A COMPARATIVE STUDY ON THE INSURANCE LAWS

IN IRAQ.

By

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PREFACE

I have been often asked, "Why do you study your Iraqi law at a Scottish University?" This valid question has been put by many whose opinions I have respected, and I have appreciated their encouragement. I am not in a position to give a comprehensive answer, but the following explanation may indicate the reason.

When we say Iraqi law and Scottish university, it is obvious that there is no connection whatsoever between these institutions. But by confining ourselves to the subject of insurance, a great deal of this gap will be bridged. Insurance is a subject which does not belong to any locality. It is associated with trade and consequently, its benefits extend all over the world. This branch of law is international and almost universal. Apart from certain formalities peculiar to each system, this remains the truth, and so there is a direct and real link between the law of insurance in Iraq and the Scottish university in which the Scottish legal system is a subject of study.

The general system of law in Iraq is based upon Islamic law, but this does not prevent the introduction of legal conceptions which have evolved and become established in other parts of the world. One of these conceptions is the contract of insurance, and insurance legislation in Iraq is not purely Iraqi law. It started with marine insurance. This is almost a complete reproduction of European law, particularly the French codification, and the introduction of this system, which is no more than a background, made the situation more complicated, for the fact is that insurance legislation in Iraq has not evolved through the need of trade or to organise the business of insurance in the country, which is hardly to say it existed. What happened was the Ottoman legislature, under the influence of the Napoleonic era of codification, introduced between 1839-1875 many reforms to modernise administration. These legal reforms were represented as additional, rather than contrary to the Islamic law. Among them was the law of insurance. The introduction of the French Code was probably for ease of management and citation and certainty in the law, but there was not enough insurance business to justify this new phenomenon.

The matter is further complicated, after the establishment of the state of Iraq in 1921, by the fact that the business of insurance is also influenced by another system, through the use of Lloyd's style of policy of mar-
ine insurance and consequent introduction of British practice. Thus, in course of time there has come to be a wide gap between law and practice. The Ottoman legislation was forgotten rather than ignored; the enactment of the Civil Code in 1951 did not greatly alter the situation. Disputes were very rarely brought before the courts; the matter was handled by the method of arbitration in which the arbitrators, like the insurance companies were foreigners. This method of arbitration had no success in establishing local customary rules.

It is noteworthy that the Arab legal writers, especially in Egypt, do not hesitate to borrow their opinions from French legal literature, regardless of the needs of the business. Their scholastic method has taken no account of what is the practice of insurance in the country.

There are, however, no major differences between the law and the business which need radical change, even though any reform is highly required. The problem becomes how to adapt and apply present legislation and reduce the gap between law and practice, and it is the aim of this study to investigate this problem.

The new situation must be studied under new circumstances. To ascertain the differences between the French background legislation and the British system of insurance is, however, one way of approaching this problem. The British or, to be more specific, the English system, has its own peculiarity. It has developed through custom of trade and a long history of legal precedents developed through cases arising on the Lloyd’s policy of insurance. This system is based on reliance on practice and distrust of theory, and its legacy is the means of solving practical problems. The law of insurance in Britain is, unlike that of the Continent, based on the judicial opinion, and the supremacy of the courts of the country leaves no difference
between juristic and legislative opinion, both being absorbed in the opinion given by the judge. In France, on the other hand, it is found that there may be three distinct opinions. The legislature enacts the law, the jurists in their opinions explain what is meant in the law, and finally, the courts select a suitable opinion according to the circumstances of each individual case. In the Arab world, the latter method is followed.

It is, therefore, necessary to choose a neutral place for deliberation, a place which does not reject French legislation or neglect the French scholastic way of thought, but at the same time regards practical methods in dealing with the business of insurance. This advantage is, thanks to Scots lawyers, preserved in the Scottish legal system. The Scottish courts have through the centuries, developed law and practice in one complementary system. Consequently, I have found that a Scottish university, in which Scots law has its own identity as a system-based on the Civil law on one hand and developed within the practical sphere of the needs of the business of insurance on the other hand, is a suitable place to try to study Iraqi legislation and to find a way to reduce the gap between it and the practice of insurance. It may be also that, as the political unification of the Arab world appears to be a matter of time, Iraq may be able to effect a new outlook in legislation in the Arab world.

The answer to the question proposed at the beginning is, I trust, becoming clearer. In this work, I am endeavouring to discover, by comparison, the differences between the principles of insurance legislation based on French code and a system of insurance based on practice. I cannot claim that I am able to emerge with a new theory on insurance; the subject is extensively studied in this part of the world, and there is nothing much left to be said. I am also unable to claim that I have dealt with every
topic of this wide subject, but I can say that I have done my utmost to deal with every important matter and I have tried to look at certain problems, not only from the legal side but also in their economic and social aspects. I have used the Iraqi legislation as the basic subject of examination, not because it is the best, but because it is the law of the country in which the problem has arisen. Primarily, what is dealt with is the Iraqi law of insurance, its origin and some of its problems. Secondly, when this law is found to differ from the British system of insurance, the difference is discussed. The substance of the law consists of a series of proportions, many unconnected with the other and arranged in a somewhat arbitrary order. I have accordingly had to try to find a new approach and present a co-ordinated system.

The structure of this thesis consists of three parts. In the first part there is an attempt to study the historical origins of the concept of insurance. I can say that this is the first of its kind in the Arab world. In the other two parts, the substantive laws of insurance are studied. In the first of them the general aspects of the contract of insurance as applicable to all kinds of insurance are considered. The other part is devoted to provisions which concern particular contracts. A comparative study is made by selecting certain problems. The Epilogue contains certain conclusions as to possible lines of reform and development.

Finally, I would like to record my indebtedness to the University of Edinburgh for allowing me all the facilities to undertake this endeavour. I would like to express my gratitude to Professor George A. Montgomery, Q.C. of the Chair of Scots Law for his encouraging and valuable help. I am much indebted to Mr. David Maxwell, Q.C. of the Department of Scots Law, for his help and advice as well as the great deal of time he spent giving considerable patient observation with careful notes on the bulk of this work. It is also a pleasure to express my thanks to the Librarians of the University Library and particularly of the Law Section, the Advocates' Library, the National Library, the Central Library in Edinburgh, the libraries of the British Museum, Colonial Office, and the Public Record Office in London, for all the help they gave me and for their kindly disregard of the trouble I gave them in the course of my researches.

S.N.K.

Edinburgh, May 1966
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1. THE NATURE OF INSURANCE

A. General

Security against risk and indemnity for loss are the main principles of insurance. In recent times, perhaps ever since insurance was known, its importance has steadily increased until it has become part of the structure of modern civilization; and in this respect, there is, broadly speaking, no difference between advanced and under-developed countries, whether the economy of these countries is regarded as "free" or "planned".

Originally, insurance was introduced in the field of commerce, and especially maritime commerce, to meet certain risks. Risk of loss is always a result of adventure. The adventures which are undertaken are consequences of the dynamic nature of human beings, and more and greater adventures will result in more and greater risks. Human ingenuity cannot prevent loss, and so human beings seek protection against risks. Such sense of need of protection leads to the fundamental conception of insurance, which is to divide risks among many individuals who are exposed to, or are prepared to undertake, the same risks.

Risks which cause loss are, generally, of two kinds, namely risks

(1) The etymology is doubtful. "The word risk comes from the Arabic word risq, originally meaning 'quotidient bread' or distribution." (Postan and Rich, The Cambridge Economic History of Europe, 1952, vol.ii, p.284) And it appears to have come into the English language through the Italian risco and the French risque.

(2) The word 'insurance' means 'making sure'; French sure, Latin securus. The term assecuratio, which was unknown in classical Latin, was used by notaries and merchants in the early Middle Ages for a contract of security against risk in maritime trade. (Marshall, On Marine Insurance, 4th edn., 1861, p.3.)
which may be described as "preventable" and risks which are "non-preventable". Preventable risks are caused by the action of others and may be avoided by precautionary measures. But there are other risks which result from another kind of force, known in law as "force majeure" or, sometimes, "Act of God"; terms which express the inability of human beings to prevent them. Since earliest times men have been unable to prevent the loss caused by this force and will doubtless so remain as long as they cannot unravel the mystery of the future and control the forces of nature. Yet their creative mind is never dejected and being unable to prevent such risks, they have evolved the remedy of sharing with others, and so minimising, both risks and loss.

Increase in adventures in the field of trade, particularly in maritime trade, increased the need for means to minimise loss and promoted their development; and protective measures increased with the increase of adventures. Thus it may be said that insurance originated in the needs of merchants, who found in it a means of protecting themselves and their property with the help of others who agreed to undertake a proportionate share of risk and loss. And so insurance became one of the most usual means of reducing loss and getting security against the risks which might otherwise restrict trade; and it has gradually been extended into many other fields of human interest and concern, so that now there is virtually no risk which is uninsur-

(1) This division is more comprehensive than the traditional one in which the risks are classified as risicium gentium and risicium maris (see F.E. de Roover, Early Examples of Marine Insurance, J.E.H. 1945, p.174; F.Hendriks, Contribution to the History of Insurance, J.I.A.1852, p.136)

(2) "The lose lighteth rather easilie upon many, than heavely upon fewe..." (Policies of Assurance Act, 1601, 43Eliz c.12, Preamble)
able.

B. Definition

Insurance became, in the fourteenth century, well established as a custom of trade among merchants in most centres of commerce in the Mediterranean, and the study of this conception, as practised by them and recorded by the notaries, was presently undertaken by legal scholars. The earliest works on this subject were in Latin, but some of them were later translated into English, and Roccus, who wrote in 1655 one of the first manuals devoted to the subject, defined it thus:

"Insurance is a contract by which a person assumes upon himself the risque to which the property of another may be exposed, and binds himself in consideration of a certain premium to indemnify him in case of loss." (3)

This definition was adopted by the courts in England and became, in substance, part of the Common Law and later of statute law.

It is worthy of mention that in 1787 a learned Scots lawyer, Miller, said, with characteristic brevity:

"Insurance is a contract by which one man, for consideration received, becomes liable for the loss arising to another from any specified contingency." (6)

In France, insurance is not defined in the Ordinance of Louis XIV in 1681, the Code of Napoleon in 1808, or the Law of 1930, but recently Planiol and Ripert, in their treatise on the French Civil Law, have given a simple, and what they have called 'the usual'

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(2) e.g. Roccus' Manual of Maritime Law by Ingersoll, 1899.
(3) Ibid., p.85.
(5) e.g. Marine Insurance Act, 1906, s.1.
definition, stating that:

"Insurance is a contract by which one person called the 'insurer' promises to another called the 'insured' to indemnify him for an eventual loss to which he is exposed, for a sum called 'premium' paid by the insured to the insurer. The eventual act which causes the loss is called the 'disaster'."

In Iraq, as in other Arab countries, European jurisprudence is the main source of the law of insurance; and article 983 of the Civil Code of Iraq, which has provisions similar to those of the Egyptian, Syrian, and Libyan civil codes, provides that:

"Insurance is a contract whereby the insurer undertakes, in consideration of a premium or other pecuniary payment, to pay to the assured or the beneficiary a sum of money or an annuity or other pecuniary payment upon the occurrence of the event insured."

It will be seen that there is, in substance, not much difference between the various general definitions of insurance. Conflicting views were, however, long held on the subject of life insurance and, in particular, on the questions, whether the life of a human being might be the subject of a commercial transaction, and whether life insurance was a contract of indemnity. Roccus stated that "the life of a man may be insured", and mentioned that such a contract was recognised in Florence. In France, before 1818, however, life assurance was deemed a wager and consequently prohibited; and the Ordinance of 1681 provided that:

"We forbid making insurance on the life of any person." (6)

(1) Articles 747, 713, and 747 respectively.
(3) For life insurance in other parts of the Mediterranean, see R.S. Smith, Life Insurance in 15th Century Barcelona, J.E.H.1941, p.59.
(6) Title 6, article 10, see Magens' Essay on Insurance, 1755, vol.ii, p.170.
In England in the 18th century, life insurance was permitted to be undertaken by two companies, and in the following century it was judicially defined:

"The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable...This species of insurance in no way resembles a contract of indemnity." (2)

The subsequent development of the contract is indicated in a later definition by Smith:

"Insurance upon a life is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay to the person for whose benefit the insurer is made a certain sum of money or annuity, on the death of the person whose life is insured." (3)

This definition is adopted by Lillie and a similar definition is given by French authors Pianiol and Ripert. The contract of life assurance is thus generally recognised as a lawful contract; but whether and in what circumstances it is a contract of indemnity has not yet been settled.

C. Kinds of Insurance

There are various methods of classifying the many kinds of insur-
ance which have evolved, the usual methods being according to subject matter or consideration or risk.

Classification according to subject matter is as follows:
1- Insurance of property, which includes marine, fire, transport, and burglary insurance;
2- Insurance of persons, which includes life, personal injury, and third party liability insurance.

Classification according to consideration consists of two parts:
1- Insurance by premium;
2- Mutual insurance.

Insurance by premium is the usual kind of insurance; and all the above types of insurance may be included under this heading. They may be undertaken either by individuals or by companies; and the payment of the premium is the only consideration that binds the insurer to indemnify the assured.

Mutual insurance is undertaken by a group of individuals who agree to take upon themselves the loss that may occur to any one of them during a certain period. This kind of insurance does not require the payment of any premium because each member of the group becomes at the same time insurer and assured; that is, each member of the society insures his property or his interest with the society. Every member must pay a subscription, and he is also obliged to contribute to meet a loss which the collected subscriptions do not cover.

Classification according to risk is exemplified in the law of France, where the lawyers classify insurance in accordance with either the nature of the risk, or the parties concerned. The first (1)

is divided into:

1- Maritime and terrestrial insurance;
2- Insurance of damage to property and personal insurance.

The second is formally divided into:

1- Ordinary insurance;
2- Mutual society insurance.

There is, however, no comprehensive classification agreed upon by all lawyers and companies undertaking insurance, and it is worthwhile considering what is done in practice. Most insurance companies find that the classification followed in Britain is a practical one and adopt it. According to this method insurance business is divided into:

1- Life insurance;
2- Industrial insurance;
3- Fire insurance;
4- Accident insurance;
5- Bond investment;
6- Motor vehicle insurance; and
7- Marine, aviation and transit insurance.

In Iraq from 1936 to 1960, the insurance companies followed the British classification laid down in the Insurance Companies Act, 1909, but in the Law of Insurance Companies of 1960, the business which insurance companies may undertake is classified in the following way:

1- Life insurance;

(1) Insurance Companies Act, 1958, s.1.
(2) This was substantially the same as in the 1958 Act (supra), which repealed the 1909 Act.
2- Fire insurance;
3- Accident insurance;
4- Marine insurance;
5- Bond investment insurance; and
6- Other kinds of insurance which are not contrary to law, and
(1) insurance by way of tontine is declared void.

(1) Tontine: a financial arrangement under which subscribers to a loan each receive for life an annuity, which increases as other subscribers die, so that ultimately the last survivor receives for whatever is left of his life an annuity amounting in the aggregate to the total of the original annuities. The Dictionary of English Law, ed. Earl Jowitt, s.v. "Tontine".
II. THE HISTORY OF INSURANCE

A. Earliest Times

i. Conflicting Views

Trade has always been an integral part of everyday life in settled communities, and no one can ascribe its commencement to any particular date or period. As soon as there exist goods sufficient for consumption and a surplus for exchange, trade begins, capital increases, and further ventures are undertaken with corresponding risks. The question naturally arises: Did the ancients have insurance? This question has been debated for a long time, and as yet there is no final answer.

Sources of information are fragmentary, and no one can claim that there is, particularly in the field of commerce, a full record of the history and customs of any ancient people. One is dependent on surmise and inferences drawn from incomplete laws and regulations, letters and contracts. Every civilization, moreover, like human life, is born, grows and dies; no civilization has survived from earliest times.

In this state of knowledge two conflicting views are held: Some experts on the one hand deny that the ancients knew of insurance, basing their denial on the fact that amongst the laws and contracts surviving from ancient times there is no law or contract of insurance. Others, on the other hand, believe and try to prove that the ancients may have known,

(1) This idea was recognised by a great Arab scholar, Ibn Khaldun, Introduction to History, translated by F. Rosenthal, 1958.

(2) N. Magens, Essay on Insurance (1753); Park, On Insurance (1786); Miller, On Insurance (1787); Marshall, On Insurance (1802); P.B. Boucher, Institute du Droit Maritime (1803); M. Hopkins, Manual of Marine Insurance (1867); Smet, Droit des Assurance Maritime (1934); G. Ripert, Droit Maritime (1953).
and probably did know, of insurance. By the ancients they mean specifically the Romans, whose great and highly organised empire, with the pax Romana secured by the legions on the frontiers, made possible a great and highly organised trade, and whose standard of civilization and superiority of legal thought would seem to support the probability of a highly developed mercantile law. They claim that the silence of Roman law on the subject of insurance is not conclusive against their views, as the record of Roman law is incomplete, and accordingly there is no proof of the non-existence of insurance.

It is difficult to accept or reject either of these contradictory but logical arguments. The first is based on the failure of a search through the centuries among fragmentary sources for a contract called "insurance". The second is based on the fact that many inherently interesting contracts still in use were known to the Romans, and that it is scarcely credible that they did not know so useful a contract as insurance. They found also in certain narratives, but cannot prove, that insurance is the kind of contract which the Romans would naturally evolve. But one need not confine oneself to either school of thought. An answer to the problem may be found, it is suggested, in a study of the sequence of development of trade. This development has led to the evolution of many kinds and forms of mercantile transactions, and it may be that the evolution of insurance was brought about by a development unknown to the ancient, namely the slow change from the travelling merchant to the sedentary merchant. Let us therefore consider briefly

(1) Malynes, Consuetudo vel Lex Mercatoria (1622); Loccennium, De Jure Maritimo (1652); Molloy, De Jure Maritimo et Navali (1692); H. Aschen, Disputatio juridica inauguralis de assecuratione (1693); Emerigon on Insurance (1783); J.M. Pardessus, Coutume de la mer (1847); Duer on Insurance (1850); Vance, The Early History of Insurance Law (C.L.R. 1908); Trenerry, Origin and Early History of Insurance (1922).

(2) See p.19

(3) de Roover, F.E., loc. cit, p.173.
the nature and method of trading practice and customs from earliest times to see if we can trace the emergence of the concept of insurance.

ii. Character of Trade

Practice: Trade was in ancient times, and even after the invention of money, carried on by barter. Merchants in trade both at home and overseas accompanied their merchandise from place to place. Methods of transport were primitive, and journeys were of such duration that merchants moving from town to town to buy and sell were frequently away from home for long periods of time, possibly sometimes for years. One of their problems was, by all means in their power, to protect themselves and their goods from innumerable hazards. One such means was association, particularly practised, both on land and sea, by gathering to form large caravans or fleets and using the services of slaves and hired soldiers to protect their property. In the maritime trade they kept as near the coast as they could. Thus human thought sought to solve the problem of risk. They could not, however, arrest these inevitable risks known as Acts of God, and the consequences of these they regarded as misfortunes. Moreover, since a merchant was likely to lose his life as well as his goods, an indemnity for loss of property would be of little value to him and would not be readily thought of as a practical proposition.

The practice of accompanying goods lasted a long time and was ultimately modified by the formation of a kind of partnership, in which one partner, usually the older, remained at home and settled to business

(1) Hence the idea, prevalent in the Middle Ages, that merchants had no nationality.
there, while the younger ventured farther with the goods.

Custom: Practice is the only field where customs are known; sound practice becomes established custom, and established custom becomes law. This is a simple and general description of how law, and particularly mercantile law, emerged in ancient times. Consequently, it can be said that the laws of merchants never perish. The merchants carried about with them not only their goods but also their customs and laws, and the destruction of their trading centres did not necessarily mean the destruction of their customs and laws, which doubtless became known in and mixed with the customs and laws of other trading centres. It may be also that the merchants of the centre which was destroyed were away at the time and escaped destruction. The best example of this is Carthage: It is probable that the trading customs and laws of that great mercantile city did not totally perish with it, but were preserved in the customs of other centres which survived.

Laws: Well-established custom becomes law and so attains definitive and greater authority. Law, unlike practice and custom, is in course of time committed to writing and thus secures a degree of permanence. The mercantile laws of the ancients are the main source now available to us of knowledge of the customs of the ancients. Investigation of these laws, begun last century, shows them to be incomplete and unable to shed full light on the life of the ancients. Their origins also remain unknown, and it is suggested that the more recent laws have (1) evolved from older laws, and that those which exist are mostly a compilation of old traditions and customs accepted by the people. It

(1) Trenerry, loc. cit., p. 48.
might therefore be useful to try to find out whether these laws can assist us to discover whether or not there was a contract of insurance. It is an undisputed fact that they are silent on this topic; all one can do is to try to find out whether there existed the possibility of evolving such a contract.

iii. Laws of the Ancients

a) The Babylonians: The discovery in 1945 of the law of Ashnuna — a ruined town near Baghdad in Mesopotamia — gives an interesting idea of life in that kingdom. Before this discovery, it was thought that the Code of Hammurabi (18th century B.C.) was the oldest comprehensive code in the world, but the law of Ashnuna is two centuries older. Written on a piece of clay tablet made up on sixty-two sections, it is not a complete system, but it contains articles regulating trade by river-transportation and some commercial contracts. Besides this law, hundreds of contracts and letters written on clay tablets were discovered in the town. These discoveries are still undergoing examination, but it is already fairly certain that there is no trace of any means used by those people to solve the problem of risk or any contract which may be considered as serving the same purpose.

(2)

The Code of Hammurabi, written on a great stele of diorite discovered in 1901, is more important. Compiled in the 18th century B.C., it consists of 282 sections, and it can be regarded as a complete system of law which had reached an advanced stage of codification.

The Code contains considerable amount of mercantile law, including rules concerning agents through whom merchants had invested their capital in commercial ventures. It is noteworthy that these factors were not liable to their principals in cases where goods were lost by "force of enemy", i.e. *force majeure*. Some have recognised in this transaction the origin of the contract of commendite. The Code also regulated responsibility, prescribed cases in which compensation might be paid, and provided that the debt of a debtor who lost his crops by *damnum fatale* were discharged. An extensive examination by philologists of the Code and thousands of letters and contracts warrants, however, has resulted in the conclusion that the Babylonians did not evolve insurance to meet the problem of risk.

Babylon was a great centre of trade, and its laws and customs had an extensive influence both in the Far East and in the Mediterranean, being carried by the Phoenicians to the coasts of Egypt and Greece.

b) The Phoenicians: It is well established that the Phoenicians were the oldest navigators in the world. They settled on the coasts of the Mediterranean, from Syria to Spain, and their cities, of which the most famous was Carthage, became centres of maritime trade. There is unfortunately no record of their laws and customs, but it is inconceivable that these have been totally lost. It may be that they survived embodied in the customs of other Mediterranean peoples.

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(2) A contract of partnership by which the capital was invested by a sleeping partner.
c) The Egyptians: The Egyptians were primarily cultivators and not traders; but Revillout, a scholar versed in the laws of ancient Egypt, suggests that early Egyptians were acquainted with maritime trade and had their own maritime law although nothing is left of this law. The only law of the Egyptians which has survived written on papyrus is the mixed Greco-Egyptian law, in which there is no indication of how they faced the problem of risk, or any contract in which a similarity may be found to insurance.

(2)

d) The Greeks: It is evident from general history that the Greeks had attained a more advanced stage in the field of trade and were acquainted with navigation. Apart from the Rhodian laws, however, most of the Greek laws have been lost, and in the documents which survive there is no indication of any system of indemnity for loss by disaster. The Greeks continued their maritime trade under the Roman and Byzantine Empires but do not appear to have solved the problem of inevitable risk.

(3)

The Rhodian laws of maritime commerce were regarded as the law maritime of Greece, and the most important contracts in these laws were the contracts of Bottomry and Respondentia, whereby a shipmaster might get, on the security of ship and cargo, a loan to resume his journey (it being stipulated that in the event of loss, the loan was discharged). These contracts were used to provide capital not only to shipmasters but also to merchants who needed loans. These contracts have continued

(1) Trenerry, loc. cit., p.73.
(3) Ashburner, W., The Rhodian Sea Law, p.209 et seq.
in use in medieval and even in modern times. Some writers suggest that the origin of insurance may be traced in these contracts. Others reject this assumption and suggest that these contracts were developed separately, a view which is supported by the fact that the lenders also accompanied the ship or the merchandise and personally faced the same risks. Therefore it was not likely that there was any provision for indemnity in case of disaster. The risk was not the subject of either contract, and so it would appear that the method of trading practised by the Greeks did not require a contract which would have solved this problem.

e) The Romans: Attention must be concentrated on the Romans, particularly in the period of their Empire, maintaining for centuries a magnificent civilization which incorporated and gave cohesion to the earlier civilizations of the Phoenicians, Egyptians and Greeks, and many other peoples, enabling trade to be carried on in security on an unprecedented scale. One of the distinguishing features of this great civilization was the Roman law, comprehensive and just, the foundation of many later systems of law in the Western World. Here, however, one is confronted with the phenomenon that the Romans, being primarily soldiers, governors and administrators, did not regard trade with much respect; Engagement in it by Romans was discouraged by Roman public opinion, and it was neglected by the civil jurists. Consequently, the civil law was developed for Roman citizens; the protectorates were with

(1) Trenerry, loc. cit., pp.50-60.
(3) Eli, R., after making references to Colhoun (Losses in Ancient Athens) and Sieveking, H. (Das Seedarlehen des Altertums), says: "According to the Law of Rhodes, no maritime insurance(sic) agreement could be made unless the lender himself sailed in the ship." Insurance Through the Ages, (1946), p.5.
characteristic Roman tolerance permitted to retain their own laws and customs; and the Greeks and other inhabitants of the Mediterranean, including many who had been slaves of the Romans, prospered in trade regulated by their own customs which in course of time became law. Thus for example the Rhodian law became the law maritime of Rome, and when the comprehensive Digest of Justinian came to be compiled, the mercantile law incorporated in it was the mercantile law developed in the trading communities of the Empire.

Now the question again arises whether the Romans had any form of insurance. The fact is that Roman law, inasmuch as there is not a full record of it, is silent on this matter. Some writers think that this silence is inconclusive and that since the Romans had reached a high standard of legal thought, and since commerce was so extensive at that time, it is a logical assumption that contracts of insurance, or at least contracts similar to it, were known. This assumption cannot, however, be accepted for two reasons: Firstly, the contract of insurance is not a product of the law; it is an evolution of the custom of the merchants. And, secondly, the trade of the Empire remained in the hands of the Greeks and was carried on according to their methods. It is not accidental that there is no trace of so useful a contract in any part of the Empire.

It is, however, worthwhile mentioning that the theory advanced by these writers has been built up upon three references by which they were impressed and which, they consider, contain at least an embryo

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(1) Reddie, loc.cit., p.79.
of insurance if not the contract itself. These references are given
by Livy and Suetonius and are as follows:

Firstly, Livy mentions that, on two occasions during the Punic War,
the Senate of the Roman Republic agreed to guarantee the losses of the
merchants who supplied the army in Spain. Some say that there is no
resemblance between such an obligation and the contract of insurance,
while on the other hand others maintain that the Senate would not have
been bound by either positive law or natural equity to indemnify the
merchants unless a system of insurance had existed in practice. Yet,
it cannot be said that this indicates a contract of insurance existing
in practice though not expressly referred to as insurance. It is known
that during the period of the Punic War, the Roman Republic was in
financial difficulties; The army was in Spain, and it seems that the
Senate bought the supplies and asked the merchants to deliver them to
the army and receive the price there. In case of loss, the Senate as
owner of the supplies was bound to pay the price, and so it seems that
this was not a case of indemnity.

Secondly, Livy also quotes from a letter of Cicero to the Proquaestor
Caninus Saliust at Laodicea in the East directing him to procure sureties
for the public treasure he would be sending to Rome. Duer and Marshall
do not agree with Emerigon on this passage. They consider that this
kind of transaction bears a closer affinity to remitting money by means

(1) Marshall, loc.cit., p.4; Emerigon, loc.cit., p.xxiii; Duer, loc.cit.,
(2) Park, loc.cit., p.15; Marshall, loc.cit., p.4.
(3) Duer, loc.cit., p.17.
(4) See p.21 for a similar story in Arab history.
of bill of exchange than to insurance. It seems that Rome was in need of money urgently and unable to wait until the whole army returned with booty. The Proquaestor was asked to find a person who would deposit the money in Laodicea and accept repayment in Rome.

Thirdly, Suetonius conjectures that the Emperor Claudius encouraged merchants to hasten the importation of corn into Rome and for this reason took upon himself the loss and damage which might happen to the goods through the hazards of navigation. This promise by the Emperor cannot, however, be used as evidence to prove that the Roman State became the insurer of the merchants. It is obligatory for every government to procure food for the people, particularly in time of disaster, and it was the duty of the state to grant security to the merchants who gave service to the public and sought the protection of Roman law. And so this promise may be regarded as one of the securities or privileges that a state may grant to a foreigner.

The conclusion therefore must be that the Romans did not find it necessary to evolve a system of insurance or to add such a contract to the mercantile law which they adopted from the trading nations of the Empire.

f) The Arabs—Pre-Islamic Period: To complete this outline of the history of early times, it would perhaps be useful to consider the history of the Arabs. Situated in the middle of the ancient world, through the hard life of the desert they emerged as a merchant people (1) to carry the products of China, India and other countries of the East to the coasts of the Mediterranean. It is interesting to mention that they were accustomed to keep peace for four months of the year, during

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which time fighting was not allowed and caravans gathered in certain markets to exchange goods. They also enjoyed freedom of navigation on the Indian Ocean, the Arabian Sea, and the Red Sea. Their caravans crossed the desert of the Arabian Peninsula to the harbours of the Mediterranean. The peoples of that Peninsula who emigrated to settle on the coast of the Mediterranean and in Mesopotamia formed great civilizations, but the history of the ancient Arabs and their customs and laws remains almost unrecorded. The Holy Books and a vast quantity of poetry are the earliest chronicles of this people, but it may be assumed that many kinds of commercial contracts of Islamic days — partnership, commenda, letters of credit, bills of exchange — were in use in the pre-Islamic period. No great change was made by the advent of Islam in matters of contracts save that aleatory or wagering contracts, thitherto recognised, were now prohibited, and usury and the exaction of interest entirely forbidden. But neither in the contracts sanctioned nor in those forbidden does there appear any contract which might be considered as in any way resembling insurance. Arab merchants did,

(2) In early Arab history, during the occupation of Iraq in the 7th century, the treasurer of the army loaned some of the booty to some persons for purposes of trade on condition that they should repay the loan to the treasury office at the seat of the Caliphate. The transaction was at first repudiated by the Caliph and the traders were ordered to restore the loan with profit as the property of Muslims, but after further consultation, the transaction was, on the traders making over to the treasury half the profit, accepted as a contract of commenda. This incident is mentioned in the Arabic manuscript (British Museum no. CR3739) by Yahia ibn abi-al-Khair ibn Salim al-Umrani, 558H-1162), p.43.
(4) The Qur'an, Chapter ii, Verse 275.
however, try in two ways to solve the problem of preventable risks.
Firstly, they made a convention of honour to refrain from fighting for (1) four months of the year, known as "safe" months, during which caravans and tribes could gather in certain markets to exchange goods, knowledge, and poetry with impunity. Killing was entirely prohibited during these months, and any person breaking this rule was held in dishonour by all tribes. Secondly, they gathered together in caravans, and journeys (2) were arranged systematically, i.e. during the summer they travelled to the Mediterranean coasts and in winter their journeys were to the coasts of the Arabian Sea.

iv. Conclusions

The following are, in brief, the conclusions reached on this period:

1- The main feature of the ancient's trade was their system of barter.

2- Merchandise was always accompanied either by the merchants themselves or by their partners, and sometimes by their factors.

3- Travelling merchants used caravans in the land trade and gathered in fleets in the maritime trade as the only means of security against risks.

4- There remained some hazards for which no provision could be made since the travelling merchants did not realise that the impact of non-preventable risks could be reduced by indemnity.

5- If in certain cases a party damaged by the happening of risk was discharged from his contractual obligations, there is no reason to

(2) The Qur'anic, Chapter cvi.
regard this discharge as matter of contract.

6- Methods of trade, the merchants' customs and the ancient laws contain no indication that the ancients may have evolved any contract to give them assurance against the hazards of trade or relief in the form of indemnity.

B. The Dark Ages in Europe

After the downfall of Rome, the last remnants of Roman organisation seem to have been replaced by chaos and anarchy. The pax Romana passed away, and the Imperial Papacy of Rome was unable to stop the process of the so-called "Dark Ages".

The Eastern Empire inherited the eastern coasts of the Mediterranean. The Greeks enjoyed trade between east and west. The Byzantine fleet reached the Arabian Sea in the south through the Red Sea. The Digest of Justinian was compiled but soon became forgotten because of public (1) intolerance of scholars. The status of commerce in the south of Europe did not change for centuries; it remained a despicable profession. The influence of the Roman law appeared in the canon law of the Papal Empire, in which there was no place for commercial law, and the people of northern Europe, like others, became Romanized as soon as they entered (3) "Romania". In contrast, however, the Byzantines encouraged trade, and Byzantium became a famous centre of commerce.

The continuity of the old methods of trading during this period did not help to evolve any kind of contract in which the problems of the

(2) Lewis, A.R., Naval Power and Trade in the Mediterranean A.D. 500-1100, 1951, p.7 et seq.
(4) Pirenne, H., Mohammed and Charlemagne, 1939, p.152.
risk might be reduced by indemnity.

i. The Advent of Islam

At the end of the seventh century, Europe was challenged by a new invasion. Islam appeared in the Arab Peninsula, and the Arabs set out to conquer the old world. In the course of less than half a century their "Empire" was established from the coasts of the Atlantic to the border of China. The change cannot be compared with the previous invasion from the north. It was not solely a military advancement but the establishment of a new civilization. This civilization filled the gap between the ancient civilizations and the Middle Ages.

The advent of Islam as a religion in the seventh century brought many changes in the life of the Arabs in particular, and other people in general. The Arabs remained essentially a commercial community; Muhammad the Prophet was himself a merchant, and the Muslims continued to regard trade with much respect. The Islamic Law is uncodified and does not make a distinction between commercial and other contracts. Its certainty is the Qur'an (The Holy Book of Islam), in which no distinction is made between moral and legal obligations. Islamic "jurisprudence", called Shari'a, is thus part of Islamic religion, and Muslim jurists contributed in finding out which contract was legal and which was not according to the religion of Islam.

The main essential of a contract in Islamic law, besides the consent of the parties, is the certainty of the subject matter at the time of

the constitution of the contract. There was an attempt by Muslim jurists to solve the problem of risk by formula such as this: 'if you go by this way, I shall guarantee you against loss in the event of damage occurring to you or to your goods.' This kind of guarantee was considered legal, but the question was never really raised as to whether a guarantor received a consideration, which if he was not required to implement his guarantee, would be considered unjustified enrichment. Had this question been raised, there might have been doubt as to the validity of the transaction on account of its affinity to usury, which is illegal. There is no evidence that this kind of surety was widely used, and it seemingly did not develop into a contract of insurance against risk.

Muslim merchants enjoyed the advantage of having all the year considered a period of peace. Every Muslim country was regarded as a "country of peace" to all Muslims and non-Muslims alike who accepted the terms of peace, and caravans and merchants were free to travel from the coasts of the Atlantic to the border of China. This law, though sometimes violated by some rulers, was the international law of the Muslims. This idea of world peace may be regarded as a step to-

(1) Mahmassani says that: "Every contract must have an object which must fulfill the following conditions—
1-The object must be capable of delivery. Thus the sale of a sunken ship which cannot be salvaged is void.
2-The object must be specified and sufficiently known to the contracting parties.
3-The object must be in existence. A contract for future delivery is generally void.
4-The object must be permissable in law, otherwise the contract is void. "Transactions in the Shari'a", Law in the Middle East, ed. Khaddari & Liepesny, 1955, p.194.

(2) Ibn Abi'd7, Treatise on Islamic Law, p.249.
(3) cf. The Arab before Islam, p.22.
(5) Bartold, V.V. finds: "In the Muslim world the political division was regarded as an incident without a basis in law.", p.128, Caliph and Sultan, 1, 2, 1963.
wards the prevention of preventable risks. As for the non-preventable
risks, the Muslim merchants and the Muslim jurists do not try to inter-
vene in the course of human fortune but always accepted the result of
damnum fatale as being according to "fate and divine decree," which
they believed was the will of God.

It is noteworthy as the most distinct phenomenon in the history of
the Arabs that the Islamic law has kept its principles and provisions
since the seventh century. This continuity of culture has given the
Arabs an unique position, as for thirteen centuries to the present day,
despite many periods of depression, they have maintained the spirit
of their history and traditions.

ii. Conclusion

The Arabs of the East and the Arabs of the West in Spain contributed
(1) much to reduce the effect of the "Dark Ages" over Europe. Trade was
for centuries in the hands of Muslim merchants who moved freely between
(2) East and West and thus became acquainted with maritime commerce. Little
enough is known of the commercial life of the eighth and ninth centuries,
(3) but it is at least more than the knowledge available of trade in Europe.
In the period between the 9th and 12th centuries Muslim trade reached
its peak. The luxurious life of the Levant encouraged Europeans to
recapture the sources of wealth, or at least control the centres of
trade on the eastern coast of the Mediterranean to prevent monopolisa-
tion by Muslim merchants. The merchant of Europe accordingly under

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et seq.
(3) Lopez & Raymond, loc.cit., p.23.
the influence of the Church financed the Crusades for the deliverance of the Holy Land, and under the protection of the Crusaders' armies they established their trade centres on the eastern coasts of the Mediterranean. The Crusades started at the end of the 11th century and lasted until the end of the 13th century. Direct contact with the East by the establishment in the Levant of centres helped to introduce many changes into the system of Western trade, and thus the whole process was latterly called the "Commercial Revolution." Many commercial terms (1) can be traced to their Arabic origin. The customs of Muslim merchants (2) and their transactions (such as negotiable instruments, letters of credit, cheques, banking, and the contract of commandite) found their way (3) into Europe, so it was no accident that European merchants started using these commercial instruments during the period of direct contact with Muslim merchants, who had been acquainted with such transactions for (4) centuries.

(1) Day, C., loc.cit., p.86.
(3) Jenkes, E. writes: "The only fact which makes against the character of Codex (Cavenis a collection of early Lombard documents) as an exposition of pure Lombard practice, is the admittedly successful inroad of the Saracens into southern Italy during the pre-Carolingian period. But it is unlikely that the Lombard lawyers would be seriously affected by Saracenic influence. Of course the bulk of the documents in both collections come long before the revival of the study of Roman Law in Italy." The Early History of Negotiable Instrument, L.Q.R.,1893, p.77. It seems that the learned author has dismissed the role of the merchants in creating their customs. It is unlikely that Lombard lawyers who were under the Church influence contributed much to the law merchant. Their duty was merely the collecting of merchants' customs. The merchants' need creates the customs, or sometimes they use other merchants' customs without distinction of country or religion. These customs, after a long period, become recognised by the law and the lawyers as a part of the law merchant.
C. The Middle Ages

i. The Evolution of Insurance

It is commonly agreed among scholars that insurance was known in the period at the end of the twelfth century and the beginning of the thirteenth century. After this period, the contract quickly developed and became established and can be said to have reached its maturity at the end of the fifteenth century when it was recognised by most legislatures. During these four centuries certain circumstances aided its growth. Development of trade has always played a great part in evolving commercial transactions, and the new character of trade of which the ancients were ignorant, namely the slow change from travelling merchants to sedentary merchants, necessitated the evolution of insurance. So it cannot be said that insurance is the result of a new idea that occurred to the mind of anyone, merchant or lawyer. Many factors contributed to the evolution of this contract, and the Mediterranean has been considered as the area in which contracts of insurance came to evolve.

The merchants who continued for centuries to move with their goods from place to place used many means to protect themselves and their goods from risks and contingencies. Besides the length of the voyage and the need of expensive protection, damage by piracy and continual wars among the maritime cities of the western Mediterranean had a lasting effect on trade. The result was the development of many transactions of various sorts, in which risks were divided among many individuals. The need for greater capital promoted partnerships, and these associations helped also to spread the risk of loss in trade. At the

(1) de Roover, F.E., loc.cit., p.173.
same time merchants who formed partnerships began to settle in some centres of trade. Increasing profits also led to an increasing demand for capital, which allowed some merchants to engage in lending money; and it seems that the profits that they obtained were no less than the profits they would have made if they had carried on the trade by themselves. Thus the contracts of *commenda* and sea loan came into use. Consequently it was found that raising capital from many travelling merchants reduced the chance of individual loss, and this accounts for the emergence of a new class of merchant who sought profit with less risk. The spread of lending affected also the rate of usury, which reached a very high level, and when the Church of Rome intervened, it did not make any distinction between usury on loans and interest on trade. The sea loan (*mutuum*), in which the return of the loan depended on the safe arrival of the ship carrying the goods or the money, was at first exempted from the Canonistic Orders since the interest on what was called the "premium" was considered to be compensation for undertaking the sea risks. Yet the Church's prohibition of usury was extended in 1236 A.D. to include sea loans, and the prohibition of sea loans opened the way for another transaction called "*cambium nauticum*" or maritime exchange contract. The Byzantine Church, on the other

(1) The name of the contracts *commenda* or *accomendatio* or *accomendacio* are medieval terms for the transactions which may be known as "sleeping partnership" or "business venture". See Lopez & Raymond, loc.cit., p.174.
hand, did not forbid usury, and later on the Church of Rome under the influence of wealthy merchants and bankers who had been of service to it in handling its financial affairs made a compromise in respect that the theologian, which still forbade "usury", now permitted "interest", and the first record of the word "interest" (interesse) appears in 1279 A.D. All these changes helped to evolve insurance, but the really significant factor which led to this result was that merchants ceased to accompany their goods. The perils of the sea had been increased by the use of the compass for bigger adventures, and there were continual wars and piracy. But it seems that the danger which brought most anxiety to them was the risk of being deprived of their personal liberty by enslavement, from which they might be liberated on payment of a heavy ransom. All the transactions mentioned above did not help to reduce the new danger, and so they found that if they settled in the centres of trade and sent their goods unaccompanied to other merchants in other centres, payment could be made by bill of exchange. The need for such settlements of accounts brought prosperity to the bankers, whose business increased by financing the merchants and accepting their negotiable instruments. An era of sedentary merchants now opened.

"The merchant-bankers, who themselves operated with borrowed funds, were not willing to run any sea risk, and the borrowers whose commitments were unconditional had to find someone who would take over this risk. There is a close connection between the development of terminal partnerships, of the bill of exchange, and of premium insurance. They are all the result of the transition from the travelling trade to that which centered around the sedentary merchant." (4)

(3) Lopez & Raymond, loc.cit., p.115; Brunschig, R.S.V., Abd(Slave), E.I. vol.i, p.231.
(4) de Roover, F.E., loc.cit., p.177.
During these crises insurance emerged. There was no record of when it was started, but among the documents that throw light upon the circumstances of that period are the records of notaries. They disclose that the first available document of security against risk appears amongst Genoese documents of 1191-1192 in which a shipper was said to "let" (locare) certain goods to a man who promised to deliver them to a certain place for a certain consideration. This indicates that the shipper who had abandoned the practice of accompanying his goods was looking for someone who would himself agree to accept responsibility for the risks, and it is possible that the shipmaster may have accepted the risk in consideration of a higher freight.

"The merchants, in their search for a new type of contract, did not immediately hit upon the idea of premium insurance. They experimented first with a form of contract, the so-called "insurance loan", which contained already several of the elements present in real marine insurance but proved to be unsatisfactory for the full coverage of risks. The expression "insurance loan", in accordance with the practice of the German and Italian writers, is used for lack of a better term. (The German use versichungsdarlehn; the Italian, prestito a secpa assicurativo.)

The following three elements, characteristic of real marine insurance, are found in the insurance loan: 1-the insured or borrower remained on land; 2-the goods insured were sent unaccompanied; 3-the loan was repayable not upon safe arrival of the ship (sana eunte nave) but upon the safe arrival of the borrower's goods (mutuum ad risicam maris et gentium)...

It appears from the surviving example that insurance loans rarely covered the full value of the cargo, but only 25 or 30 percent. The shipper remained his own insurer for the remainder. Insurance-loan was thus not satisfactory for the purpose of covering the risks completely." (3)

Accordingly, after the merchants' engagement in the business of sea

(1) Lopez & Raymond, loc.cit., p. 255.
(2) Ibid.
(3) de Hoover, R.E., loc.cit., pp. 177-8.
loans ceased by reason of the prohibition of the Church, those who sought profit through such a transaction found themselves engaged in a contract of "insurance loan". As profit through interest was the purpose of the lenders, there was no need to introduce new contractual terms. Consequently, the term "premium" was used in the same manner as the consideration for the lender's responsibility for the sea risks. Yet the term "premium", used to conceal "interest", has sometimes disappeared from documents, though it may be included in higher freight without specific mention. From the early contracts of insurance, it would appear that the merchants were, in order to avoid the objection of the theologians, eager to confine themselves to precise definition in their contracts. They depended on the notaries whose experience in the constitution of the contracts was limited by old formulae, and they were at the same time careful to put their contract into a form in which the Church could not trace the prohibited elements. This may explain why the contract of insurance had terms and formulae borrowed from other contracts. The result of such adaptation makes it very difficult for historians and jurists to find out exactly how or when real insurance came into existence.

The earliest use of the word *securatio* appears in Genoese documents of 1191-1192, where it means a "safe-conduct". These documents were drafted according to the formula of the contract of hire, the term "let" (*locare*) being used, but they may contain an instance of insurance. In another case in which the shipowner had given loans to the merchants, and the contracts provided that in the event of the safe

arrival of the ship or the goods the loans were returnable, there was no mention of interest, and it is possible that it was disguised in
the form of higher freight. Similar contracts appeared in the 13th
century documents drafted in Naples (1261), which provided that the loans were not to be reimbursed in the event of the safe arrival of the goods. In the 14th century another example is found in Genoese documents (1347).
In this case the insured did not receive a loan, but the insurer acknowledged the receipt of a sum of money in mutuo gratis et amore and promised to repay it in the event of non-arrival of the ship at its destination. This form of Genoese insurance is like a sea loan disguised as a contract of mutuum gratis et amore. There is no mention of interest or that the borrower (insurer) had promised the lender (insured) to repay a sum of money (which the borrower had not in fact received) on condition of the safe arrival of the ship, and it would appear that in fact either the lender had received the interest or the borrower had not received the actual amount specified in the contract. More examples appear in Genoese documents of 1393, in which the contract of insurance is concealed under another formula: that a purchaser bought, for a certain price, certain goods from a shipper, with stipulation that the contract of sale was to be considered void if the goods had arrived safely at the port of destination, and there is no reference to a premium.

From these Genoese documents, it appears that the contract of insurance was disguised under the form of a contract of loan, let, or

(1) de Hoover, F.E., loc.cit., p.179.
(2) Ibid.
(3) Ibid., p.184.
sale. It cannot, therefore, be presumed that the contract of premium insurance was unknown. The only assumption is that such a contract was concealed under another formula by omitting anything that might be considered to be usury.

"Thus the Genoese contract represents a complete reversal of the earlier relation between insurer and insured; instead of the insured repaying to the insurer a real loan, the insurer promised to pay the insured a certain sum of money in case of sea disaster. Here we have real insurance, however much disguised under the form of loan. The omission of any reference to a premium was unimportant. The premium was probably handed over by the insured to the insurer before the contract was drawn up by the notary. The insured needed no receipt because nothing in the contract would permit the insurer to claim the premium anew. The insurer had the premium in his pocket, hence, he needed no written evidence of its payment." (1)

The first contract of real insurance was drafted in Palermo in 1350, and the documents contain clearly the term asscuratio or securatio. The amount of the premium as well as the nature of the contract are stated in plain language.

Meanwhile, real insurance was in no need of protection. It became well known among the merchants of the Mediterranean. The obstacle of usury was removed by the Church's permission of interest. By this time a considerable advantage of the contract of insurance had become more noticeable in that it not only gave the insurer a respectable profit, but also provided a good solution to the problem of non-preventable risks by giving the merchants reasonable indemnity against the hazards of trade.

The conclusion, accordingly, is that the contract of insurance is a fruit of the "commercial revolution" which had by that time effected many changes in methods of trade. The direct contact of Europeans with

(1) de Roover, F.E., loc.cit., p.185.
Muslims during the Crusades had helped to introduce these changes into the commercial field of southern Europe.

When dealing with trade in the Mediterranean in which Muslim merchants continued to participate at this time, it is necessary to answer this question: If these merchants were acquainted with commercial instruments long before the 9th century, why did they not know of insurance? The answer is that they still retained their freedom of moving without any restriction in the Muslim countries. The incidents of civil wars did not affect their caravans, and there was no danger of being enslaved since they had, because of piracy, abandoned their maritime trade. Hence, there was no need for them to give up the classical method of accompanying their goods. It seems they did not feel a need for a kind of transaction which would secure them by indemnity against the risks which often affected not only their property but also their lives, for no human provision could change God's will. The strict prohibition of usury, moreover, did not allow the merchants who practised contracts (3) of muqarda or mudaraba, also known as the commenda of Islam, in return for a "legal" profit, to develop a new transaction that might be considered usurious. As we have noticed, the contract of insurance was constituted by using the terms used in contracts of loan. The aim of the insurer was to get the profit, and he was not aware of the conse-

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(1) Atiya, Aziz S., Crusade, Commerce and Culture, 1962, p.120 et seq.  
(3) Wallach, F. says that: "It has been established that the Arabs, whose commercial institutions prospered brilliantly as early as the 4th century, knew limited and sleeping partnerships." loc.cit., p.21. It seems that the "4th century" is meant to be of Islam, which is equivalent to the 10th century A.D.  
(4) In Latin incommenda, in English "dormant partnership"; see Ruxton, Maliki Law, a Treatise on Islamic Law, p.227.
uent utility that he had provided. So the idea of insurance was not acceptable to the Muslims mainly because it involved the possibility of wager, usury or interest; and in addition they were not in pressing need of such protection, so the contract of insurance which evolved in the northern part of the Mediterranean failed to find its way to the southern coasts.

It is noticeable that with the progress of time the contract of insurance became well established, and by the 15th century it took a printed form in which a uniform phraseology was used — *styleis mercatorum*. The remarkable features of the old policies of the 14th and 15th centuries are still the foundation of those now in force, and very few changes were made in the next three or four centuries. The notaries who, as the legal advisers to the merchants, were engaged in designing the contracts did not conceal any part of the agreement; and the increasing recognition of the utility of insurance resulted in the policy adopting a stereotyped form providing many blank spaces to be filled by the parties.

### ii. Earliest Laws

While insurance was evolving out of the custom of merchants in the Mediterranean area, legislatures and jurists did little to promote its development, and the contract was mature before they intervened to organise and regulate it. But from the 15th century onwards, a great number of ordinances and regulations were promulgated in most of the states of Europe; and many amendments and improvements were directed

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(1) E.g. Ibn Jujair, an Arab traveller in the 13th century who recorded his journeys in the Mediterranean felt unprotected against a "Will of God."

(2) de Roover, F.E., *loc.cit.*, p.198.
towards solving the problems that arise from the business of insurance, the main centres of trade having each its own laws as follows:

a) Bruges: The earliest reference to a law of insurance appears (1) in the Chronicle of Flanders, where, it is said, that in the year of 1310, at the request of the merchants of Bruges, a "Chamber of Insurance" was established to regulate the operation of marine insurance practised among the merchants. Considerable doubt has arisen among some (2) scholars regarding the authority of this reference; Pardessus denies that such an institution was established in Bruges since there is no record of such a "chamber", and the law that is mentioned was unknown (3) at that time. Trenerry, on the contrary, tries to prove that insurance originated in Bruges and refers to another statement that insurance was known there in the year of 1377. The new evidence does not, however, prove the establishment of a Bruges Chamber of Insurance; and even if it were truly established then, the fact remains that insurance was known in southern Europe at an earlier date.

b) Barcelona: In the 14th century, the development of the commercial business of Catalonia had reached its peak as a result of the war (4) between two big centres of trade in Italy, Venice and Genoa; and in 1401 the King of Aragon granted a Charter to Barcelona, where the commercial tribunal had extended its jurisdiction to civil cases arising from mercantile contracts. There was no mention in this period of insurance, but by an Ordinance of 1435 the business of marine insurance was placed

(1) Trenerry mentions that this chronicle was published in 1735. Loc.cit., p.265.
(2) See Hendriks, loc.cit., p.147.
(3) Ibid., pp.264-276.
under the control of the public authority of Barcelona. It seems that marine insurance developed greatly in the city between 1410 and 1435, and that firm steps were taken to prevent fraud and other abuses. The Ordinance of Barcelona of 1435 is the earliest known law dealing with marine insurance. It was amended in the years 1436, 1443, 1456, 1461 and in 1489 was replaced by a new ordinance.

c) Venice: Venice was the next maritime centre in which regulations were made regarding marine insurance. Statutes were promulgated in 1468 and were followed in the years 1586, 1602, 1622 and 1629 by many new ordinances.

d) Florence: An ordinance regulating matters of marine insurance appears to have been made in Florence in 1408, the only information concerning it being given by Ussano in 1417 when he said:

"The Ordinance which forbids the insurance of foreigners, should not hold good so far as respects merchandise exported or imported from Pisa." (1)

Ordinances dealing with marine insurance are, however, known to have been promulgated in the years 1522, 1523, 1525 and 1528, and later on Florence, Pisa and Leghorn became subject to the maritime ordinance of Tuscany, which was in fact the maritime ordinance of Florence.

e) Brussels: An ordinance of marine insurance was promulgated in 1563 by King Philip of Spain and appears to have been a more highly developed regulation of the subject. A similar ordinance was in 1566 promulgated in Spain.

Ordinances regulating marine insurance were promulgated by several other states and maritime cities, and it is worth mentioning that in

(2) See Smet, loc.cit., p.xii; Magens, loc.cit., vol.ii.
Scotland in 1417 Parliament passed an act entitled "The Leave of Merchants to sure their Gudes." This title has misled some writers into thinking that this Act concerns insurance. What, in fact, this Act provided was that to have Scottish ships being impossible, merchants might "sure" their goods and their merchandise in ships of other countries as best they could for a year notwithstanding a previous statute made thereupon to the contrary. "Sure" here evidently meant nothing more than "convey."

D. Modern Times

i. The Jurisprudence of Insurance

According to the available sources of the law of the Middle Ages, state regulation preceded juristic opinion. Courts were established to enforce merchants custom; in these courts the opinions which were taken and upheld were the opinions of prominent merchants. It was these merchants and the notaries who framed the policies of insurance on the principles of the earlier maritime loans who first became familiar with the subject of insurance. The jurists, however, presently began to collect the principles of the law of insurance, partly to distinguish between insurance and other transactions, and partly because the rapid spread of the contract created difficulties for the merchants, and the judges were eager to find more settled doctrines for the contract. Thus the jurists began to make their contribution in this field and found that insurance first appeared in the maritime cities of the Mediterranean and was practised by merchants who undertook ventures in maritime trade, and so at first regarded the law of insurance as

(2) Act of Parliament of Scotland II.16,c.7,1, March, 1427.
Various works, of the nature of compendia rather than treatises, were written in Latin in the 16th, 17th and 18th centuries, notably by Santerna (1500?), Straccha (1556), Rocces (1655), Stymanmus (1661), Loccenius (1652), Rynkershoeck (1700?) and Casaregis (1740). The earlier works are now known chiefly from a few references by later writers; and, in fact, they are a mere collection of the principles of the contract. Although some of them provided excellent commentaries which have been quoted and referred to by posterior authorities, these compilations cannot be regarded as complete works.

These works were followed by many treatises in various European languages. In France the oldest surviving compilation on the subject of insurance is that entitled Le Guidon de la Mer, published by Cleriac in 1671. The editor did not mention its origin but stated that it was originally composed for the merchants of Rouen, and it is thought it could have been composed after 1556. It was followed by many eminent treatises which the contract of insurance dominated and was dealt with quite extensively. They were published by Valin (1766) and Pothier (1767), and they were followed by the excellent work of Emerigton (1783). In England insurance was dealt with by authors such as Malynes (1622); Molloy (1692); Beawes (1783); and finally by distinguished author Park, whose work A System of the Law of Insurance (1786) was followed by the notable work of Marshall in 1808. In Scotland the subject of insurance received little consideration until Miller in 1787 published

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(1) Duer, loc.cit., p.46; Reddie, S., loc.cit., for the dates.  
(2) Emerigton, loc.cit., p.xxxix.  
(3) Reddie, S., loc.cit., pp.341-343.
his elaborate work, *Elements of the Law relating to Insurance*, which contributed greatly to the knowledge of the subject.

The successful emergence of the contract of insurance in practice, as distinct from its formulation as a disguised contract of maritime loan, created much confusion among the jurists of maritime law; and the contract of insurance, having borrowed its principles from contracts of maritime loan, meanwhile failed to find a place among the commercial contracts of the law merchant. So the early jurists, who did not take much part in evolving such a contract, differed in their opinions, the main differences being between the schools of thought of the students of the civil and the common law.

a) The Civil Law and Insurance:

The Italian jurists, with their knowledge of the Roman Law, attempted by analogy to find a category and a title for the contract of insurance. Some considered it a *nudum pactum*, or agreement by mere promise; others considered it a *contractus innominatus*, or contract without any proper title. This uncertainty resulted from the use of the word *assecuratio*, which is Latin in derivation but not in origin; and the fact that the contract, if it existed, had failed to find a title in Roman Law. Other analogies were drawn by other writers; and some, in accordance with the formula traced in the documents of the notaries, used *fidejussio* (Latin: *fideiussor*, "cautioner or guarantor"), as a title for insurance. Roccou in his manual refrained from accepting these titles and says:

"The contract of Insurance is anonymous; as do, ut facias, do si fiat:...Some assimilate it to the contract of *locatio operum*, others to the mere

\(1\) Emerigon, *loc.cit.*, p.6.
locatio, and others again to the fide jusso. But the most generally received opinion is that insurance is a contract of purchase and sale; for he who insures for a valuable consideration, does, as it were, sell his own obligation because he binds himself to pay the value of the thing insured, in case it should be lost; and the other party, that is the Insured, purchases that obligation." (1)

The earlier jurists had mostly built their opinion on the uncertainty of the event, in which they found a similarity with the elements of wager. Straccha, the author of the treatise on Wager, had suggested (2) that insurance by form of wager was lawful. Roccou was of the same opinion, saying that a wager on insurance of any sum was valid like any other wager when not made on an improper consideration; and subsequently the jurists of the Civil Law classified the contract under the description of "aleatory." But these ideas did not remain for long, and the identity of the contract of insurance became more elaborate. Emerigon, the learned French author on insurance, said:

"But in the course of time, the growth of commerce having developed its nature and utility, it acquired a title subsequently confirmed by the laws of sovereigns ...Corvinus (de naufragiis), after examining the diverse opinions of different writers, adds, that insurance is a titled contract distinguished from all others by a character peculiar to itself. It is plain, therefore, that insurance properly so called is neither a sale, letting to hire, partnership, nor a wager, nor anything of what certain writers have imagined it to be. It is a contract, such as it has arisen from the necessity of things. It is truly synallagmatic provided it has been made complete by the existence of the risk contemplated by the parties." (4)

(1) p.86.
(2) Emerigon, loc.cit., p.3.
(3) p.135.
(4) Emerigon, loc.cit., p.11.
In Scotland the reception of insurance was later than in other civil law countries; and although Scotland is a civil law country, the opinion of English merchants on questions of insurance prevailed in the Scottish courts over the theories and civil law ordinances of Europe. Lord Blackburn describes this practical approach thus:

"We constantly in the English courts, upon the question what is the general law, cite Pothier, and we cite Scottish cases where they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurists, provided they bore upon the point." (3)

The influence of the civil law jurists, however, retained its effect to some extent. Stair, in his Institutions of the Law of Scotland, exemplifying innominate contracts, says, "As the contract of insurance, where money or things are given for the hazard of anything that is in danger, whether it be goods or persons." He regarded insurance as a contract, "not to exchange totally things, use, or work for the like, but to communicate them together." Bankton found that the Scottish law of insurance had undergone many alterations and received great improvements since the time of Stair, and he appears to have been impressed by the civil law scholars when he states that:

(1) Smith, T.B., A Short Commentary on the Law of Scotland, 1962, p.2; Walton, P.P. writes that: "The Scots Law in the 17th and 18th centuries followed as regards contracts the general civil law of Europe. When Lord Stair writes his chapter on "Obligation Conventional," he has his eye all the time fixed on the Corpus Juris and the later civilian jurist as much as his contemporary Domat." Cause and Consideration in Contract, L.R.1925, p.325.
(3) M'lean v. Clydesdale Bank (1883) 11R. (H.L.)1,3.
(4) 2nd edn., 1693, p.94-7.
"the contract whereby ships, goods, merchandise, or other things are insured or assured, is a kind of sale for thereby the assured purchases security to his goods for a certain premium given to the assurers, and which is for the encouragement of commerce." (1)

In the same trend another Scottish lawyer, Miller, has built his theory by finding "a consideration analogy" between the Civil Law and contracts of insurance. He says:

"Those contracts among the Romans, which had no particular name, and which by lawyers are said to be comprehended under the words, do ut des, and do ut facias, occurred but seldom in society; and this was the reason why judges did not think it worthwhile to support them unless they were accompanied by a rei interventus. The same reasoning was, at an early period, applicable to insurance, then a rare and unusual contract." (2)

b) The Common Law and Insurance:

In England insurance came into use some time after it had become known in southern Europe, being introduced by Italian merchants, namely the Lombards. There is some suggestion that this occurred between the 14th and 15th centuries, but there is no record available for this early period, and the earliest evidence indicates the 16th century.

The Common Law Courts, it would seem, at first declined to adjudicate upon disputes arising out of the contracts of insurance, as insurance was a custom of foreign merchants, and the common Law Courts had nothing to do with such customs. The merchants accordingly brought their disputes before their own arbitrators. The use, however, for

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(3) Raynes, loc.cit., p.26; Blackstock, loc.cit., p.9 refers to Uzzano who wrote about 1400 in his work on commerce that marine insurance was practised in London at that time.
the central courts to solve these disputes was encouraged to some extent by the court of the Admiralty; the Common Law Courts could not, however, fail to take notice of the increase of insurance. The records of the Admiralty Court show some policies of insurance recorded there between 1547-1602, and the competition which existed at that time between the Common Law and the Admiralty Courts moved the Common Law Courts to bring insurance disputes within their jurisdiction.

Coke in his Reports had noticed that insurance was a mere novelty and stated that action could be brought before the Common Law Courts by process of assumpsit. But the cases brought comparatively few for two reasons. Firstly, the complicated procedure did not encourage merchants to give up arbitration; and secondly, Parliament in 1601 erected a special "court" of Insurance Commissioners. This court, for several reasons, fell into disuse and was abolished virtually in 1658. But Common Law Courts now realised the important part which the law merchant, including the law of insurance, could play in encouraging commerce and were prepared to absorb it into their own system while at the same time preserving its peculiar identity. Coke, who said "the law merchant is part of the law of the realm," aided the Common Law

(1) Selden Society, Court of Admiralty, Select Pleas, vol. ii.
(3) A case of 1588 (30&31 Eliz.) cited in Dowdale's case (1606)6Co. Rep. at p.47b. This case is considered the earliest recorded case in Common Law Courts.
(4) Marshall, loc. cit., p.16.
(5) 43Eliz., c.12.
(6) Blackstone, Commentaries, 10th edn., Book iii, ch.6, p.75.
(7) Smith on Mercantile Law, 12th edn., p.470, with reference to Came v. Moye (1658) 2Sid,121 as the case which was used as reason to abolish the court.
Courts to increase their jurisdiction in matters governed by the law (1) maritime also by issuing prohibition "against the Admiralty." Blackstone in his Commentaries (1760?) has explained the absorption of the Mercantile Law by the Common Law thus:

"...the law of nations, (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the Common Law and is held to be a part of the law of the land. And those Acts of Parliament, which have from time to time been made to enforce this universal law or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitution of the kingdom; without which it must cease to be a part of the civilized world. Thus, in mercantile questions such as...insurance ...; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to." (2)

Lord Mansfield, who did so much to build the law merchant and the law maritime into the Common Law of England, is of the same opinion. How the fusion was completed is not clear. Blackburn in his work on Sale observes: "There is no part of the history of English law more obscure than that connected with the maxim that the Law Merchant is part of the law of the land," but the fact remains that questions of insurance law were by the middle of the 18th century finding their way into the courts of Common Law.

(1) Potter, H., Historical Introduction to English Law, 1932, p.190; Vance says: "Lord Coke's misleading report of Crane v. Bell, a case decided in 1546, has been the source of several mistaken statements that the writ of prohibition granted in that case by a Common Law Court took away from the Admiralty Courts all jurisdiction of insurance questions. As a matter of fact, however, Crane v. Bell had nothing to do with insurance, and we know that Admiralty Courts still heard insurance for nearly a half century after the date of that case." Loc. cit., p.13.
(2) 10th edn., Book IV, p.67.
(3) Pillans & Rose v. Van Mierop & Hopkins, (1765)3Burr,1669.
c) The Islamic Law and Insurance:

The Muslim jurists had, until comparatively recently, no knowledge of the law of insurance, the contract being unknown both to them and to the Muslim merchants. The practice of insurance among European merchants could not, however, fail to attract their interest, and in the 19th century insurance in its modern form was, in a period of general reformation in the Ottoman Empire, introduced with the promulgation in 1863 of the Ottoman Maritime Code. As the Ottoman Empire was never a maritime state, her maritime trade was carried out chiefly in foreign ships, and this had the effect of making the Ottoman government succumb to European influence in framing/commercial law. The work was entrusted to a mixed commission of Turks and nationals of European states which had jurisdiction in the country by virtue of capitulatory rights, particularly in cases where their subjects were involved. This commission consulted mainly the commercial laws of Europe, and in particular the French Commercial Code; the law of insurance which they introduced was merely a repetition of the insurance laws of Europe, especially those of France. Although this law was considered not contradictory to the Islamic law, the Muslim lawyers were, in theory, opposed to insurance because of its superficial similarity to usury and gambling. Beyond this they said nothing but kept a discreet silence because the government can pass freely any law which does not by express contradiction violate Islamic law. Recently an Arab legal writer has said:

"The classical Muslim jurists based their theory of Gharar (aleatory) on the Koranic interdiction of gambling (mayser). They extended the sanction of absolute nullity to all contracts where a risk was to be taken in a spirit of speculation, or where the extent of the obligations undertaken by one of the parties and the advantages which would redound to the other party were not clearly defined at the time the contract was entered into. Pushed to its logical con-
The theory of Gharar would have deprived the Muslim community of the benefit of many useful contracts. For instance, in their anxiety to secure exact equality in commutative transactions, the Muslim jurists would have forbidden contract of insurance as unlawful." (1)

This juristic analysis of the contract of insurance by Muslim jurists was made long before the enactment of the Ottoman Maritime Code. It has had no effect in recent times, but it is worthwhile to have a glance at two aspects. Firstly, we have seen how the element of insurance appeared in certain cases of surety, as where A says to B: 'If you go this way and someone robs you, I will be liable to pay what you lose.' The Muslim lawyers permitted such a transaction if it contained a condition, and A knew that there was a danger of robbery, and B did not know that; but this cannot be recognised as insurance since there was no premium - it was limited in scope to one kind of risk. Secondly, there is the main question: What is the opinion of Muslim jurists on the problems raised by the contract of insurance? The available sources provide us with two examples of transactions practised by merchants who engaged in trade with European ports, and an answer to the question is given by a Muslim jurist consult of the 17th century. The first transaction is: There is a custom among merchants who hire a ship belonging to a foreigner to pay the freight plus another amount of money for keeping the goods on condition that the master of the ship takes the burden of responsibility in case of piracy to indemnify the owners of the goods to an extent not exceeding the value of the looted goods. The opinion of jurist after classifying such a transaction under the title "hiring", is that the responsibility of the master of the ship

(2) Ibn Abdin, Treatise on Islamic Law, vol.ii, p.249.
is limited to one case, namely when the master knows the extent of the risks, and the master is not otherwise responsible for anything. The second example is a custom of merchants who hire a ship belonging to a foreigner. They pay, in addition to freight, a certain amount of money called "sécurité" to an agent authorised by the Sultan to conduct such business on behalf of a foreigner resident abroad. The agent who is paid that "sécurité" is liable to indemnify the merchants to an extent not exceeding the value of their goods in case of loss by fire, shipwreck, piracy, or other peril of the sea. The jurist's opinion is that the person who accepts the sécurité is not liable to indemnify the merchants since the events on which the contract is based are a décret et de l'arrêt divins and, therefore, that such contract, if constituted in a Muslim country, should be considered "invalid," and any payment of the indemnity is a voluntary gift and no obligation arises.

From this brief exposition two inferences can be drawn: Firstly, that Muslim merchants were not accustomed to insurance and such business was handled by Europeans; secondly, a pure contract of insurance, even in the use of the word sécurité, the French word used to disguise "premium," but the similarity to wager and the element of usury cannot be concealed.

It may thus be noted that until recently the contract of insurance has remained in Muslim countries a matter of controversial debate, and scholars of Islamic law refuse to recognise it as a legal contract.

