THIRD PARTY RIGHTS UNDER CONTRACTS OF PROPERTY INSURANCE

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Ivamy defines the contract of insurance as

> ... [A] contract whereby one person, called the 'Insurer', undertakes, in return for the agreed consideration, called the 'Premium', to pay to another person, called the 'Assured', a sum of money, or its equivalent, on the happening of a specified event.[1]

This definition emphasizes the rights and obligations of the two parties — insurer and insured — who have negotiated the insurance contract. Indeed, most insurance cases before the Courts involve the legal position of only the insured and the insurer. There is, however, a body of case law involving "third party" claimants under insurance contracts. The expression "third party" refers to a claimant who has suffered loss and who seeks indemnification for that loss under a contract of insurance in which he is neither named nor described in any way as an insured. Surprisingly, the law provides fairly extensive protection to third parties who seek the benefits of someone else's insurance coverage. This article will examine two devices employed by the Courts to provide such protection under contracts of property insurance: 1) the "trust principle" and 2) equitable assignment of the insurance policy.

As the cases discussed in this article will show, third party claims under contracts of property insurance take many forms. The third party may be an equitable titleholder, a legal titleholder, a mortgagee,[2] an expropriating authority, or indeed anyone with an indemnifiable legal or equitable interest in property which has been damaged or destroyed. The common elements in all the cases examined are as follows: The third party has no insurance contract to protect his own interest. However, the property damage has also affected another person who has a legal or equitable interest in the same property and who holds a contract insuring against the peril which has occurred. The third party is not named or described in this insurance contract in any way.[3] Nevertheless, the third party attempts to extinguish his loss by claiming — either personally or through action by the insured — under the insurance contract.

The most important device for protecting the interests of third parties under insurance contracts is the "trust principle". The "trust principle"

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1. E.R.H. Ivamy, *General Principles of Insurance Law* (4th ed. 1979) 3.

2. In most cases, the insurance contract names the mortgagee as assignee of proceeds or protects the mortgagee's interest by means of an independent mortgage clause. These situations are beyond the scope of this article, which deals only with third parties who are not named or described at all in the insurance contract.

3. This article will not discuss the enforceability of claims by persons who are not named, but are described, in insurance contracts. *See e.g., Vandepitte* v. *Preferred Accident Ins. Corp. of New York*, [1933] A.C. 70; [1933] 1 D.L.R. 289 (P.C.). In *Vandepitte*, an automobile insurer had bound itself to indemnify any person "who with the insured's consent personally drives the automobile." The Court ruled that, notwithstanding this clause, a person driving the car with the consent of the named insured could not sue on the contract because she had no privity of contract with the insurer and had provided no consideration for the contract. The problems of lack of privity and lack of consideration would certainly seem applicable to the situation of a third party seeking the benefit of an insurance contract in which he is neither named nor described. However, in applying the principles of trust and equitable assignment described in this article, the Courts tend not to concern themselves with questions of privity and consideration. *See infra* n. 78. One reason for this approach seems to be that — at least in the case of the "trust principle" — the Courts regard the rights of the third party as essentially non-contractual in origin. *See Battersby* v. *Lenhoco Enterprises Ltd., infra* n. 46 and n. 68.

involves analysis of three leading insurance cases: on the one hand, the companion cases of *Rayner* v. *Preston*[4] and *Castellain* v. *Preston*[5], and on the other hand *Keefer* v. *Phoenix Ins. Co. of Hartford*.[6] In *Rayner*, the plaintiffs purchased land and buildings from the defendants. Between the date of sale and the date of possession, fire damaged the buildings. By the rules of the common law, the plaintiffs were obliged to pay the full purchase price in spite of the damage. At the time of the fire, the defendants were still in possession of the property, and they recovered money due under a policy of insurance which they had taken out prior to their sale contract with the plaintiffs. The plaintiffs sued the defendants for the benefits of the insurance contract, claiming that the real loss suffered in the fire was their own. However, the Court denied their claim, holding that the contract of insurance was personal between the defendants and the insurer, that the contract did not run with the land, and that the plaintiffs as vendees had no rights under the contract. Brett, L.J. put the matter this way:

> In this case there was a contract of insurance made between the Defendants and the insurance company. That contract was made by the Defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the Defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the Plaintiffs. It was a personal contract between the Defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in Equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the Defendants to the Plaintiffs. It would have been assigned by the Defendants to the Plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the Plaintiffs to the Defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the Plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the Plaintiffs and the Defendants.[7]

In the course of its judgment, the Court in *Rayner* also rejected the plaintiffs' argument that the defendants were trustees of the property until the date of possession and that therefore the defendants must be considered trustees of the insurance moneys recovered. Cotton, L.J. stated:

> But the Appellants' [plaintiffs'] case was put in another way. It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part.[8]

The upshot of *Rayner* was that the purchasers received no insurance proceeds but still paid full price for damaged property. The vendors, however, collected twice — once on the sale agreement, and once on their insurance

4. (1881), 18 Ch. D. 1; 50 L.J. Ch. 472 (C.A.) (hereinafter referred to as *Rayner*).
5. (1883), 11 Q.B.D. 380; 52 L.J. Q.B. 366 (C.A.) (hereinafter referred to as *Castellain*).
6. (1901), 31 S.C.R. 144 (hereinafter referred to as *Keefer*).
7. *Supra* n. 4, at 10 (Ch. D).
8. *Id.*, at 6 (Ch.D.).

policy. However, the vendors' happiness was dashed in *Castellain*.[9] Aware of the *Rayner* decision, the insurer sued the vendors to recover the proceeds paid to them under their contract of insurance. The insurer argued that, because the vendors were legally entitled to receive the full price under their sale contract and because they had in fact received the full price, they had suffered no loss as a result of the fire. Under the principle of indemnity, they would not be entitled to any insurance moneys. The Court agreed with the insurer. Cotton, L.J. stated the principle of indemnity and its consequences in this case as follows:

> I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss.[10]

Given the full receipt of sale proceeds by the vendors, there was no loss against which they could be indemnified under their contract of insurance.

