Practice and Procedure in Fire Insurance Claims*

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The client who has suffered a fire loss may present his solicitor with a variety of problems. Many of them may have arisen *after* loss, some over compliance with statutory conditions on establishment of values and completion and delivery of proofs of loss, some with immediate duties like securing the property against further damage and the insurer his right of access, inspection and appraisement, and some with such ultimate questions as arbitration and subrogation. Again the problems may have arisen *before* the contract was completed, for example over misrepresentation or fraudulent concealment, co-insurance, description of the property and limitations of the risk, or they may have arisen *between* its effective date and the date of loss, in the form of changes material to the risk. Modern multi-peril policies may also pose, as a preliminary problem, the question whether in fact the contract is one of fire insurance.

There is no need for a solicitor to approach a fire policy as if it were a mysterious document, full of traps for the unwary. The standard fire policy, with its statutory conditions, is a reasonably simple document. It has remained substantially unchanged in form for about seventy-five years and most of the problems of interpretation which arise have been dealt with by the courts on many occasions. Most of these have their origin either in the insured's failure to observe the statutory conditions or in the application of the conditions to the particular facts.

As the term condition implies, statutory conditions limit or qualify the insurer's liability or impose a duty upon the insured. The Ontario Statutory Conditions, in effect since 1876, were the first statutory conditions adopted anywhere. Some amendments

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have been made to them from time to time but they continue in force substantially as first enacted. The public has had ample opportunity therefore of becoming familiar with them, though the public's acquaintance with them is perhaps best summed up by the comment that the principal beneficiary of the statutory conditions is the printing trade.

Preparation of Proof of Loss

Usually the first problem presented to the insured's solicitor is the preparation of the proof of loss.

Section 94 of The Insurance Act of Ontario requires the insurer to furnish proof of loss forms and makes it an offence not to do so; the default of the insurer, however, does not excuse the insured's failure to comply with condition 15 and to give notice of loss and furnish the specified declaration in proof of loss. Sometimes the insurer's proof of loss form asks for more information, or more detailed information, than condition 15 requires and it may be to the advantage of the insured's solicitor to waive section 94 and prepare his own proof. But if he does so he should follow with care the requirements and the exact wording of condition 15.

Condition 15(b) requires delivery of a particular account of the loss. This account should be prepared promptly, with care and after critical scrutiny by the insured's solicitor of his client's claim and records. Where the loss is to industrial or business plants the services of a public adjuster should be secured promptly. He will make a detailed survey of the loss; he will supply proof to support values, replacement cost and value of salvage. These are tasks for a person with special experience.

The next step is a critical comparison of the loss inventory with the client's books and records. If necessary an auditor should be consulted at this point. Under condition 15(d) the insurer is entitled to the production of all relevant records. The insurer examines these, usually with three objects in mind: (a) verification of the items alledged to have been lost or damaged; (b) their book valuations; and (c) generally, to show the insured's financial condition and whether he stands to profit by the fire. The alert solicitor and his auditor will have examined the client's records before completing proof of loss forms.

Delivery of Proof of Loss

Prompt completion and delivery of proof of loss is essential. The insurer is allowed sixty days after completion of proof in

which to pay and the longer proof is delayed the longer the insured must wait for his indemnity.

If there is undue delay another and more serious difficulty arises by reason of the combined operation of section 95 and condition 20. Condition 20 provides that every action against an insurer for the recovery of any claim is absolutely barred unless it is commenced within one year after the loss occurs; section 95 provides that no such action may be brought until the expiration of sixty days after proof of loss. If, for example, the loss occurs on January 1st and proof has not been delivered until November 15th, the insured will be on the horns of a dilemma. To comply with condition 20 he must commence his action on or before December 31st; at the same time section 95 prohibits him from commencing his action until January 15th of the next year, that is, after the expiry of sixty days from delivery of his proof.