(1) This old French term meaning insurance was used by Muslim merchants to denote the contract of insurance; it was adopted by Muslim jurists.
(2) Act of God.
(3) Mustafa Ahmad al-Zarqa, Insurance and Islamic Law, 1962, pp.18-25.
contending that it is a contract of wager, that the subject-matter is uncertain, and that it involves usury. The only kind of insurance to which no objection is made is "mutual insurance," since this is believed to encourage the public responsibility which by implication means "public interest." But some other scholars do not agree with these contentions, and their views have found support in recent legislations throughout the Arab world.

ii. System of Insurance Law

From the practice of the merchants rationalised by the jurists there began to emerge distinct systems of insurance law, and this historical outline might appropriately conclude with some general accounts of the two systems, namely those of France and England, which have had most influence on the system of Iraq, and an account also of the system now operative in Iraq.

a) France: In France there were no legislative provisions relating to marine insurance until 1681 when King Louis XIV promulgated the "Ordonnance de la Marine", comprising all the ancient laws. Scholars of the 17th and 18th centuries regarded this ordinance as a most excellent work. It dealt with the subject of insurance in more detail than any previous work, and its principles remained as the main inspiration of the modern laws of marine insurance in the world. With regard to it, Reddie has observed: "Lord Mansfield, when Chief Justice of the Court of King's Bench, did not disdain or hesitate to derive from this foreign source many of those enlarged and enlightened views of equity and expediency which, in all matters connected with commerce, characterised the judgement of that court." In 1808 a new Code of Commerce was promulgated;

(1) Muhammad Abu Zahra, a commentary cited by Mustafa Ahmad al-Zarqa, Ibid., p.93.
(2) Emerigon, loc.cit., p.xi.
(3) The text was published in English by Magens, loc.cit., vol.ii, p.169.
(4) Reddie, loc.cit., p.352.
it consists of four books. The second book provides the law of maritime commerce, including marine insurance. The Code is remarkable in the new arrangement it adopts, but its principles are in substance the principles of the Ordinance of 1681. In 1930 there was promulgated a new law of insurance regulating all contracts of insurance other than marine insurance. Finally, under the pressure to modernise the system of marine insurance, a draft code is prepared by a commission in 1950. The new draft is in principle similar to the Code of 1808.

b) England: In England marine insurance was practised from the 15th century, but the government took no interest in organisation of mercantile business and, in particular, of marine insurance until the latter half of the 16th century when an Office or Chamber of Assurance was erected in the Royal Exchange by the patent Roll of 1575, and compulsory registration of all policies of marine insurance was imposed. A further statute was enacted in 1601 under the title "An Act Concerning Matters of Assurance Amongst Merchants," by which the Lord Chancellor was instructed to establish a "Commission," or "Court of Insurance," as it is sometimes called, for determination of questions arising from policies of insurance. The Act contains an instructive preamble which narrates that insurance

"hath bene tyme out of mynde an usage amongste merchants both of this realm and of forraine nacyons. When they make any greate adventury (speciallie into remote partes) to give some consideracion of money to other persons (which commone are in no small number), to have from

them assurance made of their goods, merchandizes, ships, and things adventured, or some parts thereof, at such rates, and in such sorte as the parties assurers and the parties assured can agree, whiche course of dealing is commonlie termed a policie of assurance; by means of which policies of assurance it cometh to passe, upon the losse or perishinge of any shippe, then followeth the not the undoing of any man, but the loss lighteth rather easilie upon many, than heavilie upon fewe, and rather upon them that adventure not, than those that doe adventure, wherebey all merchants speciallie the younger sorte, are allured to venture more willinglie and more freeliely.

An amending act was passed in 1662 to give more power and effectuallness to the Commission, but some defect making it unpopular, it fell into disuse. Registration of policies of insurance was no longer required, and the Common Law Courts become predominant in insurance cases. These courts gave no guidance on matters of insurance, but later in the 18th century "Lord Mansfield became Chief Justice of the Court of King's Bench in 1756, which may rightly be considered as the date of the beginning of the development of the modern law of insurance as a part of the common law system. This great judge, thanks to his more liberal Scottish training, was not so slavishly attached to common law precedent as to be unable to perceive the necessity of recognising merchants' customs in determining rights under merchants' contracts, nor so bigoted as to be unwilling to seek light from foreign sources." Parliament

(1) 43Eliz., c.12; Hendrika, loc.cit., p.142.
(2) Molloy, De Jure Maritimo, 1676.
(3) Scrutton, T.E. observes that "the special Courts die out, and the Law Merchant is administered by the King's Courts of Common Law, but it is administered as a custom and not as law," Loc.cit., p.13.
(4) Whom Buller, J. called "the founder of the commercial law of this country," Lickbarrow v. Masson (1787), 2T.R.73.
also was active in this matter, and many enactments were passed to restrict insurance upon ships or merchandise belonging to an enemy. In 1746 a further Act dealing with marine insurance was passed to prohibit gambling insurance, and reference must be made to the Life Assurance Act (1774), which is still in force and provides that any contract of insurance made by way of gaming or wagering, or made by any person against the death of any person in whom he has not an interest, is void – the first provision, incidentally, recalling and confirming the views of Muslim jurists of earlier times. In 1906 the law of marine insurance was codified in a Marine Insurance Act, but other branches of insurance law have not been thus dealt with, possibly because their diversity made this impracticable.

c) Iraq – Insurance Law: While Iraq was, from 1638-1918, under the direct rule of the Turkish Sultan, the legislative power was within his prerogative; and to understand the legal system of the Ottoman Empire, some explanation must be made of its background.

Before the period of Tanzimat (reformation) in 1839, the only source of law in the Ottoman Empire was Islamic Law, and this uncodified law and the work of the jurists had to be consulted in every matter. The Turks confined themselves to one school of law, namely, the Hanafi School, and since the vast materials of Islamic jurisprudence were written in Arabic with which they were unfamiliar, with the passage of the years the Ottoman law was, as it were, crystallised on the doctrines of the Hanafi School. The Turks did not make any attempt to

(1) Raynes, loc.cit., p.160.
(2) This Act remained in force until 1906.
develop it since they imagined that any change might lead to a deviation from Islamic Law. In 1839, however, under pressure of the necessity to modernise administration, the Sultan, by his famous Order, began the period of reformation; and to eliminate the power of the religious men in opposition, his prerogative power was increased on the ground that his orders were in the public interest and, therefore, must be obeyed. But these reforms, which were meant to achieve rapid progress, were introduced by a strange method, namely, by the importation of Western Codes without very much attempt to graft the new codes on existing local laws. Thus many difficulties arose.

The reformation began with re-organisation of the judicial system, and the first judicial reform that affected foreign trade was the creation in 1840 of a new ad hoc commercial tribunal in the newly created Ministry of Commerce, with jurisdiction limited to dealing with disputes arising between European and local merchants.

Of the codes adopted from European systems, the first and most

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(2) Sati' al-Hassry, *Ottoman Empire and Arab Countries*, 1959, p.91.
(3) Mardin, E., commenting on this method of codification, says: "A great majority of the laws borrowed from the West...were adapted from French Law. Some provisions were omitted intentionally to conform to internal policy, others were abridged or distorted through the negligence of translators, heedlessness or contempt in using legal terms." *Development of the Shari'a under Ottoman Empire*, see *Law in the Middle East*, ed. Khadduri & Liepensy, p.288,285.
(4) Onar, also, had criticised the Turk's method of legislation by saying: "The application of the new laws and regulations produced a certain amount of confusion. Compilations such as the commercial law was Western, but Ottoman civil law continued to be based on the Shari'a. Thus, there existed a basic irreconcilable difference between the traditional law of the Empire and the new statutes derived from foreign sources." "The Majalla," see *Law in the Middle East*, ibid., p.293.
important was the Commercial Code. Maritime law was, however, not dealt with at this stage, and thus any problem arising from disputes in maritime business was solved by consulting a foreign law. The (1) British Consul in Varna, writing to the British Ambassador in Istanbul in November, 1859 to report on trade, said: "The Code Napoleon is generally consulted here in all commercial and maritime matters, to (and) the Greek code which is almost a complete copy of the Code of Napoleon (2) is used by the Greeks and also by Levantines in general."

The Ottoman Maritime Code was promulgated in 1863. It was inspired by, or more correctly, it was almost a complete copy of the French Code of Commerce, though the Belgian, Spanish and Prussian codes were also consulted to some extent. It deals in Chapter II with the subject of marine insurance; the Chapter consists of 66 articles (175-240) and is divided into three parts. Part one provides rules for constitution of the contract; part two deals with the obligations of the insurer and the assured; part three covers the subject of abandonment.

In 1905 the Ottoman Government promulgated a new law concerning some aspects of insurance other than marine insurance, which was regulated in the Ottoman Maritime Code. The Ottoman Law of Insurance Companies, however, has its origin in the Belgian law of 1874. It consists of 25 articles, deals with some rules of insurance other than

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(1) Varna is a port in Bulgaria, sometimes called "Stalin." In 1859 it was under Ottoman occupation. The Commercial Code of Bulgaria, after independence, was influenced by the German Code of Commerce. (Wallach, F., loc.cit., p.47). The Greek Code of Commerce was promulgated after 1822. It is drawn up to be a copy of the French Code which is "already almost universally in force in the eastern basin of the Mediterranean." (Zepos, J., The New Greek Civil Code of 1946, J.C.L.,1946, p.57). Hence the reference made by the British Consul to the Greek Code, not because it was officially recognised, but because it was seemingly used as a translation of the French Code that could be easily adopted in the area.

(2) Public Record Office — F.O. Trade Reports — Turkey no.195.
marine and life insurance and covers inter alia the constitution of the policy, the subject matter of the insurance and the different types of policy which may be effected and two remarkable points. Firstly, the title is misleadingly; it regulates insurance companies, but, in fact, it does not deal with the business of insurance. Secondly, it is, as mentioned, silent on the matter of life insurance. It seems that the influence of the religious men had created an obstacle to such provisions, and it is worth mentioning that the Muslim jurists do not accept life insurance for two major reasons: Firstly on account of its close similarity to usury, and secondly, since life insurance is contrary to the Will of God.

Between 1914 and 1921, during direct British administration, no change was made in the commercial, civil and maritime codes which had been promulgated by the Turks; and all these codes remained in effect after the national administration was established in 1922-32.

In 1932, after Iraq attained independence, further attempts were made to meet the increase of the insurance business in the country, and a new law dealing with insurance companies and giving official sanction to the business of life insurance was passed. In 1951 the Civil Code was promulgated comprising a chapter entitled "The Contract of Insurance." It consists of 25 articles (983-1007), covering the elements and conditions of insurance contracts and their effect, and there are particular provisions relating to various kinds of insurance such as life, fire and third party liability insurance. These provisions correspond to the Egyptian, Syrian, Lybian civil codes. They have been influenced mainly by the French Law of 1930; the Swiss Law of 1908 and the Lebanese Code of Obligations and Contracts were drawn upon it to some extent.
In 1964 the first compulsory insurance was introduced into Iraq to provide for death and bodily injury in motor car accidents. The law consists of 17 articles, and most of its provisions are borrowed from Egyptian law, which is in turn based on the compulsory insurance of France and Britain.

Insurance Business: Until 1936 insurance business in Iraq remained outside state control. The limited and small market for insurance was too insignificant for much effort to be expended on its development. The Iraqis themselves had no particular interest in insurance, and consequently most policies of insurance were effected outside the country. In 1936, however, the situation began rapidly to alter. The Government then promulgated the "Insurance Companies Law", and the "Insurance Agents Licenses Law," prescribing the conditions under which insurance companies could operate in Iraq. In 1952 the Financial Minister of Iraq brought into effect a National Company of Insurance Law of 1950, incorporating a company with a capital of 12. 1,000,000., 50 percent of which was paid by the Government and 50 percent by the state banks, namely, the Agriculture, Industrial, Mortgage of Real Estate and Rafidain Banks. The company has its own legal personality and an independent administrative board; it may not be dissolved except by statute law, and it can carry on all kinds of insurance business. It has subsequently been able to monopolise the insurance business of governments, offices and corporations.

Successful engagement in the business of insurance and the expansion of the market for insurance encouraged the government in 1960 to increase its activities in the business of re-insurance. The Iraqi Re-Insurance Company was then incorporated with an authorised capital

(1) Iraqi Dinar = Pound Sterling.
of I.D. 5,000,000. and paid up capital I.D. 1,250,000., 60 percent being paid by the government and its corporations and 40 percent subscribed by the public. The principal feature of the legislation is, it seems, that all insurance companies and underwriters who practise the business of insurance in Iraq are obliged to re-insure their policies in the Iraqi Re-Insurance Company in proportions not exceeding 15 percent of marine insurance, 10 percent of fire insurance, 5 percent of motor car insurance, 10 percent of accident insurance and 15 percent of life insurance.

The engagement of the state in the business of insurance has coincided with the promulgation of a new law to regulate insurance companies, and the Insurance Companies Law of 1960 has replaced the Law of 1936. The latter was found to be unable to deal with new developments in the economy of the country, and the new law aims at encouraging national private enterprise. Its most important provisions are:

1. The Iraqisation of insurance companies carrying on business in Iraq; at least 60 percent of the shares of insurance companies must be owned by Iraqi nationals.

2. The paid-up capital of any insurance company must not be less than I.D. 100,000. for an Iraqi company and the equivalent of I.D. 150,000. for a company established outside Iraq.

3. Agents of insurance companies must be an Iraqi individual or companies of which at least 60 percent of the shares are owned by Iraqis.

4. Underwriters established outside Iraq must now be registered and, to obtain registration, they have to be by the law of their own country authorised to carry out insurance business. They must have completed five years since establishment, and they are subject to deposit provisions.
5. Insurance companies and underwriters, Iraqi or foreign, are under obligation to deposit a sum in cash or its equivalent in shares, debentures or mortgage on real property acceptable to the Minister of Commerce, as follows: (a)I.D. 30,000. - if the company transacts life assurance, annuities or bond investment business; (b)I.D. 15,000. - for other kinds of insurance.

The government does not permit any person to insure outside the country the life of a person domiciled in Iraq, or moveable or immovable property situated in Iraq.

The Market for Insurance: The statistical report of the Directorate General of the Registration and Supervision of Companies in Iraq reports that at the beginning of 1963 there were in Iraq 26 companies that had undertaken the business of insurance - five of them belonging to Iraqi enterprises, two incorporated by the state, five owned by Arab enterprises and fourteen incorporated in foreign countries, details of business being as follows:

1. Life insurance: Only nine companies are engaged in life insurance.

   The total number of policies on 31st December, 1961 was 4422. The sums assured amounted to I.D. 5,728,734., and the annual premiums to I.D. 328,097. Only a small percentage of the population realise the utility of the life assurance, and it seems that the similarity of such a contract to usury has continued to hinder the development of this line of business.

2. Other kinds of insurance: Companies undertaking all kinds of insurance business number 24. The total number of policies covering marine, fire, motor-car and other accidents issued during 1961 amounted to 101,988.; the premiums then paid amounted to I.D. 2,454,346.,
the total sum insured to I.D. 579,478,908.

The market for insurance in Iraq — other than life assurance — has thus made considerable progress, as will appear from the following schedule:

Gross premium paid in 1959, 1960, 1961 in I.D.

| All insurance other than life assurance | 1635959/- | 1939502/- | 2454346/- |

Nationalisation: On the 14th of July, 1964 the Government of Iraq announced details of important legislative measures. The transformation of Iraq into a socialist state had begun. The State is to increase its participation in the development of the economy of the country. At the same time, the aim of the decrees of nationalisation is to benefit the people by minimising class differences in society. So, it has been decided to transfer to the public sector the banks, insurance companies, principal industries, and certain economic establishments; and no private companies will be established in future to carry the same business. Article I of the Law no. 99 of 1964 provides that:

"All insurance companies and underwriting companies in Iraq, and the companies and establishments named in the list attached to this Law, are nationalised. Their ownership shall revert to the State."

The nationalised companies retain their legal status and continue their work. All are attached to and under the control of the Ministry of Economics. The Board of Insurance has been established for their administration, and the nationalised insurance companies have been classified into three groups, namely: National Company of Insurance, The Iraqi Re-Insurance Company, and the Iraqi Company of Life Assurance. Under each

(1) The Prime Minister of Iraq in his manifesto, in which the decrees are declared.
(2) Art. 4 of the Law No. 99 of 1964.
(3) Art. 1 of the Law No. 166 of 1965.
group a number of insurance companies are combined together to practise one line of business, but all constituent companies still retain their legal status as companies and continue their particular service.

Finally, it is worth mentioning the effect of the nationalisation on the market of insurance. Despite the impact of the new phenomenon on the economy of the country, the result proves the success of the nationalisation in this field. The following data may help to shed a light on the business of insurance after nationalisation.

<table>
<thead>
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<th>From 14-7-1963 to 13-7-1964</th>
<th>From 14-7-1964 to 13-7-1965</th>
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<tbody>
<tr>
<td>Total number of policies issued other than life assurance:</td>
<td>76199</td>
<td>103329</td>
</tr>
<tr>
<td>Gross premiums paid in all insurance other than life:</td>
<td>I.B.2,561,193</td>
<td>I.B.2,624,019</td>
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(1) Government Report on the first year of nationalisation.
# PART TWO

**GENERAL ASPECTS OF THE CONTRACT OF INSURANCE**

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# Chapter I

## 1. **DEFINITION OF THE CONTRACT OF INSURANCE**

A- In Iraq  
B- In Scotland  
C- In England  
D- In France  
E- Conclusion

## 2. **THE NATURE ASPECTS OF THE CONTRACT**

A- Aleatory Contract  
B- Commercial Contract  
C- Consensual Contract  
D- Contract **Uberrimae Fidei**  
E- Bilateral Contract  
F- Continuing Contract  
G- Conditional Contract
DEFINITION OF THE CONTRACT OF INSURANCE:

In the preceding part, the definition of insurance was traced to earlier authorities on which the modern law of insurance is based. In this part the matter will be considered with reference to the existing laws of various countries.

The contract of insurance in law contains six essential elements, the absence of any one of which may affect the validity of the contract. These elements are: the parties, the insurable interest, the premium, the risk, the subject insured (life or property), and the indemnity. To constitute the contract all these elements must be brought together by a legal process designed to give security against the occurrence of possible risks.

In modern times, insurance has become so complex that a strict legal definition is inadequate to cover both the practical and the legal aspects of the contract. Accordingly, any new definition must be twofold. On the one hand, it must provide a comprehensive legal definition applicable to all kinds of insurance; on the other hand, it must also contain some technical elements which belong to the field of commerce. Similar terms are used in most countries to define the legal function of the contract of insurance, but in most definitions no reference is made to the function of insurance in this field.

A- In Iraq, the law of insurance is dealt with in three separate enactments, each applying to a certain type of insurance. A long period elapsed between the promulgation of each enactment. The earliest was (1) the Ottoman Maritime Code of 1863, which provides definition of the

(1) Hereafter referred to as O.M.C.
contract of marine insurance only. A more general definition was given
by the Ottoman Law of Insurance of 1905, but this does not cover life
assurance, and so on the promulgation of the new Civil Code in 1951 it
becomes obsolete. The Civil Code provides a more comprehensive defini-
tion, applicable to all kinds of insurance.

B— In Scotland, the law of insurance is considered as part of mercantile
law and has been very largely restated and modified by consolidating
statutes, such as the Marine Insurance Act, 1906, which applies to the
whole of the United Kingdom. There is a remarkable similarity between
the English and Scots laws of insurance, which can be attributed to the
frequent reference in Scotland to English text books and cases. There
are, however, some minor variations which reflect the separate origins of
the two systems.

Apart from the definition provided in the Marine Insurance Act, there
is no statutory definition, and it is thus necessary to go back to the
works of the Institutional writers whose authority is considered to be
equal to that of a judicial decision. Rankine in his edition of Erskine's
Principles of the Law of Scotland and Bell, "the architect of the mercan-

(1) Art.176, see p.397.
(2) Hereafter referred to as O.L.I.
(3) Article 1 of the O.L.I. provides: "Insurance consists of the granting
of an indemnity, in exchange for a fixed premium, against all loss or
damage to moveable or immoveable property, however caused by perils or
damage of any nature whatsoever."
(4) Hereafter in the text of this part referred to as C.C.I.
(5) Art.983, see p.5
(6) Miller on Insurance, p.17; Bell's Commentaries, 5th edn. (1826) p.xiii.
(9) 21st edn., 1911, p.467.
tile law of Scotland", in his Commentaries on the Law of Scotland provide similar definitions, Bell's definition being as follows:

"Insurance is a contract by which the insurer or underwriter, in consideration of a sum or premium advanced, undertakes to indemnify the insured against risks or perils to which his property is exposed." (2)

This definition does not include life assurance, so it may be modified to embrace it by using Bell's description of life assurance, making the last sentence read as follows: "...undertakes to pay a certain sum, or an annuity, to the insured or his representative, upon the death of the person whose life is insured, or to indemnify the insured against risks to which his property is exposed." Alternatively, it may be preferable to retain a separate definition of life assurance such as that cited by Lillie.

C- In England, apart from the statutory definition of marine insurance and a special definition of life assurance, there is no comprehensive definition of the contract. The English courts, influenced by the fact that the concept of insurance was introduced into the country by foreign merchants, have frequently referred to the opinions of foreign writers; Blackstone has attempted to give a definition. Apparently no English textbook makes reference to the words of J. Lawrence, who stated that

(1) Lord Cooper, Select Papers 1922-59, 1960, pp.50,126.
(2) Vol.1, p.598.
(3) "By this contract the insurer, for certain premium paid in gross or periodically, undertakes to pay a certain sum, or an annuity, upon the death of a person whose life is to be insured." Ibid., p.629.
(4) See p.6.
(5) Marine Insurance Act, 1906, s.1.
(6) Fitz-Gerald v. Pole(1756), iv, Brown.
(7) e.g. names of Cleirac, Guidon, Rocusc, Grotius, Loccenius, Pothier and Valin have been referred to in the following case: Pelly v. Royal Exchange Assurance Co. 1Burr,341; Hamilton v. Mends, 2Burr,663; Goss v. Withers, 2Burr,1199; Pole v. Fitz-Gerald(1750), Willes,641; Lucena v. Grauffurd(1804) 2Bos & Pul,269.
the definitions given by writers of different countries are in effect the same and concluded his opinion with these words:

"Insurance is a contract by which one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them." (1)

This statement has been approved by Lord Blackburn. Since the English textbooks use terms substantially the same as Lawrence's, it is reasonable to suggest that his definition covers all kinds of insurance except marine and life assurance.

In France, since the Ordinance of 1681 there has been no specific statutory definition of the contract of insurance, either in the French Code of Commerce of 1808 or in the Law of Insurance of 1930. The French have not sought to confine the law to a particular kind of insurance, and instead of propounding a general definition, the statutes enumerate in general terms the requisites for the validity of the contract, any further definition being left to the French legal writers, who are cited where there is no other authoritative source; the law has developed considerably this use of juristic writings. Since all French writers use substantially the same terminology, a definition which would be generally acceptable to them and which has the advantage of including a commercial element may be given.

"Insurance is an operation in which one party, the insured, by payment of the premium (or a contribution) or behalf of himself or a third party, accepts a promise made by

(1) Lucena v. Graufurd, ibid.
(2) Lloyd v. Fleming (1872) L.R. 7 Q.B. at p.302.
(3) e.g. Art.332 of the F.C.Com.
(6) The term "(or a contribution)" is added by Besson(ibid.) to include mutual insurance, cf. Smet, Droit des Assurance Maritime, 1934, p.2.
another party, the insurer, to pay an indemnity on realization of a risk; compensations are made in accordance with the rules of statistics." (1)

E- In conclusion, a study of the above-mentioned definitions indicates that none of them is comprehensive. To obtain such a definition, it would be necessary to combine therein the purpose of insurance, the legal incidents of the contract, its technical features and its economic function; and it would be necessary as well to embrace within it all kinds of insurance. The following definition is suggested: The contract of insurance is an agreement by which the liability arising on the occurrence of a contingent or future event is minimised by distributing it among a number of persons on a statistically valid basis so that one party, the insurer, in consideration of a premium or contribution, undertakes that, on the occurrence of the event, the other party, the assured, shall receive an indemnity for damage to his interest, or that he or his beneficiary shall receive a specific sum or annuity.

From a combination of the legal incidents of the contract of insurance and its economic function comes the use of the term "on a statistically valid basis" in the above definition. The explanation of this is that:

"The essence of insurance lies in the elimination of the risk of loss for the individual through the combination of a large number of similarly exposed individuals who each contribute to a common fund premium payments sufficient to make good the loss caused to any of them." (2)

In practice, the function of the statistical rule is to discover the probability of an individual claim of loss and to distribute this claim among the policyholders. There are two possible theoretical bases. The

(1) Hemard, see Besson, Ibid., p.614.
first is known as the "individual risk theory," which may be summarized as follows:

"The gain or loss of the company arising during a given time on one single policy is regarded as a random variable and the mathematical development of the theory is based on a study of the probability distribution of variables of this type." (1)

The second theory is the "collective risk theory"; in this

"no attention is paid to individual policies, the risk business of an insurance company on one side, and the totality of policyholders on the other. In the course of this game, certain random events known as claims occur from time to time and have to be settled by the company while on the other hand the company receives a continuous flow of risk premium from the policyholders." (2)

The aim of both theories is to furnish the business of insurance with scientific methods of protection against the inconvenient effects of the occurrence of risks. These methods rely on the mathematical analysis of risks and are not concerned with the legal side of the contract; but the brief outlines given above being part of the practical business of insurance may help to explain that part of the definition.

THE NATURE ASPECTS OF THE CONTRACT:

The contract of insurance, like any other contract, has certain aspects, some of which are common to all contracts while others are particular to the contract of insurance. Although in practice these may not be of immediate concern to the parties, they are important since they are fundamental to the contract.

A- Aleatory contract

In any legal system it is advisable that contracts be classified in categories. In Iraq, the Civil Code distinguishes between those contracts

(2) Ibid.
in which the subject matter of the obligation is certain or will become
certain and those in which it is uncertain, and classifies insurance
(1)
as an "aleatory contract" although it does not define the term "aleatory".
The contract is aleatory because of the speculative element in it, in
that one party must gain and the other lose. In other words, the insured
loses the premium if the event insured against does not occur, and the
insurer loses the sum insured if the event does occur. It is essential
in an aleatory contract that each party knows that he is either going to
gain or lose on the occurrence or non-occurrence of the uncertain event,
but in insurance it is important that the assured understand that he will
not profit from the insurance except in so far as any loss which he may
suffer is made good. The importance of classifying insurance under the
title of "aleatory contract" is that a party is aware from the beginning
that he cannot claim against the other party an annulment of the contract
on the ground of wager or inequality. In other words, the assured cannot
claim re-payment of the premium because of non-occurrence on the ground
of non-realisation of the risk, and the insurer cannot claim that the
amount of the indemnity is too high compared with the premium paid.

B—Commercial contract

The contract of insurance was evolved and developed in the mercantile
field as a result of commercial custom. It has always been recognised as
a part of the law merchant.

(2)

In Iraq, the Code of Commerce, 1943, includes all agreements in res-
pect of life assurance and of insurance against maritime and all other
risks, whether these agreements are constituted by payment of a premium

(1) Part 4, Book 2, Division 1 of the Civil Code of Iraq.
(2) Section 14, Art.14.
or by mutual contribution. Such transactions are considered to be "actes de commerce", and they are subject to the Commercial Code. It is not necessary for the parties to be merchants, nor may any objection be taken as to their reasons for insuring. Despite the existence of a Commercial Code, there is, however, no special court for commercial matters. All civil and commercial matters are decided in the ordinary courts.

The importance of classifying certain contracts as "commercial" arises only in the application of certain provisions by which commercial cases are distinguished from other civil cases. Mostly these differences arise in matters of judicial procedure and evidence. That is notwithstanding the fact that the C.C.I. embraces some aspects of the law of insurance; the contract of insurance remains in essence a commercial contract. Consequently, the provisions of the Code of Commerce apply in relation to, for example, the construction of the contract and the effect of the contract. The C.C.I. applies only to matters on which the Code of Commerce is silent.

The English Common Law does not distinguish between "civil contracts" and "commercial contracts", but an unsuccessful attempt has been made to explain the existence of commercial contracts as an autonomous entity within the scope of the Common Law.

C- Consensual contract

The contract of insurance is an agreement between the insurer and the assured; it is constituted by 'offer' and 'acceptance', which do not require to be in terms. The declaration of the intention of the parties to enter into a legal relationship is sufficient to create a reciprocal

obligation between them, and no formalities are required as regards the communication of such an intention, so long as the parties express their consent freely and without any duress or unlawful pressure.

Two problems appear to arise: the existence of standard-form contracts (1) and the requirement that a policy must be in writing, which may affect the formation of the contract.

Standard-form contracts of insurance are provided by statutes which (2) compel insurance, especially against third party risks and by insurance companies. Apparently there is no freedom of contract here, and, in fact, there is really no problem. Standard-form contracts still permit any one intending to take out such a policy to choose from among the considerable (3) number of companies which provide such policies, and this freedom of choice is especially important where rates of premium differ. Moreover, all standard-form contracts have two basic features. Firstly, the terms stated in the contract must not be contrary to the law of the country; and secondly, they must provide proper legal terms to save the time of the parties and avoid many complicated problems. Although the weaker party, the assured, has no freedom to negotiate the terms of the standard-form policy of insurance, he always has the protection of the law in the (4) interpretation of the contract; and the insurance companies must give due regard to the mutual interests of the parties. The forms of compulsory insurance also occasion no great problem; and the social necessity of protecting people from damage caused by the various complex commodities

(1) Art.176 of the Ottoman Maritime Code; Art.2 of the Ottoman Law of Insurance; Section 91 of the Stamp Act, 1891; Section 22 of Marine Insurance Act, 1906.
(2) See p. 230 et seq.
(3) After the nationalisation of insurance in Iraq, the matter becomes more limited.
(4) Art.162 of the Civil Code of Iraq.
of a modern society is the price which must be paid for the advantages conferred by these facilities.

The second apparent problem is that the contract of insurance must be in writing as an indication that the formal requirement of the law has been implemented. In fact, the requirement of writing has no effect on the constitution of the contract. As soon as the offer has been accepted, the contract is complete. Writing, although it is prescribed by statute, is not a necessary formality of constitution. The statutory requirement means only that, without writing, the contract cannot be proved unless there is an admission by the parties of the existence of an unwritten agreement, in which case the legal validity of the contract is unquestionable. Thus, the requirement of the statutory provisions in Iraq that contracts of insurance must be in writing should be regarded as merely a requirement of the law of evidence.

D- Contract uberrimae fidei

The validity of any contract is based, fundamentally, upon the good faith of the parties, and the contract may be annulled if misrepresentation by one party is discovered by the other in respect of the terms of the contract. This rule is known as the rule of "good faith" or bona fide. While there is no rule of law, where contracts generally are concerned, which compels either party "to open his mouth and speak"; if one party does make a statement, he must ensure that it is true. This rule applies to contracts of insurance with the important additional provision that the peculiar nature of the contract compels the prospective assured not merely to act honestly but also voluntarily to disclose all material

(1) See p158.
facts affecting the contract.

The contract of insurance is, thus, a contract *uberrimae fidei*. This requirement is essential; it is implied in all contracts and has been given statutory force because full information of all circumstances must be given to the party who undertakes the burden of the risk. The reason for this is that calculation of the risk requires full knowledge by the insurer of all facts, not only at the time (*ab initio*) of the constitution of the contract, but also during its currency. And because misrepresentation, fraud, or concealment of any facts are presumed capable of influencing the insurer's consent to undertake the insurance, the whole contract may, if any such acts have occurred, be annulled at his insistence by judicial decree.

E- **Bilateral contract**

The parties to the contract of insurance are bound by reciprocal obligations. The contract binds the insurer to undertake the burden of the contingent event and at the same time binds the assured to pay the consideration agreed upon—*the premium*.

Some practical consequences follow. It is of the essence of the contract that it cannot be abrogated by either party. Any amendment to the existing contract requires the consent of both parties. As soon as the contract is ratified, neither party can release himself from his obligation without reasonable cause, the only exception to this rule being in the case of life assurance, where the assured may notify the insurer of the cancellation of the policy.

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1. Art. 9§ of the Civil Code of Iraq, see p.129.
3. Art. 996, ibid., see p.197.
Continuing contract

The contract is of a continuing nature, as performance cannot be immediate, and both parties must remain under contractual obligations to perform their duties and entitled to enforce their rights throughout the contract period. Duration is a very important element in the contract of insurance because the contingency insured against does not exist at the time of constitution of the contract.

It follows that continuous nature of insurance results in an important distinction from other contracts, especially with regard to termination. The general rule in Iraq in the case of contract is that, in the event of one party's breach in his contractual duties, the other party has the right to set aside the contract; and both parties must be reinstated in the same position as they would have been if the contract had never been made; a party who has been damaged or injured must be indemnified. In other words, this termination has a retroactive effect. This rule is not applicable in the case of the contract of insurance. When it is validly constituted and one party elects to set aside the contract because of the other party's failing to continue to fulfill his duties, the termination of the contract becomes effective at that moment. In other words, the termination produces its effect only in the future. So according to Article 987 of the C.C.I., the insurer has the right to retain the premium, and in the case of payment by instalments, he has the right to claim any instalments remaining unpaid. The explanation of this is that the insurer remains under the risk of fulfilling his obligation to indemnify the assured, and the law presumes that he has suffered loss; consequently, he is entitled to be reimbursed with the premium.

(1) Article 177 of the Civil Code of Iraq.
G- Conditional Contract

The contract of insurance has a conditional character in respect that where the insurer assumes liability for the consequences of a contingency, the occurrence of this contingency must not precede the constitution of the contract. This does not mean that if the contingency does not occur, the contract is ineffectual; it means that the contingency may or may not occur but, in the event of its occurring, the contract comes into effect. Thus also, if the contract is made after the loss of the subject or after the actual happening of the event insured against, the contract is not valid because the things insured are incapable of being at risk, and so the obligation is lacking in one of its foundations.

Finally, the conditional contract means that the things insured must be exposed to risks and that, in the event of the occurrence of the risk, (1) the indemnity is payable. Thus the Civil Code of Iraq provides:

"The contract of insurance is null and void if it appears that the risk insured against has disappeared or happened at the date of the contract or either party comes to know this." (2)

(1) Art. 984(2); also Art. 4 of the O.L.I. provides: "If the immovable or movable property insured is not in existence, or if it is proved that such property has been exposed to no danger of any nature whatsoever, the contract of insurance is considered to be null and void." Cf. Art. 194 of the O.M.C. See p.334.

(2) The Civil Code of Iraq does not provide, as the Draft Egyptian Civil Code does, that the knowledge of either party must be a condition of the nullity of the contract, for instead of providing that "...and if either party has knowledge..." the Iraqi article, by inadvertence, uses the disjunctive and says "or either party..."
Chapter II

GENERAL PRINCIPLE

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1) **Principle of Indemnity**

Article 1 of the O.L.I. provides that insurance is an agreement "of the granting of an indemnity." It follows from this definition that nothing is more fundamental in insurance than the principle of indemnity. The contract is recognised as a contract of indemnity whether or not it is expressly stated to be so in the policy. This recognition arises from a basic principle of law, and the contracting parties cannot over-rule this principle or exclude it by agreement. The assured does not expect the insurer to take steps to prevent the occurrence of the risk, but he does expect to be indemnified in the event of any damage to the things insured. From the principle of indemnity the following consequences arise:

A- Not gaming or wagering: Since early times, a constant endeavour has been made by courts and legislations to differentiate insurance from gaming and wagering. In all, contingency and risk of loss are main factors; but in gaming or wagering, the parties create the risk of loss by their own agreement, each undertaking, in a certain event, to pay the other a certain sum of money; there is no question of either party otherwise suffering loss. In the case of insurance, on the contrary, one of the contracting parties, the assured, may in fact suffer loss; and the other party, the insurer, is liable to make good such loss. This distinction is based on the principle of indemnity, and a person who intends to enter into a contract of insurance must not be a speculator who intends to profit from the occurrence of the event.

Gaming and wagering cannot be enforced by law. In English Common Law

(1) e.g. Castellain v. Preston (1883) 112.B.D., per Brett, L.J., 380,386.
(2) e.g. Art.175 of the O.M.C., Art.1 of the O.L.I., and Art.983 of the C.C.I.
the Gaming Act, 1845 forbade all contracts by way of gaming and wagering; in Scotland there is similar attitude, the prohibition is by statutes; in France they are forbidden because they are regarded by the civil law jurists as natural obligations which cannot be enforced by law. In Iraq, though, a similar view is applied, but those forbidden are based on the Islamic Law. The Civil Code provides: "all agreements of wagering and betting are null and void", and that the loser has a right of legal action for restoration of the amount lost.

B- Not a source of profit: The meaning of indemnity is that the assured has the right to be restored to the position in which he was before the occurrence of the event insured against. Thus payment is limited to the actual loss and is not meant to be a source of profit. Observing this principle, the C.C.I. provides that the insurer must indemnify the assured against "loss" resulting from the occurrence of the risk insured against, and that the indemnity is limited to the amount of the sum insured. The article does not make clear whether the term "resulting loss" means "actual loss". Recently, however, the Cassation Court of Iraq has held that the "resulting loss" means "the actual loss" for which the insurer is liable within the sum insured to indemnify the assured.

2) An Exceptional Case: Life Assurance

The principle of indemnity applies in all kinds of insurance except one, the exception being life assurance, particularly in case of death, bond investment, bond policies and annuity.

(1) Section 18.
(3) Planier & Ripert, Treatise on French Civil Law, vol.ii, part 1, pp.197-204.
(4) Art.975.
(5) Art.989., see p.143.
It is obvious that the contract of life assurance is not a contract of indemnity since the object of indemnity is to restore loss. In life assurance, however, the subject insured is the life of a human being; it is not suggested that the value of a human being's life can be fixed at a definite sum, and no one questions the fact that a human being has an unlimited interest in his own life. An unlimited sum may, therefore, be fixed in a policy of life assurance, but a practical restriction on the amount of such insurance may well be the premium which the insurer charges in the individual case, for any increase in the sum insured leads to a proportionate increase of premium. So far as the ordinary life assurance is concerned, this remains the fact, but life assurance is not the only contract which the human life is the subject of. Under the title "personal insurance" some other contracts are included, i.e. accident insurance, liability insurance. Moreover, some other kinds of personal insurance are intended to provide an accumulation of capital as a form of saving.

It is to be noted that the principle of indemnity is inapplicable to some kinds of personal insurance, especially those known as life assurances, and where the loss of a life cannot be "made good" by insurance.

In Iraq, although there is no specific provision for it, the C.C.I. takes account of the general principle. In provisions dealing with life assurance, the term "sum insured" is used instead of "indemnity". A distinction is made between the payment of indemnity in the event of the occurrence of the risk in one case and of the sum due to be paid in the other.

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(1) Articles 982-998.
(2) Art. 988., see p.142.
It is worth mentioning as an illustration of the fact that life assurance is not a contract of indemnity that the C.C.I. provides that the insurer who has paid the sum insured shall not be entitled to be subrogated to the rights of the assured against any person responsible for the occurrence of the event insured against, and the assured or the beneficiary has the right to claim compensation from the wrong-doer.

3) The Relation between Indemnity and Loss

A contract of insurance is entered into by an assured because of the possibility of his incurring financial loss as the result of suffering damage in certain circumstances of the things insured; and as a consequence of the principle of indemnity, mentioned above, the assured may not recover more than the loss. The relationship between indemnity and loss must now be more fully investigated. Before going into details, it must be remembered that the indemnity may be less than, but cannot exceed, the amount of the loss.

Article 17 of the O.L.I. provides: "Upon any loss being caused to the things insured, the insurer is under obligation to pay the assured the damage for which the insurer is liable..."

Apart from the case of marine insurance, no provision is made in the insurance statutes of Iraq to explain how loss is to be assessed or damage estimated. It is left to the contracting parties to provide for this in the policy. A reference must, therefore, be made to the general rules of insurance law to decide matters on which the law of Iraq is silent.

There are two degrees of loss recognised by the general law: (i) partial loss, and (ii) total loss.

(1) Art.998., see p.207.
Fewer difficulties arise in the case of "total loss" than in the case of "partial loss". For a "total loss" to occur, the things insured must either be completely destroyed or the degree of loss must be sufficient for them to be considered as totally destroyed, i.e. constructive total loss. In this case, therefore, the indemnity is measured by the amount of the sum insured, provided that there has been no exaggeration of value and also provided that nothing has happened to reduce the value of the things insured between the date of the contract and the occurrence of the risk. In other words, any decrease in the value of the things insured must be taken into account, and it may be necessary to re-evaluate them. For example, if goods are insured against certain risks, say 'fire', and the goods depreciate as the result of some contingency which is not insured against, if the risk insured against happens, the assured has no right to claim the full sum insured because the value of the goods has been reduced by damage not covered by the policy.

"Partial loss" is measured by taking a valuation of the things insured at the time of the happening of the risk insured against and a re-valuation after the occurrence of the risk. The difference between these valuations is regarded as an amount equal to the "partial loss" by which the indemnity should be measured.

It is worth reverting to the relationship between "loss" and "indemnity" in marine insurance where "total loss" may be of two sorts: a) actual total loss, and b) constructive total loss.

The O.M.C. does not provide specifically for such a division, but it may be inferred from Article 214, which provides that any loss in the property insured by a policy of marine insurance, i.e. ship, cargo or any

(1) Article 22 of the Ottoman Law of Insurance, see p.280.
(2) Marine Insurance Act of 1906, Articles 56,57, and 60.
(3) See p.63.
other property exposed to maritime perils, extending to three-fourths of its value, is to be considered a total loss. In these circumstances the assured has the right to abandon the property insured and claim the full amount insured. There is, of course, in this case not much difficulty in determining the scope of the term "partial loss". It is any loss which does not extend to three-fourths of the value of the things insured. If the loss does reach this proportion, it is considered to be constructively a "total loss".

Apart from "total loss", the contract of marine insurance is subject to the rules of average, which are of two kinds: a) particular average, and b) general average.

In marine insurance the calculation of indemnity depends on the kind of risk insured against. Certain damage may not be covered by the indemnity. Thus, the O.M.C. states that any loss incurred through decrease in value, as the result either of wastage or of the perishable nature of the property insured, will not give right of indemnity.

Another peculiarity of marine insurance is apparent in the method of valuation of the things insured, there being no specific valuation in the policy. The question is dealt with in two different ways, depending on whether it relates to the valuation of the cargo or the valuation of the ship. In both cases, however, the rules are inconsistent with the general notion that the date of the occurrence of the risk is the proper date for the valuation of the things insured. In the case of the valuation of the cargo, in order to prevent insurance from being a source of profit, it must be made at the time and place of shipment in accordance with in-

(1) See p. 404 et seq.
(2) Art. 197 see p. 319.
voices or current prices. The valuation of the ship is a different matter. The O.M.C. is silent on this question, but an analogy may be drawn from the article dealing with the time at which the liability of the insurer arises. In this case, the liability of the insurer arises at the time when the risk begins, i.e. at the commencement of the voyage. Therefore, the commencement of the voyage is the proper time at which to take the valuation of the ship when it is not specified in the policy. This rule will continue to apply as long as the prohibition against insurance of the freight remains in effect in the O.M.C.

There is another type of insurance contract which gives rise to difficulties, namely, insurance against carriers' liability. In Iraq the general provisions of the contract of carriage relating to carrier's liability are enumerated in the Code of Commerce of 1943. This provides that the carrier is liable for the loss or deterioration of anything entrusted to him to carry except in the case of force majeure. The carrier cannot stipulate for his liability to be excluded, but he may insure against his liability to the owner or the consignor of the goods for loss or damage to the property entrusted to him. His liability is limited to the period between the time when the property is left in his hands and the date of acknowledgment of receipt at its destination. Any claim in respect of damage is limited to the value of the property at the destination. The carrier's liability is to make good the damage, but it may also extend to any profit that the owner has lost. The difficult question is whether

(2) Articles 170 and 186, ibid. See p.324.
(4) Art. 192, see p.301.
(5) Articles 303-361.
the liability of the insurer is limited to the value of the property at
the time of the loss or its value at the time of acknowledgment of receipt
of the goods, in which case the anticipated profit may be included.

The carrier may seek in his policy a cover against liability for any
damage occurring to the goods entrusted to him. So, the owner of the
goods who is given a direct legal right against the carrier is given a
further right against the insurer. Therefore, although the C.C.I. does
not lay it down expressly, the insurer is precluded from paying the sum
insured to any one unless the injured party has just been indemnified.
In other words, the owner of the goods or the injured party, not the
carrier, has a legal right to the sum insured.

Finally, the amount of the claim of the owner of the goods against the
carrier's insurer is limited to the amount of the claim against the car-
rrier, and, as mentioned, the anticipated profit may be included in this
claim. This does not make the insurance a lucrative contract because the
insurer's obligation is not so much to indemnify the owner of the goods
as to cover the carrier's liability.

4) Indemnity and the Sum Insured

The sum insured is prima facie the evaluation of the assured's inter-
est in the things insured, and it is the measure of indemnity in case of
loss. Accordingly, the sum insured must be fixed in the policy by the
assured, who must, if called on, prove that he has acted in good faith.
This relationship between the sum insured and the indemnity does not mean
that the sum insured is a substitute for the indemnity, but it is an
amount agreed upon as a measure for the indemnity. This results from the
fact that the assured cannot be indemnified beyond the amount of either

(1) Art. 100 of the Civil Code of Iraq.

see pp. 131, 343. (O.L.I.)
the actual loss or the sum insured, whichever is the smaller.

Sometimes, however, the sum insured includes the addition of a sum which is not more than 10% of the true value of the things insured. This addition was accepted by merchants as a custom of trade and is recognised by the courts of Iraq. But the assured sometimes wishes to take precautions against speculative loss, and it is legal to inflate the value of the things insured, provided that this is done in good faith. This inflation is called "over-valuation", and is made either in a single policy or by taking out more than one policy, the latter being called "double insurance." "Over-valuation", apart from cases where there is a legal dispensation, is always restricted to the real value of the things insured, and so in case of loss an actual valuation is required.

The statutes of insurance in Iraq make two distinct provisions in respect of over-valuation. One applies to marine insurance and the other to all non-marine insurance except life assurance. In marine insurance, if the over-valuation in a single policy is made fraudulently by the assured, the policy is null and void and the underwriter is entitled to retain the premium. If the over-valuation arises without fraud, the policy is valid but the indemnity is limited to the actual value of the things insured.

In non-marine insurance, if the over-valuation of the sum insured is the result of misrepresentation, the policy is still valid with regard to the premium, and the value of the actual loss may be recovered. It is noteworthy that if the insurer has not acted in good faith, the whole

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(2) See p.91.
(3) Art. 202 of the Ottoman Maritime Code, see p.359.
(4) Art. 203, ibid.; see p.357.
(5) Art. 11 of the Ottoman Law of Insurance.; see p.131.
amount of the sum insured must be paid.

5) Methods of Indemnification

Generally the principle of indemnity depends on the rule of *restitutio in integrum*, which means that the injured party, the assured in the contract of insurance, must obtain a remedy to restore him to the position in which he was before the occurrence of the risk. On the method of attaining this, the statutory provisions of insurance in Iraq are silent, the parties being left free to settle by contract whether indemnity is to be by payment or by restoration. Where the parties have agreed in advance that the indemnity is equivalent to a certain amount of money, settlement of the indemnity must, in general, be made by payment of cash; and sometimes this payment includes a sum to cover the cost of repairing the subject insured.

The parties to the contract can on the other hand agree that the indemnity may be made by way of restoration. This term includes the other terms, re-instatement and replacement, which are used in Scots and English Law.

6) Further Consequences of Principle

a—Abandonment: When a loss covered by the policy occurs and the insurer fulfills his obligation by indemnifying the assured, it may be asked whether the right of abandonment of a subject which has sustained extensive and irreparable damage is a necessary consequence of the principle of indemnity? Obviously, the assured, if the risk insured against occurs, seeks to be fully indemnified; but the nature of indemnity does not permit him both to claim indemnity and to retain an interest in the subject. So he may elect to abandon the subject and claim as for a total loss or retain the subject and claim for partial loss.

The right to abandon the subject is expressly recognised in the O.M.C., and there is thus no doubt that in marine insurance the assured has this right. The question of its existence in other contracts of indemnity arises, however, and on this the statutory provisions relating to insurance in Iraq are silent, leaving it to parties to make such provision, if they choose, in their contract; e.g. the standard form of a policy of fire insurance in Iraq provides:

"The assured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not." (2)

b- Subrogation: This other consequence of the principle of indemnity is that the assured cannot claim both the indemnity under the policy and at the same time compensation from the person responsible for his loss. Similarly, the insurer cannot escape from fulfilling his obligation to pay the indemnity by alleging that the assured can make good his loss by claiming from the person who caused it.

To ensure that a wrong-doer does not escape liability, the legislature allows the insurer to take the place of the assured in any claim for compensation against the wrong-doer. The statutory provisions give the insurer who pays the indemnity a direct legal claim against the wrong-doer. For insurance against damage the O.L.I. provides in Article 17:

"Upon any damage being caused to movable or immovable property insured, the insurer is obliged to pay the assured the sum for which he is liable. When this has been done, the right of bringing an action against the person who caused such damage is transferred to the insurer, the owner of the property having no right to claim compensation from any other person. Both the insurer and the assured, however, have the right to claim against the party who caused the damage when the property and goods are insured in part only."

In addition to this general rule, there are two other provisions concerning non-marine insurance. Firstly, in insurance against the insolvency

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(1) Articles 214-240, see p. 378.
(2) Section 12, see p. 284.
of the debtor, Article 18 of O.L.I. provides that when the insurer has paid the sum insured, he is "subrogated to all the rights of the creditor." Secondly, in fire insurance, Article 1001 of the C.C.I. provides that "the insurer shall be, by virtue of law, subrogated to the rights of action of the assured against the author of the act causing damage."

In marine insurance, the O.M.C. contains no clear provision allowing subrogation of the underwriter: Article 229, by which the assured exercises the right of abandonment, provides that "the things insured belong to the insurer," but it does not deal specifically with the question of subrogation. Even though the article provides that the date of abandonment is the time when the underwriter becomes proprietor of the things insured, this does not mean that he has no right against the wrong-doer, for he is liable to the owner (assured) at the time when the damage is sustained; e.g. in the case of general average, in the case of fault on the part of the carrier and his employees, and in the case of collision between two ships where one of them is at fault and the assured has the right to claim damages against the person who caused the damage. But the assured who is indemnified by the underwriter cannot make profit by claiming, too, against the person who caused the damage, and so his rights should be subrogated to the underwriter. This view receives support from the terms of the policy of marine insurance in Iraq, which is similar to Lloyd's:

"Clause 10— In case of loss or damage, which may result in a claim being made hereunder, the Assured undertake to cause appropriate measures to be taken to prevent any remedy against any carrier or other bailee becoming

(1) See p. 886.
(2) See p. 399.
(3) In case of jettison, see p. 317.
(4) See p. 315.
(5) See p. 309.
barred by reason of non-compliance with terms and conditions governing the liability of such carrier or other bailee. Should expenses be incurred thereby, underwriters will reimburse the Assured for such expenditure provided the loss or damage falls within the provisions of this insurance." (1)

It is noticeable that this clause is a modification of the Institute (London) Clauses of 1946. The earlier clause provided expressly that "the assured shall with all diligence bring and prosecute, under the direction and control of the underwriter, such suit or other proceedings to enforce the liability of the carrier or bailee as the Underwriters shall require." The omission of this section from the present Institute Clauses is justified by the existence of Section 79 of the Marine Insurance Act, 1906, in which the underwriter is entitled, upon payment of the indemnity, to take over the interest of the assured in whatever may remain of the subject-matter, and he is thereby subrogated to all the rights and remedies of the assured in and in respect to the subject-matter. But the absence of such a clause from the policy of insurance in Iraq does not mean that the underwriter's right against the person who caused the damage is reduced. In practice, the insurance companies, prior to payment of the indemnity, secure their rights by having the assured sign an assignation of his rights against the wrong-doer. This assignation is, in fact, a conventional subrogation. It is governed by the rules applicable to "Assignment of a Right" in C.C.I., and the Cassation Court of Iraq has given its approval to a subrogation on condition that the assignor is conjoined in the action with the underwriter.

We have already referred to life assurance as a non-indemnity contract

(2) Chalmers on Insurance, 5th edn., p.171.
(3) Art. 362.
(4) Case No. 848/Civil/1962.
of insurance, for it is clearly provided in the C.C.I. that the insurer
"shall not be entitled to be subrogated to the right of the assured or of
the beneficiary against the person who caused the event insured against." (1)

c- Double Insurance: A further important consequence of the principle
of indemnity is the right of the assured who insures the same property
against the same risks with many different insurers. In practice, there
is nothing to stop the assured doing so, but in law the matter is differ-
ent. This is called double insurance and is of two types: Firstly, where
the value of things insured is covered by more than one policy of insur-
ance; and secondly, where more than the value of the things insured is
covered by more than one policy of insurance. The first case, however,
is clearly not the case of double insurance, and here there can be no
violation of the principle of indemnity, but in the second case there is
violation of this principle. This distinction is recognised by statute
in Iraq; Article 10 of the O.L.I. provides:

"If a contract is made for a second insurance over immovable
or movable property already insured, and in respect of the
same risks, before the expiry of the first insurance, the
second insurance is null and void, unless the second con-
tract stipulated that the rights attaching to the first
insurance are transferred to the second insurance, or un-
less the second contract provides a right of recourse
against the second insurer in the event of the first in-
surer not being able to meet his obligations or in the
event of the first insurance being cancelled for valid
reasons.

If the total value of the immovable or movable property
is not insured by the first contract, however, the remain-
der may be insured by a second insurer.

Similarly, the whole of the said property may be insured
a second time against different risks."

These provisions cover all kinds of insurance except life and marine, and
their effect is to ensure in the second insurance the assured's disclosure
of the facts concerning the first insurance.

(1) Art. 998. see p.207.
In marine insurance, the situation is slightly different, Article 187 of the O.M.C. providing:

"When the assured effects an insurance for the full value of the things insured for a certain period and against certain risks, he cannot effect another insurance for the same period and against the same risks on the same things insured. If he does so, the second insurance is null."

So, the law, generally, does not recognise the double insurance and provides that policies are invalid unless the first policy does not cover the value of the things insured, in which case the excess amount may be recovered from the other insurers according to the dates of their respective policies. Thus the question of contribution does not arise in the law of Iraq as it does in the laws of Scotland and England.

Life assurance, being as mentioned a non-indemnity contract, an assured having an unlimited interest in his own life, can take out over it as many policies as he can afford to pay premiums for, and he or his representative is entitled to the benefit of them all.

(1) Gow, Mercantile Law of Scotland, p.345.
CHAPTER III

ELEMENTS OF THE CONTRACT OF INSURANCE

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1. The Object of the Contract

A. The Theory of Obligation; and the Contract of Insurance — The Subject-Matter of the Obligation

Contracts of insurance are, as agreements, similar to other agreements in that each contract creates one or more legal obligations, and every obligation has a subject-matter. This is a general rule and part of the theory of obligations. How far is the rule applicable to the contract of insurance? In other words, as the contract of insurance creates a legal obligation, what is the subject-matter of this obligation? To understand this problem, it is necessary to consider the theory of obligations, though this, too, raises difficulties: The theory of obligations is part of Roman Law which has developed into a legal system of droit civil, while the contract of insurance is part of law merchant and has been developed in the sphere of international trade, not by lawyers but by merchants.

In both the Common Law and Civil Law systems a contract creates an obligation between the parties. With reference to the civil law, Planiol says: "Every obligation has as its object an act which a person can exact of another." On the same point Bell writes:

"The essence of an obligation consists in the obligor being so bound to give, or do, or abstain, as to entitle the obligee to rely on fulfilment. The jus exigendi is the right conferred, and forms part of the universitas of the creditor's estate." (2)

With reference to the Common Law, Salmon says: "A technical synonym for obligation is 'chose in action' or 'thing in action', and in the words of the New Dictionary of English Law, a 'chose in action' is "a right of proceeding in the court of law to procure the payment of a sum of money (e.g. a policy of insurance)." Although the objet d'obligation means in the

(3) Jurisprudence, 11th edn., p.489.
(4) ed. Earl Jowitt, s.v. under 'chose in action' term.
civil law "to give, to do or to abstain from doing something." The French Civil Code makes no distinction between the subject-matter of the obligation and the object of the contract. This usage is inconsistent with the theory of obligations because the only object of a contract is to create obligations. "A contract has not necessarily any single object; the contract is a juridical act which produces obligations."

It would seem therefore that the terms objet d'obligation and 'chose in action' have similar meanings.

In applying these doctrines to the contract of insurance, we can say that the contract does create obligations between the parties to it, and that every one of these obligations must have a subject-matter. Is this subject-matter an "action" to obtain the indemnity? Is it simply to make the kind of agreement which occurs where someone buys property e.g. a house, the subject-matter of this obligation being the transference of the property? A similar example occurs in Roccus when he says:

"But the most generally received opinion is that Insurance is a contract of purchase and sale; for he who insures for a valuable consideration does, as it were, sell his own obligation because he binds himself to pay the value of the thing insured, in case it should be lost and the other party, that is the Insured, purchases that obligation." (5)

This view is not completely acceptable. Payment of the premium and the obligation to pay the sum insured, even though they may give rights of action, are not the subject-matter of the contract because the assured does not insure in order to obtain the sum insured. The assured's aim is to avoid sustaining loss. In other words, the assured intends to be secured against any loss occurring as the result of a contingent event.

(2) Ibid., p.45.
(3) It here means "subject-matter".
(4) Walton, op.cit., p.45.
(5) Insurance, translated by Ingersoll, p.86.
Therefore, payment of the premium and the obligation to pay an indemnity are obligations of the parties to the contract of insurance and not the subject-matter of the contract.

Roccus has ignored the question of risk, but Emerigon, on the other hand, stresses its importance, saying that it is the subject-matter of insurance and that the absence of risk may make "the contract disappear for want of a subject."

Emerigon's view of "risk" as the sole subject-matter of the contract is also not sound although this view has a considerable influence on modern writers of civil law because the creation of risk is not the intention of the parties to the contract, and the contract only takes effect in the event of the occurrence of the risk. This contingent event cannot, therefore, be the subject-matter of the contract. The non-realisation of the risk insured against, however, raises the question of the insurer being enriched at the expense of the assured by receiving the premium without legal "cause" or "consideration", but risk in fact is not the real element which gives the insurer the right to the premium. This right depends on the "cause" or "consideration" of the things insured being exposed to the risks insured against. It is not necessary for the contract itself to have any subject-matter; only the obligation created by the contract requires a subject-matter; and, as has been pointed out, the object of the parties is not to create the risk but to provide security against its

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(1) Insurance, translated by Meredith, p.11.
(2) e.g. Jesserand, L. Cours de Droit Civil Positif Français, 1930, vol.ii, p.725. On the other hand, Picard et Besson in their famous work, Traité Général des Assurance Terrestres en Droit Français (1938), consider the risk, the sum insured and the premium as the elements of insurance. No reference is made to the subject-matter of the contract of insurance, vol.i, p.18; this view is followed among many Arab legal writers, e.g. Abdul-Bazziq al Samhuri, who considers the risk, the premium and the sum insured as the elements of insurance but also regards the risk as the only subject-matter of the obligation in the contract of insurance, Treatise on the Egyptian Civil Code, vol.vii, part 2, p.1217.
occurrence.

Payment of the premium, the obligation to pay the indemnity, and the risk cannot exist independently; and no one of these elements by itself is the subject-matter of the obligation, but all must be combined to provide it. Thus, the risk, the sum insured and the premium together form the subject-matter of the obligation in the contract of insurance.

As the result of the intervention of law, i.e. courts, legislation, another element has appeared in the subject-matter of insurance. In order to distinguish between a contract of insurance and a wager, the law requires that insurable interest be part of the subject-matter. This concept of insurable interest does not replace the elements mentioned before but is additional to them. The subject-matter of the obligation in the contract of insurance has, thus, four elements, and the absence of any one of them may invalidate the contract.

The accompanying diagram may help to clarify the problem of obligations arising from the contract and how the elements of the contract interact to become the subject-matter of the obligation.

The reason for this theoretical survey of the theory of obligations in the civil law is that the Civil Code of Iraq draws from the same sources as the French lawyers. In the C.C.I., the subject-matter of the obligation is provided for in Article 126:

"It is necessary that each obligation arising from a contract must have a subject-matter which is governed by the contract. The subject-matter of the obligation may be a legal property, that is a material, pecuniary obligation or usufruct, or any other pecuniary right; or it may be an obligation to do or not to do something."

Under the Code it is sufficient for the validity of the subject-matter of

(1) Lucena v. Craufurd (1806) 2 Bos. & P. 269.
(2) Life Assurance Act, 1774; Marine Insurance Act, 1906; Civil Code of Iraq.
(3) Art. 984 of the Civil Code of Iraq.
(4) It will be referred to as 'C.C.I.'
ASSURED → CONTRACT ← INSURER

creates

Payment of PREMIUM

have subject-matter

OBLIGATIONS

INurable INTEREST

Payment of SUM INSURED

RISK
an obligation that it be possible, specific and sufficiently known to the parties, in existence or known to be coming into existence in the future, permitted by law, and having a legal cause.

To sum up, therefore, the elements of the subject-matter of the obligation in the contract of insurance are: an insurable interest, the risk, the sum insured, and the premium.

These elements are subject to the legal requirements for the subject-matter of obligations in general, i.e. it must be possible, specific and known to the parties, either in existence or known to the parties to exist in the future, lawful, and having a legal cause. Any failure to conform to these requirements may invalidate the contract.

B. The Distinction between the Subject-Matter of the Obligation and the Subject Insured

As has been already mentioned, the C.C.I., following the general principles of the theory of obligations in the civil law systems, does not require that a contract of insurance as such should have a subject-matter. The contract has as its object the creation of one or more obligations, and each of these obligations must have its subject-matter. In this context the term "subject-matter" means the combined elements which generate obligations which the parties are bound to perform, and the term "subject insured" means always the thing insured which may be any right, real or personal, corporeal or incorporeal, which may arise in the course of commerce. It must be certain and lawful, and there is a fundamental distinction between these terms.

Bell is of the same opinion and although there is no express statement that the "object" of the contract is to create obligations, there is an arrival at the same conclusion: "The effect of the obligation is to confer

(1) Articles 127-131, C.C.I.
the right, and impose the duty, which the engagement fairly and equitably imports." In the contract of insurance he distinguishes between the terms "object of obligation" and "subject insured", the latter meaning that:

"The subject insured must be a thing at hazard." This definition of the subject insured is more in keeping with the concept of insurance in modern times than is the earlier view of something material held for example by L.J. Brett:

"...in my judgement, the subject-matter of the contract of insurance is money and money only...The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only."

This statement, although persuasive, in truth is neither comprehensive nor convincing. It is not comprehensive because it excludes insurance against third party liability and life assurance. It is unconvincing because the subject-matter of insurance may be a corporeal entity like a house or goods, or a ship, or it may be merely pecuniary rights, or a personal right, such as to do or not to do something. It is also debatable whether the subject-matter of the contract of insurance is "money and money only." In fact, the object of the contract of insurance is to create one or more obligations binding the parties to perform their duties. The money in the contract of insurance is the premium and the sum insured. L.J. Brett considers payment of money necessary as a duty for performance of the contract of insurance, and, broadly speaking, he means the "indemnity". But it must not be forgotten that the indemnity itself, or the right to obtain the indemnity, is not the purpose of the contract of insurance; the purpose is that the assured will suffer no loss.

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(2) Ibid., p.174.
To eliminate this confusion, the subject insured, or the thing insured, must be taken as one of the elements in the subject-matter of the obligation because the subject insured is the only thing in which the assured has an interest, and he will suffer damage to this interest if the risk occurs. For example, if a person insures his property against any kind of risk, the subject insured is the property, but the subject-matter of the obligation is that the assured suffer no damage, and this subject-matter insured creates the obligation of the assured to pay the premium and the obligation of the insurer to indemnify him.

To regard the subject insured as one of the elements in the subject-matter of the obligation raises the question of the rights of the parties in the things insured. The insurer has certain rights relating to the subject insured since otherwise the assured would be under no obligation to preserve the things insured. For example, the assured cannot dispose of or change the subject insured without the approval of the insurer, and the insurer has a right to require that the assured keep the subject insured reasonably secure. So, as soon as the assured enters into a contract of insurance, his rights in the things insured are restricted, and certain rights concerning the things insured are conferred upon the insurer. Thus it may be said, theoretically, that the thing insured is no longer the exclusive property of the assured but has become the subject of the agreement: The right of the assured to abandon the thing insured, the obligation of the insurer to accept the thing abandoned, and the right of the insurer to be subrogated by the assured against the person responsible for the damage give further support to the theory that the subject insured is part of the subject-matter of the obligation.

2. The Elements of the Subject-Matter of the Contract

A. Insurable Interest
1. **Meaning**

An insurable interest, in its broadest sense, is a relation between the insured and the event insured against such that the occurrence of the event will cause substantial loss or injury of some kind to the insured. The existence of such an interest is one of the fundamental elements in the contract of insurance. For long, however, it was considered to be required only in the contracts of insurance which covered damage to the things insured. Under this theory contracts of personal insurance, e.g., life assurance and insurance against bodily accidents, were exempted from the requirement of insurable interest. The reasons for this were that it is not in human nature to cause harm to oneself for pecuniary profit, and there is no need to prove that a human being has an interest in his own life. To be alive is the natural desire of every human being. But the difficulty arises at whether a person has an insurable interest in the life of other persons.

The Civil Code of Iraq considers insurable interest as one of the general elements of every contract of insurance and does not define it but describes it by enumerating its requisites, Article 984 providing that: "Any lawful thing from which a person may have a benefit on the non-occurrence of a specific risk, may be the subject of insurance."

This article corresponds to Article 749 of the Egyptian Civil Code, Article 715 of the Syrian Civil Code, Article 749 of the Lebyan Civil Code, and Article 960 of the Lebanese Code of Obligations and Contracts. The Egyptian article is derived from article 48 of the Swiss Law of Insurance, 1908, and similar provisions are found in Article 32 of the French Law of

(2) See p.107.
Insurance, 1930, and Article 68 of the German Law of Insurance, 1908.

The Syrian and Libyan articles are identical with the Egyptian article, but they differ slightly from the Iraqi provision since they start with the words "Any lawful economic interest..." This emphasis on economic interest does not fit with the fact that this article appears under the heading of "The General Element of the Contract of Insurance" since the (1) category of life assurance would be excluded.

The civil codes of Arab countries introduce the interesting innovation of making insurable interest one of the general elements of the contract of insurance. This means that it applies to all contracts of insurance. This is in contrast with the European system already mentioned which limits its application to insurance against damage to property. The requirement of insurable interest in life assurance puts the Iraqi law, to some extent, on the same line with the systems which do not limit its application to property insurance, i.e. Scotland, England, and the U.S.A. The inclination of insurable interest in the Civil Code has further advantage of applying (2) it to marine insurance in Iraq as the Ottoman Maritime Code, 1863, contains no such rule but follows the French Code of Commerce without taking account of the amendment of that Code in 1885.

Not every interest is insurable, and as it would appear that an interest to be insurable must be valuable in money, there may be subjects on which there may be an interest which is not insurable. French writers, for example, holding that an insurable interest must have a commercial value, point out that an interest in such things as the property of a living testator, social matters, religion and morals is not commercial in

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(2) See p. 108.
(3) Will be referred to as G.M.C.
character, cannot give rise to a pecuniary loss, and consequently is not
insurable.

As far as the requirement of insurable interest in the C.I.I. is con-
cerned, the subject must, as mentioned, be a "lawful thing", that is a
"thing permitted by law", but to understand what is meant by the phrase,
it is necessary to examine the meaning of "thing" in the C.I.I. "Thing"
is classified as either: (a) moveable property, or (b) immovable prop-
erty. And it is enacted that: "A right of property may be exercised over
any thing, unless it is excluded either by its nature or by law." "Right
of property", or what is called in French law a droit subjective, is
divided into: (a) real right - droit réel, and (b) personal right - droit
personnel. Real right is defined as: "A direct authority over a specific
tingthing given to a certain person by the law" and is either: (a) original
droits réels principaux), such as ownership, usufructus, the beneficial
use of tenements, servitude, endowment and long lease; or (b) accessory
droits réels accessoires), such as mortgage, pledge and rights of priority.
Personal right, which is synonymous with the terms "obligation" and
"debt" or "liability", is defined as:

"A legal bond between two parties, a creditor and a debtor,
by which the creditor may procure from the debtor
the transference of a real right, or an obligation to
do or not to do an act."

Personal rights arise either from contract, unilateral declaration of will,

(1) Art.62.
(2) Art.61.
(3) Such natural things as wind, sun, water, etc.
(4) E.g. things against the public order, such as vice houses, opium,
smuggling, etc.
(5) S.1, Art.67.
(6) S.1, Art.68.
(7) S.2, Art.68.
delictual acts, unjust enrichment or by force of law. These are also the
sources of obligation according to the C.C.I., obligation in general being
derived from the two sources, contract and law.

The use of the term "lawful thing" does not mean that it includes only
material things and obligations. The term "thing" has its ordinary as
well as its legal meaning. It includes "whatever is or may be an object
of thought". It may, thus, be used to indicate any "lawful interest".
This interest need not only be pecuniary but may be based on any relation¬
ship. Hence, it may have a "moral" concept. A "moral interest" can arise
from any "moral obligation" or from any other relationship based upon
blood or affection. Thus, the term "thing" can cover any moral obligation
whether created by blood, law or affection.

The conclusion, therefore, is that the subject of insurance is, by
the law of Iraq, any right, personal or real, in property, moveable or
immoveable, which gives rise to benefit which may be lost in the event of
the occurrence of a foreseeable risk, and that the owner of any such right
has an insurable interest in it.

ii. Sources

Insurable interest was introduced, generally, by the legislature with
the specific intention of preventing the assured from contriving the incident
insured against merely to gain a profit. Statute law is the main
source of the element of insurable interest, and parties cannot by agree¬
ment create an insurable interest which is not recognised by law.