The apparent conclusion to be drawn from *Rayner* and *Castellain* is that a party who is not privy to an insurance contract cannot benefit from that contract, even if he has enforceable rights and obligations in respect of the subject-matter of insurance and therefore suffers real loss when that subject-matter has been damaged. Conversely, the actual loss suffered by an insured is diminished to the extent to which the loss has been borne by the uninsured third party. The insured, therefore, is susceptible to a reduction or denial of his insurance claim on the basis of the principle of indemnity. The big winner here is the insurer, who benefits from the third party's predicament by paying a reduced claim[11] or nothing at all,[12] even though the peril insured against has occurred.

However, *Castellain* envisions another scenario with happier results for the third party. Bowen, L.J. makes the following *obiter* observations:

> It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy ... If [a mortgagee] intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover.[13]

9. *Supra* n. 5.
10. *Id.*, at 393 (Q.B.D.).
11. *e.g. Willumsen and Larwill Construction Co. v. Royal Ins. Co.*, [1975] 5 W.W.R. 703 & [1976] 1 W.W.R. 446 (Alta. C.A.).
12. *e.g. Castellain, supra* n. 5.
13. *Id.*, at 398-399 (Q.B.D.).

These remarks raise interesting questions when applied to the facts of *Rayner* and *Castellain*. The vendors in *Rayner* had a "limited interest". They held legal title to the property until possession date, and therefore had an obvious insurable interest in the property. Similarly, the purchasers had an obvious interest in the property by virtue of the enforceable sale contract which they had made. Why then did the Court in *Rayner* not apply the principle which Bowen, L.J. summarized later in *Castellain*? In other words, why were the vendors not found to be persons with a limited interest who were insuring not only their limited interest, but also the interest of the purchasers in the property? Since the vendors' policy apparently was for the full value of the insured property, the answer must be, according to Bowen, L.J.'s test, that the vendors did not *intend to insure* the interest of the purchasers. This answer makes sense, because the vendors had insured their property *before* they sold it to the purchasers. To repeat the words of Brett, L.J. in *Rayner:* "The contract [of insurance] was made by the Defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the Plaintiffs."[14]

If the *Rayner* situation were reversed — that is, if a vendor purchased insurance *after* signing a sale contract — the purchaser could conceivably be protected by the vendor's insurance, even if the purchaser's interest was not set out in the insurance contract. This brings us to the *Keefer* case.[15] Keefer, the plaintiff, sold his land and buildings to Cloy. Cloy agreed to pay the purchase price in installments. Keefer retained legal title in the property pending full payment of the purchase price. At the time of sale, Keefer verbally agreed with Cloy to keep the buildings fully insured until the purchase price had been paid. Some time after the sale agreement, the existing insurance on the property expired, and Keefer took out a new policy with the defendant insurer. The indemnity clause in this policy set out the loss payable as "all ... direct loss or damage ... not exceeding in amount the sum or sums insured as above specified ... nor the interests ... of the assured in the property herein described ...."[16] Keefer was the only insured; Cloy's interest in the property was not disclosed to the insurer. A fire occurred, and Keefer claimed against the defendant under the new policy of insurance. At the time of the fire, Cloy had made some, but not all, of the installment payments pursuant to the sale contract, so that both Keefer and Cloy had an equitable interest in the property. The question before the Court was whether Keefer could recover not only for his own beneficial interest, but also for the beneficial interest of the purchaser, Cloy.

The Court ruled that he could recover for both interests. In support of this conclusion, Sedgewick, J. quoted various authorities, including *Waters* v. *Monarch Fire and Life Assurance Co.*[17], which established the right of a person with a limited interest in property to insure the full value of the property. In particular, Sedgewick, J. emphasized the two requirements set out by Bowen,

14. *Supra* n. 4, at 10 (Ch. D).
15. *Supra* n. 6.
16. *Id.*, at 152-153.
17. (1856), 5 El. & Bl. 870; 119 E.R. 705 (Q.B.).

L.J. in *Castellain*[18]: the policy must insure for full value, and the insured must intend to insure for full value. Sedgewick, J. continued:

> There cannot, I think, be any question, but that in the present case the appellant [Keefer] intended to insure the whole property, and not merely his beneficial interest therein. The agreement between him and Cloy is clear evidence of this as well as the terms of the policy itself. Nor in my view is there any doubt but that the company thought that it was insuring the whole property. The premium is for an insurance not upon a partial but upon an absolute interest. The terms of the policy show that the building itself was insured. The company agreed to make good all such direct loss or damage not exceeding in amount the interests of the assured in the property described, and that word 'interests,' I think clearly includes interests of all kinds, if insurable; legal interests, equitable interests, and all other interests arising from any relationship between the assured and any one claiming under the assurance.[19]

Thus, in spite of his limited interest in the property destroyed, and in spite of the apparently restrictive wording of the indemnity clause in his insurance contract, Keefer recovered fully for the damage to the insured property. However, he could not keep all the insurance money. He held any money in excess of his own interest in trust for the purchaser, Cloy.

Unlike the purchasers in *Rayner*, therefore, the purchaser in *Keefer* did benefit from an insurance contract held by the vendor, even though the purchaser was not a party to the insurance contract and even though his interest had not been disclosed to the insurer. Furthermore, unlike the insurer in *Castellain*, the insurer in *Keefer* was unable to employ the principle of indemnity to relieve it from liability under the insurance contract. Because the vendor in *Keefer* was holding any excess insurance moneys in trust for the purchaser, he could not possibly be over-indemnified. Sedgewick, J. distinguished *Castellain* as follows:

> There is nothing inconsistent with our present judgment in that case. There, it was practically admitted that the vendor insured only his own interest, and the case proceeding upon that assumption merely held that the vendor having received the full amount of the purchase money the insurance company became subrogated to his rights against the vendee, and could recover from him, the vendor, any excess which he received beyond a proper indemnity.[20]

The *Rayner, Castellain*, and *Keefer* cases thus appear to turn on an important factual distinction. In *Keefer*, the third party's equitable interest in the property had been established (by virtue of the contract of sale) before the insured negotiated his insurance coverage. This sequence of events triggered the application of the "trust principle" summarized by Bowen, L.J. in *Castellain*. The Court in *Keefer* had no difficulty in finding that the form of the insured's contract protected the third party and also that the insured intended to protect the third party. Conversely, in *Rayner* and *Castellain* the insured's purchase of insurance preceded the sale contract which established the third party's interest in the insured property. Under these circumstances, the "trust principle" was not applied. The Court denied the third party any benefit of the insurance contract, and compelled the insured to account to the insurer, rather than to the third party, for any surplus money.