Is there any relief from loss of insurance in these circumstances? The insured may have recourse to section 109, which provides that where there has been imperfect compliance with a statutory condition as to proof of loss and consequent forfeiture of the insurance the court may relieve against the forfeiture. Whether or not section 109 would provide a remedy is uncertain; the insurer may well contend that in these circumstances the forfeiture was not a "consequence" of imperfect compliance with condition 15. In one case, I had two writs issued, one before December 31st and the other after January 10th. The actions were consolidated and settled before trial so that the application of section 109 was not determined. Later a decision of the Supreme Court of Canada was found which appears to solve the problem in favour of the insured.[1] Here the fire occurred in Saskatchewan on April 2nd, 1915, and proofs of loss were not furnished until February 29th, 1916. The applicable conditions were not unlike those found in the Ontario Act. The trial court exercised its statutory power and excused the delay in filing proof. A majority of the Supreme Court took the view that when the trial judge granted relief the effect was to put the insured in the same position for all purposes as if the proof had been furnished in time. Accordingly, the sixty-day period for payment should be deemed to have expired before the writ was issued.

There may be other grounds of alleged forfeiture in addition

[1] *Shepard and The Merchants Bank* v. *British Dom. Ins. Co.* (1919), 58 S.C.R. 551.

to those dealt with in section 109. Section 18 of The Judicature Act enacts that the court shall have power on terms to relieve against all penalties and forfeitures, but in *Johnston* v. *Dom. of Can. Ins. Co.*[2] the Ontario Court of Appeal expressed the opinion that section 18 did not give the court jurisdiction to relieve against the consequences of failure to give "immediate notice" under an accident policy. The reasons given for this judgment may not discourage some solicitor from relying on section 18, if necessity demands it.

As a rule the courts require strict compliance with the conditions as to proof. The circumstances may show, however, that the conditions have been waived by the insurer and he cannot rely on default if liability has first been denied on some other ground.

The duty of the insured's solicitor to make critical examination of the evidence submitted in support of proof has been emphasized, not because the solicitor should necessarily suspect fraud, but because it is his duty to detect and correct errors. Conditions 16 vitiates the claim for fraud in relation to proof of loss. There may be circumstances where suspicion arises. If there are the solicitor must make critical inquiry into the insured's financial position. Did he stand to gain by the fire? Had he over-valued his assets? Did his books honestly support his claims? False items in the proof or excessive claims in respect of them may provide the necessary evidence of fraud. Where there are false items or excessive claims the insurer is likely to find them. The solicitor's best service to his client is to find them first.

A finding by the trial judge that the insured was guilty of gross exaggeration in his proof of loss has been held by the Ontario Court of Appeal to be consistent with mistaken judgment and not fraudulent.[3] In another case, where in the opinion of the trial judge the insured had grossly exaggerated the value of his loss, recovery was disallowed for property in respect of which the value was exaggerated.[4] On appeal the insured's action was dismissed for breach of vacancy condition and the proof of loss did not enter into the result.[5]

It is wise practice to regard the proof of loss as one step, and an important step, in preparation for trial. All possible sources of information touching both the occurrence and the

[2] (1908), 17 O.L.R. 462.
[3] *Renshaw* v. *Ocean Accident Ins. Co.* (1941), 8 I.L.R. 182.
[4] *Lambert* v. *Wawanesa*, [1944] O.W.N. 545, at p. 547.
[5] [1945] O.R. 105.

proof of loss should be explored in detail and promptly, before there is any change in the physical condition of the damaged property. Interviews, observations and other evidence should be recorded. Thus the solicitor qualifies himself, not only to prepare an accurate and sufficient proof of loss, but later to present his client's claim to the court in an intelligible way.