Before the introduction of insurable interest in Iraq, the old statu¬
tory provisions enumerated the things that could be insured and the things

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(1) S.1, Art.89.
(2) Oxford Dictionary, s.v. "thing"; same meaning in Arabic - in Lane's
Arabic-English Lexicon the word shai' (thing): properly signifies what
be known, and that whereof a thing may be predicted.
(3) Art.984 of the Civil Code of Iraq.
that could not, but this differentiation is now an obsolete doctrine.

Under the earlier law, a person might insure another's goods, provided there was no deception in the contract, and the question of ownership could not be raised by the insurer against the assured. This doctrine appears in the statement:

"...the insurers have little interest in the fact whether or not the effects insured belong to the party assured. It is sufficient that the subject insured exist on board the ship. It is not competent for the insurer to object to the assured the want of ownership." (3)

This approach was generally speaking in line with the tendency of English Courts, but it lacks the express requirement of the rule of insurable interest. This was introduced in France in 1885 by way of amendment of the Code of Commerce, 1808, but it was applied in English Courts long before the French amendment, as appears from a judgment of J. Lawrence in 1806:

"Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of insurance; which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring. And where a man so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of a thing." (6)

(1) Articles 178 and 195 of the Ottoman Maritime Code, see pp. 298, 307.
(2) Articles 7 and 9 of the Ottoman Law of Insurance provide that: "Any person, whether proprietor or responsible for and interested in the safe keeping of any moveable or immoveable property, whether by way of ownership, or mortgage, or by way of deposit or by way of loan, or any similar way, may insure such property to the extent of his interest therein. Future interest in such things as crops and fruits which have not yet ripened may be insured with the exception of any thing contrary to law."
(3) Rocce, Insurance, p. 113.
(6) Lucena v. Craufurd (1806) 280s. & P., 269, 302. This judgment was summed up by J. Blackburn in Lloyd v. Fleming (1872) L.R. 7 Q.B., 302: "...subject-matter need not be strictly a property in either the ship, goods, or freight; for as has been long said, if a man is so situated with respect to them that he will receive benefit, sustain loss in consequence of their not arriving safely, he has an insurable interest in them."
This decision found its way into the Marine Insurance Act, 1906.

Insurable interest, thus, has only one source - the law, by which it is described, and the law may create an insurable interest even though there is not, in fact, any real interest in the thing insured. Thus the law may require someone who has no interest to enter into an insurance for the benefit of another person who has an insurable interest. This is apparent in a contract of sale C.I.F. (cost, insurance, freight) where it is the seller's duty to insure the goods sold, and the premium is included in the price. The Code of Commerce in Iraq provides that the seller is obliged to insure the goods sold although, in fact, he has no interest in them because ownership and risk are transferred to the purchaser at the moment of loading the goods on board ship. The seller does not act as the purchaser's agent and must assign the policy to the purchaser.

iii. Insurable Interest in Life Assurance

Life, health and physical safety are not things in commercio and are, strictly speaking, in this respect outside the economic definition of insurable interest, but the use of an economic measure has proved in practice to be reasonable and satisfactory; this method of valuation is used in all legal systems. Life assurance accordingly may be effected either on the life of the assured, or on the life of another person. No one disputes that every human being has an unlimited interest in his own life, but the difficulty in insuring the life of another lies in whether there can be an insurable interest in the life of another or not. The Civil Code of Iraq requires the approval of the third person whose life is insured. This rule, without any doubt, assumes that the insurable interest in the

(1) S.o.
(2) Articles 179-203.
(3) Art.992, see p.199.
life of another person is not sufficient by itself unless the consent of
the person on whose life the assurance is to be made is had, and this
authorisation by the third party is necessary to make a valid policy of
insurance. The assured is not entitled to persuade the *cestui que vie*
to give his consent unless the assured has a substantial interest in the life
insured. This interest need not necessarily be economic so long as it is
a legal relationship between the assured and the person whose life is in-
sured. This relationship will be either a pecuniary obligation or a "mor¬
al" obligation, both arising from either law, blood or affection. Thus,

(1) Article 992 is not a substitute for Article 984 but an additional provision.
The conditions of both must be satisfied to create an insurable interest
in the life of the *cestui que vie*.

Arab legal writers have expressed different opinions on this subject.
(2) They have criticised the Civil Code of Egypt – the source of the Civil
Code of Iraq – firstly, for including the doctrine of insurable interest
under the heading of "General Elements of the Contract"; and secondly, for
keeping the description of the insurable interest as an "economic interest."
They suggest that the doctrine of insurable interest must be included among
the special rules for insurance of things, sometimes called insurance again¬
st damage. In this they are influenced by the French Law of Insurance of
1930. They also find "economic interest" inconsistent with life assurance.
(3)
The majority accept the doctrine of insurable interest in life assur¬

(1) See p.199.
(2) See p.102.
(3) Mohammed Ali Arafa, *op.cit.*, pp.26,62; M/o Kamel Mursi, *Commentary on
the Egyptian Civil Code*, vol.iii, p.41.
(4) Mohammed Ali Arafa, p.64.
(5) Article 32 comes under the heading "Des assurances de dommages"; Bicard
ance, but some suggest that the doctrine of insurable interest applies only in the case of insurance against damage. So, there is no need for the assured to have an insurable interest in the life insured; and consequently, the consent of the cestui que vie is fully sufficient to effect a policy of life assurance.

But it may still be of some importance to make brief comparison with the British system of insurance. The Life Assurance Act, 1774, provides that no policy of life insurance may be effected on the life of another unless the assured possesses an insurable interest in the life insured. The required interest is a pecuniary insurance, e.g. a creditor has an insurable interest in the life of his debtor; similarly, partners have an insurable interest in each other's lives; spouses have an insurable interest in each other's lives.

iv. Effect of Insurable Interest

Insurable interest is required by law in every contract of insurance. Thus, if the assured has no interest in the things insured at the time of making the contract, the insurance is void; and if during the currency of the contract he loses his interest in the things insured, the contract becomes voidable and so an assured must declare his interest in the things insured, not only at the constitution of the contract but also at the time of the occurrence of the risk insured against.

B. Risk

i. Meaning

Risk is: "An uncertain but possible event which is not created by the
act of either party." It is very important as an element in insurance, and its existence is presumed in every contract. This means, not that the risk is certain to happen, but that the interests of both parties are exposed to its possible occurrence; and if it occurs, the insurer must fulfill his obligation. Thus, in every policy of insurance, whether marine or non-marine, the nature of the risk must be clearly stated and the time and place of its incidence fixed - otherwise the insurer is not liable. This means, in effect, that the performance of the insurer's obligation depends on the occurrence of the event insured against.

The event insured against need not necessarily involve danger. Sometimes the performance of the insurer's obligation depends on the assured's reaching a certain age or his marrying or on a child being born, but even in such cases the burden of economic liability is transferred to the insurer. In such cases since there is no danger involved, it is better to refer to "the event insured against" than to use the term risk, which implies danger or hazard.

Risk has two theoretical aspects: Firstly, the general category of the risk will be apparent from the very name of contract, e.g. fire insurance, marine insurance, life assurance, accident insurance. The second aspect of risk concerns the subject-matter of the obligation in the contract. This distinction appears in the following example: It is not necessary that every risk covered in a fire insurance policy must be caused

(1) Besson, see Planiol et Ripert, Traité Pratique de Droit Civil Français, Vol.xi, p.615.
(2) Art.175 of the Ottoman Maritime Code, see p.297.
(3) Ibid. and Art.2 of the Ottoman Law of Insurance, see p.166.
(4) Art.988 of the Civil Code of Iraq., see p.142.
(5) Besson, see Planiol et Ripert, op.cit., p.616.
by fire. "Fire policy" merely a title, whereas the risks insured must be specified. These meanings differ from other meanings of risk, especially those in the context of contractual liability or delictual liability resulting from the creation of a risk which causes damage to persons or things. This latter is called "objective responsibility" and is based on the theory of responsabilité du risque créé. The difference arises from the circumstance that in the case of these latter risks a person may exonerate himself from liability by proving that the damage is the result either of the act of the injured person himself or of force majeure or fortuitous events, and this kind of risk has been a considerable factor in the development of third party liability insurance. In the contract of insurance on the other hand, as soon as the insurer accepts the burden of the risk, he cannot exonerate himself from liability since, otherwise, there would be no insurance.

ii. Characteristics

The characteristics of risk in insurance are uncertainty, futurity, fortuitousness and legality.

a) Uncertainty: Risk must be uncertain. This means that the assured must face the possibility of its occurring, but there must be a doubt as to whether it will occur. If it does, its occurrence would affect

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(1) Art.153 of the Civil Code, by which the risk occurs upon the sold thing before delivery is on the vendor; Art.153 of the Commercial Code on the contrary puts the risk on the purchaser.
(3) Articles 186-232 of the Civil Code.
(4) Amos & Walton, Introduction to French Law, p.263.
the interest insured and cause loss to the assured, and, therefore, he seeks to transfer liability for these consequences to the insurer. No difficulty arises in the case of life assurance, for although "death" is something certain, the time at which it will occur is uncertain.

b) Futurity: If it has already occurred at the time of constitution of the contract, this nullifies uncertainty, for its occurrence is now certain and consequently, the contract is null and void. Following this rule, the C.C.I. provides: "The contract of insurance is null and void if it appears that the risk insured against has disappeared or happened at the date of the contract or either party comes to know this." This article corresponds in substance to Article 981 of the Lebanese Code of Obligations and Contracts. This article, however, following the French Law of Insurance, 1930, does not provide that knowledge of either party of the occurrence of the risk is necessary to nullify the contract; and it is sufficient for the insurer to prove that the risk occurred before formation of the contract.

Similar to the above provision, the O.M.C. provides that if either party is informed or can be presumed to have been informed of the occurrence of the risk or of the safe arrival of the ship before the constitution of the contract, the contract is null and void.

It should be noted that in a contract of insurance against liability for professional negligence it is possible to provide that insurance cover will run from prior to the date of constitution of the contract. In this case, it is, therefore, possible for the event insured against to happen

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(1) Maseaud, Lecons de Droit Civil, vol.iii, p.1239.
(2) Emerigon, Insurance, p.4.
(3) S.2, Art.984 of the Civil Code, cf. Art.194 of the O.M.C., see p.102,339
(4) Art.32.
(5) Articles 210 and 211, see p.29.
before formation of the contract but within the currency of the contract (1) without affecting its validity; the insurer's obligation must be performed (2) if there is a claim for damages against the assured. It is essential in this case that the assured does not already know of every claim pending against him as, if he does, the contract is null and void.

Precisely similar problems arise in British systems of insurance. The terms commencement and attachment of the risk have similar results as future of the risk. The period of currency of the risk must be specified in the policy, otherwise it is presumed that it runs from the date of the policy. It follows that unless the subject insured is for a time exposed to the risk insured against, the contract no longer remains in force because the risk is determined one way or another. In practice it is uncommon to antedate the policy of insurance to the date of the proposal.

c) Fortuitousness: The risk must not depend on the will of either party, and if the risk insured against occurs through the agency of the assured himself, the insurance will be considered null and void for insurance must not be used to compensate the assured for any intentional act of his own. This is apparent in the case of life assurance where the C.C.I. provides that suicide nullifies the life assurance policy, and the contract of fire insurance provides that the insurer is not liable if the fire is caused intentionally or fraudulently by the assured. In marine insur-

(1) Besson, see Pianiol et Ripert, op.cit., p.615.
(2) Art.1001 of the Civil Code of Iraq, see p.281.
(3) Art.987, ibid., see p.131.
(6) MacGillivray, Ibid.
(7) Article 993, see p.205.
(8) Art.1000, see p.271.
ance the O.M.C. provides that loss or damage arising from any act of the assured or damage resulting from the act or default of the owners or shippers does not involve the underwriter in liability.

In Britain, the policy of insurance covers damages occurring through the negligence of the assured action unless there are express provisions of exception, but the loss occurred through wilful misconduct of the assured is not covered by the policy.

d) **Legality**: Risk must be lawful, that is it must not be contrary to either private or international law. Article 130 of the C.C.I. provides: "The subject-matter of the obligation must not be prohibited by law, nor against les bonne meseurs ou l'ordre publique." Thus, the risk or the event insured against must be neither implicitly nor expressly forbidden by law and should not contravene the rules of public order or morality. Thus, no insurance may be effected to protect an unlawful business or to facilitate the commission of a crime. But contravention of laws and regulations does not invalidate insurance unless such contravention amounts to a crime or deliberate misconduct, i.e. insurance is intended not to encourage breach of the laws but merely to indemnify the injured person.

iii. **Duration of Risk**

The commencement and termination of the period during which the subject is at risk are matters of concern to both assured and insurer. Article 21(1) of the O.L.I. provides:

"In the absence of any special provision in the contract of insurance, the date of signature of the provisional receipt (slip) shall be considered as the period from which the insurance of immovable and movable property begins to run."

This article is supplementary to Article 2 of the same Law which provides

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(1) Articles 196 and 197, see pp.340,317,319.
(2) Preston and Colinvaux, Law of Insurance, p.60.
(3) S.1, Art.985 of the Civil Code of Iraq, see p.163.
that "the beginning and the end of the insurance" must be fixed in the policy. In marine insurance, too, the period of the policy must be fixed specifically. Failing this, especially in case of a voyage, policy for such extends the period of risk for the ship and its accessories from the date of commencement of the voyage until the ship anchors in its port of destination, and in the case of the cargo, the period of risk is from the date of loading until the time of unloading in the port of destination.

iv. Extent

It is well established that parties to a contract of insurance must act honestly. The risk, whether anticipated or putative, along with details of all circumstances concerning the things insured and any other facts which go to increase or reduce the risk, must be specifically declared by the assured to enable the insurer to decide whether he wishes and, if so, to calculate the premium. Any concealment or misrepresentation in these matters invalidates the contract. Unless specifically agreed, the insurer's liability is limited to the risks specifically insured against. Article 15 of the O.L.I. provides: "The insurer is liable only in respect of the kind of risks for which the contract of insurance is made." Any reduction or increase in the risk does not ipso facto affect the validity of the contract as evidenced in Article 13 of the O.L.I.: "If any circumstances arise which may increase or change the risk attached to the immoveable or moveable property insured and these are communicated by the assured to the insurer, the contract of insurance continues in force unless cancelled in writing."

(1) See p.166.
(2) Articles 186 and 170 of the Ottoman Maritime Code, see p.324.
(3) Article 176 of the Ottoman Maritime Code, see p.165.
(4) Art. 986 of the Civil Code of Iraq, see p.133.
v. Causation

Distinction is made between risk in marine insurance and risk in non-marine insurance. In marine insurance, the policy covers all the maritime risks enumerated in Article 195 of the O.M.C., and Articles 197 and 198 exclude the insurer's liability in respect of certain kinds of risks. The enumeration of risks which are covered and those which are not covered is based on the distinction between risks occasioned by perils of the sea, fortune de mer; whether force majeure or fortuitous act, and risks caused by the fault or act of the insurer or person whose duty it is to take care of the things insured. The doctrine causa proxima, non remota, spectatur is not mentioned in the O.M.C., and it is left to the courts to decide whether the damage was caused by the risk insured against or not, this being a matter of fact and not of law.

In non-marine insurance, the insurance statutes do not refer to causation of risk but provide that any voluntary act of the assured is an immediate cause relieving the insurer of liability: Article 19 of the O.L.I. and Article 1000 of the C.C.I. relieve the insurer of any obligation in the case of a fire insurance policy, where the fire is caused by the deliberate act of the insurer.

vi. Assessment

Assessment of risk is necessary to enable the insurer to decide whether he will accept it, and, if so, to fix the premium; this is based on the past experience of the insurer. In other words, the insurer reviews the premiums received and the claims paid. From the practical point of view, it is necessary that the number of persons who seek the protection of in-

(1) See p.307.
(2) See p.319, 315.
(4) See p.270.
(5) See p.271.
Insurance is large enough that claims of loss will not cause difficulty in covering them. It is noticeable that the persons who are exposed to the same kind of risk pay the same premium; and if the risk is not substantially equal, some adjustment of the premium is necessary.

C. Sum Insured

The third element in the subject-matter of the contract of insurance is the sum insured. The importance of this element is twofold. Firstly, the assured thereby places a value on his insurable interest in the things insured. Secondly, in proportion to this valuation, the insurer computes the amount of the premium. The sum insured is prima facie the measure of (1) indemnity, though indemnity is (in all contracts except those of life assurance) always restricted to the actual amount of loss.

In the contracts of life assurance and insurance against bodily injury (assurance des personnes) the assured is at liberty to fix the amount of (2) the sum insured; and in these cases the insurer must pay the full sum regardless of whether the assured, in fact, suffered less through the realisation of the event insured against or not. The only limit of the sum insured in such circumstances is the size of the premium which the assured is prepared to pay since any increase in the sum insured leads to a proportionate increase of the premium.

The Iraqi insurance statutes provide that the sum insured must be specified in the policy, and there must be no fraudulent exaggeration of amount. The necessity for specification of the sum insured appears in Article 3 of the O.L.I., which provides: "The insurance of immovable and movable property necessitates the payment of the sum agreed upon between the part-

(1) See p.85.
(2) Art. 988 of the Civil Code, see p.142.
(3) Art. 176 of the Ottoman Maritime Code; Art.2 of the Ottoman Law of Insurance of 1905, see pp.165-6.
ies and set out in the contract."

At first sight, this provision seems to contradict the principle of indemnity. In fact, however, the scope of this article is restricted by Article 11 of the same Law which provides that the parties must act honestly. It is also restricted by Article 17, which provides that the insurer is to make good any damage to the things insured.

D. The Premium

1. Meaning

The premium is the fourth element in the subject-matter of the contract of insurance. It is the amount paid to the insurer in consideration of his undertaking to pay the sum insured or to pay the appropriate indemnity in the event of occurrence of the risk. If a contract is constituted without any stipulation for a premium or other similar contribution, it is not a contract of insurance but is possibly a kind of "donation".

The word premium is derived from the Latin word praemium, signifying "reward or recompense". It has been defined by A. Lawrence as: "...price paid adequate to the risk." This is perhaps not an entirely satisfactory definition. If the premium is a price of the risk, it should be recoverable if the risk has not occurred even though the subject insured has been exposed to it; for the insurer has, without legal cause, been enriched at the expense of the assured. The modern explanation of the nature of the premium is derived from the collective solidarity of human beings in facing risks to which they are exposed. They agree to share among themselves any loss arising out of such risks, and each person seeking security contributes a small, almost insignificant, sum, the premium, in respect of certain risks, to cover the losses affecting some of them. The person

(1) See p.88.
(2) Emerigon, Insurance, p.77.
(3) Ibid., p.51 suggests that it is derived from Primo indicating payment of the first installment.
(4) Preston & Colinvaux, op. cit., p.114; Lucena v. Craufurd, cf. Roccus, op. cit., p.86 whose views were referred to by A. Lawrence, see p. 66.
who receives this contribution is under an obligation to indemnify the payer in the event of the occurrence of the risk. This is an economic analysis of the function of the premium, but legally it has another function: it is the consideration for the contract by which the insurer undertakes liability for the consequence of the occurrence of the risk insured against. This would appear to have been the function which Lawrence had in view when he framed his definition.

Before acceptance of the theory that the insurer's remaining potentially liable for the risk was a sound reason for his retaining the premium, the contract of insurance was regarded as a transaction similar to "purchase and sale". In order to avoid any question of repayment of the premium in the event of the non-occurring of the risk, the O.M.C. provides that the insurer acquires a right to the premium as soon as the risk attaches, and it is recoverable if the contract of insurance becomes null and void, as when the risk occurs before formation of the contract or before the risk attaches, the things insured are diminished in value or do not exist at all or the voyage is cancelled.

A definition of premium taking into account both its legal and its economic role might be: The premium is a contribution paid in consideration of the distribution of the risk of loss among many individuals and received by a person who himself accepts the liability arising of the occurrence of the risk.

The only function mentioned in the insurance statutes in Iraq is the binding of the insurer to his obligation. This was introduced in a simple form into O.L.I. and C.C.I. providing that payment of the premium is a

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(1) See p.95.
(2) Art.196, see p.79.
(3) Articles 210,211; same rules in Art.984 of the Civil Code and Art.12 of the Ottoman Law of Insurance, see pp.329,112,76.
(4) Art.194 of the Ottoman Maritime Code, see p.321.
(5) Art.1, see p.65.
(6) Art.983, see p.5.
reciprocal obligation undertaken by the assured and obliging the insurer
to undertake the burden of the risk and to pay the sum insured or an indem-

ii. Mode of Payment

Payment of the premium must be in money. The C.C.I. allow the premium
to be paid by installments, but there is no direction as to the particular
mode of payment, the matter being left to the parties to regulate. In
certain kinds of insurance, such as mutual society insurance, no premium
is payable, but the assured obliges himself to share in payment of any in-

iii. The Rate of Premium

As has been pointed out above, the premium is a contractual contribut-
on of the assured, but it also plays an important part in the business
of insurance since the insurer depends on the collected premiums for set-
tlement of his liabilities. Thus, in insurance the accumulation of premi-
ums is in the nature of a safeguard, and it plays an essential part in
the fulfilment of the contract. However, the need to accumulate premiums
is not only to protect the assured against the risk of loss but also to
provide a reasonable saving. This is not to deny the importance of pro-
viding a capital fund. The rate is fixed according to rules of statistics.
In rating a risk the insurers need to examine all the risks involved; wha-
they are of frequent occurrence, and the disasters happen with regularity
more or less constant. On this basis the insurer must calculate the rates
of premium adequate to meet his liabilities.

iv. The Effect of the Premium

The statutory provisions for insurance in Iraq provide that the premi-
ium must be fixed in the policy. These statutes do not make it clear

(1) Besson, see Planiol et Ripert, op.cit., vol.xi, p.617.
whether the operation of the contract depends on payment of the premium; and the question is whether the insurer can suspend his own obligation till the premium is paid. The general rule is that whenever a party to a contract does not perform his obligation, the other party may ask for termination of the contract provided that a warrant (mise en demeur) is issued to the other party. This warrant is obligatory even though it is stipulated in the contract that in case of non-performance by either party, the contract is annulled per se. In insurance, the insurer has the choice of either demanding payment of the premium, as in the case of an ordinary debt or demanding, on issue of a warrant, the rescission of the contract. In the former case, the validity of the contract is not affected, whereas in the latter the insurer is relieved from his obligation unless the assured performs his. The only exception is where there is agreement to the contrary or the nature of the contract or custom of trade obliges either party to fulfill his obligation before the other party has fulfilled his. These provisions are, however, not absolute, and parties may regulate the matter themselves in the policy. For example, in life assurance policies in Iraq, the insurer is obliged to grant the assured who declines paying the installments regular loans until the assured forfeits his right in the proceeds of the policy.

After the payment of the premium, the insurance becomes binding contract. This is made clear in fire insurance, Article 21(2) of the O.L.I. providing:

"In the event of a fire occurring before the policy has been constituted and delivered, and after the premium has been paid, the provisional receipt shall have the same force and validity as the policy."

(1) Art.177 of the Civil Code of Iraq.
(2) Art.121 of the Commercial Code of Iraq.
(3) Clause 6 standard form policy in Iraq.
v. Augmentation or Reduction of the Premium

The amount of the premium is fixed by the parties to the contract and normally depends on the circumstances existing at the time of the constitution of the contract. Any change in these circumstances will not discharge the parties from performance of their obligations unless it is beyond the contemplation of the insurer and the risk is grossly increased.

Article 13 of the O.L.I. provides that:

"If any circumstances which have arisen and whose nature is to increase or change the risk attached to the immoveable or moveable property insured are communicated by the assured to the insurer, the contract of insurance continues to be in force unless it is cancelled in writing."

This means that the contract remains valid, but this validity does not preclude the insurer from using the rights given in S.2 Article 146 of the C.C.I.:

"When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive. Any agreement to the contrary is void."

The contract of insurance is an aleatory contract; the parties to it are not in an equal position, and one part will either lose or not lose. This is the theory of insurance, but, in practice, it is hardly the case. The balance between the parties and their correlative obligations are fixed at the formation of the contract in accordance with all the circumstances, but if these circumstances are changed by any predictable events, the balance may be disturbed and the parties may find that the contract has become difficult to perform. The law, accordingly, provides that the contract remain valid but, to reduce the increased burden of risk, gives a remedy in the C.C.I. article (above), and the insurer may augment the premium.

In the case of life assurance, the problem is less and the remedy for
change of risk is found in the above article. An example may be given: let us suppose that in a life assurance contract the premiums are fixed between the parties with regard to a certain event, either peace or war, and by following the general rule in the above article, the rate of premium in this example may be changed unless there is a contrary agreement. (1)

In marine insurance, the case is different; Article 188 of the O.M.C. does not allow any change in the rate of premium unless there is agreement to this effect in the contract.

(1) See p. 338.
CHAPTER IV
PARTIES TO THE CONTRACT

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The parties to any contract are, prima facie, those who have declared their consent to its provisions; and the parties to a contract of insurance are, primarily, the assured and the insurer. The contract may, however, affect other persons, and, in insurance, there may be persons other than the assured who are entitled to payment of the sums due under the contract, such persons being called "the beneficiaries".

In every contract it is necessary for the parties to have the legal capacity to consent to its provisions.

The parties to a contract are either natural persons or legal persona (personnalité morale). A natural person is a real person, a human being. A legal persona or fictitious person is artificially created by the law and has only a legal and not a physical existence. The C.C.I. recognises both kinds of person.

In the case of a natural person the C.C.I. provides: "Every one has capacity to contract unless the law declares him incapable or disqualifies him."

Certain persons are, according to the C.C.I., disqualified from entering any contractual obligation because they are subject to certain disabilities or incapacities. Thus, those under the age of eighteen years, lunatics and persons of unsound mind are disqualified. How far such disqualification extends depends partly on the persons themselves and partly on the nature of the purported agreement.

(1) Articles 34-46.
(2) Articles 47-60.
(3) Chapter 2 of the Introduction.
(4) Article 93.
(5) Articles 93-111.
(6) Article 94.
Children under seven years of age and lunatics have no capacity to enter into any transaction whether it is to their advantage or not. All transactions must be entered into by their legal guardian on their behalf.

Transactions of those aged between seven and eighteen (the age of majority), imbeciles, prodigals and persons of unsound mind are classified into three types. A transaction which is solely for the benefit of the incapable is considered valid, and there is no need for the consent of his guardian. Transactions which are entirely disadvantageous to him are considered null and void. In the case of transactions which may be either advantageous or disadvantageous, their validity is suspended until the guardian approves. A person aged between fifteen and eighteen has the right to engage in trade with the approval of his guardian or permission of the court.

(1) Art.96 of the Civil Code of Iraq.
(2) Art.108 of the Civil Code of Iraq does not define the term "lunatics", the matter being left to be determined in accordance with the Islamic Law. An apt juristic definition was cited in the Ottoman Civil Code (Majalla), Art.944 providing: "Lunatics are divided into two classes; the first consists of persons who are continuously mad and whose madness lasts the whole time - the second class consists of persons whose madness is intermittent, that is to say, persons who are sometimes mad and sometimes sane."

(3) Art.97 of the Civil Code of Iraq.
(4) Art.106, ibid.
(5) Art.107. The term "imbecile" is defined in Art.945 of the Ottoman Civil Code which provides: "An imbecile is a person whose mind is so deranged that his comprehension is extremely limited, and his speech confused, and whose actions are imperfect."
(6) Art.109 of the Civil Code of Iraq. The term "prodigal" is defined in Article 946 of the Ottoman Civil Code, which provides: "A prodigal person is a person who by reckless expenditure wastes and destroys his property to no purpose."
(7) Art.110 of the Civil Code of Iraq: "A person of unsound mind - sometimes called simple-minded, are classed with prodigals." Art.946 of the Ottoman Civil Code provides: "Persons who are deceived in their business owing to their being stupid or simple-minded are also considered to be prodigal persons."
(8) Art.97 of the Civil Code of Iraq.
(9) Art.98, ibid.
(10) Art.101, ibid.
The legal persona is dealt with in Articles 47-60 of the C.C.I.,
the most important provision appearing in Article 48, where the rights
and capacities of a legal persona are enumerated as follows:

1- to be represented.
2- all civil rights except rights peculiar to natural
   persons (i.e. marriage, testacy, intestacy).
3- private pecuniary capacity (the right to own and
   possess property).
4- the right to be a party to litigation.
5- a domicile.

1. The Assured
   A. Definition

   The assured is defined in the C.C.I. as: "The person who pays the in¬
   surer the bilateral obligations of the contract." He has rights and ob¬
   ligations arising out of the contract, his rights being the counterpart of
   the insurer's duties and vice-versa. He must also have an insurable inter¬
   est in the things insured, and such an interest is recognised and protected
   by law so that he may seek security against any damage to his interest.
   Sometimes the assured's interest in the insurance is as representative of
   a third party. This is legally valid provided that the fact of representa¬
   tion is stated in the contract. If it is not, any rights arising out of
   the contract belong only to the person who signs it as assured. On this
   matter, Article 4 of the O.L.I. provides that: "If it is not stated in the
   contract that the assurance is made for the benefit of a third party, the
   contract is held to relate to the person whose name appears in it."

   B. Contractual Capacity of the Assured

   As mentioned before, the assured may be either a natural person or a
   legal persona; and in the case of a natural person, he must be over eight¬
   een years of age and sane. It is to the advantage of an assured to obtain
   security against loss which/

(1) Section 2, Art.983.
he cannot afford to incur.

The Iraqi insurance statutes do not deal with the question of whether those under legal disability (apart from children under seven years of age and lunatics, who have no right to enter into any transaction) can enter into a contract of insurance. It seems to be the case that other classes of incapables have the right to do so in the following circumstances:

Firstly, a child must be over fifteen, the age at which permission to engage in trade may be granted. In such a case, a contract of insurance is valid, provided that there is no question of any fraud or misrepresentation for the insurance is for the benefit of the assured, and a comparison between the amount of the premium which the assured is bound to pay and the damage which he may suffer will show whether the balance is in the assured's favour. Secondly, in the case of persons who are mentally defective, their capacity depends on whether they are able to understand the contract or not. If they understand the nature of insurance and the benefit which they may obtain, the contract is valid provided there is no fraud or misrepresentation.

In the case of a legal persona, the general rule is that it may enter into the contract through its legal representatives.

C. Obligations

i. Disclosure

The contract of insurance is a contract uberrimae fidei. The obligation of the insurer is to undertake the burden of the risk, and the likelihood of this cannot be assessed unless all information relevant to the circumstances surrounding it is communicated to the insurer. The assured must, therefore, not conceal anything from the insurer, and his obligation is not merely not to defraud him but to disclose to him any information which he may have concerning the risk or the things insured and which the insur-
er requires to be able to calculate the premium. Such disclosure must be made spontaneously, and the insurer is under no obligation to take steps to extract it from the assured. Section 96 of Article 986 of the C.C.I. deals with this matter:

"The assured is obliged:

b) To declare, at the time of making the contract, all the circumstances within his knowledge. Upon such a declaration, the insurer is able to assess the risk undertaken. In this case, the facts about which the insurer has demanded in writing precise information are considered important."

a) Facts and Circumstances

The article quoted refers to all the circumstances within his (i.e., the assured's) knowledge. This means that the assured is bound to disclose all the circumstances of which he knows. The necessity for disclosure does not extend to matters which the assured actually does not know, or to those which he need not know. In other words, the assured is not presumed to have such information. The facts which must be disclosed relate either to the risk or to the things insured, and any material representation of fact must be true or substantially correct. The Iraqi insurance statutes do not deal with the question whether disclosure of only material facts is necessary or whether all facts, even immaterial facts, should be declared. This silence in applying any test to distinguish between material and immaterial facts makes the Iraqi system of insurance different from the British system. The above mentioned provision of the C.C.I. refers to "all the circumstances". Knowledge of the circumstances is of importance to the insurer in his assessment of the risk, and so the

(1) Besson, see Pianiol et Ripert, op.cit., vol.xi, p.675.
(2) Lillie's Mercantile Law, 6th edn., p.363.
question of which facts are immaterial is left primarily to the insurer (1) and he can discover them by means of written questions. The court, by examination of each individual which comes before it, may determine which facts are material to the risk and which are not. (2)

In marine insurance, however, the O.M.C. gives more detail than the C.C.I. The assured must not conceal or give any false declaration or differences between the contract of insurance and the bill of lading, which affects the nature of the risks or changes the things insured and is such that it may prevent constitution of the contract when the insurer has been notified of the facts, even though the facts concerned have no relevance to the damage or the loss of the things insured. This provision, it seems, imposes on the contract a sanction of nullity in the event of the assured’s concealment of fact.

b) **Time of Disclosure**

Disclosure of the facts concerning the risk must be made before completion of the contract, and the assured cannot claim that continuation of the contract extends for the period of disclosure. The insurer must at the outset know all the circumstances so that he can assess the probability of the risks, which may even deter him from entering into the contract.

c) **Change of Circumstances**

Section 3 of Article 986 of the C.C.I. provides:

"The assured is obliged:
3- to notify the insurer of all circumstances which may increase the risk and which occur during the period covered by the contract."

Every contract of insurance made for a certain period during which the insurer accepts liability for the risk, he must know the circumstances re-

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(1) Section 2, Article 986 of the Civil Code of Iraq, see p.129.
(2) Art.193, see p.343.
lating to the risk and the things insured not only at the time of making the contract but also throughout its currency. Consequently, the assured must inform the insurer of any change affecting the things insured or the risk which occurs during the course of the contract. The assured cannot decide which circumstances may aggravate the risk and which are not; his obligation is to inform the insurer of every change in the circumstances as long as the contract subsists.

d) Effect of Non-Disclosure

The general rules on this subject are given in Article 987 of the C.C.I. which provides:

"s.1- The insurer may apply for cancellation of the contract if the assured intentionally conceals any matter or gives false information which results in a change of the subject of the risk or lessens its importance to the insurer.

The premium paid remains vested in the insurer. The insurer may claim any unpaid premium.

s.2- A similar provision applies in the case of fraudulent misrepresentation. However, if the assured has acted in good faith, the result of cancellation is that the insurer must repay either the whole premium received or a part of it proportional to the amount by which the risk was effected."

But the Iraqi statutes contain in another place provisions dealing differently with the same subject; and as it is very doubtful whether these other provisions will retain their effect or not, the matter must be decided by the court. Before expressing an opinion on this question, it is necessary to state the other provisions contained in Article 11 of the O.L.I.:

"1- If a contract of insurance is entered into as a result of a false statement in respect of the nature or value of property insured, such as goods, objects or supplies, and it is proved to the satisfaction of the proper legal authority that the deception was carried out by the person assured without intervention or fault on the part of the insurer, the contract of insurance shall remain in force as regards the clause relating to the premium, but in the event of loss occurring, the person

(1) Art.1381 of the Civil Code of Iraq.
who has been guilty of deception shall have the right of claiming payment equivalent only to the value of the actual loss sustained.  

2- If the proper authority is satisfied that the insurer has been guilty of deception without intervention or participation on the part of the assured, the insurer will be obliged to pay the whole amount of the sum insured."

Article 987 of the C.C.I., thus, covers all kinds of insurance other than marine, whereas Article 11 of the O.L.I. is limited to insurance of property, with some amelioration in that it allows the insurer to elect between rescinding the contract or ratifying it with abatement of his contractual liabilities, i.e. the indemnity must not exceed the actual loss sustained; and in both cases he has the right to retain the premium. In other kinds of insurance which are not within the purview of Article 11, the insurer has the right to elect between rescinding the contract or ratifying it with increased premium to equate the risks insured against.

The right of the insurer to rescind the contract creates another problem, namely, whether the contract is cancelled from the date of its inception or from the date of anuliment by the court. In regard to this question, a distinction must be made between information which must be disclosed at the time of constitution of the contract and that which concerns the aggravation of the risk. In the first case, the rescinding of the contract has a retroactive effect, whereas in the other case the cancellation of the contract operates only from the date of cancellation because in this case the contract is validly constituted and the only defect is the assured’s concealment of the change in the risk.

Finally, the facts to be disclosed must be within the assured’s knowledge. Therefore, it is important for the insurer to prove that the assur-

(1) See p.86.
(2) Besson, p.681 (Planiol et Ripert, op.cit.), see p.122.
ed knew the facts which he did not disclose. Conversely, the assured must establish that any non-disclosure on his part is not the result of dishonesty but has been made in good faith. Only then does the question of repayment of the premium, wholly or in part, arise. In the case of marine insurance, the matter is dealt with in Article 193 of the O.M.C., which provides that the policy may be invalidated by the underwriter who at the same time has the right to retain the premium.

ii. Payment of the Premium

Section 1 of Article 986 of the C.C.I. provides:

"The assured is obliged:
1. to make payment of the premium—wholly or in instalments—or of the pecuniary payment at the time which has been agreed upon."

Payment of the premium, whether in the form of money or of subscription to a mutual society insurance, is, of course, of great importance in insurance. The assured cannot release himself from the obligation to pay and the insurer cannot relieve him of this obligation. In either case, the contract of insurance would, nevertheless, continue to exist because the assured's obligation to pay the premium is correlative to his right to have security against the occurrence of risks. In this case payment of

the indemnity by the insurer would be a donation.

The method of payment of the premium is left to the parties, payment being made, as Article 986 allows, sometimes in a single sum and sometimes by instalments.

a) Time

Payment of the premium, or of the first instalment, usually falls due

(1) See p. 343.
(2) In mutual society for insurance.
(3) Art. 601 of the Civil Code of Iraq.
at the time of formation of the contract, but if the insurer agrees to allow the assured a certain period in which to pay, this agreement is valid and the premium becomes a "debt due". The insurance is not suspended until payment of the premium has been made. If it is agreed between the parties that in the event of non-payment, the contract will be either voided or suspended till payment, such an agreement is valid provided that a warrant (mise en demeure) is served on the assured before rescission of the contract; any agreement purporting to dispense with service of the warrant is void.

The O.L.I. makes an important provision with regard to payment of the premium. It states that in the case of fire insurance, where damage by fire occurs, receipt of the premium has the same effect as delivery of the policy, even though the policy has not been signed. After payment of the premium, the insurer is barred from repudiating his obligation.

**b) Place**

The place of payment is normally a question for the parties to agree between themselves, but failing such agreement, Article 396 of the C.C.I. provides that the normal residence of the debtor is to be the place of payment, as the assured is the debtor quoad payment of the premium, and so by the law of Iraq the insurer must seek him out and demand payment of the premium at his place of residence. In the case of payment by instalments it seems that the first instalment ought to be paid at the premises of the insurer at the time when the contract is constituted.

In Scots law and in English Common law, the debtor must seek out his creditor and tender payment at his residence or place of business.

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1. Article 394 of the Civil Code.
3. Art.21, see p.104.
5. Haldane v. Johnson (1853) 8 Ex. 689.
c) Repayment

In certain circumstances this is called "divisibility of the premium". It must be borne in mind that payment of the premium is a correlative obligation of the assured in consideration of the insurer undertaking liability for the occurrence of the risks. There is no relation between payment of the premium and the necessity of occurrence of the risk: Readiness of the insurer to remain liable for the occurrence of the risks, so that the assured will suffer no damage, is a synallagmatic obligation for the payment of the premium, and his liability runs from the date of the contract. Sometimes, however, after payment of the premium and after the contract begins to operate, the insurer, because of some supervening cause, does not run any risk. In such a case the question arises whether the premium should be repaid in whole or in part.

The C.C.I. provides that if the insurer does not run any risk, the contract shall be considered null and void, ineffective. Since this would mean that the insurer was enriched at the assured's expense because of impossibility of performance of the obligation, the parties are by provisions of the law of contract in the C.C.I. to be restored to the position in which they were before they made the contract, so that the premium must be repaid to the assured. The question of payment of damages to an injured party is decided according to the circumstances of each individual case.

The same rule appears in the O.M.C. with the difference that the insurer must be compensated by payment of either one-half percent of the sum insured or of half the premium if the latter is less than one percent of the sum insured.

(1) Art. 984 of the Civil Code, see p.102.
(2) Art. 12 of the Ottoman Law of Insurance, see p.76.
(3) Art.138.
Repayment of the premium before attachment of the risk is not the only case to consider. There is also the situation where, after attachment of the risk and after the insurer has become liable for any loss which may occur, the risk ceases as a result of some supervening cause. The question then arises whether the premium should be divided so that the assured may be repaid part of it in proportion to the period during which no risk attached to the subject of the contract. There are two conflicting opinions on this question. One view is that the premium is regarded as the absolute property of the insurer and is not repayable for any reason once the risk attaches. Emerigon states that the premium "...is due in entirety at the moment of the commencement of the risk, in the case even where it has not lasted but an instant. (sic)"

Article 196 of the O.M.C. (which is similar to Article 351 of the French Code of Commerce of 1808) is based on this opinion. It provides that as soon as the insurer has begun to run any risk, he acquires an absolute right to the premium.

According to the other view, the assured has the right to repayment of a part of the premium in proportion to the risk which has not attached. This seems the more logical opinion. The contract of insurance is a bilateral and continuous contract, the bilateral nature of the contract implying that the parties must perform their obligations. As a result of its continuous aspect, the length of the period of exposure to risk is taken into consideration when the premium is calculated. The cessation of the risk prevents the insurer from fulfilling his obligation and precludes the assured

(1) pp.52,654.
(2) See p.340.
(3) See Besson (Planiol et Ripert, vol.xi, p.665); Ripert, Droit Maritime, Vol.iii, p.450.
from obtaining any benefit from the premium paid. In other words, the insurer makes a profit at the expense of the assured without any legal consideration. When, however, the insurer is relieved of his obligations before the end of the contract, he is not entitled to receive anything which may be considered as a profit for which he has given no consideration. The Civil Code of Iraq incorporates the concept of division of the premium.

For example, Section 2 of Article 987 provides that the premium is to be repaid partially in proportion to the non-emergent risk if the insurer intends to terminate the contract and if the assured proves that he has acted in good faith. Although the first section of this article allows the insurer to retain the whole premium and to claim any unpaid premium, this does not mean that the concept of non-divisibility of the premium is accepted; it seems that the right of the insurer to retain the premium is intended as a sanction against dishonesty on the part of the assured. The same reason may explain the insurer's retention of the premium under Article 11 of the O.L.I. and Article 193 of the O.M.C.

It should be noted that parties may agree that the rule of the non-divisibility of the premium should not apply, but any stipulation made with the intention of reducing the right of the assured to claim divisibility of the premium is void.

When the parties to the contract agree on payment of the premium by several instalments, the insurer is entitled to claim the outstanding instalments if the risk occurs before they become due. The assured has no

(1) cp. Art. 233 of the Civil Code of Iraq.
(2) See p. 131.
(3) See p. 73.
(4) See p. 131.
(5) See p. 131.
(6) See p. 343.
right to claim that the premium should be divided and that outstanding instalments should remain unpaid.

In French law it is clear from Articles 17, 18, 22, 35, and 47 of the Law of Insurance of 1930 that the idea of divisibility of the premium is accepted, except in the case of marine insurance, where the classical theory of indivisibility of the premium prevails.

The view of the English Common Law, before the enactment of the Marine Insurance Act, 1906, was that the premium was indivisible. This is illustrated by a dictum of Lord Mansfield that if the "risk of the contract of indemnity has once commenced, there shall be no apportionment or return of the premium afterwards." It should be noted that, in this case, Lord Mansfield made a distinction between this situation and that when the risk has not yet attached.

Although the Marine Insurance Act, 1906, for the most part repeats the Common Law, it does provide for some other cases, apart from agreement by the parties, in which failure of consideration creates a situation where the assured may recover a proportion of the premium. These cases are:

(3) where the policy is void or voidable at the instance of the underwriter;
where the things insured have never been exposed to the risk; and where the assured has no insurable interest.

In the case of non-marine insurance, the same rules apply. As soon as the things insured are exposed to the risk the premium is irrecoverable. The assured is also entitled to a refund of the premium when the insurer runs no risk and in cases, such as when he cancels the contract or is mis-

(2) Tyrie v. Fletcher (1777) 2 C. 666.
(3) Section 84, see p. 341.
taken or fraudulent.

iii. Preservation of the Things Insured

It has been mentioned that one of the obligations created by the contract is an implied condition that neither party shall neglect the interest of the other. Each must perform his obligations in good faith, and both parties have a common interest in the preservation of the things insured. The performance of these obligations need not be stated expressly in the contract as there is an implied term requiring the assured to take all reasonable measures to preserve the rights of the insurer in accordance with rules of law, custom and equity, for otherwise he would be in breach of the terms of the contract.

The result of this rule is that the assured who seeks security against any risk must act as a "reasonable person" to preserve the things insured. His obligation extends to the minimisation of loss by salvage of the things insured in the event of their sustaining damage. He must spend a reasonable sum in his attempts to salvage. Article 16 of the O.L.I. provides that the assured may recover expenses incurred to save the things insured, the intention of this provision being to induce the assured to do his best to salvage the things insured. In the case of marine insurance the O.M.C. contains similar rules, and the assured is obliged to make every effort to recover wrecked property and release the things insured from arrest or capture by pirates.

iv. Intimation of Occurrence of Event Insured Against

On the occurrence of the risk insured against, the insurer must implement his obligation of indemnifying the assured, but no claim for indem-

(1) Preston and Colinvaux, op.cit., p.122.
(2) See p. 144.
(3) Articles 225,231,239, see pp.371,385,372.
nity may be made unless the insurer has been informed of the occurrence of the event insured against. The assured is, therefore, obliged; a) to inti-
timate to the insurer the occurrence of the risk, and, except in life assur-
ance, b) to prove that damage has occurred. This intimation allows the
insurer to examine the damage, ascertain whether it has been caused by the
risk insured against or not, assess its amount and secure his right of sub-
rogation to the assured in the thing insured.

a) When Intimation Should be Made

Apart from marine insurance, it is left to the parties to agree terms, but the Civil Code of Iraq, in order to protect the assured against possible
forfeiture of his right, provides that a condition in a contract of insur-
ance is null and void if it provides for forfeiture of the assured’s rights
because of his delay in notifying the authorities of the occurrence of the
risk insured against, or in providing documents. In the case of marine
insurance, the insurer must be informed within three days of receipt by
the assured of information of the occurrence of the risk. The O.M.C. com-
pels the assured to inform the insurer if there is either a total loss or
a partial loss amounting to three-quarters of the value of the things in-
sured, i.e. a constructive total loss. In the event, too, of the arrest
of a ship by a foreign authority, the assured is obliged to inform the in-
surer of the arrest within three days of receipt of information thereof.

Similar provisions apply if the ship is declared innavigable or unseaworthy,
and the cargo insured has to be either abandoned or transferred to another
ship.

(1) Section 2, Art.985, see p.163.
(2) Art.218, see p. 373.
(3) Art.214, see p. 363.
(4) Art.231, see p. 346.
(5) Art.234, see p. 346.
(6) Art.238, see p. 382.
(7) Arts.235,236, see p. 312.
2. The Insurer

A. Definition

(1) Section 2 of Article 983 of the C.C.I. refers to the assured as "the person who pays the insurer the bilateral obligations of the contract", i.e. the premium. The article does not define the term "insurer", but it may be inferred from the above provision and from section 1 of the same article that the insurer is the person who receives the premium and who is bound to pay the sum insured or the indemnity at the occurrence of the event insured against. Sometimes, particularly in marine insurance, the insurer is called the underwriter.

The main obligation of the insurer is to undertake the burden of the risk. In order to assume this obligation, the insurer must be in a good financial position. Insurance is not a gaming contract, and the assured who seeks security against supervening events causing him damage should not be in a position to become the victim of the insurer's insolvency. Accurate calculation of the likelihood of risks usually helps the insurer to minimise his liability and retain a reasonable profit. The task of the insurer is to assess the probability of the risks, and if it is high and the value of the things insured is great, he will require to distribute his liabilities among many. This is known as re-insurance.

B. Legal Capacity

The C.C.I. generally speaking allows any person of legal capacity (which means the attainment of eighteen years of age and sanity in the case of natural persons, and recognition by the law in the case of a legal persona) to enter into a contract of insurance. But from the commercial point of view, if not from the legal, it is unlikely that a single natural person

(1) See p. 127.
(2) See p. 5.
could assume all the consequent obligations; and because of this unlikelyhood and in order to distribute liability collectively among many individuals, insurance companies were established. For this purpose, the Iraqi law of Insurance Companies of 1960 required that the business of insurance be undertaken only by companies, groups of underwriters like Lloyd's, or agents of foreign companies. This law remained as stated until 14th July, 1964 when the government of Iraq issued a decree nationalising all insurance in Iraq. This drastic step was intended to minimise the scope of private enterprise and to increase state participation in the economy of the country. The transfer of the properties of the insurance companies to the public sector did not effect the continuance of these companies in their business, but no new companies will be licensed, and no new insurance company can be established in Iraq.

C. Obligations of the Insurer

i. Indemnity

Article 968 of the C.C.I. provides: "On the occurrence of the risk or at the due time of the contract, the payment of indemnity or of the sum insured becomes obligatory." This Article distinguishes between the occurrence of the risk on which the insurer must pay the indemnity, and the time stipulated in the contract on which payment of the sum insured becomes due. This distinction is made for the purpose of including life assurance when the sum insured becomes payable at the due time of the contract or on the death of the person whose life is insured. The requirement that, on the occurrence of the risk insured against, the insurer must perform his obligation to indemnify the assured, does not mean that if the risk insured

(1) See p67.
(2) See p80.
against does not occur, the insurer is under obligation to return the premium. The contract comes into effect at the time of attachment of the risk.

Payment of the indemnity or the sum insured must, in all contracts of insurance, be made to either the assured or the beneficiary. Usually payment is in cash, but sometimes the insurer may replace the things insured.

a) Limitation of Indemnity

Article 989 of the C.C.I. provides:

"The insurer shall only be bound to indemnify the assured to the extent of actual loss arising as a result of occurrence of the risk insured against and to the extent of the amount of the sum insured."

The obligation of the insurer to indemnify the assured is, thus, limited by: a) the sum insured; b) the actual loss; and the risks insured against. He must indemnify the assured to the extent of either the actual loss or the sum insured, whichever is the smaller. In life assurance, the sum insured is payable without proof of damage. The insurer is also liable only for loss or damage arising from the risks insured against. Hence, no indemnity is payable unless it is proved that the damage which has occurred resulted from the risks insured against.

An intentional act by the assured does not involve the insurer in any liability, e.g. if the assured sets fire to the things insured, scuttles the ship insured, causes the death of the person whose life is insured, or commits suicide. Unless otherwise agreed, the insurer must indemnify the assured against any damage resulting from force majeure or fortuitous event (Act of God), or from the act of some other person. The fault or negligent act of the assured, whether serious or not, is covered in the policy unless

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(1) See p. 87.
(2) Art. 15 of the Ottoman Law of Insurance, see p. 115.
(3) Art. 1000 of the Civil Code of Iraq, see p. 271.
(5) Art. 994 of the C.C.I., see p. 212.
(6) Art. 993, ibid., see p. 204.
(7) Such an agreement is not applicable in the case of fire insurance, Art. 1001, ibid., see p. 881.
the act is tantamount to a crime.

ii. Expenses

Article 16 of the O.L.I. provides: "In the event of the things insured sustaining damage, all expenses incurred by the assured in order to save all or part of the things insured shall be borne by the insurer."

To encourage the assured to minimise the loss, the Iraqi statutes oblige the insurer to pay the expenses of salvage. As to the extent to which these will be paid, in the case of marine insurance the O.M.C. provides expressly that the insurer must pay the expenses of recovery up to the extent to which the goods are recovered, and the expense of repairing the ship and the cost of reshipment of the goods in the event of the ship insured becoming unseaworthy must be paid by the underwriter. The above article, which covers property insurance, does not give such a limitation, and the term "all expenses incurred by the assured" may include any amount which is greater than the value of the things salvaged. The policy of fire insurance in Iraq, similar to the British policy of insurance, gives the insurer an option either to pay or to reinstate the property insured. If the insurer elects to restore the thing insured, he will be bound to pay all the cost of restoration. "Where the property is capable of repair or reinstatement, the damaged value may be estimated by deducting the cost of repair from the repaired value, and the damage payable is then arrived at by taking the difference between the undamaged value and the damaged value."

The article mentioned above does not cover life assurance although a

(1) See p.163.
(2) See p. 139.
(3) Art.225 of the Ottoman Maritime Code, see p. 371.
(4) Art.237, ibid., see p.366.
similar question may arise there, i.e. as to whether the insurer should pay for something which helps to save the life insured. It seems that in the absence of agreement between the parties to the contract, the insurer is not obliged to pay for any such thing since the interest of the assured in remaining alive or, in other words, his interest in life, is greater than the interest of the insurer in the sum insured. Moreover, since life assurance is not a contract of indemnity, the value of the life of the person insured cannot be limited to an amount of money other than the sum insured in each individual case.

3. The Beneficiary

A. Definition

Section 2 of Article 983 of the C.C.I. provides: "The beneficiary is the person who is paid the sum insured by the insurer. If the assured has the right to the sum insured, he is the beneficiary."

The assured often insures his own interest and is himself the person entitled to receive either the indemnity or the sum insured. Often, however, the assured, even though his interest is the subject of the insurance, may nominate another person to receive the indemnity or the sum insured. In this case, the insurer does not act as an agent of the assured nor does the assured act as a donor. The assured acts primarily for himself and for his own interest but stipulates that another person is entitled to get the sum insured or the indemnity. The nomination is made either by express stipulation of the assured, especially in the case of life assurance or is provided for by statute, as in the case of insurance against liability. The nomination may be in favour either of a definite named individual or of an individual to be ascertained at some future time as, for example, in life assurance or third party liability insurance for the ben-

(1) Art. 997 of the Civil Code, see p.209.
efit of an injured person, who may claim compensation. The beneficiary is, thus, a person whose interest in the contract is limited to receipt of the sum insured or the indemnity.

If the beneficiary is not a party to the contract, it may be asked exactly how and when can the insurance contract concern the beneficiary. In this respect the contract of insurance follows another kind of contract, known as a "contract stipulated for the benefit of a third party." Articles 152-154 of the Civil Code of Iraq deal with this type of contract. This type of contract is, however, different from an insurance contract even though they both have similar consequences. The contract of insurance cannot be considered completely performed until the event insured against occurs, and the beneficiary's right to claim the benefit of the insurance is dependent on the happening of the event insured against, which is not in existence at that time and may never exist, whereas in the other type of contract, the right of the third party emerges at the time when the contract is made.

Another distinction requiring explanation is that between the two senses in which the term beneficiary is used. It means, on the one hand, in its ordinary concept, the person who does not have the insurable interest and to whom the proceeds shall be paid, and on the other hand the person who does not himself enter into the contract of insurance but actually has the insurable interest and receives payment of the proceeds. The latter concept has two aspects. The first is known as assurance pour compte de qui il appartiendra, while the second is called assurance pour compte d'autre. These insurance transactions are not the same. The contract of "insurance

(1) Articles 1004-1006, ibid. Insurance against liability, see p.230.
(2) Planiol and Ripert, Treatise on French Civil Law, vol.1, part 2, p.690.
for account of the person whom it may concern" occurs when the assured becomes liable for the safe keeping of property belonging to some other person. The assured may stipulate in the policy that every person who has an interest in the property entrusted to him may claim indemnity in case of loss. So the person who has the actual insurable interest gets the benefit of the contract. The assured's interest in affecting such a contract is to protect himself against any claim of damage. This kind of insurance concerns mainly insurance against third party liability or damage occurring to the property, and it may be effected by persons such as carriers and depositaries. There is no need for the beneficiary to ratify the contract. "Insurance for account of another", on the other hand, is similar to the transaction known as gestion d'affaires. It may occur, theoretically, if the assured acts without legal obligation to do so and without any necessity to protect himself against any claim of damage, e.g. a person who insures property which belongs to his wife or his friend or which he has sold but insures for the benefit of the purchaser. It must be pointed out that to call the person who effects the contract the assured is a misnomer, as the person who has the insurable interest is in fact the assured; and so in law also if the contract of insurance is ratified by him. It is important for the assured to declare that the contract is entered into for the benefit of the third party as otherwise Article 4 of the O.L.I. will apply. This provides: "If it has been stated in the contract that the insurance has been entered into for the benefit of a third person, the contract is presumed to relate to the person whose name is signed thereon."

All these kinds of insurance must be distinguished from what is called the floating policy of insurance. This is the case where the name of the beneficiary (the owner of the things insured) is left to be determined by a sub-contract. In this case, the insurer's obligations are towards not
only the assured as the present owner of the interest in the things insured but towards also any future owner.

B. Nomination

i. Right

The right to stipulate the name of the beneficiary in every contract of insurance belongs to the assured. When the assured has failed to nominate a beneficiary and has become unable to do so, by reason either of death or of loss of legal capacity, the benefit of the insurance remains in the assured. No one else has the right to nominate a beneficiary, not even the heirs, the guardian, or creditors of the assured.

Sometimes, however, the assured delegates his right of nomination to some other person. This is especially common in the case of a contract of insurance on the life of the other person. The assured must by law in such a case obtain the consent of this other person, and the latter may withhold his consent unless he is given the right to choose the beneficiary. This is the usual situation where an employer insures the life of his employees, or insurance between partners in a partnership.

ii. Revocation of Nomination of the Beneficiary

There are three possible situations in relation to the nomination of a beneficiary. Firstly, the beneficiary may either be specifically nominated in the contract at the date of its constitution or be ascertained in a sub-contract in a later date. Secondly, the beneficiary may be a living person who is unidentified at the time of formation of the contract. Thirdly, the beneficiary may not exist at the date of constitution of the contract, but will exist at some future time.

There must now be considered the question whether the assured has a

(1) Art. 992 of the C.C.I., see p.199.
right to revoke the nomination of the beneficiary; in other words, is the declaration of acceptance of the benefit by the beneficiary binding upon the assured? One or another of two possible situations may arise, according as the revocation is made before or after the declaration of the beneficiary's consent. It is assumed that the event insured against has not occurred, for if it has, the contract is complete, and the beneficiary can enforce his droit acquis directly.

In the case of revocation before the beneficiary’s declaration of consent, there is no difficulty. Legal writers are unanimous in affirming that the beneficiary has no vested right in the contract; and consequently, an assured who has made a nomination has in this situation the right to change it. This view is supported by the rules governing the analogous stipulatio alteri.

Difficulties arise, however, where the revocation is made after the beneficiary’s declaration of his willingness to accept the benefit of the insurance. The classical opinion in this matter is that the beneficiary acquires an irrevocable right to the benefit of the insurance as soon as his consent is declared; his right is created by the contract, and his consent is a mere confirmation of this right. This opinion is based on an equation of the contract of insurance with the stipulatio alteri.

The French Law of Insurance of 1930 in Section I, Article 64, provides: "The stipulation by virtue of which the benefit of a contract of insurance is granted to a named beneficiary, is made irrevocable by acceptance by the beneficiary." The Lebanese Code of Obligations and Contracts repeats

(2) Art.153 of the C.C.I.
(3) Planiol and Ripert, op.cit., vol.ii, part 1, p.710.
(4) Art.1003.
the French article.

This opinion, however, is, in respect that it fails to take account of the two types of contract, not satisfactory, and the French legislature seems to adopt a theory which is inadequate to explain the nature of the stipulatio alteri. This theory is the "theory of offer" and is to the effect that the stipulation made by the stipulator is a mere "offer" and, as soon as a third party to whom the stipulation is made declares his acceptance, the contract is binding on all parties. The French legislature has overlooked the fact that in the French Civil Code the word "acceptance" is not used, Article 1121 providing: "A person who has made such a stipulation cannot revoke it if the third party has declared that he desires to benefit from it."

The above summary of the French law is given because almost all the Arab legal writers accept the views expressed by the French Law of Insurance although it is not accurately drafted. On the other hand, the silence of the Civil Codes of Egypt, Syria and Iraq on this question suggest that there is room for a difference of views to be taken of opinion.

It has been pointed out above that the contract of insurance is not considered completely performed, and the assured does not acquire his rights (i.e. payment of the sum insured or of the indemnity) until the event insured against occurs. This means not that there is no contract until after the occurrence of the event, but merely that the performance of the oblig-

(1) Planiol and Ripert, ibid., p.696.
(3) To compare the French text of the above articles -
(a) Article 64 of the Law of Insurance: "La stipulation en vertu de laquelle le bénéfice de l'assurance est attribué à un bénéficiaire détermine devient irrevocable par l'acceptation expresse ou tacite bénéficiaire," (It is noticeable that the article continues with a great deal of repetition of the word "acceptance").
(b) Last sentence of Article 1121: "...celui qui a fait cette stipulation, ne peut plus la revoquer, si le tiers a déclaré vouloir en pro-

(4) Abdul-Razzaz al-Sanhuri, cit., v.vii,p.2,p.449; Mohammad Ali Arafa, Com-
mentary on the New Civil Code, p.251.
ation of one party (the insurer) is suspended until after the occurrence of that event. In other words, the benefit of the insurance depends upon a future uncertain event. Thus, the contract of insurance may be validly created but may not be completely performed.

In the case of the stipulatio alteri, on the contrary, the third party acquires the right created by virtue of the stipulation in his favour by the declaration signifying his consent. Following this, Article 153 of the C.C.I. provides:

"The party who makes the stipulation, but not his creditors or heirs, may revoke the agreement before the third party has signified his wish to take the benefit thereof, unless such revocation is contrary to the provisions of the contract."

This is the main difference between the contract of insurance and the stipulatio alteri, to which the general rules of contract do not apply.

Since the Iraqi legislature did not consider it right to accept an analogy with exceptional rules, Article 153 (above) does not apply to contracts of insurance.

The result of this is that in a contract of insurance the declaration of the beneficiary's consent before the occurrence of the event insured against does not create a droit acquis. In other words, it has no significant effect on the performance of the contract. Thus, the assured's right to revoke his nomination of the beneficiary continues until the event insured against occurs.

It is worth mentioning that the C.C.I. provides in Article 594:

"In the event of attempted homicide, the assured shall have the right to substitute another person for the beneficiary, even if the beneficiary has already accepted the insurance benefit stipulated in his favour."

(1) Art.288 of the C.C.I.
(3) Art.3 of the Code of Iraq.
This section follows the French Law of Insurance (Article 64) which provides that acceptance by the beneficiary bars the assured from revoking his nomination. It should be noted that the legislature fails to take account of the fact that the word "acceptance" is not used in Article 153 relating to a stipulatio alteri. Some Arab legal writers have found in this article evidence against the view that the assured can revoke his nomination even though the beneficiary has declared his consent. In fact this is a very special case, an express provision in which the assured is allowed to revoke the beneficiary nomination is not an exception from the general rule, but it is obedient to it. This new suggestion is strongly supported by the terms of the standard form of life assurance policy in Iraq.

This provides:

"When the right of revocation has been reserved, or in case of death of any beneficiary under either a revocable or irrevocable designation, the Policyholder, prior to maturity of this Policy by death or as an endowment, and subject to the rights of the assignee, if any, may from time to time while this Policy is in force, designate a new beneficiary with or without reserving the right of revocation..." (2)

From a practical point of view the only possible case of irrevocable nomination is when the assured renounces his right to revoke. It seems that the incorporation in the policy of a stipulation by which the assured expressly reserves his right to revoke the beneficiary's nomination is not consistent with the nature of the contract of insurance. The assured's right to revoke the nomination of the beneficiary is contractual and it is not necessary to declare acceptance of such a right. It is, however, important to make it clear if the assured surrenders this right. It is also necessary to provide specifically that the beneficiary's approval is required for a change of nomination if this is what has been agreed. In

(1) Abdul al-Razzaq al-Sanhuri, op.cit., p.1455.
(2) Section 9 of the policy of life assurance issued by "The Iraq Insurance Co."
both cases the assured’s rights are diminished. But there are some cases in which the assured cannot revoke the nomination, e.g. when the assured receives from the beneficiary some personal benefit (material or moral), as this benefit may be regarded as a counterpart of the premium paid by the assured, or when a policy of life assurance is effected upon the life of a third person who agrees to the insurance but stipulates that a certain person must be nominated as beneficiary; so the assured may not revoke the nomination unless the person whose life is insured approves the change because this person is a party to the contract.

An irrevocable nomination of a beneficiary creates some problems. As has been said, when the assured surrenders his right of revocation, a contractual relationship is created between the assured and the beneficiary; the beneficiary obtains a sort of insurable interest in the contract of insurance, and difficulties arise in the event of his losing this interest. This occurs for example when the beneficiary is a creditor, a partner or spouse of the assured, and their relationship is ended as a result of payment, dissolution of partnership or divorce. In all these cases, the consideration or cause of the contract flies off; the right of the beneficiary ceases to have any foundation, and the assured may seek annulment of the stipulation by which he surrendered his right of revocation. This may be done either by consent of the beneficiary or by a judicial decree. This right is personal to the assured and cannot be exercised by some other person, such as a contingent beneficiary, heir, or creditor. If, however, the assured has started his action to annul the nomination, these persons are entitled to continue it.

Parties to a contract of insurance may agree before the occurrence of

(1) Art. 992 of the Civil Code of Iraq, see p. 199.
the event insured against to cancel their agreement altogether and withdraw from their obligations. In the case of life assurance, the beneficiary has no rights under the policy of insurance as long as the assured remains alive and the contract may be set aside by the unilateral act of the assured. Hence, the beneficiary's declaration of consent has no effect. The assured who has the right to cancel the whole contract must also be entitled to modify its terms. The right of revocation of a nomination is, it should be noted, personal to the assured and is not readily transferable to his heirs or creditors.

C. Declination

When the beneficiary refuses to accept the benefit stipulated in the contract of insurance, the contract nevertheless remains valid between the contracting parties, the assured and the insurer; and the benefit of the insurance goes to either the next beneficiary or, if there is no other, returns to the assured.

Since the assured is the only person who has an interest in the contract of insurance and the contract is made primarily for his benefit, a refusal by a beneficiary, in order to be effective, must be made after the occurrence of the event insured against, i.e. the time at which the benefit vests in the beneficiary. It follows from this that a refusal by a beneficiary made before the occurrence of the event insured against may be rescinded by him up to the time when his nomination is revoked by the assured.

D. The Right and Obligation of the Beneficiary

The beneficiary is not a party to the contract of insurance, and his only concern is that, if the event insured against occurs, he is entitled to the benefit of the contract.

(1) Art. 996 of the C.C.I., see p. 197.
(2) See p. 193 et seq.
The beneficiary has certain rights: a) He has a right of direct action against the insurer; b) The assured is forbidden to include the policy as part of his own estate; c) As soon as the event insured against occurs, the assured is precluded from substituting a new beneficiary for the one previously nominated. The status of beneficiary involves certain other legal consequences: a) He must declare his willingness to accept the benefit arising from the contract of insurance, and this declaration must be made after the occurrence of the event insured against; b) He must prove his interest in the contract, whether it be as a nominee under a personal insurance (i.e. life or personal accident) or as the third party in case of insurance against third party liability; c) The beneficiary's right is personal to him and does not transmit to his heirs before the occurrence of the event insured against.

E. Comparative Problems

In Scots and English Laws the term "beneficiary" is seldom used; both systems employ the term "third party". The policy, mainly in life assurance, usually now provides that the proceeds are payable to a third party. But the right of the third party to enforce the contract is different between Scotland and England.

In Scots Law the beneficiary is entitled to the proceeds of the policy in case of the policy of insurance being delivered or intimated to him. The beneficiary rights are enforceable also in special cases where the policy is made in accordance with the Married Woman's Policies of Assurance (Scotland) Act, 1880, and where the policy creates a trust for the benefit of a third party.

In English Common Law, third party has no right in the proceeds of the

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(1) Articles 995 and 1005 of the C.C.I., see p. 211 and 245.
(2) Art.995, ibid.
policy unless there is a statutory protection. This is in accordance with the doctrine of "privity of contract". The third party is entitled to receive the proceeds of the policy when there is a trust constituted for his benefit or when the policy is made in accordance to the Married Woman Property Act, 1882. Thus, the creditors or the assured representatives may direct the insurer to stop payment of the proceeds to the third party.

As it was mentioned above, the life assurance is the main subject in which the beneficiary's rights may arise; the subject is discussed in detail in life assurance. The above brief comparison is made to give a general idea on the subject.

(1) See p. 221.
CHAPTER V

CONSTITUTION OF THE CONTRACT

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1. Form (offer, acceptance and consent)

The contract of insurance is a consensual contract. The parties to the contract must have the legal capacity to declare their intention. There must be mutual agreement between the insurer and the assured, whether they enter into the contract in person or through their legal representatives. Each party must intend to enter into a contract of "insurance".

The first step in the formation of the contract is a declaration by one party called an "offer". "Acceptance" by the other party of this offer creates a valid legal agreement.

The offer is a declaration by the one party in which his readiness to enter into a contract is expressed. No particular formalities or terms are required. All that is necessary is that it must be clear and must indicate an intention to enter into a contract of insurance.

The acceptance must correspond exactly to the offer, and it must be free from ambiguity. A failure by the offeree to give a specific acceptance cannot give rise to a binding contract unless there have been previous dealings between the parties, in which case the failure specifically to accept the proposed offer may indicate tacit acceptance by the offeree.

In such a case when one party notifies the other that he wishes to continue the contract for a further period, this notification is considered to be implicitly accepted by the other party unless there is a clear refusal.

Neither the offer nor the acceptance must be for future dates as this would amount only to a "mere promise" and would have no legal effect unless

(1) Art.65 of the C.C.I.
(2) Art.61, ibid.
(4) Art.78 of the C.C.I.
there was a declaration of willingness to accept its validity. Such a promise may be withdrawn at any time.

Sometimes the offer may be made to the public at large by means, for example, of an advertisement in a newspaper. Such an offer is valid and binds the offerer unless its terms are such that it can be understood as a mere "invitation to negotiate".

