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STATUTORY CONDITIONS IN INSURANCE POLICIES*

Following my acceptance of Mr. Brais' invitation to prepare an article dealing with insurance law for submission to the Insurance Law Committee of the Canadian Bar Association, I found myself confronted with the problem of dealing with some particular branch in a way that might prove interesting and instructive. It occurred to me that if I selected one branch of insurance law and cited cases dealing with such branch I would in all probability be covering ground that was already familiar to most, if not all, of you. It was under these circumstances that I decided to make observations and suggestions in connection with certain matters applying to insurance law.

For the purposes of my article I have divided the same into three parts, as follows :

I. General observations and suggestions;

II. Observations and suggestions in reference to certain provisions of the standard form of contract of automobile insurance;

III. Observations and suggestions in reference to certain provisions of the standard form of fire insurance policy.

In making these observations and suggestions I am doing so from the standpoint of the law of the Province of Ontario, as I understand the same. Many of the observations and suggestions, however, are applicable to the law prevailing in other provinces of the Dominion, with the exception of the Province of Quebec.

I

GENERAL OBSERVATIONS AND SUGGESTIONS

(1) *Defence without Prejudice.*—Under the standard form of motor vehicle liability policy the insurer obligates itself to

* An address delivered to the Section on Insurance Law at the Annual Meeting of the Canadian Bar Association, September 11th, 1941.

indemnify, to the extent mentioned in the policy, the named insured and the described insured from loss arising out of certain tort liability and to defend any action brought against such insured to enforce such liability. Quite frequently the insurer receives information following an accident and either before or after an action has been brought against the insured, indicating that the insurer has or may have a defence under its policy in so far as the insured is concerned. For example, this situation may arise because the insurer has received information indicating that the policy was secured from the insurer by reason of misrepresentation or failure to disclose in the application facts required to be stated therein, or that the insured has violated a term or condition of the policy, or that the insurer has otherwise a defence under section 191 of the Insurance Act. It may well be that the information received clearly and definitely establishes a defence under the policy, or, on the other hand, it may be that the information, while not definitely establishing a defence under the policy, is nevertheless sufficient to put the insurer upon inquiry. Under such circumstances the insurer, depending upon the nature and extent of the information received, may take any one of the three following courses, namely :

(a) disclaim all liability under the policy;
(b) take from the insured a non-waiver agreement;
(c) forward a letter of reservation of rights to the insured.

The cases in which the insurer has adopted the first course by disclaiming all liability under its policy are few in number. Many reasons readily suggest themselves why an insurer does not look with favour upon an outright disclaimer of liability under the policy and a refusal to take any part in any proceedings against the insured. If the insurer desires to follow the second course above mentioned, by seeking if possible to secure a non-waiver agreement, the insurer may find that the insured declines to execute such a document and that he takes the position that the insurer must elect to either assume liability under the policy or to disclaim liability thereunder, in which latter event the insured will retain his own counsel and seek to hold the insurer liable for all loss and expense which he may incur by reason of the insurer's disclaimer of liability. I think that a non-waiver agreement should not be taken by the insurer's solicitor from the insured unless and until the insured has had independent legal advice, and, furthermore, I think there are circumstances under which an insurer should not

defend the insured even though the insured does execute such a non-waiver agreement.

If the insurer finds that the insured refuses to sign a non-waiver agreement, the insurer may then adopt the third course above mentioned by notifying the insured that the investigation of the accident in question and the defence by the insurer of any action or actions brought against the insured are with full reservation of and without prejudice to the rights of the insurer under the policy in question. The view has been expressed that if the insured accepts the notice that the insurer is investigating and defending with a full reservation of its rights under the policy, and by his silence acquiesces, the letter of reservation is then just as effective in preserving the insurer's rights as a non-waiver agreement executed by the insurer and the insured. It may well be, however, that the insured upon receipt of such a notice takes the position that he objects to the insurer investigating and defending without prejudice to its rights under the policy, and that the insurer must elect either to assume liability under the policy or disclaim liability thereunder.