Other Duties of the Insured after Loss

The delivery of proof is not the only duty after loss that is imposed on the insured. In addition condition 11 requires him to secure the insured property from further damage — to separate reasonably the damaged from the undamaged property and to notify the insurer of the separation. Condition 13 gives the insurer the right to access, inspection and appraisement, but declares that possession and control remain with the insured unless the insurer elects under condition 19 to make replacement. In fire insurance there is nothing corresponding to what is known in marine insurance as constructive total loss, nor is there any such thing as notice of abandonment to enable the insured to treat his loss as a total loss within the policy. Therefore the salvage is the insured's responsibility unless the insurer elects under condition 19 to make replacement. It is reasonable to assume that conditions 11 and 13 would be treated by the courts as conditions touching proof of loss, imperfect compliance with which would be excused in a proper case by the application of section 109.

Following logically after the statutory conditions on the amount of the loss and the circumstances of its occurrence come two conditions relevant to recovery of the amount: arbitration and subrogation.

Arbitration — Statutory Condition 17

The "differences" which under condition 17 "shall be submitted to arbitration" are only those that relate to value and amount of loss. Disputes over matters other than amount, such as disclosure of facts, coverage and breach of conditions, do not come within condition 17.

It has been held that this condition does not deprive the insurer of its right under condition 19 to replace.

Arbitration, it is often assumed, is a quick procedure and saves costs. The contrary is the fact. The taking of evidence by arbitration proceeds informally and leisurely; it usually takes as many days as the same inquiry in court would take hours.

Subrogation — Statutory Condition 24

Subrogation may present another problem to the solicitor. Where the loss was caused by some wrongdoer, are the rights of recovery enforcible by the insured or by the insurer? All condition 24 says is that an insurer may demand an assignment of the right of recovery from the wrongdoer to the extent that payment is made by the insurer.

The doctrine of subrogation arose in equity and was applied by the common-law courts to cases of insurance, but limited to cases where the contract was one of indemnity. The doctrine, as applied, is that the insurer, upon paying the insured the full amount of his loss, is entitled to the benefit of all the insured's remedies against the person liable for the loss.

In *Globe & Rutgers* v. *Truedell* Hodgins J. A. said that condition 24 "adds nothing to the right of an insurer to be subrogated if he has paid the full amount of the loss. If it purports to assign pro tanto only a right to sue . . . if the claim is in tort, it may be found to convey nothing."[6] This may be the right view. Those who are interested in pursuing the opposite view may refer to the decision of the Privy Council in *King* v. *Victoria Ins. Co.*[7] If the extent and limits of the doctrine of subrogation is to be found outside condition 24, the inquirer will turn at once to the leading case of *Castellain* v. *Preston.*[8]

The following principles are clear. The right of subrogation does not arise in the insurer until the insurer has admitted liability and the insured has received complete indemnity for his loss. Where the amount of the loss exceeds the amount paid under the policy the insured is not deprived of his right to maintain the action against the wrongdoer. The doctrine was adopted to prevent the insured from recovering more than full indemnity — once from the insurer and again from the wrongdoer. Where the right of subrogation exists the insured may do nothing to prejudice it and, where the insured has in the result recovered more than full indemnity, he holds the excess in trust for the insurer.

In the automobile part of The Insurance Act the legislature has, by section 195, dealt with this subject in a way that has apparently been satisfactory to insurer and insured.

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[6] (1927), 60 O.L.R. 227, at p. 240.
[7] [1896] A.C. 250.
[8] (1883), 11 Q.B.D. 380.

Statutory Conditions Relevant to the Making of a Fire Insurance Contract and the Insurance of Special Risks

Although the first problem usually presented to the solicitor is the preparation of the proof of loss, all the conditions in the group so far dealt with impose duties upon the insured to be observed *after* the loss has occurred. Another group of conditions imposes duties to be observed by the insured *before* the contract is entered into. One of these duties is to make disclosures to the insurer of circumstances material to the risk. Another is to see that certain particularly hazardous risks are insured by specific agreement.

