INSURANCE — THIRD PARTY — REINSURANCE — STATUTORY INTERPRETATION.

The question of the right created by section 211(1) of the New Brunswick Insurance Act[1] was raised again in the recently decided case of *New Zealand Insurance Company v. Cyr.*[2] As a result of a motor vehicle accident, the respondent Cyr had recovered judgment against Grondin, the insured named in a motor vehicle liability policy issued by the United Scottish Insurance Company Limited and in force at the time of the accident. Between the date of the accident and the date of entering judgment, the United Scottish decided to terminate its Canadian business. To this end it entered into an agreement of reinsurance with the appellant company which provided, in part, that the latter company, for consideration, would ". . . assume all the duties in connection with and the liabilities of the 'UNITED SCOTTISH' for all losses and other obligations arising out of Insurance Policies and Certificates on risks in Canada that are Outstanding and Unsettled. . . ."[3] His judgment against Grondin remaining unsettled, Cyr brought action against the New Zealand Insurance Company, seeking recovery under section 211(1) of the Insurance Act and the agreement between the two Insurance Companies.

At the trial it was held that as a result of the judgment entered against Grondin, and the operation of the statute, a liability had been imposed on the United Scottish Insurance Company, and that this liability was transferred to the New Zealand Insurance Company by their agreement to reinsure.[4] This decision was reversed in the Appeal Division of the Supreme Court of New Brunswick on the basis that no privity of contract could be established between the parties. In delivering the unanimous decision of the Court, McNair, C.J.N.B., quoted from Halsbury:

> As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if

---

1 R.S.N.B., 1952, c. 113, s. 211(1):

> Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, nothwithstanding 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.

2 (1964), 49 M.P.R. 298.

3 *Ibid.*, at p. 299.

4 [1962] I.L.R. 1-080.

> the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.[5]

The interpretation of section 211(1), and of the identical provisions in the Insurance Acts of the other common law provinces,[6] has been the subject of considerable litigation. The question which has repeatedly arisen is the nature of the right bestowed by the statute upon a third party judgment creditor of the insured. Is the third party given the right to sue the insurer upon the terms of the contract of insurance, or is he given a statutory right to sue the insurer independent of the terms of the contract? It is clear that McNair, C.J.N.B., based his decision on the former point of view. In addition to the passage from Halsbury, his judgment quoted with approval the following words of Harrison, J., in the Appeal Division of the Supreme Court of New Brunswick in *Bourgeois et al. v. Prudential Assurance Co. Ltd.*:

> The principal question here is whether the action is based upon the contract contained in the policy or upon an entirely independent statutory liability imposed on insurance companies. . . . In my opinion, sec. 183 gives a third party a right to sue upon the insurance contract, if any; . . .[7]

The statutory provision[8] referred to by Harrison, J. is identical to section 211 of the present Insurance Act of New Brunswick.

The majority decision of the Supreme Court of Canada in *Northern Assurance Co. Ltd. v. Brown*[9] departed from the decision in the *Bourgeois* case, however. In that case the respondent was struck and injured by a car owned by Schnurr, and driven with his consent by Corbett. One ground of appeal was that a statutory provision of the policy required that any action under the policy be commenced within one year from the date the cause of action arose. The respondent brought his action more than a year after the accident and it became necessary for the Court to decide whether the right of action under the statute was independent of the insurance contract. The majority of the Court held that the right of action arising under section 214 of the Ontario Insurance Act[10] did not depend in any way upon the contract of

---

5 Halsbury's *Laws of England*, 3rd ed., vol. 8, p. 66.

6 R.S.A., 1955, c. 159, s. 302; R.S.B.C., 1960, c. 197, s. 242; R.S.M., 1954, c. 126, s. 227; R.S.N., 1952, c. 96, s. 26; R.S.N.S., 1954, c. 18, s. 26; R.S.O., 1960, c. 190, s. 223; R.S.P.E.I., 1951, c. 77, s. 200; R.S.S., 1953, c. 133, s. 251.

7 (1945), 18 M.P.R. 334, at pp. 341-2.

8 *The Insurance Act*, 1937, 1 Geo. VI, c. 44, s. 183(1).

9 [1956] S.C.R. 658.

10 R.S.O., 1950, c. 183, s. 214(1).

insurance. Kerwin, C.J., with the concurrence of Taschereau, J., stated:

> . . . I am of opinion that condition 9(3) does not apply to the claim of the respondent. That claim is a substantive right given by statute and does not arise under the contract.[11]

Locke, J., stated the same opinion in the following words:

> I do not consider that the cause of action vested in the respondent was a right to sue upon the insurance contract issued by the appellant to Schnurr.[12]

Further on there was approval of the dissenting opinion of Baxter, C.J., in the *Bourgeois* case:

> In the *Prudential Assurance Company* case above referred to, Baxter, C.J. dissented from the judgment of the majority of the court, his opinion being that the limitation section did not apply, for substantially the same reasons as those which commended themselves to the Court of Appeal in the present matter. I respectfully agree with these learned judges and would dismiss this appeal with costs.[13]

Rand, J., also gave reasons for holding the right of action afforded by the section to be non-contractual. Despite a strong dissenting opinion by Cartwright, J., therefore, the answer to the question raised above was clearly settled by the Supreme Court of Canada: a third party's right of action against the insurer under section 211 of the Insurance Act is not upon the provisions of the insurance contract, but arises solely out of the statute.