Under these circumstances it must be apparent that in a case where information has been received by the insurer establishing or indicating a defence under its policy, an insurer may, and as a matter of fact frequently does, find itself in a most embarrassing position by reason of the attitude of the insured in refusing to sign a non-waiver agreement or to permit the insurer to investigate and defend with a full reservation of its rights under the policy. As a matter of fact there are lawyers, whose opinions are entitled to profound respect, who doubt the efficacy and value of either a non-waiver agreement or a letter of reservation of rights, acquiesced in by the insured. The question therefore arises whether there is a possible remedy which takes it out of the power of the insured to place the insurer in an embarrassing position and at a disadvantage, and which is however eminently fair and equitable to both the insurer and the insured. I propose to suggest a remedy, and in doing so am not overlooking sub-section 7 of section 205 of the Insurance Act, which provides that where an insurer denies liability under a motor vehicle policy it shall have the right, upon application to the court, to be made a third party in any action in which the insured is a party. Nor am I overlooking the absolute liability imposed on the insurer, so far as the public is concerned, by sub-section 3 of that same section. I am very definitely of the opinion that sub-section 7 of

section 205 is not an adequate protection to an insurer who receives information establishing or indicating a defence under the policy. Many reasons readily suggest themselves to any capable insurance lawyer to justify the view that I have expressed in this regard. The absolute liability imposed upon the insurer by sub-section 3 above mentioned adds weight, I think, to the remedy which I now suggest as a relief from the dilemma in which the insurer so frequently finds itself.

When one has regard to the liability which sections 202 and 205 of the Insurance Act purport to impose upon an insurer, it seems to me that no insurer should be put in a position where it can be forced either to assume liability under its policy or to disclaim liability thereunder. For example, let us suppose that an insurer, following an accident, has received information indicating that the named insured made false answers in his application for the policy in question as to previous cancellations or refusals or as to previous accidents within the three-year period, or that there has been a material change in the risk within the meaning of statutory condition number one, or that there was at the time of the accident a prohibited use of the automobile mentioned in the policy within the meaning of statutory condition 2, and let us suppose that, with this information before the insurer, a writ has been issued against the insured, who tenders it to the insurer and demands that the insurer defend the action pursuant to the terms of the policy. Let us further suppose that the insured declines to execute a non-waiver agreement or to acquiesce in a letter of reservation of rights served upon him by the insurer. It may be that at the time that the writ of summons is issued the insurer has not yet completed its investigation but has however received information sufficient to put it upon inquiry. What, then, is the insurer to do under such circumstances? It certainly is not safe for the insurer to undertake or continue the defence of an action against the insured, because it has been repeatedly held that where an insurer has actual knowledge of any fact relied on as a defence under its policy, or information *sufficient to put it on inquiry*, and undertakes or continues the defence of an action against the insured, there is thereby a waiver and the insurer cannot later disclaim liability. Let us suppose that it is during the conduct of the trial of the action itself which is being defended by the insurer in the name and on behalf of the insured that evidence is disclosed establishing a defence under the policy as between the insurer and the insured. Surely under such circumstances no one could fairly say that an insurer should

immediately withdraw from the defence. If counsel for the insurer asks for an adjournment with a view of securing a non-waiver agreement signed by the insured, he may find that the insured refuses to sign such a document, and that if he does so, it is later on attacked on the ground that he signed same without first having independent advice. What, then, is the insurer to do under such circumstances? There is certainly authority establishing the proposition of law that the insurer, in continuing the defence of the action after receipt of knowledge, acquired during the conduct of the trial itself, of a fact establishing a defence under the policy, cannot later on deny liability under the policy.

I have mentioned a few of the circumstances with which an insurer or its lawyer may be confronted at some time or other between the date of the accident itself and the conclusion of the trial of an action against the insured, in the hope that you will agree with me that some remedy should be devised for the protection of the insurer. It seems to me that this protection can be secured in one of two ways :

(1) by incorporating in the Insurance Act a section providing that the investigation by an insurer of an accident which purports to be covered by a policy issued by such insurer and the defence by the insurer of any action brough against a person purporting to be insured by said policy and arising out of said accident shall be deemed to be entirely without prejudice to the rights of the insurer and of the insured under said policy; or

(2) by incorporating in the policy itself a non-waiver provision, binding an all parties concerned, to the effect that the investigation by the insurer of an accident which purports to be covered by the policy and the defence by the insurer of any action brought against a person purporting to be insured by said policy and arising out of said accident shall be deemed to be entirely without prejudice to the rights of the insurer and of the insured under said policy.