18. *Supra* n. 5, at 398-399 (Q.B.D.).

19. *Supra* n. 6, at 150.

20. *Id.*, at 151.

Canadian case law subsequent to *Keefer* justifies the conclusion that the application of the "trust principle" depends on whether the third party's interest in the insured property arose before or after the contract of insurance. A good example is *Bellhouse* v. *Gore*.[21] The appellant (defendant) had acquired title to goods and machinery from a company called Paramount Knitting Mills, and had insured these items against fire. Subsequently, the respondent (plaintiff) and other creditors of Paramount Knitting Mills had obtained judgment setting aside the appellant's acquisition of the property as fraudulent. As part of its judgment on the issue of fraudulent title, the Court had ordered the appellant to store the property in certain named premises for the benefit of all interested parties pending sale. While the items were being stored in these premises, they were damaged by fire, and the appellant collected on his insurance policy. The respondent and the other creditors of Paramount then sued the appellant for an order compelling him to disclose on discovery the amount of insurance money he received, and to account for the surplus of money over and above the value of his interest in the property. The respondent succeeded at trial, but the appellant's appeal was allowed. McDonald, J.A., writing for the Court, analyzed the situation as follows:

> Admittedly, at the time when the insurance was effected, there was no contractual or fiduciary relation between the respondent and appellant, nor did appellant insure as the former's agent, or for his benefit, or intend to insure any interest regarded as belonging to the respondent. No case has been cited which holds that under such circumstances the respondent has any claim to the insurance moneys, and the appellant's right as against the insurance company does not arise in this action. Such cases as *Rayner* v. *Preston* (1881), 18 Ch. D. 1; *Warwicker* v. *Bretnall* (1882), 23 Ch. D. 188, and *Leeds* v. *Cheetham* (1827), 1 Sim. 146, seem to be decisive against the respondent ....
>
> The respondent is forced to rely on cases in which the owner of an interest has been held entitled to the benefit of insurance effected by the owner of another interest, the policy covering the entire property.
>
> But in all these cases it will be found that not only did both interests exist when the policy was taken out, but the person who took out the policy did so with the intention of protecting the other's interest, and so practically as his agent, his intention being either expressed or readily to be inferred from their contractual or fiduciary relationship. In *Keefer* v. *The Phoenix Insurance Co. of Hartford* (1900) [sic], 31 S.C.R. 144 there was a contractual obligation to insure. In other cases such as *Waters* v. *Assurance Co.* [sic] (1856), 5 El. & Bl. 870 there was a quasi-fiduciary relation of bailor and bailee at the time the policy was effected .... If the insurance in this case had been effected after the judgment establishing the respondent's interest, the matter might be doubtful. But the mere fact that both parties have an interest in the same property is not itself decisive, as shown by *Leeds* v. *Cheetham*, *supra*.[22]

On the other hand, the Courts have consistently applied *Keefer* to protect third party interests which arose before the insured purchased his insurance coverage.[23] In these cases, the prior existence of the third party's interest seems to create the impetus for applying the "trust principle"; the Court rarely troubles itself with intensive scrutiny of the insured's intention or the form of

21. (1941), 56 B.C.R. 455; (sub nom. *Bellhouse* v. *Wong*) [1941] 3 W.W.R. 503 (C.A.).
22. *Id.*, at 458-459 (B.C.R.).
23. *e.g. Trotter* v. *Calgary Fire Ins. Co.* (1910), 12 W.L.R. 672 (Alta. C.A.); *Drumbolus* v. *Home Ins. Co.* (1916), 37 O.L.R. 465 (S.C. App. Div.); *Goulding* v. *Norwich Union Fire Ins. Society*, [1947] 2 W.W.R. 4 (Sask. K.B.), aff'd by [1948] 1 W.W.R. 33 (Sask. C.A.); *Decelle* v. *Lloyds of London*, [1973] 3 W.W.R. 134 (Sask. Q.B.); *Battersby* v. *Lenhoco Enterprises Ltd.*, *infra* n. 46.

the policy. Occasionally, however, *Keefer* will not protect the third party even when the facts seem appropriate. For example, in *Cumming* v. *Homestead Fire Insurance Co.*,[24] the insured took out a policy to cover property which he owned in partnership with another person. The indemnity clause in the insurance policy obliged the insurer "to pay the insured or his or her their executors and administrators all the damage and loss which the said insured shall suffer ...."[25] The Court was considering a claim under the policy in respect of both partnership interests in the insured property. Middleton, J.A. accepted the principle that an insured with a limited interest may insure the whole property for the benefit of other interest holders as well as himself. In this respect, the case is unexceptional; the partnership preceded the insurance, so a "*Keefer* approach" is more likely than a "*Rayner* approach". However, Middleton, J.A. found "no trace in the policy of any intention on the part of the insured to do more than to insure his own interest."[26] Consequently, the insured recovered only the value of his own interest in the property. This result is surprising. The indemnity clause in *Cumming* v. *Homestead Fire Insurance Co.* seems much less restrictive than the indemnity clause considered in *Keefer*[27], yet the Court in *Keefer* had no difficulty in allowing the insured to recover for both his own and the third party's benefit.[2]

The above analysis of *Rayner*, *Castellain* and *Keefer* may help explain two of the most intriguing insurance decisions of the Manitoba Courts: *Jakimowich* v. *Halifax Ins. Co.* [29] and *Drache* v. *City of Winnipeg*.[30] In each of these cases, the City of Winnipeg had issued a notice of expropriation for a home. Subsequent to the notice, but prior to the actual transfer of title to the City, the home in question was damaged by fire. At the time of the fire, the resident homeowner(s) held the only policy of insurance covering the property. Thus, the "third party" in *Jakimowich* and *Drache* was the City of Winnipeg; its equitable interest in the home had been established by its notice of expropriation, but it held no insurance contract to protect that interest. The City's position was similar to that of the purchaser in *Rayner* and *Keefer*. The intriguing aspect of the *Jakimowich* and *Drache* decisions is that, in each case, the insured homeowner(s) emerged from the litigation in a very happy position. Under the relevant statute, the City was obliged to pay full compensation for the value of the property as of the date of the expropriation by-law.[31] Therefore, no fire damage could be deducted from the amount of compensation payable. Nevertheless, in each case the Court allowed the insured to collect and keep the proceeds of insurance. The homeowners had apparently

24. [1935] O.R. 161 (C.A.).

