his services as advocate are less and less frequently required. But whether as adviser or advocate the lawyer is trained to know that facts are all important and that he must approach all his problems objectively, that is he must ascertain and face the realities of his problem and that spirit is all too rare to-day.

Each volume of the Cambridge Modern History has a title—the titles of the last two are “The Growth of Nationalities” and “The Latest Age”. When the volume dealing with our times comes to be written I suggest it should be called “The Dawn of Thought”.
The general education of the whole people has reached a stage in the Western world where its first dynamic results are becoming apparent in an attempt by the great mass of the people to think for themselves. In this fact the significance of which is not sufficiently appreciated lies the real hope of the future of the democratic countries and the continued movement towards a greater fulfillment of the democratic ideal. But the weaknesses of our educational system have been such that these same people are working without the historical background so essential to all intelligent and constructive thought and they have not been trained to think effectively. They are entitled to receive and deserve to have all the help possible. But they are not getting it just when they need it most. Not only are they being fed theories for facts, which is bad enough, but facts are too often being suppressed or distorted when their suppression or distortion is thought necessary to support a theory. At a time when the people are making a courageous and honest effort to think out their problems, appeals are being made from all sides to their emotions, to their passions, to their hates, to their fears, to their necessities and to their greed, but too seldom to their reason and intelligence.

In a group such as forms this Section no man could, even if he wished to do so, and here I do not believe he would, mis-state facts. His cross examination by his associates would be too severe for even the most brazen to face, and the ridicule of his professional brethren too great a punishment. There would, I have no doubt, almost always be substantial agreement on all matters of fact discussed in this Section and in case of doubt we all know where to find the evidence or authorities to settle any point of fact.

It has sometimes occurred to me that if our public men had before each session of Parliament to submit themselves to cross-examination before a judicial officer on the various economic doctrines they put forward and their knowledge of the various subjects with which they profess to deal, a great deal less public time would be wasted than is at present the case.

When it comes to the conclusions to be drawn from our factual data we are again fortunate. Generally speaking our members may be divided into two groups, those who in their practice are solicitors for insurance companies, and those who in practice act for insureds. This means that in any discussion in this Section the viewpoints of both insurer and insured are
clearly put forward for consideration and the few differences are intelligently discussed.

If I am correct in believing that this Section can perform a service to the public in presenting, year by year, reports on Social Insurance and kindred matters, which, in an objective and impartial manner, place before our fellow-citizens in language all can understand at least some of the things they need, and wish, to know, I feel that an attempt should be made to do so.

I suggest, then, that each year a member of the Section, taken in rotation from the various provinces, be requested to place before the Section a paper in which he deals with all insurance matters of general public importance, such as Social Insurance and that the paper in the form in which it receives the approval of the Section and the Association be published in pamphlet form for general distribution.

Further, I suggest that another member of the Section, to be chosen in the same way, prepare a paper along the lines of Mr. Agar's (19 Can. Bar Rev. 701) noting the more important insurance cases decided during the year and all changes in insurance statute law. It might be possible to arrange that the paper also be printed separately so that the members of the Association could gradually assemble a useful text-book on insurance law.

Mr. McLean is this year presenting a paper on changes in the statute law relating to Insurance. I shall conclude this paper by recording and commenting on certain decisions on insurance questions rendered since September 1941 which I think will be interesting and which I hope will be useful.

But before doing so I should like to draw attention to a very-well written and extremely significant article which appeared in the May number of the Canadian Bar Review (21 Can. Bar Rev. 369). It is from the pen of Dr. W. Friedmann of University College, London, and is entitled: "Social Security and Some Recent Developments in the Common Law." In some sense it ties together any consideration of Social Security and the Beveridge Report and any study of the changing attitude of judges "declaring" the common law as it comes to be applied to changing conditions in the social order. I quote only Dr. Friedmann's concluding paragraphs. He says:

By a variety of means, the common law has thus strengthened the responsibilities of those who, as manufacturers, employers, car owners, public utility providers, etc., are in a position to influence the lives and safety of their fellow citizens. It has not touched the rights of
private property and enterprise as such; any change that has occurred in this respect has been the work of the legislator, but it has given recognition to the evaluation of public opinion and current conceptions of society in balancing the use of these powers and rights by a growing number of legal duties to those affected by it.

In political terms, the effect of this change might be summarised by saying that the common law has moved from an ideology of unrestricted property right as the corollary of the early phase of capitalism—to an ideology of social reformism, as the corollary of a tamed and controlled capitalism.

It has therefore paved the way for a further development in which the numerous types of legal duties devised for social protection may be co-ordinated into a comprehensive system of social insurance, which would be administered by the State. That, indeed, is the suggestion of the Beveridge Report on “Social Insurance and Allied Services,” published in November, 1942.