The question in the *New Zealand* case therefore should have been: Have the statutory requirements giving rise to a right of action in the third party been satisfied? These requirements are quite clear:

(1) The claimant must have a claim against an insured for which indemnity is provided by a motor vehicle liability policy.

(2) He must have a judgment therefore against an insured.

(3) He must bring his action against the insurer.

Clearly the respondent Cyr was able to fulfil the first two requirements of the statute. He had a claim against an insured for which indemnity was provided by the policy issued by the United Scottish Insurance Company and he had a judgment therefor. To succeed in his action against the New Zealand Insurance Company,

---

11 [1956] S.C.R. 658, at p. 660.

12 *Ibid.*, at p. 663.

13 *Ibid.*, at p. 667.

however, he would have to show that that company was an insurer for the purposes of section 211(1) of the *Insurance Act*.

Section 211(1) seems to suggest that before an insurance company can properly be deemed to be an "insurer" it must have undertaken or effected a contract of insurance entitling the insured to indemnification. The operation of the section would seem to demand the existence of a relationship between the judgment debtor and the insurance company founded on either a contractual or a statutory right in the former to indemnity from the latter. This grounds the statutory right in the third party to sue the insurer.

It is difficult to say how far a court may go in interpreting the term "insurer". In attempting to fit a reinsurer within the scope of "insurer" for the purposes of section 211(4) it may be useful to consider two cases in which the Supreme Court of Canada has given a broad interpretation to the term "insured" as it applies to the same section. In *Northern Assurance Co. Ltd. v. Brown*[14] it was argued that the claim must fail since the third party claimant had recovered judgment not against Schnurr, the insured named in the policy, but against Corbett, who was driving the car with Schnurr's consent. However the court was unanimous in holding that for the purposes of an action under the corresponding section 214 of the Ontario Insurance Act, Corbett was an insured. Considerable assistance was offered by the definition in the statute:

> 'insured' means a person insured by a contract whether named or not.[15]

That Corbett was actually insured by the contract, although not named, was unquestioned.

In *Global General Insurance Company v. Finlay and Layng*[16] the named insured died before the expiry date of the policy. It was unanimously held by the Supreme Court that the named insured's executrix, and a person driving with her consent, should properly be considered to be "insured" under the policy. Cartwright, J., adopted the reasoning of Schroeder, J.A., in the court below,[17] who had based his decision on the fact that the words of

---

14 [1956] S.C.R. 658.

15 R.S.O., 1950, c. 183, s. 192(e). An identical provision is included in the New Brunswick Insurance Act, R.S.N.B., 1952, c. 113, s. 191(d).

16 [1961] S.C.R. 539.

17 (1960), 23 D.L.R. (2d) 376.

the policy, read in the light of statutory conditions 1(a) and (b)(i),[18] showed that the parties had contemplated that the named insured's executors should succeed to the rights under the policy in the event of her death during the policy period.

In these cases, the Supreme Court was able to rely on statutory and contractual provisions as founding a relationship between the judgment debtor and the insurance company and thus to extend the meaning of "insured" beyond the parties named in the policies. Unfortunately, however, these interpretations of section 211(1) may not be found adaptable so as to bring a reinsurer within the scope of the term "insurer" due to the total absence of the necessary relationship between the insured and the reinsurer. No reliance may be placed on any statutory relationship since the definition of "insurer"[19] does not seem to contemplate a reinsurer as the term is used in the *New Zealand* case. Nor would a policy holder with one company appear to be in a contractual relationship with a reinsurer when he is neither a party to the reinsurance contract nor an assignee of the benefit. A claim such as that by Cyr in the *New Zealand* case would therefore seem to fail for want of statutory assistance and for want of privity of contract between the insured and the reinsurer.

Fact situations identical to that encountered in *New Zealand Insurance Company v. Cyr* are not likely to arise frequently. They are, however, a predictable result of insurance companies reinsuring their policies and leaving the jurisdiction. Moreover, in view of the decided cases and the interpretation placed upon the statute they leave a third party judgment creditor in the unfortunate position of having to establish that the reinsurer is to be considered the insurer for the purposes of section 211(1). His only alternative is the expensive process of securing judgment against the original insurer, and then attempting to have this judgment enforced in a jurisdiction in which the original insurer has assets.

There is no doubt that justice demands a quick and effective method of providing recovery against the reinsurer in these cases. The reinsurer has undertaken an obligation of a commercial nature

---

18 R.S.O., 1950, c. 183, s. 197, Statutory Condition 1(a), (b)(i). An identical provision is included in the New Brunswick Insurance Act, R.S.N.B., 1952, c. 113, s. 196, Statutory Condition 1(a), (b)(i).

19 R.S.N.B., 1952, c. 113, s. 1(32):
"insurer" includes any corporation or any society or association incorporated or unincorporated, any fraternal society or any person or partnership, or any underwriter or group of underwriters, that undertakes or effects, or agrees or offers to undertake or effect, a contract of insurance;

and has received a consideration which it agreed was adequate to cover the risk. The legislature could avert this type of injustice by amending the *Insurance Act* to provide that for purposes of an action of this type a reinsuring company shall be deemed to be an insurer.

Eric A. Bowie*

---

* Eric A. Bowie, II Law, U.N.B. Mr. Bowie is a Sir James Dunn Scholar in Law.