25. *Id.*, at 166.

26. *Id.*, at 164.

27. *Supra* n. 16.

28. *See also Sommerville* v. *Home Ins. Co.*, [1931] 1 D.L.R. 987 (Alta. S.C.), where the Court applied the principle of indemnity to prevent a tenant in common from recovering more than the value of his own interest in the property. However, the other tenant in common had expressly withdrawn from a prior agreement whereby he had contributed toward insurance premiums on the property. Thus, in interpreting a contract taken out in the name of the first tenant alone, the Court could not reasonably apply the "trust principle" to protect the tenant who had withdrawn premium contributions.

29. (1966), 56 W.W.R. 359 (Man. Q.B.); aff'd by (1966), 57 W.W.R. 767 (Man. C.A.) (hereinafter referred to as *Jakimowich*). The C.A. decision is short and essentially affirms the reasoning of the Q.B. decision. Therefore, the Q.B. decision will be analyzed.

30. (1970), 75 W.W.R. 317 (Man. C.A.); aff'g (1970), 72 W.W.R. 379 (Man. Q.B.) (hereinafter referred to as *Drache*).

31. *Supra* n. 29, at 362 (Q.B.); *supra* n. 30, at 319 (C.A.).

eluded one of the most fundamental principles of insurance law — the principle of indemnity. Or had they?

In *Jakimowich*, the homeowners (husband and wife) were the plaintiffs suing on their insurance policy, and the insurance company was the defendant. After the conclusion of the trial, but before judgment, the plaintiffs settled with the City an amount of compensation payable under the expropriation by-law. In this settlement, the City expressly released to the plaintiffs all of its interest in the insurance policy isssed by the defendant. Significantly, the plaintiffs had taken out this policy *after* having received the notice of expropriation from the City. Dickson, J. (as he then was) rejected the insurer's argument that the plaintiffs had been fully indemnified by the City and had therefore suffered no loss in the fire. Although at one point he observed that "[p]laintiffs had at risk the full value of the dwelling"[32], Dickson, J. went on to say:

> In my opinion, plaintiffs were entitled to, and did insure for, the full value of the dwelling up to the limit set out in the policy. There has been a loss by fire in the agreed amount of $7,197.97. It appears to me that, once that loss has been established, plaintiffs are entitled to recover for that loss and, once it has been shown that defendant is liable to pay, it must pay the full amount of the damage *even though plaintiffs may have only a limited interest.* (emphasis added)[33]

He supported this finding by citing *Keefer*, the *dictum* of Bowen, L.J. in *Castellain*, and other authorities which established that the holder of a limited interest could recover the full measure of loss under an insurance contract. Dickson, J. then found that the plaintiffs had, by the form of their policy and by their intention, insured the whole value of the property, and he concluded; "There was undisputedly a loss of $7,197.97, whether it be the loss of plaintiffs or of the city. How plaintiffs and the city settle their differences does not affect the liability of defendant to pay."[34] It appears that Dickson, J., on the basis of the "trust principle set out in *Keefer* and other cases, held that the third party interest of the City had been protected by the plaintiffs' insurance policy. The fact that, in the expropriation settlement, the City had surrendered the value of this interest was irrelevant to the insurer's obligation to pay. Just as in *Keefer*, the indemnity principle could not be applied against the insureds because they held any excess insurance money in trust for the City.[35] This conclusion is entirely consistent with the key fact that the insureds had effected insurance *after* they received the notice of expropriation from the City.[36]

Drache[37] was an action by the plaintiff homeowner to enforce in full an arbitration award arising out of the defendant City's expropriation of the

32. *Supra* n. 29, at 364 (Q.B.).

33. *Id.*, at 364-365 (Q.B.).

34. *Id.*, at 367 (Q.B.).

35. *Contra Tees* v. *Great American Ins. Co.* (1972), 30 D.L.R. (3d) 488 (N.W.T. Terr. Ct.). Here, the third party was the holder of a purchase option. After the fire, he exercised his option and voluntarily surrendered any claim he may have had to insurance proceeds. The Court speculated that the third party may have been able to claim the insurance from the vendor on the basis of a trust. The Court then applied the indemnity principle, denying the vendor's insurance claim because he had received the purchase money from the option holder.

36. There was apparently a second, alternative ground for the *Jakimowich* decision. Dickson, J. noted that the compensation settlement between the City and insured was reduced to take insurance into account, and that since the value of the property had never been arbitrated, there was no basis for saying the insured had been over-indemnified. This reasoning is dubious; by accepting reduced compensation, the insured has abrogated the insurer's subrogation rights. See *Phoenix Assur. Co.* v. *Spooner*, *infra* n. 39.

37. *Supra n. 30.*

plaintiff's property. The plaintiff's insurer was not a party to the action. The insurer had already paid to the plaintiff the total sum of the fire loss to the expropriated building. Although the City was obliged by law to pay the full value of the building as it stood before the fire, the City argued that the insurance proceeds should be set off from the full value awarded by the arbitrators. In rejecting the City's argument, Freedman, J.A. (as he then was) stated:

> The issue is not disposable on the simple view that the plaintiff should not be paid twice, once by the insurance company and once by the City. The source and nature of the payments must be examined. Payment by the City arises under its statutory obligation to compensate the plaintiff for the value of the expropriated property as of the date when the by-law was passed. Payment by the insurance company is made pursuant to a contract entered into with the plaintiff, for which the plaintiff paid and the insurance company received an appropriate premium. The City was not a party to the insurance contract nor, of course, did it pay the premium. It should not be entitled to receive the benefit thereof.[38]