The Report proposes the unification of social insurance under a Ministry of Social Security, including provision for industrial accidents and its extension to all persons in gainful occupations (including housewives) as well as to all causes of disablement—not only industrial accidents.

This means that for at least two important branches of the law of tort—general accidents caused by negligence, and industrial accidents in respect of which an employee has a common law claim against the employer—the question of alternative remedies arises. The regulation of the relations between common law remedies and social insurance is a matter of great complexity, and beyond the scope of this study. But we should realise that the proposed change would be one of a quantitative extension, systematisation and a change in administration rather than of principle. The common law of today has, to a large extent, absorbed and incorporated the ideal of social security.

I have not been able to decide to what extent I can agree with Dr. Friedmann. It is more important now than ever before that the line should be drawn between a judge “declaring” the law and a judge “making” the law. In the United States we have the phenomenon of judges being appointed to the highest court in the land apparently because it is known they will decide certain types of cases in a certain way. We have not had any thing like that in Canada and it is to be hoped we shall be spared it, no matter what party is in power. One of the great attributes of the common law is its flexibility: its capacity to apply principles to new states of fact and new conditions. But there has been a tendency towards judge-made law where the courts are doing or attempting to do what should be left to the Legislatures. For example, it has seemed to me that the British Columbia courts are making new laws in certain phases of the law of landlord and tenant. The Legislatures have never been slow to
change the law: even when it turns out that the change may not have been necessary or advisable. The result of the tendency to which Dr. Friedmann refers has been to make it increasingly difficult for lawyers to advise with any certainty what the law is likely to be declared to be, with no real compensating advantage to the general public.

II

The temptation to deal with a large number of cases in a paper such as this is great. There are many that call for analysis and critical comment. This paper is far too long but it may be useful after this meeting is over. I shall therefore deal with some matters as briefly as possible.


When the Ontario Appellate Division held in Cooper v. Toronto Casualty Insurance Co. (1928), 62 O.L.R. 311, that where a policy of fire insurance on a building contained the words “only while the premises are occupied as a private dwelling” the insured could not recover if the premises were vacant when a fire occurred because the words quoted were part of the description of the property insured, Middleton J. A. said (p. 313):

The case, it appears to me, calls for legislative interference. It is contrary to the policy of our statutes that an insurance company should be able to cut down a risk by a few words in inconspicuous type printed so that they are not likely to be observed.

As a result of these remarks what is now s. 106 (1) of the Ontario Insurance Act was amended in 1929 by adding:

... nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids such condition.

In Renshaw’s case these words came up for consideration. He had a policy with the defendant on a summer cottage and its contents, “while located and contained as described herein” (on a certain island) “and not elsewhere”. The cottage was removed to the mainland and the company’s agent after its removal informed Renshaw that he could not insure the cottage unless a foundation was put under it. Before this could be done the cottage was destroyed. It was held by Makins J. that the
plaintiff could not recover and he was sustained by the Court of Appeal. Robertson C. J. O. after referring to *Cooper v. Toronto Casualty Co.* said:

—to what extent the Legislature intended to adopt the suggestion of Mr. Justice Middleton, and what affective alteration was made in the previous law on which he had commented can be gathered only from the words that the Legislature used to express its intention.

It was contended for Renshaw that the words quoted "are inconsistent with and vary or modify statutory condition 7" (relating to changes material to the risk) "and are therefore ineffective by reason of the amended s. 106 (1)". The Chief Justice after considering the statute and authorities continued:

If it was not the intention of the Legislature, in amending what is now s. 106 (1) . . . . to prevent an insurer from defining the risk it assumed in terms which contain such a restriction as there is in this policy, the words are singularly inapt for the purpose. It is only by confusion as to the meaning and purpose of the description of the risk, on the one hand, and of statutory condition 7, on the other, that it can be considered that this description is inconsistent with, varies, modifies or avoids statutory condition 7. The statutory condition is applicable, and is applicable only, to the risk as described in the policy, whatever the description may be. In no sense does the statutory condition purport to enlarge or extend the risk beyond that described. That is not its purpose. (p. 232) In its amendment in 1929—the Legislature may have had some purpose not relevant to statutory condition No. 7, but whatever was sought to be accomplished by the amendment, there is not to be found in it, in my opinion, anything that prevents effect being given to the description of the risk in the policy in question according to its terms. (p. 233)