Before dealing with this group it should be made clear that every policy insuring against fire loss is not necessarily a fire policy to which the statutory conditions attach. In *Staples* v. *Great American Ins. Co.*, where the plaintiff's yacht was destroyed by fire and a claim was made under a policy in respect of fire and other perils, the Supreme Court of Canada held that the policy was not a fire policy within the definition of the Ontario Act but a marine policy.[9] In another case, *Regal Films* v. *Glen Falls Ins. Co.*, the risk insured was fire, including the extended coverages of lightning, windstorm, etc. The policy was entitled "Inland Marine Policy". It was held by the trial judge and affirmed by the Ontario Court of Appeal that this was a fire policy to which the statutory conditions did attach.[10]

What is a "fire loss"? "Fire" implies ignition but does not include a fire lighted in the ordinary course for domestic or other use whilst confined to proper limits.[11] In *Horn* v. *Poland* the insured hid money and jewellery in the fire-grate. Later, forgetting that she had done so, she lit a fire in the grate and lost both money and jewellery. It was held that the insured was entitled to recover on the ground that there had been ignition of the insured property, not intended to be ignited.[12] In *Morley* v. *Employers Liab. Assce. Co.* explosive heat within an engine caused damage to the insured automobile. It was held that there had been no ignition except where ignition was intended and no fire loss within the meaning of the policy.[13]

Automobile fire loss is usually dealt with under the Standard Automobile Policy and is then subject to the conditions appro-

[9] [1941] S.C.R. 213.
[10] [1946] O.R. 341.
[11] Welford on Fire Insurance (4th ed.), p. 1.
[12] [1941] 1 All E.R. 204.
[13] [1939] O.W.N. 204.

priate to that policy. By sections 102 and 103 of The Insurance Act, however, an automobile may be insured under a fire insurance policy, in which case the statutory conditions of a fire policy apply.

Policy provisions that are descriptive of the subject matter, for example "only when occupied as a private dwelling", have been discussed in many decided cases.[14] Many of these are no longer applicable by reason of an amendment to The Insurance Act made in 1920. This amendment now appears as the concluding words of section 106:

> nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with . . . any such [statutory] condition.

On the other hand, conditions of the insurer's liability are to be distinguished from properly expressed provisions that define or describe the risk assumed. The latter do not vary, or conflict with, the statutory conditions.[15]

The personal property floater is a "hybrid" covering fire, theft, mysterious disappearance and other risks. The draftsman seems to have assumed that it was an inland marine policy and that the statutory fire conditions did not attach to the fire risk. To me it seems preferable to treat it as a fire policy of which the statutory conditions are deemed a part, so far at least as a fire loss is concerned.

In one case a personal property floater policy and an unexpired fire policy ran concurrently when a fire loss occurred. The personal property floater policy was expressed to be "excess insurance only"; it was held to be contributory with the fire policy pursuant to statutory condition 8, upon the ground that the "excess only" provision was contrary to section 107(2).[16]

Statutory Condition 1

Misrepresentation or fraudulent concealment avoids the policy. Misrepresentation to be effective must be of a material circumstance. Where concealment is relied upon the insurer must show actual fraud.[17] The test of materiality is this: If the matters represented had been truly disclosed, would they, upon

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[14] *E.g.*, *Cooper* v. *Toronto Casualty Ins. Co.* (1928), 34 O.W.N. 92 (C.A.).
[15] *Palatine Ins. Co.* v. *Gregory*, [1926] A.C. 90; *Curtis & Harvey* v. *North British Ins. Co.*, [1921] A.C. 303.
[16] *Wasser* v. *Urbaine Fire Ins. Co.* (1942), 9 I.L.R. 304. For the contrary result see *Wasser* v. *Scottish Union Ins. Co.* (1942), 9 I.L.R. 302.
[17] *Salata* v. *Continental Ins. Co.*, [1948] O.W.N. 240 (C.A.).

a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to stipulate a higher premium?[18]

The recent decision of the Supreme Court in *Springfield Fire* v. *Maxim* deals with the position of an assignee of the policy which was obtained by misrepresentation on the part of the assignor.[19] The facts were that a husband, with the consent of the insurer, had transferred property to his wife. The court held that the wife's recovery on the policy was not barred by the husband's failure in the application to disclose previous fires. The court's view was that the wife was not a mere assignee of the policy, but a party to a new contract with the insurer, and therefore that she was not affected by the fraud of the husband.