These remarks are in fact an application of the personal contract rule set out in *Rayner*. Although *Rayner* was not cited in the judgment, Freedman, J.A. subsequently quoted from *Phoenix Assurance Co.* v. *Spooner*[39] in support of the personal contract rule. *Keefer* and *Castellain* were not mentioned at all in the judgment. The Court appeared simply not to consider the "trust principle" and its potential benefits for the City. In fact, neither the appeal decision nor the trial judgment of Hall, J. (as he then was)[40] clearly indicated whether the plaintiff had bought insurance before or after the City issued its notice of expropriation. As shown in *Keefer* and *Jakimowich*, if the notice preceded the insurance, the proper factual foundation for the "trust principle" had been laid. Conversely, if the insurance came first, the Court was correct in applying the personal contract rule. However, in this latter situation, the indemnity principle should then have come into play. On the clear authority of *Castellain*, the insurer — not the City — could have sued to recover the proceeds of insurance. On this basis, it is respectfully submitted that Freedman, J.A. erred when he observed: "Following the fire the insurance company (probably aware that in the light of the *Jakimowich* case no other course was open to it) paid to the plaintiff the sum of $9,891.10, being the amount of the fire loss."[41] Drache's insurer would not have been bound by *Jakimowich* unless the City had benefitted from Drache's contract of insurance.

Discussion of the "trust principle" will conclude with two further cases. In *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.*,[42] the insured was bailee of a cargo of tobacco owned by Imperial Tobacco (the "third party"). The bailee purported to insure the full value of the tobacco, and claimed under its policy after the tobacco was stolen from a warehouse owned by Imperial. The insurer resisted the claim, arguing *inter alia* that the insurance contract was one of indemnity and that the insured had suffered no loss by virtue of the theft of

38. *Id.*, at 321 (C.A.).

39. [1905] 2 K.B. 753. In *Spooner*, the third party was an expropriating authority which sought to benefit from the homeowner's insurance by paying reduced compensation for fire-damaged property. The homeowner had insured the property before the notice of expropriation. The Court applied the personal contract rule, denying the expropriating authority any benefit under the insurance contract.

40. *Supra* n. 30.

41. *Supra* n. 30, at 318 (Man. C.A.).

42. [1966] A.C. 451; [1966] 1 All E.R. 418 (H.L.) (hereinafter referred to as *Hepburn*).

goods which were in fact owned by Imperial. The House of Lords ruled in favour of the insured. Their Lordships held that the insured, as bailee, had an insurable interest in the tobacco, and could therefore insure for the full value of the cargo. The insured would then be compelled to account to the owners for the money recovered under the insurance policy. The Canadian authority of *Keefer* was not cited in support of this finding, but their Lordships did follow *Waters* v. *Monarch Fire and Life Assurance Co.*,[43] the same decision applied by the Supreme Court of Canada in *Keefer*. In the course of his decision, Lord Reid, writing for a majority of the House of Lords, commented on the two criteria for the "trust principle" summarized by Bowen, L.J. in *Castellain*. Lord Reid stated:

> This case has been complicated by the supposed existence of a rule that, if the insurer [sic] has only a limited interest in the subjects insured, he cannot recover more than sufficient to indemnify him against his own personal loss, unless it is shewn that he intended to insure for the benefit of the owner of those subjects. It is said that under this supposed rule that intention need not appear from the terms of the policy and need not have been communicated to the insurer, but that the intention can be proved by evidence ....
>
> There is, in my judgment, no rule which would make it relevant in this case to go behind the words of the policy and investigate the respondents' intention when they took out this policy.[44]

If *Hepburn* is to be followed, the House of Lords has apparently made the "trust principle" more readily applicable in support of a third party's claim to insurance proceeds. As long as the insurance contract can be interpreted to indemnify up to the full value of the insured property, the third party's interest can be protected. In this connection, it is interesting to note that there was no discussion in *Hepburn* of the necessity for an agreement between the insured and the third party concerning the placing of insurance on the subject property. In fact, Lord Reid quoted a passage from *Waters* v. *Monarch Fire and Life Assurance Co.* which included the following sentence: "And I think that a person entrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy."[45] *Hepburn*, of course, does not affect the fundamental factual assumption that the third party's interest must exist prior to the time that the insured takes out his coverage. In *Hepburn*, the third party (Imperial) obviously owned the goods before turning them over to the plaintiff company, which insured them in its capacity as bailee.

There is one recent Canadian authority which has examined this question of intention in terms of the disposition of insurance proceeds: *Battersby* v. *Lenhoco Enterprises Ltd.*[46] The plaintiff was the administrator of the estate of a mortgagee of certain property. The mortgagor had covenanted both to insure the building on this property in favour of the mortgagee and to assign the policy to the mortgagee. However, the mortgagor proceeded to sell his interest in the property to another party, who in turn assigned that interest to the defendant. The mortgagee was unaware of these transactions. The defendant then insured

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43. *Supra* n. 17.

44. *Supra* n. 42, at 469-470 (A.C.).

45. *Id.*, at 467 (A.C.), quoting Lord Campbell, C.J. in *Waters* v. *Monarch Fire and Life Assur. Co.*, *supra* n. 17, at 709 (E.R.).

46. [1980] 3 W.W.R. 56 (Sask. C.A.) (hereinafter referred to as *Battersby*).

the building against fire. A fire occurred, and the plaintiff sued the defendant, claiming that part of the proceeds of the defendant's insurance should be used to redeem the value of the mortgagee's interest in the property. The central issue before the Court was whether the defendant intended to insure the whole value of the building or merely the value of its personal interest. If it intended to insure the whole value, the insurance proceeds would be impressed with a trust in the mortgagee's favour to the extent of the mortgagee's interest.

The Court ruled in favour of the plaintiff. Bayda, J.A. cited numerous authorities in support of this decision, including *Keefer, Castellain,* and *Hepburn*. He stated that *Hepburn* had settled the law concerning intention only where the dispute was between the insured and the insurer. In such cases, intention was to be garnered only from the terms of the policy. However, where the dispute was between the insured and a third party, *Hepburn* was not definitive. Bayda, J.A. referred to *Keefer* as "perhaps the dominant authority [in Canada] on the matter of permissible source of intention."[47] He continued:

> In brief, Sedgewick, J. [in *Keefer*] found it proper to derive the intention from both the terms of the policy and the evidence adduced in proof of such intention .... Whether *Keefer* was correctly decided is not for me to say. But, if the *Keefer* rule is the rule governing disputes between contracting parties, that is, between an insurer and an insured, then, a fortiori, it is the rule for disputes between an insured and some other person claiming a portion of the insurance money.[48]

After reviewing the terms of the defendant's policy in the context of other evidence concerning the value of the destroyed building, Bayda, J.A. concluded that the defendant had intended to insure the whole value of the building.

