INSURANCE LAW: 1923-1947

E. B. MacLATCHY
Fredericton

The most significant development in insurance law during the period under review has been an extension of benefits under insurance contracts to persons and classes of persons who are not parties to the contract. The period has also witnessed the popularization of multi peril policies. There has been a further deterioration in the Dominion position in the field of insurance jurisdiction. A considerable measure of uniformity of insurance legislation has been achieved in the common-law provinces.

Insurance is a conservative business without predilection for revolutionary changes. It is also closely interwoven into the fabric of our social and economic life and, as social relationships and economic conditions change, so must insurance inevitably keep pace.

An insurance transaction is essentially a contract. Law serves to regulate the making of such contracts and to interpret and enforce them and, in this capacity, should be adaptable to changing conditions. Where the common law falls short in this respect, statutory law is called in aid, for even the law should not stultify progress.

The Privity Rule[1]

The usual life insurance contract has always purported to confer a benefit on a stranger to the contract. This development in other classes of insurance, such as automobile, fire and aviation, is of more recent origin.

As the privity rule is a heritage from the English common law, it is of interest to note that at one time in England both common law and equity recognized exceptions to the rule. At law, with its peculiar genius for legal fictions, the exception was based on a close blood relationship, agency being implied from the relationship.[2] The earlier decisions, which had gained considerable recognition in the courts, were repudiated by *Tweddle* v. *Atkinson* in 1861.[3] Courts of equity implied a trust in favour of the third party.[4] This doctrine still persists, but its efficacy

[1] This problem is not encountered in Quebec since a right to "stipulate for the benefit of a third person" is given by article 1029 of the Civil Code.

[2] *Dutton* v. *Poole* (1677), 83 E.R. 523. This case received judicial approval as late as 1776 in *Martyn* v. *Hynd*, 98 E.R. 1174.

[3] 1 B. & S. 393.

[4] *Tomlinson* v. *Gill* (1756), 27 E.R. 221.

has been so impaired by recent decisions,[5] that it may be said that, in insurance contracts at least, it has no practical application. Since the *Vandepitte* case[6] it has been generally accepted that no relief from the rigorous enforcement of the privity rule can be afforded except by the legislature.[7] Rigid adherence to the rule is peculiar to common-law jurisdictions.[8]

Life Insurance

Since the earliest legislation in common-law jurisdictions[9] to confer benefits on third persons was in the field of life insurance, its experience in overcoming the strict application of the privity rule should be referred to first.

The Uniform Life Insurance Act, enacted in several provinces in 1924,[10] is a comprehensive code governing the rights and obligations of the parties to the contract and the rights of persons to whom benefits flow from the contract. It provides for a vested interest in the case of an assignee or beneficiary for value,[11] a statutory trust for "donee" preferred beneficiaries[12] and, since 1945, a right to recover in the case of the ordinary beneficiary.[13] The vested interest of the assignee and the trust for the preferred beneficiary were not new in the 1924 Uniform Act but were merely a codification of an orderly development of principles formulated many years before.

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[5] *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co. Ltd.*, [1915] A. C. 847.

[6] *Vandepitte* v. *Preferred Accident Insurance Corp.*, [1933] A.C. 70.

[7] (1933), 49 L.Q.R. 474. The author, speaking of the *Vandepitte* case, said: "It seems to amount to an admission that the law cannot adjust itself to the altered conditions and requirements of modern life without legislative assistance".

[8] Not applicable to Quebec, see footnote 1, *supra*. United States courts have enforced rights for "donee beneficiaries" without benefit of statute. In England, the Law Revision Committee appointed by the Lord Chancellor, in its Sixth Interim Report, said, "the common law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him". Later the Committee recommends "that where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision *in his own name* . . .", subject to certain limitations set out in the recommendation.

[9] A *jus quaesitum tertio* arising out of contract was recognized in Roman law and in the Code Napoléon.

[10] This Act, recommended by the Association of Superintendents of Insurance at its 1923 conference, was later enacted in identical terms in all common-law provinces. See footnote 113, *infra*.

[11] S. 152 (all section references are, unless otherwise indicated, to The Insurance Act (Ontario), R.S.O., 1937, c. 256).

[12] S. 156.

[13] S. 153 (2); amended in 1946, c. 42. This amendment was passed in all common-law provinces in 1945, except Ontario and Saskatchewan, where it was passed in 1946.

The statutory code of life insurance in Canada commenced in 1865 when the Husbands' and Parents' Life Insurance Act[14] of the Province of Canada affirmatively gave a right to a person to enter into a contract for the benefit of another. This Act provided by section 1 that a person could insure his life for the benefit of his wife or children, or any or all of them. By section 5 the insurance money[15] was to be payable at maturity according to the terms of the policy *"free from the claims of any creditor or creditors whomsoever"*. This provision was the forerunner of the modern statutory trust. It is evident that the legislature was in some doubt as to the legal position, aside from the statute, since section 6 was designed to preserve the existing rights at law and in equity, whatever they were. *Tweddle* v. *Atkinson*[16] had been decided four years earlier and may have inspired the 1865 Act from the common-law point of view. In Quebec the provision constituted an exception to the rule that consorts could not confer benefits upon each other inter vivos.[17]

Life insurance statutory law underwent many revisions before it emerged in the common-law provinces as the Uniform Act of 1924. It has had its own peculiar development, but, in the process, it has borrowed from the English law in creating the statutory trust for preferred beneficiaries and from American law in recognizing any rights in an ordinary beneficiary. In England prior to the Married Women's Property Act of 1870[18] rights in third persons could only be conferred by express trust.[19] Section 10 of this Act provided that a policy of insurance effected by a man on his own life and expressed to be payable to his wife or children, or any of them, created a trust in favour of any members of the class so named. By an amendment of 1882[20] this principle was applied also to policies effected by a wife on her own or her husband's life. The insured was given power to appoint a trustee by the policy itself or by "any memorandum

[14] 29 Vict., c. 17. Earlier legislation: The Friendly Societies Act (Imperial) (1850), 13 & 14 Vict., c. 115, s. 42, prohibited payment to any nominee other than a widow or child. An amendment in 1855 (18 & 19 Vict., c. 63, s. 31) authorized payment of not more than £50 to a nominee, limited to husband, wife, father, mother, child, brother, sister, nephew or niece. The amount so payable was increased to £100 in 1883.

[15] The term "insurance money" is rather meaningless but is now defined by s. 128 (12).

[16] *Supra*, footnote 3.

[17] Article 1265 of the Quebec Civil Code, enacted in 1866, read in part, "nor can the consorts in any manner confer benefits intervivos upon each other except in conformity with the provisions of the Act 29 Vict. c. 17".

[18] 33 & 34 Vict., c. 93.

[19] This is still the law in England today except in the limited class of cases referred to in the Act.

[20] 45 & 46 Vict., c. 93.

under his or her hand" and change such appointment from time to time.

In 1884 a new Act to secure to Wives and Children the Benefit of Life Insurance[21] was passed in Ontario and, while the right was confined to the husband and father,[22] it did contain the statutory trust provision[23] in language similar to the Married Women's Property Act and provided for changing the appointment within the restricted class of beneficiaries.[24]

In the United States case law has abrogated the privity rule sufficiently to give a third party a right to recover under the contract. The right is held to vest in the donee beneficiary[25] when he is appointed. This applies without distinction as between relatives and strangers.