If the offerer provides that his offer is to be open for acceptance within a certain time, he cannot revoke it before this period of time has elapsed. Death or incapacity of the offerer does not affect the validity of such an offer, which thus remains valid until the fixed period of time expires or until the offer is rejected by the other party.

Similar provisions concerning the irrevocability of an offer apply in the case where the offer is made by telegram or letter.

2. Time of Constitution

The contract of insurance, or any other contract, may be made either inter praesentes or inter absentes.

A contract concluded in the presence of both parties raises no difficulties. The agreement is legally binding as from the time at which the parties declare their mutual consent (consensus ad idem) to the terms of the contract.

We must now consider the contract made when the parties are not in the same place at the time of its constitution, e.g. a contract entered into by letter or by telephone. In the case of a contract entered into by

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(1) Art.80, ibid.; Art.124 of the C.C.I.
(2) Art.89, ibid.
(3) Art.130 of the Commercial Code of Iraq.
(4) Art.125, ibid.
letter, the Commercial Code of Iraq, following the Civil Code, provides that the contract is considered constituted as at the moment when the acceptance reaches the offerer. The acceptance, however, has a retrospective effect and the Commercial Code provides that the contract takes effect from the date of dispatch of the letter.

Both the Commercial Code and the Civil Code treat a contract entered into by telephone as a contract inter praesentia so far as the time of constitution is concerned, but with regard to the place, the Civil Code provides that the contract is treated as a contract inter absentia, which means that it is considered to be concluded at the place where the offerer is. The Commercial Code does not deal with this matter.


The unique nature of the contract of insurance necessitates a certain procedure for its constitution. The rules of this procedure are not mere formalities but have been developed in order to reduce the difficulties of the everyday business of insurance. Since these procedures are not strictly speaking matters of law, the statutory provisions relating to insurance do not deal with them. The rules are as follows:

A. Proposal

This is a business name for the term "offer". In it the assured declares his intention to enter into a contract of insurance by specifying the things to be insured, the insurable interest and the risks insured against. The proposal has no legal effect unless the contract of insurance is legally constituted.

(1) Art. 129.
(2) Art. 87.
(3) Art. 130.
(4) Art. 129.
(5) Art. 88.
(6) Art. 88.
B. **Cover-Note**

This is a temporary or provisional contract issued by the insurer pending his acceptance of the assured's proposal. In practice, it contains a clause to the effect that it is to remain in force for a fixed period of time or until completion of the policy. The insurer after making inquiries may withdraw the cover-note unless the premium has been paid, in which case the cover-note becomes equivalent to a deposit receipt. If payment of the premium precedes the event insured against in a fire insurance contract, the cover-note has the same force and validity as a completed contract.

C. **Slip**

This is an acceptance of the proposal by which the insurer binds himself to issue a policy. Unlike a cover-note, a slip cannot be withdrawn by the insurer; although it is not effective as a policy, it may be considered by the court as a "preliminary negotiation", which, if supported by other evidence, is a basis for a binding contract. The issue of the policy in accordance with the slip after the occurrence of the risk does not reduce the insurer's right against the assured.

4. **Written and Un-Written Agreements**

Insofar as it is a consensual contract, the contract of insurance does not require to be in writing. The parties may reach agreement orally.

There is no special form of terms, either verbal or written, necessary to create the contractual obligations.

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(1) Preston and Colinvaux, op.cit., p.16.  
(2) Art.21 of the Ottoman Law of Insurance, see p14.  
(3) Art.480 of the Civil Code of Iraq.  
(4) Preston and Colinvaux, op.cit., p.17.
However, insurance is in many respects a serious and complex contract, not only on account of its rôle as providing security against a contingent event or risk, but also on account of the value of money involved and of the period which must elapse between the commencement of the obligations of the parties and the time of performance of these obligations. All these factors caused the legislature to enact that contracts of insurance should be reduced to writing. Article 176 of the O.M.C. and Article 2 of the O.L. I. contain provisions to this effect; they provide that the policy must be in writing. The O.M.C. also provides that the policy may be authenticated by a notary although the latter is not necessary. The contracts authenticated by a notary have an unquestionable force, and any amendment on a written contract must be made in the same way as the original contract.

Although the requirement of writing is only an evidential and not a substantive rule, the parties may agree from the beginning that the contract of insurance will have no effect unless it is reduced to writing. The written agreement not only proves the existence of the contract, but also determines its effect. It seems that either party may revoke his offer or acceptance before signing the written agreement, provided that the other party suffers no prejudice as a result of the revocation. Parties may also agree that the contract is valid even if there is no written document containing it. In such a case the agreement is valid as from the moment when the offer is accepted. Despite agreement that the contract of insurance

(1) S.1 of Art.488 of the Civil Code provides: "If the contractual obligation in non-commercial matters exceeds the amount of ten(Iraqi) Dinars, or is of unlimited value, the existence or non-existence of the agreement may not be proved by parole evidence unless there is an agreement or condition to this effect."

(2) Art.449, ibid.

(3) Art.451, ibid.

must be in writing, a verbal agreement may be proved by parole evidence if it is accompanied by the type of written evidence known as "the beginning (1) of written proof" (le commencement de preuve par écrit). This is defined by the C.C.I. as: "Any written instrument emanating from the person against whom the action is brought, tending to show the probability of what is alleged."

5. Contents of the Contract

A. Conditions

The contract of insurance is a conditional contract since the performance of the insurer's obligations depends on the occurrence of the event insured against, and the things insured must be exposed to the risks insured against. However, when one refers to the conditions of a contract, this means provisions stipulated by the parties and contained in the terms of the contract. The parties are free to incorporate any terms and conditions in their contract, provided these are not illegal. However, because of the unique nature of the contract of insurance, the legislature took steps to protect the assured, who is the weaker party, from any unfair bargaining. Article 985 of the C.C.I. provides:

"The following conditions in a policy of insurance are void:

1. a condition providing for forfeiture of the right to the benefit of the insurance on account of a breach of any law or regulation unless such breach constitutes a crime or a deliberate misdemeanour;

2. a condition providing for forfeiture of the right of the assured on account of his delay in notifying the authorities of the occurrence of the risk insured against or in producing documents, if it appears from the circumstances that there was a reasonable excuse for the delay;"

(1) S.1, Art.490 of the Civil Code.
(2) S.2, Art.490, ibid.
3. any printed condition relating to a situation involving nullity or forfeiture which is not expressed in a clear manner;

4. an arbitration clause included in the general printed conditions of the policy and not as a special agreement distinct from the general conditions;

5. any other clause of an arbitrary nature, the breach whereof appears to have no bearing on the occurrence of the event insured against."

The general term "clause of an arbitrary nature" in section 5 requires some explanation. For example, the insurer cannot stipulate in the policy a condition depriving the assured of his legal rights. However, it is important to distinguish between a condition by which the insurer excludes certain kinds of risks and a condition as a result of which the assured may lose his rights under the contract. For example, the insurer cannot insert a condition forbidding the assured to marry, but he can exclude certain kinds of risks such as those incurred in flying.

(1) In a recent case in Iraq, the Court of Cassation held that an insurer may not provide that he is exempted from liability when an insured motor-car is used by a person other than the assured or a person nominated in the policy. This kind of condition is incorporated in almost all policies dealing with motor-car insurance, but the Court held that such a stipulation might prevent the assured from changing his chauffeur. However, the insurance companies, before nationalisation, were reluctant to remove the stipulation from the policy. Their contention that this stipulation is not intended to prevent the assured from exercising his rights, but merely to exempt the insurer from liability arising from the assured's use of such rights. This difficulty was resolved by the enactment of the Law of

Compulsory Insurance in 1965. Article 6 provides that insurance covers any risks arising from the use of the motor-car by a third party who has the assured's permission.

Conditions incorporated in the policy must not be contrary to the provisions of the law governing insurance. This is made clear by Article 991 of the C.C.I., which provides: "Any agreement contrary to the provisions of this Chapter shall be void unless such agreement is in favour of the assured or of the beneficiary."

If either party breaks any condition of the contract, the aggrieved party has the right to be relieved from performance of his obligations.

B. The Policy of Insurance

The insurance policy is a written document in which the parties to the contract of insurance incorporate their agreement. The policy is not meant to be the contract itself, but merely a document in which the contract is embodied.

1. Contents of the Policy

The Iraqi insurance statutes provide that every policy of insurance must contain certain information which must be given by the parties. Blank spaces in the policy are forbidden by the statutes. The O.M.C. provides in Article 176:

"The contract or the policy of insurance is constituted either by an instrument drawn up by a notary or by ordinary signed agreement. It must be drawn up without blank spaces and contain:

1. The year, the month, the day and the time of its subscription.

2. The name, profession and residence of the assured and whether he is the owner or merely a legal agent of the owner.

3. The nature and the value, or the estimated value, of the goods or the things insured and the sum for which they are insured.

(1) See p. 258.

(2) The chapter of the Civil Code which deals with insurance contracts; Chapter-iii, Section 4, Book II, Part One.
4. The risk which the underwriter undertakes.
5. The time of commencement and of expiry of the period during which the insurer undertakes the risk.
6. The amount of the premium.
7. The name of the master, the ship and the ship's description.
8. The place where the goods have been or are to be shipped.
9. The port from which the ship sailed or is to sail.
10. The ports at which the ship is to load and discharge and those at which the ship will call.
11. The reference of parties to arbitration in the event of dispute where such reference has been made.
12. And generally all other conditions upon which the parties have agreed."

The O.L.I. enumerates the contents of other policies of insurance except those of life assurance. They are almost the same as those quoted above; thus, Article 2 provides:

"A contract of insurance must in every case be in writing. Such contract must contain the following particulars:

1. The name, description, profession and place of residence of the assured; and the name, description and place of residence of the insurer.
2. The nature and type of movable or immovable property insured, and the nature and type of damage and risk insured against.
3. The amount of premium to be paid and the amount of the sum insured.
4. The time of commencement and of expiry of the term of the insurance.
5. The date on which the contract was drawn up."

The above article can be applied to life assurance policies with certain modifications even though no express provision is made for these. Section 2, which specifies the things insured requires to be amended.

Although all the above particulars must appear in every policy of insurance, the parties may agree to suspend inclusion of them until a later date. In such a case the policy is known as a "floating policy".
A written policy of insurance may not be amended except by a written document of equal authenticity. For example, if a policy is executed by a notary, any amendment of it should be executed in the same way. No document can be used to explain or modify the policy's terms unless it is of equal validity with the policy. If there is any contradiction between the printed standard form and the hand-written terms, the latter must prevail, the parties being presumed to have intended to amend the printed terms.

The policy may cover part of the thing which is exposed to the risk insured against. Article 8 of the O.L.I. provides:

"The insurance may be made in respect to the whole amount of the movable or immovable property or different portions thereof or by persons jointly interested therein or in respect to a definite portion thereof for a sum of money agreed upon—either in respect to the whole or each portion of such property."

(1) Ripert, Droit Maritime, vol.iii, p.443.
CHAPTER VI
EFFECT OF THE CONTRACT

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A validly constituted contract of insurance will operate to create reciprocal obligations between the parties to it, and they are bound to fulfill these obligations. Although the general rule is that the contract does not bind any one except the parties, other persons may become bound at a later date. These are the avants cause à titre universal and are, generally speaking, the heirs or creditors without a specific security. They may become bound to the contract except in certain circumstances, e.g. when it is agreed by the parties that no rights shall be transmitted, or when the agreement of the parties is based on the personality of either party (delectus personae), or if by a rule of law the contract is considered terminated by death of either party.

1. Performance of the Contract

The parties must perform their obligations according to the terms of the contract. The failure of one party to perform his obligations gives the other party a legal right not to fulfill his obligations. No party has the right to modify the contract either expressly or implicitly by unilateral action. A contract of insurance cannot be cancelled or modified unless the parties express their mutual consent. However, Article 13 of the C.L.I. provides:

"If any circumstances arise such as to increase or change the risk attached to the immovable or movable property insured and are communicated by the assured to the insurer, the contract of insurance continues in force unless it is cancelled in writing."

At first sight, the above article seems inconsistent with Article 146 of the C.C.I., which provides that a party who is prejudiced as a result of the occurrence of an exceptional and unpredictable event may seek a

(2) Art. 142 of the Civil Code.
(3) S.1, Art. 146, ibid., see p. 122.
reduction of his obligation so that a balance is maintained between the obligations of the parties. In fact, there is no inconsistency as Article 146 does not relieve the party who has suffered prejudice of his obligations but only provides him with a remedy. A party who is likely to be prejudiced as the result of the occurrence of unusual circumstances is not relieved of any obligation unless both parties agree to terminate the contract.

2. Avoidance of the Contract

In the case of a contract of insurance, as in that of any other contract, either party may seek to nullify it on the ground that it contains a defect. Such a nullification operates by virtue of law. There are two grounds of nullity, either a defect in the formation of the contract, or a defect in the elements of the contract.

The Civil Code of Iraq provides that nullification makes the contract non-existent and of no effect whatsoever. The parties must be restored to the position in which they were when the contract was formed. If it is impossible to do so as, for example, where this would cause prejudice to one party, the party responsible for the nullity must compensate the other party. If, however, the contract is nullified as the result of a defect in the formation of the contract such as a party having no legal capacity to constitute it or being induced to enter into it by mistake, deceit, or coercion accompanied by duress or voidance, the party who is not at fault may ratify the contract when he learns of such a defect and the defect may, thus, be cured. In this type of situation, the contract is said to become "suspended" until ratification by the party who has the

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(1) See p. 68.
(2) Art. 138 of the C.C.I.
right to reside.

The application of the general rules of nullifying the contract of insurance involve some complications that the "utmost good faith" rule binds the parties, particularly the assured, to act honestly. In marine insurance, the O.M.C. contains many provisions by which the underwriter has the right to set aside the contract and retain the premium. The underwriter is bound to prove that there is a concealment and false declaration on the part of the assured or a dole or fraud is committed in the valuation of the things insured. Nevertheless, the underwriter may still ratify the contract, but by claiming nullity the retention of the premium is a legal compensation presumed by law.

In the case of non-marine insurance, the rule is different. Article (3) 11 of the O.L.I. provides that if there is fraud in the valuation of the things insured, the validity of the contract may not be affected although the insurer is bound to pay only the actual loss. The premium is not affected; this article does not, however, prevent the insurer from exercising his rights under Article 987 of the C.C.I. by nullifying the contract and at the same time retaining the premium.

If the nullity of the insurance arises from a defect in the elements of the contract, the situation is different. The contract is treated as non-existent and cannot be ratified.

If any of the elements of an insurance contract - the premium, the sum insured, the risk or the insurable interest - is forbidden by law, the contract is null and void. The parties must be restored to the position

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(1) Art.193 of the Ottoman Maritime Code, see p.343.
(2) Art.202, ibid., see p.357.
(3) See p.131.
(4) See p.131.
in which they were before the contract was constituted. The injured
party is entitled to compensation and the assessment of compensation is
left to the Court. The Court cannot take account of any provision in the
contract itself as to the amount of compensation to be paid in the event
of non-performance because nullification of the contract avoids the whole
agreement including the provision for compensation.

There is one further possible ground of nullity of a contract of ins-
urance. On account of its conditional nature the contract is null if the
insurer runs no risk of the event insured against occurring. Here, too,
the parties must be restored to the position in which they were before they
constituted the contract. If a question of compensation arises it is as-
essed by the Court, except in the case of marine insurance. The parties
in this case may agree in advance upon the amount of compensation, and such
an agreement must be taken into consideration as this kind of nullity differs
from those previously mentioned. The contract is initially valid and so
the fact that it becomes null does not affect any agreement in respect of
compensation.

In the case of marine insurance, there are three possible situations
where the contract may be nullified on the ground of no risk: cancellation
of the voyage, safe arrival before the formation of the contract, loss of
the things insured before the constitution of the contract. In the first
case, the O.M.C. provides that the insurer is entitled to claim either one
half percent of the sum insured or half of the premium, whichever is the
less. In the second case, if the underwriter knows of the safe arrival

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(1) See p. 76.
(2) Art. 194 of the O.M.C., see p. 339.
or if information of it is available, the assured is entitled to be compensated by payment of double the amount of the premium. In the third case, if the assured knows of the loss or if information of it is available, the underwriter is entitled to claim double the amount of the premium as compensation.

3. Cancellation of the Contract

Once the contract has been validly constituted, the parties must abide by its provisions. They are bound by their obligations so long as the contract exists, and any violation by one party gives the other the right (3) to bring the contract to an end. The term "cancellation" means termination by a party of a valid contract.

It should be noted that the effect of cancellation of a contract differs from that of annulment based on a defect in the contract. The latter has a retrospective effect whereas the former has not. In other words, cancellation of the contract takes effect from the date of the decree by which it is cancelled and the contract is valid till this date. Retention of the premium by the insurer is, therefore, not simply a penalty payable on account of the assured's act of non-disclosure, but a right arising from the contract itself. The validity of the contract prior to cancellation gives the insurer the right to the whole premium because he has undertaken liability for the risk.

(1) Articles 210, 213, ibid., see p.329 and 336.
(2) Articles 211, 213, ibid., see p.329 and 336.
(3) Planiol and Ripert say, "The word cancellation designates any act by which the parties themselves annul the contract which they have made." vol.ii, part 1, p.753.
CHAPTER VII

MISCELLANEOUS ASPECTS OF INSURANCE

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1. Bankruptcy

In Iraq a person whose debts are more than his assets is subject to one of two distinct provisions depending on whether he is engaged in trade or not. The person who is engaged in trade (commerçant) is declared bankrupt and is subject to the Code of Commerce. The non-trader is declared insolvent (déconfituré) and is subject to the Civil Code. After the person has been declared insolvent, the Court appoints a syndic in the case of the trader or a guardian in the case of the non-trader. In the latter case, the court may appoint the person himself as guardian of his own property. In both cases, the person loses his legal capacity and, therefore, is prohibited from entering into any transaction.

We must now consider whether bankruptcy or insolvency of either the insurer or the assured affects the validity of the contract of insurance. It is well established that legally bankruptcy or insolvency does not affect the validity of the contract. The creditor — whether the insurer in the case of the premium or the assured in the case of the sum insured — can rank with the other creditors and share in the bankrupt estate with them in proportion to the value of his claim. However, the aim of insurance is to provide security against risks, and the insured is not safeguarded if an insolvent insurer is allowed to retain his rights in the insurance. Insurance is a continuing contract — it continues to exist until the occurrence of the event insured against or the expiry of the period of the contract — and hence, any change occurring in the capacity of either party may affect the contract so as to preclude that party from fulfilling his obligations. To obviate this Article 14 of the O.I.I., which covers

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(1) Articles 142-315 of the Ottoman Commercial Code of 1853.
(2) Articles 270-279.
(3) Art. 271 of the Civil Code.
property insurance provides:

"In the event of bankruptcy, liquidation or cessation of business, both the assured and the insurer have the right to demand from the other a personal guarantee or security. If such a personal guarantee or security is not given the contract of insurance may be cancelled."

The above article makes it clear that so far as bankruptcy or insolvency are concerned, the law does not distinguish between insurer and assured. In other words, the law implies that the obligations of the assured are not confined merely to payment of the premium. The O.M.C., Article 191, contains a similar provision in the case of the underwriter becoming bankrupt, but makes it clear that it is only in the event of the premium being unpaid that the assured must give a guarantee. The Article provides:

"Where the insurer becomes bankrupt before the end of the period of risk, the assured may demand a guarantee or insist on cancellation of the contract. The insurer may do the same in the event of insolvency of the assured before payment of the premium."

It should be noted that both provisions use the term "cancellation", which means that the contract ends as at the date of cancellation. In other words, the contract is considered to have been valid up to the time of the declaration of bankruptcy or insolvency. Among the reasons for allowing the assured to cancel the contract is to give him the right to effect an insurance with another insurer without being involved in double insurance.

The question arises whether the premium should be refunded wholly or in part in the event of cancellation because of bankruptcy. Neither the O.L.I. nor the O.M.C. deal with this matter, and it is, thus, left to be agreed between the parties. In the absence of such agreement, however, the assured is entitled to repayment of part of the premium in proportion to the period of risk still to run at the time of cancellation.

(1) See p. 91.
In the case of life assurance, the proceeds of the policy are not included in the property of the bankrupt or insolvent assured. The Civil Code of Iraq has no provision as to whether either party is entitled to terminate the contract, and the matter is left to the parties to agree upon. In the absence of such an agreement, however, it seems that in the case of the assured being bankrupt or insolvent, the beneficiary may agree to guarantee the unpaid premiums. Alternatively, the court may allow the assured to elect one of the options mentioned in the policy, e.g. (a) to surrender the policy for its cash value (the proceeds must then be added to the estate of the bankrupt or insolvent assured), (b) to reduce the amount of the sum insured, (c) to have the policy continued with a new sum insured, in which case the premiums already paid will be regarded as a single premium. In the event of the insurer becoming bankrupt, the assured has the right to terminate the policy and to claim its value along with the other creditors.

In all cases of bankruptcy or insolvency, any matters arising out of the contract must be referred, not to the party who is unable to meet his liabilities, but to his legal representative, whether syndic or guardian.

2. Construction of the Contract

Under the heading of "Interpretation of Commercial Contracts", the Commercial Code of Iraq deals, in Articles 132-136, with the construction of contracts. Articles 155-167 of the C.C.I. are devoted to the same subject, and they are titled "Interpretation of the Contract". The interpretation of insurance policies is dealt with primarily by the provisions

(1) Art. 995 of the C.C.I., see p. 211.
(2) Clause 5 of the standard policy in Iraq.
(3) Art. 996 of the C.C.I., see p. 197.
of the Commercial Code, but an Article of the Code provides for reference to the Civil Code in the absence of suitable provisions in the Commercial Code.

The complicated character of the business of insurance combined with its wide scope has resulted in the use of standard form contracts for policies. A policy of insurance is prepared by one party, and it is rare for the other party to dispute its terms. This suggests that the terms of a policy are imposed on the person seeking insurance cover. The law, with the intention of strengthening the position of the assured vis-à-vis the insurer, provides that, if there is any ambiguity in the policy, the courts must interpret its terms in favour of the assured. It is the responsibility of the insurer if the policy which he has prepared is, in any way, unclear. The Law, thus, protects the assured from arbitrary terms in a standard form policy.

The contract of insurance is known as a "contract of adhesion", and Article 167 of the Civil Code of Iraq provides:

"s.1 - Acceptance in a 'contract of adhesion' is confined to adhesion to standard conditions drawn up by the offerer which are not subject to negotiation.

s.2 - If a contract of adhesion contains leonine conditions, the court may modify these conditions or relieve the adhering party of his obligation to perform these conditions in accordance with the principle of equity. (3) Any agreement to the contrary is void.

s.3 - The construction, however, of ambiguous clauses in a contract of adhesion must not be detrimental to the adhering party, even though he is the creditor.

The provisions of this Article do not apply in the case of compulsory motor-car insurance. In this case, the policy is in statutory terms under

(1) Art. 167 of the C.C.I.
the law of Compulsory Insurance of 1905, and it cannot be said that the insurer is the person responsible for the policy. Ambiguous clauses in this policy, therefore, are not governed by the traditional rules mentioned above, but one policy must be construed in favour of neither party and both parties must be treated on an equal footing.

3. Assignation of the Contract

In insurance the sole aim is to safeguard the assured's interest in the things insured in the event of any damage being caused by the occurrence of the event insured against. Both the assured and the insurer have an interest in the things insured. The assured's interest in the things insured already exists, but the insurer's interest is created by the contract. The limited extent of the insurer's rights in the things insured does not prevent the assured from transferring his interest in them. Thus, the assured is quite free to make a donation, sale or testamentary disposition of the things insured. Not only may the things be transferred by the assured, but they may even be taken by force of law, as when a creditor takes action to recover his debts. The things insured may also be transferred to the assured's heir by testate or intestate succession.

The question arises to what extent the assured's rights in the contract of insurance may be transferred to the new possessor or proprietor of the things insured. In other words, to what extent may a third party who is a stranger to the contract enjoy the benefits of the insurance therein?

Article 6 of the O.L.I. provides:

(1) See p. 251.
(2) See the title "Insurable Interest", p101.
"The assured has the right to assign his interest in the sums for which his movable or immovable property have been insured to a third party to whom he may have sold, transferred, given or mortgaged such property. In that event, a statement signed or sealed by the parties must be appended to the contract of insurance. The validity of such assignment as regards the third party is dependent upon acceptance and confirmation by the insurer in writing, or notification to him officially through the public notary."

The right of a creditor is preserved if he takes over the assured's interest in the things insured in payment of his debts. Article 1003 of the C.C.I. provides:

"s.1 - Should the things insured be burdened by a pledge, mortgage or other real warranty, these rights will be transferred to the indemnity due to the debtor by virtue of the contract of insurance.

s.2 - If these rights have been published or notified, the insurer is only entitled to pay the amount due by him to the insured with the consent of the creditor.

s.3 - When the things have been attached (have been placed in judicial deposit), the insurer, if duly notified, shall not pay any sum due by him to the assured."

The right of the heir of the assured to enjoy the benefit of the insurance is secured by Article 142 of the C.C.I., which provides:

"s.1 - The effect of the contract passes to the contractual parties and to the ayants cause universel (1) without violation of any right of succession, unless it is understood from the contract or because of the nature of the business or as the result of a rule of law that the effect does not pass to the ayants cause universel.

s.2 - Where the contract creates obligations and personal rights, these rights attach to a thing which is transferred at a later date to the ayants cause particulier (2); these obligations and rights transfer to the latter at the time when the things are transferred provided they are necessary to it and the ayant cause particulier knows of them at the time when the things are transferred to him."

It should be noted that, apart from the case of succession by the

(1) Universal successors (i.e., heirs).
(2) Those who succeed or acquire some particular right (e.g., creditor, buyer).
heirs of the assured, the statutes of insurance provide that the insurer must be notified of an assignment. However, these provisions are not absolutely binding, and the parties may agree to make their own conditions in the contract.

The Ottoman Maritime Code does not provide for the assignation of a marine insurance policy. In the case of life assurance, too, there is no express statutory provision dealing with the assignation of a policy. In practice, however, the assignment of any right is allowed by the provisions of the Civil Code. Articles 362-3 do not require the consent of the debtor (the insurer) to an assignation, but unless the debtor (the insurer) declares his acceptance, or has been notified of the assignation, it is not valid against him. Thus, an assured who is the creditor in a policy of insurance—marine or life—may assign his right in the policy to a third party.

4. Re-insurance

This is a contract of insurance made between an insurer and a re-insurer to cover some of the risks that the former has undertaken in the original contract of insurance. The basis of re-insurance is the distribution of risks among those who are able to undertake extensive obligations. The insurer who himself accepts liability for the risks on behalf of the assured reduces his liabilities by re-insuring them.

Re-insurance may be effected by one of two methods. Firstly, the insurer may cover all his liabilities by a single policy. In other words, all the contracts of insurance are covered by one single policy of re-insurance. This single policy may cover a particular risk. For example, the insurer may re-insure the risks he has undertaken in respect of fire. Secondly, the insurer may cover each individual contract of insurance which
he has made by a separate policy of re-insurance in respect of each of them. All the risks insured against may be covered or only some of them. In both cases there is no connection between the original contract of insurance and the re-insurance. Each is independent of the other, which means that the assured cannot claim from the re-insurer.

For the constitution of a re-insurance contract all the elements necessary to a normal contract of insurance are required. In addition, the (insurer) assured must be in the insurance business. Thus, the contract of re-insurance is a contract uberrimae fidei and a contract of indemnity and creates obligations between the parties the subject matter of which are the premium, the sum insured, the risk and insurable interest. Insurable interest in re-insurance is created by virtue of law.

In Iraq, the O.L.I. in Article 5 provides:

"The insurer may, provided that it is in accordance with the terms of the contract, cause the immovable and movable property which he has insured to be re-insured by another insurer; the owner of such property retains his right of recourse against the first insurer."

This provision concerns the kind of re-insurance by which each contract of insurance is re-insured separately.

For marine insurance Article 187 of the O.M.C. provides:

"s.2 - The underwriter may have the things which he has insured, re-insured by others...

s.3 - The premium in the contract of re-insurance may be less or greater than that of the first insurance."

This Article refers to re-insurance of the things insured but in fact the insurer re-insures not the things insured, but his liability under the original policy of insurance.

In order to organise the business of re-insurance and prevent insurers from becoming over-burdened with liabilities, the Government of Iraq est-

(1) See p.101.
published a re-insurance company by the Re-Insurance Company Law of 1960. Under this Law each insurance company is obliged to re-insure a certain percentage of its liabilities with the re-insurance company.

It should be noted that re-insurance is always effected between legal personae, particularly since the nationalisation of insurance in Iraq and its not being possible now for an individual to engage in the business of insurance or re-insurance in Iraq.

5. Extinction of the Contract

The Civil Code of Iraq enumerates the different ways in which a contract may be terminated under the title "Extinction of Obligation" as follows:

1. Extinction of the obligation by payment.
2. Extinction of the obligation by the equivalent of payment as:
   a) by performance of something which is not the original obligation;
   b) by novation or delegation;
   c) by compensation (compenser c'est payer);
   d) by confusion between the parties.
3. Extinction of the obligation by non-performance, as:
   a) by release;
   b) by impossibility of performance;
   c) by negative prescription.

The complete performance of a contract of insurance depends upon the occurrence of the risks insured against. If the risk does not occur, the contract expires at the end of the period agreed by the parties and no rights arise from it. The effectiveness of the contract depends not on the occurrence of the risks, but on the fact that the risks have attached. If the risks insured against occur, the insurer is obliged to perform his obligations. Depending on its terms, the contract may expire either on the happening of a certain event within a certain period, or at the end of a certain period, no matter how many events insured against have occurred.

(1) See p. 37.
(2) Articles 375-443.
during that period. In both cases the insurer must fulfil his obligations by indemnifying the assured.

The contract of insurance differs from other contracts as regards negative prescription. The period at the end of which the contract is extinct and of no effect is three years from the date when the contract is completed by occurrence of the risks insured against. Article 990 of the Civil Code provides: "Actions arising out of insurance contracts shall be barred after the expiry of three years from the date of the occurrence which gives rise to such actions." In other words, the date of extinction of the obligation is calculated either from the date of the occurrence of the risks or from the date on which the legal action against the assured was commenced, as in the case of third party liability insurance.

In marine insurance the period is five years. Article 276 of the O.M.C. provides: "All actions arising out of contracts of bottomry or contracts of insurance prescribe after the lapse of a period of five years from the date of the contract." It should be noted that in the case of marine insurance, the prescriptive period runs not from the date of the occurrence of the risk but from the date of the contract.

6. Conflict of Laws

The contract of insurance has developed in the field of mercantile law and the provision of insurance is of universal application. Although there is often a lack of uniformity especially in detailed provisions, there is a considerable element of similarity between the insurance laws of different countries. The business of insurance has spread all over the world in the field of trade, and a contract of insurance can, thus, be constituted in one country and performed in another. Difficulties arise through the existence of different trade usages and different laws in the
various countries, and in order to solve these difficulties, the rules of conflict of laws have been established.

The Iraqi insurance statutes provide two different sets of rules: firstly, rules enabling the ordinary courts to determine the law applicable to the contract; and secondly, rules regulating the organisation of insurance and enforced by the Minister of Commerce. The second class of rules is outside the scope of conflict of laws since the licencing of any company, foreign or local, is an act of administrative authority which is purely a domestic matter.

Problems of conflict of laws arise when it must be decided by which laws a foreign contract is governed. These problems are concerned either with the formality of the contract or with interpretation of the provisions of the contract itself.

In a question of the formal validity of a foreign contract of insurance in Iraq, the rule of lex loci contractus applies. The Civil Code in Article 26 provides: "The formal validity of contracts is governed by the law of the country where the contract is made." This applies to compulsory formalities and not to those which are optional.

The rules of conflict of laws governing interpretation of contracts apply only if the parties do not agree on the 'proper law' of the contract. The lex domicilii governs the contract where the parties have the same domicile, but if the parties have different domiciles, then the lex loci contractus applies. Section 1 of Article 25 of the Iraqi Civil Code provides:

"The contractual obligations are governed by the law of the country of domicile of the parties where the parties belong to the same domicile. But, if they belong to different domiciles, the law of the country where the contract is made applies unless otherwise agreed or it appears from the circumstances that another law is intended to be applicable."

It is important to note that where the courts of Iraq apply rules of foreign law, they must disregard the rules of conflict of laws of the foreign system, and the foreign law to be applied must not be contrary to public policy or good morals — l’ordre publique et les bonnes moeurs.

A. Comparison with other Systems

Generally speaking, both in Scotland and in England, the subject of conflict of laws is considered as one of the more obscure branches of the law. In neither system are there any statutory provisions, and the courts have to ascertain the law in each individual case according to the circumstances and by reference to authoritative precedents.

In Scotland, the subject is known as "international private law" and in England "conflict of laws". The latter term seems more adequate because the subject matter "is not international in the sense of being a law between states." It deals with individuals who are subject to different systems of law. In both systems: "The tendency is to recognise all rights acquired under the law of another country unless their recognition is flatly contradictory of fundamental principles of British law." Each system recognises the other as foreign. The fact that the House of Lords is the highest court for both systems has not created unanimity between them in cases of conflict of laws, despite the fact that it is in the highest degree desirable that the laws of all countries should as far as possible be the same.

In England the idea of "proper law" governs contracts in general.

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(1) Art. 39 of the Civil Code.
(2) Art. 32, ibid.
(3) Salmond, *Jurisprudence*, p. 89.
This term is defined as: "The law or laws by which the parties intended, or may fairly be presumed to have intended the contract to be governed." The development of the doctrine of "proper law" has been attributed to the strength of the concept of freedom of contract in the Common Law System. It has been suggested that parties have absolute freedom to choose the proper law to govern their contract and that their agreement must be respected unless it is left to the court to discover the intention of the parties from the circumstances. This view is known as the "subjective theory". It has been criticised by some legal writers on the ground that the proper law should be the law with which the contract has the most substantial connection. This means that the parties are not absolutely free to choose the law to govern their contract, but the law which is chosen must have some connection with the contract. This is known as the "objective theory".

A recent attempt has been made to reconcile these theories, suggesting that they are not, in fact, contradictory but complimentary:

"...The two theories can be reconciled if it is realised that the test of intention is a primary test for the ascertaining of the proper law of contract, and the test of connection the secondary criterion which is invoked if the former fails. This view is in harmony with the statement of Lord Simonds that the proper law of a contract is 'the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.'" (3)

In the Scottish legal system, the scope of "International Private Law" is limited, the number of works which have been written on the subject being very small. Lord Brougham has described the rules of international private

(3) E.g. Cheshire, G.; Morris, J., C.; Westlake, J. See ibid.
(6) Gibb, A.D. International Private Law in Scotland in the XVI and XVIII Centuries, p.5.
law in Scotland relating to contract as follows:

"Whatever relates to the nature of the obligation - ad valorem contractus - is to be governed by the law of the country where it was made - the lex loci; whatever relates to the remedy, by suits to compel performance or by action for a breach - ad decisionem iitis - is to be governed by lex loci - the law of the country to whose courts the application is made for performance or for damages." (1)

This opinion does not settle the question. The term "proper law" has not been much used by Scottish lawyers, but the concept exists clearly in Scots law.

"A choice of law, practically amounts to selecting as the system of jurisprudence to be applied -
a) the lex loci actus;
b) the lex loci rei sitae;
c) the lex fori;
d) the lex domicilii." (2)

Under Scots Law a question of choice of law may arise in connection with either the form of the contract or the operation of the contract.

"The general rule with respect to the validity of contracts entered into abroad is that if executed in accordance with the forms prescribed by the law of the locus contractus they are recognised and enforced in Scotland though they do not comply with the forms of Scots Law. The effect of a contract, i.e. its true construction, incidents, and validity, is ruled by the law which the parties intended or are presumed to have intended to govern their right." (3)

The rules governing contracts in general are summarised in the Encyclopaedia of the Laws of Scotland as follows:

1. The capacity of the parties to constitute the contract is governed by the law of the country where it is made.
2. The formal validity of the contract is governed by the lex loci contractus.
3. Questions of constitution and interpretation are governed by the law which the parties intended to apply, in the absence of agreement, the law of the country with which the contract has the most substantial connection and the court may choose between the lex loci contractus and lex loci solutionis according to the circumstances.

(1) Don v. Lippmann(1837) 2Sh.Macl., p.723.
(3) Ibid., p.787.
4. Questions of assignation are determined by the law of the place of the assignation.

After this summary of the subject of conflict of laws in English and Scots law in relation to contract in general, we must consider how far these rules apply to the contract of insurance. This contract has two specialities: first, it is a commercial contract which frequently has international implications; secondly, it is usually a standard-form contract whose terms are those of the legal system of the party who drew it up.

In the case of marine insurance Dicey states the following rules as being those of the English Common Law:

"Rule 161 - A marine insurance policy issued by an underwriter in business in England is governed by English Law, except in so far as the policy stipulates that it shall be construed or applied in whole or in part according to the law of a foreign country.

Rule 163 - The parties to a contract of marine insurance are bound by an average adjustment duly taken according to the law of the place of adjustment in the absence of special agreement to the contrary."

From these rules it may be inferred that, unless otherwise agreed by the parties, the proper law of a marine insurance contract is that of the place of the underwriter's business.

In the case of non-marine insurance, it is uncertain whether the above rules apply. In Dicey's work, it is stated that this matter "does not appear to have been decided in this country"; but, with regard to life assurance, Professor Unger has concluded from the recent cases (cf. Pick v. Manufacturer's Life Assurance Co. and Rossano v. Manufacturer's Life Assurance Co.) that:

(1) pp.836,839.
(2) p.836.
"...the cases of Pick and Rossano can then be taken to establish the rule that, in the absence of an express choice, the proper law of a contract of life insurance is that of the country in which the head office of the insurer is situated."  (1)

The question of whether the law of the place where a branch office is situated can apply does not appear to have been considered. It seems, therefore, that the rules of marine insurance are applied in the case of life insurance.

So far as other kinds of insurance are concerned, the matter is not clearly settled. The question may arise whether the law of the place of the risk in fire insurance and insurance against third party liability is the proper law of the contract or whether it is the law of the place where the insurance contract is made or the law of the place where the insurance contract is performed. Unless the parties have agreed as to which law governs the contract, the proper law is that with which the contract has its closest connection. In some cases, it has been held that the place of the insurer's business was the place intended by the parties to govern their contract.

In the case of assignment of a policy of insurance, the proper law is the law of the country where the assignment is made. (4)

In Scotland, in Cook v. Crewcocks Ins. Co., a marine insurance case, the law of the place of the insurer's business was the law applied by the court. So far as non-marine insurance is concerned, it is stated in Erskine's Elements of Scottish Law that in the case of life assurance, the country where the policy is issued is that whose law the parties intend.

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(2) Wolff, M. Private International Law, p. 442.
(3) E.g. Spurier v. La Cloche (1902) A.C. p. 446.
(5) (1843), S.B. 1379.
(6) 21st edn., p. 788.
to govern their rights. Thus, in the case of a contract concluded at the head office of an insurance company, the law of the country where the head office is situated is the law governing the contract, but in the case where a branch office is authorised to conclude such a contract, the law of the situs of the branch is that which will govern the contract. So far as other kinds of insurance are concerned, the general rules applicable to contract in general govern contracts of insurance.

In practice a large number of policies of insurance for use abroad include a clause known as a "foreign jurisdiction clause". This provides that the insurer accepts the jurisdiction of the courts of the country of the policy-holder. A clause to the effect that the law of that country is to apply is sometimes added.

PART THREE

PARTICULAR CONTRACTS OF INSURANCE

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CHAPTER I

THE CONTRACT OF LIFE ASSURANCE

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1. Nature

Life assurance belongs to the class of contracts embraced by the term "personal insurance". Contracts in this class are concerned solely with securing the individual against uncertain events affecting his life, some providing for payment only in the event of death and others being intended to cover some specific event, e.g. survival to a certain age or accident resulting in sickness or bodily injury. Simple life assurance falls into the first category, and the second category includes endowment and investment, bond policies, personal accident, and liability insurance.

The special nature of life assurance is a result of the subject insured, i.e. human life and apart from the unusual features arising from this speciality, contracts of life assurance are governed by the general rules applicable to all insurance contracts. Life assurance is based on the supposition that the life of a human being can be the object of a contractual transaction and that death can form the subject-matter of a commercial bargain. This raises the question whether life assurance is a contract of indemnity. In other words, is the death of a person whose life is insured to be considered a loss sustained by him or, in the case of an endowment policy, is a person who reaches a certain age to be regarded as having suffered damage which justifies payment of an indemnity?

Life assurance has been compared to a wagering contract. Suspicions of a similarity between the two resulted from religious and social phenomena of the later Middle Ages, this being the period during which contracts of insurance were first established. Since that time various writers have (1) expounded views as to the validity of life assurance. Although the contract of life assurance has in modern times been recognised as legally

(1) For detail see Emerigon, Insurance, pp. 157 et seq.
valid, some suspicions remain and still influence the approach of the law to the contract. These have been caused by the application of the principle of indemnity to life assurance, whereas the correct approach is rather to consider death as having certain legal and economic consequences on which a pecuniary value may be placed.

In France, where life assurance was unrecognised till 1818, most 19th century writers did their best to prove that life assurance was a contract of indemnity and not a sort of wager. Modern French writers on the other hand maintain that life assurance is neither a contract of indemnity nor a wager.

In Britain, life assurance was recognised earlier. In England the Common Law accepted the validity of wagering transactions, and there was no argument as to whether life assurance was a wagering contract or not. The English Common Law Courts, however, decided that it was not a contract of indemnity. In Scotland, although a wager was not a contract enforceable by law, the Courts followed the English decision that life assurance was not a contract of indemnity.

The view that life assurance is not a contract of indemnity has prevailed among writers and is recognised by the law although it is not completely justified for some kinds of personal insurance must be classified as contracts of indemnity, e.g. assurance taken out by a creditor over the life of his debtor. The sum insured in such a contract must be limited to

(3) Kaynes, A History of British Insurance, pp.113 et seq.
the actual loss by the creditor on the death of his debtor. Third party liability insurance in the case of insurance against accidental death or injury of employees is considered as a contract of indemnity since compensation is payable if an accident occurs to the third party. The same applies in the case of motor vehicle liability insurance where the injured person may claim full compensation for the damage which has occurred. Another example of indemnity in personal insurance occurs in the case of insurance against sickness, accident or disability where the indemnity is either estimated in advance by the parties or fixed by the law or assessed by the courts in each individual case.

The difficulty of putting a value on human life is the only logical point that makes the contract of life assurance different from other insurance contracts. As has been said, "it is practically always a predetermined sum that is payable on the happening of the contingency, and never an indemnity." The assessment of the amount of the sum insured is left to the assured, and there is no need to prove the quantum of damages. Thus, a contract of life assurance is not an indemnity contract and may be made in favour of a person who has no interest and who has suffered no damage as a result of the death of the person assured or the occurrence of the event insured against.

The law excludes the amount of the sum insured from the estate of the assured, the legal basis for this being that the sum insured is presumed to be no longer the property of the assured but to be transferred to the beneficiary on the occurrence of the event insured against. This may be compared with transfer by will or donation, but an heir of the deceased,

(2) Art.995 of the C.C.I., see p.211.
unless he is the beneficiary, has no right to prevent the beneficiary from exercising a direct right over the sum insured. It should be noted, however, that in the case of a will, the right of the testator to dispose of his property is limited to one-third of his estate (otherwise the approval of the heirs is required for implementation of the provisions of will) while in the case of donation the heirs may claim, in certain circumstances, that the gift should be considered as equivalent to a will.

Another point arising from the non-indemnity nature of the contract of life assurance is that the insurer has no right to subrogate himself to the assured or his heirs in their rights against the person who is responsible for the occurrence of the event insured against.

2. Constitution of the Contract

As in other contracts of insurance, it is essential that the parties should consent to the terms of the contract and that they should be competent to contract. The parties are the assured and the insurer, and, in appropriate cases, the beneficiary, each of whom has his duties and rights. These again are the same as were described in relation to insurance contracts in general. There are, however, several rules peculiar to the contract of life assurance which are laid down in the C.C.I. and have no application to other types of insurance.

A. The Assured

The assured’s duties and rights in the contract of life assurance are in the main the same as those of an assured in other contracts of insurance. Thus, the assured must declare uberrima fide all the facts relating

(1) Art.1108, ibid.; Art.70 of the Code of Personal Status in Iraq.
(2) Articles 1109-1112, ibid. (in case of death, sickness).
(3) Art.998 of the C.C.I., see p.307.
to the contract and must pay the premium. He has the right to receive the sum insured at the appropriate date in the case of an endowment policy and is entitled to nominate a beneficiary who is entitled to receive the sum insured.

In all contracts of insurance, the assured must pay the premium whether in a lump sum or by instalments. In life assurance, however, the C.C.I. permits the insurance to be cancelled by means of the assured's ceasing to pay the instalments of the premium: Article 996 provides -

"The person assured who has undertaken to pay periodical premiums may release himself from the contract at any time by sending written notice to the insurer prior to the expiry of the current period. In such an event he should be released from payment of subsequent premiums."

This Article corresponds to Article 759 of the Egyptian Civil Code, Article 725 of the Syrian Civil Code, and Article 759 of the Libyan Civil Code.

These Articles are similar to the equivalent articles of the Swiss and German Laws of insurance; but they differ from Article 79 of the French Law of Insurance of 1930 which provides that the insurer has no right to claim the premium in the event of the assured ceasing to pay. It should be noted that it is explained in the "Preparatory Works" of the Egyptian Civil Code that the French Article is defective because it does not protect the insurer by obliging the assured to express his wish to cancel the contract in writing.

In Iraq written notice is essential to bring the contract of life assurance to an end, and the assured's refusal to pay the premium does not mean per se that the contract is cancelled unless the parties have agreed that this should be the case. The insurer must issue a warrant to the assured giving notice that the contract may be considered cancelled unless

(1) Art. 89.
(2) Art. 169.
(3) Ministry of Justice publication, vol. v, p. 373.
the assured pays the outstanding instalments of the premium.

The question then arises whether the assured is entitled to reclaim the instalments of premium which he has already paid up to the date of cancellation. The C.C.I. does not deal with this point and the matter is apparently left to the parties. However, where there is no specific provision in the contract, the rule is that a distinction must be drawn between life assurance as a means of accumulating capital on the one hand and as a safeguard against some contingency (e.g. accident insurance) on the other. In the first case, the assured is entitled to recover the accumulated capital, while in the second he has no such right since he has received the benefit of the insurance cover up to the date of cancellation.

i. The Assured's Right to Take Out Insurance on the Life of a Third Party

The assured has an unlimited interest in his own life and this needs no proof, but it must be considered whether the assured can have an interest in the life of another person. The C.C.I., as mentioned before, provides that "insurable interest" is essential for the validity of a contract of insurance, and, despite the non-indemnity character of life assurance, the Code makes no distinction between it and any other type of insurance. This means that the assured must have a continuing insurable interest in the life of the person whose life is insured (cestui que vie). Insurable interest is described in the C.C.I. as "every lawful thing". It need not necessarily be a pecuniary interest and may include any moral interest. The assured must, thus, prove either a pecuniary interest in or some relationship to the life of the person whose life is insured by him.

In addition to the requirement of insurable interest, the C.C.I. pro-

(1) See p.173.
(2) See p.107 et seq.
(3) See p.107.
vides that the person whose life is insured must give his consent to such an insurance. Article 992 provides:

"The insurance of the life of a third party is void unless such third party consents thereto in writing prior to the conclusion of the contract. If such third party is under legal incapacity, the contract will not be valid unless consented to by his legal representative."

This Article corresponds to section 1 of Article 755 of the Egyptian Civil Code, section 1 of Article 721 of the Syrian Civil Code, and section 1 of Article 755 of the Libyan Civil Code. These Articles are substantially the same as Article 995 of the Lebanese Code of Obligations and Contracts and section 1 of Article 57 of the French Law of Insurance.

The Iraqi Article applies whether the third party has a lineal relationship to the assured or not. Thus, the assured cannot insure the life of even his spouse or children or any other relative unless he obtains written approval therefore. The same applies in the case of insurance of an alien.

The consent must be in writing and must be given before the constitution of the contract. The consent of a cestui que vie given after the constitution of the contract, thus, does not enable the assured to claim the sum insured. It has been suggested by an Arab legal writer that the provision in Article 992 "prior to the conclusion of the contract" means that the signature of the cestui que vie on the policy of insurance is not sufficient to indicate that his written consent has been procured prior to formation of the contract; the person whose life is insured must sign a separate document before the policy is issued. This view is justified on a strict construction of the Article, but it seems, however, that the person whose life is insured can sign the proposal from which is submitted to

the insurer by the assured. The insurer, who accepts the signature of a cestui que vie on the policy of life assurance may be barred from avoiding the policy on the ground of the assured's failure to obtain written approval before formation of the contract on the ground that it must be inferred that the signature of the cestui que vie has been appended before the parties to the contract signed themselves.

(1) As has been stated before, the consent of the person whose life is insured is not a substitute for insurable interest but is an additional requirement and the person whose life is to become the subject of the insurance has the right to grant or withhold his consent to the contract. There is, thus, a distinction between insurance effected by a person upon the life of another and that effected by a person on his own life with a subsequent nomination as beneficiary of another person who may not have an insurable interest. In the former case the assured cannot effect the insurance unless he has an insurable interest in the life of the person whose life is sought to be insured and obtains the consent of that person, while in the latter, the assured has an undisputed interest in his own life and, at the same time, has the right to nominate any person to receive the proceeds of the policy. So long as the assured has the right to change the beneficiary, payment of the premium by the latter may be made at his own risk, but if the assured and the beneficiary agree that the latter should pay the premium, unless the beneficiary has an insurable interest in the life of the assured, the policy may be invalidated for want of insurable interest. This clearly illustrates the difference between the two forms of insurance.

(1) See p. 107.
(2) See p. 148.
The Iraqi law differs in this respect from the French law, from which the Iraqi provisions relating to insurance are derived. The mere consent of the *cestui que vie*, under the French Law of Insurance of 1930, is sufficient to enable insurance to be taken out on his life, and the doctrine of insurable interest is confined to insurance against damage. Lebanese law is the same as the French. It can scarcely be said either that the requirement of insurable interest in life assurance is derived from the British system of insurance — a system which has had a practical influence on that of Iraq, for the British Life Assurance Act, 1774, provides that insurable interest must be a *pecuniary* interest.

It seems that the two requirements of insurable interest and consent of the *cestui que vie* make the Iraqi similar to that in some states of the U.S.A. This resemblance is completely fortuitous, and there are, in fact, many differences. In the U.S.A., in the case of insurance by either spouse, by a person upon whom a minor is dependent for support or who has an insurable interest in the life of a minor, and in the case of group life insurance, the consent of the *cestui que vie* is not required.

It has already been mentioned that the Iraqi statutory provisions require a continuing insurable interest in life insured. It may reasonably be argued that a strict application of this rule is in conflict with the non-indemnity nature of life assurance since the contract of life assur-

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(1) Art.57, see p.199.
(4) See p.56.
(5) See p.217.
(7) New York and Louisiana, *ibid.*
(8) New York, *ibid.*
insurance is not merely a speculative contract depending on a contingent event but is also of the nature of a capital investment. However, the statutes are quite clear and their provisions are absolutely binding. There are probably two factors which led to this attitude on the part of the Iraqi legislature. Firstly, the loss is not always pecuniary but may sometimes be emotional or moral. The indemnity is intended not only to provide for the adjustment of pecuniary damage but also as a legal means of providing for such moral or emotional "loss". Secondly, it is clearly provided by the Iraqi legislature that insurance must not be a source of profit, and this included life assurance. If the assured has a pecuniary interest in the life of the person whose life is insured, the contract must not be a source of profit, but when the interest is not pecuniary, it is not possible to limit it to a certain amount of money.

The requirement of continuing insurable interest gives rise to problems in two connections: Firstly, the possibility of the assured's recovering premiums paid while he had an insurable interest after he has lost it, and secondly, the effect on an assignation of a policy where the assured loses his insurable interest.

So far as recovery of premiums is concerned the effect of lapse of insurable interest depends on whether the policy has been issued for a speculative purpose (e.g. a creditor's insurance of his debtor's life) or is intended to provide an accumulation of capital as a form of saving.

In the first case, the assured has no right to recover the premium, for the situation is exactly similar to that in insurance against damage. When the creditor insures the life of his debtor and pays a regular premium, this means that the creditor - the assured - will suffer no loss if

(1) See p. 79.
the debtor dies and, as is the case in insurance against damage, the assured cannot recover the premium in the event of the risk not being realised.

In the case where the insurance is intended by the assured as a form of saving by accumulation of capital, he is entitled to recover the premiums which have been paid. For example, if insurance is taken out by one spouse on the life of the other, the assured's intention is not only that he will suffer no loss on the death of the other but also that payment of the premiums should be a means of accumulating capital and in this case, the assured who loses his insurable interest by divorce is entitled to recover the capital which has been accumulated.

The second problem arises on assignation. Under the C.C.I. one creditor is allowed to assign his credit to another, and, thus, an assured is entitled to assign his right in a policy of insurance to another person.

The Iraqi statutes contain no specific provisions relating to the assignation of life assurance policies, but under the laws of France, Egypt, Syria, Libya and Lebanon, the person whose life is insured must agree in writing to any assignation made by the assured. This rule is made to protect the person whose life is insured from the assured's misuse of the policy. His consent to effect the policy on his life does not reduce his right of further approval to the assignation. This may have application in Iraq, too, for Article 1 of the C.C.I. provides for reference to be made to the laws of systems similar to that of Iraq, and the C.C.I. derived its insurance provisions from the codes of these other countries. The assured who has

(1) See p. 179.
(2) Art.57 of the Law of Insurance, 1930, in France; Articles 755,721,755 and 995 of the Codes of Egypt, Syria, Libya and Lebanon.
(3) "s.3 - The court shall be guided in all this by the law established by legal precedents and Islamic jurisprudence in Iraq and in other countries whose legislation approximates to that of Iraq."
lost his insurable interest cannot assign the policy because it is necessary to prove his interest at the date of the assignation, but he may assign the capital invested in the policy. When, however, the assured has a pecuniary interest in the insured's life, this interest may be transferred to an assignee if the person whose life is insured consents to the assignation, but if the interest is non-pecuniary, an assignation is not possible.

One further point worth discussing is the right of the person whose life is insured to cancel his consent after it has been validly given. This situation is illustrated by the case where one spouse has taken out a policy on the life of the other spouse, written consent having been properly obtained, and the matrimonial relationship is ended by divorce. Another example is the case of a creditor taking out a policy on the life of his debtor with valid written consent by the latter and the relationship between debtor and creditor is extinguished by payment, discharge or any other means. Yet another example is that of one partner obtaining the consent of another to his taking out a policy on the latter's life and the partnership being then dissolved. In all these cases, the person whose life is insured has the right to withdraw his consent on the ground of the assured losing his insurable interest. This is an exclusive personal right to which no other person is entitled. If the cestui que vie fails to prove his case or if he does not exercise his right, the assured is entitled to receive the sum insured, and the insurer is not able to raise the question of want of insurable interest.

ii. Suicide

The general rule in the contract of insurance is that the event insured against must not come about through misconduct by the assured. Thus,
a person who insures his life must not do anything to foster its end. Article 993 of the C.C.I. provides:

"s.1 - The insurer is released from the obligation to pay the sum insured if the person whose life is insured commits suicide. The insurer shall, however, be bound to pay the persons to whom the rights revert a sum equal to the amount of the insurance reserve.

s.2 - When suicide is due to a mental illness whereby the patient loses control of his actions, the obligation of the insurer remains in its entirety."

This Article corresponds to section 1 and the first part of section 2 of Article 756 of the Egyptian Civil Code and to Article 722 of the Syrian Civil Code and to Article 756 of the Libyan Civil Code. The Iraqi provisions omit the words - "It is for the insurer to establish that the person whose life is insured died as a result of suicide and for the beneficiary to establish that the person assured had, at the time he committed suicide, lost control of his actions." This matter is considered by Iraqi law to be a question of 'evidence' and is, therefore, not mentioned in the Iraqi Code. Section 3 of the Egyptian, Syrian, and Libyan Articles is not repeated in the Iraqi Code. This Section provides: "when an insurance policy contains a clause by which the insurer is bound to pay the sum insured even if the suicide was committed voluntarily and knowingly by the person whose life is insured, such a clause is enforceable only if the suicide is committed two years after the date of the contract." There is no real reason why the above section should not appear in the Iraqi Article unless it is suggested that the Iraqi legislature considered that suicide could never be justified. However, the parties may provide for this point in the contract. The Iraqi, Egyptian, Syrian and Libyan articles correspond to Article 1000 and 1001 of the Lebanese Code of Obligations and Contracts,

(1) The standard form policy of life assurance in Iraq provides; "Should the insured commit suicide within two years from the date of issue or reinstatement of the policy, whether the insured be then sane or insane, the liability of the Company under this policy shall be limited to the amount of the mathematical reserve existing on the policy at the time of death..."
and all these articles have their origin in Article 63 of the French Law of Insurance of 1930.

An insurance reserve is also known as a "mathematical reserve of insurance". In life assurance, the premium is divided into a number of instalments which are equal, regardless of the fact that the chance of death is less at the time of making the contract than at a later time. If this were taken into consideration, the amount of the instalment would vary according to the likelihood of the event insured against being least at the time of formation of the contract and increasing proportionately until the end of the contract. Consequently, if the contract is cancelled by the insurer because of suicide, he is presumed to have received an amount greater than that of the actual instalments of the premium. It is this amount which is referred to as the "insurance reserve".

B. The Insurer

In the contract of life assurance, the insurer's obligation is to pay the amount of the sum insured at the time of the occurrence of the event insured against, which is either the death of or an accident to the person insured, or the survival of the person to a specified date.

In most contracts of insurance, other than life assurance, it is a condition of the policy that the assured or the beneficiary may not recover more than the actual loss. Thus, a person who has been indemnified has no right to claim compensation from the person who is responsible for causing the damage as otherwise he would recover more than the actual loss. However, the person who is responsible for the damage must not escape liability, and so the rule of subrogation takes effect and the insurer will take the place of the assured in enforcing his rights. In the case

of life assurance, however, the matter is different. As mentioned before, the non-indemnity nature of the contract is probably a result of the impossibility of measuring the amount of the indemnity and from this fundamental difference three points arise. Firstly, there is no need to prove that loss has occurred. Secondly, if loss has occurred, it is impossible to quantify it as an actual amount of money. Thirdly, as a consequence, the person whose life is insured has the right to treat the sum insured and any compensation payable as one combined amount. It should be noted that in life assurance, the beneficiary who receives the sum insured may not have suffered any loss as a result of the death of the person whose life is insured. Therefore, any person, other than the beneficiary, who does sustain loss as a result of the death is entitled to be compensated by the person who caused it.

The insurer who is obliged to pay the sum insured to the assured or to the beneficiary has, thus, no right to claim against the person who is responsible for the occurrence of the event insured against. Article 998 of the Civil Code of Iraq provides:

"In life assurance, the insurer who has paid the sum insured shall not be entitled to be subrogated to the rights of the assured or of the beneficiary against the person who caused the event insured against, or against the person responsible therefor."

This Article corresponds to Article 765 of the Egyptian Civil Code, Article 731 of the Syrian Civil Code, and Article 765 of the Libyan Civil Code. These Articles have their origin in Article 55 of the French Law of Insurance.

Article 998 refers expressly to the person who is responsible for the death of the person whose life is insured, but there is another case in which the assured may be enriched as a result of the contract of insurance.
This is when a creditor who has insured his debtor's life may obtain the amount of the sum insured and the amount of his credit and so the question arises in such a case whether the creditor can receive the credit or whether the insurer should be subrogated to the assured in his rights. MacGillivray says that:

"At first sight, it seems perhaps unfair that he (the creditor) should be paid twice over, but neither the debtor nor the insurance company have any reason to complain. Each pays in strict accordance with the contract he has made. And there is no reason why either should claim as windfall the benefit of another contract with which he has no concern."

This opinion may not be accepted in Iraq. It is true that the consideration (cause) of both agreements is separate, but the existence of the policy of life assurance depends on the assured's insurable interest which, in this case, is the assured's credit. One possible solution is to take out a policy of insurance against the insolvency of the debtor. In this case, the insurer does take the place of the assured in his rights against the debtor. An analogy may be drawn with another transaction. In the contract of suretyship, the guarantor who pays the debt is entitled to be subrogated against the debtor. Both insurance and suretyship have similar characteristics, security against the risk of loss being the main feature of both. Bearing this similarity in mind, in order to prevent insurance from being a source of profit, the insurer may stipulate in the policy that the assured's (creditor) rights against the debtor are to be transferred to him. Unless there is such a condition in the policy in addition to the assured's declaration of the nature of his interest in the life of the cestui que vie, the insurer may not be able to prevent the assured from receiving the sum insured and any other amount (credit).

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(2) See p. 286.
(3) Art. 1033 of the C.C.I.
C. The Beneficiary

In the contract of life assurance it is essential to determine which person is entitled to receive the benefit of the contract. The reason for this is based on the nature of the event insured against, especially in a contract covering the death of the person whose life is insured. Usually, the benefit of the insurance is retained by the assured, but where the event insured against is his death, it is necessary for him to nominate someone to receive the benefit. Thus, Article 997 of the C.C.I. provides:

"s.1 - It may be agreed in life assurance that the sum insured shall be paid either to persons nominated or to persons to be nominated at a later date by the assured.

s.2 - The insurance shall be deemed to have been made in favour of nominated beneficiaries if the assured stated in the contract that the assurance was made in favour of his spouse or his children or descendants, born or to be born, or of his heirs without their being named. Such heirs shall be entitled to the sum insured in proportion to their respective shares in the inheritance. This right will devolve on them even if they renounce their inheritance.

s.3 - By spouse is meant the person proved to have such a capacity at the time of the death of the assured, and by children is meant the descendants proved to have the right to inherit at that time."

This Article corresponds to Article 758 of the Egyptian Civil Code, to Article 724 of the Syrian Civil Code, and to Article 758 of the Libyan Civil Code. Article 1002 of the Lebanese Code of Obligations and Contracts contains a similar provision. These Articles have their origin in Article 63 of the French Law of Insurance, which is adopted in its entirety and without modification. Section 2 of the Article refers to the possibility of renunciation of rights in the assured's estate, but this is primarily (2) a rule of French Law and has no application in Iraq. The heirs cannot re-

(1) See p.145 et seq.
(2) Planiol & Ripert, op.cit., vol.iii, part 1, p.616.
fuse their hereditary rights and, at the same time, their obligations are limited by the actual amount of the estate. The above Article provides for three possible cases. Firstly, the beneficiary who is designated in the contract of life assurance. Secondly, the beneficiary who is named in a special agreement. Thirdly, the beneficiary who is not in existence at the time of formation of the contract.

i. Consent of the Beneficiary

The benefit of insurance is transmitted to the beneficiary at the time of the occurrence of the event insured against. The beneficiary must be notified of this occurrence, and he must declare whether he intends to accept the benefit or not. There is no special form for such a declaration and it may be explicit or implicit.

Where the consent or refusal is explicit, the position is clear, but there are certain difficulties in the case of implicit refusal or consent. A refusal may be inferred from the silence of the beneficiary as when the beneficiary is given a fixed time within which to indicate his intention. This period of grace may be stipulated for by the person who would be entitled to the benefit in the event of the beneficiary's refusal. An implicit consent may be inferred from some actions by the beneficiary, such as the transfer of the benefit to another person.

If the beneficiary signifies his acceptance of the benefit of the insurance, the sum insured becomes his property, but if he repudiates the benefit, the sum insured becomes part of the assured's estate. It should be noted that the right of the beneficiary does not transfer to his legal representative. This would arise if the beneficiary was or became incapable before declaring his consent.

ii. The Rights of the Beneficiary in the Sum Insured

It is generally agreed that the contract of insurance is the source of the beneficiary's rights. These rights are created when the contract is formed, but do not come into effect until the occurrence of the event insured against. When it occurs, the contract of insurance is considered complete, but the rights of the beneficiary may be referred back to the date of constitution of the contract. Thus, the beneficiary, who is not a party to the contract, obtains rights under the contract at the time of the realisation of the risk while at the same time, these rights have a retrospective effect.

The beneficiary can obtain the amount of the sum insured by direct action and the insurer is liable to him alone. Following this rule, the C.C.I. gives the beneficiary reasonable protection by providing that the sum insured does not form a part of the assured's estate. Article 995 provides:

"The sum insured, if it is stipulated payable to determined beneficiaries or to the heir of the assured in general, is not included within the estate of the assured after his death. If the assured has been in a state of bankruptcy, insolvency or interdiction, his creditor has no right to recover the sum insured. But in a case where the premiums paid are very excessive in comparison with the assured's means, the creditors have the right to recover the amount of these premiums."

This Article is similar to Article 1006 of the Lebanese Code of Obligations and Contracts, which corresponds to Article 67 of the French Law of Insurance. In other Arab countries, the laws of insurance do not refer to this matter.

The Article clearly states that the beneficiary, even though he may be an heir of the assured, does not acquire the sum insured by any transaction other than the contract of insurance. A beneficiary who is the heir of the assured, thus, does not receive the sum insured by way of succession.
This Article also states expressly that a creditor of the assured has no rights in the sum insured. The creditor's right to invalidate the contract of life assurance is limited to the procedure referred to in the Article. The C.C.I. provides in Article 263 that creditors may protect their interest by an action known as "action Poulienne":

"Any creditor whose claim falls due and whose debtor has entered into an act of alienation prejudicial to him, may demand that such an act be declared void so far as he is concerned, if such act has either diminished his (the debtor's) rights or increased his obligations, and has in consequence resulted in, or increased, his insolvency, when the conditions provided for in the following article (1) are all present."

iii. Forfeiture of the Rights of the Beneficiary

In life assurance, the event insured against is, however, the death of a person, either of the assured or of some other person. The C.C.I. provides in Article 994:

"If the beneficiary in life assurance is other than the person whose life is insured, the insurer is released from his obligation if the person for whose benefit the insurance is taken out deliberately causes the death of the life insured or if the death occurs at his instigation. In the case of attempted homicide, the assured shall have the right to substitute another person for the beneficiary even if the beneficiary has already accepted the insurance benefit stipulated in his favour."

This Article is based on Article 757 of the Egyptian Civil Code, which is similar to Article 723 of the Syrian Civil Code and to Article 757 of the Libyan Civil Code. Apart from the last section, these Articles have their origin in Article 170 of the German Law of Insurance, 1908, while the last section is similar to the last provision of Article 79 of the French Law of Insurance, 1930. The Iraqi Article differs, however, from the corresponding Articles in the other Codes in that the latter distinguishes between death caused by the assured's act and that caused by the beneficiary's

(1) Art. 264.
act. In the first case the insurer is released from his obligation and in the second the beneficiary forfeits his rights in the policy of insurance. Article 1015 of the Lebanese Code of Obligations and Contracts, and Article 70 of the French Law of Insurance provide that the sum insured is payable to the heirs of the *de cujus* and that at least three years must elapse from the time of formation of the contract until the heirs are entitled to the sum insured. Under the Iraqi law, if the beneficiary forfeits his rights in the sum insured, the general rule applies and the sum insured becomes part of the property of the assured and consequently, passes to his legal representative. The period of three years mentioned in the French and Lebanese Articles is a matter of procedure which does not apply in Iraq. The last section of clause 9 of the standard form policy provides:

"If the insured dies as the result of a voluntary act by the beneficiary, the latter shall lose his right to the sum insured, which shall nevertheless remain payable to other beneficiaries or to those entitled to claim it."

The rights of the other beneficiaries are not derogated from by Article 994 since the C.C.I. permits parties to a contract to stipulate for a provision which is contrary to the provisions of the Code, provided that the rights of the beneficiary are not reduced.

The last section of Article 994 is not well drafted for it should make provision for the rights of the *cestui que vie* in the event of an attempt on his life. The article gives the assured the right to change the beneficiary, but this right should be reserved to the person whose life is insured, who should be entitled to withdraw his consent to the policy or to compel the assured to change the nomination of the beneficiary.

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(1) Art. 994, see p.185.
(2) See p.198.
3. Comparative Problems

Although the idea of insuring the life of a human being was recognised in some parts of southern Europe as early as the 16th century, life assurance in its systematic and modern form emerged in England. Although in the case of marine insurance the judges of the English courts did not hesitate to incorporate foreign rules into English law, in the case of life assurance the English rules had little influence on foreign systems. Probably this was a result of the effect of the Common Law rules on the idea of life assurance on the one hand and of the crystallisation of the doctrines of Equity on the other, and this was not affected by the reorganisation of the Courts in 1873. It was suggested at the beginning of this century that "it might be advisable to deal with life assurance separately...from other branches of insurance where other circumstances and conditions prevail." The fields in which the law of life assurance in England has not been accepted elsewhere are, generally speaking, those concerning insurable interest and the rights of the beneficiary in the policy.

For example, in the United States, where the rules of English law are referred to by American courts, they (i.e. the courts) "are not as a rule hemmed in by restrictive provisions of the English statutes governing insurable interest; and by assuming a strong position upon the principle of public policy, they have paved the way for a scientific treatment of the subject." The American courts no longer insist that insurable interest must be pecuniary. A "moral" interest is, thus, included and is supported

by the rule requiring the assured to obtain the approval of the cestui
que vie.

In France, the doctrine of insurable interest has been rejected. It has been stated that life assurance "consists of the establishment of capital on an aleatory basis." Since 1818 it has been established that the validity of a contract of life assurance over the life of a third party depends on the consent of the cestui que vie.