It is very gratifying to have such a clear cut and definite pronouncement on this subject, particularly so to me, because, when the amendment was being considered in 1929, I took the position that it should not be made and that the wording eventually selected would not accomplish what Middleton J. A. had in mind. But I do wish the Ontario Court had dealt with two decisions of the western courts dealing with the same amendment.
The first of these was a decision of the Saskatchewan Court of Appeal, Miller v. Portage la Prairie Mutual Insurance Co., [1936] 2 W.W.R. 104, 3 I.L.R. 377, [1936] 2 D.L.R. 787, affirming Bigelow J., [1935] 3 W.W.R. 332, 2 I.L.R. 704. In this case the policy covered a certain brick building "only while occupied as a restaurant." At the time the policy was issued the building was occupied by a tenant who was carrying on a restaurant business. The tenant moved out about December 11 and the building remained unoccupied until the end of January when the insured owner moved in and occupied the building as a residence. The building was partially destroyed by fire on March 18. It was held (1) that by reason of the 1929 amendment the statutory conditions over-rode "anything contained in the description of the subject matter of the insurance" but only so far as they were inconsistent with the description; (2) that statutory condition no. 5 which permitted the restaurant to be unoccupied for thirty days was to that extent inconsistent and to the extent must prevail; (3) that at the expiration of the thirty days the "condition describing the risk covered would then operate and unless the building were occupied as a restaurant the insurance would not attach"; (4) that occupation as a residence was not a compliance with the condition; (5) that the authorities which applied before the section was amended (Cooper v. Toronto Casualty Insurance Co. etc.) again applied and (6) that the plaintiff could not recover.

Gordon J. A., who wrote the judgment of the Court, uses the words "the condition describing the risk" but it is submitted that this is not correct. In Cooper v. Toronto Casualty the words were "only while the premises are occupied as a private dwelling." It was argued that these words were a "stipulation instead of a piece of description" but this was rejected. Similarly in the Miller case the words were entirely description and not "conditions". The statutory conditions, as has been so clearly pointed out in the Renshaw case, are applicable "only to the risk as described in the policy whatever the description may be". The Saskatchewan judgment seems to proceed on the basis that the Cooper case suggested the law should be changed, an Act was passed and therefore the law must be considered to be changed, a conclusion that in this instance at least, does not follow. It is confidently to be expected that the Appeal Courts of the provinces other than Saskatchewan will follow the Renshaw case.

The other case to which I referred is a decision of Fisher J. in British Columbia, McGettigan v. Guardian Assurance Co. Ltd.,
The words there were, "only while occupied as a private dwelling". The building was so occupied when the policy attached: it was subsequently vacant for more than thirty days but was again occupied as a private dwelling before and at the time of the fire. This latter fact distinguishes this case from the Miller case and the decision seems to be sound. But Fisher J. also assumed that the 1929 amendment made the earlier cases no longer applicable and referred to the Miller case with approbation.

It is to be hoped that the Supreme Court of Canada may have a chance to settle the law for all of Canada. The cases of Schmidt v. Home Insurance Co., [1934] 1 W.W.R. 187, 41 M.R. 537, [1934] 2 D.L.R. 78, and Heydon v. Wawanesa Mutual Insurance Co. (1938), 5 I.L.R. 239 (Ont.), do not assist in a consideration of this question. I mention them merely to show they have not been overlooked.

But this matter should not be left without a further word. I have already said I was of opinion no amendment was required. In my opinion every insurer should be left free to decide what risks he will underwrite and if he says "I will only insure dwelling houses while occupied as such: I do not wish to insure vacant houses with all the added risks" the Legislature has no moral right to say "But we say you must insure vacant houses whether you wish to or not". The Legislature has seen fit to prescribe the form of contract an insurer against loss or damage by fire must enter into and the uniformity and reasonable clarity thus obtained may be said to justify the enactment. But when the Legislature goes farther as it sometimes shows a tendency to do, and attempts to compel an insurer to assume a risk which experience shows to be bad underwriting, in my opinion it goes far beyond the function of Government in our kind of democracy.


In 1940 the insurance world in the Province of Quebec was excited and disturbed by a decision of Duclos J. in the case of (Dame) Larocque v. The Equitable Life Assurance Society of the United States (1940), 7 I.L.R. 255. The plaintiff was the beneficiary under a policy on her husband's life. She joined him in a joint transfer of the policy to the insurer as guarantee for a cash advance. A cheque for the proceeds of the loan made payable to her was endorsed by her and handed to her husband who deposited it to his own credit with his banker. The loan
was not repaid and the policy lapsed before the death of the insured. After his death his widow brought an action alleging that the loan was null because it was in contravention of s. 1301 of the Civil Code and that the policy was therefore in force at the time of her husband's death. Duclos J. decided in her favour and his decision was affirmed by the Court of King's Bench (In appeal) (1941), 71 Que. K.B. 798, 8 I.L.R. 250. As this decision applied to loans by all insurance companies doing business in Quebec, aggregating many millions of dollars, all of which would be void if the judgment were sustained, which would make it impossible for a husband to borrow on a policy in which the wife was named beneficiary, not only was the result of an appeal to the Supreme Court awaited with unusual interest but representations were made to the Provincial Legislature. The Supreme Court in March 1942 unanimously reversed the judgment below and dismissed the plaintiff's action, and in May 1942 by 6 Geo. VI, c. 64, The Husbands' and Parents' Life Insurance Act was amended as follows:

1. Section 4 of the Husbands' and Parents' Life Insurance Act (Revised Statutes, 1941, chapter 301) is amended by adding thereto the following paragraph:

"The policy may contain the privilege of obtaining from the insurer, at any time after the issue of the policy, advances or loans or the cash surrender value of the policy."