(2) *Payment into Court.*—Rules 307–319 of the Consolidated Rules of Practice deal with the subject of a payment into court with a pleading in satisafction of the plaintiff's claim. Insurance lawyers frequently have to deal with a case in which they are of the opinion that the insured was wholly or partly responsible for the accident in question and in which they find that the amount demanded by or on behalf of the plaintiff in settlement of the action is in their opinion excessive. It is under these

circumstances that insurance lawyers frequently avail themselves of the privilege provided by the above-mentioned rules of practice of making a payment into court without admission of liability, thus forcing the plaintiff to accept, within the time provided by the rules, the amount paid into court in satisfaction of his claim, or reject the same, at the risk of being saddled with the costs incurred from and after the date of payment in, in the event of the damages allowed at the trial not exceeding the amount paid in.

Under our practice as it stands at the present time the amount paid into court must be mentioned in the statement of defence. The difficulty, as I see it, with the procedure authorized by the above-mentioned rules of practice lies in the fact that the statement of defence must of necessity mention (a) the fact that money has been paid into court, and (b) the amount of money paid in. It seems to me that the practice as to payment into court prevailing in England is preferable to that existing in Ontario. The rules of practice in England provide that, except in certain instances which are specifically mentioned in the rules, no statement of the fact that money has been paid into court shall be inserted in the pleadings and no communication of that fact shall, at the trial of the action, be made to the judge or jury until all questions of liability and amount of debt or damage have been decided. The rules in England also provide that the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment. The advantage accruing to a defendant under the English rules of practice is apparent, and such rules inflict no hardship upon the plaintiff. I suggest therefore for your consideration that a representation be made through the proper channels recommending an amendment, along the lines above indicated, to the rules of practice in force in Ontario dealing with the payment of money into court with a pleading in satisfaction of the plaintiff's claim.

(3) *Requirements where Automobile Policy issued outside Ontario.*—The section dealing with these requirements is not to be found in Part VI of the Act, dealing with automobile insurance. It is section 25 and is to be found in Part II, dealing with general provisions applicable to insurance in Ontario. This section 25 reads as follows:

> 25. It shall be a condition of a license to carry on automobile insurance in Ontario, for breach of which such license may be cancelled, that, in any action or proceeding in Ontario against a licensed insurer,

> or its insured, arising out of a motor vehicle accident in Ontario, such insurer shall appear, and shall not set up any defence to a claim under a policy issued outside of Ontario which might not be set up if such policy were issued in Ontario, in accordance with the law of Ontario relating to motor vehicle liability policies.

You will observe that in this section it is provided that the insurer, in any action in Ontario against its insured arising out of a motor vehicle accident in Ontario, "shall appear". Personally I think that this section must be read and construed in the light of sub-section 7 of section 205 of the Insurance Act, under which sub-section, an insurer which denies liability under a motor vehicle liability policy shall have the right, upon application to the court, to be made a third party in any action to which the insured is a party. This section 25 also forbids an insurer under a policy issued outside of Ontario to set up in Ontario a defence which might not be set up if the policy were issued in Ontario in accordance with the law of Ontario relating to motor vehicle liability policies. This section therefore has particular significance in respect of an automobile policy of insurance issued in the Province of Quebec to an insured whose automobile covered by the policy is involved in an accident in Ontario. I say this because, regardless of the terms of the contract of insurance issued in Quebec, the insurer, if it is carrying on business in the Province of Ontario, finds itself confronted with this section 25. I suggest that the present language of this section 25 justifies further consideration with a view of having certain amendments made to same.