Although the Uniform Act of 1924 contained detailed provisions as to the status and rights of preferred beneficiaries, it did not contain any provision conferring any rights on ordinary beneficiaries. It appears to have been assumed that ordinary beneficiaries, while not enjoying the protection of a trust, did have a right to recover the insurance money at the maturity of the contract.[26] Apparently this assumption was based on

[21] 47 Vict., c. 20. This Act was a revision of the 1865 Act and amendments of 1870 (c. 21) and 1873 (c. 19). Similar legislation was later enacted in all provinces except P.E.I. and Quebec.

[22] Preferred beneficiaries now include husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother and adopting parents (s. 151). Relationship by adoption was first recognized by an amendment of 1935, c. 29, brought into force in 1936.

[23] Under the English statute a trustee must be appointed. Under the Canadian statute the intervention of a trustee is not necessary.

[24] Quebec amended the 1865 Act in 1868, c. 39, and 1869, c. 21. In 1878 "An Act to Consolidate and Amend the Law to secure to Wives and Children the Benefit of Assurances on the lives of their Husbands and Parents" was passed (41-42 Vict., c. 13). The present Act, R.S.Q., 1941, c. 301, authorizes a married woman to insure her life for the benefit of her children but not for the benefit of her husband. The nomination may be revoked as to any or all of the "preferred beneficiaries" and re-apportioned to others of the preferred class (s. 12). The insurance money is exempt from claims of creditors of either insured or beneficiary (s. 30). Following *Laroque* v. *Equitable Life*, [1942] 2 D.L.R. 273, s. 23a was added expressly to authorize loans or payment of the cash surrender value to the insured and beneficiaries jointly (1942, c. 64).

[25] Under this doctrine the right to change a beneficiary must be reserved by the policy. Under Canadian law this right is given by statute, subject to the limitations in favour of assignees and beneficiaries for value and preferred beneficiaries.

[26] *Re Roddick* (1896), 27 O.R. 537; *Re McGregor* (1909), 10 W.L.R. 435; *Re Benjamin* (1926), 590 L.R. 392; *Re Thompson*, [1940] O.W.R. 546. *Contra*: *Re Mendelson* (1940), 10 M.P.R. 506. It was stated in the *Deckert* case that prior to the 1924 Act an ordinary beneficiary had a right to sue for the insurance money but that the statutory provision was omitted from the Uniform Act. Under the English law an ordinary beneficiary receiving the proceeds would do so as agent of the insured to receive the money and give a discharge. It is doubtful, therefore, if an ordinary beneficiary in Canada (except Quebec) could have retained the money as against the legal representatives of the insured.

American case law which recognized the rights of third persons. The judgment of Plaxton J. in *Deckert* v. *Prudential Insurance* Co.[27] cast grave doubt on this assumption, and once again where the assertion by a third person of a right under a contract was reviewed judicially the privity rule prevailed.

An amendment to the Uniform Act was recommended by the 1944 Conference of the Association of Superintendents of Insurance[28] and later enacted by all the common-law provinces.[29] Under this amendment an ordinary beneficiary may "enforce for his own benefit"[30] payment of the insurance money.

It should be noted that thus far, in contra-distinction to legislation later referred to, life insurance legislation to confer rights on third persons, who have not given consideration, does not purport to make such a third person a party to the contract.

Group Life Insurance

Group life insurance, a recent development, is growing rapidly in importance and volume. Insurance is made available to whole groups of persons, often running into several thousands, under one contract at lower rates due to savings in expenses.[31]

The interposition of another party in the transaction poses a problem not encountered in other life insurance contracts.

Under the more commonly known life insurance contracts three parties are involved; the insured insures his own life with the insurer and nominates a third person as beneficiary, the insured retaining control of the contract.[32] Under group insurance the insured (employer)[33] contracts with the insurer (insurance company) to insure the life insured (employee), the latter nominating a beneficiary. It is an essential in group life insurance that the employee have the right to nominate beneficiaries, the employer retaining control of the contract for other purposes. Thus the control vested in one person in non-group insurance must be split in the case of group insurance.

[27] [1943] 3 D.L.R. 747.

[28] Proceedings, 1944, p. 158.

[29] Alta., 1945, c. 56; B.C., 1945, c. 37; Man., 1945, c. 27; N.B., 1945, c. 28; N.S., 1945, c. 46; Ont., 1946, c. 42; P.E.I., 1945, c. 18; Sask., 1946, c. 26.

[30] "For his own benefit" inserted to negative any suggestion that an ordinary beneficiary would take as agent for the insured.

[31] *E.g.*, medical examination, this type of insurance is non-medical; premium collections, premium is paid by employer, employees' contributions are collected by payroll deduction; agency expenses.

[32] All rights of contractor including right to nominate and change beneficiaries.

[33] Group life insurance is not restricted by law to employer-employee relationship, but such a relationship does exist in a great preponderance of cases.

There has been surprisingly little litigation on this type of insurance in Canada.[34] Nevertheless, in view of the rather complicated situation, legislation defining the rights and obligations of the several parties involved was deemed desirable.[35]

Legislation was recommended by the Superintendent's Association at its 1947 Conference. Under the general provisions of the Uniform Act the right to nominate beneficiaries and control of the contract is vested in the insured.[36] By the proposed amendments, for the purpose of nominating beneficiaries, the employee[37] will be the insured while for other purposes the employer will be the insured.[38] Provision is made for the delivery of a certificate to the employee stating his rights and benefits under the contract. The beneficiary will have the rights of a beneficiary in an ordinary policy, including a direct right of action against the insurer.

Motor Vehicle Liability Insurance Policy[39]

The motor vehicle liability policy provides indemnity for unnamed persons, and persons whose identity is unascertainable,

[34] In *Re Harris*, [1939] 1 D.L.R. 495, Kelly J. repudiated a contention that there was no contract between the insurance company and the employee and held there was privity between them. In *Loscombe* v. *Metropolitan Life Insurance Co.*, [1943] 4 D.L.R. 709, Hope J. held that the group policy issued to the employer and the certificate issued to the employee thereunder together constitute the contract. *Re Lawton*, [1945] 4 D.L.R. 8, a succession duty case, held in effect that the employee's certificate conferred an enforceable right. The above appear to be the only reported cases outside of Quebec. The Quebec cases appear to accept the position that the employee is an "insured": *Dame Caron* v. *Dame Page-Tremblay* (1935), 73 C.S. 123; *L'Ecuyer* v. *L'Alliance Nationale* (1938), 76 C.S. 519; *Boris* v. *Sun Life Assurance Co.*, [1944] K.B. 537.

[35] A perplexing problem is what law governs the different rights and obligations. A proposed new section 128a provides that the law of the place where the contract is made shall apply as between insurer and employer. In determining the rights of employees and beneficiaries, the law of the place where the employee was resident at the time his life became insured shall apply.

[36] For further clarification it is proposed to amend s. 128(13) to read that "Insured" means the person who makes a contract with the insurer.

[37] Designated as the "life insured". By the proposed new s. 132a (2), "in the case of group life insurance the term 'insured' shall in the provisions of this Part relating to the designation or appointment of beneficiaries and the rights and status of beneficiaries, mean the person whose life is insured".

[38] It could be held, without straining the common law too much, that the employer effects an insurance contract as agent of the employee, the employer ratifying his act by applying for specific insurance under the contract. Consideration flowing from the employee to the insurer may be difficult to demonstrate in some circumstances and experience has dictated the danger of taking liberties with the common-law rules where third party rights are involved.

[39] There being no important differences in principle in the law relating to the insurance of property in automobile insurance and other property insurance, the following comment is confined to insurance of liability arising out of ownership or operation of a motor vehicle.

until the event giving rise to the claim occurs. By statute, any person incurring loss by reason of bodily injury, death or damage to property arising from the operation of an automobile, with respect to which such a policy has been issued, is given a direct right of action against the insurer.