In both the United States and France, the contract of life assurance confers on the person who is nominated as a beneficiary a right to claim the proceeds of the policy. A departure from the Common Law doctrine of "privity of contract" has taken place in Canada. Despite the recognition that English Common Law is the general law in the Common Law Provinces of Canada, the Uniform Life Assurance Act, 1924, was amended in 1946 in response to public demand. This amendment has effect in all the Common Law Provinces (i.e. excluding the province of Quebec, where the Civil Law system has prevailed). Before 1946, only a limited class of beneficiaries, ascendants, descendants and spouses, had statutory protection, but in 1946 all restrictions by which a vested right was conferred on only a limited group of beneficiaries were removed, and any beneficiary now has the right to enforce, for his own benefit, payment of the proceeds of the policy.

The idea of pecuniary interest has generally been found to be inconsistent with the non-indemnity nature of life assurance. An American

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(2) Planiol & Ripert, op.cit., vol.ii, part 2, p.259; see also Picard et Besson, op.cit., vol.iii, p.3.
(3) Picard et Besson, Ibid., p.145.
(6) Art.64 of the Law of Insurance, 1930.
writer states:

"The English courts, obedient to a statute enacted 1774 have halfheartedly treated the life policy as an indemnity contract. Thus, it has been held that a policyholder who has collected the full amount of his legitimate pecuniary loss, caused by the death insured against, from one insurer, cannot collect on another policy issued by a different insurer. The English courts purport to require a strictly pecuniary interest, but their decision is not consistent with any one theory." (1)

In Scotland, although it has been said that "the Act of 1774 appears to apply to Scotland", the Court of Session has declined to accept a restricted interpretation of the pecuniary nature of insurable interest. Another reservation introduced by the Scottish Courts is that the Act of 1774 "merely furnished a defence to the insuring company against a claim on the policy, but...if the company waive the defence, the question who is entitled to the proceeds of the policy falls to be determined as if the statute did not exist."

There are two main fields in which comparison should be made between the provisions relating to life assurance in Iraq and those in Britain, namely (a) insurable interest, and (b) the right of the beneficiary.

A. Insurable Interest

It is necessary for the validity of every contract of insurance in Britain that the assured possess an interest in the subject insured and that the occurrence of the event insured against will cause a loss or prejudice of some kind to the assured. Insurable interest, in order to prevent undesirable gaming and wagering, is a statutory requirement. It is, thus, necessary for the validity of the contract of life assurance that the assured

(2) Bell's Principles, pp.202-3; Griffiths v. Fleming(1908)1K.B.809,822.
(3) Wight v. Bryden(1899)1F.710.
(5) See p.107/ for the Iraqi law.
should have an insurable interest at the inception of the contract and that this should be a pecuniary interest. The Life Assurance Act, 1774, provides:

"Whereas it hath been found by Experience, that the making Insurance on Lives or other Events, wherein the Assured shall have no interest, hath introduced a mischievous Kind of Gaming: For Remedy whereof, be it enacted...that from and after the passing of this Act, no Insurance shall be made by any Person or Persons, Bodies Politic or Corporate, on the Life or Lives of any Person or Persons or any other Event or Events whatsoever, wherein the Person or Persons for whose Use, Benefit, or on whose Account such Policy or Policies shall be made, shall have no Interest, or by way of Gaming or Wagering; and that every Assurance made contrary to the true Intent and Meaning hereof, shall be null and void, to all Interests and Purposes whatsoever.

2. ...that it shall not be lawful to make any Policy or Policies on the Life or Lives of any Person or Persons or other Event or Events, without inserting in such Policy or Policies the Person or Persons Name or Names interest-ed therein, or for whose Use, Benefit, or on whose Account, such Policy is so made or underwrote.

3. ...that in all Cases when the Insured hath Interest in such Life or Lives or Event or Events, no greater sum shall be recovered or received from the Insurer or Insurers than the Amount or Value of the Interest of the Insured in such Life or Lives, or other Event or Events.

4. Provided always, that nothing herein contained shall ex-tend or be construed to extend to Insurances bona fide made by any Person or Persons, on Ships, Goods or Merchandises; but every such Insurance shall be as valid and effectual in the Law, as if this Act had not been made."

Insurable interest in the contract of life assurance is required by statute to exist at the time of constitution of the policy. It has been (1) decided that life assurance contract is not one of indemnity and that although it is important for the interest to exist at the inception of

(1) Dalby v. India and Life Assurance Co. (1854) 15C.B.,365. "It is sub-mitted that the Dalby decision, though reaching a desirable result, is a strained construction of the language of the statute. It is unfortun-ate, to say the least, whenever a statute produces diametrically op-posite effects as applied to two subjects governed by the same lan-guage." Patterson, Insurable Interest in Life, C.L.R., p.394. His author-ity is Aggs in Chitty's Statutes, vol.6, p.299, where it is said, "This section is construed differently in the case of life insurances and fire insurances."
the contract, it is not necessary for the policyholder to prove his inter-
est at the time when death or maturity of the policy occurs.

As the insurable interest must be pecuniary, it may be asked whether
a person can have an interest in his own life since the assured will be
unable to receive the sum insured when he is dead. The question whether
the assured suffers a pecuniary loss on his death may be asked, despite
what the Act says. It has been suggested that a person "has a good in-
surably interest in his life", and also that "a person's insurable inter-
est in his own life is considered to be sufficient to enable his personal
representative" to receive the sum insured. According to another opinion
this sort of life assurance is excluded from the purview of the Act, and
it is presumed that a person has a presumptive insurable interest in his
own life without necessity of proving it.

A question which also arises from the pecuniary nature of insurable
interest is whether a person has an insurable interest in the lives of
his relatives.

By the Married Women's Property Act, 1882, a married woman is presumed
to have an insurable interest in the life of her husband. S.1 provides:

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(1) Chitty's Statutes, 6th edn., vol. vi, p. 299n(a).
(2) Patterson, E.W. states: "Judicial opinions have sometimes explained the
rule by saying that every man has an insurable interest in his own life.
The present writer and some others (Vance, W.R.) feel that this expres-
sion is inaccurate since a man does not suffer loss by his own death or
at least does not survive to claim indemnity for that loss. Hence it
seems better to say that the question of insurable interest is immater-
ial where the cestui que vie procures the policy." The Essentials of
the Law of Insurance, p. 186.
(3) Housman, Life Assurance, p. 18.
(7) In Iraq a married woman has always, under Islamic Law, had independent
right of property in the same way as unmarried woman.
"A married woman may effect a policy upon her own life or the life of her husband for her own benefit; and the same and all benefit thereof shall enure accordingly." In Scotland the same rule appears in Section 1 of the Married Women's Policies of Assurance (Scotland) Act, 1880, which provides:

"A married woman may effect a policy of assurance on her own life, or on the life of her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors and assignees excluding the jus maritum and right of administration of her husband and shall be assignable by her either inter vivos or mortis causa without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman."

It has been held that the insurable interest of a wife in her husband's life is presumed without necessity of proof. Similarly, a husband's interest in the life of his wife need not be pecuniary because it is impossible to estimate its pecuniary value.

It has been decided in the English Courts that a father and mother have no insurable interest in the life of their child unless they have a pecuniary interest in the continuation of its life, but in Scotland it is well settled that parents have an insurable interest in the life of their child.

Children in England, unless they are entitled to be supported by their parents, have no insurable interest in the lives of their parents, and in Scotland a child has an insurable interest in the lives of his parents pro-

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(1) Read v. Royal Exchange (1795) Peak Ad. Cas. 70.
vided that he is entitled to claim aliment from them.

So far as other relatives are concerned mere relationship with a person is not sufficient to produce an insurable interest in the continuance of his life, but if it can be proved that they have some pecuniary interest in the life of the person concerned, his relatives may acquire insurance for his life.

i. Nullity on the Ground of Lack of Insurable Interest

S.1 of the 1774 Act places a contract of life assurance where there is no insurable interest on the same footing as gaming and wagering contracts. Such a contract of insurance is void from its inception, i.e. there is no contract. Moreover, the Gaming Act, 1845, section 18 provides: "...no suit shall be brought...for recovering any sum of money...alleged to be won, or which shall have been deposited first in the hand of any person..." For the same reason, the premiums paid under a void contract of life assurance are not recoverable. This rule has been established in many cases and is based on the principle that ignorance of the law provides no defence. The same principle applies in Scots law.

The rule that premiums are not recoverable is sometimes inconsistent with the nature of the contract of life assurance for three reasons. Firstly, the nullity of the contract from its inception means that the insurer's retention of the premium is without legal justification. Secondly, the insurer, who is in a stronger position than the assured, should not be able to profit from the assured's mistaken belief that he has an insurable interest in the life insured. Thirdly, the motive behind life assurance

(2) See p.217.
(3) Macdillivray, Insurance, vol.ii, p.1041: see the cases there mentioned.
(4) Gow, Mercantile Law of Scotland, p.337.
is not only speculation on the life of a human being but also the investment of capital with the insurer. Some of these difficulties are overcome by allowing the assured to recover the premiums if the insurer induced him, by fraud, to take out an illegal policy. A further protection is given to the assured by Section 5(1) of the Industrial Assurance Act, 1923, which provides in relation to illegal policies:

"Where any such policy has been issued, the society or company shall...be liable to the owner of the policy...a sum equal to the amount of the premium paid, unless it is proved that owing to any false representation on the part of the proposer, the society or company did not know that the policy was illegal or beyond their legal power."

B. The Beneficiary

i. English Common Law and the Rights of the Beneficiary under the Contract of Life Assurance

The general rule of the Common Law is that a person who is not a party to an agreement cannot acquire any rights allowing him to sue under the contract. The inconveniences of this rule of "privity of contract" have been considerably mitigated by Courts of Equity in applying the theory of trust. However, the rigorousness of the doctrine of trusts and the tenacious adherence of the Common Law judges to the principle of privity of contract have created injustices and many difficulties, particularly in the field of life assurance. What has been developed in other legal systems by way of recognising the right of a beneficiary to the proceeds of a policy of life assurance has not been accepted by the English courts.

In practice a policy of life assurance includes a section under which the proceeds may be received by some third party nominated in the policy. The courts, however, do not give such a person any protection against

(3) Atiyah, Contract, p. 195.
(4) Sixth Interim Report of Law Revision Committee in England.
creditors of the assured or the executor or administrator of his estate unless the assured appoints himself as a trustee and the person who is to receive the insurance money becomes the cestui que trust. This is normally required legal advice, and there is the expense of executing a trust deed including stamp duty. The failure of the courts to implement the assured’s wishes by protecting the third party’s right caused Parliament to pass legislation under which the assured’s spouse and children are permitted to receive the proceeds and are subject to statutory protection. Section 11 of the Married Women’s Property Act, 1882, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935 provides:

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premium paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under his or her policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representative, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterward, there shall be no trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trust-

(1) It is impracticable to require a layman to consult a lawyer before entering into an agreement of life assurance.
(2) Cousins v. Sun Life Assurance Soc. (1883) Ch. 122, 133.
(4) This Act replaced the earlier legislation on this subject enacted in 1870.
ees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part."

For the provisions of Section 11 of the Married Women's Property Act, 1882, to apply the policy must state in explicit terms that the assured intends to create a trust in favour of a third party. As a result almost every standard form policy provides the following condition: "This Policy is effected under the Married Woman's Property Act, 1882, and the trustee or trustees for the time being hereof shall hold this policy and the monies assured hereunder in trust for..."

Although the Statute was intended to assist third party beneficiaries, the result of various cases and extensive discussion by many writers, has been to restrict the interpretation of the provisions and to limit their effect. These problems have been realised by the Law Revision Committee, and in its Sixth Interim Report it made the following recommendations:

"46 - ...In our view it is desirable that the third party should become privy to the contract, his position being more analogous to that of an assignee of a contractual right than to that of a cestui que trust.

48 - ...We are of the opinion that the provisions of section 11 of the Married Women's Property Act, 1882, should be extended to all life, endowment and education policies in which a particular beneficiary is named. It is true that anyone who knows the law can attain this same result by creating an express trust, but, as it is not the practice of the average man to consult his solicitor before taking out an insurance policy, we feel that it is desirable to make a statutory provision on this subject."

(1) Elman, op.cit., p.455.
(3) pp.25-30.
Unfortunately, these recommendations have not yet been enacted and, unless a policy is taken out for the benefit of a person designated by the statutory provisions, i.e. the spouse and children of the assured, it is still subject to the existing rules. Although other persons are entitled to receive the insurance money, their rights are contingent, and they cannot sue for it. Their rights are protected, neither by the courts nor by statute, against any claim by the executor or the administrator of the estate of the assured, or by the assured himself who has the right to name another beneficiary. These few difficulties can, however, be met by assigning the policy to the beneficiary or by disposing of the proceeds of the policy by will.

None the less, people do not always take the legal steps necessary to implement their intentions, and it is frequently hard to penalise third parties for this failure, especially where the intention is in fact clear enough.

ii. Scots Law and the Rights of the Beneficiary

In the Report of the Law Revision Committee, it is admitted that the doctrine that a contract should not confer rights on a person who is not a party to it "has virtually been abandoned in the law of Scotland from which the expression *jus quae situm tertio* is derived." Where, a contract constituted primarily between two parties contains a stipulation by which a third party who is a stranger to the contract is nominated to receive the benefit of the contract, this person acquires a legally enforceable right. The rights of a third party in a contract stipulated for his benefit are explained in a dictum by Stair although the House of Lords, as a

(3) Institute of the Law of Scotland, I.X.5.
result of Lord Dunedin's interpretation, have apparently modified its meaning considerably. Stair's dictum to the effect that the third party acquires an irrevocable right must now be understood as meaning that "irrevocability is a condition and not a consequence." This conclusion has been criticised by some Scottish writers on the ground that what was meant by Stair is not what the House of Lords decided but rather that "when the third party had acquired a right that right was irrevocable," as from the constitution of the contract.

It seems that the decision of the House of Lords puts the Scottish rule halfway between the two leading theories on this subject — the theory of "offer" on the one hand and the theory of droit propre on the other. According to the first theory, the stipulation in favour of a third party consists of an "offer" which is irrevocable after acceptance by the third party, while according to the second theory, the third party acquires a direct and immediate right in the contract at the time of constitution of the stipulation in his favour. Both theories are impractical, particularly in the field of insurance. Under the French Civil Code, the theory of offer has been modified and the consent of the third party to the contract stipulated in his favour is required, while under the German Civil Code the question whether the third party acquires an immediate or forthwith right...

(1) Carmichael's case.
(2) Ibid., p.200.
(3) Smith, T.B. A Short Commentary on the Law of Scotland, p.779; Smith, T. G. Studies Critical and Comparative, p.183 et seq; Cameron, J.T. Jus Quaesitum Tertio, 1961, p.103-118.
(4) Cameron, p.109.
(6) It is sometimes called a "collective theory", see Bold, op. cit., p.50.
(9) See p.215.
(10) Articles 328-335.
is left to the court to decide according to the circumstances. Under Scots law, the "consent" or "acceptance" of the third party is not necessary. However, the third party acquires the rights stipulated in his favour only when the contract has been intimated to him either by delivery or registration or on the death of either party to the contract.

The idea of an irrevocable right vested in a third party is inconsistent with the nature of insurance. Performance of the contract of insurance depends on the occurrence of certain future events and to confer an irrevocable right on a person who is a stranger to the contract, therefore, means giving him privileges which the original parties do not have. It is very important to give a third party a right to sue and claim the benefit of the contract, but to confer on him an absolute privilege before the maturity of the contract is something else. In practice most life policies contain a stipulation that the assured reserves the right to revoke the beneficiary's nomination and if the beneficiary were to be given an irrevocable right at the inception of the contract, such a stipulation would be contrary to law and, consequently, would have to be annulled. In other words, the assured would not be able to reserve the right to revoke the third party's nomination. Lord Dunedin interpreting Stair's dictum avoids such an impractical result and also reduces the gap between Scots law and other systems.

Unless the contract is intimated to the third party either actually or constructively, the stipulation made in his favour cannot be enforced against the assured's trustee, his estate or his creditors. There is no

(1) Section 2, Art. 328.
(3) Since 1907 the idea of the irrevocable right of the beneficiary has been abandoned in the U.S.A. However, every policy provides for the assured's right to change the beneficiary. This clause was introduced as a result of public pressure and has been recognised judicially in the U.S.A., see Brake, S.S., op. cit., pp. 7-11.
(4) Gow, Mercantile Law of Scotland, p. 349.
indefeasible right vested in the beneficiary merely because the policy (1) contains his name, but on the occurrence of certain events this right does become indefensible. It should be noted that even when intimation to the third party takes place after the death of the stipulator, it suffices to give him an irrevocable right.

By statute protection is given to the beneficiary in the case of a policy of life assurance made in favour of the wife and children of the assured. An enforceable right is given to the beneficiary, i.e. the wife and the children, and the insurance money forms no part of the estate of the assured, the husband. Moreover, a trust is created irrevocably without any need for intimation to the beneficiary. These provisions are contained in Section 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, provides:

"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency. And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be sufficient and effectual discharge to the assurance office. Provided always that if it shall be proved that the policy is effected and the premium thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof."

(1) Jarvie's Trustee v. Jarvie's Trustee(1887) 14R., per Lord McLaren, 413.
The following points should be noted:

1. The insurance must be effected by a married man; a widower or divor-pee is included. An unmarried man has the right to effect an insurance for the benefit of his future wife, but in this case the wife cannot enjoy the advantage of the trust unless it is intimated to her. A wife who has a right to effect an insurance for the benefit of her husband and children cannot create a trust in accordance with the above provision.

2. The trust is irrevocable unless the beneficiary and the assured agree together to surrender the policy, and the assured has, thus, no right to change the beneficiary. As the Act imposes no obligation on the assured to continue payment of the premium, there are three possible solutions if payments are stopped: (a) The policy may be surrendered by the assured and the beneficiary; (b) The amount of the sum insured may be reduced; (c) A lien may be taken over the policy to cover the premiums still due.

(1) Section 1 of the Married Women's Policies of Assurance (Scotland) Act, 1880.
CHAPTER II
THE CONTRACT OF INSURANCE AGAINST LIABILITY

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This is also known as third party liability insurance or public liability insurance although the Iraqi legislature prefers the term "against liability" on the basis that it is not liability itself but rather the claim for damages arising out of liability which is insured against. Such insurance is entered into primarily to secure the assured against any claim for compensation in respect of his liability when damage has been caused by him to another person or to his property. This sort of insurance provides the injured third party with security against any possibility of insolvency on the part of the person liable— the assured, and it is the injured party who is in fact the real beneficiary in this contract.

Insurance against liability is a contract of indemnity, the indemnity being limited to the actual damage done and not exceeding the amount of the sum insured. There is this restriction because the insurer's liability is accessory and depends on the assured's liability. The relationship between the assured and the insurer is contractual, whereas the assured's liability is much wider and is the result of his duty to avoid doing harm to anyone which is created by law for the protection of the public at large.

The subject will be considered in two sections: firstly, insurance against liability in general, and secondly, compulsory motor-car insurance.

SECTION I
Insurance Against Liability in General

This subject will be dealt with by considering firstly the nature of the risks insured against— the liability of the assured — and secondly the features peculiar to the contract.

1. Liability as the Risk Insured Against

Liability has been defined as the obligation of a person to rectify

(1) Art.1004 of the Civil Code of Iraq, see p. 243.
the damage caused to another by his act or by the act of persons or things dependent on him, whether the act is a breach of contract or a breach of duty towards the public in general. This is not, however, an exact definition for the expressions "obligations" and "rectify" which are used to describe liability are, in fact, consequences of liability.

The concept of liability cannot be separated from human activity and is a result of changes in living conditions arising from restrictions imposed on the freedom of the individual. Any person who enjoys the benefits of living within a society must be liable for any harm caused to others by his actions. Liability is a price he pays for social benefits and is based on the condition that he will do no harm to any other member of the society. This applies equally to contractual and delictual liability. In modern times the field of liability has increased rapidly. The development of economy and trade, the growth of an industrial society, the use of power driven machines for transport and other things, the practice of professions, the use of things whether animal or material and all the activities of people within society have provided sources of liability.

(2)
A. Liability in the Civil Code of Iraq

In the C.C.I., three kinds of liability are distinguished: contractual liability, i.e. liability for breach of contract; civil liability, i.e. responsabilité délictuelle; and criminal liability. This last is not dealt with in this study.

(2) The C.C.I. employs the term responsabilité which has a wider sense than the term "liability". The equivalent of the latter means in Arabic only "debt" or "obligation".
(3) Articles 168-176 of the Civil Code of Iraq.
(4) Articles 186-232, ibid.
(5) Art.206 of the C.C.I.
i. Contractual Liability

A party to a contract is responsible for the fulfillment of his contractual obligations, and he must perform these without interfering with the rights of the other party or of any other person. When the other party or a third party sustains loss through his failure to fulfill his obligations, he is in breach of the terms of the contract and is liable to make good the loss.

Sometimes the loss if caused by a direct breach of contract and sometimes by an indirect breach, as where one party to the contract commits a delict in the performance of the contract for which the other is liable. In all cases of contractual liability a party is exonerated from liability if it is proved that the injured party sustained loss as a result either of (1) force majeure, fortuitous event or of his own wrongful act. Parties cannot make any kind of stipulation to escape liability as is illustrated very clearly in the case contracts of carriage. The only safeguard to an injured party is if the person liable is insured in respect of his liability and in this case there can be no question of the insurer not paying even in the case of force majeure, etc.

a) Damage sustained by a Party to the Contract

Statutory provisions in Iraq provide many examples of cases in which a breach of contract may result in liability on the part of the party in breach: 1) the liability of carriers of things or of persons towards the owner of the things or to the persons; 2) the liability of employers in respect of injuries to employees; 3) the liability of a tenant in respect

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(1) Art.168, ibid.
(2) Art.315 of the Commercial Code of Iraq.
(3) Articles 303-361, ibid.
(4) Art.913 of the C.C.I.
of damage occurring to rented property; 4) the liability of a pledgee in respect of the safe keeping of the hypothecated property; 5) the obligation of a contractor to perform the terms of the contract; 6) the obligation of a borrower in a contract of loan for use to use the property lent; 7) the liability of a paid depositary in respect of the safe keeping of the property entrusted to him. In all the above cases and in other similar cases one contracting party is under a liability towards the other party to the contract and if the former acts wrongfully or negligently so as to effect the performance of the contract, he will be liable for any loss caused. The remedy in such a case may be either agreed by the parties in the contract or left to the courts to decide.

In some cases there is a presumption of liability. Thus, in contracts for carriage of goods or persons the carriers are presumed by law to be at fault unless they can prove that the loss is due to some cause which they could not prevent such as force majeure or a fortuitous event beyond his control, inherent vice in the goods carried, or the actions of the consignee or consignor or of someone acting according to their instructions.

b) Damage Sustained by a Third Party During the Course of the Contract

This kind of liability is not in fact contractual but results from a delict arising out of performance of the contract. The person liable is the person who benefits from the contract even if the damage is not caused by any action of his. In such a case the contracting parties usually agree

(1) Articles 760-778, ibid.
(2) Art.1338, ibid.; Art.7 of the Ottoman Law of Insurance., see p.106.
(3) Articles 866-872 of the C.C.I.
(4) Articles 851-860, ibid.; Art.7 of the O.L.I.
(6) Art.170, ibid.
(8) Art.360, ibid.
that the person actually causing the loss shall be liable for his acting.

c) Contracts of Guarantee and Contractual Liability

The performance of the obligations contained therein is the main object of every contract. Some contracts are not performed immediately at the time of their constitution but are continuing contracts and in such cases the parties must be able to perform their obligations throughout the period of the contract. The financial capacity of the contracting parties must remain sound, and since insolvency on the part of a debtor is frequent in practice, the party who fears that the insolvency of the other party may prevent performance of the contract may ask him to provide security. This security takes the form of real or personal guarantees.

The contract of guarantee or surety is a protection for the creditor against the insolvency of his debtor. It may take the form either of a guarantee by a person who binds himself with the debtor to secure performance of the contract or of a right in security over property of the debtor. In the C.C.I. Articles 1008-1013 deal with personal guarantees and Articles 1285-1320 with real securities. Guarantees may take many forms, but personal guarantees or the deposit of a sum of money in a bank to obtain a "bank caution" are the most common in Iraq. Both forms cause difficulties both economic and practical, e.g. it is not easy to find a person willing gratuitously to undertake a person guarantee and, in the case of a bank caution, the depositing of money in a bank in security leads to the freezing of this money.

It is, therefore, desirable to find another means of securing compensation for the injured party in the event of a failure to perform the contract, preferably one which will also assist the national economy. Such a means can be found in the contract of insurance which is a contract of
security but has no relation to contracts of guarantee, real or personal. It is more generally useful than these because all who are insured share the losses which are incurred instead of each bearing his whole individual loss.

There are, however, difficulties in establishing this fact in Iraq since the usefulness of insurance has yet to be accepted by the people who must understand that it does not encourage wrongdoing but does provide security against disasters by distributing the risks among many persons capable of bearing them. The need for the introduction of this type of insurance has become particularly urgent since the nationalisation of insurance companies and the transfer of their assets to the public sector, but it cannot be achieved until accurate statistics are available by use of which the speculation involved in the acceptance of risks can be minimised. In time, however, this can be realised, and the solution is at present in the hands of parties to contracts who can regulate their agreements so as gradually to reduce the difficulties.

ii. Delictual Liability

The law of delictual liability is concerned with how a person's actions can give rise to liability and what remedy should follow. The C.C.I. requires that the action must be either "transgressional" or "intentional". If damage is caused directly or indirectly by the action either to the property of another individual or to his person, he is entitled to a legal remedy. Delictual liability may be in respect of either one's own actions (personal liability) or in respect of the actions of others (vicarious liability). Examples of the latter are liability for the actions of children,

(1) Art.186.
(2) Articles 182-203.
(3) Articles 218-232.
grandchildren under a grandfather's guardianship, employees, etc. Liability may also arise from the use of animals or the use of property.

The C.C.I. adopts remarkable approach to this subject attempting on the one hand to maintain the principles of liability of Islamic Law and on the other to combine these with the modern notions of liability contained in (1) the French and German Civil Codes. The Iraqi Code is less detailed than the German Code and more so than the French Code although it, nevertheless, provides only a rudimentary outline of the law.

Muslim jurists have for long been familiar with principles of liability based on what is known to them as "unlawful acts". They do not use the term "fault" or "wrong". Although Muslim jurists do not subscribe to any all-embracing theory, but deal with each case according to its individual merits, certain principles in the form of maxims have been laid down. These are:

1. No liability lies on the person who is the indirect cause of an act unless he has acted intentionally.
2. Liability lies on the direct author of an act even though he may have acted unintentionally...
3. Injury may not be met by injury.
4. An injury cannot be removed by the commission of a similar injury."

Out of these maxims and a vast number of legal opinions based on questions raised, some modern writers have formulated a comprehensive theory of liability under Islamic Law.

Although when describing the principles of liability in the C.C.I. the legislature uses Islamic legal terms, the traditional doctrine of faute does appear, particularly, in the field of damage to property. The term

(1) Articles 1382-1386 of the French Civil Code.
(2) Articles 823-853 of the German Civil Code.
(5) Articles 19,25, Ottoman Civil Code, trans. Hooper, C.
(7) Art.186 of the C.C.I.
used in the Iraqi Code, "transgressional action", corresponds to the term faute used by French legal writers - a transgressional action which results in direct or indirect injury is the liability of the person performing the action. In the fields of bodily injury, vicarious liability and liability arising from the use of things (animals, property), however, the Iraqi legislature has employed the theory of risque côte, i.e. the law presumes liability on the part of the person who undertook the risk, and there is no need to prove that the action was transgressional but only that damage has occurred. The Iraqi Code also provides a remedy in the case of "moral injury" although this is recognised by Muslim jurists only if there is actual physical pain.

B. Other Systems

From this brief examination of the concept of liability in Iraq, it should be clear that it is similar to that accepted in various other countries. Such differences as exist are not of importance since such a term as "liability" has the same implications under all systems (i.e. the provision of a remedy to a person who has sustained damage) whatever term may be used in the legal system concerned. This results from the similarity of human activities in all countries and differences between the systems do not concern remedies but only the methods of providing them.

i. Scots Law

In the Scottish legal system the term "liability" is in common use. An injured person is legally entitled to reparation for any violation of

(1) Mahmassani, Ibid., p.191.
(2) Articles 204-217 of the C.C.I.
(3) Articles 218-222, ibid.
(4) Articles 221-226, ibid.
(5) Savatier, Responsibilité, pp.349-358.
(6) Art.205, ibid.
his real or personal rights, and liability may arise either from breach of contract, from breach of obligations arising *ex lege* or from the wrongful actions of a person.

a) **Liability Arising from Breach of Contract**

The obligation of all parties in every contract is to fulfil its terms. In the event of a breach of contract the aggrieved party is entitled to claim damages, and the party in breach is liable for the consequences of his failure to perform his obligation. There is no need to prove loss as the innocent party is entitled to damages if it is proved that the other party is responsible for the failure to perform his obligation.

b) **Liability for Breach of Obligations Arising Ex Lege**

Obligations arising *ex lege* are those which are implied by law. Breach of them must be distinguished from breach of contract on the one hand and breach of duty arising from fault on the other. Obligations *ex lege* are classified as: (a) quasi-contract, and (b) strict liability without personal fault. Quasi-contract "has long been in use...to designate those equitable or obediential obligations which redress unjust enrichment. These resemble contractual obligations only in that the duty imposed under them is for payment or performance, but they differ essentially from contract in that the quasi-contractual tie arises from force of law and not from consent." Strict liability without fault arises when a person is presumed by law to be absolutely liable, irrespective of fault.

c) **Liability Arising from the Wrongful Actions of a Person**

This is known as delictual liability. "There are three essential basic principles in the Scottish law of delict. First, the generality of the
right of reparation for unlawful harm or loss (damnum) must be stressed. Secondly, the pursuer must establish fault on the part of the defender. Thirdly, there must be a causative link between the harm suffered and the fault of which the defender can be accused. Fault is the fundamental element in delictual liability since "there is no liability without fault" and this may be either dolus (intentional harm) or culpa (in the sense of negligence).

ii. English Common Law

English legal writers employ the term "liability" to describe the relationship between the actions of a person and the remedies which may be given to rectify any damage caused by those actions. Liability in English Common Law is either criminal or civil, the former involving the punishment of the wrongdoer because of his breach of law, and the latter giving rise to an action of damages for breach of duty. Criminal liability or, as it is sometimes called "penal liability", forms no part of this study. Civil liability, also known as "remedial liability" is of two kinds: either contractual liability arising from breach of contract or liability in tort.

In the case of breach of contract any harm done is presumed to be caused by the party who fails to perform his contractual obligations, and proof of the non-performance of the contract may give the innocent party the right to end it unilaterally. There is no need to prove that any damage or loss has been caused since breach of contract is sufficient in itself to give rise to a claim for damages.

In other cases of civil liability, wrong is generally speaking the fundamental element, and the wrongful act must produce loss or damage which

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(1) Smith, T.B. Ibid., p. 653.
(2) Ibid., pp. 657-683.
(3) Salmond, Jurisprudence, p. 494.
(4) Atiyah, Contract, p. 213.
need not necessarily be severe or material. In the case of strict liability, however, wrong is presumed if an infringement of the private rights of a person has occurred, irrespective of the existence of either intentional wrongdoing or negligence. Tort is merely one particular class of civil wrong for which the remedy is an action for damages. It is necessary to prove that the actual damage which may be to a person or to his property has been caused by the wrongful act of the tortfeasor.

C. Conclusion

In general, liability is the basis of the remedy which a person has in respect of injury which he has sustained whether the injury consists of damage to property or is physical or moral. The doctrines of faute and risque cré, as applied in the Civil Code of Iraq, give the same result as the principles of fault, wrong, and strict liability in both Scots and English law. The principles of liability can be more easily assimilated when it is realised that the differences are only a matter of historical development resulting in the use of different terminology.

2. Liability and Insurance

The only remedy to which liability gives rise is reparation for the harm done, whether the harm consists of actual suffering or only moral damage, and whether it results from the breach of a contractual obligation or from a delictual act. However, the rapid changes in modern communities, the spread of industrialism, and increasing mechanisation have all served to disturb the balance between the financial capacity of the individual and his obligations, and this has meant that not all wrongs can easily be re-

(1) Salmond, op.cit., pp.396,433.
(2) Jenk's English Civil Law, vol.1, p.276.
(3) Lawson,F.H. Negligence in the Civil Law, p.33; Friedmann,W. Law in Changing Society, p.126.
medied. The increase of liabilities has reduced the ability of the individual to obtain a remedy in every case and an innocent person who has suffered an injury may be unable to obtain reparation.

A new means of dealing with these problems has now appeared in the form of insurance. Insurance to cover liability is not, as has been said ad dei quendam invitant, but a protection for an innocent party against the risk of his not obtaining reparation. The burden of payment is distributed among many persons who are exposed to similar risks by means of the insurance companies. Sometimes damage cannot be prevented or foreseen since a person is never sure whether he may harm another, but in modern society the occurrence of injury to some persons is predictable and the injured person should be protected, especially when the injury is unintentional. This protection is furnished by virtue of law in the cases where insurance is made compulsory, and in such cases the law presumes automatically that there was fault or negligence on the part of the person enjoying the particular benefit of modern society (e.g. a motor vehicle). The burden of paying compensation is, therefore, distributed widely.

A. The Various Forms of Insurance Against Liability

There is no limit to the number of forms which this contract may take. It exists whenever a person who may be obliged to pay damages can insure against this liability. As only civil liability is covered, it is not possible for someone to insure against the possibility of being fined. A fine is a deterrent and is meant to punish, not to compensate.

A simple method of classifying insurance against liability is according to the risks insured against. These risks arise from two main sources:

(1) Fréjedmann, W. op. cit., p. 129.
(2) Pothier, J. Traite du Contrat d'Assurance, 1810, p. 105; Emerigon's comment on liability insurance was - "It is evident that I cannot validly agree with anyone that he shall charge himself with faults that I shall commit." Insurance, 290.
(3) See compulsory insurance, p. 251.
(a) contractual liability, and (b) delictual liability, which includes professional negligence, accident, and the use of mechanical devices.

B. The Features of the Contract

The contract of insurance against liability is a contract of indemnity, but the indemnity does not cover damage to the assured or his property. For the assured it is merely a protection against any claim arising out of his liability to a third party, whether contractual or delictual. The contract is, thus, negative in character as the assured suffers no actual harm to his interest. The payment of compensation as reparation for another's injury is not an injury to the assured himself but merely a duty or obligation towards society. It is quite competent to include insurance against liability in the same policy as insurance against damage to one's own property or person, as in comprehensive motor vehicle policies, but such a policy does, of course, contain two quite separate contracts of insurance.

The risk insured against in insurance against liability is not liability itself nor injury but a claim for damages. There is a potential risk in the fact of liability but no actual risk until a claim for damages has been made. Thus, if it is probable that a claim for damage will be brought, it is probable that the risk insured against will be realised. The claim for damages is, thus, the main feature of the contract of insurance against liability, and the date of the claim is the proper date to consider as (1) the commencement of the insurer's obligation, whether the claim is made in (2) a formal action or extra-judicially. As has already been mentioned, it is possible for the assured's liability to come into existence before the

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(1) Art.1004 of the C.C.I., see p. 243.
(2) See p. 113.
date of the insurance contract, but if the contract is to apply, it is essential that the assured must not be either directly or indirectly aware of a claim for damages.

C. The Effect of the Contract

In the contract of insurance against liability there are three relationships: (a) the relationship between the assured and the insurer; (b) the relationship between the insurer and the injured party; (c) the relationship between the insurer and the person who causes the damage (if he is not the assured).

i. The Relationship Between the Assured and the Insurer

Obedience to the rule of utmost good faith, the notification of changes (1) in circumstances, and the payment of the premium are the main obligations of the assured. In the case of the insurer, his liability to pay damages is limited to either the sum insured or the indemnity paid to the injured third party, whichever is the less. However, payment of the indemnity depends not on the fact of liability but on the claim for damages against the assured. Article 1004 of the C.C.I. provides:

"In the contract of insurance against liability, the obligations of the insurer do not come into effect unless the injured person brings a claim against the person who benefitted (2) from the occurrence of the event from which liability results."

This article is based on the draft of the Egyptian Civil Code but does not appear in the Egyptian Code or in the Syrian Civil Code. The Lebanese Code of Obligations and Contracts does not deal with this matter either. The Iraqi article corresponds to Article 50 of the French Law of Insurance, but the Iraqi version uses the term "beneficiary" instead of "assured". This seems to arise from a misunderstanding, the Iraqi provision having

(1) S.2, Art.7 of the O.L.I., see p.106.
(2) This phrase is preferred to "beneficiary", which is a literal translation.
intended this insurance to cover the acts of those for whose actions the assured is liable as well as those of the assured himself. In the case of liability no one can be said to obtain any benefit as the only principle is that a person who has suffered injury as a result of the activities of another is entitled to obtain reparation.

a) The Claim for Damages

This is the risk insured against. If the wrongdoer accepts liability with the intention of making fair and good the damage without any claim from the injured party, this is not a case of liability in the legal sense, but merely a gratuity or donation based on a moral obligation. If the injured party has no right of action against the assured, the insurer incurs no liability. A claim for damages may be either extra-judicial or judicial. In the case of an extra-judicial claim, as soon as the injured party intimates it, the assured must inform the insurer. The assured should not pay anything unless the insurer agrees, and if he pays without informing the insurer, he cannot recover his payment from the insurer. The usual procedure is for the assured to ask the insurer to deal with the matter but sometimes to shorten the procedure, the injured party may claim directly against the insurer. A judicial claim for damages may be made after the failure of an extra-judicial claim. Usually the judicial claim is directed against the assured as he is the person who was originally responsible for causing the damage. The insurer has, however, the right to support the assured in his defence of the action because it is in the insurer's interest that the injured party should fail in his action. The insurer may, moreover, insert a condition in the policy to the effect that the right of conducting the assured's defence should be transferred to him.

In neither type of claim may the assured forfeit his right to defend any action brought by the injured party nor may he directly acknowledge
the rights or claims of the injured party. He is allowed to state the facts of the case but not to admit liability unless the insurer has been informed of such admission and has approved it. These rules are based on two factors. The first depends on the doctrine of utmost good faith by which the assured must give the insurer information relating to events both before and after constitution of the contract. The second factor arises from the action for damages itself for if the assured withholds any facts from the insurer, the latter is unable to accept liability for payment of damages to the injured party.

Although the C.C.I. protects the assured and the beneficiary by providing that any stipulation in a contract of insurance by which their rights are reduced is null and void. Insurance against liability is excluded from this provision under Article 1000 of the C.C.I., which provides:

"The parties may agree in their contract to release the insurer from his obligations if the person who benefits from the insurance without the approval of the insurer pays the injured party compensation or admits his liability. But this agreement shall not have effect if the admission of this person is made only as to the material facts or if he verifies that he is not able to refuse payment of damages or admits the rights of the injured person without committing an obvious injustice."

This article is based on the draft of the Egyptian Civil Code but is not codified in the Egyptian and Syrian Codes or in the Lebanese Code of Obligations and Contracts. The first part of the article corresponds to section 1 of Article 52 of the French Law of Insurance, and although the second part is similar in meaning to section 2 of the French article, it corresponds more nearly to section 2 of Article 154 of the German Law of Insurance.

b) Payment of the Expenses

The insurer must, according to the terms of the contract, pay the in-

(1) Art. 991, see p. 165.
demnity, but the question whether he must also pay the expenses of a judicial claim for damages may arise. A claim for damages by court action is the only alternative left to the injured party if there is a failure to reach an amicable settlement. Usually the failure of extra-judicial settlement is to the advantage of the insurer, and, therefore, if the victim succeeds in his court action, the insurer must pay the expenses entailed by the judicial procedure.

ii. The Relationship Between the Insurer and the Injured Party

There are two distinct legal rights arising from the assured's liability to redress the injured party's loss, both of which are enforceable by legal action. These are: (a) the right of the assured against the insurer arising from the contract of insurance, and (b) the right of the injured person against the assured arising from the latter's breach of duty, whether contractual or delictual. There is no direct relationship between the insurer and the injured person even though the insurer may himself be a party to the action for damages.

As has been pointed out before, insurance is intended to protect the assured against any damage to his interest. In the case of insurance against liability, however, there is no direct damage to the assured's interest for the assured himself suffers no harm, and the person who sustains injury is not the assured but another person. The assured, therefore, stipulates in the insurance either explicitly or implicitly a condition by which the injured party becomes the person who benefits directly from the contract. The injured party is not determined at the time of formation of the contract but only after the injury concerned has occurred. The benefit to the assured is, thus, negative, being merely a security, while it is the injured party who is entitled to compensation.
The injured party, whether the compensation is paid by the assured directly or by the insurer, is thus the real beneficiary of this contract of insurance, and it, therefore, follows that a legal relationship is created between the insurer and the injured party. The insurer is, thus, not permitted to pay the sum insured to the assured until the injured party has been compensated. Article 1006 of the C.C.I. provides: "The insurer cannot pay the agreed sum insured, in part or in full, to anyone other than the injured person so long as this person has not been compensated for the damage done to him." This article is based on the draft of the Egyptian Civil Code but does not appear in the final form of the Egyptian Code or in the Syrian Civil Code. The Lebanese Code of Obligations and Contracts does not mention it either. It corresponds to Article 53 of the French Law of Insurance, by which the injured party is given protection in the form of a legal right to the sum insured. He has as a result a right of direct legal action against the insurer in respect of the injury done him by the assured although any compensation which he may receive from the insurer will not, of course, exceed the amount of the sum insured.

The advantages to the injured party arising from this right of direct action are: (a) The injured party is not obliged to raise an action against the person liable or the assured. (b) The injured party by notifying the insurer of his claim, whether by judicial or extra-judicial means, secures that payment must be made to him directly. (c) The right of the injured party to bring a claim against the insurer is not covered by Article 990 (1) of the C.C.I. and is different from other rights arising from contracts

(1) See p.84.
of insurance. The injured party's right against the insurer is a result of the wrongdoer's liability and, hence, comes within Article 232 of the C.C.I., which refers to delictual liability and provides:

"A law-suit arising out of delictual liability cannot be raised after more than three years from the date of acknowledgement of the harm, and it lapses completely after fifteen years from the date of the occurrence of the harm."

A different period of prescription applies in the case of contractual liability. If the injured party fails to bring an action against the insurer within fifteen years from the date when performance of the obligation was due, his right is extinguished. There is a special provision in the case of contracts of carriage. In this case an action against the carrier must be raised within 180 days from the date of delivery if it is inside Iraq and within one year if it is outside the country. (d) The right of the injured party against the insurer transmits to his heirs who have the same right as the de cujus against the insurer.

a) Comparative Problems

In Scots Law, "if two parties enter into a contract to secure their own purposes, the mere fact that a third party is interested in the fulfilment of the obligations undertaken by one of them will not give him any title to sue." Where, however, the parties to the contract agree that a third party is to receive the benefit of the contract, the third party, if the contract is intimated to him has a title to sue. In liability insurance the position is somewhat different since the third party is unknown to the parties until the assured's liability arises. Professor Smith writes:

"The mere fact that the tertius has not been mentioned in the contract is not conclusive. On this point Gloag (5)

(1) Art.429 of the C.C.I.
(3) Gloag on Contract, p.237.
observes concisely, "Was their object, in entering into the contract, to secure a benefit to a third party or was the benefit which the fulfilment of the contract would secure to a third party merely the incidental result of an advantage which one or other of them proposed to secure to himself? Where no substantial benefit is reserved by the party stipulating for performance, the courts will quite readily construe the agreement as intended to benefit a third party, if he alone has an interest in the fulfilment of the contract." (1)

A third party has a little to sue under an insurance policy if the policy (2) has been assigned or made payable to him.

Apart from this rule a statutory provision gives a third party in the event of the assured's becoming bankrupt, a right to recover from the insurer. Section 1 of the Third Parties (Rights Against Insurer) Act, 1930, provides:

"as,1—Where under any contract of insurance a person (hereinafter referred to as 'the insured') is insured against liabilities to third parties which he may incur, then—(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (b) in the case of the insured being a company, in the event of a winding-up order being made or a resolution for a voluntary winding-up being passed, with respect to the company or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge, or any property comprised in or subject to the charge; if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vested in the third party to whom the liability was so incurred."

The right of a third party to claim directly against the insurer is also considerably extended by the Road Traffic Act, 1934, as amended by the Road Traffic Act, 1960, these being the Acts which provided for compulsory

(1) Smith, T.B. Commentaries, p. 781.
(2) Gow, Mercantile Law, p. 357.
third party insurance.

Under the English Common Law a third party has no rights against the insurer as the doctrine of privity applies to all contracts of insurance in the absence of statutory exceptions. The exceptions are the same as those mentioned in relation to Scots Law. It should be noted that neither the assured nor the injured third party is permitted to refer to the insurer in the process of litigation.

"It is a general rule of practice, where the defendant in an action has been insured in respect of his liability, that the jury must not be informed that an insurance company is involved. The mere suggestion of such a fact by counsel has been held to be most improper, and to justify the discharge of the jury and the order of a new trial." (2)

iii. The Relationship Between the Insurer and the Wrongdoer

As was mentioned in the context of subrogation, an insurer who has paid the indemnity has certain rights against the person responsible for the realisation of the risks insured against, and this general rule applies in the case of insurance against liability. However, as the person responsible is usually the assured himself, the general rule must be modified since otherwise insurance against liability would afford no protection to the assured. The insurer's right of subrogation against the person who is responsible for causing the damage accordingly arises only when the assured has the right to claim damages from the wrongdoer, as in the case of vicarious liability. Article 220 of the C.C.I. provides that a person who is liable for the acts of another has the right to claim any compensation which he may have paid from the person who actually caused the damage. The following are examples of cases in which one person may be liable for the acts of another: (a) a carrier who is liable for the acts of his employees,

(1) See p. 251.
(b) the owner of a motor-car who is liable for the acts of his chauffeur;
(c) the State or any other institution or organisation which is liable for
the acts of its employees; and (d) the father or grandfather who is liable
for the acts of an infant.

SECTION II
Compulsory Motor-Vehicle Insurance

1. A Branch of Insurance Against Liability

A new type of insurance against third party risks has recently been in¬
troduced by statute in Iraq. Since January, 1965 every motor-vehicle used
inside the country has had to be insured against the risk of liability for
bodily injury to a third party. This legislation has a limited purview
and is a piecemeal innovation although its introduction reflected the de¬
fects of the existing law. Both the provisions relating to the determina¬
tion of liability in the Civil Code and the low percentage of automobiles
insured against third party risks had a significant effect towards making
such insurance compulsory as the number of accidents was considerably grea¬
ter than the number of injured persons who were actually compensated. The
new insurance is intended to provide a speedy remedy for injury and to
reduce the unfortunate effects of accidents.

Under the C.C.I. a person who is in charge of a dangerous thing is pre¬
sumed liable; Article 231 provides:

"Every person who has in his charge a mechanical device
or any other thing which is liable to cause injury un¬
less special care is taken is liable for any damage caus¬
ed by such a device or thing unless he proves that he took
a considerable degree of care to prevent the harm. This
provision does not exclude any other special provision."

The importance of this Article lies in its restriction of the doctrine of
"absolute liability". The injured party must prove a causative link be¬
ween the damage and the use of the mechanical device, but the person in
charge of it may exonerate himself from liability by proving that he took all possible care in the circumstances to ensure that no injury was caused. This created the possibility of a considerable number of injured parties remaining uncompensated. The idea that every injury should be compensated was not attractive to the legislature, partly because of the small number of mechanical devices in use and partly because the insurance companies were not ready to provide cover against such liability. Thus, no action was taken to give an injured party absolute protection, and it was left to the individual and the insurance companies to settle the remedies between themselves.

Individuals have for some time been allowed to protect themselves against claims for damages arising out of the use of mechanical devices, and the insurance companies offer many kinds of policies to cover motor-vehicle risks, usually either a comprehensive policy or a policy which covers certain special kinds of risks.

Insurance in Iraq is now, however, nationalised, and it has been found that by distributing the cost of the damages among those who benefitted from the use of motor-vehicles two advantages can be achieved; firstly, every person who suffers injury is indemnified; and secondly, the premium is kept reasonably low. These recent changes have resulted in the introduction of legislation which makes insurance compulsory for every motor-vehicle used in Iraq. The "Law of Compulsory Insurance 1964 Covering Liabilities Arising from Motor-Vehicle Accidents" has promulgated and come into effect on 1st January, 1965. The main features of the new statutory provisions are: (a) Insurance is obligatory for every motor-vehicle used

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(1) As the title of this law is long, it will be called "The Law of Compulsory Insurance" and will be referred to in the text as "L.C.I."
in Iraq, apart from the exceptions contained in section 1 of Article 16 which provides:

"Motor-vehicles which are owned by the military forces (including the police forces of the Customs, Railways, Ports, Forests and Oil services) are not subject to this law."

(b) It covers only accidents which result in death or bodily injury. (c) There is no fixed amount of indemnity. (d) The legislation provides for the establishment of a Board to deal with compensation in the case of accidents caused by "hit and run" drivers where the identity of the person responsible is unknown and also in cases where insurance is not compulsory (military and police vehicles). For this purpose, section 2 of Article 16 of the L.C.I. provides:

"The Government shall make regulations establishing a special fund out of which the persons injured in the motor-vehicle accidents specified in the first section will be indemnified, as well as those who are injured in accidents by motor-vehicles which are unidentified and those who are injured in accidents caused by uninsured vehicles or in any accidents which are not covered by contracts of insurance in accordance with this Law."

To compare the main features of compulsory motor-vehicle insurance in Iraq and in some other countries, it is noticeable that the L.C.I. provides similar provisions to compulsory insurance in Britain, both cover accidents which result in death or bodily injury. But in France the compulsory insurance must be made in respect of damages corporels au matériels. Also the establishment of a fund covering uncompensated accidents makes the Iraq Law similar to French Law.

The word "motor-vehicle" is defined by Article 1 of the L.C.I. as follows:

(1) Section 203 of Road Traffic Act, 1960.
(3) Art.8, ibid.
"i. In this Law, the term "motor-vehicle" means every means of land transport and mechanically-propelled vehicle which operates by fuel and is adapted for use on public roads with the exception of those used on railways.

ii. For a purpose of this Law a trailer drawn by a vehicle shall be deemed to be part of the vehicle itself."

2. Features of the Contracts of Compulsory Insurance

A. The Subject-Matter of the Risk Insured Against

It has been pointed out before that the risk insured against in insurance against liability is a claim for damages by the injured party. In the case of compulsory motor-vehicle insurance, however, insurance is considered as being in the same category as the registration licence. The policy must by law cover liability for loss arising from death or bodily injury, the idea behind the legislation being to substitute for the individual's liability to compensate an injured person a collective liability on the part of all motor-vehicle owners. This collective liability is limited by providing for the payment of fixed premiums and in the event of an increase in the amount of compensation, there will be an increase in the rates of premium. The insurance is accordingly not intended to cover the assured's interest nor to protect him against a claim for damages but simply to provide a protection to those sustaining injury through the use of motor-vehicles against any financial incapacity on the part of the person liable to pay compensation.

The result of this is that the subject-matter of the risk in compulsory insurance is not the claim for compensation but the use of the motor-vehicle itself, and instead of every person using a motor-vehicle having

(1) See p.444.
(2) Art.4 of the Law of Compulsory Insurance.
to be insured; it is the motor-vehicle itself which must be. This differs from the rules of compulsory insurance in other countries, particularly in Britain, where it is every person who intends to use the motor-vehicle who must be insured.

Article 2 of the L.C.I. provides:

"The owner of a motor-vehicle is forbidden to use the vehicle or to allow any person to use it unless the owner effects a policy of insurance to cover bodily injury to third-parties arising from the said use."

This provision is incorporated in Clause 1 of the standard-form policy.

Article 13 of the same Law provides:

"If the ownership of the motor-vehicle is transferred to another person during the currency of the insurance, all rights and obligations arising from the contract of insurance are transferred to the new owner from the date of the authorisation of such transference appearing in the records of the Transport and Traffic Police. The previous owner or the assured has no right to cancel the insurance either wholly or in part."

This provision is incorporated in Clause 8 of the standard-form policy.

B. The Parties to the Contract

i. The Assured

As the L.C.I. provides that every motor-vehicle must be insured, the owner of the vehicle is the person who must insure it. Article 13 provides:

"Any person who uses his motor-vehicle or gives permission for it to be used by another person without its being insured in accordance with the provisions of this law will be punishable by imprisonment for a period not exceeding six months or by a fine not exceeding 100/-, or by both. Any person who uses a motor-vehicle knowing that it is not insured is liable to the same penalties."

In addition to its owner any other person in possession of a motor-vehicle, e.g. as hirer, trustee, etc., must insure it if it is possible that it will be used. Such a person cannot force the owner to insure, and he is...

(1) Section 201 of the Road Traffic Act, 1960.
not legally the owner himself so there is no compulsory provision requiring him to insure the motor-vehicle, but he is not allowed to use it unless it is insured nor is he allowed to permit any other person to use it. If he does insure it, the insurance attaches to the car and cannot be cancelled, nor may he on losing possession claim repayment of the premium.

ii. The Insurer

In the case of compulsory insurance in most countries, the compulsory provisions bind the assured only and whether or not the insurer undertakes such an insurance is left to him to decide according to the circumstances. It is a matter of discretion, and he will consider each individual case on its own merits. In Iraq, however, matters are different as insurance is nationalised, and the only insurer is now the "State" although there are still several companies. The rate of premium and the conditions of the contract are fixed by the "Board of Insurance", and all the companies are now bound to accept any application which conforms to the regulations. In this connection Article 11 of the L.C.I. provides: "The insurer is not allowed to refuse any application for insurance if it complies with the requirements which are laid down by the "Board of Insurance". The insurance companies are also obliged at regular three-monthly intervals to furnish the authorities with details of the policies which they have issued.

In Britain the insurance companies are under no obligation to accept the proposal of the assured. Under section 203(1) of the Road Traffic Act, 1960 a policy for the purposes of compulsory insurance must be issued by an "authorised insurer", i.e. any person or body of persons "carrying on motor-vehicle insurance business in Great Britain" and complying with the provisions of the Insurance Companies Act, 1958.

(1) Art.15 of The Law of Compulsory Insurance in Iraq.
C. Injuries Covered by the Policy

In compulsory motor-vehicle insurance the risk insured against is the use of the motor-vehicle itself, and this risk is becoming more common with a consequent increase in the frequency of injuries.

Every policy of insurance must provide redress for the injuries stipulated by statute, and in the present first stage of compulsory insurance these are limited to death and bodily injury. Article 3 of the L.C.I. provides:

"Subject to the provisions of this law and unless exemption is granted by law every policy of insurance must include a condition to cover civil liability in respect of death or bodily injury occurring to any person as the result of an accident arising out of the use of a motor-vehicle within Iraq. It is immaterial whether the person who is using the motor-vehicle is the owner or any other person permitted to use it."

Article 7 provides:

"Subject to the provisions of this law, the insurer is obliged to cover contractual liability resulting from death or bodily injury occurring to any passenger in a motor-vehicle except an employee of the owner or the driver."

These provisions are incorporated in Clause 1 of the standard-form policy. Contractual liability is confined to injuries occurring to passengers in a motor-vehicle other than gratuitous passengers, and civil (delictual) liability is confined to the case of persons injured through the use of motor-vehicles such as pedestrians or passengers in other motor-vehicles.

The statutory provisions do not deal with the case where there is negligence or fault on the part of the injured party, i.e. if the accident is partly the fault of the injured party. It would seem that unless it can be proved that the injured party's action was intentional, the policy covers accidents caused by his fault or negligence.

(2) See p. 235.
In Britain the Road Traffic Act, 1900 requires the compulsory insurance of motor-vehicles against liability in respect of bodily injury or death occurring to third parties. In practice, however, motor-vehicle insurance is usually wider in its scope than the Act requires and covers not only bodily injury to or the death of a third party but also damage to or destruction of a third party's property.

D. Injuries Excluded from the Policy

Article 5 of the L.C.I. provides:

"Subject to the provisions of this law, the insurer is not liable for any civil claim arising from:

a. Death or bodily injury of the assured, his wife, his parents or his children if they are passengers in the motor-vehicle at the time of the occurrence of the accident which causes the death or bodily injury.

b. Death or bodily injury of any employee of the owner of the motor-vehicle at the time of or during the course of his employment."

Article 6 provides: "In this law, for the purposes of the application of Article 5, any person who is permitted to use the motor-vehicle is deemed to be equivalent to the assured." These provisions are incorporated in Clause 1 of the standard-form policy. Their main features are: (a) Compulsory insurance does not extend to cover a claim for indemnity made by the assured himself, his relatives within a limited degree or persons in his service. This exclusion should not be extended as the intention of the legislation may to indemnify injured persons. Thus, grandparents or grandchildren are entitled to be indemnified. (b) For the exclusion to apply the persons must be passengers in the assured's motor-vehicle at the time of accident. If such a person is injured in an accident when he is not inside the motor-vehicle, he has a right to be indemnified.

3. Formation of the Contract

(1) Section 203(3)(a)
(2) Preston & Colinvaux, Law of Insurance, p.337.
A. The Policy

Section 2 of Article 14 of the L.C.I. provides: "The Board of Insurance shall issue a standard-form policy which is to be used by all insurance companies in accordance with the provisions of this Law." The purpose of this is to provide a single form for use by all companies and to ensure that the provisions of compulsory insurance are properly enforced. Only the standard-form issued by the Board of Insurance may be used. It contains the date and period of the insurance, details of the assured and the insurer and a description of the motor-vehicle insured. The amount of the premium is also included but the amount of the sum insured does not appear as the insurer is bound to pay any sum decided by the court.

The general conditions of the policy are similar to the statutory compulsory insurance provisions and need not, therefore, be discussed here.

The existence of compulsory insurance is no bar to other kinds of motor-vehicle insurance. For example, it is possible to insure a motor-vehicle against damage or to insure the assured, his relatives and his employees against injury or death. Insurance against a claim for damages by third parties may also be obtained by the assured. Article 17 of the L.C.I. provides: "This Law does not prejudice the taking out of any policy of insurance against risks (arising from the use) of a motor-vehicle which are not covered by this Law."

It has been already mentioned that the policy of compulsory insurance must not be construed against either party to the contract. This rule of interpretation is not, however, extended to injured third parties since the main object of compulsory insurance is to benefit the injured party.

(1) See p. 179.
This point is stressed here because Articles 166-7 of the C.C.I. provide that the contract is to be construed in favour of the weaker party while injured parties are not mentioned since they are not parties to the contract.

The policy of compulsory insurance may be cancelled in accordance with Article 12 of the L.C.I., which provides:

"A-The insurance is automatically cancelled if the motor-vehicle is completely destroyed or if it becomes unusable. The cancellation takes effect from the date of issue by the Transport and Traffic Police of a certificate confirming the destruction or unusability."

The benefit of the policy is not affected by transference of the ownership of the motor-vehicle insured. Clause 8 of the standard-form policy provides:

"The policy of insurance remains in effect in the event of the ownership of the motor-car being changed, but the new owner must intimate the change to the insurer so that the policy may be endorsed."

B. The Premium

Section 1 of Article 14 of the L.C.I. provides:

"The premium which must be paid by the assured is set out in the schedule of tariffs annexed to the Law. The Ministry of Economic may amend this schedule by issuing a notification in the Official Gazette."

Another peculiarity of compulsory insurance is, thus, that the legislature has fixed the rate of premium, which varies according to the type of motor-vehicle. The schedule provides for two kinds of reduction: (a) a reduction of 10% if more than ten motor-vehicles are insured by the same owner; and (b) a reduction of 10% if no claim has been made in the preceding year.

The assured is also entitled to a reduction if his vehicle is destroyed.

Section B of Article 12 provides:

"In the event of the insurance being cancelled in accordance with section 1 of this article, the assured is entitled to be repaid a part of the premium proportional to the unexpired part of the period of the contract."

(1) See p.178.
(2) Art.13 of L.C.I; see p.255.
This Article applies the theory of divisibility of the premium but is badly framed, as it does not mention the cause of the destruction of the motor-car, which may be an accident as a result of which the insurer paid compensation, in which case the assured has received value for the premium.

4. The Effect of the Contract

The Law of Compulsory Insurance creates three kinds of legal relationships. The relationship between the assured and the insurer, which implies the assured’s obligations; the relationship between the insurer and the injured party, which implies payment of the indemnity; and the relationship between the insurer and the wrongdoer which implies the right of subrogation.

A. The Assured’s Obligations

i. Payment of the Premium

The assured must pay the premium. This is obligatory for every owner of a motor-vehicle and represents his contribution towards injury done to the community through his use of the vehicle. In this sense the premium is not a price paid to the insurer for undertaking liability for the risks insured against, as is shown by the fact that, although in other cases of insurance the premiums may differ according to the risks to which various assured are exposed, in this case the premium is fixed by statute.

The assured is entitled to a reduction in the amount of the premium if he has not been involved in any accidents during the preceding year and is also entitled to have a part of the premium repaid in the event of his vehicle being destroyed or of his travelling outside the country during the year for which the premium has been paid.

ii. Declaration of the Facts Concerning the Car’s Condition

(1) See p. 135.
(2) Section 1, Art. 14, see p. 260.
(3) Section 1, Art. 12, see p. 260.
(4) Clause 10 of the Schedule.
As well as the assured's obligations to declare all the circumstances affecting the things insured and the risks and to minimise the loss, he has a further duty in the case of compulsory insurance. As the subject-matter of the risk insured against is the use of the motor-vehicle, he must maintain it in good condition for the purpose for which it is to be used. Section 1 of Clause 5 of the standard-form policy provides:

"The assured is obliged to take all reasonable precautions to keep the motor-vehicle in a condition suitable for its use, and the insurer may examine the condition of the vehicle. The assured may not object to such examination."

The assured must also notify the insurer within three days in the event of the motor-car being lost.

iii. Declaration of the Occurrence of Accidents

The assured must inform the insurer of any accidents with details of all relevant circumstances. Section 2 of Clause 5 of the standard-form policy provides:

"The assured is obliged to notify the insurer within three days of the receipt by himself or by his agent of the information in the event of the motor-vehicle being lost, or of a claim for damages for death or bodily injury. He is also obliged to give to the insurer all letters, claims, warnings and summonses as soon as he receives them."

iv. Offer of Reconciliation

The standard-form policy stipulates that the assured is forbidden to make any offer to the injured party or to pay him any compensation. Clause 6 provides:

"The assured is not permitted to make or accept any offer regarding compensation to the injured party without written approval of the insurer. Any arrangement made between the assured and the injured party is not binding on the insurer unless he accepts it."

v. Recovery of Compensation from the Assured

The object of compulsory insurance is to give a remedy to persons injured as a result of the use of motor-vehicles. The fact of death or injury
having been caused by the use of a motor-vehicle entitles the victim to compensation from the insurer and that the injured party is, by statute, required to prove only the casual relationship between the accident and the use of the insured's motor-vehicle. At the same time, however, the insurer is entitled to recover from the assured what he has paid in the following cases detailed in Article 9 of the L.C.I.:

"A—If the assured fails to fulfil the obligations stipulated in the policy of insurance, the insurer has a right to recover from him the amount paid to the injured parties.
B—The insurer may recover from the assured the amount paid as compensation in the following cases:
   i. If it is proved that the insurance was entered into on the basis of false information given by the assured, or that material facts have been concealed which would affect the discretion of the insurer in applying the proper premium and any other condition of the contract.
   ii. Use of the motor-vehicle for purposes not mentioned in the certificate of registration or in the policy of insurance, or for the carriage of more passengers or loads greater than those fixed for it, or its use for racing or speed tests.
   iii. If it is proved that the driver of the motor-vehicle—whether the assured or any other person permitted to use it—was under the influence of drink or drugs when the accident occurred.
   iv. If it is proved that the death or bodily injury has resulted from an act done intentionally by the assured or by any other person permitted to drive the motor-vehicle."

This article is incorporated as Clause 7 of the standard-form policy, and this clause also contains a condition entitling the insurer to recover any compensation paid to the injured party:

"If the driver of the motor-vehicle—whether the assured or any other person permitted to drive it with his approval—is not in possession of a valid licence to drive the motor-vehicle."

These provisions confirm that liability is not the subject of the risk insured against as, if it were, the insurer would not be liable to meet claims for injury in the above cases. This is the case in other countries such as Britain, where the injured party must prove his case against the
assured before the insurer's liability arises.

Although the above provisions are elaborately detailed, they will require further elucidation by means of judicial interpretation.

B. The Insurer's Obligations Towards the Injured Party

It has been pointed out before that insurance against liability is intended to operate in favour of persons who are the victims of wrongful acts. The injured party is by virtue of law nominated as the actual beneficiary under this contract, and this rule is followed in the L.C.I., Article 8 of which provides:

"A-The injured party acquires a direct right against the insurer; any defence which may be used by the insurer against the assured does not prejudice the injured party's rights.

B-The right of action by the injured party against the insurer is subject to the prescription mentioned in Article 990 of the Civil Code."

This Article has two features:

(a) The injured party has a right of direct action against the assured; The relationship between the injured party and the insurer is completely different from the relationship between the insurer and the assured or that between the assured and the injured party. It is a relationship created by law despite the fact that there is no contractual tie between these persons. The injured party's right against the insurer becomes a reality at the time when the injury occurs, i.e. the event for which the insurer must pay compensation. If the assured fails to fulfil his obligations, the injured party's right to claim compensation is, thus, not prejudiced. The insurer cannot escape liability to the injured party by (2) proving that the assured undertook all due care to prevent the accident or that it was caused by the injured party's own negligence although he

(1) Section 203 of the Road Traffic Act, 1960.
(2) Art. 231 of the C.C.I.
has the defence that there was no casual connection between the accident and the assured's use of his vehicle.

(b) The period of prescription: Article 990 of the C.C.I. provides for a period of prescription of three years from the date of the occurrence of the accident insured against which gives rise to the action. Before the inclusion of this Article into the L.C.I. the insured party's rights were governed by Article 232 of the C.C.I., which provides that an insured party's rights against the person responsible for his injury are extinguished after three years from the date of acknowledgement of the injury and lapse completely after fifteen years from the date of its occurrence. The rights of the injured party against the assured are still governed by Article 232.

C. The Insurer's Rights Against the Wrongdoer

Article 10 of the L.C.I. provides:

"The insurer shall be subrogated to the rights of the injured party against the person who is responsible for causing the injury to the extent of the amount which has been paid to the injured party."

This Article is incorporated into Clause 9 of the standard-form policy.

It is not, of course, intended to give the insurer the right to recover the sum paid as compensation from the assured as this would nullify the whole purpose of the insurance and would be in contradiction to the terms of Article 9, by which the rights between the insurer and assured are regulated. However, this is not made clear in the Article which is, therefore, obviously in urgent need of revision either by judicial construction or by amendment. Article 10 was, in fact, intended to allow the insurer to take the place of the assured in any right of action which the latter may have against a person, other than himself, who has caused the accident. Article

(1) See p. 84.
(2) See p. 248. This Article is still applicable in the case of insurance against liability relating to property, i.e. insurance against damage to the property of third parties.
(3) See p. 263.
2236, 200 of the C.C.I. provides that a person who is liable for actings of another has a right of recourse against the latter if his actings have resulted in the payment of compensation. Thus, if an employee has caused injury to someone and his employer's insurer has paid compensation, he (the insurer) may claim repayment of the indemnity from the employee. Similarly, if the assured allows another person to use his vehicle and there is an accident the insurer may claim against the latter for repayment of any compensation. Similarly, if death or bodily injury has resulted from the negligence of some person who was not the direct cause of an accident but whose negligence involved the assured in it, the insurer may be subrogated to the rights of the assured against this person.

(1) See p.237.
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PROPERTY INSURANCE

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SECTION I

The Contract of Fire Insurance

1. Definition

This is a contract of indemnity for which there is no special definition in the Iraqi insurance statutes, as the general definition of the contract of insurance is considered capable of including fire insurance. Although the French Law of Insurance does not define fire insurance, it has been defined by one writer as follows: "Fire insurance in a strict sense may be envisaged only as an 'insurance of things' and only as insurance intended to make good material damage caused by fire." There is no definition of the contract of fire insurance in any British statute, but Section 33(1) of the Insurance Companies Act, 1958 explains the characteristics of fire insurance as: "...the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire."

In both of the above definitions, two facts stand out: Firstly, the principle of indemnity and, secondly, that fire insurance is a property insurance. The contract may, accordingly, be described as "a contract of indemnity by which the assured is indemnified against loss occurring to his interest in moveable or immovable property as a result of fire."

2. Insurable Interest

As fire insurance is a contract in respect of damage occurring to property, the rule of insurable interest applies. This rule has, as has been mentioned before, a provision that any contract of insurance is void unless at the time of the constitution of the contract, the assured has an insurable interest in the things insured, i.e. he must be either the owner of

(1) See p.65.
the property insured, a person entrusted with its safekeeping, e.g. a
depository or a person with a limited interest in it, e.g. a mortgagee.
The assured also must declare his insurable interest at the time of the loss.

The things which may be insured under a fire insurance policy are de-
scribed by Iraqi law as "moveable or immovable property", which means that
neither personal injuries nor non-material damage (e.g. injury to feelings)
even though caused by fire, can be covered.

3. The Risks Insured Against

The basis of fire insurance is that the insurer undertakes liability
for loss occurring as a result of fire. This subject is divided into
(a) the nature of fire, and (b) causes of fire.

A. The Nature of Fire

There is no definition or explanation given in the Iraqi insurance
statutes of the word "fire", and its meaning must, therefore, be taken as
that which is ordinarily and naturally understood by a reasonable person
unless otherwise defined by the parties in the policy. The usual legal
interpretation of the term "fire" in a legal sense is that means whereby
the ignition of certain material and flames and smoke indicates fire. A
distinction must be made between heating or fermentation and "fire", as
the former are excluded from the meaning of "fire" in its proper sense in
a fire insurance policy.