2. The said act is amended by inserting, after division x thereof, the following division comprising section 23a:

"DIVISION XA"

"Advances of loans and cash surrender"

"23a. The insured and the parties benefitted, including the wife of the insured, may jointly, at any time after the issue of the policy, obtain from the insurer advances or loans or the cash surrender value of the policy either under the conditions of the policy or by consent of the insurer."

3. The provisions enacted by the above sections shall have effect notwithstanding articles 1265 and 1301 of the Civil Code and shall have such effect as if they had been inserted in the act 61 Victoria, chapter 41, at the time of the passing thereof, but they shall not apply to cases decided in the first instance before the fifteenth day of December, 1941, nor with respect to costs only, to other actions instituted before the said date.

*Right of Insurer denying liability to be made a third party in any action in which the Insured is a Party—s. 205 (7) of Ontario Insurance Act: Lewis v. Pharand, [1942] O.R. 14, 9 I.L.R. 261.*
In 1935 the Provincial Insurance Acts were amended by adding (as s. 205 (7) in Ontario) the following:

Where an insurer denies liability under a Motor Vehicle Liability Policy it shall have the right upon application to the Court to be made a third party in the action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

In his 1941 address Mr. Agar said:

I am very definitely of the opinion that sub-section 7 of section 205 is not an adequate protection to an insurer who receives information establishing or indicating a defence under the policy.

That Mr. Agar's opinion was well founded was established by the decision in Lewis v. Pharand above referred to, a case in which his firm were solicitors for the insurance company. After the amendment was made to the statute it first came up for consideration before Middleton J. in Marshall v. Adamson, [1936] O.R. 103, 3 I.L.R. 159, [1936] 1 D.L.R. 635. As McTague J.A. points out, in the Lewis case, sub-section 7 presented quite a problem as regards practice and was a departure from the well-established former practice that only a defendent had the right to ask the Court to add a party. He said of the Marshall case that Middleton J.

....... took the position that in the circumstances of that case it was the duty of the Court by its procedure to give effect to the intention of the Legislature as determined from the wording of the sub-section. Accordingly he went to the pains and trouble of laying down the procedure he thought could be applied and even dealt in some detail with the terms of the Order.

The British Columbia Courts in McDermid v. Bowen, [1937] 1 W.W.R. 548, also dealt with the matter and worked out a form of Order. See also Obradovich v. Proulx (1940), 7 I.L.R. 144.

In the Lewis case an Order had been made by the Assistant Master which was set aside in great part by McFarland J., whose judgment was affirmed by the Court of Appeal. The Court distinguished the case of Marshall v. Adamson, McTague J. A. saying:

It must be kept in mind, however, that Marshall v. Adamson was a defended action; there was a defendant who was actually defending and there was a third party taking part in the action along with the defendant. It must also be kept in mind that one of the basic principles considered by Mr. Justice Middleton was that the plaintiff should be
in no way prejudiced by the Order which he made. He says so expressly at page 106 of the report. In this case the circumstances are quite different. The defendant has elected not to appear. Once that has happened the plaintiff has certain rights under the Rules of Practice and therefore to the Judicature Act. The effect of the learned Assistant Master’s Order is to abrogate those rights (note paragraph 8). I should think that the authority to abrogate those rights should be clear and unambiguous in the legislation before such an Order can properly be made. In addition to that the Order of the learned Assistant Master in reality gives the insurance company the right to defend in the name and place of the defendant—which is a far cry from giving it the right to participate as a third party, unless the term “third party” is to be construed as giving that right.

Although the reasoning of McTague J. A. is, as usual, very cogent it would seem that a very strong argument could be made that the Legislature having definitely shown what its intention was, the Court had inherent jurisdiction to work out a practice that would give effect to the sub-section. It would seem to me that, as the insurer was denying liability on the ground, in effect, that there was never any contract, it was in a position where its only right was that given by sub-section 7. In the Lewis case the merits of the insurer seem to be beyond question. Notwithstanding its right as against its insured to repudiate its contract, it was by the statute made liable to indemnify the innocent third party up to the limit set out in the statute. Surely the insurer should be permitted to contest the claim and, if unsuccessful in that, to hold the damages down to a proper amount. When consideration is given to the manner in which the courts are extending liability in negligence and in nuisance and in the other ways set out in Dr. Friedmann’s article already referred to, it would seem that there might be applied to this case the language of Lord Wright in Rose v. Ford quoted by Dr. Friedmann where Lord Wright refers to

. . . a tendency common in construing an Act which changes the law, that is to immunize and neutralize its operation by introducing notions taken from or inspired by the old law which the words of the Act were intended to abrogate and did abrogate. . . .