These developments are due to direct intervention by the legislatures[40] as a result of new social and economic problems created by the advent of the motor vehicle. The financial resources of automobile owners being found to fall short of providing a dependable source of compensation for innocent victims of motor vehicle accidents, the above-mentioned devices were adopted for the purpose of providing a more dependable source of compensation. Being diametrically opposed to some of the most closely guarded precepts of the common law, the legislative plan received no assistance from the former. On the contrary it was necessary to nullify expressly some of the common-law rules in the most unambiguous language.

The first step, which was ancillary to the final objective, was the adoption of the present section 198,[41] providing for an omnibus clause in all motor vehicle liability policies. Section 198 first appeared in insurance law in the Uniform Automobile Insurance Act of 1932.[42] Subsection (1), adapted from the Highway Traffic Acts,[43] provides that every owner's policy shall

[40] This was one of the subjects of inquiry by Mr. Justice Hodgins when appointed a Commissioner by Ontario. In his interim report he made sweeping recommendations as to legislation which was later incorporated in the Highway Traffic Act amendments of 1930. See footnote 42, also an address by Mr. R. Leighton Foster, K.C. (then Superintendent of Insurance for Ontario), to the Canadian Bar Association, 1933 Proceedings, at p. 142.

[41] Uniform Automobile Insurance Act (Ontario), R.S.O., 1937, c. 256. A comparable section is included in acts of all other provinces except Quebec. In view of article 1029 C.C. there is no necessity for such a provision in Quebec. In a Quebec case based on a set of facts similar to the *Vandepitte* case, the Supreme Court of Canada came to the opposite conclusion from that case, upholding an omnibus clause in the policy: *Halle* v. *Canadian Indemnity Co.*, [1937] 3 D.L.R. 320.

[42] The Association of Superintendents, after consideration in 1930 and 1931, recommended the Uniform Draft Bill in December 1931: Proceedings, 1931, p. 25. This Act, which is still in force in all provinces (except Quebec) without substantial amendment, was enacted as follows: Alta., 1933, c. 57 (now R.S.A., 1942, c. 201, Part VII); B.C., 1932, c. 20 (now R.S.B.C., 1936, c. 132, Part VII); Man., 1932, c. 20 (now R.S.M., 1940, c. 103, Part VII); N.B., 1934, c. 21 (now 1937, c. 44, Part VII); N.S., 1932, c. 5; Ont., 1932, c. 25 (now R.S.O., 1937, c. 256, Part VI); P.E.I., 1933, c. 1 (now 1940, c. 33, Part VII); Sask., 1933, c. 22 (now R.S.S., 1940, c. 121, Part VI). There was similar legislation in some of the States of the United States; a model bill had been prepared and sponsored by the American Automobile Association.

[43] Similar provisions first appeared in the Highway Traffic Acts of Prince Edward Island, Manitoba and Ontario in 1930. Prince Edward Island, c. 1; Manitoba, c. 19; Ontario, c. 47. The Prince Edward Island and Manitoba provisions were limited to persons required to give proof of financial responsibility as a result of a conviction or an unsatisfied judgment.

insure the liability of the named insured and every other person who might use the automobile with his consent.[44]

Neither the judgment of the Supreme Court of Canada nor the Privy Council in the *Vandepitte* case[45] had been delivered when this Act was drawn, but it is clear the draftsmen had in mind the possible conflict with the common law when they added subsection (2).[46] It provides that a user of the designated automobile (with the named insured's consent) "shall be deemed to be a party to the contract and have given consideration therefor". This is a good illustration of the difficulties inherent in statutory provisions which run directly counter to the natural law.[47] The legislature was driven to the expedient of saying that black is white and white is black. The object of the section is to provide indemnity for all authorized users of the automobile in order to facilitate the larger scheme, compensation for innocent victims. This indirect approach seems cumbersome, particularly because there is ample precedent for a more direct approach to the problem. Life insurance provisions give a statutory right of action to the beneficiary and do not attempt to make him a party to the contract.[48] A comparable English provision[49] states that the insurer "shall be liable to indemnify the persons or classes of persons specified in the policy . . .". The named insured draws his rights from the contract but the authorized users, in the light of the *Vandepitte* case, can only draw theirs from statute.[50] The fiction of attempting to make a third person a party to the

As a result of a recommendation by Mr. Justice Hodgins, the Ontario provisions were extended to all motor vehicle liability policies. Similar provisions were enacted in other provinces: Alta., 1933, c. 48; B.C., 1932, c. 37; N.B., 1931, c. 23; N.S., 1932, c. 6; Sask., 1933, c. 67.

[44] Practically everyone but a thief. A New Zealand statute includes even a thief of the automobile. See Finlay on Third Party Contracts (1939), p. 106.

[45] *Vandepitte* v. *Preferred Accident Ins. Corp.*, [1932] S.C.R. 22, [1933] A.C. 70. This remarkable case has provoked a storm of controversy and criticism: 1933 Annual Survey of English Law, p. 120; 49 L.Q.R. 474; 33 Columbia Law Review 749. The policy issued to R. B. contained an omnibus clause not then required by statute. J. B., driving with R. B.'s consent, injured V, who secured a judgment against J. B. Action by V against insurer under section 24 of the Insurance Act of British Columbia was dismissed on appeal on ground that the omnibus clause did not operate to insure J. B. either on an agency or trustee basis.

[46] Subsection (2) was new in the Uniform Act of 1932.

[47] Common law in the wider sense.

[48] See the section, Life Insurance, *supra*.

[49] Road Traffic Act, 1930, 20 & 21 Geo. V, c. 43, s. 36(4). This provision was upheld in *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174, where the *Vandepitte* case was distinguished.

[50] The question whether section 198(1) is a direction to the insurer or a declaratory provision does not appear to have been raised in any reported case. Unless the insurance is provided by the statute and not by the policy, presumably the *Vandepitte* decision would apply.

contract appears to be unnecessary and likely to create its own difficulties.

Section 198 was not enacted by the legislatures out of solicitude for the welfare of authorized users of automobiles but to render the right of the innocent victim to compensation more effective. Section 205, which provides for a direct right of action against the insurer of the tortfeasor by the injured victim who has a judgment and makes the liability of the insurer to the victim absolute, first appeared in an insurance statute in Canada in the Uniform Automobile Insurance Act of 1932.[51] This remarkable section is not based on any recognized principle of law.[52] Its main concern is compensation to the victim[53] and contractual rights are completely discarded. It is difficult, therefore, to assimilate such a provision in a statute dealing with contracts. Social and economic problems are involved and the whole question as yet seems to lie more in the realm of policy than of law; it is agitating legislators everywhere.

One thing should be said for the provision, it works — when the operator of the motor vehicle is insured. It was based apparently on the assumption that most motor vehicle owners would insure, but, all too often, this is not the case. Since the object is compensation, a theoretical solution would be a state compensation fund, the state being subrogated to the rights of the injured person. There are several practical objections to such a plan however, one being that it would involve the state in endless litigation, often without the willing cooperation of the injured person.

Many devices have been resorted to, including compulsory insurance, impounding of the motor vehicle in the event of an accident and financial responsibility requirements.[54]

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[51] First enacted as Highway Traffic Act provisions, see footnote 43, *supra*.