For the fire to be covered by insurance it is necessary that it be
accidental - and enough if it is unintentional. The assured's intention in

(1) Art.19 of the O.L.I., see p.270.
(2) Art.132 of the Commercial Code which provides for construction of the
contract.
(3) Clause 5 of the standard form policy of fire insurance in Iraq.
taking out insurance is to get security against loss occurring as the result of realisation of the risk insured against, and the statutes make the insurer liable for loss caused by fires occurring "for any reason and in any circumstances whatsoever." The insurer who accepts liability for the fire insured against cannot escape by construing the term "fire" in his favour as Article 167 of the Civil Code provides that a decision in any particular case must be in favour of the assured. There is no reason then to accept the French view that the fire must be accidental (l'incendie suppose un feu accidentel) although it has been adopted by most Arab legal writers in Egypt. The classic example in this field is the inadvertent dropping of property into the grate of a fire, of which the best analysis has been given by J. Atkinson:

"The risk against which the plaintiff is insured includes the risk of insured property coming unintentionally in contact with fire or being thereby destroyed or damaged and it matters not whether that fire comes to the insured property or the insured property comes to the fire." (5)

B. Causes of Fire

Article 19 of the o.L.i. provides:

"s.1 - Insurance against fire covers all losses sustained by the owners of moveable or immoveable property for any reason and in any circumstances whatsoever, with the exception of those caused intentionally by the owner of the insured property."

This Article was inadequate as it contains a plausible generalisation which can be seen on careful examination to be unsatisfactory. Difficulties arise from the ambiguity of certain words in the Article, and leaving the matter to be agreed by the parties without any directive from the legisla-

(1) Art.19 of the O.L.I., below.
(2) See p. 178.
(5) Harris v. Poland(1941) 1K.B. 462, 466.
ture subjected the weaker party in the contract to harsh terms imposed by
the stronger, whether by the introduction of further exceptions or by lim-
iting the scope of the generalisation. Article 20 of the O.L.I. provides:
"The insurer is liable for all damage to any insured building as a result
of an adjacent building being destroyed by fire." The Iraqi legislature
has recently made more detailed provisions in Articles 1000 and 1002 of the
C.C.I., which should be considered rather as additions to Articles 19 and
20 than as substitutes for them. Article 1000 provides:
"s.1. The insurer is liable for damage resulting from a fire
occurring as a result of the decret et de l'arret divin
ins (fate and divine decree) (1) and caused by the uninten¬
tional fault of the beneficiary (of insurance). He is not, however, liable for damage resulting from
a fire caused deliberately or fraudulently by the ben¬
eficiary.
s.2. The insurer is also liable for (damage resulting from)
a fire caused by persons for whose acts the assured is
responsible even though they have acted intentionally."

Article 1002 provides: "The insurer guarantees compensation for all damage
resulting from a fire caused by a defect in the things insured." Article
1000 corresponds to Articles 768 and 769 of the Egyptian Civil Code and to
Articles 734 and 735 of the Syrian Civil Code, but the Iraqi Article in¬
cludes some modifications. Firstly, the phrase "damage resulting from"
is omitted; secondly, the Iraqi Article uses the word "beneficiary" instead
of "assured"; and thirdly, the Iraqi Article replaces the term "fortuitous
event and force majeure" by the term "fate and divine decree", which means
the same as "Act of God". Iraqi legislation, by introducing this last mod¬
ification, is employing Islamic legal terminology. The Iraqi, Egyptian

(1) The Arabic term is al-qada wal-qadar. Its application is more proper¬
ly theological and philosophical than legal. Muslim logicians have
always used it in the context of whether persons have freedom of will
or whether their actions are determined by the will of God. The pro¬
priety of using it in such a limited context is thus doubtful. For
detail on the use of the term see Watt, W.M. Free Will and Predestina¬
and Syrian Articles were originally adapted, with some modification, from Articles 12 and 13 of the French Law of Insurance, which are repeated in the Lebanese Code of Obligations and Contracts (in Articles 966 and 967). The modifications are made in order to cover fire insurance specifically, whereas the French and Lebanese articles cover all kinds of insurance and appear, thus, under the heading "General Provisions of Contracts of Insurance."

Article 1002 corresponds to Article 767 of the Egyptian Civil Code and to Article 733 of the Syrian Civil Code. All these Articles were originally adapted from the last sentence of Article 44 of the French Law of Insurance, which is identical to Article 992 of the Lebanese Code of Obligations and Contracts. Similar provisions appears in Article 768 of the Libyan Civil Code with extra rules in which the insurer is liable when he learns the nature of the defect.

The above provisions make it clear that irrespective of the cause and source of the fire, the insurer is liable for the damage which results from it. The Civil Code provides that any agreement to set the provisions aside is null and void unless the Code itself allows any exception. This is, therefore, as a French writer has described it, part of L'ordre public. The following causes are, thus, covered by the insurer’s liability, whether they are mentioned in the policy or not: (a) Actions of the assured and his employees, (b) Acts of God, and (c) defects in the things insured.

i. Actions of the Assured and his Employees

Article 1000 states that the insurer is liable for damage caused by fire which is a result of the beneficiary’s actions or of those of his em-

(1) Besson, see Planiol et Ripert, Traité Pratique de Droit Civil Français, vol. xi, p.725.
ployees. It will be noted that the Article uses the word "beneficiary" instead of "assured", and this is quite correct for sometimes the beneficiary under the contract is not the assured although the benefit of the contract is vested in the assured, he is the beneficiary. A negligent action by the beneficiary or by his employees is covered by the policy and no distinction is made between degrees of negligence, i.e. whether it is gross negligence or mere inadvertence. An intentional act by the beneficiary is not, however, covered as it would be against public policy to let the beneficiary escape liability and allow him to profit from his own deliberate act although an intentional act by the beneficiary's employee is covered provided that there is no collusion between the beneficiary and the employee, in which case it would fall within the scope of the provision which stipulates that the insurer is not liable for damage caused by an intentional act by the beneficiary. Apart from this, an employee's action which causes a fire is covered by the policy whatever the nature or extent of the action.

Procedural details: It should be noted that the burden of proving that the beneficiary's act is intentional rests upon the insurer, who cannot stipulate in the policy that the assured or the beneficiary must prove his innocence. Article 19 of the O.L.I. provides:

"s.2 - Should the insurer wish to bring a civil action whether on the ground of intentional or negligent damage or of deceit or fraud as referred to in the preceding articles, he must first of all deposit the indemnity which he has undertaken to pay with some official department. If, however, the action is brought directly by the Public Prosecutor, payment of the indemnity will depend upon the judgement made under the Penal Code."

(1) Art.983, see p.146.
(2) Mohammed Alia Arafat, op. cit., p.270.
(3) Art.11 of the O.L.I., see p.131.
ii. Act of God

It should be noted in the first place that the Iraqi legislature uses a term which literally translated means "an event caused by fate and divine decree". This means that the event which caused the disaster is an événement celeste, i.e. an accidental event caused without any human instrumentality and impossible to prevent. As has been said before, the only reason for the use of this terminology is that the Iraqi legislature is trying thereby to be consistent with Islamic jurisprudence. Muslim jurists commonly use the term āja'ība, which means "calamity", "sinister", "indefatigable", and "heavenly epidemic". All these terms have the same meaning and imply an event of irresistible force which is not caused by human action, e.g. rain, tempest, cataclysm, flood, earthquake, fire, lightning. The effects of civil war or riots are included by some jurists. All these disasters have in common the characteristics that they cannot be foreseen at the time of constitution of the contract and that they cannot be prevented when they occur.

Instead of making a literal translation of the Islamic term, however, it is preferable to use the analogous term in English legal terminology. The term "Act of God" is used to describe an event which happens independently of human action and which cannot be foreseen or controlled. L.J. James put it into simple language, defining "Act of God" as an event "due to natural causes directly and exclusively, without human intervention,... which...could not have been prevented by any amount of foresight and pains

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(1) See p.271.
(7) Pollock, Contracts, 12th edn., p.233.
and care reasonably to be expected." It, thus, seems that the concept of "Act of God" does not differ from that of the term used by Muslim jurists.

In the Egyptian, Syrian and Lebanese laws from which the Iraqi provision is derived the French term _cas fortuit et force majeure_ is used. The only distinction between the terms "Act of God" and _cas fortuit et force majeure_ is that the former is narrower in meaning than the latter. This difference seems to be one of "degree" rather than of "kind", and the inclusion by Muslim jurists of disasters resulting from riot or fire within the concept of "Act of God" reduces it.

Since the insurer is liable for damage caused by fire regardless of its origin, his obligations include all fires resulting from "Act of God" in its wider sense, i.e. lightning, riot, explosion, earthquake, cataclysms, tempest, volcanic eruption and electrical short circuiting caused by rain. In this respect the Iraq statute differs from the French and Lebanese under which fire caused by volcanic eruption, earthquake or tempest is excluded.

Article 45 of the French Law of Insurance provides that a loss by fire occasioned by "volcanic eruption, earthquake, hurricane, tempest or other cataclysms" is not covered by fire insurance and that damage arising from civil war and riots is also excluded from the insurer's liability. Similar exceptions appear in fire insurance policies in Britain, the most notable being earthquake, riot, civil commotion and explosion. In other words, it is implied that the insurer is not liable to indemnify the assured against fire caused by an "Act of God". In Iraq, however, the insurer cannot stipulate in the policy for any clause excluding the assured's right to recover

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(1) Nugent v. Smith (1875) 1 C.P.D. 423, 444.
(3) Art. 19 of the O.L.I.
when the fire has been caused by anything which comes within the meaning of the term "Act of God" as this would be contrary to Article 991 of the Civil Code. Despite this the British standard form fire insurance policy has been adopted in Iraq, the exceptions clause inadvertently remaining unchanged and its modification has become a matter of urgency since the promulgation of the Civil Code of Iraq. The difficulty may be solved by the court invalidating the exceptions clause in the policy as they are not enforceable by law, but no decision can be given until a test-case is brought.

iii. Defects in the Things Insured

In other kinds of insurance, whether marine or indemnity if a loss is caused by a defect inherent in the things insured, the insurer is not liable unless otherwise agreed by the parties. In the case of fire insurance, however, the insurer is liable for loss resulting from the fire, "even if... (it)...broke out owing to a defect in the things insured." The Iraqi statutes go further than the French and Lebanese articles for the latter provide that, if the insurer learns of a vice propre in the things insured, he can exercise his right of annulling the contract on the ground of non-disclosure of a material fact.

If the fire is caused by a defect in the things insured, it does not ignite the whole stock at the same time but starts in one part and spreads

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(1) See p.165.
(2) Francis Smith explains that: "since 1922 there has been in general use amongst Companies a standard policy form. This form is employed for all types of risks other than private dwelling houses." Fire Insurance - Theory and Practice, p.33; pp.129,133 for the text of both standard forms is given.
(3) Art.197 of the Ottoman Maritime Code, see p.317.
(4) Art.1002 of the C.C.I.
(7) Articles 21 and 982 of the French and Lebanese laws, ibid.
to the rest of the insured things or to the place where they are kept. Consequently, the cause of the fire is not really the defect in the things insured but rather the spreading of the fire to them. For this reason a clause excluding defects in the things insured from the scope of the policy must be considered invalid under the Iraqi law and the fact that such a exists in the standard form policy requires judicial reconsideration.

The Egyptian Cour de Cassation held in 1960 that if a fire insurance policy contains a clause to the effect that in the event of fire resulting from a defect in the things insured the insurer shall not be liable to make good the loss, such a clause is contrary to the law and, consequently, null and void. This was decided despite the opinions of some writers who argue that the general principles of insurance do not cover vice propre, basing their argument on Article 33 of the French Law of Insurance, which exonerates the insurer in the case of insurance generally from liability for damage resulting from a defect in the things insured; this rule is repeated in the first part of Article 44. However, the Article 33 of the French law and the first part of Article 44 do not appear in the Egyptian or Iraqi Codes, which follow instead the last sentence of Article 44. This rule, which applies only to fire insurance, is an exception to the provisions of Article 33 and provides that the insurer is liable to cover damage of fire resulting from a defect in the things insured. A French writer comments on

(1) Sub-clause b of Clause 5, cf. sub-clause a, Clause 1 of the British standard form policy.
(4) See p. 272.
the application of Article 44 saying: "L'art.44 fait application de cette règle, en matière d'assurance-incendie, à propos des dommages d'incendie qui sont la suite du vice propre."

As the policy of fire insurance in Iraq is similar to the British policy of fire insurance, it is worthwhile to make comparison on this point. At Common Law in England fire insurance does not cover fire caused by an inherent vice (such as spontaneous combustion) in the things insured unless this is agreed by the parties although it has been said:

"On the whole, there appears to be no very sound reason why, if there is actual ignition, a loss by fire should be excluded on the ground of spontaneous combustion. Loss due to inherent vice is excluded from a marine risk because it is not a loss which is caused by any of the perils insured against. It is loss solely due to an independent cause. But if the inherent defect of the thing insured is brought into activity by a peril insured against, it does not follow that the loss will not be covered... the distinction between a case of inherent vice causing loss independently of the perils insured against and a case of inherent vice giving rise to one of the perils insured against, and causing loss through that peril, may well have escaped the learned judge's observation." (4)

4. Rules Covering the Contract

The rules governing contracts of insurance in general apply to the contract of fire insurance. The payment of the premium is of special importance because the time of payment, in the absence of any agreement to the contrary is the time at which the contract commences.

A. Loss which must be Indemnified

Article 999 of the C.C.I. provides:

(1) Clause 4 of the French fire insurance policy, in accordance with this article, provides: "Le présent contrat ne garantit pas, sauf convention aux conditions particulières: 4—Les dommages autres que ceux d'incendie causés par une explosion se produisant dans une fabrique ou un dépôt d'explosif; 5—Les dommages aux objets assurés autres que ceux d'incendie ou d'explosion provenant d'un vice propre, d'un défaut de fabrication, de la fermentation ou de l'oxydation lente (les pertes dues à la combustion vive étant reçues couvertes);"

(2) Besson, see Planiol et Ripert, op.cit., vol.xi, p.727,h.
(3) Boyd v. Dubois(1811) 3Camp.133 per Lord Ellenborough.
(5) Art.21 of the O.L.I., see p.121.
"The insurer is liable for all damage resulting directly from fire and for damage unavoidably caused by fire, in particular damage caused to the things by salvage measures or measures taken to prevent the spread of the fire. The insurer is also liable for loss or disappearance of the things insured during the fire unless it is proved that this was occasioned by theft."

This article corresponds in substance to Article 766 of the Egyptian Civil Code, which is identical to Article 732 of the Syrian Civil Code. These Articles also provide, however, that the insurer is liable for damage resulting "par un commencement d'incendie qui peut dégénérer en incendie véritable, ou par menace d'incendie pouvant se réaliser" and that any agreement in the policy intended to exclude the insurer's liability for the disappearance (except by theft) of the things insured is null and void. All these Articles were based originally on the French Law of Insurance and Articles 40-43 of the French Law are identical with Articles 988-991 of the Lebanese Code of Obligations and Contracts except that the Lebanese provisions omit section 2 of Article 41 of the French Law, which provides for a certain procedure relating to the valuation of the loss. The French and Lebanese articles define the loss and damage as les dommages matériels resultant directement de l'incendie. This definition is intended to exclude other loss which may result from fire, such as death or injury to the person of the assured or his relatives or any other non-material loss which might be caused by fire. The exclusion of this definition from the Egyptian and, consequently, from the Syrian and Iraqi Articles does not mean that non-material damage is covered by a fire insurance policy for it is made clear that fire insurance is an insurance of things. In Iraq this is regulated by Article 19 of the O.L.I., which provides that only movable and immovable property is covered.

Article 20 of the O.L.I. contains more detailed provisions relating to
liability in fire insurance, especially in relation to the spreading of fire from an adjacent point to the insured property. This Article, which is to be read in connection with Article 99 of the Civil Code, provides:

"The following matters are included in losses caused by fire even if they are not made the subject of a special contract:

- All damage to an insured building by reason of the adjacent building being destroyed by fire;
- All damage caused by attempts to extinguish a fire;
- All damage sustained while transporting the assured's property and goods from one place to another in order to avoid damage by fire, including depreciation and expenses;
- All damage caused by partial or total destruction of the building insured while the fire is being extinguished."

The types of damage for which an insurer is liable are as follows:

1. Damage resulting directly from the fire itself, and that which is inevitable as the result of combustion.
2. Damage resulting indirectly from the fire, such as:
   a) Damage caused by the measures taken to salvage the things insured.
   b) Damage caused by the measures taken to extinguish the fire.
   c) Any expenses of the salvage of the things insured incurred in removing them from the place where the fire began. Any depreciation in value incurred as a result of this removal must also be made good.
   d) The loss or disappearance of the property insured during the fire, provided it is not caused by theft, the onus of proving theft being on the insurer.
3. In the case of partial damage, Article 22 of the O.L.I. provides: "The amount of damage caused to immovable property partially destroyed by fire shall be calculated by deducting the value of the part which has not been damaged from the sum due in respect to the whole of the property."

B. The Effect of the Rules of Subrogation in Fire Insurance

Fire insurance is a contract of indemnity. The damage caused to the assured's interest must be material and the indemnity paid must be equal to the actual loss. In other words, the insurer is not obliged to pay more than the value of the damage which occurs and the assured is not entitled to make any profit out of the incident which is the subject of the insurance.

This brief analysis of the principle of indemnity indicates that the
rules of subrogation must be observed. Subrogation is implied by law and is not a matter of contract. An insurer who pays the indemnity has a statutory right of subrogation, and there is no need for the assured's approval. The right of subrogation has two distinct facets. On the one hand it consists of the exercise by the insurer of the assured's rights in respect of the things insured. This is personal subrogation: the insurer takes the place of the assured. On the other hand there is subrogation réelle. This is when the person who has some right over the things insured—creditor, mortgagee—is entitled to be subrogated to the assured in the amount of the indemnity.

i. Personal Subrogation

This means that the assured cannot exercise his rights against the person whose actions are the cause of the damage. Normally, a person who suffers damage through the actions of another person has, in his own right, a legal claim against the person who caused the damage, but if the assured who suffered the loss has been indemnified by way of insurance, there can be no question of his being able to obtain double compensation although it is neither just nor logical to allow the person who caused the damage to escape liability for his delict. The person causing the loss cannot escape liability by proving that the injured person has been indemnified by way of insurance. Instead, the insurer is allowed, after he has paid the indemnity, to substitute himself for the assured in the claim against the person who caused the damage. Article 1001 of the Civil Code of Iraq provides:

"The insurer shall, by virtue of law, be subrogated to the assured against the person whose actions have caused the damage involving the liability of the insurer, to the extent of the compensation in respect of the fire. But if such subrogation becomes impossible through the actions of the assured, the insurer is released from liability."

This Article corresponds in substance to Article 771 of the Egyptian
Civil Code, which is identical to Article 737 of the Syrian Civil Code, but there are three main differences between the Iraqi Article and the other Articles. Firstly, the Egyptian and Syrian Articles limit the right of subrogation to the right of action possessed by the assured in the same way as Article 17 of the O.L.I. Secondly, the Egyptian and Syrian Articles provide that there is no right of subrogation if the "person causing the damage is a relative of or is related by marriage to the assured." The omission of this section from the Iraqi Article suggests that the criterion may be whether the assured has a personal right of action against the person causing the damage or not. If the assured has such a right and can claim compensation, the insurer may be subrogated to the assured, but if the assured has no right to claim damages from the person causing the loss, there can be no subrogation. The third difference is that the last sentence in the Iraqi Article does not appear in the others. All these articles are derived from Article 36 of the French Law of Insurance, which is identical to Article 972 of the Lebanese Code of Obligations and Contracts.

Thus, subrogation operates according to the following rules: (a) The insurer must pay the indemnity. (b) The right of subrogation is limited to the actual amount he has paid, so when the indemnity paid is less than the actual loss, the assured has a personal right of action against the person causing the loss, and this right is prior to the insurer's right against this person. (c) The assured must have a personal right of action against

(1) Art.17 of the O.L.I., see p.88.
(2) This rule receives support from s.1 of Article 362 of the Civil Code of Iraq, which provides: "When a third party (non-debtor) has paid the creditor part of the debt and been subrogated to the debtor, this payment cannot prejudice the creditor's right to receive whatever remains due of his debt, in preference to the person from whom he has received payment in part, unless there is an agreement to the contrary." It also receives support from Picard et Hesson: "la subrogation n'est pour lui qu'un ultimum subsidium, op.cit., vol.ii, p.709; Abdul-Razzaq al-Sanhori, op.cit., vol.vii, p.1631.
the person causing the loss. (d) The right of the assured must not be forfeited as a result of the assured's actions, e.g. by his releasing the person who caused the damage; by his allowing the period to lapse within which an action must be raised; on the ground of the assured antecedently waiving his right to sue; or if he has received compensation from the person causing the damage.

ii. Subrogation Réelle

The contract of fire insurance is entered into for the benefit of a person who has an insurable interest in the property insured and sometimes there are persons whose right in the property is merely one of antichresis, pledge, or mortgage. These have a hypothec occurring over the property insured, i.e. they have possession of the property without ownership. The question arises whether such persons have a right to be subrogated to the assured in his right to the benefit of the insurance.

The debtor who wants to secure his financial obligations gives his creditor security by restricting his right of ownership in the property hypothecated. In other words, the owner restricts his right of intromittory with the property so long as his obligations remain in force. In this case the creditor's rights are supported by a legal privilege over the property hypothecated. Article 1239 of the C.C.I. provides:

"If the hypothecated property upon which a mortgage has been created perishes or deteriorates, the right of the mortgagor is transferred to the amount of compensation or the amount of the sum insured or the amount paid in exchange for expropriation in the public interest..."

Further, Article 1003 of the C.C.I. provides:

"s.1. Should the things insured be burdened with a pledge, mortgage or other real warranty, these rights will be transferred to the compensation due to the debtor by virtue of the contract of insurance.

s.2. If these rights have been notified to the insurer, he is obliged only to pay the amount due by him to the assured without requiring the consent of the creditors.

s.3. If the things insured are attached, the insurer, if
duly notified thereof, shall not pay any sum due by him to the insured.

This latter Article corresponds to Article 770 of the Egyptian Civil Code, which is identical to Article 736 of the Syrian Civil Code. The Egyptian and Syrian Articles provide that the insurer must be notified of the right of the creditor by registered letter, and the fact that the Iraqi Article does not mention this means that the parties usually make such a notification through a notary public. It should be noted that the creditor has a direct right of action against the insurer to secure his rights in the sum insured. All these Articles are derived from Article 37 of the French Law of Insurance.

C. Abandonment

In fire insurance the assured has no right to abandon the things insured and claim the full indemnity. This is made clear in the Iraqi standard form of fire insurance policy, Clause 12 of which provides: "The insured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not." If the things insured are damaged beyond repair the insurer has the right to replace or re-instate them. Clause 14 of the policy provides: "The Company may at its option re-instate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage." These clauses (1) are similar to the British policy of fire insurance.

SECTION II

The Contract of Insurance of Agricultural Produce

Iraq is an agricultural country and because of this the C.C.I. deals in considerable detail with agricultural matters. It does not, however,

(1) Doublet, A.R. Fire Insurance - Law and Practice, p.84.
refer to the insurance of agricultural products although this is dealt with briefly in the O.L.I.

The agricultural produce insurance may be categorised in Britain under (1) the title "consequential loss insurance" as arising from the assured's inability to deal with his property because of the intervention of the peril, and within which an insurance in respect of loss of profits is included. The livestock insurance does not appear in the statutory provisions of insurance in Iraq; this may be arranged between the parties in accordance with the general rules of the contract of insurance.

1. Agricultural Insurance

Section 1 of Article 9 of the O.L.I. provides: "A future interest in such things as crops and fruit which have not yet ripened may be insured, except when this is contrary to the law." This Article covers only agricultural products and does not permit the insurance of trading profits. For the contract of insurance to be valid, part of the crops must be in existence even though not yet ripe. Any person with an insurable interest in the preservation of crops and fruits has the right to insure this interest in accordance with Article 984 of the C.C.I. (3)

A. The Risks Insured Against

Neither the Ottoman Law of Insurance nor the Civil Code of Iraq refer to the subject of risks and it is, therefore, left to the parties to agree what risks they wish to include in the policy. The risk insured against must be a fortuitous one, and the rules applicable to the concept of the risk are applicable to agricultural insurance. The risks usually insured

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(2) Ibid., p. 329.
(3) See p. 102.
(4) See p. 104 et seq.
against are: disease affecting the crops, flood damage, storm damage (including hail and snow), damage by locusts, drought. The quality of the produce cannot be insured.

B. The Indemnity

Insurance of agricultural produce is a contract of indemnity. Section 2 of Article 9 provides: "In such transactions...the insurer must pay the indemnity relating to the things insured in the event of damage." As the value of the things insured is different at the time of constitution of the contract and at the time when the produce is ripe, Article 23 of the O.L.I. provides:

"The sum due to be paid in respect of products of soil which have been insured, shall be calculated according to their value at the time of gathering harvesting, as if they have not been damaged. This subject, however, to the terms of any special agreement on this matter."

The assured will, thus, obtain the profit which would have been expected on sale of the produce although the indemnity cannot exceed the sum insured. This rule implies that the amount of the sum insured to be first fixed in the policy must be estimated in accordance to the future value of the produce.

SECTION III

The Contract of Insurance Against a Debtor's Insolvency

It is usually provided in a contract that the debtor must provide the creditor with evidence of his solvency even if the contract is not covered or only with the payment of money. This is normally done by the debtor conjoining a guarantor with him in his obligation and if the guarantor acts gratuitously, this is a contract of suretyship. If, however, the guarantor is remunerated, the contract is similar to insurance and the sum paid to

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him is equivalent to a premium.

The O.L.I. contains one Article which relates to insurance against the risks of a debtor's insolvency. There are three possible reasons why this Article (which is similar to Articles 6 and 22 of the Belgian Law of Insurance of 1874) was inserted in the Ottoman Law:

i. The Ottoman statutes do not deal with the subject of life assurance, which would be an alternative method of insuring the solvency of a debtor.

ii. In order to add to the contract of guarantee (non-gratuitous), under which the creditor could proceed against either the debtor or the guarantor as he pleased, a provision which restricted claims against the debtor before proceeding against the guarantor.

iii. The revision of the rule of subrogation in the Ottoman Civil Code, by which the guarantor "may exercise his right of recourse against the debtor...in respect of what he has guaranteed and not what he has paid...But if he has paid a portion of the debt as a result of a settlement with creditor, he has a right of recourse in respect of that amount and not in respect of the debt." Under the rule of subrogation introduced by the insurance provision all the creditor's rights are transferred to the guarantor including any security which the creditor has. Insurance against a debtor's insolvency does not, thus, "consist of the addition of an obligation to an obligation in respect of a particular thing" but means that the insurer is exposed to the risk that the debtor will not perform his obligation.

The first section of Article 18 of the O.L.I. provides: "A creditor

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(1) Art.18, see infra.
(2) Articles 612, 614, 618, 650 and 662 of the Ottoman Civil Code.
(4) Art.657 of the Ottoman Civil Code.
(5) Art.812 of the Ottoman Civil Code, the definition of the suretyship. 
may insure sums of money due to him from clearly ascertained persons..."

The legislature did not intend to give a creditor an insurable interest in

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the life of his debtor nor to provide for the debtor to insure his contractual liability, and, therefore, the assured interest is not the debtor's life or liability but the debt. This contract must be initiated by the creditor unlike the contract of suretyship which is constituted initially between the debtor and the guarantor. Two consequences arise from the above provision. Firstly, the creditor is responsible for payment of the premium and may not claim it from the debtor as it is his own interest which the creditor is insuring and the debtor is not a party to the contract.

Secondly, as the contract is one uberrima fidei the creditor must disclose to the insurer all facts relative to the debtor's obligation; this is another distinction from the contract of suretyship in which the guarantor accepts the liability according to his personal knowledge.

The second section of Article 18 provides: "Should it be proved that the creditor cannot obtain payment of his debt owing to the inability of the debtor to make payment, the creditor may apply to the insurer for payment." The risk insured against is the debtor's insolvency although the contract is sometimes called "debt insurance" or insurance of the debtor's solvency. The creditor is not entitled to claim against either the principal debtor or the insurer as he pleases since his right arises only when the principal debtor defaults after being asked to pay. Insurance against a debtor's insolvency is, thus, a contract of indemnity which means that

(1) See p.107.
(2) See p.232.
(4) Art.6 of the Belgian Law of Insurance of 1874.
the insurer must pay not only the net debt but also any interest and expenses. Although the creditor is not obliged to exhaust all his remedies against the debtor, his suspicion that the debtor's inability to pay the debt must be disclosed to the insurer not only at the time of constitution of the contract but also at the time of its currency.

The last section of Article 18 provides: "Upon payment being made, the insurer is subrogated to all the rights of the creditor." This rule also is a result of the principle of indemnity. When the assured obtains payment from the insurer, he cannot claim against the debtor as this would mean that he profited at the expense of the insurer, but the debtor, nevertheless, remains liable. The insurer, therefore, is subrogated to the creditor's rights in the same way as in the contract of suretyship. Subrogation does not require the approval of the assured (the creditor) and the insurer is given a direct right of action against the debtor, replacing the creditor in all his rights and privileges. The rule of subrogation of the debt differs between that in English Common Law and of Iraqi Law. Although both rules arrive at similar results, the rule of subrogation in Iraq is based on the statute, whereas the rule of subrogation in England is based on special term in the policy.

The rule of subrogation obliges the assured to protect the insurer's rights against the debtor so he cannot release the debtor of his debts wholly or partly and must take any step needed for this purpose, e.g. issuing a warrant to the debtor to stop elapsing by prescription.

SECTION IV

The Contract of Insurance Against Risks Arising from Carriage

(2) Ibid., p.401.
1. Contract of Carriage

A carrier whether by rail, road or air broadly speaking is responsible under his contract for the safe delivery of the goods entrusted to him and the safe arrival of his passengers.

The carrier's liability in respect of goods is stated in Article 315 of the Commercial Code of Iraq and runs from the date when the goods are first entrusted to him until the time of delivery. The carrier cannot contract out of his liability but is released if he can prove that the damage to the goods occurred as a result of either (a) force majeure or fortuitous event, (b) inherent vice, either in the goods or in the packing, or (c) the actions of the consigner or his employees. Article 360 of the Commercial Code deals with the liability of the carriers for injury to passengers. The carrier is liable for all injuries caused by the negligence of the carrier or of his employee, but he is not liable for injury resulting from Acts of God (an event caused by fate and divine decree).

Both the carrier and the consigner of goods (or the passenger) may insure against risks arising from carriage, but the carrier insures against his contractual liability while the consigner insures his property and the passenger insures himself against accident.

A. The Risks Insured Against

The risks insured against depend on whether the carriage is by air or by land.

i. Risks in Carriage by Air

The risks in this case cover all kinds of hazards arising from the use of an aircraft for the carriage of goods or passengers, e.g. the crashing

(1) See p.271.
or destruction of the aircraft and theft or loss during the period of the carriage. In the case of the carrier, the insurance runs from the time when the goods are entrusted to his care while in the case of the consignor it runs from the time of shipping of the goods. In both cases the insurance expires at the date of delivery of the goods. In the case of passengers the insurance runs from the date of departure to the date of arrival.

ii. Risks in Carriage by Land

Carriage by land includes carriage by rail, by road and by inland waterway, and the risks insured against include damage occurring to goods or passengers. The rules governing commencement and expiry of the insurance are the same as those relating to carriage by air.

iii. Exceptions

a) The risks of the carriage by sea are not covered by this form of insurance but by marine insurance.

b) Damage to third party, e.g. as the result of an aircraft or rail crash is not covered by this insurance but by insurance against liability.

2. The Contract of Insurance

A. Insurance by the Carrier

This is a contract of insurance against liability. In the case of a carrier of goods insurance is not effected for the benefit of the owner of the goods although he will be the actual person to benefit from it. The insurer must, in the event of loss or damage, pay the value of the goods as at the destination, this being the value for which the carrier is liable.

(2) See p. 293.
passengers, it is his liability and not the passengers' lives which insures, and there is, therefore, no need to obtain the passenger's approval for the insurance. The carrier of passengers by motor-vehicle is compelled to insure his liability.

Despite the fact that the insurance is effected by the carrier, the injured person, whether the injury is to his person or to his property, has a direct action against the insurer. This right of action is protected by the law and the insurer is precluded from paying the indemnity to anyone except the injured person.

B. Insurance by the Owner of the Goods

This is an example of property insurance and the general provisions relating to this form of insurance apply. The contract may be effected by either the owner of the goods or by a consignor who is not the owner and if by the latter, it is known as a contract of insurance for the account of a third party. If a carrier insures goods entrusted to him for the account of the owner, this is valid and the owner is entitled to all rights of the assured in the contract.

C. Insurance by the Passenger

This is a personal insurance and the provisions related to life assurance contracts apply. The passenger or his heir may, thus, receive the benefit of the insurance, and, at the same time, he has a right to compensation from the carrier or the carrier's insurer. The passenger's insurer may not be subrogated to the right of the assured against the person responsible for the injury.

(1) Art.992 of the C.C.I., see p. 199.
(2) See p.251 et seq.
(3) Art.1006 of the C.C.I., see p. 247.
(4) Art.4 of the O.L.I., see p.127.
(5) See p.192.
(6) Art.998 of the C.C.I., see p.207.
3. Characteristics of the Contract

The O.L.I. contains detailed provisions on several aspects of the contract.

A. The period of Insurance

Section 2 of Article 24 provides:

"The liability of the insurer as regards the carriage of such goods and objects commences as at the date of the contract of insurance and finishes as at the date of delivery of the goods to the consignees; this is subject, however, to any stipulation to the contrary contained in the contract of insurance."

If the parties fix the period of the contract in advance, this is binding except that in the event of any delay or a change in the means of transport, the insurance continues until the delivery of the goods without any further premium having to be paid. Article 25 of the O.L.I. provides:

"If the despatch of goods is delayed or if the means of transport or the route to be followed are changed on account of force majeure, the insurer continues to be liable."

B. Payment of the Indemnity

The contract is one of indemnity, whether constituted by the owner of the goods or by another person (the consigner) for the owner's account. This means that the obligation of the insurer is to pay either the sum insured or the actual loss whichever is the less. In this contract the value of the goods includes the cost of transport. Section 1 of Article 24 of the O.L.I. provides:

"Insurers who insure the value and the cost of carriage of the goods and things forwarded from one place to another must, in the event of damage, pay the sum due in accordance with the terms of the contract of insurance and the cost of carriage. They will not be obliged, in the absence of any special agreement to the contrary, to make any payment in respect of profit which the person insured has lost by reason of increase in the value of the goods at their place of destination."

The owner, thus, cannot claim from the insurer the difference between the
price of the goods at the beginning of the journey and their price at the destination, but he can claim such a difference from the carrier. There are three possible situations.

i. When the Insurance is Effected by the Owner of the Goods

In this case the insurer is not obliged to pay to the assured the difference in price between that at the beginning of the journey and that at the destination, but the owner has a right against the carrier of the goods and the owner's right is to claim the anticipated profit.

ii. When the Insurance is Effected by the Carrier

In this case the owner of the goods is entitled to any anticipated profit and the carrier's insurer must pay that because the insurance covers the carrier's liability which includes such a profit.

iii. When the Insurance is Effected by Both the Owner and the Carrier

In this case the owner of the goods has no right to claim for anticipated profit from his insurer as this excluded is under Article 24 (above), but he may claim it from the carrier or from the carrier's insurer. In this case the carrier's insurer is the person liable for damage occurring to the owner of the goods and for payment of the indemnity made by the owner's insurer.

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(2) Art.315, ibid.
(3) Art.17 of the O.L.I., see p.88
CHAPTER IV

THE CONTRACT OF MARINE INSURANCE

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This is the most important kind of insurance and is, in fact, the origin of all other kinds, for the era of insurance began with insurance against maritime risks when in the commercial revolution and modification of methods of trading, merchants ceasing to accompany their goods and personally providing for their protection evolved other means of security, namely insurance.

1. Definition

Article 175 of the Ottoman Maritime Code of 1863 defines marine insurance as follows:

"Marine insurance is a contract by which the underwriter, for an agreed premium, undertakes to the assured payment in full up to the amount fixed for losses and damage which he might suffer by the perils of the sea upon the commodities exposed to the danger of navigation."

This Article corresponds to Article 173 of the Egyptian Maritime Code of 1875. Their origin is found in Article 1935 of the Prussian Code of 1794 and Article 246 of the Dutch Commercial Code of 1838. The French Commercial Code of 1808 gives no definition of marine insurance. The British definition, given in the Marine Insurance Act, 1906, is somewhat shorter but is in substance the same:

"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured in a manner and to the extent thereby agreed against marine losses, that is to say, losses incident to marine adventure."

There arise from these definitions some points for comment. There are the commodities which are the subject of insurance; the risk, clearly implied if not expressed; parties, the assured and underwriter; the contract

(1) See p. 28.
(2) It will be referred to as O.M.C.
(3) Noted as E.M.C.
(4) Noted as P.C.
(5) Noted as D.Com.C.
(6) Noted as F.Com.C.
(7) Noted as the 1906 Act.
(8) S.I.
embodied in a written instrument, the policy; and the principle of indemnity.

2. Subject of Insurance

A. Insurable Property

Article 178 of the O.M.C. provides:

"Insurance may be made over:
1. The hull and the keel of a ship, unloaded or loaded, armed or unarmed, alone or in convoy.
2. The rigging and tackle.
3. The fitting out of the ship.
4. The victuals.
5. The sum of money lent on a bottomry bond.
6. The cargo on board.
7. All other things capable of being given a money value and subject to maritime risks."

This Article corresponds to Article 176 of the E.M.C. and is a reproduction of Article 334 of the F.Com.C. of 1808, amended in 1885.

Article 179 provides that:

"Insurance may be effected on the whole or part of the said article, conjointly or separately. It may be effected in time of peace or in time of war, before or during the voyage. It may be effected for the outward and return journey, or for one of these only; for the whole voyage or for a limited period; for any voyage or carriage by sea, river or navigable canal and in general against all risks of navigation by sea or by water."

This Article corresponds to Article 177 of the E.M.C., and both are a reproduction of Article 335 of the F.Com.C. and Article 594 of the D.Com.C.

Section 2 of Article 187 of the O.M.C. provides that: "The assured may effect an insurance over the cost of insurance. The re-insurance premium may be less or greater than that of the first insurance." This section corresponds to section 2 of Article 185 of the E.M.C. and is based on Article 342 of the F.Com.C.

After these detailed provisions in the above Articles, the property which may be insured under the O.M.C. in Iraq are classified under these titles: the ship, the cargo, the bottomry bond, and the premium, which are now considered.
The Ship: In marine insurance the main object intended to be secured against the perils of the sea is the ship. Article 176 above does not define what is meant by the term "ship", but if the term is understood in its ordinary meaning, it covers all kinds of vessels. The description given to the accessories is not exhaustive; it includes only some parts of some kinds of ships, and it may not be wholly applicable in modern times. So it is worth citing the comprehensive definition of the term "ship" from the 1906 Act, which provides:

"The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured." (1)

The term "ship" may now be extended to include ships using electric or atomic means of propulsion.

So, when the policy is effected to cover a "ship", it includes all parts of the ship unless any part is expressly excluded, and the ship and its equipment may be insured in part or in whole at any time. Again, even though the O.M.C. does not expressly provide whether a ship under construction may be insured as a ship or not, it seems that if such a case is notified to the underwriter, a ship in course of building may be insured by policy of marine insurance.

The Cargo: Another object of marine insurance is indemnity against damage occurring to the merchandise forming the cargo of the ship. These goods become, like the ship, subject to the risks of navigation. The term "goods" is not defined in the O.M.C., but the terms "cargo", "goods", and "merchandise" all have similar meanings. The description and the nature

(1) Schedule, Rule 15.
of the goods insured must be stated clearly in the policy. The term "goods", however, does not include gold or silver coins or ingots, jewellery or precious stones and munitions, which must be specifically described; and the term merchandise does include the personal effects of the passengers and crew or livestock.

The property insured must not be unlawful by either municipal law or international convention. Thus, such things as "drugs" may not be insured unless an export or import licence is obtained from the authorities, and they must be specifically described in the policy. Smuggled goods may not be insured.

The Bottomry Bond: Article 176 (supra) permits insurance of the sum lent under the contracts of bottomry and respondentia. The loan is given by the lender either to the shipowner or the master of the ship in exchange for a mortgage of the ship or the cargo, and if the ship does not reach her destination, the loan is extinguished. So the lender may seek security by insuring the sum lent. It seems that the lender who becomes a mortgagee of the ship or the cargo has no interest to insure them as such; another creditor might rank with him on the insurance money for the ship, and so he gets protection by insuring the amount of the loan but not the ship.

The Premium: The assured may insure the premium which he pays to the underwriter. For example, when the assured merely insures his interest of £10000 at a rate of 2%, the premium paid is £200. If the risk occurs, he receives only the sum insured and loses the amount paid as premium. If, however, he insures the amount of the premium at the same rate, 2%, he loses

(1) Art.182 of the O.M.C., see p.351.
(2) Art.167 of the O.M.C.
only 4; and it is possible to insure even the latter amount, reducing the amount of loss to a trifling sum. This is often done in time of war when the possibility of loss is greater and the rate of premium considerably increased.

The premium may be insured by one or more underwriters. The insurance is embodied by express provision in the same policy as insurance of the ship or other property.

B. Non-Insurable Property

Article 192 of the O.M.C. provides that:

"The contract of insurance is null if it includes: freight of the goods actually on board the ship; the profit expected from sale of the merchandise; the wages of seamen; the sum borrowed on the bond of bottomry; and the marine interest or profit on the sum lent on the bond of bottomry."

This Article corresponds to section 1 of Article 190 of the E.M.C. and is based on Article 347 of the F.Com.C. of 1808. The latter was amended in 1885 to permit insurance on the net freight, anticipated profit, wages of seamen and interest on money lent on bottomry. The prohibition against insuring money borrowed on bottomry remains.

The Freight: The prohibition against insuring the freight is based on the old theory of mercantile law that freight is a price to be paid to the owner of the ship in exchange for the service of transporting goods from one place to another. It is a mere contingent or uncertain profit. In other words, it is, for the owner of the ship, money to be earned; and a person who fails to earn his fee is not entitled to indemnity. The above article fails to make a distinction between the person who pays the freight and the person who receives it and between the freight still to be earned (fret à faire) and the freight already earned (fret acquis).

(1) The O.M.C. provides that freight is not payable if the cargo shipped is

(1) Art.124.
lost; and not only is the shipper released from his obligation to pay freight, but if it has been paid in advance, he has the right to recover it unless otherwise agreed between the parties. A bill of lading may provide that the freight is payable whatever occurs.

In practice freight falls into one of the four following categories:

1) Freight paid in advance and payable whatever occurs; 2) Freight paid in advance and not payable in certain circumstances; 3) Freight payable in future whatever occurs; 4) Freight payable in future in certain circumstances only.

The first case is not properly "freight" at all; it is simply money paid to the shipowner. But for the shipper it is a charge which must be added to the value of the property insured. If the owner claims to spend the freight on the ship, it becomes part of the ship's value and he has no right to insure such money, but the shipper has an interest in freight which is not repayable in case of loss.

In the second case, the freight is repayable in case of loss and so the shipowner is like a borrower; if insurance is obtained by the shipper, it may be considered as not for the freight but for lending money. The shipowner has not a right to insure the money which he may not be entitled to receive.

In the third case, the shipowner is a creditor and the shipper is obliged to pay the freight in every event. So when insurance is effected by the shipowner, it is not exactly on the freight but on the debt; the shipper is entitled to add such money to the value of the property insured and consequently it also is insured.

In the fourth case, neither the shipowner nor the shipper has the right
to insure such freight because the owner may not be entitled to it and the shipper will not lose it.

The above propositions do not alter the fact that freight may not be insured in Iraq, but this prohibition affects only the shipowner and the charterer. Freight which is paid by the shipper or owner of the goods may be insured. The Commercial Code of 1943 in Iraq provides in Article 187 that the kind of sale known as C.I.F. is permitted; that is, the price of the goods includes their value, the premium for insuring them and the freight. The sum insured must be equal to the price at the place of delivery, and so freight must be included in the sum insured.

Finally, the prohibition against insuring freight is becoming obsolete. In France it has been replaced by allowing insurance of net freight, the earlier had been thus criticised:

"The French legislature, proceeding rather on scholastic refinements than mercantile consideration used to prohibit all insurance of expected or future freight on the ground that expected freight is a mere contingency in which there is no present existing interest; that it is but a gain which the assured may miss making, not property which he can risk losing." (2) (3)

In Britain, freight can be insured without provision in the 1906 Act, the Act referring only to advance freight in the sense of money paid to the shipowner as part payment of the freight and Section 12 providing that:

"In case of advance freight, the person advancing freight has an insurable interest insofar as such freight is not repayable in case of loss." It would appear, therefore, that the law of Iraq on this matter may be changed.

Profit: The legal reason for prohibiting insurance of profit is that

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(1) Art. 190 of the Com. C.I.
(3) Ibid., pp. 250-1.
profit is uncertain at the time of insurance. It is "a mental figment not existing on board the ship, and consequently cannot be insured." (1)

The only case in which profit may be included in the price of the goods insured is in the case of barter. Article 185 of the O.M.C. provides that:

"If the insurance is effected on the return voyage from a country where the value of the goods is not stated in the policy, it shall be estimated according to the value of those which were given in exchange with the addition of the costs of transport."

This Article corresponds to Article 183 of the E.M.C. and is the same as Article 340 of the F.Com.C. "The value of those which were given in exchange" includes profit which may have been earned from the transaction and is now the property of the assured; it is not an unexpected gain. The Article, moreover, does not apply to modern methods of trade as barter is under state control and regulated by convention between importing and exporting states.

Wages of Seamen: Article 176 does not permit insurance of the wages of seamen. Article 73 provides that seamen are not entitled to claim their wages when the ship is lost, and the owner of the ship, being in that event not obliged to pay these wages, he is not entitled to insure them. Article 176 prohibits such insurance, and the prohibition is extended to the seamen themselves; they are not entitled to insure their wages. Emerigon says:

"The reason is that wages do not form a physical object which exists on board the ship. They form a conditional debt, depending on the fate of the voyage. It is a profit and recompense." (3)

The seamen fail to make this profit when the ship is lost. The prohibition is also designed to avoid the situation where the seamen are sure of

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(1) Emerigon, Insurance, p.189.
(2) Ibid., p.291.
(3) Pothair, Traité du Contrat d’Assurance, p.279.
their wages and, therefore, fail to perform their duties properly. In modern laws of insurance, however, such a prohibition does not exist. The right to earn is the right of every individual, and wages are the price of his effort. This prohibition should, therefore, be repealed.

Sum borrowed on Bottomry: This provision must not be confused with the provision of Article 170, which authorises the lender to insure the amount of the loan. In this case, the prohibition is directed against the person who borrows on a bond of bottomry because if the ship is lost, the amount borrowed is not repayable. It would accordingly not be proper to allow the borrower to insure something he may not have to pay, as such insurance would be a sort of wager and a source of profit. This provision was retained in the French amendment of 1885.

Interest on Bottomry Loan: This prohibition concerns the profit arising from a bottomry loan. The person who made a loan on a bottomry bond will lose his money if the ship is lost and so he is allowed to insure the amount lent. As, however, the interest is a profit gained from this transaction, there is no reason why he should be able to insure this profit, and this is especially so in the case where the interest is received in advance and in the case of unpaid interest where the lender does not lose the interest but only fails to gain it. For this reason the O.M.C. prohibits insuring the profit from maritime loans. This problem does not arise in the case of the borrower as in the event of loss of ship, he is not responsible for repaying the loan and interest.

C. Insurable Interest

The requirement of insurable interest was introduced into Iraqi legislation recently. The O.M.C. of 1863, like the F.Com.C. of 1808, does not

(1) See p.299.
(2) Art.334 was amended in 1885 and commences: "Any person interested may insure..."
refer to it. The legislature at that instant was content to enumerate the things which could be insured and those which could not, and apart from providing that the assured must state whether or not he is owner of the things insured, it did not make a distinction between the cases where the assured has an insurable interest in the things insured and where he has not, nor does it provide that such an interest is necessary either at the constitution of the contract or during the period of risk. The importance of this distinction appears where the assured retains an insurable interest but is not the owner of the things insured, e.g. where he is the mortgagor or shipper. In France the old rule provided that the assured had to be owner of the things insured, but this rule was criticised by Emerigon:

"Wherever the policy of insurance conforms with the bill of lading, the insurers have little interest in the fact, whether or not the effect insured belongs to the party assured. It is sufficient that the subject insured exists on board the ship. It is not competent for the insurers to object to the assured the want of ownership."

In France the problem was solved by the amendment of 1885, but in Iraq Article 170 still contains the old rule, and, as was the case in France before the amendment, the taking of insurance policies on behalf of third parties and of floating policies is a violation of the law. This rule is, however, since the introduction by Article 984 of the C.C.I. of the requirement of insurable interest, no longer applicable, and the problem is changed from that of proving ownership to that of proving insurable interest. This interest must exist not only at the time of formation of the contract but at the time of occurrence of the risk. As a result, there is no question of using the contract of insurance for the purpose of gambling.

(1) Art.176, see p.299.
(2) Art.3 of the Ordonnance of 1681 in France.
(3) Ibid., p.108.
(4) Ripert, Droit Maritime, vol.iii, p.520.
(5) See p.102.
3. Risk

A. The Nature of Maritime Risk

The purpose of marine insurance being to give some security against risks resulting from adventure at sea and risks being future and uncertain events, it is desirable and indeed essential that there be some definition of "maritime risk". The term is not defined in the O.M.C.; nevertheless, its meaning is clear. The term "risk" has many synonyms, e.g. "peril", "hazard", "danger", and no distinction can be drawn between the meanings of these various terms. The term "maritime" means that the things insured are exposed to the perils of the sea. "Maritime risk" is thus, strictly speaking confined to perils met with at sea, and it is generally essential that all damage covered by the policy be suffered at sea. A policy of marine insurance may, however, if it contains a "warehouse to warehouse" clause also cover non-maritime risks.

B. Kinds of Risk

The O.M.C. recognises two categories of risk: (a) risks for which the underwriter is liable unless otherwise agreed, (b) risks for which the underwriter is not liable unless otherwise agreed.

i. Risks for which the Underwriter is Liable unless Otherwise Agreed

Article 195 of the O.M.C. provides that:

"The underwriter is liable for all loss and damage occurring to the property insured by reason of: storm; shipwreck; stranding; accidental collision; forced change in the course of the voyage or of the ship; jettisoning; fire; capture; pillage; detention by order of a sovereign power; declaration of war; reprisal; and generally all other perils of the sea unless otherwise agreed by the parties."

This Article is similar to Article 192 of the E.M.C. Both of them follow Article 350 of the F.Com.C. with the addition of the last provision which

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adds the exception of agreement by the parties. This addition is similar to the provision in Article 637 of the D.Com.C.

Unless the parties agree to exclude certain risks, the contract of insurance covers every loss that may happen at sea. In practice, however, the policy does not cover all maritime risks, and there are many kinds of clauses excluding certain kinds of risk, e.g. an "Institute War Clause", an "Institute Strike Clause" or an "Institute Theft, Pillage and Non-Delivery Clause". The general terms of the policy do not exclude any of those risks, and such "clauses" are considered as special agreements which modify these terms.

The last phrase of the Article 195 - "and generally from all other perils of the sea" - is ambiguous. In fact it is limited to such damage as is sustained while the ship is in the course of voyage and the perils must be of the same kind as those mentioned earlier in the article.

The risks specified in Article 195 are of two important kinds, i.e. (a) perils of the sea, and (b) risks arising out of hostilities.

(a) Perils of the Sea

Storm: This is the most common cause of damage to ships during a sea voyage. Storms or tempests can cause the foundering of the ship, damage to the goods on board, and damage to the ship and its accessories. Emerigon writing about "storm" says:

"The Latin word "tempestas" signifies fair weather as well as foul, according to the application made of it. By tempest is commonly understood the violent agitation of winds disturbing the equilibrium of the sea. Hurricane is an impetuous wind, whirling rapidly, and that seems to sweep everything around it; threatening clouds appear to gather tranquilly and then suddenly launch a storm." (2)

Storm damages include not only the foundering of the ship but also damage

(1) These clauses are issued by the "Institute of London Underwriters". They are accepted in Iraq and incorporated in the standard form policy.
(2) Ibid., p.316.
caused by sea water or rain during the storm.

**Shipwreck:** This means that the ship is broken up either by heavy waves or by being driven against rocks. There are two kinds of shipwreck: In the first the vessel sinks after being shattered and broken up; in the second the ship is stranded and breaks upon the land but is not totally destroyed. The damage is, in both cases, irreparable. Unless it is proved that the damage is caused by some other factor such as the fault of the master or the crew, the loss of the ship during its voyage is covered by the policy.

**Stranding:** This occurs when the ship runs aground and sticks fast. The stranding must be the result of accident. If it results from the usual course of the journey and in the absence of any exceptional cause, it is a case of mere wear and tear. If the stranding is accompanied by destruction of the ship, it is treated as a case of shipwreck. If the stranded ship is re-floated with the help of the crew or of some third party, the legal consequences depend on whether the ship is damaged or not, and the O.M.C. provides that if either the damage or the expenditure on salvaging the ship amounts to three-quarters of its value, it is treated as a case of total loss.

**Collision:** This means that the ship sustains damage by striking another vessel or some structure such as a harbour wall. A policy of marine insurance covers all kinds of accidental collision, "accidental" meaning that there must not be negligence on the part of the master of the ship insured. There are four possible kinds of collision: (a) collision for which no party is responsible, e.g. the result of a storm or any other vis major; (b)

(2) Art. 233, see p. 367.
collision due to the fault of one party, (c) collision due to the fault of both parties, (d) collision for which neither party is proved responsible.

Change of Course: If an insured ship incurs damage as a result of change from its usual voyage or its prescribed route, the deviation may be the result of one of several causes. It may happen as a result of external causes such as storm or enemy action or it may happen without justification. In the first case, any loss sustained is covered by the policy. Thus, if the master orders deviation from the original course of the voyage in order to avoid a possible cause of damage or if it is not possible to avoid making such a deviation, the underwriter is liable for any damage sustained by the property insured. In the case of unjustifiable change Article 196 of the O.M.C. provides that the underwriter is released from liability in every case in which change occurs unnecessarily or as a result of the assured's action.

There arise some noticeable points. The O.M.C., like the F.Com.C., does not distinguish between the terms changement de route and déroutements de voyage. Article 195 (350 F.Com.C.) uses the term changement forcés de routes du voyage and Article 196 (351 F.Com.C.) uses the term tout changement volontaire de route du voyage. This is unlike the 1906 Act where the distinction is made between change of voyage and deviation. Section 45 provides that: "1. Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage." Section 46 provides that:

"1. Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained

(1) Ripert, op.cit., vol.iii, p.714.
(2) This word is added by the Ottoman legislature.
her route before any loss occur.

2. There is a deviation from the voyage contemplated by the policy -
   a) Where the course of the voyage is specifically designated by the policy and that the course is departed from; or
   b) Where the course of the voyage is not specifically designated by the policy but the usual and customary course is departed from.

3. The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

The provisions of these sections distinguish between a change of the termini of the voyage and a deviation where the voyage insured is never lost sight of. It is noteworthy that the term "change of the voyage" is understood by French legal writers to mean "modification du voyage," but this does not take account of the distinction just mentioned.

Also Section 49 permits deviation in the following circumstances:

"1. Deviation or delay in prosecuting the voyage contemplated by the policy is excused -
   a) Where authorised by any special term in the policy; or
   b) Where caused by circumstances beyond the control of the master and his employer; or
   c) Where reasonably necessary in order to comply with an express or implied warranty; or
   d) Where reasonably necessary for the safety of the ship or subject-matter insured; or
   e) For the purpose of saving human life or aiding a ship in distress where human life may be in danger; or
   f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or
   g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

2. Where the cause excusing the deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage with reasonable despatch."

So as the O.M.C. fails to provide a distinction between the terms "deviation" and "change of the voyage", the term deviation which is employed in the "Institute Clause" which is attached to the marine insurance policy covers the unjustifiable change of the port of destination.

(1) Arnauld, Droit des Assurance Maritime, vol.i, p.408.
(2) Smith, op.cit., p.294.
Unavoidable Change of Ship: This is regarded as one of the perils of the sea. It mainly concerns the cargo. If the cargo insured is removed from its appointed ship without the permission of the underwriter or unjustifiably, the underwriter incurs no liability. The question of justification is dealt with by Article 235 of the O.M.C., which covers the case where the ship is considered unseaworthy. It provides: "The master is required in this case (unseaworthiness) to use his best endeavor to obtain another vessel for the purpose of carrying the goods to their destination." This article corresponds to Article 229 of the E.M.C. and is based on Article 301 of the F.Com.C.

The underwriter's liability continues in respect of the new ship, Article 236 of the O.M.C. providing that: "The underwriter undertakes liability for goods shipped in another vessel in the circumstances mentioned in the preceding article until their arrival and discharge." This provision is similar to Article 230 of the E.M.C. and is a verbatim reproduction of Article 392 of the F.Com.C.

An unavoidable change of ship is not limited to the case of the ship being innavigable but extends to all cases where the master is compelled to change ships, e.g. where the original ship is arrested by a foreign power and the goods are released.

Jettison: This is confined to goods on board ship and to the equipment of the ship. It arises mainly when the safety of the ship and the rest of the cargo is endangered. In the event of grave danger, the master may have some of the cargo or ship's equipment thrown into the sea. Loss incurred in this way may be treated as a general average loss, which means that the remainder of the cargo and the ship bear the cost of the jettisoned goods. The policy, as well as providing for the underwriter's lia-
bility in the case of jettison, deals with general average by means of "Institute Clauses".

If a thing insured is thrown from the ship, the underwriter who is liable for the loss and indemnifies the assured has a right of relief against any person who benefits from the general average act.

Fire: The O.M.C. imposes on the underwriter liability for all loss occurring at sea through fire. The fire must not be caused by the intentional act of the assured or by the inherent nature of the things insured. If it is caused by an intentional act of the master and crew, it falls into the category of barratry. Therefore, the cause of the fire must be either force majeure or "fortuitous event", such as lightning or an outside agency, such as enemy action or the action of a passenger.

From a practical point of view, the cause of fire on the high seas often cannot be investigated, especially where the ship is a total loss. However, it is possible to suggest that in wartime, if the ship is, in the outbreak of fire, in a zone of hostilities, the fire is the result of enemy action. In the case of partial loss or constructive total loss, the cause of fire can be investigated, so such speculation is unnecessary.

Pillage: The O.M.C. mentions neither piracy nor the theft of the things insured. It uses the word "pillage". This means robbery with violence of the ship or cargo. This includes piracy but simple theft is not included unless accompanied by violence.

When the property insured is lost as the result of an act of robbery, whether committed by pirates or by robbers on board the ship, the underwriter is liable to indemnify the assured, and the policy provides for loss by theft.

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(1) Clause of General Average, see p.405.
(2) Ripert, op.cit., vol.iii, p.624.
(3) See p.815.
b) Risks Arising Out of Hostilities

Article 195, based on the French Commercial Code, provides that cases of capture, detention by order of a sovereign power, declaration of war and reprisal are included in the risks for which the underwriter is liable. The inclusion of these provisions does not meet the needs of the situation. It should be left to the parties to agree whether to include them or not, and in practice they are excluded from the underwriter's liability. The exclusion appears in Clause 12 of the "Institute Cargo Clauses", which states that when this clause ceases to apply, the "Institute War Clauses" come into force.

In fact, risks rising out of hostilities, even though they remain a potential cause of damage, do not now often occur, and they are covered by a special form of clause, the "Institute War Clauses" in which replacing the general terms of the policy. This may be arranged by agreement of the parties under Clause 12 of the "Institute Cargo Clauses" mentioned above, and such agreement is quite legal. Another point resulting from this exclusion is that a separate premium applies to risks arising out of hostilities, the rate differing according to whether it is wartime, peace or a period of international war.

The kinds of war risks enumerated in the Article 195 are not exclusive. The last phrase which provides "and generally from all the perils of the sea" may cover risks arising out of hostilities which are neither referred to in the Article nor in the policy, provided that they are of the same kind.

ii. Risks for which the Underwriter is not Liable unless Otherwise Agreed
Apart from the proviso in Article 195 that parties may agree to exclude some of the risks enumerated therein, the O.M.C. stipulates that certain risks are not covered by the policy unless there is agreement by the parties to include them. These risks are: (a) barratry, (b) fault of the assured, and (c) inherent vice in the things insured.

**Barratry:** Article 198 of the O.M.C. provides that:

"The underwriters are not liable for loss incurred as the result of the barratry, misconduct and faults of the master or the crew unless there is an agreement to the contrary between the parties. Such an agreement is null if the master is the sole owner of the ship and, in any other case, null to the extent to which he is owner of part of it."

This Article is similar to the Article 195 of the E.M.C. It follows Article 353 of the F.Com.C., which does not, however, include the second section. The latter is similar to Article 640 of the D.Com.C. Article 198, moreover, differs from its French original inasmuch as the latter describes the terms "misconduct and fault of the master" as "barratry", whereas Article 198 adds the term "barratry" to the other terms. This addition does not affect the fact that the master's misconduct or fault is barratry.

The word "barratry" has an uncertain origin which gives rise to different views on its meaning in different jurisdictions. As, however, the Iraqi provision is derived from the French article, the term "barratry" will be initially construed according to its French meaning. The standard form of marine insurance policy in Iraq uses the same term - "barratry" - but in this case it is derived from Lloyd's policy of marine insurance. Thus, the introduction of this term into the standard form policy is the result of citation, not from the Code but from Lloyd's policy, and it might be

(1) See p.307.
(2) "L'assurance n'est point tenue des prévarications et fautes du capitaine et de l'équipage, connus sous le nom de baraterie de patron, s'il n'y a convention contraire."
necessary to discover the meaning of the term as used in the British marine insurance rather than to reconcile any differences of meaning.

By the term "barratry" is meant generally a lack of good faith and turpitude on the part of the master and crew of the ship. As Emerigon says: "Barratry comprises all kinds of fraud, as well as simple imprudence, want of care and unskilfulness, as well of the master as of the crew." In other words, it includes every fault whether intentional or unintentional.

In practice, as mentioned before, the policy of marine insurance in Iraq states that the underwriter's liability extends to loss resulting from the barratry of the master and crew. In fact, this is not the result of special agreement between the parties to include "barratry"; the provision already exists in Lloyd's policy, and so it is important to explain what is meant by "barratry" in the Marine Insurance Act, 1906. Rule of construction no.11 provides that: "The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer." Here a distinction is made between an act committed by the master without criminal intent or fraud and an act which is, as Arnould says, "in itself manifestly unlawful or criminally negligent." In the first case the underwriter must prove intention on the part of the master whereas in the second case there is no need for such proof. Arnould continues:

"The loss arising from ignorance or incompetence of the captain, from a mistake as to the meaning of his instructions, or misapprehension of the best mode of carrying them into effect can never amount to barratry. The master, in fact, before he can be proved to have acted barratrously, must be shown to have acted against his better judgement; if he merely acted up to the best of his judgement, however bad, this is not barratry."

(2) Ripert, op.cit., vol.iii, p.629.
(4) Ibid., p.797.
In other words, there is a distinction between an intentionally wrongful act and an unintentional fault. The distinction between the French and the British usage of the term "barratry" is thus clearly displayed. Examples of barratry are: seizure of ship by the crew, scuttling, smuggling and illegal trade.

The question of "barratry" is, as mentioned, a problem in Iraq. The O.M.C. is of French origin while the policy of marine insurance has a British background, and one must conclude that the interpretation of the term must be limited to its meaning among Lloyd's underwriters. Thus, if it is intended to extend the cover of the policy to include unintentional acts of the master and crew, the barratry clause must be removed from the general conditions of the policy and replaced by a separate clause. In such a case it would be considered as a special agreement made in accordance with the provisions of the legislation and would be construed accordingly.

**Fault of the Assured:** The O.M.C. provides that: "...Any loss or damage arising from an act of the assured releases the underwriter from liability." (2)

This is a section in Article 196; it is similar to a provision in Article 193 of the E.M.C. and is based on Article 351 of the F.Com.C. Section 2 (3) of Article 197 of the O.M.C. provides that: "The underwriters are not liable for any damage caused by the act and fault of the owner, freighter or shipper." This section corresponds to Article 194 of the E.M.C. and is derived from Article 352 of the F.Com.C.

The effect of these provisions is that damage occurring to the things insured must not be caused by acts of the assured or of persons working on his behalf. It should be noticed that the assured's act need not necessarily be a "fault". Any loss or damage caused by the assured's act, when-
ther intentional or unintentional, releases the underwriter from his contractual liability. The underwriter need only prove the act of the assured and that this act was the direct cause of the damage. Examples would be: where the assured orders the master of the ship to deviate or insures the cargo as being in the hold and, in fact, agrees that it should be put on deck.

It should be noted that the above provisions make a distinction between the assured on the one hand and the owner, freighter or shipper on the other. If the latter are to be blamed, their acts must be proved to be "fault". In the case of the assured, it is enough to prove that his act caused the damage, but the owner, freighter or shipper may prove that he has acted honestly, and it is essential that the underwriter, if he is to be relieved of liability, prove that the act is tainted with fault and that it is a direct cause of the damage. This would occur in the case of connivance of any of those persons with the crew or the master of the ship to damage the insured goods or to scuttle the ship.

It is worth discussing whether the averred to persons - the owner, the freighter or the shipper - have the right to insure against damage occurring through their own acts. The O.M.C. is silent on this point. French legal writers hold differing opinions. Some old opinions do not recognise such a right. It is said by Pothier that: "It is evident that I cannot make a legally valid contract with any one that he shall charge himself with the fault I commit." Some modern writers take the view that such an agreement is valid. Ripert makes a distinction between acts volontaires and acts involontaires and suggests that it is not permissible to make an

(1) Emerigon, op. cit., p. 290.
(2) Ibid., p. 291.
agreement in respect of wilful acts but consider that in the case of un-
(1) wilful acts a party may be insured. It seems possible that this opinion
is based upon sub-section 2a of Section 55 of the Act. The Marine Insur-
ance Act, 1906, provides that: "The insurer is not liable for any loss at-
tributable to wilful misconduct of the assured." Another suggestion is
made by the French writer who maintains that when the term à tous risques
is included in the policy, it means that the fault of the assured is cover-
(2) ed. This suggestion is based not on the technical meaning of an "all risks"
policy but on the literal meaning of the term. No such interpretation can
be inferred from the "Institute Clauses (All Risks)", where the term "all
risks" means not that the policy of marine insurance covers every item
damage or loss, however caused, but only that the "loss was caused by cas-
(3) uality or something accidental." If a party wishes to insure his own acts,
the insurance will not cover any intentional act.

Inherent Vice: Article 197 of the O.M.C. provides that: "The under-
writers are not liable for any damage, diminution or loss occurring through
an inherent vice of the things insured..." This Article has not been cod-
ified in the E.M.C. and is based on Article 352 of the F.Com.C.

The purview of this Article is not limited to any one kind of thing
insured and may cover either the ship or the cargo. The inherent vice of
the cargo or the unseaworthiness of the ship because of the natural results
of age are not perils which are included in the maritime risks, and a spec-
ial agreement is necessary to cover them. So when the policy of marine in-
surance contains the clause "all risks", this does not cover inherent vice
(4)
of the property insured.

(1) Law, vol.iii, p.678.
(2) Ripert, ibid.
The assured must give a full description of the goods insured. Some kinds of goods are very liable to be affected by inherent defect even though the defect cannot be foreseen at the constitution of the contract, and it must be established whether the defect is natural or is the result of external factors. Natural defects, e.g. in the case of livestock, death by sickness, are not covered unless by special agreement, but if the defect is caused by an external factor insured against, such as fire, storm or other perils of the sea, it is covered. In the case of the insurance of food, meat, fruit, wheat, flour, tobacco, skins, salt, sugar and such commodities, the policy usually provides:

"And it is declared and agreed that Corn, Fish, Salt, Fruit, Flour and Seeds are warranted free from average unless general or the ship be stranded, sunk or burnt, and that Sugar, Tobacco, Hemp, Flax, Hides and Skins are warranted free from average under five pounds per centum..."

When insurance is effected on the hull of the ship, the assured must declare whether the ship and its equipment are seaworthy or not. This information is included in the ship's certificate of survey at the port of departure, but sometimes it is not easy to discover all particulars and latent defects, especially when the ship is an old one, and so if it is damaged as a result of old age or the breakdown of its mechanism without external interference, the underwriter is not liable unless by special agreement. The loss of the ship's equipment during ordinary use is not covered by the policy without special agreement.

A special agreement to cover certain kinds of damages occurring to the ship but not a direct result of maritime risks may in Iraq be included in the policy of marine insurance on hull. It is known as the "Inchmoree Clause", derived from the "London Institute Clauses" included in the policy
and provides:

"This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to, hull or machinery directly caused by accident in loading, discharging or handling cargo or caused by negligence of masters, mariners, engineers or pilots or through explosions, bursting of boilers, breakage of shaft or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager. Masters, mates, engineers, pilots or crew are not considered as part owner within the meaning of this clause should they hold shares in the steamer."