(4) *Mortgage Clause.*—The phraseology of the standard form of mortgage clause in use by insurers to-day is identically the same as it was in the form of mortgage clause in use as far back as the year 1902. Since that date there have been several cases in which the courts have had to deal with the effect of a mortgage clause attached to a fire insurance policy. The standard form of mortgage clause in use in the State of New York has provisions therein which are not in the standard form in use in Ontario, and it has for a long time been and still is my opinion that certain changes should be made in the form of mortgage clause in use in this Province. For example, I think that the mortgage clause should expressly stipulate: (a) that the mortgagee shall promptly notify the insurer of any change of title, or ownership, or occupancy, or any increase of hazard which shall come to the knowledge of the mortgagee; (b) that the mortgagee shall promptly notify the insurer of any foreclosure or other proceedings under the powers contained in the mortgage

of the property in favour of the mortgagee; and (c) that failure on the part of the mortgagee to do so shall render the policy null and void. Many companies have had the unfortunate experience of learning for the first time after a serious fire has occurred that at the time of the fire the insured was considerably in arrears in respect of payments due under his mortgage and in respect of taxes against the property and that foreclosure or mortgage sale proceedings were pending at the time of the fire and had been for some time prior thereto. The company by reason of the lack of notice had thereby been deprived of the opportunity of deciding whether or not to stay on the risk. I therefore respectfully suggest that the time has arrived for insurance lawyers to take up with their respective clients the wisdom of adopting a new form of mortgage clause for use in this Province.

(5) *Consolidation of Actions.*—Section 86 of the Insurance Act in force in the year 1927, dealing with the consolidation of actions, was amended in the year 1933 and in its amended form now appears as section 92 of the Insurance Act. This section in its amended form is intended to prevent a multiplicity of actions and needless expense where an insured has several policies of insurance and, by reason of a certain loss, has a claim against the insurers named in each of said policies. Having regard, however, to the decisions which have been rendered since the amended section came into effect, I respectfully suggest that the superintendents of insurance might well consider a further amendment to this particular section. At the present time if A has, say, six policies of fire insurance covering certain property, in respect of which he suffers a loss, which loss is disputed by the insurers, these insurers may and frequently do find that a separate action has been brought by the insured against each of the insurers, and that it is not until after the pleadings have been filed that the court may make an order consolidating the actions into one action. They may find that the court, instead of consolidating the actions into one action, may direct that each of the actions be set down for trial and that all of the actions be tried together. There may be occasions when there is a conflict of interest between the insurers, or where the insurers are not all represented by one solicitor, or where the insured does not retain the same solicitor in respect of all the policies held by him at the time of the loss. Such instances, however, are very rare, and I venture to suggest for your consideration that where an insured is represented by the same solicitor in respect of all of the outstanding policies, the claims

of the insured should be embodied in one action in which all of the insurers are named as the defendants. There may be no way to compel the insured to engage one solicitor in respect of all of the outstanding policies, or to force the insured to embody his claims under said policies in one action, but I do suggest for your consideration that some amendment might well be made to section 92, under which the insured can, in the exercise of a discretion vested in the trial judge, be saddled with costs unnecessarily incurred.

(6) *Application of Insurance Money under a Motor Vehicle Liability Policy.*—Two sub-sections of section 205 of the Insurance Act read as follows:

> (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.
>
> (3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy, and (ii) no act or default of the insured before or after such event in violation of the provisions of this Part or of the terms of the contract, and (iii) no violation of the Criminal Code or of any law or statute of any province, state or country, by the owner or driver of the automobile, shall prejudice the right of any person, entitled under subsection (1), to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

I suggest for your consideration the question whether or not the right at common law of an insurer in respect of a contract of insurance which is null and void ab initio has been taken away from the insurer by this section 205, or whether the absolute liability imposed by sub-section 3 is predicated upon a policy which was not null and void ab initio. In this connection I point out the following:

(a) Sub-section 1 of section 205 refers to a person having a claim against an insured "for which indemnity *is* provided by a motor vehicle liability policy."

(b) Any statute which purports to interfere with or restrict the common law rights of a party to a contract must be strictly construed.

(c) In *Guardian Assurance Company, Ltd.* v. *Sutherland*, [1939] 2 All E.R. 246, a policy of insurance and a cover note against third party risks in respect of a motor car were obtained by misrepresentation and non-disclosure of material facts. It was held that a policy of insurance or cover note so obtained insures "no one" and therefore cannot be held to be a "policy of insurance" within the meaning of section 36 (4) of the Road Traffic Act, 1930, so as to make the insurance company liable under that section to indemnify persons or classes of persons specified in the policy.