From the above analysis, it appears that cases like *Rayner* are solid authority against any third party whose interest in property arises after formation of the insurance contract. This, however, brings us to the second device employed by the Courts to assist third parties: the equitable assignment of the policy. Equitable assignment must be contrasted with legal assignment of the policy. In a legal assignment, the insured transfers his insurance policy to the third party at the same time as he transfers his interest in the subject-matter of insurance. For example, in a real estate transaction, the parties may agree that, on possession date, the purchaser will assume the vendor's existing policy of insurance on the property. The transfer of the policy requires the consent of the insurer.[49] If the insurer consents, the third party becomes the new insured — either under the existing insurance contract, or, alternatively, under a new insurance contract between the third party and the insurer.[50] Under either alternative, the important point is that the consent of the insurer has made the third party privy to an insurance contract. Conversely, in the situation of equitable assignment, the insurer has not agreed to cover the third party, but the Court nonetheless protects the third party's interest. The basis for this protection lies in the nature of the dealings between the third party and the insured.

47. *Id.*, at 66.

48. *Ibid.*

49. *See e.g.*, *Gill* v. *Yorkshire Ins. Co.* (1913), 12 D.L.R. 172 (Man. K.B.).

50. If there is a new contract, the third party is not subject to equities existing between the insurer and the former insured. *See Springfield Fire & Marine Ins. Co.* v. *Maxim*, [1946] S.C.R. 604.

One early authority in this area is *Caledonian Ins. Co.* v. *Montreal Trust Co.*[51] The respondent insured (Montreal Trust) was liquidator of a grain company, and had obtained two fire insurance policies to cover a grain elevator owned by the company. In the course of the liquidation proceedings, the respondent sold the grain elevator to certain directors of the grain company. The purchasers agreed to pay to the respondent the unexpired portions of the insurance premiums from the date of sale. Although the purchasers paid full price for the elevator, they had not yet decided what to do with it, so they arranged with the respondent that transfer of title should remain in abeyance. Fire burned the grain elevator to the ground. At the time of the fire, the purchasers had paid the unexpired insurance premiums as well as the purchase price, but the respondent had not yet conveyed title or formally assigned the insurance policies to the purchasers. The main defence of the insurers was that, at the time of the fire, the respondent had no insurable interest and suffered no loss because it had sold the elevator and had received the full purchase price.

The Supreme Court of Canada rejected this defence and found for the respondent. The Court ruled that the respondent had an insurable interest because: 1) it had retained legal ownership in the grain elevator and 2) the agreement that the purchasers would pay the unexpired insurance premiums constituted "an implied undertaking on the part of the respondent to hold the policies for the benefit of the purchasers until such times as they were validly assigned to them."[52] This implied undertaking was also important with respect to the question of loss. The real loss in this case had been suffered by the purchasers, not by the insured. How were the purchasers to benefit from a policy which had not been formally assigned to them? Lamont, J. dealt with this question by quoting from *Welford and Otter-Barry on Fire Insurance* as follows:

> The contract under which the assignment of the subject-matter takes place may contain a provision that the assured is to keep alive an existing policy for the benefit of the purchaser. Where, as is usually the case, the consent of the insurers is obtained to what is to all intents and purposes an assignment of the policy no difficulty can arise. The effect of the provision, in the absence of such consent, does not appear to have been discussed, but the following considerations seem to apply, namely: —
>
> (i) There must be no condition in the policy precluding the assured from contracting with a purchaser in the terms of the provison.
>
> (ii) So long as the assured retains some interest in the subject-matter, such a provision may be valid, not only as between the assured and the purchaser, but also against the insurers.[53]

In this case, the sale contract for the grain elevator included a provision that the purchasers were to pay the unearned portion of insurance premiums. This provision, and the payment of those premiums by the purchasers, brought the purchasers the benefit of the respondent's insurance, and the respondent was successful in suing on their behalf.

In reaching this conclusion, the Court in *Caledonian* characterized the insured as "trustee of the purchasers."[54] However, it is noteworthy that although Lamont, J. cited *Keefer* and *Castellain* in passing, these authorities were not prominent in his reasons for judgment. This is not surprising, because

51. [1932] S.C.R. 581 (hereinafter referred to as *Caledonian*).

52. *Id.*, at 588.

53. *Id.*, at 587, quoting from *Welford and Otter-Barry on Fire Insurance* (3d ed.), at 217-218.

54. *Id.*, at 588. In support of this statement, Lamont, J. cited the old and obscure authority of *Burton* v. *Gore District Mutual Ins. Co.* (1857), 14 U.C.Q.B. 342, at 351.

the facts in *Caledonian* were inappropriate for application of the "trust principle" which had been summarized by Bowen, L.J. in *Castellain* and employed by the Court in *Keefer*. The "trust principle" assumes that the holder of a limited interest has bought insurance to protect himself and other interested parties. In *Caledonian*, there were no other interested parties in the picture when the respondent insured the grain elevator. The offer to purchase came later. Given this sequence of facts, the respondent could not logically argue that he had intended to protect the purchasers at the time he insured the elevator. The facts in *Caledonian* more closely resemble those of *Rayner*. Lamont, J. quoted from the judgment of Brett, L.J. in *Rayner*,[55] but did so in order to distinguish *Rayner* as a case in which there had been no assignment of the policy from the insured to the third party.