[52] Section 25 of The Insurance Act, R.S.B.C., 1936, c. 133, contains a provision, first enacted in 1925 as s. 24, purporting to give an unsatisfied judgment creditor a right of action against the insurer of the liability of the tortfeasor, subject however to defences which the insurer would have as against the insured. A similar section was enacted in the Ontario Act of 1924 as section 85(1), repealed in 1930 and re-enacted in 1931, c. 49. The section applies to any liability, but was originally intended for motor vehicle cases (see 1929 Proceedings, Superintendents of Insurance, p. 145). Since enactment of s. 205 (Ont.), B.C. section 25 and the comparable Ontario section do not apply to automobile insurance.

The comparable English provision has been called a statutory subrogation. In view of the absolute liability provisions in the Uniform Act the right of the injured party to bring action against the insurer cannot be regarded as subrogation.

[53] The fact that in the original enactment in financial responsibility legislation an insurance policy was an alternative to a bond or cash deposit bears out this assertion.

[54] Recent Manitoba and Saskatchewan enactments will be referred to

Section 205 and every similar provision is based on the existence of a contract of insurance. Defences based on misrepresentation by the insured are taken away by subsection (3). The situation is more difficult, however, in cases where the misrepresentation was of such a nature as to prevent the making of a contract. *Bourgeois* v. *Prudential Insurance Co. Ltd.*[55] held that in such a case the injured person had no recourse under section 205. If the *Bourgeois* case was correctly decided, and it is difficult to disagree with it,[56] before a right of action can arise under section 205 there must be a motor vehicle liability policy. Since a policy is evidence of a contract,[57] there must be a contract before there is a policy. An amendment to section 205 has been recommended by the Association of Superintendents[58] for the purpose of nullifying the effect of the *Bourgeois* judgment. The purport of the amendment is that where an insurer has issued a document *as* a motor vehicle liability policy he cannot, as a defence to an action under section 205, deny that it is such a policy. Viewed as a principle of contract law this provision is difficult to justify.[59] Viewed as a compensation measure it is justifiable as carrying out the real intention of the legislature.

The question of whether the misrepresentation would merely give the insurer a right to avoid the contract or whether it renders a contract void ab initio is a nice legal distinction. In the first case the injured victim has a right of action under section 205, in the second case he has not. The victim and the general public cannot be blamed if they fail to appreciate the nicety of the

later. The only compulsory insurance provisions in force on this continent are in Massachusetts and Saskatchewan. Such provisions have been in force for many years in England, Australia and New Zealand.

[55] (1943), 18 M.P.R. 334. The applicant for the insurance was not the owner of the motor vehicle that was the subject matter of the insurance, although he falsely represented that he was. The court held that no contract had been entered into and, therefore, no indemnity was provided by a motor vehicle liability policy. The facts were on all fours with *Comer* v. *Bussell*, [1940] 1 D.L.R. 97; affirmed on appeal, [1940] 3 D.L.R. 417. In this case section 198 was relied on since the driver was not the person named in the policy as the insured. The court held that the policy was not an "owner's policy" within the meaning of clause (9) of section 183, which, in effect, was a finding that there was no policy at all. The Supreme Court of Canada upheld the Ontario Court of Appeal on this point.

[56] A Massachusetts court came to the opposite conclusion under a compulsory insurance law: *Fallon* v. *Mains*, 302 Mass. 166.

[57] S. 183(1).

[58] Proceedings, 1946, p. 139; enacted Alta., 1947, c. 59; B.C., 1947, c. 45; Man., 1947, c. 22; P.E.I., 1947, c. 19; Sask., 1947, c. 41.

[59] In the *Bourgeois* case there was a complete failure of consideration and the applicant for insurance was entitled to return of his premium. The effect of the amendment is to estop an insurer from denying that he has entered into a contract. This serves to illustrate the difficulty of dealing with the problem on a contractual basis.

point. As long as compensation is dependent on private contract, difficulties of this nature will doubtless continue to arise.[60]

Recent Manitoba and Saskatchewan Enactments[61]

By the 1945 amendments to the Manitoba Highway Traffic Act[62] any motor vehicle involved in an accident is impounded regardless of fault, unless the owner or driver can exhibit proof that he is insured by a motor vehicle liability policy or has furnished financial responsibility. This is a strong inducement to insure in advance of an accident, because after impoundment it may be difficult to obtain a release of the vehicle. The most unusual feature is the establishment of an unsatisfied judgment fund from which a person, having obtained judgment for over one hundred dollars for damages resulting from bodily injuries or death arising out of an automobile accident, may receive compensation if unable to satisfy the judgment from any other source.[63] The 1945 statute made no provision for the case where the victim was unable to obtain a judgment by reason of inability to identify the tortfeasor. A 1947 amendment[64] is designed to remedy this by permitting the injured party to take an action against the Registrar of Motor Vehicles as nominal defendant.[65]

The Automobile Accident Insurance Act, 1947,[66] of Saskatchewan provides for compulsory insurance with the Saskatchewan Government Insurance Office by every person registering an automobile or obtaining a driver's licence in Saskatchewan. By Part II every person is insured by statute against bodily injuries received as a result of driving, riding in or operating a motor vehicle or as a result of collision with or being struck down or run over by a moving motor vehicle in Saskatchewan.[67] The Saskatchewan plan is not based on liability, nor is it based on indemnity. Benefits[68] are payable if a person is injured as a result of any of the eventualities referred to in section 16, unless

[60] The question of limitation of action under statutory condition 9, which was raised in the *Bourgeois* case, is still outstanding.

[61] Space will permit only the briefest reference to these important provisions.

[62] 1945, c. 23.

[63] The judgment creditor must satisfy the court that he has exhausted his remedies against the judgment debtor, his insurer, if any, and any other tortfeasor responsible for his loss.

[64] 1947, c. 20.

[65] This may open the door to fraud. Presumably the Registrar, who is authorized to defend, will be on guard against perjury.

[66] 1947, c. 15; replacing 1946, c. 11.

[67] S. 16.

[68] The sums payable under Part II are called benefits, the scale of benefits being set out in the Act.

the injured person was in breach of the statutory condition.[69] The insurance is personal accident insurance by statute and no contract is involved. This plan is only possible when coupled with a government operated insurance plan.

Neither of these novel plans has been in operation long enough to permit an evaluation of its merits, but both will undoubtedly be observed closely by legislators throughout Canada.[70]

Other Third Party Contracts

The practice of entering into contracts purporting to provide benefits for or insure the property of third persons is becoming more prevalent in other classes of insurance.

The Personal Property Floater, an inland transportation contract, insures the property of members of the named insured's family. In this connection a recent British Columbia nisi prius case[71] is of great interest as an outstanding example of judicial resistance to the privity rule. The contract purported to insure the personal property of the named insured's wife and son, both being named in the application. Action was brought by the wife and son to recover a loss by fire. The court held both wife and son entitled to recover, distinguishing the *Vandepitte* case. This case was not appealed so far as is known.

Fire contracts often insure the property of members of the insured's family, guests and servants while on the premises.

The recent case of *Attorney General of Ontario* v. *Stevenson* is an illustration of an attempt by the operator of airplanes to insure passengers on the plane. The case was decided on the ground that the contract was never intended to cover the deceased persons, since they were not authorized passengers. Even in the case of authorized passengers further difficulties remain.[72]

The right to recover under any of these contracts is extremely doubtful, notwithstanding the *Spencer* case; yet if the insurer

[69] S. 27 enacts statutory conditions which contain several prohibitions, all concerned with operating a motor vehicle without a licence or negligent acts while driving, riding in or being pushed or pulled by a motor vehicle.