In suggesting that the point is arguable I am not overlooking the decision of Mr. Justice Ives in *Shaw* v. *Home Assurance Company of Canada* (1940), 7 I.L.R. 183.

(7) *Relief from Forfeiture.*—A careful perusal of the Insurance Act shows that relief from forfeiture in respect of a policy of fire insurance appears in section 109 of the Act; that relief from forfeiture in respect of a policy of automobile insurance appears in section 192 of the Act, and that relief from forfeiture in respect of a policy of accident or sickness insurance appears in section 217 of the Act. These three sections are substantially in the same form. Having regard to the fact that there are several contracts of insurance other than fire, automobile, accident and sickness, in which there are conditions or requirements as to proofs of loss to be given by the insured, or as to other matters or things to be done or omitted by him, I suggest that it is desirable that these three sections, 109, 192 and 217, should be repealed, and that a new relief from forfeiture section should appear in Part II of the Act, which deals with general provisions applicable to insurers in Ontario.

(8) *Payment of Premiums.*—Life insurance companies have the benefit and protection afforded to them by sections 139 and 140 of the Insurance Act, and I suggest for your consideration that it is in the interests of insurance companies, insurance agents, and, in the final analysis, of the public at large, that provisions somewhat similar to those appearing in sections 139 and 140 should appear in the Act in regard to all other forms of insurance contracts.

9 *Misrepresentation as a Defence.*—In this connection I draw your attention to the language of statutory condition 1 of a fire insurance policy, of section 191 in reference to automobile insurance, and of statutory condition 2 of a contract of accident and sickness insurance. Personally I have found it difficult to understand why misrepresentation and non-disclosure should be

treated in one manner in regard to a fire insurance policy, and in a different manner in regard to a policy of automobile insurance, and again in a different manner in regard to a policy of accident or of sickness insurance, and having regard to the fact that a contract of insurance is a contract requiring the utmost good faith on the part of the applicant for same, and to the fact that there are many forms of insurance contracts other than the three which I have just mentioned, I suggest for your consideration that a section dealing with the effect of misrepresentation or non-disclosure of material facts upon an application for a contract of insurance might well appear in Part II of the Act, which is the Part dealing with general provisions applicable to insurers in Ontario.

II

Observations and Suggestions in Reference to Certain Provisions of the Standard Form of Contract of Automobile Insurance

(1) Statutory condition 1 specifically mentions three things as changes in the risk material to the contract, namely :

> (i) Any change in the insurable interest of the insured named in the policy in the automobile by sale, assignment or otherwise, except through change of title by succession, death or proceedings under the Bankruptcy Act;
>
> and in cases other than motor vehicle liability policies:
>
> (ii) Any mortgage, lien or encumbrance affecting the automobile after the application for the policy;
>
> (iii) Any other insurance of the same interest, whether valid or not, covering loss or damage insured by the policy or any portion thereof.

I suggest for your consideration that if an insured under a policy of automobile insurance has created a change in the risk material to the contract by transferring to someone an interest in the automobile, or placing a mortgage, lien or encumbrance upon the automobile, or effecting other insurance upon the automobile, then it is reasonable to think that the same result ought to follow if any one of these three changes takes place in reference to property covered by a policy of fire insurance. I understand that the statutory conditions of a fire insurance policy have recently had and are still having serious consideration by the superintendents of insurance, and I suggest for your consideration that statutory condition 7 of a fire insurance policy might well be amended by adding a sub-paragraph thereto, to

the effect that without restricting the generality of the first paragraph thereof the words "change material to the risk" shall include certain things, and then expressly specify certain things as changes material to the risk. I have in mind particularly the experience which fire insurance companies frequently have, of discovering, after a fire, that without their knowledge or consent the property covered by the policy was, subsequent to the issue of the policy, mortgaged or otherwise encumbered, or that the insured, while still retaining an insurable interest in the property, had conveyed a substantial interest in the property to someone else, and by reason of the lack of notice to the insurer the latter has been deprived of the opportunity of deciding whether or not, under such circumstances, it wished to stay on the risk.