The matter dealt with in this case was said by Plaxton J. in what Chief Justice Robertson fittingly described as an “able” judgment, to be res nova in Canada.

M. insured his life and named his wife as beneficiary. He subsequently murdered her and after his conviction he made a
will by which he bequeathed his whole estate including all policies of insurance effected upon his life to his sister, Mrs. Deckert, the trust for the wife, the preferred beneficiary, having terminated on her death. It is plain, said Robertson C. J. O. (p. 475), "that to give effect to the disposition of the insurance moneys according to the terms of the assured's will, made while he awaited execution for the murder of his wife, would be to permit the increase of his estate as a result of his crime. And Kellock J. A. said (p. 476): "In my opinion public policy prohibits the enforcement of the contracts here in question, at the instance of the appellant as executrix or as beneficiary. The principle applicable is stated by Lord Atkin in Beresford v. Royal Insurance Co. Ltd., [1938] A. C. 586 at 599, [1938] 2 All E.R. 602 as follows':... the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime'."

The Beresford case was the case of the suicide of the insured. The policy contained the following provision.

If the life assured die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof.

It was held that "although the condition in the policy necessarily implied a positive undertaking by the company to pay if the assured died by his own hand, sane or insane, after the expiry of a year from the commencement of the insurance, it was contrary to public policy that either a person who had committed a crime or his personal representative should be allowed to benefit by that crime. In the circumstances the contract was unenforceable." ([1938] 2 All Eng. 602.) It was pointed out that an assignee for value before suicide might enforce a contract containing such a clause.

This decision caused a great deal of discussion and there was a demand for legislation to alter the rule of public policy. Life insurance contracts in Canada nearly all contained "suicide clauses" similar in effect to that in the Beresford policy, and life insurance had been bought and sold on the faith of the validity of such a clause, while premium rates had been calculated on an experience which allowed for a proportion of deaths by suicide.

The Superintendents of Insurance came to the conclusion "that the doctrine of public policy as applied in the Beresford case is not appropriate to the conditions obtaining in Canada to-day and should yield to the principle that contracts should
be upheld where no public interest is jeopardized. The enactment of new legislation to offset the O'Hearn case is a precedent which, your committee submits, should be followed here. It should be lawful beyond doubt for an insurance company to make contracts under which the insurance money is payable where the insured commits suicide". (1938 Proceedings: Superintendents of Insurance, pp. 108 sq.). The companies agreed (ibid. 290) and as a result the Insurance Acts of the various provinces were amended by adding the following provisions:

An agreement, express or implied, contained in a contract of life insurance for the payment of insurance money in the event that the insured commits suicide shall be lawful and enforceable.

The O'Hearn case, it will be remembered, decided that "an insured cannot maintain an action on a policy of insurance to indemnify him from the civil consequences of his own criminal act in driving an automobile while in a drunken condition as a result of which he ran down a pedestrian and injured him to such an extent that he subsequently died as a result of such injuries”. O'Hearn v. Yorkshire Insurance Co. (1921), 67 D.L.R. 735, 51 O.L.R. 130.

The new legislation that was enacted to offset this decision appears as s. 205 (3) (iii) of the Ontario Insurance Act:

No violation of the Criminal Code or of any law or statute of any province, state or country, by the owner or driver of the automobile shall prejudice the right of the person, entitled under sub-section 1, to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

This was the first step in altering public policy in insurance matters. It, however, only altered public policy to the extent necessary to protect an injured and innocent third party up to the statutory limits: it did not in any way relieve the insured.

The next step was the amendment following the Beresford case. It did not protect an assignee for value, he was already protected, as was most probably a beneficiary for value. It did protect a preferred beneficiary who would be in most cases the object of the insured’s bounty and it also enabled an ordinary beneficiary or the insured’s own estate to recover insurance money on the suicide of the insured if the policy contained a “suicide clause.”

Actually the companies had been paying for years on the basis of the clause and it was for that reason they favoured the
amendment which made legal something they had been doing illegally. This law is not likely to be changed but it is perhaps time to consider whether the old rules had not much to recommend them and should not be still retained.

Situations similar to that in the Deckert case are, and will continue to be, rare. It is to be hoped that no attempt will be made to alter a rule so salutary as that applied by the Ontario Courts.

If the legislatures go too far, is there not a possibility that at some not distant day it will be suggested that the man who has burned down his own house should be permitted to recover the insurance money on the ground that he wished to provide his family with a fully modern, streamlined, residence in which they would have more of the latest amenities of life?


These conflicting judgments by two judges of the same court (County of York, Ontario) in two cases arising out of the same set of facts again bring to the fore a matter which I believe can only be settled by legislation.