The delivery of a fire policy without a written application is in my judgment an unjustifiable insurance practice; the satisfactory results of the written application in automobile insurance are proof of this conclusion. But the solicitor must deal with the practice as it exists. If there is no written application the solicitor will look for relevant correspondence and examine it. He will have the agent interviewed and if possible a detailed statement obtained from him. He will give particular attention to previous fire losses, cancellations of insurance, refusals to renew and any circumstances affecting the "moral risk" of the insured.

Statutory Condition 2

Condition 2 deems the policy delivered to be in accordance with the application, but only if the application is in writing, which it seldom is. Where it is found that the policy is not in accordance with the insured's application, oral or written, the solicitor will consider alternative remedies. If the agent is a recording agent of the insurer, a remedy may lie against the insurer for breach of contract on the ground that its agent failed to provide the precise coverage it agreed to provide. If, in the circumstances, the agent is the agent of the insured, there may be a remedy against the agent. In this case the first question to be asked is: Is the agent financially responsible? In other words can a judgment against him be collected?

Where an agent of the insured deals so negligently with the matter that the benefits of the insurance are lost, he is liable for the loss.[20] Where the agent gratuitously undertook to

[18] *Mutual Life Ins. Co.* v. *Ont. Metal Products*, [1925] A.C. at p. 351.
[19] [1946] S.C.R. 604.
[20] *Antiseptic Bedding Co.* v. *Gurofsky* (1915), 33 O.L.R. 319.

procure, and did procure, policies from American companies and the policies proved invalid, the agent was held not liable because it was not shown that he knew or ought to have known of the invalidity.[21]

Co-insurance

Fire policies frequently contain a co-insurance clause. In a policy without such a clause additional insurance is optional for the insured; in a policy with one, additional insurance is compulsory. Should the insured fail to provide the additional amount specified he becomes an insurer of his own property to the amount of his default.

Co-insurance is usually provided for by an endorsement on the policy, somewhat as follows:

> The insured shall maintain insurance concurrent in form, range and wording with this policy on each item of the property hereby insured to the extent of at least [80%] of the actual cash value thereof, and, failing to do so, the insured shall be a co-insurer to the extent of an amount sufficient to make the aggregate insurance equal to the specified percentage.

The object of the insurer in co-insurance is to reduce the amount of its liability for a fire loss to a ratable proportion, as provided in statutory condition 8. The advantage to the insured is a substantial reduction in premium. It is clear that a provision like the one quoted operates as a condition which, in case of loss, limits the insurer's liability. Such a condition is permitted by section 107 if the words, "This policy contains a co-insurance clause", are stamped in red ink on the policy.

Hypothetical figures will illustrate the operation of co-insurance:

Assumed value of property insured	$10,000
Principal sum insured with Company A, subject to 80% co-insurance clause	3,000
Amount of insurance placed by the insured with other companies	3,000
Amount of risk assumed by the insured himself as co-insurer, being the difference between the aggregate amount of insurance ($8,000) the insured agreed to maintain and the amount actually placed ($6,000)	2,000

Thus the insured, having agreed to maintain aggregate insurance to the extent of $8,000 and having failed to do so to the

[21] *Dimitroff* v. *Gonder* (1923), 53 O.L.R. 132.

extent of $2,000, must himself assume 2/8ths of the loss, and the liability of the other insurers is correspondingly reduced by 2/8ths.

One curious result follows. If the fire damage exceeds 80% (or other specified percentage) of the value, the co-insurance clause has no effect on the adjustment of a loss, whether it is complied with or not. The other insurers must pay in any event 6/8ths of the loss, which in this case will equal or exceed the principal sum of the policy.