(2) Sub-section 2 (b) of statutory condition 2 provides that the insured shall not permit, suffer, allow or connive at the use of the automobile

> (b) by any person who is not for the time being qualified and authorized by law to drive or operate the automobile or, in case the law does not prescribe any qualification or authority, by any person under the age of sixteen years;

Personally I have never had a case where the named insured admitted or where I have been able to prove that the person who was driving the automobile with the named insured's consent was, to the knowledge of the named insured, a person who was not qualified and authorized by law to drive or operate the automobile, or that the driver was under the age of sixteen years. My experience has been that the named insured has *assumed* that the driver was duly qualified and authorized by law to drive, or was over the age of sixteen years, as the case may be. I venture to suggest for your consideration that the burden should be cast upon the named insured of making sure, before he permits anyone else to drive his automobile, that that person is qualified and authorized by law to drive such automobile. In this connection it is interesting to note section 35, sub-section 1 of the Road Traffic Act in England, which reads as follows:

> Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks, as complies with the requirements of this Part of this Act.

(3) *Third Party Liability.*—Sub-paragraph b of sub-section 1 of section A of the insuring agreements in the standard automobile policy form provides that the insurer shall not be liable

> (b) for loss or damage resulting from bodily injury to or the death of any person insured by this policy or the son, daughter, wife, husband, mother, father, brother or sister of any such person;

The intention of this clause was to protect insurers from collusive claims. I venture to offer for your consideration, however, the suggestion that the language of this exclusion clause is sufficiently broad to deprive the named insured of protection under his policy in respect of claims by persons who are not in any way related to him personally. For example, (a) if the named insured's chauffeur, while driving the named insured's automobile, injures a pedestrian who comes within the class of relations of the chauffeur mentioned in this exclusion clause, and such person sues the named insured as owner of the automobile, it would appear that although such person is not in any way related to the owner, nevertheless, on such a set of facts, the owner is not covered by his policy; (b) if the chauffeur or some person to whom the owner lends his automobile is driving the owner's automobile in a Province or State where a gratuitous passenger still has a cause of action against the owner and driver, and one of the passengers comes within the class of relations mentioned in said exclusion clause, in so far as the chauffeur or the driver is concerned, and the owner is sued by the injured party, again it would appear that the policy affords him, on such a set of facts, no indemnity.

III

Observations and Suggestions in Reference to Certain Provisions of the Standard Form of Fire Insurance Policy

1. Statutory condition 7 deals with a change material to the risk and within the control and knowledge of the insured. I repeat in this connection the observations which I made in reference to statutory condition 1 of a policy of automobile insurance.

2. Statutory condition 8 is a condition which has given considerable trouble in the adjustment of losses, and there is a lack of uniformity in the interpretations placed upon this particular condition. This is well shown by the following cases:

Excelsior Tailoring v. *Glens Falls Insurance Company*, 55 O.L.R. 35;
Vanderburgh v. *Oneida Fire*, [1935] O.W.N. 16;
Gerhardt v. *British Empire*, [1933] 2 D.L.R. 617;
Reid v. *Home Insurance*, [1936] 1 D.L.R. 676.

I suggest for your consideration that this statutory condition 8 should be amended so as clearly and definitely to set forth the respective rights and liabilities of the insured and the insurer.

3. Statutory condition 9 provides that where the loss, if any, under the policy has with the consent of the insurer been made payable to some person other than the insured, the policy shall not be cancelled or altered by the insurer to the prejudice of such person without *reasonable* notice to him. The statute does not define "reasonable notice" nor does it provide how such notice shall be given. In the absence of any statutory provision in this regard, it would appear that notice to the payee must be *actual* notice and that a notice of the length mentioned in section 10 should be held to be "reasonable notice." I suggest for your consideration that this statutory condition 9 in its present form may and often does work a hardship upon the insurers in cases in which the whereabouts or address of the mortgagee or other payee is unknown to the insurer at the time that it desires to cancel the policy. What, then, is the remedy? I suggest that the insurer should insist on the address of the mortgagee or payee being inserted in the loss payment clause or in the mortgage clause, as the case may be, and that statutory condition 23 be amended so as to provide that written notice may be given to such mortgagee or payee in the same manner as now provided in that condition for a notice to the insured.