[70] P.E.I. provided for an unsatisfied judgment fund in 1945, c. 17. Ontario also provided for the establishment of such a fund in 1947, including provisions for hit and run accidents: An Act to amend The Highway Traffic Act, 1947. See also B.C., 1947, c. 62.

[71] *Spencer* v. *Continental Ins. Co.*, [1945] 4 D.L.R. 593.

[72] (1947), 14 I.L.R. 143. Ratification of the contract by the authorized passenger might help. In the case of persons who are not employees ratification would, presumably, have to precede the loss.

is receiving a premium for the coverage there should be a right to recover.[73]

The Law Revision Committee in Great Britain has recommended that "where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name".[74] The application of this recommendation to insurance contracts in Canada might well be considered.

Multi Peril Policies[75]

There is a marked trend in the insurance business towards the inclusion of insurance against two or more perils in one policy, or, to be more accurate, towards a more widespread use of such policies. Contracts insuring against loss from many perils, contained in one policy, have been in use since the earliest times,[76] but, until recently, they have been departmentalized.[77] The modern tendency is to break through departmental barriers and include many unrelated risks in one policy.[78]

The development of this practice conflicts with existing insurance statutory requirements,[79] some of them of long standing. There seems to be no efficient and convenient means of writing multi peril policies under existing statutory law. A decision will have to be made as to whether the law should be changed to permit the practice to develop in an orderly manner or whether the present law should be retained and the practice discouraged.

The mere fact that the use of the multi peril type of policy has increased to the point where a substantial proportion of the insurance written in Canada, despite hampering statutory provisions, is

[73] Presumably recovery could be made if the third person ratified before loss, or even after loss if the named insured had an insurable interest in the property. The latter proposition formed the basis of the *Spencer* decision, the court holding that the insured had an insurable interest in his son's personal property.

[74] Footnote 8, *supra*.

[75] A term applied to a modern type of contract insuring against many perils. Other policies, *e.g.* personal property floater, are called all risk policies.

[76] In marine insurance. More recent developments: life insurance policies often include accident and sickness insurance; the standard automobile policy includes insurance against fire, theft, property damage, marine and liability; fire insurance, by its supplemental contract, insures against such perils as windstorm, hail, explosion, riot, impact by aircraft or vehicles, and smoke.

[77] All the perils of the fire policy and supplemental contract cover at a fixed location (with minor exceptions). The automobile policy has been standardized by statute and covers with respect to one designated object.

[78] The personal property floater is a so-called all risk policy and insures against all risks not specifically excepted.

[79] *E.g.*, statutory conditions.

covered by such policies, is probably the best evidence that the multi peril policy has become a permanent feature in the insurance business of the country. Since the true function of insurance is to provide a means whereby such persons as wish to protect themselves against the financial shock of a catastrophe may do so, it follows that insurance must adjust itself to the changing habits and conditions of individuals and commerce. When a type of insurance contract cannot be adapted to meet new needs, a new type will be devised.

Statutory conditions are peculiar to Canadian insurance law. Conditions are at present provided for three major[80] and two minor[81] classes of insurance. All other classes are free of statutory conditions or detailed statutory control. Each set of statutory conditions being drawn to meet the requirements of a particular class of insurance, it necessarily follows that many of them are not applicable to other classes and to attempt to apply them would lead to an absurd situation.

The fire conditions afford probably the best example. Every comprehensive policy covering damage to property contains insurance against loss by fire. As a simple example, suppose that fire and theft are included. Many of the fire conditions do not apply to theft.[82] Statutory conditions do not exist for theft insurance. There are two alternatives: to leave the fire cover subject to the fire conditions and leave the theft cover free of control, or to make statutory conditions for theft and have two sets of conditions in the policy. Add several more classes to the policy and it is apparent that the statutory-conditions method is unworkable in multi peril policies.

One of the most serious features of the present situation is the uncertainty as to when statutory conditions apply and when they do not. Frequently this cannot be determined with any degree of certainty in advance. If the insurance against loss by fire is only *"incidental to some other class of insurance defined by or under this Act"*,[83] it is not a fire contract. Whether a cover against fire along with other perils is incidental to some other

[80] Fire, automobile, and accident and sickness. There are statutory provisions respecting life and marine, but they are not included in this discussion because different considerations apply to them.

[81] Livestock and weather.

[82] The condition of stoves and stove pipes (Stat. Con. 4) or the quantity of petroleum or gun powder kept on the premises. (Stat. Con. 5) can have no relation to theft insurance.

[83] Ontario Insurance Act, s. 1(23).

class of insurance is a question of fact which often can only be determined by a court.[84]

The Association of Superintendents of Insurance has had the problem under consideration for several years and has come to the conclusion that changing conditions require a revision of the statutory provisions respecting other than life insurance.[85] As a basis, an attempt has been made to find a natural division of insurance contracts in place of the twenty odd arbitrary and haphazard classifications now in use. The following division has been settled upon: property insurance, liability insurance, marine insurance, insurance of the person and suretyship.[86] The Association has gone on record as being favourable to regulations of a general character applying to all contracts coming within one of the proposed classes instead of regulation by detailed provisions based on a particular peril or subject matter of insurance.

Even if the Association's recommendations are implemented it does not follow that all the statutory conditions will be discarded. Some that are still useful could be enacted in revised form as substantive provisions. Prominent notice in the policy of conditions that avoid the contract or reduce the amount payable thereunder will be required.

Fire Insurance

In 1923 the Association of Superintendents of Insurance[87] recommended for enactment a Uniform Fire Insurance Act, which was subsequently enacted in eight provinces.[88] The Uniform Act made many changes in detail and phraseology but few in principle, being devoted mainly to a restatement and clarification of principles previously enunciated.

The fire statutory conditions have been for many years, and still are, the keystone of Canadian fire insurance law. A brief reference to their origin should, therefore, be of interest.

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[84] See *Staples* v. *Great American Ins. Co.*, [1941] 2 D.L.R. 1, where the fire insurance cover was held to be incidental in a marine insurance contract. See also *Regal Films Corp.* v. *Glens Falls Ins. Co.*, [1946] 3 D.L.R. 402, where the fire cover was held not to be incidental in an inland marine policy.

[85] See Proceedings, Association of Superintendents of Insurance, 1946, pp. 140 *et seq.* Report of Committee, discussion and resolution.

[86] The regulations made under the Dominion Insurance Acts define twenty-six classes of insurance, several of them with two or more sub-classes. Most of the provincial acts define twenty-three classes. Halsbury (2nd ed.), Vol. 18, p. 406, classifies insurance as (1) personal insurance, (2) property insurance, (3) liability insurance.

[87] 1927 Proceedings (conferences prior to 1927), Part II, p. 207.

[88] Ont., 1924, c. 50; Alta., 1926, c. 31; B.C., 1924, c. 25; Man., 1925, c. 29; N.B., 1931, c. 52; N.S., 1930, c. 7; P.E.I., 1933, c. 1; Sask., 1924-5, c. 20.