C. Duration and Area of Risk

As it has been pointed out, the characteristic of risks is that they are uncertain and future events. The assured seeks, and the underwriter undertakes to give, security against risks resulting from adventure at sea. The phrase "perils of the sea" indicates that the disaster must occur within a limited time and in a certain place. It is, therefore, important that the duration and area of the risk be defined, and the O.M.C. expressly requires that the policy must state the period during which liability is incurred for risks and that the route on which the risks may be defined.

i. Attachment of Risk

Article 194 of the O.M.C. provides that: "If the voyage is interrupted by an act of the assured before the attachment of the risks insured in accordance with Article 170, the contract of insurance is void..." This section corresponds to similar one in Article 191 of the E.M.C. and originates in Article 349 of the F.Com.C. The validity of the contract of insurance is based upon the condition that the subject insured is for sometime exposed to the risk insured against or, in other words, that the risk attaches. If the risk is non-existent or the subject is never exposed to it, the underwriter comes under no obligation. The risk is presumed to attach at the time of departure of the ship or at the time of loading the goods, and so

(1) See p339.
(2) See p324, Art.170 of the O.M.C.
any outside factor, in order to preclude commencement of the period of the risk, must occur before these dates.

Article 201 of the O.M.C. provides that:

"If the insurance is effected on goods for both the outward and return voyage, and if the vessel having arrived at its first destination returns without a cargo or only partially loaded, the underwriter received two thirds of the premium agreed upon unless otherwise agreed by the parties." (1)

This Article is similar to Article 198 of the E.M.C. and is based on Article 356 of the F.Com.C. This is another example of the risk having being attached, but its effect is different. In a case under Article 194 the contract is cancelled and the underwriter receives compensation of one half percent of the sum insured or half the premium. In a case under Article 201 the contract remains valid and the non-attachment of the risk on the return voyage affects only the premium.

(2) It must be noted that the "Institute Cargo Clause" provides that:

"This insurance attaches from the time the goods leave the warehouse at the place named in the policy for the commencement of the transit and continues until the goods are delivered to the consignees or other final warehouse at the destination named in the policy..."

The clause "warehouse to warehouse" thus extends the underwriter's liability so that it begins not at the date of loading the goods but at the date of their leaving the warehouse mentioned in the policy; and so if for some reason they are not shipped, the underwriter is liable for any damage they may sustain.

ii. Duration of Risk

The O.M.C. provides that insurance may be made for the "whole voyage (4) or for a limited time." The policy either expressly defines the time as a specific period or the time is limited by the voyage of the ship. There

(1) See p.339.
(2) See p.339.
(4) Art.179, see p.298.
(3) Clause 1
is no difference whether the voyage is "outward and return journey or for (1) one of them", and duration may be defined for cargo or ship or both.

The O.M.C. provides further that if the duration of the policy is not (2) fixed, it is considered to be the time of voyage. So there are two kinds of policies: (a) time policy, and (b) voyage policy.

a) **Time Policy**

The O.M.C. is silent as to limitation of the period covered in a time policy. In practice it is limited to one year, particularly in the case (3) of a ship, as the value of a ship becomes less after one year in use. In (4) Britain the 1906 Act provides that the period of every insurance is limited to one year and no more.

**Commencement and Expiry of the Period of Risk:** In a time policy the parties should fix by agreement the date at which the underwriter's responsibility is to start. Otherwise, the date of the policy is the date of the commencement of the risk. The underwriter remains under his contractual obligation for the duration of the policy, and after the expiry of this period, he is released from responsibility. Article 208 of the O.M.C. provides that: "When the insurance is made for a limited period, the underwriter is released after the expiry of such time and the assured may effect an insurance against new risks." This Article corresponds to Article 205 of the E.M.C., and both are based on Article 363 of the F.Com.C.

In practice the underwriter's liability is expressly limited after the goods insured arrive at the port of destination, Clause 1 of the Institute Cargo Clauses providing that: "...In no case, however, shall the period of cover after completion of the discharge overside of the goods from an overseas vessel at the final port of discharge extend beyond 60 days."

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(1) Art.179, see p. 298.
(2) Art.186, see p. 324.
(3) Kipert, op.cit., vol.iii, p.699.
(4) Section 12
(5) See p.322.
**Unknown Date of Loss of Ship:** When no news is received from a ship insured by a time policy and it becomes certain that it has perished, but it is not possible to ascertain when it perished, Article 220 of the O.M.C. provides that: "In the case of an insurance for a limited time after the expiry of the period above mentioned for ordinary and long voyages, the loss of the vessel is presumed to have happened within the period of insurance..." This provision corresponds to a provision in Article 215 of the E.M.C., and their origin is found in Article 376 of the F.Com.C. (2)

The periods of "limited time" referred to are specified in Article 219; they are six months for short voyages, one year for distant voyages and eighteen months for long voyages. The importance of this provision is that the date of the disaster is presumed to be within the period of the policy. It is, in fact, possible that the date of the disaster may be later than the expiry of the policy, but this possibility is excluded by the law, subject to the right of the underwriter to prove the contrary.

**b) Voyage Policy**

When there is no time limit in the policy, it is considered a voyage policy. In this case the parties must specify the place where the voyage starts, and different considerations apply according to whether the property insured is ship or cargo.

Article 186 of the O.M.C. provides that: "Where the policy of insurance does not limit the period of risk, the risk commences and ends with the period determined by Article 170 for bottomry and respondentia." Article 170 provides that:

"If the period from which the risk commences is not determined by the contract, it starts:

With regard to the ship and its rigging, apparatus, outfit, and victualling, from the day the ship sails down to the day when it is anchored or moored at its port of des-

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(1) See p. 388.
(2) See p. 386.
With regard to cargo, the risks begin from the day it has been shipped on board the ship or the lighter to be conveyed there until the day it is unloaded. When a loan has been made on security of the cargo during the voyage, the risks begin from the date of the contract until the day it is discharged on shore."

These Articles correspond to Articles 184 and 168 of the E.M.C. and are based on Articles 341 and 328 of the F.Com.C. respectively. The last section of Article 170 does not appear in Article 328, and it seems that it is borrowed from Article 528 of the D.Com.C.

iii. Area of Risk

The sea is the place where the risks are presumably incurred, and the underwriter's responsibility is limited to disasters happening at sea and from the perils of the sea. This responsibility in practice is extended to cover some risks which do not happen at sea, especially by the introduction of the clause "from warehouse to warehouse", but this extension does not alter the fact that the main object of marine insurance is to cover disaster through perils of the sea.

Accordingly, the place where the goods insured are exposed to the perils of the sea must be specified by the parties. If the property insured is cargo, the ship on which it is must be known to the underwriter and its route and any change in it must be declared in the policy. If the property insured is a ship, it is important to know its route and the ports at which it may dock, and, in fact, all these matters are stated in the policy. Thus the extent of the risk is made known to the underwriter, and any change in it releases him from responsibility. Article 196 provides that: "Every change in the course of the voyage or change of the vessel...releases the underwriter from liability." This provision causes three kinds of change,

(1) See p 347.
(2) See p 340.
without distinction between insurance of a ship and insurance of cargo. These three kinds of change are: (a) change of route, (b) change of voyage, and (c) change of ship.

a) Change of Route

Article 196 mentioned above distinguishes between the voyage insured against and the route by which the ship proceeds on the voyage. When a policy states that the voyage is "from London to Basrah (port of Iraq)", the route may be either through the Suez Canal or around Africa by the Cape of Good Hope. The voyage remains, but there may be change of route.

The specification of the route in the policy affects the insurance of the ship as well as the insurance of cargo. In practice each ship uses a certain route during its voyage, and routes can be ascertained from shipping companies. It is, therefore, not necessary to state all in detail.

In the policy there is also usually a clause by which the master is allowed to enter any port in the course of the voyage, one form being: "And that it shall be lawful for said ship or vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance." This clause is made to reduce difficulties of navigation unless the ship is prevented specifically from entering any enemy port. Any deviation from the usual route must be the result of fortuitous events, otherwise the underwriter may be released from liability.

b) Change of Voyage

This restriction applies to insurance on the hull of a ship. When the ship insured proceeds on a certain voyage, it is not possible to change it without the approval of the underwriter. A change of voyage may occur by extension of the journey, but curtailment of the voyage does not need the
approval of the underwriter. Article 209 of the O.M.C. provides that:

"The underwriter is released from liability for risks, and is entitled to the premium, if the assured sends the ship to more distant ports than those mentioned in the policy, even though it is in the same direction. The insurance is of full effect if the voyage is shortened."

This Article corresponds to Article 206 of the E.M.C., and both are based on Article 304 of the F.Com.C.

c) Change of Ship

This restriction concerns insurance of cargo because it is not possible to change the ship in case of insurance on its hull, as this would change the subject of insurance. In a change of ship on which the cargo insured is loaded, it is a matter of changing the place of risk. The name of the ship on which the goods insured are loaded must be stated in the policy. Article 196 (mentioned above) provides that any change of ship renders the contract null and void. No distinction is made between a time or a voyage policy. Any change of ship made voluntarily by the assured releases the underwriter from liability. Even more, as the legislation does not include the barratry of the master and crew within the risks insured without specific agreement, the change of ship, by removing the cargo to another ship without necessity, is considered barratry; so in the absence of an agreement to cover such risks, the underwriter is discharged from any responsibility which results from this change.

The change of ship is made in two cases: (a) before proceeding on the voyage, and (b) during the voyage.

Before Proceeding on the Voyage: As pointed out in the previous section, when the ship is named in the policy, the goods insured cannot be loaded on another ship without the consent of the underwriter. If they are loaded without his consent, the contract is null on the ground of con-

(1) In practice the policy covers the risks of barratry. See p.315.
tradiction between the bill of lading and the policy of insurance, and he is released from his obligation. Moreover, the ship cannot be changed although other goods insured by the same underwriter are being shipped on the second ship. This is made clear in Article 206 of the O.M.C., which provides that:

"If the insurance has been effected divisibly for goods which are to be shipped in several ships named with a declaration of the sum insured on each, and where the entire merchandise is put on board a single ship or on board a smaller number of ships than expressed in the policy, the underwriter shall only be liable for what he has insured on the ship or ships which have received the merchandise, notwithstanding the loss of all the vessels mentioned; and he shall, nevertheless, receive on the sum on insurance which has been cancelled, the compensation prescribed in Article 194."

This Article corresponds with Article 203 of the E.M.C., and they are based on Article 361 of the F.Com.C. Yet the French article, instead of making reference to the article which corresponds to Article 194, states that the underwriter is entitled to receive one-half percent on the amount of the insurance which has been found null, whereas Article 194 (above referred to) gives the underwriter the right to receive either one-half percent or half the premium if that is less than one percent. The following example illustrates this provision: Goods valued at £8000 are insured from London to Basrah in four shipments, each one for £2000; the assured shipped cargo valued at £6000 on one ship and this shipment becomes a total loss. The assured is entitled only to receive the amount of £2000 designated for the lost ship.

**Change During the Voyage:** The policy is designed to avoid restraint of trade. It contains a condition which permits the ship to trade from port to port, which means that when the ship is allowed to touch at any ports during its voyage, the cargo insured must not be affected by such a

(1) Art. 193 of the O.M.C., see p. 343
(2) See p. 383.
proceeding. In other words, the cargo must not be removed from the ship
during its course, either to be loaded on another ship, or to be kept in a
port at which it touched during the voyage. For example, it is not possible
unless the underwriter agrees in the policy to remove the goods to another
ship during the voyage or to leave the goods in a port as, for example, if
the ship is allowed during its voyage from London to Basrah to touch at
Antwerp and Hamburg, the cargo insured must not be discharged at Antwerp
in order that it may be recollected after the ship returns from Hamburg.

This matter is explained in Article 207 of the O.M.C., which states:
"If the master is allowed to put in at different ports to complete or
change the cargo, the underwriter runs only the risks of the goods insured
when they are on board unless there is a contrary agreement." This article
corresponds to Article 204 of the R.M.C., and they are based on Article
362 of the F.Com.C.

The feature of this Article is that the act of the master in removing
the goods insured from the ship - the place of risk - is a barratrous act.
Moreover, a voluntary act of the assured in removing the goods insured from
the place of the risk without necessity is an act which releases the under¬
writer from any liability.

D. Termination of the Risk

Article 210 of the O.M.C. provides that:
"Every insurance effected after loss or arrival of the goods
insured is void if it is proved that the assured has been
informed of the loss or the underwriter of the arrival of
the things insured or if it can be presumed that before the
policy was signed the assured was informed of the loss or
the underwriter of the arrival of the goods."

and Article 211 provides that:
"The said presumption applies if, owing to the distance bet¬
ween the places and the routes of communication, it can be
proved that either from the place of arrival or of loss of
the vessel or from the place where the first news of arrival
or loss arrived, information might have reached the place
where the policy of insurance was entered into before the
signing of the contract."

These Articles correspond to Articles 207 and 208 of the E.M.C. and are the same as Articles 365 and 366 of the F.Com.C., except that Article 210 has an extra provision, the phrase "if it is proved...things insured" being added by the Ottoman legislature. In Article 211, too, there is a modification from the French Code, the phrase "by allowing three-quarters of myriametre per hour without prejudice to other evidence" being replaced by the phrase "owing to...communication."

The above provisions were not used to ensure complete abandonment of the traditional theory of risque putative in the French Commercial Code, but a new rule was introduced by the Ottoman legislature to reduce this "presumption of knowledge", and proof is required that either the assured has been informed that the things insured are already lost or that the underwriter has been informed of their safe arrival. This does not, however, mean proof that these parties have in fact been informed of such events, as the possibility of their having received such information is in certain circumstances presumed.

Modern opinion in the field of insurance is that the conditional character of the contract requires that risk be in the future. To give effect to this principle, the contract must be considered null and void if the things insured have perished before its constitution. It is not necessary that either party is aware of this fact. In marine insurance, however, the position is rather different. The nullity of the contract depends upon whether either party knows either of the occurrence of damage or of the safe arrival of the things insured. The receipt of such information or the

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(1) Smet, op. cit., p. 211.
(2) See p. 113.
possibility of its receipt renders the contract null and void.

The question, therefore, must be changed from whether the occurrence of the risk before the constitution of the contract renders the insurance null to whether the parties knew of the actual occurrence of the loss or that the risks insured against had ceased to exist. This knowledge has two aspects. It is either actual or putative. Article 211 provides for a presumption of knowledge that the things insured have already perished or that they have already arrived safely. This presumption arises when there is a possibility that the information may have reached either the assured or the underwriter. It is a presumption of law and does not mean that the parties have already been informed but simply that it is possible for them to have been informed. This legal presumption is juris et de (1) jure, which means it is absolute and irrefutable. The possibility of information is, however, a matter of fact, and the application of the presumption falls to be decided in accordance with the circumstances of each individual case.

It should be noted that the date on which the assured is presumed to have obtained information of the realisation of the risks insured against (2) is the date of his signature of the document known as the "insurance order" whether this document is signed by his agent or by him personally. In the case of the underwriter, the date on which he is presumed to have obtained information of the safe arrival of the things insured is the date of his (3) signature on the "cover notes".

Finally, it is necessary to consider whether knowledge of safe arrival

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(1) Emerigon, op.cit., p.693.
(2) See p.160.
(3) See p.161.
by the assured or knowledge of the disaster by the underwriter may affect the validity of the policy. In other words, is it possible for those persons to release themselves from their obligations for these reasons? The above rules are not applicable in this case. The contract is valid and neither party can release himself from his obligation. The assured must pay the premium and the underwriter must pay the sum due under the policy. Both parties are aware of the facts and must perform their respective obligations.

E. "Lost or Not Lost" Clause or Insurance "on good or bad news"

The O.M.C. provides in Article 212 that:

"If, however, the insurance has been effected upon good or bad news, the presumption mentioned in the preceding articles is not admissible. The contract is only annulled upon proof that the assured knew of the loss or the underwriter of the arrival of the ship before signing the contract."

This Article corresponds to Article 209 of the E.M.C., and they correspond verbatim to Article 367 of the F.Com.C. This kind of insurance is known as insurance on "good or bad news". It means that the parties agree to enter into a contract of insurance after a delay in receiving any news from the ship. There is a possibility of its being lost, but there is no certain evidence. The parties, therefore, may stipulate for a special case different from the cases provided for in Articles 210-1 mentioned above, namely, the clause of bonnes ou mauvaises nouvelles, which means that if news of the ship is received either party may lose. In the case of bad news, the underwriter is the loser, and in case of good news the assured is the loser.

In practice this rule is in common usage, and is inserted in every policy of insurance. To regard it as exceptional is more theoretical than

(1) See p. 329.
(2) Ripert, op.cit., vol.iii, p.508; Smet, op.cit., pp.689,703.
practical, and, in fact, reduces the effect of the prescience of either party and makes it almost useless.

In Iraq, even though the O.M.C. copies the French Clause in practice, there is a difference. The clause used in policies is not "bad or good news" but "lost or not lost". As, however, both terms have similar consequences, it is more useful to consider the meaning of the term "lost or not lost" as it is used in its original source, Lloyd's policy of marine insurance.

Rule 1 of the rules for the construction of the policy provides that:

"Where the subject-matter is insured "lost or not lost" and the loss has occurred before the contract is concluded, the risk attaches unless at such time the assured was aware of the loss and the insurer was not." (2)

In marine insurance the term "lost or not lost" has two effects. First it gives the policy retrospective effect to cover the risks which already existed before the constitution of the contract. Second, it covers the insurable interest of the assured in default of such interest at the date of loss. In fact, in both cases the term "lost or not lost" is used for the purpose of giving the insurance retrospective effect. On the first point, the O.M.C. permits of insuring to cover risks which may or may not be in existence. The difference is only in terminology; the term "good or bad news" has the same meaning as "lost or not lost". On the second point, the question is whether it is possible to use the term "lost or not lost" in cases where the assured may not have an insurable interest at the time of the loss but may have obtained it at the time of the constitution of the contract.

The following problem arises from the different origins of the above effects. Lloyd's policy provides in its preamble that the assured may in-

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(1) The standard form policy of marine insurance which is used by insurance companies in Iraq.
sure in his own name "and in the name and names of all and every person to whom the same doth, may or shall appertain in part or in all...", and there is in addition to the statement of this that of B. Parke that: "Such a policy (lost or not lost) is already a contract of indemnity against all past, as well as all future losses, sustained by the assured in respect to the interest insured. It operates just in the same way if the plaintiff (the assured) having purchased goods at sea, the defendant (the underwriter) for a premium, had agreed that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good."

This statement is incorporated in Section 6 of the 1906 Act, which provides that:

"1. The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected; provided that where the subject-matter is insured "lost or not lost" the assured may recover although he may not have acquired his interest until after the loss unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

2. Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss."

The Act, moreover, does not provide that the assured must declare his interest at the time of formation of the contract, ss.1 of s.23 merely requiring that the policy must contain: "The name of the assured or some person who effected the insurance on his behalf." There is no need to describe the assured's title to the things insured, and the policy may be made initially by a person "who shall acquire the subject-matter insured."

In fact, the saying of B. Parke and the other provisions cannot be applied in Iraq. It is necessary for the assured to acquire an insurable interest before the formation of the contract. Even though the O.M.C. does not mention the rule of insurable interest expressly, it provides that the

(1) Sutherland v. Pratt (1843) 11 M. & W. 296, 311.
policy of marine insurance must state whether the assured is proprietor of
the things insured or a mere agent of a real owner. Furthermore, the rule
of insurable interest which is applied in the Civil Code is also applicable
(1) to all kinds of insurance including marine insurance. So it is important
that the assured must declare his interest not only at the time of con-
stitution of the contract but at the time of loss. Otherwise, the contract
(2) is invalid for want of subject-matter.

This argument may be illustrated as follows. In the case of goods
sold which are on board a ship at sea or in a rather inaccessible place
(3) necessitating a long voyage, the contract is concluded at the time of de-
(4) livery of the invoices and the bill of lading or the document of ownership,
and the risk of these goods being lost or deteriorated passes to the buyer
(5) from the date of the contract. It may be inferred that any loss or deter-
ioration which takes place before the conclusion of the contract is borne by
the vendor. When the buyer, therefore, insures goods at the time of sign-
ing of the contract of sale, the underwriter is not responsible for the
loss even though the policy contains the term "lost or not lost". The
reason is that the contract of sale is null, and the buyer is not responsi-
(6) ble for the payment of the price; moreover, he has the right to recover
it. Consequently, the assured (the buyer) cannot ask the underwriter for
an indemnity, otherwise the insurance becomes a source of profit and not

(1) See p. 103.
(2) See p. 101.
(4) Art. 150, ibid.
(5) Art. 153, ibid.
(6) Compare with Article 1601 of the French Civil Code, which says:
"1. If at the moment of sale the goods sold have perished entirely, the
sale shall be null.
2. If a part only of the goods has perished, it is at the option of
the purchaser to abandon the sale or to demand the part preserved
on having the price determined by intimation."
a matter of indemnity. At the same time, if the underwriter agrees to indemnify the assured, he has no recourse against the vendor because the latter is not liable for damage to his property.

Accordingly, the term "lost or not lost" cannot be employed in Iraq in the sense that the assured may acquire his insurable interest in the goods insured after they are lost.

Sanctions: Besides the rules of nullity which are mentioned in the previous section, Article 213 of the O.M.C. provides that:

"In case of proof against the assured, he must pay a double premium to the underwriter.
In case of proof against the underwriter, he must pay to the assured a sum double the amount of the agreed premium. In either case, the party against whom the proof has been adduced may be prosecuted criminally."

This Article is similar to the Article 210 of the E.M.C., and they are based on Article 368 of the F.Com.C.

It is noticeable here that there is no need to prove fraud by the party at fault, as it is obvious that when any party to a contract of marine insurance has received any information concerning the safe arrival or loss of the goods insured, his subsequent insurance is a misrepresentation. In fact, it is not necessary to prove that either the assured or the underwriter actually received this information; it is sufficient to presume from circumstances that the information was received by them. If, on the other hand, it is proved that this information was received before the constitution of the contract, the question of fraud arises. For example, in the case of delay to the ship, the owner of the ship may be informed of the loss but the owner of the cargo who insures his goods may not have received such information even though he has the same domicile as the owner of the ship. In this case, it is presumed that the owner of the cargo received the information, and the contract of insurance is, accordingly, null al-

(1) See p. 329 et seq.
though there is a probability that the act was honest.

4. **Parties to the Contract: Obligations**

The parties to a contract of insurance are the underwriter and the assured, both of whom undertake specific obligations.

**A. The Underwriter**

(1) In marine insurance the insurer is called the underwriter, so called because he subscribes the policy of marine insurance. His obligations are twofold: (a) to accept liability for the risks, and (b) to indemnify the assured. The first of these has been considered in relation to risk. The second is considered in relation to indemnity.

**B. The Assured**

In the contract of marine insurance, as in other contracts of insurance, the assured is the person who effects the contract with the underwriter in order to secure his interest against risks, and any person who is competent to contract and has an interest in the property exposed to maritime risks may enter into a contract of marine insurance. The assured must declare all the relevant facts concerning the contract so that the underwriter may be in a position to investigate all the circumstances, and in this as in all matters, the assured must abide by the rule of utmost good faith. He is responsible for payment of the premium essential to the conclusion of the contract. He must also, in order to avoid any suspicion of gambling, show that he has at the time of constitution of the contract an insurable interest in the things insured, and he cannot claim indemnity under the policy unless the damage has occurred to his interest.

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(1) See p.141.  
(2) See p.307.  
(3) See p.362.  
(4) See p.127.  
(5) See p.102.
Besides the requirements, the O.M.C. imposes certain conditions which the assured is obliged to observe. These conditions or obligations are:
(a) payment of the premium, (b) declaration of the risks insured against, and (c) declaration of the damage suffered.

i. Payment of the Premium

The premium has been defined as the amount to be paid by the assured to the underwriter in consideration of his undertaking responsibility for the (1) risks insured against. The rate is regulated by the underwriter; it differs from one kind of risk to another, and it depends too on the state of the insurance market. The amount must be stated in the policy.

a) Limitation of the Premium

Article 188 of the O.M.C. provides:
"Where the premium is agreed in time of peace it cannot be increased on the outbreak of war and, conversely, the premium cannot be reduced because peace is declared, save by the agreement of the parties.
Where the increase or reduction of the premium agreed upon has not been fixed by the contract of insurance, it shall be settled by the Courts or by arbitration, having regard to the risks insured against, circumstances of the case and the provisions of the policy of insurance."

This Article corresponds to Article 186 of the E.M.C. and follows Article 343 of the F.Com.C., but the latter does not deal with the reduction of premiums or with arbitration. It provides that the premium cannot, failing agreement between the parties, be changed either by increase or by reduction. The reference to war and peace does not mean that the provision is designed solely to take account of eventualities, but the outbreak of war or the declaration of peace are two of the most important factors affecting the rate of premiums. In fact, whatever the reason, the premium cannot be changed without agreement between the parties.

(1) See p.118.
b) Divisibility of the Premium

Before Commencement of the Period of Risk: Article 194 of the O.M.C. provides that:

"If the voyage is interrupted by an act of the assured, before the commencement of the risks insured in accordance with Article 170, the contract of insurance is void and the premium, if it has already been paid, may be recovered from the underwriter, except for that part received by him by way of indemnity, i.e. one-half percent of the sum insured or half the premium if that does not amount to more than one percent."

This Article corresponds to Article 191 of the E.M.C. It originates in Article 349 of the F.Com.C. and Article 635 of the D.Com.C. with minor changes introduced by the Ottoman legislators.

The feature of this article is that the part of the premium that must be paid to the underwriter is called "indemnity". This means that the legislature wished to avoid the possibility of confusion between divisibility and non-divisibility of the premium. In fact, however, the premium is divided; the idea of divisibility is maintained, and the premium divided even without express provision. It is important to mention that Article 170 of the O.M.C. referred to in Article 194 provides that the commencement of the period of risk starts with the departure of the ship insured or, in case of goods, from the loading of the goods insured on board the ship.

Support for the proposition that the O.M.C. retains the theory of divisibility of the premium appears in Article 201 which provides that:

"If the insurance is effected on goods for both the outward and return voyages, and if the vessel having arrived at its first destination returns without a cargo or only partially loaded, the underwriter receives two-thirds of the premium agreed upon unless otherwise agreed by the parties."

(1) "If the voyage is broken off before the departure of the vessel, even by an act of the assured, the insurance is cancelled; the underwriter receives as indemnity one-half percent of the sum insured."

(2) "If the voyage is broken off before the commencement of the period of risk undertaken by the assureds, the insurance is cancelled. The premium shall be restored to the assured. In the two cases all the assureds shall receive is one percent of the sum assured or one half of the premium, whichever is the less."
This Article provides an important rule that the outward and homeward voyages cannot be regarded as one entire risk.

After Commencement of the Period of Risk: Article 196 of the OMC provides that:

"Any deviation in the course of the voyage or change of ship and any loss or damage arising from an act of the assured releases the underwriter from liability, and he is entitled to retain the premium if he has begun to incur any risk."

This Article corresponds to Article 193 of the EMC and is based on Article 351 of the FComC.

The force of this Article lies in the last phrase, in which the idea of the indivisibility of the premium is clearly stated. Thus, as soon as the underwriter incurs responsibility for the risks insured against, the whole amount of the premium becomes his property, and his responsibility begins at the commencement of the risks insured against by either, in the case of the ship the starting of the voyage, or in the case of goods on their being loaded on board ship. It is sufficient that the risks insured against have started, and at this moment the whole premium becomes the property of the underwriter. This view has been criticized by some French legal writers (3) Ripert suggests that there is a possibility that the underwriter becomes enriched at the expense of the assured, as would happen when the risks insured against cease to exist before the end of the period for which the premium has been computed and his conclusion is that the rule of indivisibility of the premium is peculiar to marine insurance. So this exceptional rule may not establish a general doctrine that the premium is always indivisible.

Examination of the first part of the article shows that any deviation

(1) See p.307.
(3) Ibid., vol.iii, p.453.
(4) Ibid., p.455.
and any act on the part of the assured which causes loss are not the responsibility of the underwriter. These amount to breaches of contract and cannot be corrected after they have occurred. Even if the ship returns to its normal route or even if the loss caused by the assured’s act is restricted, the underwriter remains under no obligation.

Points for Comparison: In Britain the general rule that if the property insured has once been at risk, prima facie the premium is not returnable. So if the risk has never attached, the assured is entitled to recover it. But the application of these rules are not absolute; other qualifications were introduced into these rules in the Marine Insurance Act, 1906, which provides certain circumstances in which premiums are returnable. These circumstances are provided in Sections 82—84; they are as follows—

Section 82 provides that:

"Where the premium or a proportionate part thereof is by this Act declared to be returnable—
a) if already paid, it may be recovered by the assured from the insurer; and,
b) if unpaid, it may be retained by the assured or his agent."

Section 83 provides that:

"Where the policy contains a stipulation for the return of the premium or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured."

Section 84 provides that:

"1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agent, the premium is thereupon returnable to the assured. (2)
2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured. (3)
3) In particular—
(a) Where the policy is void or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or

(2)Art.194, O.M.C., see p.334.
(3)Art.201, ibid., see p.339.
illegality on the part of the assured; but if the risk is not apportionable and has once attached, the premium is not returnable. (1)

(b) Where the subject-matter insured, or part thereof, has never been imperilled the premium or, as the case may be, a proportionate part thereof, is returnable; provided that where the subject-matter has been insured "lost or not lost", and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless at such time the insurer knew of the safe arrival. (2)

(c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering.

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable.

(e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable.

(f) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premium is returnable, provided that if the policies are effected at different times and any earlier policy has at any time borne the entire risk or if a claim has been paid on the policy in respect of the full sum insured thereby no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured, no premium is returnable." (3)

So it may be concluded that the Ottoman Maritime Code differs from the Marine Insurance Act, 1906. The latter is more practical. It seems, also, that the criticism made by Ripert is influenced by the rules of the Marine Insurance Act.

ii. Declaration of the Risks Insured Against

a) Before Constitution of Contract

The contract of marine insurance is a contract based upon the utmost good faith. This means that the underwriter is entitled to know all the circumstances concerning the risks undertaken by him or the state of the things insured. In other words, the assured must disclose any material

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(1) cf. Art.193 of the O.M.C., see p.343.
(2) cf. Articles 210-13, ibid., see pp.329,330.
(3) cf. Art.187, ibid., see p.92.
information of which he has knowledge. Moreover, this disclosure must be made with honesty and without fraud or misrepresentation, otherwise the contract may be avoided at the instance of the underwriter. In this connection Article 193 of the O.M.C. provides that:

"Any omission on the part of the assured or any difference between the insurance policy and the bill of lading, which affects the nature of the risks or changes the things insured and is such that it may prevent fulfilment of the contract or modify its conditions when the underwriter has been notified of the true state of the things insured, may make the contract void quoad the underwriter. The insurance is void even in the case where such omission, misrepresentation or difference would not have caused the damage or loss of the things insured."

This Article is similar to Section 2 of Article 190 of the E.M.C., and both articles are based on Article 348 of the F.Com.C., but there is an important difference. The Iraqi Article makes the contract voidable "quoad the underwriter", whereas the French Article makes the contract void quoad both parties. In other words, the above Article provides that the underwriter may be released from his obligations while the assured is still obliged to fulfil his obligations. The underwriter is, thus, the only person who has the right to avoid the contract, and the assured has no right to claim restitution of the premium. The underwriter may, moreover, claim any unpaid instalments of the premium.

(1) Certain Arab legal writers have commented on this provision. These views have been influenced by the views of French lawyers although the latter have been coloured by the provisions of the French Commercial Code which, as has been noted above, are different from those of the Iraqi Code. Despite these differences, the Arab writers have approved a decision of the French Court de Cassation, in which it was held that the assured had the

(2) Ripert, op.cit., vol.iii, p.427.
right to claim repayment of the premium and that the underwriter could seek compensation from the assured when damage occurred under this nullity. There is no reason for limiting the provision "quoad the underwriter" to the right of claiming avoidance of the contract, and it, therefore, follows that the claim for avoidance of the contract by the underwriter gives him the right to retain the premium.

The assured is obliged by law to disclose all facts relating to the risks, and there must be no discrepancy between the bill of lading and the policy. Any non-disclosure or false declaration is treated as valid reason in law for denying the assured any benefit from the contract of insurance. Thus, the retention by the underwriter of the premium is tantamount to a penalty authorised by law. It would, therefore, not be logical to abandon the implications of the provision by allowing only a claim for compensation restricted in accordance with Article 194. The assured's obligation fully to disclose the facts continues for the whole period of the contract. If it is found, after the assured has been indemnified as a result of the occurrence of the risk, that the contract was based on false information, it is treated as void ab initio.

What Information must be Disclosed: The above article provides for two situations in which the contract may be annulled by the underwriter. The first arises if there is non-disclosure on the part of the assured in his declaration of any material facts about the contract. The fact not disclosed must be of such a kind that, had it been known to the underwriter, he would have refused to effect the contract. The article does not distinguish between failure to disclose made in good faith and that made mala

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(1) Smet, op.cit., p.95.
(2) See p. 63q.
fide, and the rule applies equally in both cases. Nor does it matter whether damage to the things insured has resulted from the non-disclosure.

The application of the above provision is left in each case to the court or to the arbiters, who will examine the facts of each case, and they have the power to decide which facts are material so that their non-disclosure would lead to avoidance of the contract.

It should be noted that the assured's obligations to declare the circumstances concerning the things insured is quite general. It may cover the "warranty of seaworthiness" although it has been noted by an English writer that:

"On the Continent the fact of unseaworthiness does not invalidate the policy; seaworthiness is not a condition of the policy attaching. In England and in the United States, on the contrary, seaworthiness at the time of sailing in the case of a voyage policy is a condition. If not satisfied, the underwriter is not liable for a loss which may happen although by a peril insured against and although the loss may have no connection with the unseaworthy state. On the other hand, there is in England no warranty of seaworthiness at all in time policies nor any obligation on the assured against his underwriter under such a policy to take care that the ship be made fit for her voyage, nor is there any such obligation in voyage policies except at the first port of departure." (1)

This view has been supported by and embodied in Section 39 of the Marine Insurance Act of 1906.

It is true that there is not, in the Iraqi Code, a clear provision corresponding to the "warranty of seaworthiness", but the master of the ship must submit a "certificate of survey" at the time of departure. If the master issues a false "certificate of survey", this is a barratrous act and the underwriter is, in the absence of special agreement, not liable. If the assured himself is responsible for concealing this fact, the

(2) Art. 119 of the O.M.C.; Art. 397 of the F.Com.C.
contract of insurance is null and void. In navigability and unseaworthiness are, moreover, examples of inherent vice in the ship. It can, therefore, be concluded that the shipowner and the master are under obligation to keep the ship in a seaworthy condition.

The owner or shipper of goods is also under obligation to notify the underwriter of all the circumstances which might affect the risk, and when he has done so, no express warranty is necessary because in practice a warranty is part of the obligation undertaken by the assured.

b) After Constitution of Contract

Declaration of New Circumstances Affecting Risk: In all insurance contracts the assured must, as mentioned before, inform the insurer of any new circumstances affecting the risks. Section 1 of Article 986 of the Civil Code obliges the assured to observe this condition during the whole period of the contract.

In marine insurance, further special provision is made. Section 1 of Article 231 which concerns the arrest of the ship or the cargo by a foreign power provides: "In the event of arrest and stoppage by a sovereign power, the assured is bound to notify the underwriter within three days after receipt of the information." This section corresponds to similar section of Article 225 of the F.In.C. It is based on Article 287 of the P.Com.C., yet the Ottoman legislature has used the term prise et arrêt, whereas in the original French article, the term arrêt is used. It seems that the former does not include capture, therefore, they are translated as "arrest and stoppage". Article 234, which deals with unseaworthiness of the ship, provides that: "If the ship has been declared unseaworthy by the experts, the person who has

(1) See p.319.
(2) See p.133.
insured the cargo is bound to give notice, therefore, within three days after receipt of the information." This article corresponds to Article 228 of the E.M.C. and is based on Article 390 of the F.Com. C. These Articles refer to news of a disaster, but they do not affect the application of Article 986 of the C.C.I. requiring the assured to notify the underwriter of all circumstances which increase the risks. Both obligations have the same effect, intimation of the news of a disaster or of circumstances increasing the risks being intended to enable the underwriter to reduce the (1) effect of the damage or to examine the situation.

5. The Policy

This is the instrument in which the parties express their agreement. There is not a special definition of the word "policy" in the O.M.C., but it gives a precise description of what the policy must contain, Article 176 providing that:

"The contract or the policy of insurance must be made by instrument drawn up by a notary public or under private signature. It is drawn up without blanks and contains:

i. The year, month, day and hour when it is subscribed.

ii. The name, profession and domicile of the assured, with designation whether he is proprietor or agent.

iii. The nature and value or estimated value of the goods or other things which are insured and the sum by which they are insured.

iv. The risks which the underwriter undertakes.

v. The time of the commencement and termination of the risks insured by the underwriter.

vi. The premium or cost of insurance.

vii. The name of the captain and the name and description of the ship.

viii. The place where the goods have been or are to be shipped.

ix. The port whence the ship has sailed or is about to sail.

x. The ports at which the ship is to load and discharge and those which it is to enter.

xi. Whether parties have agreed to submit to arbitration in case of dispute,

xii. And generally, every other condition upon which the parties have agreed."

This Article corresponds to Article 174 of the E.M.C., and both are based on

Article 332 of the F.Com.C. and Article 256 of the D.Com.C.

Form: Though the above provisions require that the policy of marine insurance must take the form of a written instrument, this does not mean that the contract of marine insurance is a "formal contract". As soon as the parties to the contract agree as to their contractual obligations, the contract is legally constituted, and writing is required solely as evidence. So the Article puts on an equal footing the instrument made in the ordinary way and the instrument drawn up by a notary public.

A. Contents

The Article quoted above provides that certain matters must be specified in every policy of marine insurance, and the validity of the contract may be affected by the omission of any of these elements. Yet, it is worth mentioning that some of them are not of sufficient importance to be stated in the policy at the time of its constitution; it is possible for parties to agree that certain matters are to be included in a later sub-contract or that the assured may notify them to the underwriter as soon as they become known to him. This agreement between the parties is valid and does not affect the validity of the original policy. The doctrine of the utmost good faith applies here, as elsewhere, and parties must not commit any fraud or misrepresentation.

In practice the provisions of the policy become stereotyped, and it takes a more or less standard form. The general conditions are the same for every kind of marine insurance, whether, for example, the insurance of a cargo or the insurance of a hull, but each type of marine insurance has its own special conditions, known as "Institute Clauses". Like its original sources, the O.M.C. does not actually prescribe a fixed form for any

(1) See p. 71.
(2) See p. 161.
policy. The advantage of this appears in Britain in the Marine Insurance Act, 1906, to which the well-established "Lloyd's Policy" of marine insurance is appended. So, in Iraq, it is left to the insurance companies to produce their own policies. In practice it is difficult to do so and the companies chose a more practical method and base their standard form on Lloyd's policy. This practice by-passes the Maritime Code, which is not consulted by the companies. The details given in the above Article appear, therefore, to be matters more of theory than of practice, not only because the business of insurance was not investigated to discover its needs but because the Article is a mere citation from the Commercial Code of another country - France. Moreover, the business of insurance was established locally only some fourteen years ago. Before the establishment of the "National Insurance Company" in 1952, it was in the hands of non-Iraqi insurance companies which operated in the country through agents and used their own forms of policy. After 1952 many insurance companies were formed by Iraqis, but the situation was entirely changed by nationalisation in July, 1964, and the need to provide an official and certain single version of marine insurance policy became more urgent. This means not the replacement of Lloyd's standard form but taking steps to ascertain the needs of the business.

Meantime, the policy of marine insurance as stated in the above Article has official sanction, and its elements are as follows:

The Date of the Policy: The time when the policy of insurance is concluded and signed by the parties is crucial for two reasons. Firstly, the

(1) Ripert, op. cit., vol. iii, p. 433.
(2) See p. 57.
exact date must be stated in accordance with Articles 210-213. By those Articles the existence of the risk before the constitution of the policy may render the contract null and void. Secondly, from the date of the policy the time which must elapse before contractual rights are forfeited starts to run.

The specification of the date of the policy does not, however, prevent the parties from agreeing that the period of insurance is to commence on a different date, for example, the date of the shipment of the merchandise or the date of the departure of the ship. It must be noticed that this agreement is valid whether the exact date is expressly stated in the contract or notified subsequently to the underwriter.

The Name of the Assured: The name of the party who makes the contract with the underwriter must be stated in the policy, whether the contract is made on the assured's behalf or on behalf of some other person, and the name of the owner of the goods must be clearly specified. As the O.M.C. does not refer to insurable interest, Article 98 of the C.C.I. must be taken into consideration, and the assured must have an insurable interest in the things insured, not only at the date of the formation of the contract but as long also as the contract subsists.

A problem arises as to whether the assured may make the contract on the account of some other person who may claim the interest at the time of the happening of the risks. Such insurance is known as pour compte de qui il appartientra, on the behalf of a holder of the policy who is unknown till the happening of the risk. This would seem to contravene the Article above which requires the name of the assured to be stated in the policy. The

(1) See pp. 324, 332.
(2) See p. 102.
holder is thus an assignee to whom the assured assigns his rights when he states in the contract that any person who proves his interest in the things insured may claim the proceeds.

The Subject Insured: The subject insured must be described specifically in the policy. It is important to state whether it is the hull of the ship and its accessories or the cargo or both. The value of the subject insured must also be specified. Article 182 provides that:

"If the assured is ignorant of the kind and value of merchandise which is dispatched or consigned, he can have it insured under the general denomination of goods. But the policy must state the person to whom the goods are sent or consigned unless there is an agreement to the contrary in the policy of insurance.

This insurance does not include gold or silver coins, ingots of same material, diamonds, pearls, jewellery and munitions of war."

This Article corresponds to Article 180 of the E.M.C., and both are a combination of Article 596 of the D.Com.C. and section 3 of the Article 337 of the F.Com.C. The value of the goods may be stated in the invoices, Article 184 providing:

"If the value of the goods is not fixed in the policy, it may be proved by the invoices or books of the shipper; in their absence a valuation is made at the current price at the time and place of shipment, including all duties and expenses until placed on board."

This Article corresponds to Article 182 of the E.M.C., and both are based on Article 339 of the F.Com.C.

The nature of the things insured must also be stated, Article 200 of the O.M.C. providing that:

"Mention shall be made in the policy of goods which, by their nature, are subject to special damage or loss (as grain or salt) or subject to leakage; otherwise the underwriter will not be liable for any damage or loss which may happen to these things unless the assured was ignorant of the nature of the cargo when the policy was signed."

This article corresponds to Article 197 of the E.M.C. and is based on Article 355 of the F.Com.C.
The Sum Insured: The assured must state whether the sum insured is the value of the subject insured or includes that value, this happening when the sum insured is larger than the value of the subject insured. The former is a "valued policy", the latter an "unvalued policy". Yet the contract of marine insurance, being a contract of indemnity, the assured or the holder has no right to claim more than the actual loss.

The Risks: The O.M.C. in Article 195 denotes the kinds of risk for which the underwriter assumes responsibility and permits parties to exclude certain kinds of risk. In addition to this provision, it is provided that certain kinds of risk are not the underwriter's responsibility unless the parties agree to include them in the policy. So, in practice, the matter is left to the parties to choose which risks are covered by the policy and what are not, and the underwriter may limit his liability in respect of certain goods. The policy of insurance in its standard form provides more detail:

"...And it is declared and agreed that Corn, Fish, Salt, Fruit, Flour and such are warranted free from average unless general or the Ship be stranded sunk or burnt and that Sugar, Tobacco, Hemp, Flax, Hides and Skins are warranted free from average under Five Pounds per centum..." (4)

By this clause the underwriter's responsibility is clearly limited.

The Period of Risk: The parties must agree whether the period of risk commences on the shipment of the goods or the departure of the ship, and it is possible that more than one voyage may be covered in a single policy. Article 186 of the O.M.C. provides that: "Where the insurance policy does not fix the period of risk, the latter commences and ends within the period fixed by Article 170 for bottomry and respondentia bonds." This Article

(1) See p. 78.
(2) See p. 307.
(3) See p. 315.
(4) See p. 320.
(5) For Art. 170 see p. 324.
corresponds to Article 184 of the E.M.C., which is based on Article 341 of the F.Com.C.

**Premium:** The amount of the premium must be specified in the policy, and in practice the policy specifies also the rate of the premium, which differs from one risk to another. The importance of such a specification is recognised in Article 188 of the O.M.C.:

"The premium stipulated in time of peace cannot be increased if war is declared, and conversely, the premium cannot be reduced because peace is concluded unless otherwise agreed between the parties.

If the increase or the reduction of the premium has not been provided for in the contract of insurance, it will be settled by the court or by arbiters by taking into consideration the circumstances and the stipulations of the policy of insurance."

This Article corresponds to Article 186 of the E.M.C., which originated in Article 343 of the F.Com.C., but the reduction of the premium and the settlement by arbitration were introduced by the Ottoman legislator.

**Name of the Ship and the Master:** The specification of the name of the ship and its captain is less important in the insurance of cargo than in the insurance of the hull of the ship or its accessories. In the former case the parties may agree to delay such a nomination till it becomes known to the assured. Article 181 of the O.M.C. provides that:

"If the assured does not know in which ship the goods which he expects from abroad are loaded, he will be exempted from description of the captain and the ship. The ignorance of the assured on these points must be stated in the policy as well as the date and signature of the last letter of advice or order he has received.

In this case insurance can only be made for a specified time."

This Article corresponds to Article 179 in the E.M.C., which is based on Article 595 of the D.Com.C. To some extent they are similar to sections 1 and 2 of Article 331 of the F.Com.C.

**Place of Shipment:** When the parties agree that the insurance of goods
is to commence from the date of shipment, it is necessary to state the place of shipment. This is more important in time of war than in time of peace, but this distinction does not reduce the importance of specifying the place of shipment, particularly in the case of a voyage policy.

**Port of Departure of the Ship:** This clause mainly concerns the insurance designated on the hull of the ship and its accessories. It is as important as specification of the place of shipment.

**Ports of Call:** This clause has not much importance when the subject of insurance is merchandise. In Iraq the standard form of the policy, which is similar to Lloyd's, provides: "...it shall be lawful for said ship or vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance..." But the freedom mentioned in this clause is limited in time of war; the ship cannot proceed to enemy territory or touch at enemy ports.

**The Arbitration Clause:** The parties may agree that any dispute concerning the policy be settled by arbitration, and the provision of the C.C.I. must be observed, Article 985 providing that the arbitration clause must not be embodied within the general clauses of the policy but must be separate and distinct. So the Article 176 (above) is amended implicitly by the latter rule, which in fact adds an extra provision.

**The Other Conditions:** Article 176 (above) allows parties to include in their agreement any condition they find suitable. Usually in practice those conditions take a standard form, and they are of two kinds, namely, gener-

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(1) Section 4, see p.163.

(2) Some writers in Egypt say that this provision of the Civil Code does not apply to a policy of marine insurance and consequently cannot amend the provisions of the Article 176 of the Ottoman Maritime Code provision, Art.174 of the E.M.C. See Ali Hassan Yunis, op.cit., p.396.
al conditions and special conditions, known as "Institute Clauses".

B. Policy Covering More than One Insurance

Article 177 of the O.M.C. provides that: "The same policy may contain several insurances, either for different goods at a different rate of premium or effected by different underwriters." This Article corresponds to Article 175 of the E.M.C. and is based on Article 334 of the F.Com.C. It can be gathered that different things at different rates of premium may be embodied in one policy and responsibility may be undertaken by one or more underwriters. This kind of multiplicity of insurances is different from what is known as "double insurance", in which the things insured may be covered by more than one policy with a resultant excess in the sum insured.

Plurality of insurances in the policy occurs when the assured wishes either to insure more than one subject or to insure one subject against more than one kind of risk. This may be done in one policy, and the risk may be underwritten by one or more insurers. It should be noted that the failure of the above Article to mention different risks does not mean that insurance against a number of different risks is not allowed. That it may be inferred from the provision "at a different rate of premium". It is well-known that the rate of premium differs according to the type of risk. For example, war risks have a different rate of premium from other risks, and premiums in wartime differ from those in peace time.

It is important to note that there is no community of obligations between underwriters when more than one subscribes a policy unless such a community is clearly stipulated for. Each underwriter enters a separate

(2) See p. 82.
(3) Ripert, op.cit., vol.iii, p.404.
contract with the assured. This is made clear in Article 320 of the C.C.I. which provides: "The community of obligations between debtors is not presumed by law; it must be either conventional or legal."

Finally, it seems that, for practical purposes, the case of "different underwriters" has become obsolete since the nationalisation of insurance in Iraq and the consequent prohibition against individuals carrying on business therein.

C. Valued Policy

The O.M.C. does not define or contain the term "valued policy", but it does provide that every policy must contain the value of the things insured. The onus is on the assured to state this value; when the underwriter agrees, he is relying on the assured having acted with the utmost good faith. The policy is nullified if there is any misrepresentation. The valuation is presumed to be agreed by the parties to the contract; in other words, unless it is proved that such a valuation is excessive because of fraud or misrepresentation, the underwriter cannot ask for nullification of the contract and the burden of proof is on the underwriter. For this purpose the O.M.C. empowers the underwriter to make an inspection in order to make a re-valuation, Article 180 providing that:

"In the case of fraud in the valuation of the things insured or in the case of misrepresentation or falsification, the underwriter may take steps to obtain a true estimation of the value of the things insured without prejudice to any other proceeding, civil or criminal."

This Article corresponds to Article 187 of the E.M.C. and is a verbatim reproduction of Article 336 of the F.Com.C.

This provision is procedural; it allows the underwriter to make some investigation, verification and re-valuation before claiming annulment of the contract. Article 202 of the O.M.C. provides that:
"A contract of insurance or reinsurance entered into for a sum exceeding the value of the goods on board is void with regard to the assured only if it is proved that there was deceit or fraud on his part."

This does not apply. It is similar to Article 199 of the E.M.C. and is based on Article 357 of the F.Com.C. The Egyptian translation of the French Article into Arabic does not use the term "re-insurance" in this context but refers to the "first and second contract of insurance", the object being to prevent confusion between reinsurance made by the assured and the contract of re-insurance made by the insurer.

Some French legal writers have found that the application of these Articles, 180 and 202, is different. They suggest that the verification of the value of the things insured must be effected after the contract is concluded and before the risk takes effect. But, as I have said, this step must be taken before any claim of nullity can be made, and there is no need to apply the limitation suggested by the French writers. The underwriter has the right to inspect the goods insured whether the risk has begun to take effect or not, even if damage has partially affected the goods. Thus, when goods arrive at their destination partially damaged, the underwriter has the right to re-examine these goods to find out whether there has been fraud in their valuation.

Article 202 provides only for "goods on board", but this specification does not limit its application. It may be applied to all kinds of things insured whether they are on board or not.

Nullity of the contract in "regard to the assured only" means that the underwriter has the right to release himself from his obligation towards

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(1) See p. 91.
(2) See p. 182.
(3) Smet, op. cit., p. 390; he cites Nyssens et Baets.
(4) Smet, ibid., p. 360.
the assured; the latter cannot claim any right to annul the contract.

Other difficulties are caused by the application of the Article. Some French legal writers regard it as defective in respect that it does not state whether the obligation of the assured to pay the premium is void or not or, in other words, whether the avoidance of the assured’s rights means that his duties and obligations are also avoided. Some writers maintain that the assured’s obligations are nullified, which means that the underwriter must restore the premium and suggest that the underwriter is entitled to be compensated in accordance with Article 349 of the F.Com.C. (Article 194 of the O.M.C.) Ripert suggests that the literal interpretation of this Article provides no legal basis for the underwriter’s retention of the premium, i.e. there is no legal obligation on the part of the assured. Other writers, however, suggest that the underwriter’s retention of the premium is compensation for the assured’s fraud. This latter view is more consistent with the meaning of the Article and is more acceptable than the former view, which suggests that the underwriter is entitled to be compensated in accordance with Article 194, a proposition without legal authority. Thus the wording of the article providing for the nullity of the contract in “regard to the assured” means that retention of the premium by the underwriter or the recovering of the unpaid premium is a penalty imposed by the legislature on the assured.

1. Over-Valuation without Fraud or Deceit

If there is exaggeration of value without any sort of fraud or misrep—

(1) Ripert, op.cit., vol.iii, p.544.
(2) Smet, op.cit., p.360; Ali Hassan Yunis, op.cit., p.413.
(3) See p.339.
(4) Ibid., vol.iii, p.544.
resentation, the contract of insurance is not nullified but remains operative provided that the things insured are revalued correctly and any excess over the true value discounted. This must be done in accordance with Article 203 of the O.M.C., which provides that:

"If there is neither deceit nor fraud in the contract of insurance on the part of the assured, the contract is valid for the amount of goods on board according to the valuation made or agreed on between the parties. In case of loss the underwriters are bound to contribute to it, each in proportion to the sum he has underwritten. They receive no premium for the excessive amount but only the compensation provided for in Article 194."

This Article corresponds to Article 200 of the E.M.C. and is based on Article 358 of the F.Com.C. with some slight changes. The French article does not refer to Article 349 of the F.Com.C., which corresponds to Article 194, and allows the underwriter to receive one-half percent of the sum insured.

(1) whereas Article 194 provides that the underwriter is entitled to compensation of either one-half percent of the sum insured or one-half of the premium if it does not exceed one percent.

ii. Kinds of Valuation

The O.M.C. requires that local currency be used in the valuation of the things insured, Article 183 providing:

"The value of all things insured, whose value is described in the policy in terms of foreign currency, is estimated at the value in Ottoman currency according to the rate of exchange at the time of effecting the policy."

This Article corresponds to Article 181 of the E.M.C. and is based on Article 338 of the F.Com.C. French currency was replaced by Ottoman currency and, as Iraq has become independent of the Ottoman Empire, the term "Ottoman currency" now means "Iraqi currency".

D. Unvalued Policy of Insurance

This term is not defined in the O.M.C. The parties may agree to dis-

(1) See p.339.
pense with valuation of the things insured. This may happen when the things insured comprise many shipments. In a case of a floating policy, Article 184 provides that:

"Where it is not specified in the policy, the value of the goods may be proved by the invoices or books of the shipper; and in their absence a valuation is made according to the current prices at the time and place of shipment which valuation shall include all duties and expenses prior to loading."

This article is similar to Article 182 of the E.M.C. and is based on Article 339 of the F.Com.C. It has two features: the exclusion of the expected profit at the port of destination, and the possible inclusion of freight in the term "expenses". It seems that, when there is an agreement that the freight is payable whatever may occur, freight is included in the term "expenses". The expected profit is included in the value of the things insured in only one case. This is where the goods insured have been exchanged by barter, and the profit has been already earned and is the property of the assured.

E. Double Insurance

The principle of indemnity in the contract of insurance prevents the assured from making any exaggeration of the value of the things insured. The question of valuation when a single policy is concerned has already been discussed. In this section, the situation will be considered which arises when more than one policy is used. This is known as a "double insurance". The policies may be effected either all with the same underwriter or with more than one. Again, in this case, a question of misrepresentation or fraud may arise.

The O.M.C. deems that a second insurance effected over things already

(1) Art.185 of the O.M.C., see p.304.
insured against the same risks and for the same value is null and void, Section 1 of Article 187 providing: "The assured cannot, under penalty of nullity, re-insure for a second time the whole value of the things which have been already insured for the same period and against the same risks." This section corresponds to Section 1 of Article 185 of the E.M.C. It was introduced by the Ottoman legislature and was appended to Article 342 of the F.Com.C., and its origin may be traced in Article 2000 of the P.C.

The first contract of insurance is not affected. In fact, the underwriter of the second policy cannot claim the annulment of his policy for any period when the things insured are not covered by the first policy, and this question will be determined at the time of the occurrence of the risks insured against. Article 204 of the O.M.C. provides that:

"Where there are several insurance policies upon the same cargo without fraud and the first of them covers the entire value of the goods on board, the others are void. The underwriters who effected the subsequent policies are released from liability and receive compensation only in accordance with Article 194.

When the whole value of the goods on board is not covered by the first policy, the underwriters who have effected the subsequent policies are responsible for the balance according to the order of the dates of their policies."

Article 205 of the O.M.C. provides:

"When there are goods on board to the amount of the sum insured, in case of a partial loss the insurers of the goods shall all pay in proportion to the sums underwritten by them."

These articles correspond to Articles 201 and 202 of the E.M.C. They originate from Articles 359 and 360 of the F.Com.C., but there is a slight difference. Article 204 refers to the compensation mentioned in Article 194, which is one-half percent of the sum insured or half of the premium if it is less than one percent, whereas the French article mentions only that the underwriters are entitled to only one-half percent of the sum insured.

It follows from the article above that two conditions must be fulfilled if the effecting of more than one policy is to be permitted. Firstly,

(1) See p. 339.
there must not be fraud, misrepresentation or deceit in the policies. Secondly, the amount covered by the first policy must be less than the actual total value of the things insured.

In the Marine Insurance Act, 1906, the law of double insurance has a different effect. Double insurance is not prohibited, but the assured who has the right to elect between the underwriters may not claim more than the actual loss. Moreover, the underwriters are entitled to distribute the loss amongst them, each contributing in proportion to the amount for which he is liable under his policy.

6. Loss and Indemnity

The underwriter undertakes the risks insured, and consequently he is obliged to bear the effect of these risks. To say that the risks are realised means that the assured has sustained loss, and the underwriter is obliged by the term of the contract to indemnify him for his loss, his obligation being subject to one general limitation that the amount of the indemnity must not exceed the sum insured. This limitation is made for two reasons: Firstly, it is not always the case that the sum insured is the exact amount of the value of the things insured. Secondly, the sum insured is, nevertheless, the measure of the premium. Indeed, in a very recent case the parties agreed to use the sum insured to raise the premium in-

(1) ---Section32, section 80(1).
(2) See p.78 et seq.
(3) "Suffice it to say that there was no legal objection to a ship with a low market-value being insured on hull and machinery on a high agreed value where such agreement accorded with the wishes of both parties to the transaction. The plaintiffs wished for a high value, the cost of obtaining which was not very much greater than the cost of obtaining insurance on a lower value, and the underwriters also wanted a high value, for insurance on a high value enable their premium income to be maintained without the necessity for an increase in the actual rate percent of premium." per Roskili, J., Helinville Ltd. v. The Yorkshire Insurance Co. Ltd. (1965) q.B.D. The Times, 16th February, 1965.
Loss may be considered under three headings: (a) nature of loss, (b) proof of loss, and (c) measurement of loss.

A. Nature of Loss

By the term "loss" is implied the damage which affects the goods insured and consequently the interest of the assured in those goods. But in practice the term "loss" is expanded to cover certain losses which affect the property insured but are borne by the assured. In dealing with these matters, the nature of the loss is discovered from its effects. It occurs either direct damage to the goods insured or indirect damage to the interest of the assured in respect of the expenditure required firstly to save the things insured and secondly to cover the assured's liability against any claim made by the others.

i. Direct Damage

This kind of loss has two degrees, either partial or total. Total loss does not always mean complete destruction. But a partial loss reaches, sometimes, such a degree that it is considered a constructive total loss.

a) Total Loss

In the O.M.C. an express definition of the meaning of "total loss" is not given. But certain standards are laid down, and by employing them, the term "total loss" becomes practically determined. These measurements are either material or not material. The first standards appear in Article 214 which states:

"Abandonment of the things insured may be made in case of - shipwreck, stranding with wreck, unseaworthiness brought about by peril of the sea, capture by the enemy or by pirates or arrest by a foreign power or by arrest by the Ottoman government after the voyage has attached; and loss or damage to the things insured if the loss or damage exceeds not less than three-fourths of its value insured."

This Article corresponds to Article 211 of the E.M.C., and both are based...
on Article 369 of the F.Com.C. An interesting change is introduced in the last section by the Ottoman legislation, the term effets assurés being replaced by the words objets assurés. This change removes the ambiguity of the former term, which means "goods insured" and may indicate only the "cargo", whereas the latter, though having wider meaning, is more precise, "things insured" covering both ship and goods. The words "Ottoman Government" should now read "Iraqi Government".

This Article allows the assured in the cases specified to abandon the thing insured; abandonment indicates total loss, and all the above losses are considered "total loss".

Damage amounting to not less than three-quarters of the value of the things insured is considered a constructive total loss. As regards the ship, where the whole cost of repairing it and making it seaworthy for continuing its journey exceeds three-quarters of its value, it is considered a constructive total loss and the assured has the right to abandon it. As regards the cargo insured, it may be considered a constructive total loss when, upon the realisation of the risks insured, it cannot be forwarded on its voyage because no ship is available.

Non-material measurement is the expiry of a certain period without news of the ship. In this case, the O.M.C. permits the assured to abandon the things insured, Article 219 providing that on the expiry of the period of six months for short voyages, one year for distant voyages and eighteen months for long voyages, without news of the ship, the assured may exercise his right of abandonment of the things insured. In fact, this provision

(1) See p.378 et seq.
(2) Art.238 of the O.M.C., see p.382.
(3) See p.286.
has with modern means of communication become inappropriate and probably only retains its effect when the ship does not use a usual trade route or refrains from communication because of a state of war.

b) Partial Loss

Here again the O.M.C. does not give an exact definition, but it states in Article 215 that: "All other damage comes under the title of average and is to be settled by the assured and the underwriter in proportion to their respective interests." This Article corresponds to section 2, Article 211 of the E.M.C., and both are verbatim reproductions of Article 371 of the F. Com.C. From it it can be inferred that partial loss is loss where the right of abandonment cannot be exercised. In other words, it must not be total, and it must be less than three-quarters of the value of the goods insured.

Further, this article employs the term "average" which is divided into two classes - particular and general average. "Particular average" is equivalent to "partial loss" and applies where goods and ship are affected. "General average" does not differ from partial loss, but it is distinguished from particular average by its coverage, being distributed proportionately between the ship and cargo, saved from damage by the sacrifice of other things. The O.M.C. allows the parties to regulate this matter of average.

ii. Indirect Damage

Primarily, it is important to mention that indirect damage means not that resulting loss is not taken into consideration for the purpose of division into "total" and "partial", but that there are some other losses, borne by the assured, which do not necessarily affect the goods insured. There are two categories: (a) expenditure, and (b) claim of third party.

(1) See p. 364.
(2) See p. 407.
(3) See p. 409.
Expenditure

The underwriter's liability to indemnify the assured is not limited only by the actual damage and the sum insured, but he is obliged to cover certain kinds of expenses incurred in saving the goods insured. These expenses fall under three headings:

(1) Article 225 of the O.M.C. provides that the assured is obliged to use his utmost-effort to reduce the effect of the damage and expend money to save the goods insured, and that: "...the expenses of recovery are allowed to him to the extent of the value of the things insured upon his affidavit."

(2) Article 233 provides that where the ship becomes stranded and is refloated again after some repairs and taken to a port for further repair to enable it to continue its voyage: "...the assured retains his claim against the underwriter for the expense and damage occasioned by the stranding."

(3) When the ship becomes unseaworthy, the master is obliged to find another ship and transfer the cargo to it; and he is not entitled to recover the extra freight. Where the master cannot engage another ship, the freight is divided in proportion to the extent to which the voyage has been completed. An assured who brings another ship to carry his goods incurs the cost of doing so, and Article 237 provides that: "The underwriter is liable, not only for damage, but also for the cost of unloading, warehousing, re-shipping, additional freight and any other expense incurred in saving the goods to the amount of the sum insured." This Article corresponds to Article 231 of the E.M.C., and they are based on Article 393

(1) See p. 371.
(2) See p. 267.
(3) Art. 233 of the O.M.C., see p. 312.
of the F.Com.C.

In all the above three cases, the cost of saving, recovering and removing the goods insured must not exceed the valuation of the goods insured otherwise they are considered a total loss. Thus, the expense must be considered as partial loss or particular average when it is less than the value of the goods insured. This departure from the rule of three-quarters of the value is made because, as mentioned above, these expenses do not directly affect the goods insured; but if they do, the old rule is observed. Thus, when the cost of repairing a ship exceeds three-quarters of its value, it is considered a constructive total loss and the assured has the right to abandon it. In this case it is not necessary that the cost of repairing the ship be already paid; it is enough that it be estimated. Article 233 provides that:

"Abandonment by reason of unseaworthiness is not allowed if the stranded ship can be refloated, repaired or put in condition to continue its voyage to the place of its destination unless the expenses of repairs exceed three-fourths of the value for which the ship has been insured." (1)

This Article corresponds to Article 227 of the E.M.C. They are based on Article 389 of the F.Com.C., but the last clause, which is similar to a provision in Article 664 of the D.Com.C., does not appear in the French Article.

Finally, as mentioned above, the underwriter is obliged to bear the cost of reducing his obligation by litigation, and this kind of expense is not limited to the sum insured but is considered an additional expense incurred for the interest of the underwriter.

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(1) See p.366.
(2) See p.366.
(3) Clause 10 of Institute Cargo Clauses, see p.900.
Exception: From the above cases there may be formulated the rule that the underwriter is responsible for expenses which are intended to minimise the damage, but expenditure necessary for the ship in ordinary course is not borne by the underwriter. In this case Article 199 of the O.M.C. provides that: "The underwriter is not liable for pilotage, towage or harbour pilotage, nor for any kind of duties imposed on the ship or the goods unless in case of a force majeure." This article corresponds to Article 198 of the E.M.C.; both are based on Article 354 of the F.Com.C., but the last sentence is added by Ottoman legislation. It does not consider these expenses as average. In fact, they are ordinary expenses which are necessary for ordinary navigation, and they are, therefore, borne by the shipper. But for costs incurred if the master is involved in force majeure, the underwriter is liable, this extra expense being regarded as reducing the effect of the risks. The case of force majeure must be limited to the cases mentioned in Article 195.

b) Claim of Third Party

Even though marine insurance is not essentially insurance against third party liability, the underwriter may become responsible for payment for certain damage sustained by third parties, and this rule is expressly included in the "Institute Clauses" attached to the policy. Such payments are of two kinds:

General Average Payments: The owner of cargo gets the benefit when goods belonging to other people are sacrificed to save his goods. The clause of general average in the standard form policy in Iraq provides:

"Clause 8 - General average and salvage charges payable..." This means

(1) See p.307.
(2) The standard form policy of marine insurance in Iraq.
that if there is a general average sacrifice or expenditure, the owner of the things insured comes under legal obligation to pay his share to the persons whose property has been sacrificed to save his property, and the underwriter is obliged to pay such share. Every policy contains such a clause.

Collision Payments: The Institute (Hull) Clauses attached to the policy of insurance on the hull of the ship contain a clause applicable when there is a collision between the ship insured and some other ship, and the owner of the ship insured becomes responsible for payment of such damages.

This clause, which is included in both time and voyage policies, states:

"...if the vessel hereby insured shall come into collision with any other vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the underwriter will pay the assured such proportion of three-fourths of such sum so paid as their respective subscription..."

B. Proximate Cause

When there is a number of causes, it is not easy to decide to which cause a loss is attributed, particularly when the things insured are exposed to many kinds of risk, only some of which are insured against. The problem is to find out whether the risks covered by the policy are the cause of damage or not. As mentioned before, the O.M.C. is silent on the question of causa proxima, leaving it to be decided in each individual case on its merits.

The O.M.C. is based on the F.Com.C., and among French legal writers the doctrine causa proxima non remota spectatur was abandoned because the term proxima was unsatisfactorily confined to its temporal sense, and the doc-

(2) Ibid., p. 1298.
(3) See p. 116.
trine known as "cause determinate" was adopted. In fact, the doctrine of "cause determinate" does not differ from the English doctrine of "proximate cause" and was adopted merely to avoid confusion arising from the use of the term "proximate". This, however, is not necessarily to accept the opinion of French authorities. This is due to the fact that the standard form policy in Iraq is not the instrument on which their opinion are based. It is not wise to construe a policy which is based on Lloyd's by reference to opinions based upon different concepts. The law which may appropriately be applied in construing the doctrine of proximate cause is the English Common Law. The underwriter's liability for the risks insured against is thus limited to the risks which "proximately" caused the damage. For this purpose, the word "proximate means proximate in efficiency rather than proximate in time", and proximate cause is in law the dominant or effective cause. For example, war risks and inherent vice in the things insured are exempted from the risks covered by the underwriter. In the event of loss or damage caused by any of the risks, the underwriter is not obliged to prove that the damage was not caused by the risks insured against. The burden of proof of the contrary is on the assured. Problems arise when the things insured suffer damage resulting from two possible causes and one is covered by the policy while the other is not. To reach a solution it is important to find out which risk was the more effective in causing damage or which made the things insured unable to withstand another damage. In this case, the subsequent hazard does not cause the loss. The cause of the damage is the first hazard which is a direct and proximate

(1) Ripert, *op.cit.*, vol.iii, p.658.
cause and vice-versa. In fact, the distinction between which risk is a "proximate cause" and which is not is mainly a question of fact. The explanation of which one is active and effective depends upon the particular event and the particular policy of insurance.

C. Minimisation of Loss

There are three cases in which the O.M.C. requires that the effect of the disaster be minimised. These are: (a) shipwreck, (b) arrest by foreign power, and (c) seizure by outside force.

i. Shipwreck

Article 225 of the O.M.C. provides that:

"In the event of shipwreck or stranding and consequent destruction, the assured must make every endeavour to recover the wreck without prejudice to his right to abandon it within the legal period. The costs of recovery are allowed to him upon his making declaration on oath as to the value of the goods recovered."

This Article corresponds to Article 219 of the E.M.C. and is based on Article 381 of the F.Com.C. The Ottoman legislature stipulated that the assured had to give his oath as well as other evidence to prove that he had incurred the expense of salvaging the things insured.

Two points should be noted in this provision. Firstly, the assured must do his best to recover the things insured. Secondly, the underwriter must pay the expense of the assured's so doing. In addition, the assured may exercise his right to abandon the things insured and claim complete

(1) indemnity.