4. *Subrogation.*—Statutory condition 24 reads as follows:

> The insurer may require from the insured an assignment of all right of recovery against any other party for loss or damage to the extent that payment therefor is made by the insurer.

Very frequently the amount of the loss sustained by the insured is in excess of the amount of the insurance, and it is under such circumstances that an embarrassing situation often arises by reason of the fact that the insured through his solicitor claims that he is *dominis litis* and that he intends to bring the action through his own solicitor for recovery of the loss sustained and that he is willing, on certain conditions which he names, to include the subrogated claim of the insurer in the action against the wrongdoer. The position of the insurer in a case

where the insured's loss exceeds the amount of the insurance is dealt with in *Globe & Rutgers* v. *Trudell*, 59 O.L.R. 444, and 60 O.L.R. 227.

In the case of a payment by an insurer under a contract of automobile insurance, the insurer would appear to be in a much stronger position by reason of section 195 of the Act than it is in the case of the payment of a loss under a fire insurance policy.

This subject of subrogation has been thoroughly canvassed by the Insurance Law Committee of the Canadian Bar Association and also by the superintendents of insurance of the Provinces of Canada, and various suggestions and recommendations have been made. I think that under these circumstances it would be inexpedient for me to add my own views to those that have already been expressed. I therefore content myself with the observation that, in my opinion, legislation is desirable in order to set forth more clearly the nature and extent of the subrogation rights of an insurer.

5. *Mortgage Clause.*—Until recently the position of an insurer which paid off a mortgage and took from the mortgagee to whom the loss under the policy was payable an assignment of the mortgage, and took the position that it was not liable under the policy to the mortgagor, was not by any means free from doubt. That doubt has existed ever since the cases of *Imperial Fire* v. *Bull*, 18 S.C.R. 697, and *McKay* v. *Norwich Union*, 27 O.R. 251. Quite recently, however, the position of the insurer has been clarified by the Court of Appeal of Ontario in *Farmers Union* v. *Hanrahan*, [1941] O.W.N. 212. It would now appear that the insurer can, without first waiting to have it established by law that it is not liable to the mortgagor, to whom it has issued a policy, safely pay the amount of the mortgage and take an assignment of same from the mortgagee, and thereby stand in the shoes of the mortgagee.

6. *The Meaning of Fire.*—Under the standard form of fire insurance policy the insurer agrees to indemnify the insured against direct loss or damage by fire to the extent of the amount mentioned in the policy. When does a loss by fire occur within the meaning of a fire insurance policy? This is a question which recently came before the Honourable Mr. Justice Atkinson for consideration, and that learned judge has made history in his decision in the case of *Harris* v. *Poland*, [1941] 1 All E.R. 204. In a recent issue of a journal published in England the publisher has this to say about this case:

Fire insurance has been known in England for well over 200 years. Both the London Assurance and the Royal Exchange Company were founded as fire offices in the South Sea Bubble; in 1728 a suit on a fire claim (*Lynch* v. *Dalzell*) came before the Court of Chancery on a policy signed in 1721; for generations every lease has contained provisions for fire insurance; thousands of millions of pounds sterling have changed hands in premia and in settlement of losses; and less than a fortnight ago the High Court decided for the first time what the word 'fire' in a policy of fire insurance really means.

The decision arose out of a very unusual episode. A Mrs. Harris had taken out with Lloyd's underwriters a comprehensive policy on the contents of her premises, covering them in one document against fire, burglary and theft. Mrs. Harris was particularly afraid of burglary and the loss of her jewels, and it occurred to her that the place in which they would be safest against a burglar's visit was the grate. Wherever else a burglar might look, he would surely never think of investigating the coal in the drawing-room fireplace. So, before she went out, she laid the fire with the jewellery and £100 of money underneath the coal and left the premises happily confident that her valuables at any rate would not be stolen while she was away. And safe from burglary they undoubtedly were.

But they were not safe from the other main peril covered by the comprehensive policy, for Mrs. Harris when the time came for lighting the fire forgot her ingenious ruse and applied a match to the coal with over £400 worth of jewellery and £100 of Treasury notes hidden inside it, and she burnt the lot.