The first fire statutory conditions were enacted in Ontario in 1876[89] on the recommendation of a Commission appointed as a result of judicial criticism of the number and complicity of conditions contained in the policies of many fire insurance companies.[90] The Commission recommended twenty-one statutory conditions, which were enacted in the 1876 Act almost verbatim.[91]

These conditions were carried through the several revisions of the Ontario insurance statutory law prior to 1924 with no change in principle and very little change in wording. Similar conditions were also enacted in other provinces.[92] During discussions at Canadian Bar Association meetings preceding the adoption of the revised conditions, more emphasis was placed upon the right to vary the conditions than upon the conditions themselves.[93]

The 1876 Act and the revisions of it provided for variations upon notice in the policy in "conspicuous type" and "in ink of a different colour" (from the remainder of the policy),[94] but the variations were binding on the insured only if held by a court to be just and reasonable. An important change in this respect was effected by the Uniform Act, as finally adopted in all the common-law provinces,[95] by the substitution of the following provision for the former red ink clause:[96]

> Where the rate of premium is affected or modified by the user, condition, location, or maintenance of the insured property, the policy may contain a clause *not inconsistent with any statutory condition* setting forth any stipulation in respect of such user, condition, location, or maintenance,

[89] 38 Vict., c. 65. This is thought to be the first provision of its kind anywhere. New York approved its first standard policy in 1886: N.Y. Laws, 1886, c. 488, art. 3.

[90] *Smith* v. *Commercial Union Insurance Co.* (1872), 33 U.C.Q.B. 69, *per* Wilson J. at p. 89. Since the case itself was concerned entirely with technical points in pleadings, the remarks were obiter. The extraordinarily severe criticism was apparently the result of long experience with unbelievably onerous conditions.

[91] 38 Vict., c. 65, as amended by 39 Vict., c. 24. The conditions were included as a schedule to the Act. Clause (c) of the Commissioner's condition 10 (providing for a positive liability on the insurer) was separated from condition 10 (which otherwise contained exceptions to liability) and was enacted as condition 11. Thus there were twenty-two conditions in the original enactment.

[92] Man. (1888), R.S.M., 1892, c. 59; B.C., 1893, c. 12; N.S., 1899, c. 30; Sask., 1903, c. 16; N.B., 1913, c. 26; Alta., 1915, c. 8. Quebec enacted somewhat similar statutory conditions in 1908, 8 Ed. VII, c. 69. These have not been materially altered since.

[93] Proceedings, Canadian Bar Association, 1919, pp. 20 *et seq.* A new New York standard policy had been adopted in 1917, variations being prohibited although additions could be permitted by administrative approval.

[94] Later "ink of a different colour" was changed to "red ink" and this became known as the "red ink" clause.

[95] Footnote 88, *supra*. Provisions in the Quebec Insurance Act are similar to the 1876 (Ontario) provisions: R.S.Q., 1941, c. 299, s. 241.

[96] Co-insurance and limitation of liability clauses are permitted with "red ink" notice, s. 93 (Ont.) (1924).

> and such clause shall be binding on the insured *only in so far as it is held by the court* before which a question relating thereto is tried to be just and reasonable.

This provision can scarcely be said to contain a right of variation, since the clause must be "not inconsistent with any statutory condition".

Three noteworthy changes in the statutory conditions were incorporated in the Uniform Act. In statutory condition (1) the word "fraudulently" was inserted before the word "omits".[97] The Supreme Court of Canada[98] has since held that "fraudulently", as used in the statutory condition, means "actual fraud", with the result that the omission to communicate material facts must be with intent to deceive in order to invalidate the contract.

A new clause (d) was added to statutory condition (5) with the apparent intention of permitting thirty days consecutive vacancy. The Court of Appeal of Ontario held, however, in *Cooper* v. *Toronto Casualty Insurance Co.*[99] that the phrase "only while the premises are occupied as a private dwelling" in the insuring clause was descriptive of the risk undertaken and not a condition or a variation of a condition. Under such a clause the building ceased to be insured the day it ceased to be occupied as a private dwelling. As a result of the *Cooper* case, the Uniform Act was amended in all provinces where it was in force, by the addition of the following words to section 106(1) (Ontario)[100] and the comparable sections in the other provincial acts: "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 any such condition".

A new condition, No. 24 entitled "subrogation", requiring the insured to assign his right of recovery against a third person for the loss "to the extent that payment therefor is made by the insurer", was included in the Uniform Act. The effect of this condition is doubtful.[101] Apparently it was intended to place

[97] The condition now reads: "1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or *fraudulently* omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the representation or omission is made". The Uniformity Commissioners wanted the clause to read "fraudulently misrepresents or omits to communicate". Insurers objected to the use of the word "fraudulently" at all. The above compromise was arrived at.

[98] *Taylor* v. *London Assurance*, [1935] S.C.R. 422.

[99] [1928] 2 D.L.R. 1007.

[100] 1929, c. 53, s. 12.

[101] *Globe & Rutgers Fire Insurance Co.* v. *Trudell* (1926-27), 60 O.L.R. 227; *Royal Exchange Ins.* v. *Grimshaw* (1928), 62 O.L.R. 25. A right of action in tort is not assignable. Where a right under a contract has been satisfied there is no right to assign.

the right of the insurer to recover against a third person, when it has paid only part of the loss, ahead of the right of the insured. The condition really provides for assignment and not subrogation since the full benefit of subrogation cannot be conferred by assignment.

Practically all the conditions limit or qualify the liability of the insurer or impose a duty on the insured. They are, however, in substitution for the onerous conditions previously introduced into policies by over-cautious insurers, which were scored by Mr. Justice Wilson in *Smith* v. *Commercial Union*,[102] and the effect of them is to provide a minimum of liability on the insurer and a maximum of duty on the insured.[103]

The fire statutory conditions have served to remedy the situation they were intended to cure, but they have not kept pace with changing conditions and a revision of them is overdue. Some of them are outmoded,[104] and some are waived as a matter of course by endorsement.[105] Others still serve a useful purpose.[106] A revision of the fire statutory conditions is now merged in the more ambituous undertaking, a revision of all provisions relating to property insurance.

Uniformity

One of the most satisfactory developments in insurance law in Canada during the past twenty-five years is the degree of uniformity attained in the legislation of the eight common-law provinces.

Although ground had been broken before 1922, it is since that date that all our Uniform Insurance Acts, as we now know them, appeared on the statute books.

[102] *Supra*, footnote 90. Wilson J. felt that the conditions were designed to guard against the dishonest man but in the process the honest insurer suffered most. As stated by Professor E. W. Patterson of Columbia University recently, "the way to catch crooks is with policemen, not with printing presses".

[103] Conditions 2, 6 and 24 are exceptions to this.

[104] The words "while illuminating gas or vapour is generated by the insured . . . in the building insured . . ." were introduced in condition 5(6) in 1924. While this practice may have been prevalent in 1924 it is believed to have died out. The condition of the New York standard policy comparable to statutory condition 5 was omitted from the N.Y. standard policy of 1943.

[105] In the words of Professor Patterson, "The only beneficiary is the printing industry".

[106] The purpose of requiring the condition to be included in the policy no doubt was to give the insured an opportunity to read them. It is doubtful if any appreciable proportion of insureds have taken advantage of this opportunity. Many of the conditions would apparently serve as well in the substantive law.

About thirty years ago three different associations, all organized within a space of four years, adopted uniformity of insurance legislation as their primary task. It would be difficult to offer better evidence of the need for it.

A committee of the Canadian Bar Association presented a report on insurance law at its second meeting in 1916,[107] and further reports in 1918[108] and 1919.[109] The final report was referred to the Conference of Commissioners on Uniformity of Legislation in Canada, which had been established in 1918 at the suggestion of the Canadian Bar Association.

In 1914 the Superintendents of Insurance of the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba met in Calgary to consider a standardization of the Statutory Conditions relating to contracts of fire insurance.[110] In 1917 the Superintendents of the four western provinces and Ontario met in Winnipeg and organized an association under the name of "The Association of Provincial Superintendents of Insurance of the Dominion of Canada". This Association has met annually in conference since 1917.[111] Its primary objective is uniformity of insurance legislation and practice in Canada.