The principle of equitable assignment of the policy was also important in a Manitoba decision, *Denesuk* v. *Zajanczkowski*.[56] In this case, the plaintiff bought a building from the defendants. The building was insured under an existing policy held by the defendants, and the sale contract included the following clause: "Unearned fire insurance premiums, taxes and insurance to be adjusted to the first day of July, 1947 [the date of possession]."[57] After the date of the sale contract, but before the date of possession, fire damaged the building. The defendants collected on their insurance policy, and refused to complete the sale unless they could keep the insurance money. The plaintiff claimed the benefit of the insurance proceeds. He tendered the balance owing on the sale contract minus an allowance for fire loss, and sued for specific performance of the sale contract. The defendants argued, *inter alia*, that the plaintiff was a stranger to the insurance contract and therefore ought not benefit from it, and further that they would have to account to the insurer if they abated the purchase price by the amount of the fire loss. They cited, *inter alia*, *Castellain*, *Rayner*, and *Phoenix Assur. Co.* v. *Spooner*.[58]

The plaintiff succeeded. Major, J. stated:

> The points in issue in these cases [e.g., *Castellain* and *Rayner*] are very similar to those existing in the case at bar, with the one important exception: that the contract for sale in all of these cases had no reference to the existing policy of insurance on the building, and I have been unable to find any indication in any of these judgments as to what the result would have been if any one of the contracts for sale had contained a reference to an existing fire insurance policy ....
>
> Can it be said the English cases decided that where an unpaid vendor who has an insurable interest in the property and holds a policy of fire insurance, and who has agreed with his purchaser to assign the policy on completion of the contract, is prevented from being fully indemnified by the insurance company in case of loss by fire, or that he is by reason of that occurrence absolved from his contractual obligation to the purchaser? I think not.[59]

Major, J. concluded that the plaintiff, by virtue of the sale contract, had become "not only the equitable assignee of the policy of fire insurance on the

55. The quoted words are included in the exerpt from *Rayner*, *supra* n. 7.

56. (1948), 56 Man. R. 272, [1948] 1 W.W.R. 225 (K.B.); aff'd without written reasons by (1948), 56 Man. R. 284, [1948] 2 W.W.R. 494 (C.A.) (hereinafter referred to as *Denesuk*).

57. *Id.*, at 281 (Man. R.).

58. *Supra* n. 39.

59. *Supra* n. 56, at 279-280 (Man. R.).

building but also of the moneys payable thereunder ..."[60] Therefore, the defendants were compelled to account to him for the insurance money. In support of this conclusion, Major, J. cited *Keefer*, stating that *Keefer* had removed "whatever doubts may exist in the English decisions in regard to the relationship of vendor and purchaser and fire insurance on a building."[61] He applied the "trust principle" in *Keefer* by quoting from the headnote of *Keefer* as follows:

> An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss, though his interest may be limited if when he effected the insurance he intended to protect the interest of the vendee as well as his own.[62]

Denesuk, like *Caledonian*, avoided the harshness of the personal contract rule by employing the concept of equitable assignment of the insurance policy. In both cases, the equitable assignment originated in the terms of the sale contract between the insured and the third party. What is remarkable about *Denesuk* is how far the Court went to find an equitable assignment. The vendors had merely agreed to assign the policy to the purchaser on the date of possession. It would seem to follow that the purchaser was not to benefit from the insurance *until* the date of possession. The fire occurred prior to this date, but the Court nonetheless awarded the proceeds of insurance to the purchaser.

The most important feature of the *Caledonian* and *Denesuk* cases is that the Courts applied the concept of equitable assignment in circumstances where the "trust principle" expressed in *Keefer* would not have seemed applicable. As discussed earlier, Courts seem to apply the "trust principle" when the third party's interest in the insured property has arisen *before* the time the insured buys coverage. In both *Caledonian* and *Denesuk*, the third party's interest arose *after* the insurance had been bought. Thus, the principle of equitable assignment emerges as an alternative to the "trust principle". Which principle the third party will argue depends on the sequence of facts in the case at hand.

There is in *Denesuk*, however, one disturbing aspect which challenges the above analysis. The defendants had purchased insurance *before* selling the building to the plaintiff, yet the Court did not hesitate to apply the "trust principle" as expressed in *Keefer*. The key fact in *Denesuk* was the contractual undertaking by the vendors to assign their insurance policy upon transfer of possession. Correspondingly, the facts in *Keefer* included an agreement by the vendor to keep the property insured, while the Court in *Rayner* emphasized that there was no agreement of any kind between vendor and purchaser in respect of insurance on the property in question. Could it be that the protection of the third party's interest actually depends on whether or not there has been, prior to the occurrence of the peril insured against, some kind of *contractual arrangement* between the insured and the third party, whereby the third party is to benefit from the proceeds of insurance? Under this theory, the question of when the third party's interest arose would be irrelevant. As shown in *Denesuk*, even a third party whose interest came after the insurance contract would be protected — as long as the third party had a contractual arrangement

60. *Id.*, at 281-282 (Man. R.).
61. *Id.*, at 280-281 (Man. R.).
62. *Id.*, at 281 (Man. R.).

with the insured in respect of insurance. Moreover, under this theory, distinctions between the "trust principle" and the principle of equitable assignment would be a matter of semantics. Whether the Court expressed the result in terms of the "trust principle" (*Keefer*), equitable assignment (*Caledonian*), or both (*Denesuk*), the key fact would be that the third party had contracted with the insured to receive the benefit of the insurance policy.

Such a theory, however, does not survive scrutiny. In the first place, the application of *Keefer* to the facts in *Denesuk* is, with respect, open to criticism. As noted above, Major, J. quoted from the headnote in *Keefer* to support the application of the "trust principle". According to that quote, the trust principle applies "if when [the vendor] effected the insurance he intended to protect the interest of the vendee as well as his own."[63] On the facts in *Denesuk*, the vendors could not have intended to protect the vendee's interest because there was no sale contract — and therefore no vendee — when they bought their insurance. The only demonstrable intention of the vendors came later; that intention, as evidenced by the sale contract, was merely to adjust the insurance as of the date of possession.