In due course Mrs. Harris presented her claim to the underwriters and was told, doubtless to her surprise, that the loss was not recoverable. It was true that fire had destroyed the jewellery and the underwriters were careful to say that the bona fides of the claim was beyond dispute; but fire "within the meaning of the policy" did not, so the underwriters declared, mean any sort of fire. It meant a fire which broke bounds and did its destructive work outside the place in which it was intended to be, so that the burning of an article secreted in the grate or accidentally thrown on to the drawing-room fire was not the kind of loss against which an insured party was protected.

It probably seemed to Mrs. Harris, as it has seemed to many people before her, that this construction of the policy was unfair and ridiculous. It is not unlikely that she was angry with her underwriters for raising such a defence. But it is only fair to the underwriters to say that the answer they gave her and the view they took of the law were not invented by them *ad hoc*. On the contrary their reading of the fire policy was (until this case was tried and decided) the orthodox reading accepted, not only by insurance officials and underwriters, but also by the text books and by at least one of the most eminent commercial lawyers who ever wore a silk gown and adorned the bench of the Court of Appeal.

One of the standard books on the law of insurance is McGillivray's Insurance Law, which competes with Bunyon and Welford and Otter-Barry for the chief place among the text books on non-marine

insurance law and is comparable to Arnold's monumental work on marine insurance. And McGillivray in the 1912 edition defines the word 'fire' for purposes of insurance in this way :

> Fire within the meaning of the policy means fire which has broken bounds.

It is clear from this that the learned author would have rejected Mrs. Harris' claim, since the fire which destroyed her jewellery had certainly never broken its bounds, any more than a lion which kills a trainer in a circus cage has broken his bounds to commit the slaying. McGillivray would have been with the underwriters.

And six years after this edition of McGillivray was published a curious case (*Upjohn* v. *Hichens*) came to the Court of Appeal. It was during the last war that Upjohn the landlord found that Hichens the tenant (who was bound to insure against fire with the Alliance) had not insured against fire arising from enemy bombs. He had not done so for the very good reason that he couldn't. Neither the Alliance nor any other Tariff Office would cover the risk. 'That,' said Upjohn, 'is no business of mine. Fire is fire, whether it comes from a defective flue or a German bomb, and when I said fire I meant fire. The lease is cancelled and I want my premises back.'

The Court of Appeal found against Upjohn and decided that fire in a legal document does not necessarily mean fire of any sort. It means only certain kinds of fire—a point that was emphasized by the great Lord Justice Scrutton, who said categorically and clearly without hesitation :

> It has been held that fire within the meaning of a fire policy means fire which has broken bounds.

So the high authority of McGillivray is reinforced by the tremendous weight of Lord Justice Scrutton's opinion without doubt, qualification, or mistrust. It is not to be wondered at that when underwriters refused this claim they thought their reading of the law was an orthodox, indisputable part of the ABC of insurance law.

It turned out that they were wrong, for Mr. Justice Atkinson found against them and delivered a judgment which blew sky-high both the doctrine of the text books and the *obiter dictum* of the Lord Justice. The essence of his judgment is that on the rules of construction fire means any kind of fire and that the restriction of breaking bounds cannot be imported into the policy by one party to the contract. Unless a conventional meaning of the word can be proved—and Mr. Justice Atkinson held that it was not proved—'fire' must be taken in its ordinary obvious sense, and, furthermore, if there is an ambiguity in its meaning, the benefit of the doubt must be given to the policy-holder, because the document was drawn up by the underwriter—the legal doctrine of *contra proferentem*. And the conclusion to which these rules of construction led him—the conclusion that fire need not have broken bounds to produce a claim—was in his Lordship's view the sensible one. Are we to believe, he said, that if the wind blows the candle flame into the curtain there is a claim, but if it blows the curtain into the candle flame there is none?

I have reason to believe that no appeal has been or will be taken from the judgment of Mr. Justice Atkinson, and under these circumstances one must conclude that the law dealing with the question as to what is or is not a fire, within the meaning of a fire insurance policy, has now been clarified by this judgment. Consequently in the future, anyone in arriving at a conclusion in any given case as to whether a certain loss by fire is or is not covered by the present standard form of fire insurance policy, should do so in the light of the judgment of Mr. Justice Atkinson in the case to which I have just referred.

T. J. AGAR.

Toronto.