The article does not provide for any sanction in the event of the assured's failure to perform his obligation but, as the assured must act in the utmost good faith, the obligation on him is binding. This means that

(1) See p. 376.
if the underwriter can prove that the assured's failure to salvage the things insured was wilful or fraudulent, the courts may reduce the amount of indemnity payable.

ii. Arrest by Foreign Power

The assured must do his best to effect the release of the arrested ship or cargo. Article 232 provides that:

"During the periods provided in the preceding article, the assured must use his best endeavour to obtain the release of the property arrested. The underwriters, for their part, may act either together with the assured or independently to take any steps for the same end."

This Article corresponds to Article 226 of the E.M.C. and is based on Article 388 of the F.Com.C. The periods referred to in the article are those during which the assured is entitled to use his right of abandonment of the things insured. They are laid down in Article 231, Section 2.

iii. Capture of the Ship by Outside Force

Article 239 of the O.M.C. provides that:

"In the event of capture where the assured has not been able to give notice to the underwriter, he may ransom the property without waiting for orders. The assured is bound as soon as he is able to give notice to the underwriter of the arrangement he has made."

This Article corresponds to Article 233 of the E.M.C. and is based on Article 395 of the F.Com.C. The underwriter need not accept such an agreement made by the assured. This matter is expressly dealt with in Article 240, which provides that:

"The underwriter has the option either of accepting the arrangement for his own account or of disclaiming it; he must give the assured notice of his decision within twenty-four hours after receipt of notice of the arrangement.

If he accepts the arrangement for his own benefit, he must contribute without delay to the ransom according to the terms of the agreement and in proportion to his interest and he continues to be liable under the terms of the policy. If he disclaims the arrangement, he must pay the sum due under the policy and forfeit any claim which he may have over the property (1)

(1) See p. 386.
redeemed.
Should the underwriter fail to make known his decision within the period above mentioned, he shall be considered to have disclaimed the arrangement."

This Article corresponds to Article 234 of the E.M.C. and is based on Article 396 of the F.Com.C. It follows, therefore, that: (a) The assured or the master may arrange to ransom the things captured without the approval of the underwriter; (b) The underwriter must declare his acceptance or rejection of such an arrangement within 24 hours.

D. Notification of Disaster

The O.M.C. by Article 218 provides that:

"In cases where abandonment is possible and in the event of any other accident at the risk of underwriters, the assured must communicate to the underwriter any information he has received. This notice must be given within three days after receipt of the information."

This Article is the same as Article 214 of the E.M.C. and is based on Article 374 of the F.Com.C.

(1) Notification of the disaster must be made in writing, but the O.M.C. does not require any special form. Failure of the assured to notify the underwriter of news of a disaster does not affect the validity of the insurance, but if the failure of the assured to notify causes loss to the underwriter, he is entitled to be compensated therefor. It is not necessary that the underwriter should receive news of the disaster within three days. All that is necessary is that the assured must dispatch it within

(1) In the French edition of the O.M.C., the word "signification" is used without reference to a written communication. Moreover, the Arabic edition provides that notification must be made through the official authorities. This requirement does not appear in the French article which is reproduced verbatim in the Ottoman Code. Therefore the word "signification" must be construed in relation to French usage and is taken to mean that the notice must be in writing. See Ripert, op. cit., vol. iii, p.406; Smet, op. cit., p.133; Emerigon, op. cit., p.888.

(2) Ripert, op. cit., vol.iii, p.465.
that time. Thus, any delay in its reaching the underwriter because of distance or for any other reason does not affect the assured's rights. This is why the notice must be in writing.

E. Proof of Loss

Article 227 of the O.M.C. provides that: "The certificates which prove the shipment and the loss thereof must be notified to the underwriter before the assured can claim payment of the sum insured." This Article corresponds to Article 221 of the E.M.C. and is based on Article 383 of the F. Com.C. The assured must prove that the things insured were on board the ship. The bill of lading is sufficient evidence of this fact, Article 103 of the O.M.C. providing that unless it is proved to be erroneous, it is binding between the assured and the underwriter.

In two cases the O.M.C. requires further evidence to prove the shipment of the cargo. The first is when insurance is effected by the master of the ship on goods either for himself or for the ship. The second is when insurance is effected by the seamen or the passengers.

In the first of these cases, Article 189 provides that:

"In the case of loss of goods insured and shipped by the master for his own account or for the account of the ship on board the ship of which he is in command, he is required to prove to the underwriter the purchase of the goods and to exhibit a bill of lading signed by two of the ship's officers."

This Article corresponds to Article 187 of the E.M.C. and repeats the terms of Article 344 of the F.Com.C. with the exception that the latter does not mention the shipment of the cargo for the account of the ship.

The master must, therefore, prove not only that he shipped the goods he intended to insure but also that he purchased them. The necessity for proof

(1) See p. 375.
does not affect the validity of the contract of insurance. If the assured (the master) fails to prove their purchase, the contract is not invalid; it is only the proof which has failed, and the underwriter can legally retain the premium. It should be noted that the article does not apply where the insurance is effected by the master on behalf of some third party.

In the second case, relating to crew and passengers, Article 190 of the O.M.C. provides that:

"Every member of the crew and every passenger who brings from a foreign country goods which have been insured in the Ottoman Empire must deposit a bill of lading with the Ottoman Consul or, in his absence, with a reputable Ottoman merchant or with a magistrate in the place."

This Article corresponds to Article 188 of the E.M.C. and is based on Article 345 of the F.Com.C. with the necessary substitution of "the Ottoman Empire" for "France". This must now read "Iraq", as at the time of codification Iraq was part of the Ottoman State.

The above two provisions have no equivalent in the Marine Insurance Act 1906. It is difficult to say whether they have any practical effect in modern time when the means of communication have greatly improved.

The assured is also obliged to prove that the things insured were exposed to the risks insured against by providing the underwriter with documents establishing that the things insured were at the place of risk and that the occurrence of the damage was a consequent effect; the underwriter may prove the contrary. Article 228 of the O.M.C. provides that:

"The underwriter is allowed to give proof of facts in contradiction to those given in evidence.

The admission of such proof will not suspend judgment against the underwriter for the provisional payment of the sum insured where the assured furnishes security. This security is not exigible as after four years if no action has been brought within that time."

(1) Art. 227 of the O.M.C., see p. 274.
This Article is similar to Article 222 of the E.M.C., and they are based on Article 383 of the F.Com.C. It is designed to help the assured by providing a quick remedy in lieu of an old procedure and to secure the right of the underwriter to prove any untruth in the documents of the assured. The assured is obliged to prove his case by written evidence, and the underwriter's evidence is not admissible to contradict a written document unless he proves simulation or challenges the documents by written evidence tending to prove the contrary. The legislature at that time took into consideration the distance between the place of shipment and the place of destination, and the above article is, therefore, designed to enable the underwriter to challenge the claim of the assured. The court admits such challenge but does not suspend the case till the underwriter produces his evidence. The assured receives the indemnity but is obliged to secure the underwriter's recovery of the indemnity if and when the latter proves his challenge.

F. Measurement of Indemnity

When it is said that the underwriter is responsible for the damage, this does not mean that he must make good all the losses. The policy categorises losses in three classes, and this classification finds support in the rules of the O.M.C. The divisions of loss are: (i) total loss, (ii) particular average loss, and (iii) general average loss.

i. Total Loss

Apart from specifying causes of damage, the O.M.C. does not give a precise definition of the term "total loss". As mentioned before, it is divided into two kinds, actual total loss and constructive total loss. Owing to the silence of the statutes on one hand and the use of a policy
similar to that appended to the Marine Insurance Act 1903 on the other, it is very useful to consider the definition provided by the Act. Sub-section 1, section 57, provides that: "Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured or where the assured is irretrievably deprived thereof, there is an actual total loss."

Also, sub-section 1 of section 60 provides that:

"Subject to any express provision in the policy, there is a constructive total loss where subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred."

This latter provision is not applicable in Iraq, the O.M.C. providing that there is constructive loss where damage amounts to three-fourths of the value of the things insured. The latter rule is criticised, and it is said (1) that:

"(It) has the same arbitrary or fictitious character as that which allows it in the case of half damage. (2) The English rule has the advantages of reality and accordance with the facts; it is free from fiction; it fits in with the other legal consequences of the facts; it keeps in view the principle that insurance means indemnity, and it corresponds best with modern modes of insurance."

Total loss is confined to the following cases: (a) destruction of the goods insured, (b) change of nature and kind, (c) where the assured is deprived of the benefit of the goods insured; (d) where the damage amounts to more than three-quarters of the value of the goods insured; (e) where the cost of repairing the ship and salvaging reaches three-fourths of its value.

In these cases the assured is entitled to exercise his right to abandon the things insured and claim full indemnity within the amount of the sum insured. The most important consequence of total loss is, therefore, the

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(1) Carver, op.cit., p.386.
(2) This rule is applied in the United States of America.
a) Abandonment

1) Definition

The O.M.C. does not define exactly what is meant by the term "abandonment". It gives only the cases in which the assured may exercise this right. In addition, it mentions two kinds of abandonment: one in which the assured abandons the goods insured (dailleissement), and the other in which the owner of the ship abandons the voyage and the freight (abandon). Dailleissement is an optional right (faculté); it must be accepted by the underwriter, and the ownership of the goods insured passes to him. It is a transference of ownership in exchange for indemnity. In contrast, abandon is exercised by the owner in order to release himself from the voyage's difficulties, and the freight must be left to the creditors but the ship remains the owner's property until it is sold by them. It is a right which is exercised to end the owner's responsibility.

So, abandonment in Iraq is a right of action which is given to the assured. It may be defined as a right exercised by the assured because of the total loss of the things insured - whether actual or constructive - and he becomes entitled to recover the lesser amount of the sum insured or an indemnity, whichever is the lesser; the ownership of the things insured passes to the underwriter.

There is a close relationship between abandonment and total loss. Every case of total loss gives the assured the right to abandon the things insured.

2) Cases of Abandonment

Article 214 of the O.M.C. enumerates certain cases in which the assur-

(1) Art. 30 of the O.M.C.
(2) Chauveau, Des Assurance Maritime, p. 723.
(3) See p. 363.
ed may exercise his right to abandon the things insured. These cases amount, in fact, to major disasters. The parties may, however, agree to regulate the matter between them, and such agreement is not considered as contrary to the statutory provisions, as these provisions are applied when parties do not make their own arrangement. The cases of abandonment mentioned in Article 214 may be classified as follows:

Shipwreck: In this case the ship is considered a complete loss, but the shipwreck must be absolute, which means that the ship cannot be refloated. In other words, it must be wholly submerged in water and no longer existing as a ship. Shipwreck is peculiar to vessels and their kind and to the cargo on board at that time, but the case of throwing cargo into the sea is jettison which governs general average and gives no right to abandon.

The French classification which includes shipwreck under abandonment without taking into consideration the amount of the damage is criticised thus:

"The French Code (Article 389)(Article 214 of the O.M.C.), for example, following Article 46 of the Ordonnance of 1681, allows abandonment in case of shipwreck (naufrage) or stranding with breaking (échouement avec bris); and the right of the assured to abandon to his insurer may turn upon whether the accident which has befallen the ship comes within one of these descriptions, regardless of the actual effect of the accident upon the things insured. Thus, if the ship has suffered naufrage, it may be abandoned without enquiry into the extent of the damage; so, also, may the cargo on board although that may have suffered little or no damage."

The questions raised are pertinent. French opinion maintains that shipwreck is an absolute total loss. Any salvage of the wreckage or of the merchandise cannot prevent abandonment, for these are considered accidental results, as the ship no longer exists. But the opinion concerning

(1) Chauveau, ibid., p.723.
(3) Carver, op.cit., p.384.
the cargo saved from the wrecked ship must be accepted with some reservation. Emerigon says: "Hence, shipwreck and bris give room indefinitely to the action of abandonment, even for the cargo, which cannot be saved without having in general suffered loss or considerable damage." So, if the cost of salvage and the damage sustained by the cargo amounts to more than three-fourths of its value, they become constructive total losses.

In the Marine Insurance Act 1906 the provision is different. Total loss of a ship because of wreck is of two kinds. The first is when the ship is completely broken and scattered in the sea and becomes a mere congeries of planks. The second is when the cost of salvage and repair reaches the amount of the value of the things insured. In other words, if the ship after the accident of naufrage survives and reaches its destination, the matter is considered total loss when the amount spent on salvage reaches its whole value. The same rules are applicable in case of the cargo.

It is important to mention that the shipwreck must be the result of a risk insured against. Article 214 (above) does not specify the cause of the wreck, but this omission does not imply that all kinds of shipwreck are included. For example, if the risks of war are excluded and the ship insured becomes a wreck because of these risks, there can be no abandonment. Therefore, the risks insured must be a proximate cause of the shipwreck.

Stranding with Wrecks This means that the ship touches the bottom of the sea and is in such a condition that it cannot be refloated because there is not enough water. It is necessary, in this case, that the ship is con-

(1) Loc.cit., p.671.
(2) Art.214 of the O.M.C., see p.363.
(3) Arnauld, op.cit., p.758; Carver, op.cit., p.378.
sequently destroyed or is unable to continue its voyage. Article 233 of the O.M.C. refers to the case where the stranded ship is refloated and retains its seaworthiness; here there is no abandonment.

Unseaworthiness: The O.M.C., like its main source the F.Com.C., employs the term innavigabilité. This term does not differ much from the English term "unseaworthiness" although the former may have "additional shades of meaning". In this connection, the latter is preferable because it is used in business and the policy. The term signifies that the ship becomes unfit to continue its journey. But a distinction must be made between a ship which is wrecked and one which is unseaworthy. Both are included within the term "total loss". But in the first case it must be destroyed or submerged, whereas in the case of unseaworthiness, the condemnation of the ship depends on the opinion of the experts. Article 234 of the O.M.C. expressly provides that the declaration of unseaworthiness must be made by experts, the word "experts" being added to the French Article 390 in its reproduction by the Ottoman legislature. The experts may be chosen either by the parties or by the courts. They have to decide whether the ship can continue its voyage or cannot do so because it is irreparable or the costs of repair exceeds three-fourths of its value. So when a ship is condemned as unseaworthy, the assured is entitled to abandon it. The condemnation of a ship is based upon one of the following grounds: (1) The damage to the ship is so severe that it is not possible to repair it; (2) The cost of the repair is so extensive that it amounts to three-

(1) See p. 367.
(2) Meredith, S.; see Emerigon, op.cit., p. 557.
(3) See p. 346.
(4) Art. 233 of the O.M.C., see p. 367.
quarters of the ship's value; in these expenses the expenditure of towing it to the place of repair is included; (3) It is not necessary that these expenses are already incurred; it is sufficient that the experts estimate the cost; (4) Repair is not possible because the materials needed are not available at the place of refuge. The effect of unseaworthiness is not confined to the ship itself; it extends to the cargo on board. When a ship cannot continue its voyage, the cargo on board may become a total loss. The O.M.C. not only imposes on the master the responsibility of finding another ship to which to transfer the cargo, but it gives the owner the right to abandon the cargo if there is not a ship available. Article 238 states that:

"If, within the periods mentioned in Article 231, the master has been unable to find a ship in which to re-ship the cargo and carry it to its destination, the assured may abandon the cargo within the periods determined in Article 217 from the day when the delay for re-shipment of goods has expired."

This Article corresponds to Article 232 of the E.M.C. They are based on Article 394 of the F.Com.C., but the last sentence in which the time for abandonment is mentioned is an additional provision made by the Ottoman legislature and is based on Article 928 of the Spanish Code of Commerce, 1829.

This Article, by making reference to Articles 231 and 217, creates certain problems. Article 231 is enacted to allow the assured to abandon the cargo within six months or one year after the ship on which the cargo is loaded is arrested, and Article 217 permits the assured to abandon the car-

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(1) Art. 333, ibid., see p. 367.
(3) Art. 235 of the O.M.C., see p. 312.
(4) See p. 383.
(5) See p. 399.
go seized by a foreign power within the periods of six months, one year and two years. In the above case the master must reship the cargo within the periods of six months and one year, according to the circumstances after the ship on which the cargo is loaded becomes unseaworthy, and the assured after the expiration of those periods may abandon the cargo within six months, one year and two years. Ripert describes the periods referred to in Article 231 within which the French Code allows the master to reship the cargo as too long. Therefore, the addition of Article 217 made by the Ottoman legislature within which the assured is entitled to abandon the cargo makes the periods extremely long.

The Case of Prize: Capture can take one or another of two forms: being made either by an enemy power or by pirates. In both cases the O.M.C. allows the exercise of the right of abandonment where the things insured is a ship or cargo or both.

In case of the capture of a ship, the master is obliged to remove the cargo and re-ship it in another ship. Accordingly, the assured cannot use his right to abandon the cargo within the periods mentioned in Articles 231 and 217. But when the cargo only is captured, the ship cannot be abandoned.

Arrest: This differs from capture. In the latter case the thing insured is exposed to confiscation, and ownership no longer lies with the assured, whereas in the case of arrest the things insured are merely prevented from proceeding on the voyage. It is important to make a distinction between the arrest of the ship and the detention of the cargo on

(1) Ibid., vol.iii, p.790.
(2) Art.238 of the O.M.C., see p. 382.
(3) See pp.385,394.
board. Article 214 of the O.M.C. provides that the arrest of the things insured must be made after the commencement of the voyage. This means that if the ship is arrested before the voyage is started, the assured has no right of abandonment; that is, the underwriter's liability for the risk (1) starts from the commencement of the ship's journey. But the case of the detention of cargo is different. The risk attaches from loading of the cargo on board the ship and even from its leaving the "warehouse". So, on one or other of these events, the underwriter undertakes the risk. Therefore, if a ship is arrested before its departure and the master at that (2) fails to re-ship it in another ship, the assured may abandon the cargo.

In the case of a time policy, there is a difficulty which appears insoluble. Even though the underwriter undertakes the risk from the date of the policy, the general rule cannot be applied, though the arrest happens (3) within the period for which the underwriter is liable. Emerigon tries to prove the application of the general rule; his argument is logical but invalid. The Article makes it very clear the arrest is made before the voyage commences and no right of abandonment accrues. The Article does not say "after the risks have attached"; it says simply "after the voyage has commenced" and makes commencement of the voyage the attachment of the risk, but the attachment of the risk in a time policy is a certain and possibility of its being a different date. So unless the Article is revised, such contrary construction as Emerigon proposes cannot be put upon it.

Arrest of the ship may be made in time of war or peace. It is not

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(1) Articles 186 and 170 of the O.M.C., see p. 324.
(2) Art. 238, see p. 382.
classified within the risks of war. It may happen in time of peace if the ship is carrying illegal trading such as smuggling.

The things insured may not be abandoned at once. The assured is obliged to notify the underwriter of the arrest within three days of receiving it. Section 2 of Article 231 of the O.M.C. also provides that:

"Abandonment of the property arrested cannot be made after the lapse of six months from the date of notice thereof, when the arrest takes place on the coasts of Europe in the Mediterranean or in the Baltic.

If the arrest takes place in a more distant country, abandonment cannot be made after the lapse of one year.

The periods commence from the date of notification of arrest or the stoppage.

Where the goods arrested are of a perishable nature, the period above mentioned is reduced to one and a half months in the first case and to three months in the second case."

This section corresponds to section 2 of Article 225 of the E.M.C., and they are similar to section 2 of Article 387 of the F.Com.C.

Finally, as pointed out above, the arrest of the things insured does not mean that the assured is deprived of their ownership. The person who claims interest, usually the assured, must try his utmost to free the things arrested. This action must take place within the period mentioned in Article 217 of the O.M.C. After this period lapses, the assured may abandon the goods. Article 232 of the O.M.C. provides that:

"During the period mentioned in the preceding Article, the assured is bound to do his best to obtain the release of the property under arrest. The underwriters on their part may either in conjunction with the assured or separately take any step for the same purpose."

This Article corresponds to Article 226 of the E.M.C., and they are based on Article 386 of the F.Com.C.

**Constructive Total Loss:** Where the damage amounts to three-fourths of the value of the property insured, the loss is known as constructive total

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(1) See p.346.
(2) See p.394.
(3) Art. 231.
loss. It may take one or another of two forms. The first concerns the hull of the ship and is almost always dealt with as unseaworthiness. The second relates to insurance of the cargo, this being, in fact, the main instance in practice. It is regulated by Article 214 of the O.M.C. and the corresponding Article 369 of the F.Com.C. makes it clear that it concerns goods.

Constructive total loss of cargo is, thus, more important. In practice as soon as the damaged cargo reaches its port of destination, the usual procedure is that it is divided into two parts, damaged and undamaged. If the damaged cargo amounts to three-quarters of the value of the whole cargo insured, the whole cargo becomes a constructive total loss and the assured is entitled to exercise his right of abandonment. But the damage must be assessed from the time of realisation of the risks. If, therefore, some of the cargo is jettisoned, it is considered a general average loss, and if the loss occurs because of inherent vice in the cargo, there is no right of abandonment unless the risk is covered by the policy.

Default of News: If no news is received from the ship after its departure, there is a possibility that it has foundered at sea or has fallen victim to other perils of the sea. There is difficulty in fixing the exact date of the loss. In the O.M.C. the periods of six months for ordinary voyages, one year for distant voyages and eighteen months for long voyages are sufficient to indicate whether the ship has been lost during the period of insurance. The time commences from the date of receipt of the last news, Article 219 providing:

"The assured may also abandon to the underwriter and demand payment of the indemnity agreed without being bound to prove the loss of the ship or of its cargo if since the day of departure of the ship or from the day of receiving the
last news of her, some continuous delay has occurred without receiving any news at all;

Six months for ordinary voyages made from Turkey to the ports or coasts of Europe or towards those of Asia and Africa and reciprocally from the Balkan Sea or the Mediterranean;

One year for distant voyages made from Turkey to the Azores, Canaries, Madeira and other isles and coasts of Western Africa and Eastern America and vice versa;

Eighteen months for long voyages made from Turkey to other parts of the world and reciprocally.

In the case of all the voyages between ports both situated outside the Empire, the delay must be regulated according to the distance of the ports which shall most nearly approach the regulation above. In all cases for which the assured may be able to abandon, it is sufficient that the assured declares under oath that he has not received any information, direct or indirect, of the vessel insured nor of that in which the cargo insured is on board unless proved the contrary.

But it will not operate after the expiry of the delay mentioned above for bringing action against the underwriter within the required periods of Article 217."

This Article corresponds to section I of Article 215 of the E.M.C. Their origin is found in Articles 667 of the D.Com.C. and 375 of the F.Com.C. of 1808, amended by the law of 1862. The latter Article does not give such detail for determination of the voyages.

Article 221 of the O.M.C. describes what is meant by a long voyage, stating:

"Voyages of great length are defined as those which are made to South or North America or to the islands and countries surrounding and to all coasts, islands and countries situated in Africa, Asia, Europe and the Oceans beyond the Straits of Gibraltar."

This Article is based on Article 377 of the F.Com.C., amended by the law of 1854.

It is noticeable that the voyages mentioned above are made according to circumstances deemed reasonable in the Ottoman Empire; and though the port of Iraq, Basrah, was in the Ottoman Empire, the above articles need revision to make them relevant to the new circumstances.

Periods were fixed because of the difficulty of finding the actual date
of loss, and so the loss is presumed to have occurred after certain periods within which no news is heard of the ship, and the assured is allowed thereafter to exercise his right of abandonment of the ship or cargo or both.

In the case of a time policy, a loss is presumed to have taken place during the period of insurance, Article 220 of the O.M.C. providing that:

"In the case of an insurance for a limited time after the expiry of the periods above mentioned for ordinary and long voyages, the loss of the vessel is presumed to have happened within the period of insurance.

If it is proved, however, in the sequel that the loss has not taken place within the time of the insurance, abandonment ceases to have its effect and the indemnity paid should be restored with legal interest."

This Article corresponds to section 2 of Article 215 of the E.M.C. Their origin is Article 376 of the F.Com.C. and section 2 of Article 674 of the (1) D.Com.C. Arnould, in his treatise, comments that:

"The result of this provision is that in the case of a missing ship, the loss in the modern law of France (similar to Iraq) is presumed to have happened immediately after the last news. Thus, if a ship be insured for three months and not being heard of, a further insurance is then made for a year, and the vessel is never heard of, in that case the first insurance pays the loss."

Finally, after the abandonment is made and accepted, the underwriter cannot release himself from payment of the indemnity if the ship returns safely from its voyage.

3) Method of Abandonment

The right of abandonment is exercised by legal action and cannot be authorised unless certain procedures are observed, as follows: (a) notice of abandonment given, (b) abandonment absolute, (c) declaration of abandonment within statutory period.

(a) Notice of Abandonment: It is important to make a distinction bet-
ween the two kinds of notification which appear in the O.M.C. The assured is obliged firstly to notify the underwriter of his receipt of news which may be a ground of abandonment, and secondly to declare that he intends to exercise his right of abandonment. For each distinct stage the legislature lays down a definite period. For the first the period is three days, for the second two years, one year or half a year, according to distance.

The purpose of this distinction is to make clear the difference between the notices because the O.M.C. allows the assured to notify the underwriter of the news and to declare the abandonment in a single notice, Article 222 providing that:

"The assured may, by giving the notice mentioned in Article 218, either make the abandonment and summon the underwriter to pay the sum insured within the period fixed by the law or reserve to himself the right to abandon within the period fixed by law."

This Article corresponds to Article 216 of the E.M.C., and they are based on Article 378 of the F.Com.C.

Notice of abandonment is, therefore, a distinct right which may be exercised by the assured. It is not necessary to make this notice of disaster, and the assured's right is subject to the periods mentioned in Article 217. The notice of abandonment needs no special formality, but it must be in writing, even though the O.M.C. has not a clear provision on the subject. In practice the notice of abandonment has become a mere formality and is usually not accepted by the underwriter because acceptance is irrevocable.

The notice of abandonment must contain certain facts, Article 223 of the O.M.C. providing that:

(1) Art. 218 of the O.M.C., see p. 373.
(2) Art. 217, ibid., see p. 394.
(3) Art. 291, ibid., see p. 346.
(4) Dover, op. cit., p. 410.
"The assured is bound, in making abandonment, to declare all the insurances which he has made or caused to be effected even those which he has borrowed on a loan, either on the ship or on the merchandise; in default of which delay of payment, which was to commence from the day of abandonment, shall be made until the day he shall make the aforesaid declaration without any prolongation of the time being allowed within which to abandon."

This Article corresponds to Article 217 of the E.M.C., and they are based on Article 379 of the F.Com.C. It has two features. Firstly, the assured must disclose the insurances he has made and the loans of bottomry and respondantia. The second feature is that the non-disclosure of these facts neither invalidates the right of abandonment nor extends its period. The only effect is that payment of the indemnity may be delayed till the declaration of the facts.

Upon this principle, it would appear that when there is no other insurance to be disclosed, the assured is obliged to mention this negative fact to the underwriter. Some do not agree with this view but suggest that the provision applies only when there is already more than one insurance. It seems, however, that they do not recognise that Article 222 provides that the assured may summon the underwriter to pay the sum insured. And the underwriter may delay payment of the indemnity on the ground of not having received complete information. Article 226 of the O.M.C., which provides that the underwriter must make payment within three months of the final stage of abandonment does not prevent the underwriter from exercising his right in Article 223, mentioned above. It is, therefore, advisable that the assured state that there is no other insurance covering the things insured and so preclude delay of payment by the underwriter on the ground of

(1) Ripert, op.cit., vol.iii, p.798.
(2) Ali Hassan Yunis, op.cit., p.568.
(3) See p.493.
not having received such information.

Again, the assured is obliged to be honest; any fraud or misrepresentation of the facts disclosed to the underwriter may render the assured liable to be deprived of the benefit of the insurance, Article 224 of the O.M. C. providing that: "In the case of fraudulent declaration, the assured is deprived of the advantages of insurance; he is bound to repay the money borrowed, notwithstanding the loss or capture of the vessel." This article is similar to Article 218 of the E.M.C., and these are based on Article 380 of the F.Com.C. It makes no mention of the invalidation of the contract. It is still valid but the assured loses his right to the advantages of the insurance. It is important to distinguish between fraudulent giving of information and the innocent omission of information. When the underwriter proves fraud on the part of the assured, the latter loses his right to the insurance, whereas in the case of innocent intention, the assured is obliged to make his declaration in proper form and the underwriter has the right to delay payment until the assured does so.

(b) **Absolute Abandonment:** When the assured declares his intention to exercise his right of abandonment, he surrenders all his rights in the things abandoned and has no right whatsoever to make stipulations or reservations. At the same time, the underwriter can neither accept part of the property abandoned nor extend it to goods which were not exposed to the risks. In this connection, Article 216 provides that: "The abandonment of the things insured can be neither partial nor conditional. It only extends to goods which are the subject of insurance and risks." This article corresponds

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(1) This article makes reference to the matter of maritime loans. This mixing of provisions of insurance and provisions of bottomry loans is inherited from the French Ordonnance of 1681, when insurance remained under the influence of such transactions. This is noticed by the Belgian legislature, and when the French article is cited in Belgian Commercial Codes of 1879 and 1908 (Article 235), maritime loans are excluded.
to Article 212 of the E.M.C., and both are based on Article 372 of the F. Com.C. Four points are to be noticed: (i) Abandonment must be indivisible; (ii) Abandonment must be unconditional; (iii) Abandonment extends only to things insured; and (iv) The things insured must have been exposed to the risks insured.

(i) Indivisible Abandonment: The main purpose of the right of abandonment is that the assured is entitled to be fully indemnified, and consequently his interest must be wholly transferred to the underwriter. The assured cannot by this rule declare his intention to abandon part of the goods insured. In other words, when the assured intimates his intention to exercise his right of abandonment, he has no right to divide this right by retaining a right to part of the property insured and at the same time claiming in respect of the rest indemnity for partial loss.

(ii) Unconditional Abandonment: Any condition in the declaration or acceptance might affect the abandonment, suspend its operation and delay transfer of ownership. The parties, therefore, cannot impose any conditions and as soon as the underwriter accepts the abandonment, or the matter is judicially approved, the right to the property becomes his and the abandonment is irrevocable.

Article 218 does not specify whether a condition in the notice of abandonment is void or affects the whole abandonment. Emerigon, quoting Valin, says that "such an abandonment would be nuli and could not be admitted." This opinion is supported by many recent French legal writers, though this rule is not practical. The validity of the abandonment depends on either acceptance by the underwriter or enforcement by the court. It is not a

(1) Loc. cit., p. 684.
(2) Smet, op. cit., p. 625.
unilateral act. The underwriter, who would primarily declare his non-acceptance, has the right to accept the abandonment and refuse the condition, and his acceptance is valid because the condition is unlawfully imposed. Moreover, if the underwriter accepts abandonment on conditions, the condition can be disregarded, and abandonment is irrevocable. A party who imposes a condition cannot seek its enforcement by judicial authority or claim irrevocability. It may be concluded, therefore, that nullity affects, not the abandonment, but any condition imposed by either party.

(iii) Abandonment Extended only to Things Insured: Article 216 (above) requires that abandonment be limited to the things insured. It may, therefore, be inferred from this rule that when the property insured is only partly covered by the policy of marine insurance, the assured is entitled to abandon only the part insured, and the other part either remains at his own risk or is covered by another policy.

(iv) Property Insured Exposed to Risks Insured: The right of abandonment affects only things which are at risk at the occurrence of the disaster. If part of the goods insured is not exposed to risk either by delay of shipment or by unloading them before the disaster occurs, it cannot be abandoned.

In addition to the provisions of Article 216 mentioned above, the last section of Article 214 provides that: "However, abandonment may be made as much for the ship as for the merchandise before the risks commence in accordance with Article 170." This section corresponds to the last section of Article 212 of the E.M.C., and both are a reproduction in substance of Article 370 of the F.Com.C. The latter provides that abandonment may not

(1) Dover, op.cit., p.410.
be made before the commencement of the voyage, whereas Article 170 provides that the risk attaches for the cargo from the date of loading and for the ship from the date of its departure. It seems that the Ottoman article is more accurate and consistent with the risks insured. The importance of this difference appears in the case of an event affecting a cargo on board ship, and before the commencement of the voyage, by arrest of the ship, fire or storm. The French provision does not allow abandonment of the cargo because the voyage has not commenced, although the cargo on board is at the underwriter's risk. So, in the French law, the assured has only a claim of particular average. But the Ottoman provision allows the assured to claim a total loss by exercising the right to abandon.

Now it is clear that abandonment must be made at or after the time when the underwriter began to run the risks insured against, and so any damage occurring before the attachment of the risk or because the things insured are not exposed to risk is not covered by the right of abandonment.

(c) Declaration of Abandonment within Statutory Period: It has been mentioned before that the O.M.C. requires that the assured should within three days after receipt notify the underwriter of all news of events which may be grounds of abandonment. This notification is distinct from notice of abandonment, as appears from the provision as to the period within which notice of abandonment requires to be served, Article 217 of the O.M.C. providing that:

"The abandonment must be intimated to the underwriter within a period of six months, one year or two years, proceeding from the places hereunder designated, namely:
Within the period of six months, counting from the day of receipt of news of a disaster happening at any port on the coasts of Europe or of Asia and Africa or in the Mediterranean or in the Black Sea; or in the case of capture from the day the news was received that the ship was driven into one of the ports or places situated on the coasts before mentioned.

(1) Art. 341 of the F.Com.C., see p. 325."
Within the space of one year after receipt of news of either loss or capture at the islands of Azores, Canaries, Madeira and other islands and the coasts of western Africa and the eastern coasts of America.

Within the period of two years after news arrives that the disaster or capture has taken place, in all other parts of the world.

And after these periods have lapsed, the assured shall no longer be entitled to abandon.

This Article corresponds to Article 213 of the E.M.C., and both are based on Article 373 of the F.Com.C. of 1808 with some modification, the Ottoman legislature introducing the exordium, adding the "Black Sea" and omitting "islands of West India Colonies". The French article was replaced in 1862 by a new article which took into consideration the defects in the earlier provision but is inconsistent with modern means of communication and kinds of vessel used. Reference to a recent law of marine insurance makes the defect clearer, the Marine Insurance Act 1906 in s.s. 3, Section 62, providing that:

"Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss but where the information is of doubtful character, the assured is entitled to a reasonable time to make inquiry."

The term "reasonable diligence" and "reasonable time" are construed in accordance with the circumstances of each individual case and give the assured ample opportunity to ascertain the facts and decide whether to intimate abandonment. Before the enactment of the Marine Insurance Act, it was suggested that a delay of five days was too long, and in some other cases

(1) "The abandonment must be intimated to the underwriter within six months from the day when news is received of loss, if it happened at any port on the coast of Europe, Asia or Africa or in the Mediterranean or in case of capture, within six months from the receipt of news that the vessel has been driven into one of the ports or upon one of the coasts mentioned above; within one year after the receipt of information that the vessel has been lost or carried as a prize to Africa on this side of Cape Horn; within eighteen months after news that the loss happened on a vessel carried as a prize to any other ports of the world. When these periods have elapsed, the assured shall not be allowed to abandon."

a delay of sixteen or seventeen days was considered unreasonable.

So the periods given in the Maritime Code are not only too long but unreasonable and require to be reconsidered in the context of a modern society.

4) Limitation of Action

The right of abandonment is protected by a legal action which is subject to certain time limits prescribed by the O.M.C. These are distinct from the terms of prescription determining rights arising from a contract of insurance. In addition to the last sentence quoted in Article 217, Article 275 of the O.M.C. provides that: "The action of abandonment prescribes within the periods mentioned in Article 214 (217)." This Article corresponds to Article 268 of the E.M.C., and both are similar to Article 431 of the F.Com.C. The periods mentioned in Article 217 are six months, one year and two years.

It is important to note that the assured's right to claim indemnity is not completely forfeited. The above prescriptions apply only to his right to abandon, and he may claim indemnity by exercising his right therein in the action of average. In other words, if he loses his right of abandonment on the ground of lapse of one or other periods mentioned, his right to indemnify remains enforceable by action of particular average until it lapses after the expiry of a period of five years.

5) Effect of Abandonment

(a) Acceptance by Underwriter: The underwriter is entitled to be notified at the earliest possible moment of any circumstances that may give

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(2) Art. 276 of the O.M.C., see p. 184.
(3) The number of the article is mistakenly cited as 214; it must be 217. This mistake appears in all the editions of the Ottoman legislation - Turkish, French, Arabic.
(4) See p. 394.
(5) See p. 184.
rise to a right to abandon. This notification is required to be given (1) within three days from the date of the assured's receipt of such news. The assured is also obliged to declare his intention to abandon the property insured within the periods of six months, one year and two years in accordance with distance and place of the disaster. The abandonment is effective after it is accepted by the underwriter or enforced by a legal judgment.

So acceptance of abandonment by the underwriter is a material factor in the situation, and his refusal to accept it enables the assured to seek other means of enforcing his right. In practice the underwriter instantly (3) declares his non-acceptance because as soon as acceptance is declared abandonment becomes final and irrevocable, and he needs time to consider whether the facts received are actually ground for abandoning.

The O.M.C. has declined to provide whether the underwriter's declaration of acceptance or refusal of the abandonment should be made expressly or whether it may be inferred from circumstances. As the O.M.C. obliged the assured to make a clear declaration of abandonment, it is important for the underwriter to take similar action. The underwriter's declaration must, therefore, be made in the same way and by the same means as the assured's declaration. It is noticeable that the policy in Iraq, which is similar to that of Lloyd's, provides that: "And it is expressly declared and agreed that the act of the assured or insured in Recovery, Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment."—This clause is well known as the "Waiver Clause".

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(1) Articles 218, 231, 234 of the O.M.C., see pp. 373, 346.
(2) Art. 217, ibid., see p. 394.
(3) Dover, op. cit., p. 410.
(4) Art. 229 of the O.M.C., see p. 399.
which was added to the Lloyd's policy in 1874, although it was not given effect in a later Common Law decision. But the position is different in Iraq. The contract and its stipulations are law between the parties and there is nothing in the O.M.C. which may be used to cancel this clause or to reduce its effect. An Arab writer in Egypt, trying to solve the dilemma of the ineffectiveness of the existing Clause, suggests that the application of the "Waiver Clause" is made after the underwriter declares his refusal and before the result of the action of abandonment is known, but this view has no support either in the policy or in the E.M.C., which is similar to that of Iraq. Perhaps the writer based his opinion on the provisions of the Marine Insurance Act 1906, s.s.5, Section 62, which provides that: "The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after the notice is not acceptance."

There are precedents for the view that the underwriter indicates acceptance when he exercises his right of salvage. Moreover,

"Whenever the underwriters, after receiving notice of abandonment, do any act in consequence thereof which could be justified only under a right derived from it, ... such act to be itself decisive evidence of an acceptance." (5)

This opinion and the view of the Egyptian writer cannot be treated as absolute. It is true that they may be applied after the underwriter's refusal to accept notice of abandonment, but as the underwriter is not obliged to declare his refusal immediately or even after a certain period, he has the right to examine the circumstances and find out whether the loss

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(1) Chalmers, op.cit., p.143.
is really total or merely particular average, and he is entitled to a reasonable time for this purpose. The O.M.C., moreover, allows him to obtain some assistance in reducing the effect of the damage, and this is stated expressly in Article 232 in the case of arrest. The matter, therefore, is not one of law but of fact. These facts must be examined by the court in each individual case. But the underwriter must not by exercising his right of salvage reduce the right of abandonment, and his doing so is equivalent to acceptance. For example, he must not, by spending his own resources, reduce the loss to one of particular average, but he is entitled to protect the things insured from further damage and minimise the loss.

(b) Transference of Ownership in the Property Abandoned: The assured, to be entitled to abandon, must have title to the things abandoned, and as soon as abandonment reaches its final stage, the ownership of the things abandoned falls to the underwriter. Section 1 of Article 239 of the O.M.C. provides that: "After abandonment has been notified and accepted or legally adjudged, the things insured belong to the underwriter from the date of abandonment." This provision is similar to section 1 of Article 223 of the E.M.C., and both are based on Article 385 of the F.Com.C. This provision has four features:

(1) Ownership in the property abandoned is transferred to the underwriter as soon as the abandonment is considered legally complete, acceptance or judicial sanction of the abandonment vesting the underwriter with all rights of the assured to the things insured. The assured need not deliver the things abandoned to the underwriter or authorise him to take possession thereof but is obliged only to deliver the documents of title.

(2) Vesting of ownership has a retrospective effect. The things abandoned pass to the underwriter from the date of declaration of the abandonment and not from the date of acceptance, judicial sanction or the occurrence
of the risk insured against. If acceptance is enforced by a legal judgment, abandonment is effective from the date when the assured notified the underwriter of his wish to abandon.

(3) The underwriter becomes for all purposes owner of the property abandoned and, consequently, assumes all the obligations of ownership. For example, if the property abandoned causes damage to another person, the underwriter is obliged to make good that damage.

(4) The underwriter is subrogated to the assured in his right to the things insured, and the assured, who has been indemnified, has no right to claim against a third party responsible for the damage. Consequently, the underwriter can claim against the third party for compensation. Although the O.M.C. has failed to provide clearly for this, the standard form policy of marine insurance embodies this right, Clause 10 of the Institute Cargo Clauses providing that:

"In the case of loss or damage which may result in a claim being made hereunder, the assured undertakes to cause appropriate measures to be taken to prevent any remedy against any carrier or other bailee becoming barred by reason of non-compliance with terms and conditions governing the liability of such carrier or other bailee. Should expenses be incurred thereby underwriters will reimburse the Assured for such expenditure provided the loss or damage fails within the provisions of this insurance."

(c) Is the Underwriter Entitled to Accept Total Loss and Refuse Abandonment? When the property insured becomes a total loss, actual or constructive, the assured has the right to abandon it to the underwriter and claim a full indemnity which is not more than the sum insured. But there is the further question whether the underwriter, before the matter is settled by legal action, is entitled to accept the total loss and pay the appropriate indemnity but decline to accept abandonment and ownership of the things abandoned. This question arises especially in the case where the
goods abandoned may cause further loss to the underwriter, either by his
incurred additional expense in removing the wreck or by the things aban-
doned becoming flotsam and involving him in liability to other vessels.

In France the matter is solved by inserting in the policy a clause
stating that the underwriter may accept abandonment by payment for total
loss without transference of the property. This stipulation is accepted
by some Arab legal writers who suggest its introduction to some policies.

In Britain the matter has the same result for different reasons. The
Marine Insurance Act 1906, in s.s.1 of Section 63 and Section 79, gives
the underwriter an option to take over the ownership of abandoned proper-
ty if he wishes to do so, and in practice the underwriters sometimes agree
to indemnity as for a total loss but decline to accept ownership of the
things abandoned. This practice is based on many cases in which the courts
have refused to impose on the underwriter the obligation to accept any tran-
sference of any property, and it has influenced another Arab legal writer
in Egypt.

In Iraq the matter remains undecided. The French view cannot be applied
because the policy following Lloyd's does not have such a clause, and to
give the underwriter the option of refusing a transfer of the property is
hardly permitted by the existing provisions. If such a dispute is brought
before the Court, it is bound to apply the provision of Article 229 and
eventually the underwriter is compelled to accept ownership; any refusal
on his part may render the property res nullius. Moreover, non-acceptance

(1) Ripert, op.cit., vol.iii, p.807.
(2) Mustafa Kamal Taha, op.cit., p.478.
(3) Arnould, op.cit., vol.ii, p.1182 (notes)
(4) Ibid., p.1181.
(5) Jamal Hakim, op.cit., p.158.
(6) See p. 399.
of notice of abandonment does not mean that the underwriter may not be compelled to accept it by legal action. The disposal of things abandoned is left to the parties and, consequently, to the Court to decide.

(d) Abandonment is Irrevocable: Unless it is proved that an abandonment is based on fraud or misrepresentation or the parties agree to rescind it, it is irrevocable and cannot be revoked by the unilateral act of either party.

Acceptance of a valid abandonment also cannot be revoked, section 2 of Article 229 providing that: "The underwriter cannot under pretence that the ship has returned be exempted from payment of the sum insured." This section is similar to Article 223 of the E.M.C., and both are based on Article 385 of the F.Com.C. The provision refers to cases where a ship returns after being declared missing or an arrested ship is released after the expiry of the period necessary for making the abandonment, cases which raise the question of the assured to consider it a "total loss" and exercise his right to abandon. The existence of such a peculiar situation as a ship returning cannot support the possibility of revocation of abandonment in other cases. These cases need some such express provision as that quoted above because it must be borne in mind that the assured may sustain no damage and has, therefore, no need to be indemnified.

(e) Abandonment of Freight: Article 230 of the O.M.C. provides that:

"The freight of goods saved, even if it should have been paid in advance, forms part of the abandonment of the ship and belongs alike to the underwriter without prejudice to the rights of the lender on bottomry bond, the rights of sailors for their wages and claims for expenses and charges during the voyage."

This Article corresponds to Article 224 of the E.M.C., and both are similar to Article 386 of the F.Com.C. of 1808. Yet the French article was repealed, without replacement, by the law of 1885 after the French legisla-
ture authorised insurance of freight (le fret net).

After the abandonment is accepted by the underwriter, and the problem of ownership of the things abandoned is settled, the assured's obligation is to abandon the freight. The above article provides that the abandonment of the ship must include abandonment of the freight earned on the goods saved. It seems that in practice the freight earned may be deducted from the amount of indemnity to which the assured is entitled. This is based on the ground that freight is an accessory of the ship and becomes part of it. The article also distinguishes between freight earned on lost goods and freight earned on saved goods. Thus, where there is an agreement that freight is payable in any event, the assured is obliged to abandon only that part of the freight which related to the cargo saved. The whole matter, however, requires reconsideration, possibly on the lines of ss.2, section 63, of the Marine Insurance Act 1906, which provides that:

"Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned and which is earned by her, subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss."

6) Time of Payment of Indemnity

As soon as the abandonment is accepted, the underwriter is obliged to pay the indemnity. Usually, the time when the indemnity is to be paid is agreed by the parties. In the absence of such agreement, the O.M.C. provides in Article 226 that:

"If the time for payment is not fixed in the contract, the underwriter is bound to pay the total amount of insurance and the costs within three months after notification of the abandonment.

After this period, the assured is entitled to legal interest. The things abandoned are entitled to be taken as payment."

(1) Art. 334 of the F.Com.C., see p. 301.
(2) Emerigon, op.cit., p. 705.
This Article corresponds to Article 220 of the E.M.C., and both are based on Article 680 of the D.Com.C. They do not far differ from Article 382 of the F.Com.C. except in the addition of the last section and the addition of costs to the sum insured.

ii. Particular Average Loss

The O.M.C. does not define the term "particular average", but it may be inferred that it arises in every case where the assured has not a right to abandon the goods insured and the underwriter pays only the damage. In other words, what is left of the goods insured is valued and deducted from the indemnity. It is regarded as another name for a partial loss. In the Marine Insurance Act 1906 this dual terminology is expressly accepted, s.s.1, section 64, providing that: "A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss." The cases of particular average are enumerated in Article 246 of the O.M.C. as follows:

"Particular averages are:
1. Injuries arising to the things insured from their peculiar nature, from tempest, capture, shipwreck or stranding.
2. The expense of their salvage.
3. The loss of cables, anchors, sails, masts, cordage, occasioned by tempest or other perils of the sea.
4. The expenses arising from putting into a port in consequence either of the fortuitous loss of the things above-mentioned or of scarcity of provisions or the springing of leaks.
5. The victualling and wages of seamen while the ship is undergoing necessary repairs and held in quarantine whether the ship has been freighted for voyage or by the month.
6. The victualling and wages of seamen during detention, when the ship has been stopped in the course of the voyage by order of a power where the ship has been freighted for voyage.
7. And in general, the expense incurred and damage sustained on account of the ship only from the time of the loading and departure until return and discharge."

Further, Article 247 of the O.M.C. provides that:

"Damage arising to the things insured from the master's failure to have properly tightened the hatches, moored the ship, furnished sufficient tackle and from all other accidents attri-
but able to the negligence of the master or crew are, in like manner, particular average, borne by the master, the ship and the freight."

These articles correspond to Articles 239 and 240 of the E.M.C. and are based on Articles 403 and 405 of the F.Com.C.

a) Liability for Particular Average

Before discussing the rules of adjustment of particular average in detail, it is necessary to mention the nature of liability for particular average. Section 2 of Article 244 of the O.M.C. provides that: "Particular average is borne and paid by the owner of the thing which has suffered the damage or caused the expense." This section corresponds to section 2 of Article 251 of the E.M.C., and both are based on Article 404 of the F.Com.C.

It may be inferred from the article that particular average is not covered by the policy unless specifically included. In practice a distinction is made between two kinds of particular average, namely, particular average of goods and particular average of ship.

Adjustment of Particular average of Goods: It has been stated many times that the underwriter is the person who bears the damage, total or partial, caused by the perils of the sea. But, in practice, it is rather different, the policy frequently providing that: "...and that all other goods are warranted free from average under three pounds per centum unless general or the ship be stranded sunk or burnt." The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss and does not include "particular charges".

(1) In a case in 1749 where it was held that general average could not be added to Particular Average to make up the 3 percent warranty, Lord Esher said that: "The words 'average unless general' must be read as equivalent to warranted free from partial loss under 3 percent, unless it be a general average loss." See Chalmers, op.cit., p.156.

There are, in practice, two kinds of clause appended to the policy to regulate the adjustment of a particular average loss occurring to goods; they are particular average clause and free from particular average clause.

**Particular Average Clause:** Section 2 of Article 250 of the O.M.C. provides that: "No claim of average lies...when the particular average does not also exceed one percent of the value of the things insured." This section corresponds to section 2 of Article 243 of the E.M.C., and both are based on Article 408 of the F.Cora.C.

This provision is designed to protect the underwriter against trifling and inconsiderable damage. In practice, the parties, although they are obliged to respect this rule, regulate the matter more precisely between themselves. Clause 6 of the standard form of Institute Cargo Clause (W.A.) provides that:

"Warranted free from average under the percentage specified in the policy unless general or the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty, the underwriters are to pay the insured value of any package or packages which may be totally lost in loading, trans-shipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water or discharge of cargo at a port of distress.

This clause shall operate during the whole period covered by the policy."

Arnould's commentary on this clause is that:

"It will be seen that this clause, even in its f.p.a. form, makes substantial concession to the assured in respect of casualties which cannot be strictly regarded as stranding, sinking or burning, provided that the damage is caused thereby." (1)

**Free from Particular Average Clause:** Article 251 of the O.M.C. provides that:

"The clause 'free from average' exempts the underwriters from all averages, whether general or particular, except in those cases which admit of abandonment and in those cases the assured has the option either to abandon or to prosecute the action of average."

This Article corresponds to Article 244 of the E.M.C., and both are based on Article 408 of the F.Com.C.

It is intended by including the "F.P.A." clause in a policy to relieve the underwriters liability for small losses, especially of perishable goods so that they will be liable only for accidents which cause total loss of the property insured and give cause for abandonment. This regulation is approved by the legislature, the O.M.C. providing that it applies in cases when there exists no special agreement between the parties, and, in fact, it takes the place of the standard form clause included in the "Institute Cargo Clauses" and attached to the policy by agreement of the parties.

Clause 6 of the "Institute Cargo Clauses" provides that:

"Warranted free from Particular Average unless the vessel or the craft be stranded, sunk or burnt, but notwithstanding this warranty the Underwriters are to pay the insured value of any package or packages which may be totally lost in loading, trans-shipment or discharge, also for any loss of or damage to the interest insured which may reasonably be attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay special charges for landing, warehousing and forwarding if incurred at an intermediate port of call or refuge, for which Underwriters would be liable under the standard form of English Marine Policy with Institute Cargo Clauses (W.A.) attached.

This clause shall operate during the whole period covered by the policy."

In practice the parties regulate the matter by agreement which may contain some of these provisions.

b) Adjustment of Particular Average on Ship

When it is stated that a ship insured is on particular average, at first sight it suggests that it is probably in a state of unseaworthiness,
but condemnation on this ground can only be made by experts. Yet the O.M.C. refers to the case of innavigability, where the costs of repair of the ship amount to three-quarters of its value, and the assured is entitled to abandon it. So when the costs of repair do not reach three-quarters of the value of a ship, this is particular average and is dealt with as such.

iii. General Average

The O.M.C. does not define "general average" but enumerates the cases of general average and describes the nature of the liability. As the policy which is used in Iraq is similar to Lloyd's policy, it is advantageous to make reference to the definition given in the Marine Insurance Act 1906, section 66, which provides that:

"(1) - A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) - There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."

The cases of general average are in Article 245 of the O.M.C., which provides that:

"General average is:
1. All which is given to the enemy or pirate by way of compensation or under the title of ransom of the vessel and merchandise.
2. Those objects thrown overboard for the common safety or utility of the vessel and cargo conjointly.
3. Cables, masts, sails and other appurtenances which have been cut away or torn down with same intention.
4. Anchors, cordage and other effects abandoned for the same motive.
5. Damage caused by throwing overboard to merchandise remaining in the vessel.
6. Damage purposely made in the vessel to facilitate the casting overboard, the lighterage, or safety of the merchandise or leaking of water, as well as the damage which has occurred on account of it to the cargo.

(1) Art. 234 of the O.M.C., see p. 346.
(2) Art. 233., see p. 367.
7. The treatment, dressing of wounds, food and injury sustained by persons on board and who have been wounded or mutilated in defending the vessel.
8. The indemnity or ransom of those who are sent on land, or to sea for the service of the vessel and the cargo and who are taken and made captive or slaves.
9. The wages and food of the crew if the vessel, after the voyage has commenced, be compelled to suspend it by order of a foreign power or in consequence of war breaking out so long as the vessel and cargo are not discharged from their reciprocal obligation to the freight where the ship has been freighted by the month in accordance with Article 122.
10. The expenses of repair of the damage caused intentionally to the ship because of common safety and also the rights of pilotage and other expenses of entry and departure paid in a port of harbourage when the vessel is constrained to it by storm or the pursuit of the enemy or by some other motive for the safety of the vessel or the cargo, as well as the expenses of discharge and of lightening the ship when it is constrained to enter into a harbour or the river in those cases.
11. The expenses paid for discharging the cargo on land and the hire for warehouse and deposit of the cargo which cannot remain in the ship during the refitting in the port of distress.
12. The expenses demanded in restitution of the vessel and merchandise when they have been arrested or taken away and are claimed at that time by the captain.
13. The expenses of setting the ship afloat again if it has been stranded purposely to prevent capture or loss and the damage occurring to the ship and the cargo conjointly or separately.
14. And, generally, all damages suffered voluntarily and expense incurred and deliberately dictated for the common safety of the ship and the cargo after discussion between the captain and the sailors and decided together, as well as the expenses incurred under similar circumstances."

This Article corresponds to Article 238 of the E.M.C. They are based on Article 699 of the B.Com.C. and to some extent on Article 403 of the F.Com.C.

a) Adjustment of General Average

The rule is generally stated that damage caused by a general average act is apportioned in accordance with section 1 of Article 244 of the O.M.C., which states: "General average is borne by the goods and by the half of the ship and freight in proportion to their respective value."

This section corresponds to section 1 of Article 251 of the E.M.C., and
both are cited from Article 401 of the F.Com.C.

In practice the parties agree to apply the rules of adjustment of general average known as "The York-Antwerp Rules" in the latest edition of 1950.

General Average Clause: Section 2 of Article 250 of the O.M.C. provides that: "No claim of average lies where... the general average does not exceed one percent on the joint value of the ship and the goods." This section corresponds to section 1 of Article 243 of the E.M.C., and both are based on Article 408 of the F.Com.C.

This provision is made to release the underwriter from inconsiderable payments of general average, and the policy of marine insurance provides in its attached "Institute Cargo Clauses" that: "Clause 8 - General-average and salvage charge payable according to foreign statement or to York-Antwerp Rules if in accordance with contract of affreightment."

The subject of this thesis is a comparative study on the insurance laws in Iraq. This comparison reveals many interesting problems which affect the legal structure of insurance on the one hand, and on the other, the existence in practice of principles different from the principles of the substantive law. But how to reduce these differences? Suggestions have been made in various parts of this work, but the problem can only be solved by legislation. The matter is, thus, left to be dealt with at some future time, and instead of writing an epilogue in the usual form, I would prefer to make some observations on the law and practice of insurance as they now are and to set down some conclusions.

It is convenient here to suggest, for instance, a unification of the statutory provisions which distinguish between commercial and non-commercial matters. They are at present embodied in four Codes - the Civil Code, the Commercial Code, the Ottoman Maritime Code and the bankruptcy provisions of the Ottoman Commercial Code; and some of the provisions affecting insurance, which is considered a commercial contract, are contained in the Civil Code. This distinction came about through the adoption of French method of codification, but Islamic Law, apart from applying customs of trade in certain commercial causes, does not in general recognise any difference between commercial and non-commercial matters. Whenever the Commercial and Maritime Codes and other commercial legislation are silent, the provisions of the Civil Code must be consulted; both commercial and non-commercial matters are dealt with in the ordinary courts of Iraq. There is only one single code of procedure. Thus, apart from some minor matters of judicial procedure and evidence, this distinction is more of theoretical
than of practical importance, and there is no need to mention it.

Another circumstance favouring reform in the field of insurance law is that the insurance statutes are not suited to the needs of modern business. The Ottoman legislature which first introduced insurance law into Iraq and the Iraqi legislature which followed the Egyptian method of codification where both were influenced by the French legislation, while the actual business of insurance in Iraq has been influenced by British practice. It can, thus, be seen that a new approach to the law of insurance, with a view to assimilating the insurance statutes with business practice, is an urgent necessity. The first essential is to examine and revise the statutes. Such a revision is likely to take place very soon as a result of the nationalisation of insurance in Iraq, and since nationalisation inevitably reduced the element of competition, it is unlikely that further customary rules will emerge.

Any approach reform in Iraq must not be made in isolation from what is happening in other parts of the world, and especially in the Arab countries. The French codes, on which the Iraqi enactments were modelled, were the result of the liberal philosophies of the French Revolution, but at the present time social and economic changes due to other philosophies are taking place throughout the world and account much for other changes. Uniformity in the laws of all Arab countries is one of the objects of the Arab League Organisation. The government of the United Arab Republic has prepared two drafts of codes, one to replace the Egyptian Maritime Code and the other to cover some matters with which the Egyptian Civil Code did not deal; both are modelled on the draft of French Commercial Code and the French Law of Insurance 1930 with some consultation with other continental systems, e.g.
Swiss and German, and it is highly probable that the Egyptian drafts of codes will be taken into account when consideration is given to any change in Iraqi law. But the new legislation should not be modelled on any one system of law but should adopt the best provisions from all the leading systems. The sound theoretical basis of the law of France and of other Continental countries would be combined with British law and practice to provide a system which is both theoretically and practically sound.

There now follow some general suggestions as to the ways in which the law of insurance in Iraq might be reformed, firstly in the field of statutory law and secondly in the field of practice, the precise nature and scope of the reform to be worked out by men of law in consulting with men experienced in the practical business of insurance.

I. Statute Law

1— The Ottoman Law of Insurance of 1905 and the marine insurance provisions of the Ottoman Maritime Code of 1863 should be replaced by a single enactment. The defects of the present system are very obvious; some minor matters are covered in detail while some important ones are ignored, and the layout is unsatisfactory.

2— The proposed enactment should deal in detail with every kind of insurance. It might be called "The Law of Insurance", but it would be infinitely preferable for it to be included within the Civil Code under the heading "Contracts of Insurance". Its contents might be as follows:

Chapter I: General Rules of the Contract of Insurance

+ Definition and kinds of insurance classified according to the risks insured against.
+ The policy and its contents; necessity for writing.
+ Rule of insurable interest.
+ Risks which may be insured against.
+ Risks which may not be insured against without special agreement.
+ The parties to the contract; their rights and obligations.
+ Measure of indemnity.
+ Right of subrogation.
II. Practice

In order to promote efficiency in the business of insurance, the legislature should introduce a new standard form policy. General conditions for every policy would be provided in the proposed enactment, but any special stipulation would be left to be agreed between the parties.

The suggestion of the introduction of a new standard form of policy raises the question of replacing the Lloyd’s (S.G.) standard form of policy of marine insurance. This policy has been subject to severe criticism by many English judges on account of its obscurity and lack of cohesion. The main reason for its remaining unchanged is that every term and word has been interpreted through a long judicial process, and this interpretation has been codified in the Marine Insurance Act 1906, which is widely accepted in the field of international trade and insurance. This means that when a question arises it is the decided cases rather than the policy itself which are consulted, and the result is that Lloyd’s policy has come to be generally regarded as sacrosanct. Whether this is so in Iraq is, however, doubtful, for in that country there is, despite the close relation which has existed between the two countries since 1914, a considerable degree of ignorance of the English legal system. All policies, whether Lloyd’s or
not, have been interpreted by the courts according to Iraqi, not English law, i.e. they are construed strictly according to their terms and not according to how the English judges have interpreted them. Moreover, although there is throughout the world a high degree of uniformity in insurance in particular the Lloyd's policy is not used, e.g. in France. The French policy of marine insurance is based on the French Commercial Code 1808, and if the draft French commercial code is promulgated, the new French policy will be modelled likewise. In formulating any new standard form of policy in Iraq in order to be appended to the new legislation, the French policy would doubtless be considered.

It might, thus, be more satisfactory for the legislature in Iraq to rewrite Lloyd's policy in a way more suited to the needs of modern insurance, especially in view of the possibility of Britain's entering the Economic Community. The new policy would, of course, retain the basic provisions of the present one; the terminology would be in accordance with the provisions of the Marine Insurance Act 1906, and leading cases in marine insurance. The things which would be made would be such as would be necessary to facilitate its application and construction abroad.

The foregoing suggestion for the reform of insurance law and practice in Iraq are quite general, and the legislature may by enactment cover in detail the many problems which may arise or provide only the general principles and rules, leaving particular provisions to be included in the policy by agreement of parties. The second method has the advantage of being sufficiently flexible to provide adaptation to special circumstances and facilitate future development.
BIBLIOGRAPHY

All the materials referred to throughout this work are mentioned hereunder, also a selective list of materials which helped in building up the ideas of this work.

Abdul Mun'im Faraj al-Ssada, Muhadharat fil-Qanun al-Madani (Lectures on Civil Code), Cairo, 1958.

Abdul-Wadud Yaha, 'Iadat-ul-Ta'min (The Reassurance), Cairo, 1963.


Adib, Y. Sadir, editor of Qanun al-Mujibat wal-'Uquod (Law of Obligations and Contracts), Beirut.

Adler, E.N., Jewish Travellers, 1930.

Aggs, W.H., Chitty's Statutes of Practical Utility, 6th edn., 1911 etc.


Aschen, H., Disputatio Juridica Inauguralis de Assecuratio, 1693.

Ashburner, W., The Rhodian Sea Law, 1909.

Association of American Law Schools, editor of Select Essays in Anglo-


Belgium, The Law of Insurance 1874, see Smet, the Appendix.


Benecke, W., Treatise on the Principle of Indemnity in Marine Insurance, Bottomry and Respondentia, 1824.

Besson, see Planiol et Ripert.


Boucher, P.B., Institute du Droit Maritime (1803), France.


Bruce, J.S., "Designation of the Beneficiary", see Beneficiary in Life Insurance, ed. D. MacCahen, 1948, U.S.A.


Cleriac, Le Guidon de la Mer, 1671.


Colhoun, S.M., Sea Losses in Ancient, as referred to by Eli, R.


Day, J., An Economic History of Athens under Roman Domination, 1942, U.S.A.


Dold, G.W., Stipulation for a Third Party, 1948.


Duer, J., The Law and Practice of Marine Insurance, 1845, U.S.A.

Dunbar, Ch.F., The Theory and History of Banking, 5th edn. revised and rewritten with additional material by O.M.W. Sprague, 1929.


Analysis of Marine Insurance Clauses, 1956.


Ellis, Ch., The Law of Fire and Life Insurance, 1832.


Emerigon, B.M., Traite des Assurances et des Contrats a la Grosse, 1783, trans. S. Meredith, 1850, U.S.A.


Fifoot, C.H.S., English Law and its Background, 1932.

Lord Mansfield, 1936.

Finlay, A.M., Contract for the Benefit of Third Party, 1939.


France, French Civil Code, see Wright, E.B.

French Commercial Code, see Mayer S. and Levi, L.

French Law of Insurance, see Dallow, recueil periodique, 4me partie Loi et Decret, 1931, pp.1-46.


Germany, The German Law of Insurance, 1908; see Sievenking, A.

German Commercial Code, see Scustee, A.F. and Arnold, W.

Prussian Code, see Levi, L.

Gibb, A.D., Law from Over the Border, 1950.

International Private Law in Scotland in the XVI and XVIII Centuries, 1928.


*Sources and Literature of English Law*, 1952.


Hourani, F.H., *Arab Seafaring*, 1951, U.S.A.

Ibn Abdin, Muhammad Amin Ala-al-Din, al-Hasqafi, Majmu'at Rassal (Collection of Letters), 2 vols. (Arabic), Istanbul, 1325H=1907A.D.

Sharb al-Dur al-Mukhtar (Treatise on Islamic Law), 2 vols., Cairo.


Ibn qudama, abi Mohammad Abdullah, al-Mughni (A Commentary on Islamic Law) ed. in 1222, Cairo, 1947.


*Commercial Code*, 1943; see Kamel al-Samara'i.


*Ottoman Civil Code*, see Hooper, C.A.

*Ottoman Law of Insurance*, 1905, see Hooper, C.A.

*Ottoman Maritime Code*, 1863, see G. Young, Nicolaides, D. and Kamel al-Samara'i.

*Uqud al-Ta'min* (Contracts of Insurance), Cairo, 1965.


Kamel al-Samara'i, ed., *al-Qawanin al-Khassa bil-Tijara* (Commercial Laws), Baghdad, 1957.

*al-Qawanin al-Khassa bil-Sharikat* (Companies Law), Baghdad, 1960.


Lane, *Arabic–English Lexicon*, 1869.


*Negligence in the Civil Law*, 1955.


Transactions in the Shari'a, pp. 179–202, *The Law in the Middle East*, see Khadduri & Liepensy.

Malynes, G., *Cosuetudo vel Lex Mercatoria*, 1622.


Mardin, E., "Development of the Shari'a under the Ottoman Empire", pp. 279–91 of *The Law in the Middle East*, see Khadduri & Liepensy.


Meredith, S., see Emerigon.


Mohammad Abu Zahra, Ta'liq (Commentary); see Mustafa Ahmad al-Zarqa.


Molloy, De Jure Maritimo et Navali, 1692.


Morris, R. W., Transport, Trade and Travel Through the Ages, 1948.

Moscati, S., Ancient Semitic Civilization, 1957.


Mustafa Ahmad al-Zarqa, al-T'amin wal-Shari'a al-Islamia (Insurance and Islamic Law), Damascus, 1962.

Mustafa Kamel Munib, ed. Quanin al-Tijara (Laws of Commerce), Cairo, 1950.


"The Usurer and the Merchant Prince—"

Netherland, Dutch Commercial Code, see Levi, L.

Nicolaides, D., Législation Ottomane by Aristrchi Beg, Constantinople, 1873.

Onar, S.S. "The Majalla – the Ottoman Civil Code", pp.292–308 of The Law in the Middle East, see Khadduri & Liepesny.

Pardessus, J.M., Coutume de la Mer, 1847.


Pirenne, H., Mohammed and Charlemagne, 1939.

Economic and Social History of Medieval Europe, 5th edn., 1937, U.S.A.


Pollock, Sir Frederick, Principles of Contracts, 13th edn., 1946, Winfield, P.H.


Pothis,M., Traité du Contrat d'Assurance et du Contrat des Prêt à la Gross


Prothero,G.W., Mesopotamia, Handbook prepared under the direction of the
Historical Section of the Foreign Office, no.63, British Government

Prussia, see Germany.

Public Record Office, Foreign Office Papers, Turkey, no.195.


Roccus, trans. by Ingersoll,J.R., 1809, U.S.A.

Roscoe,E.S., A History of the Prize Court, 1924.


Roover, Florence Edier, de, "Early Examples of Marine Insurance", pp.172-

Roover, Raymond, de, The Rise and Decline of the Medici Bank 1397-1794,
1963, U.S.A.

Ruxton,F.H., ed. and trans. of Maliki Law, being a summary from French
translation of the Mukhtasar of Siddik Khalil with notes and bib-
liography, 1916.

Sa'ad Wasif, al-Ta'min min al-Masuulia (Insurance Against Liability) Cairo,
1958.

Saba Habachi, "The System of Nullities in Muslim Law", The American Journal

Salah Eidin Abdul-Wahab & Brinsley,J.B., "The Stipulation for a Third Per-
son in Egyptian Law", The American Journal of Comparative Law Quar-


Satti' al-Hassari, *al-Dawla al-Uthmania wal-Bilad al-Arabia* (Ottoman Empire and the Arab Countries), Beirut, 1959.


Introduction to Islamic Law, 1964.


Selden Society Publication, *Select Pleas in the Court of Admiralty*, 2vols., no. vi, 1892; xi, 1897.

Sieveking, H., *Das Seedarlehen des Altertums*, 1893, as referred to by R. Eli.


Slater, *On Mercantile Law*, see Lord Chorley & Giles.

Smet, R., *de, Droit des Assurance Maritimes*, 1934, France.


Studies Critical and Comparative, 1962.


Spain, *Spanish Commercial Code*, see Levi, L.


Egyptian Civil Code, 1948, see

see Mustafa Kamel Munib.

Egyptian Maritime Code, 1873,


Yahia ibn abi al-Khair ibn Salim al-Umrani, A Treatise on Islamic Law (Arabic manuscript, British Museum) no. 0R3739.

Young, G., *Corps de Droit Ottoman*, 1906.