Co-insurance has one inherent danger for the insured: he undertakes not only to place but to maintain insurance to the required percentage of the actual cash value at the time of the loss. In recent years there have been substantial and rapid increases in the values of premises and inventories. Actual value at the time of the loss may be greatly out of line with book values, or assumed values, at the time the insurance was placed. Thus an insured who has placed the required aggregate of insurance at the inception of the term may find himself in default at the date of the loss. The increase in value of inventory may itself create a default on the part of the insured to maintain the required aggregate insurance. Periodic appraisals of premises and plant, and stock-takings annually or at seasons when stocks fluctuate, are therefore to be recommended. It would be unwise to advise a mortgagee of any industrial or business plant to accept insurance policies that were subject to a co-insurance clause.

Statutory Conditions 3 to 7

A further group of statutory conditions, 3 to 7 inclusive, deals with limitations of coverage on property involving special risks. Some items are not on cover at all unless specifically described; others are on cover by special permission only and then to a limited extent.

Most of the conditions in this group have been dealt with in the decided cases and only two or three features of this restricted coverage will be discussed here. One of the risks excluded is loss of property owned by any person other than the insured, unless the interest of the insured is stated in the policy. This exclusion does not prevent a person with a limited interest insuring the whole property for the benefit of whom it may concern. If, however, a policy is issued to such a person and there is no mention in the policy of any intention to do more than insure his own interest, then the insured can recover only the value of his interest. Where therefore a fire policy was issued to one of

two partners and no mention was made of any intention on the part of the insured to insure more than his own half-interest, the insurers were held liable only for that interest. The insured partner's interest was not merely a half interest but was a right to have paid out of the insurance moneys, first, the partnership debts and, then, one-half of the balance.[22] Where, under an open contract of sale, the purchaser had paid the purchase price in full, but the deed had not been delivered, the vendor had no interest in the property to insure.[23]

Under the common law the accidental destruction of property by fire is a loss that, as between vendor and purchaser, falls on the purchaser.[24] A fire policy is a personal contract and does not run with the land. Where, before the time fixed for completion, a house was damaged by fire and the vendor collected the insurance, it was held that the purchaser who had completed his contract was not entitled as against the vendor to the benefit of the insurance.[25] In England an attempt was made to mitigate this rule by a statute passed in 1925, which gave the purchaser the right to recover any insurance that the vendor may have collected.[26] In Ontario it would seem to be a prudent practice for the purchaser, as soon as the agreement for sale has been signed, to ask the vendor's insurers to hold the purchaser covered under the vendor's policy pending completion of the sale. This request is always granted.

The risk of loss by *fire during alteration or repair* of the building does not receive the attention it deserves from the insuring public. Except for a period of fifteen days in each year allowed for incidental repairs, the risk of loss in consequence of alteration or repair is not recoverable except by special permission. Alteration and repair are usually an additional fire hazard. With the present shortage of labour, repairs are likely to be protracted. How many insured in Ontario at the present time are having repairs made on borrowed time, as it were, that is in excess of the fifteen-day limit? Whatever the number, many of the policies, lacking as they no doubt do the required endorsement, are off cover for fire loss that is a consequence of the work being done.

The problem of *vacancy of premises* cannot be said to have been clearly or satisfactorily solved. The following provisions of

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[22] *Cummings* v. *Homestead Fire Ins. Co.*, [1935] O.R. 161.
[23] *Rowe* v. *Fidelity Phoenix Fire Ins. Co.*, [1944] O.W.N. 600 (C.A.).
[24] *Castellain* v. *Preston* (1883), 11 Q.B.D. 380.
[25] *Raymer* v. *Preston* (1880-1), 18 Ch. D. 1.
[26] Law of Property Act, 1925, s. 47.