On the 30th January 1941 W. the plaintiff in both actions held a fire insurance policy for $2,000 on his furniture in the Urbaine Company. On that date he took out a “personal property floater” policy in the Scottish Union. At the time the agent for the Scottish Union advised W. that until the expiry of the Urbaine policy the Scottish Union policy would cover only the loss or damage in excess of $2,000 and the Scottish Union policy contained the following clause:

In consideration of a return premium of $4.15 this insurer as respects loss or damage caused by perils covered under policies listed below, shall be liable only for the amount of loss or damage, if any, in excess of the total face amount of such policies but in no event for an amount exceeding the differences between such total face amount and the amount which would otherwise be collectible hereunder.

The Urbaine policy was listed and the amount of the “return premium” was the full premium on the $2,000.00 fire policy for its un-expired term.

The Scottish Union had not “printed or stamped on the face of it in conspicuous type and in red ink” the words “This
policy contains a limitation of liability clause or clauses”: see s. 107 (2) of the Ontario Insurance Act (Fire Insurance: Part IV).

W. first sued the Urbaine Co., which paid into Court an amount intended to be the amount which the plaintiff could claim if the Scottish Union were “other insurance” within the meaning of statutory fire condition 8. It was held that (1) the Scottish Union policy was “other insurance”, (2) it was not co-insurance, (3) statutory condition 8 applied and (4) s. 107 (2) applied, and W. recovered only the amount paid into Court, with costs to date of payment in.

W. then sued the Scottish Union to recover the difference between the amount paid into Court in the first suit and his actual loss and also the costs paid by him in the first action. He was unsuccessful; the Court holding that the Scottish Union policy was excess insurance only and not “other insurance” within the meaning of statutory condition 8 and that W. was not entitled to contribution from the defendant. Barton Co. J. said:

As stated by Hudson J. in Republic Fire Insurance Co. v. Strong (1938), 5 I.L.R. 117 at p. 121: “It is a sound rule of construction that the first thing that should be done is to ascertain the real intention of the parties from a perusal of the whole contract, and then seek to give full effect to this intention, unless otherwise prevented by law.” The intention of the parties here, as disclosed by the contract was that until the loss amounted to $2,000.00 the only fire insurance in effect was the specific insurance carried by the Urbaine Company and this being so the Statutory Condition No. 8 did not apply.

In the second case, according to the report, it was “admitted that the policy is primarily a burglary policy but that loss or damage to the plaintiff’s furniture by fire is also included.”

It is submitted that the better opinion is that “excess” insurance is “other” insurance within statutory condition 8 or within similar clauses in policies to which statutory conditions do not apply. No authorities are referred to in the Wasser cases to indicate the line of argument. It was once suggested that such cases as Clarke v. Fidelity Phoenix Fire Insurance Co. of N.Y. (1925), 58 O.L.R. 148, and North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co. (1877), 5 Ch. D. 569, were cited to support the argument. These were cases of different persons (e.g., owner and mortgagee in the Clarke case) insuring in different companies two distinct and differing proprietary interests, though they were in the same subject matter. They cannot support an argument that “excess” insurance is not “other insurance”. The decision of the Supreme
Court of Canada in *Republic Fire Insurance Co. v. Strong* (supra) must be read in the light of its peculiar facts and the Quebec statutes. Statutory condition 9 (the "other insurance" condition) was properly varied in eleven floater policies by a co-insurance clause. The Republic Fire policy was the twelfth policy and an excess policy, the clause reading:

This policy does not attach to or become insurance upon property herein described, which at the time of any loss is otherwise insured until the liability of such other insurance has been exhausted, and shall then cover only such loss or damage as may exceed the amount due from such insurance (whether valid or not and whether collectible or not) after application of any contribution, co-insurance average or distribution or other clauses contained in policies of such other insurance affecting the amount collectible hereunder, not, however, exceeding the limits as set forth herein.

Without the "excess" policy the co-insurance clause had not been complied with and it was held that by reason of its terms it could not be reckoned with the other insurance in deciding whether the co-insurance provisions had been carried out.

The Statutory Committee on Fire Insurance Legislation of the Conference of Superintendents has had the matter under consideration for several years. In its report made in 1940 it said:

2. A decision will have to be arrived at as to whether or not excess insurance should be permitted. If it is permitted the onus should be on the excess insurer to notify all primary insurers of the excess on the penalty of having the excess insurance treated as concurrent.

4. If it is decided that excess insurance is not to be permitted in connection with fire insurance, then it should be made clear that the words "other insurance" apply to all insurance whether concurrent or "excess insurance." (1941 Proceedings—Superintendents p. 111 and see pp. 125 sq. and pp. 143 sq.)