From 1919 to 1923 the Uniformity Commissioners and the Superintendents' Association collaborated on the drafting of a Uniform Fire Insurance Act[112] and a Uniform Life Insurance Act, final drafts being recommended in 1923. Both Acts were subsequently enacted in all the common-law provinces.[113]

The Superintendents' Association also recommended Uniform Accident and Sickness and Automobile Statutory Conditions in 1921.[114]

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[107] 1916 Proceedings, p. 242.

[108] 1918 Proceedings, p. 183.

[109] 1919 Proceedings, pp. 20, 153.

[110] The report states that "The Conference recommendation in this respect was enacted by each of the Legislatures of the Provinces represented at their next session": Minutes of Proceedings, Ass. of Supt. of Ins., 1927, Part II, p. 177.

[111] The name was changed to "Association of Superintendents of Insurance of the Provinces of Canada" in 1921. Other provinces joined the Association as follows: Quebec, 1921; Nova Scotia, 1932; New Brunswick, 1932; P.E.I., 1933.

[112] For a detailed history of this project see: Ontario Insurance Report, 1926 (business of 1925), p. 375.

[113] For Uniform Fire Insurance Act citations, see footnote 88, *supra*. Uniform Life Insurance Act, Ont., 1924, c. 50; Alta., 1926, c. 31; B.C., 1925, c. 20; Man., 1924, c. 35; N.B., 1924, c. 31; N.S., 1925, c. 2; P.E.I., 1933, c. 1; Sask., 1924, c. 12.

[114] Enacted: Ont., 1922, c. 61; Alta., 1926, c. 31; B.C., 1922, c. 34 and 25; Man., 1924, c. 33 and 34; Sask., 1923, c. 27; N.B.,R.S., 1927, c. 85; N.S., 1932, c. 5 and 1937, c. 8; P.E.I., 1933, c. 1.

In 1933 the Uniformity Commissioners formally relinquished the field of uniformity of insurance legislation to the Superintendents' Association.[115]

As a result of the efforts of the three Associations complete uniformity in contract provisions in the common-law provinces has now been accomplished in the following major classes of insurance: Life, Fire, Automobile, and Accident and Sickness.

In 1925, British Columbia enacted a Marine Insurance Act[116] and Nova Scotia passed a similar Act in 1941.[117] The 1942 Executive Session of the Superintendents' Association recommended for enactment in all provinces the codified Marine Insurance Act as enacted in British Columbia.[118] This Act has been passed in New Brunswick, Manitoba and Ontario.[119]

In an address at the first annual meeting of the Canadian Bar Association, the late Mr. Eugene Lafleur, K.C., said:

> The law of insurance in Canada presents an example of wasteful and unnecessary discordance. Every province has an insurance law of its own for the most part in the form of a statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities . . . How much better it would be for insurers and insured if we could standardize the policy conditions and have a Uniform Insurance Act adopted by all our Legislatures.

Mr. Lafleur's wish has been fulfilled in full measure in the common-law provinces.

There is no great degree of uniformity between Quebec and the common-law provinces. Although it is a very desirable objective, the different approach to legal problems, consequent on the adherence to different basic legal systems, renders complete uniformity very difficult of accomplishment. If the project of revision of insurance laws (other than life and marine) is proceeded with, it may serve as an opportunity to explore the possibilities of accomplishing some measure of uniformity with Quebec.

Constitutional Aspect

The litigation between the Dominion and provinces over jurisdiction in insurance matters, which commenced in 1921,[120]

[115] 1933 Proceedings, Canadian Bar Association, p. 236.
[116] 1925, c. 21.
[117] 1941, c. 7.
[118] Minutes of Conference, 1944; Resolutions of the 1942 Meeting, p. 146.
[119] N.B., 1943, c. 40; Man., 1945, c. 29; Ont., 1946, c. 51. Except for a few minor details the Marine Insurance Acts in all the above-mentioned provinces are the same as the Imperial Marine Insurance Act of 1906, c. 41.
[120] The reference as to sections 4 and 70 of The Insurance Act, 1910 (Dominion) was dated June 29th, 1910, but was not argued before the Supreme

continued in the period under review, culminating in three important references which reached the Judicial Committee of the Privy Council. As a result the Dominion lost further ground, to the point where it is doubtful if there is any more ground to be lost.

The *Reciprocal Insurance* case[121] marks the first of three attempts by the Dominion to find the elusive formula for "properly framed legislation", referred to in Viscount Haldane's now famous dictum in the 1916 Reference.[122] Following the 1916 decision, Parliament passed a new Insurance Act in 1917.[123] This last enactment declared it to be unlawful for companies and persons to transact the business of insurance in Canada without a licence from the Minister of Finance. It did not, however, purport to prohibit any person from doing such business without a licence. Provisions to enforce licensing requirements were enacted in the Criminal Code by an amendment passed at the same session of Parliament. It was there provided, by section 508C, that any person who transacted business or acted as agent for an insurer, not licensed by the Minister of Finance, was guilty of an indictable offence and liable to the penalties set out in subsection (2).[124] Exceptions were made for provincial companies and several other classes.

Ontario had passed a Reciprocal Insurance Act in 1922,[125] which came in direct conflict with the 1917 Dominion provisions. The dispute reached the courts on a reference by the Lieutenant-Governor as to (1) the validity of the Ontario Act of 1922; (2) the validity of section 508C of the Criminal Code; (3) the difference (if any) in cases where the person effecting a reciprocal insurance contract was a non-resident British subject immigrating into Canada or an alien. On appeal from the Appellate Division of the Supreme Court of Ontario to the Judicial Committee,

Court of Canada until 1912 and the opinion of the Judicial Committee was not delivered until 1916. *Citizens* v. *Parsons* (1881), 7 App.Cas. 96, was a suit between private parties.

See also 31 Vict. (1868), c. 48, s. 24 (Canada), purporting to repeal legislation of New Brunswick (19 Vict., c. 45) and of the Province of Canada, 23 Vict., c. 33 and 26 Vict., c. 43.

[121] [1924] A.C. 337.

[122] [1916] 1 A.C. 588. In reply to the second question of the Reference, Viscount Haldane said: "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada by *properly framed legislation* to impose such a restriction. It appears to them that such a power is given by the words in sec. 91 which refer to the regulation of trade and commerce and to aliens". For an interesting account of the discussion before the Privy Council see V. Evan Gray, More on the Regulation of Insurance (1946), 24 Can. Bar Rev. 481, at pp. 485 *et seq.*

[123] Statutes of Canada, 1917, c. 29.

[124] Statutes of Canada, 1917, c. 26, s. 1.

[125] 1922 (Ontario), c. 62.

Duff J. (as he then was) delivered the opinion of the Board.[126] The validity of the Ontario Act was upheld. Section 508C was held to be not true criminal legislation but a colourable attempt by means of the Criminal Law to interfere with the business of insurance, a subject assigned exclusively to the Provinces. The results with respect to the third question, regarding aliens and immigration, were not so conclusive. The question was answered in the negative but with qualifications. Duff J. reiterated and endorsed Viscount Haldane's expression as to properly framed legislation without, however, giving any further assistance as to how such legislation should be framed.

In 1926 the Appellate Division of the Supreme Court of Ontario, by a majority judgment delivered by Masten J.A.,[127] held certain sections of The Ontario Insurance Act, 1924,[128] providing for automobile insurance statutory conditions, to be intra vires the Ontario legislature. At the same time they found sections of the Dominion Act of 1917, dealing with licences of British and foreign insurers and prescribing automobile statutory conditions as a condition of licence, to be ultra vires the Parliament of Canada. This decision was not appealed.