The Insurance Act are all relevant to the question whether the premises are on or off cover:

(a) statutory condition 5(d) excluding coverage when the building is, to the knowledge of the insured, vacant or unoccupied for more than thirty days;

(b) statutory condition 7, which avoids the policy for changes material to the risk unless the insurer is notified in writing;

(c) section 110, first enacted in 1924, recognizes as valid any policy stipulation upon which the rate of premium was based and which relates to the user condition, location or maintenance of the insured property and was not inconsistent with the statutory conditions;[27]

(d) an amendment to section 106, passed in 1929,[28] which added to the section the words, "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".

By virtue of condition 5(d) vacancy for a period of thirty days is deemed to be one of the risks contemplated by the policy and assumed by the insurer. Where the vacancy is for less than thirty days statutory condition 7 (change material to the risk) does not apply.[29]

In *Lambert* v. *Wawanesa Ins. Co.* there was a division of opinion in the Court of Appeal as to what constitutes a condition of vacancy within the thirty-day period.[30] The owner of a farm left it and went elsewhere to reside. In the stated period he visited the farm "at most seven or eight times" and stayed overnight "about seven times". Two members of the court were of opinion that the premises were unoccupied and off cover. "For a dwelling to be in the state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."[31] McRuer J. A., dissenting, was of opinion that the matter must be decided having regard only to the language of statutory condition 5(d) and that the premises were not, on the evidence, "unoccupied for 30 consecutive days". "A statutory condition",

[27] A mere description of the property insured, or its use, is not the sort of stipulation contemplated by section 110: *Cooper* v. *Toronto Cas. Ins. Co.*, *supra* footnote 14.

[28] 19 Geo. V, c. 53, s. 12.

[29] *Laurentian Ins. Co.* v. *Davidson*, [1932] S.C.R. 491.

[30] [1945] O.R. 105.

[31] *Ibid.*, *per* Gillanders J.A. at p. 114, quoting an American decision.

he quoted from a judgment of Lord Halsbury, "if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability."[32]

A final matter to which I would direct attention in this group of conditions is the risk of loss *while inflammable substances are kept or stored* on the insured premises. In these cases the loss is off cover unless special permission has been given by the policy. Under the condition as worded before 1924, the loss was off cover while "petroleum . . . gasoline . . . (refined coal oil for lighting purposes only, not exceeding 5 gallons in quantity . . . excepted) is stored or kept in the insured building". By an amendment in 1924[33] this condition was changed to its present wording: ". . . (refined oil for lighting, heating, or cooking purposes not exceeding 5 gallons in quantity, gasoline . . . not exceeding one quart in quantity . . . excepted)".

In 1910, in *Thompson* v. *Equity Fire Ins. Co.*, the Privy Council dealt with a loss occurring while a small quantity of gasoline was on the premises.[34] It held the insurer liable on the ground that the words in the condition, "stored or kept", implied a notion of warehousing or keeping in stock for trading purposes, an element that was not present. In 1931 Logie J., in considering the problem of a loss while the insured had two gallons of gasoline in the cellar, distinguished the *Thompson* case.[35] The amendment of 1924 made it clear, he said, that the loss was off cover while any quantity of gasoline in excess of one quart was kept on the premises. The condition could not now be read as limited by any notion that the gasoline must have been kept for trading purposes.

Any insured who keeps on the insured premises oil in excess of five gallons, or gasoline in excess of one quart, should have the necessary permission expressed in the policy or by endorsement, unless his policy is in one of the many forms that grant the permission automatically.