It is to be hoped that a decision will be made shortly so that this vexed question may be settled. Let me suggest that those of you who are interested communicate your views to the Superintendents of Insurance. I know they will be glad of your help. Everyone should follow, and assist in, the excellent and valuable work done by the Superintendents at their Conferences. It is well-known to members of the Bar having insurance practices. They make a point of attending them whenever possible and of obtaining and studying the printed reports of their proceedings. But all solicitors should do the same. The Superintendents have the assistance of the various law officers of the different
provinces, of the officials of the insurance companies, and of the many lawyers and laymen who take part in their open meetings. The interests of the public are carefully and intelligently safeguarded and much care and deliberation is spent in the work of the Conference. Any lawyer who follows my suggestion will be repaid in many ways. It is now a truism to say that the well-read Canadian lawyer must have on his shelves, and must study the Canadian Bar Review and the Proceedings of the Canadian Bar Association, which include those of the Conference of Commissioners on Uniformity of Legislation. To these I would add the Proceedings of the Conference of the Superintendents of Insurance.


Many husbands who have made provision for their wives by taking out insurance policies on their own lives naming their wives as beneficiaries have, very wisely provided, as they are by law entitled to do, that on death the insurance moneys shall remain with the insurer at interest and, interest first being resorted to, shall be paid out to the wife in fixed monthly instalments. Others have sought to achieve the same result by appointing a trust company as trustee to receive, invest and disburse the insurance moneys and the income thereof and pay a monthly sum to their wives. That such a provision is a most desirable one for many reasons admits of no argument, but the practice is one that may have to be discontinued if the present policy of the taxing authorities is continued. Now some counsel consider that the only safe thing is to provide that the wife shall receive the insurance money in a lump sum and be left to invest it herself, inexperienced as she may be, or to use it up too quickly or to become the victim of the various harpies who prey on just such unprotected people.

Prior to 1940 the Income War Tax Act taxed

Income from but not the proceeds of life insurance policies paid upon the death of the person insured, or payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract. (s. 3 (1) (b)).

While this clause was said to be ambiguous it is submitted that it really was not so and in principle was entirely fair. No one could object to the income from the proceeds of an insurance
policy being taxed: but it is a valid objection that the proceeds of the policy, a capital sum, should be treated as income and taxed as such.

Let us take the case of a man who has managed to carry $30,000.00 worth of insurance and who desires his wife, a year younger, to have, on his death, an amount coming in that will enable her to live respectably for the balance of her life. He dies, say, at 65 years of age; she then is 64 and has an expectancy of life of, say, 12 years. He has provided by a declaration attached to his policy that the proceeds of his insurance shall be paid to a trust company as trustee for her, and invested, and the proceeds and interest thereon, interest first being resorted to, shall be paid to her in monthly instalments of $150.00 commencing one year after his death. If the trust company were to obtain an investment for the trust moneys that yielded a net 3\% and she were only to be given the interest she would get $900.00 a year—$75.00 a month. But her husband desires her to have more and has estimated that the fund will last during her life and pay her $150.00 a month. Up to 1940 she would pay income tax on such portion of the monthly payments as represented income but not on the portion that represented capital. Since 1940 the taxing power has attempted to make her pay tax on the whole amount received.

In that year the clause above quoted was repealed and there was substituted therefore a clause taxing:

Annuities or other annual payments received under the provisions of any contract, except as in this act otherwise provided. (s. 3 (1) (b)).

The exception is found in s. 5 (k) which provides for certain exemption of income under Dominion or Provincial Government annuities or those issued by companies entitled to effect like contracts, and for the purposes of the problem I am now considering may be disregarded.

The change in the Act was apparently made because of the decision of the Supreme Court of Canada in Shaw v. Minister of National Revenue, [1939] S.C.R. 338, [1939] 4 D.L.R. 81, reversing [1939] Ex. C.R. 35. S. took out a policy on his life payable to his wife on his death in monthly instalments for as long as she should live but with 10 years' payments guaranteed. It also contained an option to convert the proceeds into a single sum. On his death his wife chose to take the instalments, $700.00 a month. In 1934 she received 12 instalments totalling $8,400.00 and was assessed for income tax for that year on that
amount. It was held that the instalment payments were proceeds of an insurance contract and specifically exempt under s. 3 (1) (b).

Mr. Plaxton says in his 1941 Supplement (p. 8):

The ambiguous wording of the former s. 3, para. (b) occasioned considerable doubt as to the nature of the payments included in definition of "income" by that paragraph.

The following decision, handed down under the provisions of the former paragraphs contain some interesting passages. It was apparently due, in part, to this finding that the paragraph was changed.

He then refers to the Shaw case and continues:

The amendment was designed to render applicable under this Act the distinctions made by English decisions re annuities, and it is suggested that it may not be effective to bracket as income annual payments which clearly constitute a return of capital under the provisions of any contract—whether or not the payments are proceeds of an insurance contract (See Plaxton, pp. 25, 27, 40, 41).