Dominion insurance legislation was again before the Privy Council in 1931.[129] This time the ancillary legislation was found in the Special War Revenue Act. The case came on appeal from a judgment of the Court of King's Bench of Quebec on a reference to that court by the Lieutenant-Governor-in-Council of Quebec. The enactments complained of were sections 11, 12, 65 and 66 of The Insurance Act, 1917 (Canada) and sections 16, 20 and 21 of the Special War Revenue Act.[130]

The Board held the provisions complained of in both the Insurance Act and the Special War Revenue Act ultra vires. This was the first serious test of legislation purporting to be alien legislation. Viscount Dunedin, referring to the first question, said:

> What has got to be considered is whether this is in a true sense of the word alien legislation and *that is what Lord Haldane meant by 'properly framed legislation'*.[131]

The italicized words were the first judicial interpretation of Lord Haldane's phrase since he uttered it. The distinction is drawn between *bona fide* legislation and *colourable* legislation.

[126] *Reciprocal Insurance* case, *supra*.
[127] *Re Insurance Contracts*, [1926] 2 D.L.R. 204; at p. 208.
[128] Statutes of Ontario, 1924, c. 50.
[129] *Re Insurance Act of Canada*, [1932] A.C. 45.
[130] R.S.C., 1927, c. 179.
[131] At p. 51 (italics are mine).

The Committee disposed of the taxation branch of the case by holding that the Dominion could not, through its powers of taxation, appropriate to itself a field of jurisdiction to which it was not otherwise entitled, any more effectively than it could accomplish that result by the purported exercise of its jurisdiction over criminal law.

As to a Dominion licence, Lord Dunedin said:

> But it has been already decided that this is not so; that a Dominion licence so far as authorizing transactions of insurance business in a province is concerned, is *an idle piece of paper* conferring no rights which the party transacting in accordance with provincial legislation has not already got, if he has complied with provincial requirements.[132]

Following the 1932 decision the Dominion completely reorganized its insurance legislation. In place of its 1917 Act as contained in chapter 101 of the Revised Statutes of 1927, it passed three Acts: The Department of Insurance Act,[133] which was concerned exclusively with the administration of the Department of Insurance; The Canadian and British Insurance Companies Act[134] and the Foreign Insurance Companies Act.[135] All provisions purporting to regulate insurance contracts were dropped from the two last mentioned Acts. Although of doubtful validity ever since *Citizens* v. *Parsons*,[136] these provisions had become more numerous in every revision of the Dominion Act. The two "Companies" Acts did, however, contain provisions for licensing, or rather for registration. In fact, the "registration" provisions reverted to the prohibitory character of the licensing provisions of the 1910 Act.[137] The distinction between a compulsory licence and a compulsory certificate of registration is difficult to appreciate. No doubt the intention was to escape the "idle piece of paper" doctrine laid down by Viscount Dunedin in the 1932 case.

In 1941 the Dominion again called upon the Special War Revenue Act[138] to aid the licensing (certificate of registry) provisions of the Insurance Act. Why this vehicle was chosen in spite of its rejection in 1932 is not clear.

The validity of section 16 of the Special War Revenue Act was referred to the Supreme Court of Canada by the Dominion.

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[132] At p. 52 (italics are mine).
[133] 1932, c. 45.
[134] 1932, c. 46.
[135] 1932, c. 47.
[136] *Supra.*
[137] Canadian and British Insurance Companies Act, 1932, c. 46, s. 121; renumbered s. 117 by 1934, c. 27. Foreign Insurance Companies Act, s. 4.
[138] S.C., 1932, c. 54, s. 1; as amended by 1940-41, c. 27, s. 4.

The Chief Justice, delivering the unanimous judgment of the court,[139] found that section 16 of the Special War Revenue Act was so related to the insurance legislation affecting British and Foreign Companies that, if the insurance legislation were invalid, section 16 must fall with it. The court then proceeded to examine the purport and intent of sections 116, 117 and 118 of the Canadian and British Insurance Companies Act and found them to be ultra vires. It followed as a natural consequence that the comparable sections of the Foreign Insurance Companies Act were also invalid. The Privy Council refused leave to appeal from the unanimous judgment of the Supreme Court.[140]

The principle is now established, beyond hope of successful contradiction, that the business of insurance in Canada consists of entering into contracts within a province and, as such, comes exclusively under the jurisdiction of the Provinces under the heading of property and civil rights; that the Dominion cannot, directly or indirectly, trespass on their jurisdiction by legislation calculated to interfere with such business. There is little doubt that legislation of a general character under any of the heads allotted to the Dominion under section 91 would not be held invalid on the ground that it did, incidentally, trench on the insurance business, provided such legislation is, bona fide, part of a wider scheme and not aimed at merely controlling or regulating the insurance business.

It is not the purpose of this article to discuss the relative merits of Dominion versus Provincial jurisdiction. Both sides have been well presented in the Canadian Bar Review.[141] The Sirois Report, so called, contains a recommendation for settlement of the conflict.[142] Briefly the Sirois Report calls for a clear-cut division allocating to the provinces the right to prescribe statutory conditions, to regulate the contract and to regulate agents, brokers and adjusters. It would also give exclusive jurisdiction to a province over companies incorporated by it and operating only in it. The licensing, taking deposits and financial supervision of all companies, other than purely provincial companies (companies operating in the province of incorporation only) would come under the exclusive jurisdiction of the Dominion. By this recommendation the Provinces are

[139] *Reference re Section 16 of Special War Revenue Act*, [1942] S.C.R. 429.

[140] [1943] 4 D.L.R. 657.

[141] Vincent C. MacDonald, The Regulation of Insurance in Canada (1946), 24 Can. Bar Rev. 257, and V. Evan Gray, More on the Regulation of Insurance (1946), 24 Can Bar Rev. 481.

[142] Report of the Royal Commission on Dominion-Provincial Relations.

asked to abandon all the ground won since *Citizens* v. *Parsons.*[143] All the Privy Council and Supreme Court decisions since then have been primarily concerned with the Dominion's jurisdiction to require British and foreign insurance companies to obtain a Dominion licence or registration as a condition precedent to transacting the business of insurance in a province.[144]

The Dominion has not amended its insurance legislation in any material respect since the 1942 decision. Assuming the absence of an agreement with the provinces, it is difficult to see which way it can turn unless it recognizes the *de facto* situation and puts its registration provisions for British and foreign insurers on a voluntary basis.[145] Such a move might help to clarify existing doubts as to the status of deposits made with the Dominion under statutory provisions which have been declared ultra vires.

Conclusion

Modern social and economic conditions have increased the necessity for insurance against catastrophic loss arising out of day-to-day activities. Their most marked effect, however, has been to accelerate a movement towards extending the potential benefits under insurance contracts to an ever-expanding "donee" beneficiary class to the point where the personal contract of insurance is being transformed into an instrument of quasi-public service, creating legal relationships not formerly known to law. It seems clear that such new relationships cannot be recognized under presently accepted principles of law and that the transformation can be accomplished only under legal conceptions developed by statute.

[143] *Supra.*

[144] There is no available record of the attitude of any provincial government toward the Sirois recommendations. Nova Scotia now requires Dominion registration as a condition of transacting the business of insurance in the Province. Manitoba has a somewhat similar provision with regard to life insurance. It may be inferred that the smaller provinces would accept a lesser degree of insurance jurisdiction than the larger provinces would be willing to accept.

[145] In somewhat the same manner as provincial insurers are registered by the Dominion.