Furthermore, some of the authorities discussed earlier in this article do not justify an assertion that application of the "trust principle" depends on a contractual arrangement in respect of insurance between the insured and the third party. Obviously (as in *Keefer*), if such a contractual arrangement exists prior to the purchase of insurance, it is compelling evidence that the insured intends to cover the third party's interest. However, that is not to say that there *must* be such an agreement before the "trust principle" will be applied. For example, the early English case of *Waters* v. *Monarch Fire and Life Assurance Co.*, [64] applied in both *Hepburn and Keefer*, contains the statement quoted earlier[65] that a person entrusted with goods may insure them without orders from the owner and even without the owner's knowledge. Among the Canadian cases, *Jakimowich*[66] and *Battersby*[67] exemplify situations in which there was no apparent agreement between the insured and third party in respect of insurance. Nevertheless, in *Jakimowich* the Court appeared to protect the third party's interest, while in *Battersby* the Court most certainly did so. In fact, the third party in *Battersby* was entirely ignorant even of the insured's interest in the property until after the fire had occurred. Therefore, he could hardly have agreed with the insured to benefit in some way from the policy. For this reason, Bayda, J.A. expressly refused to apply the principle of equitable assignment to the facts at hand. (In this case, the Court was considering equitable assignment of the proceeds rather than of the policy itself.) However, Bayda, J.A. then proceeded to consider the "trust principle" as an alternative to equitable assignment, noting that trust "is a principle which is rooted not in contract (which could have given rise to an equitable assignment), but in the intention of the insured, Lenhoco, when it effected the policy."[68] As noted earlier, the

63. *Ibid.*
64. *Supra* n. 17.
65. *Supra* n. 45.
66. *Supra* n. 29.
67. *Supra* n. 46.
68. *Id.*, at 64.

evidence in *Battersby* indicated that the insured intended to insure the full value. Although the insured was aware that it had purchased only a limited (mortgagor's) interest in the subject property, its insurance policy nonetheless covered the total value of the building on the property. The policy therefore incorporated the value of the mortgagee's existing interest, and the Court applied the "trust principle".

The following conclusions emerge from the cases discussed in this article:

1. Where the third party has acquired an interest in insured property prior to the purchase of insurance, the third party can argue the "trust principle" (*Keefer, Battersby*, etc.) in order to benefit from the proceeds of insurance. The Court will then consider whether the insurance contract in fact insures the full value of the subject property, and whether the insured intended to insure the full value.

2. Where the third party has acquired an interest in insured property subsequent to the purchase of insurance, the third party can argue equitable assignment of the policy (*Caledonian, Denesuk*) in order to benefit from the proceeds of insurance. The Court will then examine whether, prior to the occurrence of the peril insured against, the third party had contracted with the insured to benefit from the insurance.

3. Where the third party has acquired an interest in insured property subsequent to the purchase of insurance, and the third party has not contracted with the insured to benefit from the insurance, the third party will be caught by the "personal contract" rule (*Rayner, Bellhouse, Spooner*).

In Manitoba, however, there is one final option available to a third party caught in the *Rayner* situation: argue statute law. One statutory provison which may be relevant is s. 40(1) of *The Law of Property Act*. It reads:

> Notwithstanding anything in any other Act or in any agreement for sale of land or in any mortgage of land made or given before or after the coming into force of the Revised Statutes, or in any agreement renewing, or extending it, in the event of damage to, or destruction of, buildings on the land by fire the purchaser or mortgagor may, after giving the notice required by subsection (2), apply to the Court of Queen's Bench for an order governing the application of any moneys received or receivable under any insurance policy, in respect of the damage or destruction; and upon the application the court may make an order directing the application of the moneys on the mortgage or agreement for sale or in or towards rebuilding, restoring, or repairing the buildings damaged or destroyed, or partly in the one way and partly in the other.[69]

On its face, this provision contains at least four important limitations: 1) it applies only to buildings; 2) the buildings must be damaged or destroyed by fire; 3) the third party must be a purchaser or a mortgagor; 4) the Court has complete discretion as to whether or not it will make an order. The provision appears to be unique to Manitoba,[70] and has been applied at least once in this province. In *Denesuk*,[71] Major, J. cited it as an alternative ground in support of his decision to allow the purchaser to benefit from the vendors' insurance

69. *The Law of Property Act*, R.S.M. 1970, c. L90, s. 40(1).

70. *See* the discussion in C. Brown and J. Menezes, *Insurance Law in Canada* (1982) 395.

71. *Supra* n. 56.

contract. He interpreted the subsection as permitting the Court to direct that insurance moneys be applied either to the purchase price or to restoration of the damaged building.[72]

Also, a third party mortgagee could claim the protection of s. 8 of *The Mortgage Act*, which reads:

> 8(1) All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.
>
> 8(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all moneys received on an insurance be applied in or towards the discharge of the money due under his mortgage.
>
> 8(3) This section is subject to The Law of Property Act.[73]

Whether this wide provision is explicit enough to affect the personal contract rule may be debatable. Apart from passing references in two cases,[74] it appears never to have been applied in Manitoba.[75]

The issue of third party rights under contracts of property insurance is both complex and interesting. As noted at the outset of this article, the law provides surprisingly extensive protection to a third party who seeks to benefit from the insured's coverage. This protection defies the problems of privity and consideration which afflict third party claims under the common law of contracts in general.[76] In *Hepburn*, Lord Reid recognized the uniqueness of third party rights in insurance law:

> No doubt the principle preventing jus quaesitum tertio [the third party's right to recover] has been firmly established for at least half a century. But it does not appear to me to be a primeval or necessary principle of the law of England. We must uphold it until it is altered. But I do not think that we are bound to be astute to extend it on a logical basis so as to cut down an exception, if it be an exception, which has stood unchallenged since the decision of *Waters* case[77] more than a century ago.[78]

In spite of this unique situation, any party with an interest in property would do well to purchase his own insurance in order to avoid a difficult problem which might end up in Court.

72. *Id.*, at 283 (Man. R.).
73. *The Mortgage Act*, R.S.M. 1970, c. M200, s. 8.
74. *Royal Bank of Canada* v. *Kenward* (1925), 35 Man. R. 301 (C.A.); *London and Lancashire Guarantee and Accident Co. of Canada* v. *M. and P. Enterprises Ltd.* (1968), 65 W.W.R. 242 (Man. Q.B.), aff'd by (1968), 66 W.W.R. 704 (Man. C.A.).
75. *See* the discussion of s. 8 and the related s. 9 of *The Mortgage Act* in D. Ringstrom and R. McDonald, "Fire Insurance Coverage and Losses" in *Isaac Pitblado Lectures on Continuing Legal Education — 1981 - Insurance Law* (to be published).
76. *See supra* n. 3 for a discussion of these issues as they relate to insurance law.
77. *Supra* n. 17.
78. *Supra* n. 42, at 470-471 (A.C.).