But did the amendments have that effect? The first question that arises is: "Do the terms of new s. 3 (1) (b) apply to instalment payments made under ordinary insurance policies? In my opinion they do not. At the most it would seem that they apply to ordinary annuity contracts "where an income is purchased with a sum of money and the capital has gone and has ceased to exist the principal having been coverted into an annuity." See Foley v. Fletcher (1858), 3 H & N. 769.

If I have taken out a policy on my life for $30,000 and by it have provided that on my death the sum shall remain with the company or be paid to a trustee and out of the capital $200 a month be paid to my wife, surely it cannot be said that this constitutes an annuity. I am not purchasing an annuity. I think the Shaw case decided that. (See per Davis J. [1939] S.C.R. at p. 345.) Certainly my wife is not. The words "or other annual payments" must be read ejusdem generis. See per Thorson J. in the O'Connor case, and so would not touch the insurance moneys.

But suppose I had used a provision, which is fairly common, and provided that the insurance money be left with the company at interest and, interest first being resorted to, the principal and interest be paid to my wife at the rate of $200 per month. Would s. 3 (1) (b) apply? Strictly speaking I still think it would not, but I would not recommend the use of such a provision.

The section refers to "annuities or other annual payments received under the provisions of any contract". Does a preferred
beneficiary receive insurance moneys under the provisions of a contract? I think not. There is no contract between such a beneficiary and the company. The contract is between the insured and the company. The preferred beneficiary receives the insurance money under a trust.

If I am correct and s. 3 (1) (b) does not apply to such insurance moneys does s. 3 (1) (g) apply? This section was first added to the Act in 1938 without the proviso which was added in 1943 and reads:

(g) annuities or other annual payments under the provisions of any will or trust, irrespective of the date on which such will or trust become effective, and notwithstanding that the annuity or annual payments are in whole or in part paid out of capital funds of the estate or trust and whether the same is received in periods longer or shorter than one year.

Provided, however, that annuity payments or other annual payments received under the provisions of any will or trust which became effective prior to the 1st day of January, 1944, shall be exempt to the extent of the amount paid out of the corpus of the estate or trust but not exceeding fifteen hundred dollars in any year.

It was passed as the result of the decision of Angers J. in Toronto General Trusts Corporation v. Minister of National Revenue, [1936] Ex. C.R. 172. “In that case the testator by his will had provided:

12. I give and direct my Trustees to provide and pay to my wife, Sarah Whitney, an annuity of Twenty-five thousand dollars ($25,000) per annum during her life, payable quarterly in advance.

and the only question in controversy was whether the so-called annuity of $25,000 given by the testator to his wife was income within the purview of the Income War Tax Act.” (per Thorson J.)

Section 3 (1) (a) of the Act was the section involved. It reads:

The income from but not the value of property acquired by gift, bequest, devise or descent.

Angers J. “held that the annuity payable to Mrs. Whitney was a charge upon the whole estate, that it was not payable out of a settled fund, and, in effect, that it was excluded from liability for income tax by the terms of paragraph (a) of section 3, that ‘income’ shall include ‘the income from’ but that it shall not include ‘the value of’ property acquired by gift, bequest, devise or descent’.” (per Thorson J.)
It was s. 3 (1) (g) that Thorson J. had to consider in the O'Connor case. The testator left all his estate to National Trust Company Ltd. as executor and trustee upon certain trusts, one of which was, “to pay the following legacies out of the capital of my estate... to H., the sum of $1,000 on each 24th day of March and the 4th day of December after my death until her death or until she shall have received the total of $40,000, whichever event shall first occur.” There were many such legacies.

Thorson J. in a carefully reasoned and scholarly judgment held that the payments were not subject to income tax. He said:

In my view, the term ‘annuities or other annual payments received under the provisions of any will or trust’, as used in section 3(g) of the Income War Tax Act, does not include or extend to legacies payable exclusively out of the capital of an estate, even when such legacies are payable by instalments on specified dates annually, where the maximum amount which the legatee is to receive out of such capital is specified, such legacies being in such case the legatee’s share in the distribution or division of such capital and constituting property acquired by him by gift, bequest, devise or descent within the meaning of section 3(a) of the Act and as such not subject to income tax.

In view of the conclusion which I have reached it is not necessary to deal with the contention of counsel for the appellants that, if the payments in question are held to come within section 3(g) of the Income War Tax Act, the appellants are taxable only in respect of the annual profit or gain from such payments on the ground that paragraph (g) is merely a statement of one of the sources from which only the annual profit or gain is taxable income, nor with the very interesting argument of counsel for the respondent in reply thereto, with his historical exposition of the section and the French version of it, or his contention that the subject matter of the paragraph is all included as taxable income within the meaning of section 3 of the Act.

In my opinion the principles of the O'Connor case would apply to insurance trusts, but, to deal with the numerous points that arise would expand this paper almost to text-book size. I have offended too much already and shall leave the matter to be dealt with in the discussion which I hope may follow.

E. K. WILLIAMS.

Winnipeg.