Mortgages

Mortgagees are given certain privileges by The Insurance Act:

(a) by statutory condition 14 any person to whom any part of the insurance money is payable may make proof of loss if the insured refuses to do so (such a person may, it is sug-

[32] *Ibid.*, at p. 126.
[33] Ont., c. 50.
[34] [1910] A.C. 592.
[35] *Lonsberry* v. *Trans-Canada Ins. Co.* (1931-2), 41 O.W.N. 2.

gested, rely on section 109 for relief from forfeiture if the necessary circumstances exist);

(b) by statutory condition 9 the policy must not be cancelled or altered to the prejudice of such person and without notice to him if the loss is, with the consent of the insurer, payable to him;

(c) section 95 provides that after sixty days from the date when proof of loss was made a mortgagee having the right to recover the insurance moneys may sue for them in his own name;

(d) a mortgagee has an insurable interest in the property and he may effect insurance of that interest as he pleases.[36]

It is now common practice to add a mortgage clause to the effect that the insurance, as to the interest of the mortgagee only, shall not be invalidated by any act or neglect of the mortgagor-owner or by the occupation of the premises for purposes more hazardous than those permitted by the policy. This clause is an effectual protection to the mortgagee where the insured has subsequently done something that, as against him, would avoid the policy. It provides only against acts subsequent to the making of the policy. Where the policy is void at its inception the mortgagee, notwithstanding the clause, cannot recover. The mortgagee has the right to have the proceeds of the insurance applied by the mortgagor in making good the loss or damage.[37]

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Most business men are casual about making an insurance contract. They leave too much responsibility to the local agent, who frequently has not the required experience either with his customers' needs or with the insurance law to provide what is required for the particular risk. In due time a policy is delivered to the insured and filed without more attention than is required to record the expiry date. How many solicitors make it a practice to discuss their clients' insurance needs with them? What better service could be rendered a client than to discuss policy or insurance requirements *before* a loss occurs? Are his policies in order? Are the risks adequately covered? Is the amount sufficient? Has he inventories and records to prove any loss that may occur? Has he observed the duties imposed upon him by the statutory

[36] Such insurance is not "other insurance" within statutory condition 8 so as to make either the mortgagor's policy or the mortgagee's policy liable to ratable reduction: *Clarke* v. *Fidelity Phoenix Ins. Co.* (1925), 29 O.W.N. 125.

[37] *City Feed Co.* v. *Jylha* (1930-31), 39 O.W.N. 130.

conditions? The inquiries need not be limited to fire insurance. What about automobile insurance? Has the client the right limits? If he occupies premises to which customers resort, are his premises risks covered? If he produces goods for sale has he a products liability; if not, has he any idea of his potential liability under, for example, section 15 of the The Sale of Goods Act or under the principle laid down in *Grant* v. *Australian Knitting Mills*?[38] Of course it is not the office of a solicitor to sell insurance, but the client who buys insurance should have an intelligent understanding of what insurance he should have against the risks inherent in his business.

The Function of Legal Philosophy

In all stages of what may be described fairly as legal development, philosophy has been a useful servant. But in some it has been a tyrannous servant, and in all but form a master. It has been used to break down the authority of outworn tradition, to bend authoritatively imposed rules that admitted of no change to new uses which changed profoundly their practical effect, to bring new elements into the law from without and make new bodies of law from these new materials, to organize and systematize existing legal materials and to fortify established rules and institutions when periods of growth were succeeded by periods of stability and of merely formal reconstruction. Such have been its actual achievements. Yet all the while its professed aim has been much more ambitious. It has sought to give us a complete and final picture of social control. It has sought to lay down a moral and legal and political chart for all time. It has had faith that it could find the everlasting, unchangeable legal reality in which we might rest, and could enable us to establish a perfect law by which human relations might be ordered forever without uncertainty and freed from need of change. Nor may we scoff at this ambitious aim and this lofty faith. They have been not the least factors in the power of legal philosophy to do the less ambitious things which in their aggregate are the bone and sinew of legal achievement. For the attempt at the larger program has led philosophy of law incidentally to do the things that were immediately and practically serviceable, and the doing of these latter, as it were *sub specie aeternitas*, has given enduring worth to what seemed but by-products of philosophical inquiry. (Roscoe Pound, An Introduction to the Philosophy of Law (1924))

[38] [1936] A.C. 85.