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# The Right to Jury Trial in Insurance Coverage Declaratory Relief Actions: An Historical Perspective

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Insurance coverage disputes are a common source of litigation in California. If coverage under an insurance policy is questionable, insurance companies ordinarily provide their putative insured with a conditional defense subject to a full reservation of rights to bring an action for declaratory relief that seeks a judicial determination of non-coverage.<sup>1</sup> Although this procedure results in greater expense in the form of defense costs to insurance companies, the current state of California law concerning an insurer's duty to defend<sup>2</sup> and its covenant of good faith and fair dealing<sup>3</sup> have forced insurance companies to take this route to protect themselves from potential bad faith liability. Therefore, when insurance coverage is questionable, two law suits are often initiated involving the same parties and the same set of operative facts.

The first action is one at law for damages; that is, the underlying

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1. See 18 G. COUCH, CYCLOPEDIA OF INSURANCE LAW, 322 (2d ed. 1959).

2. See generally Revere & Chapman, *Insurers Duty to Defend*, 13 PAC. L.J. 889 (1982).

3. See generally Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833 (1982).

liability suit in which the insured is named as defendant. The second action is one for declaratory relief initiated by the insurer that names all the parties to the underlying liability suit as defendants. This multiplicity of suits serves only to overburden an already congested court calendar. In addition, the increase in litigation costs incurred by insurance companies in bringing insurance coverage declaratory relief actions manifests itself in higher operational costs which are ultimately passed on to the consumer in the form of higher premiums. Therefore, a solution to crowded calendars and high premiums should be favored by both the legal profession and the consumer.

Before the legislature can remedy this problem by enacting appropriate legislation, one hurdle must be overcome. If a party has the constitutional right to a jury trial in insurance coverage declaratory relief actions,<sup>4</sup> then any act by the legislature which infringes upon that right is a nullity.<sup>5</sup> Therefore, it must be determined if a right to trial by jury is preserved by the California Constitution in insurance coverage declaratory relief actions before the legislature is free to act.

The issue of whether the right to a jury trial exists in coverage disputes between an insurer and its insured is not an easy one to decide. Ordinarily, causes of action are clearly legal or non-legal in nature. As discussed below, if the cause of action is legal in nature, deciding issues cognizable at common law, then the right to a jury trial is protected by the California Constitution.<sup>6</sup> If, on the other hand, the cause of action is non-legal in nature, cognizable in the courts of equity or admiralty for example, then the right to a jury trial is not protected.<sup>7</sup> The determination of the legal or non-legal nature of insurance coverage disputes is complicated by the fact that the remedy sought, a declaration of non-coverage, is neither traditionally legal nor equitable in nature.<sup>8</sup> Declaratory relief is *sui generis*; a creature of statute which was unknown to the common law.<sup>9</sup> Therefore, with respect to insurance coverage disputes at least, confusion abounds in the cases dealing with the issue.

This article will attempt to show that the issue of whether a right to a jury trial exists in insurance coverage declaratory relief actions has not been adequately addressed by the California courts. The appellate de-

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4. See CAL. CONST., art. I, §16.

5. *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951); *People v. Kelly*, 203 Cal. 128, 133, 263 P. 226, 228 (1928).

6. See text accompanying notes 12-70 *infra*.

7. See text accompanying notes 12-70 *infra*.

8. See COUCH, *supra*, at 322.

9. *Patterson v. Insurance Co. of N. Am.*, 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665, 667 (1970); *Veale v. Piercy*, 206 Cal. App. 2d 557, 560-61, 24 Cal. Rptr. 91, 93 (1962).

cisions which have addressed the issue have not properly applied the test articulated by the California Supreme Court. As explained below, the determinative question to be answered in deciding this issue is whether the English common law courts had jurisdiction over cases involving insurance contracts at the time the California Constitution was adopted in 1850.<sup>10</sup> An historical inquiry will be made into the origin and development of insurance in an attempt to answer this very question. This article will show that the historical evidence suggests that the English common law courts did not have proper jurisdiction over cases involving insurance contracts at the time the California Constitution was adopted. Therefore, the California Constitution does not preserve a right to jury trial in insurance coverage disputes.<sup>11</sup> Moreover, the legislature is free to enact legislation to relieve over-burdened court calendars. Before the history of insurance is explored, this article will briefly trace the development of California law concerning the right to a jury trial.

#### THE RIGHT TO JURY UNDER CALIFORNIA LAW: AN HISTORICAL APPROACH

Article I, Section 16, of the California Constitution provides that “[t]rial by jury is an inviolate right and shall be secured to all . . . .”<sup>12</sup> Although the constitution clearly states that the right to a jury trial is a sacred right, an inviolate right is not synonymous with an absolute right. In other words, the inviolate right to a trial by jury is not without its limitations. In general, a person only has a right to a jury trial when the issues being litigated are legal in nature. If the issues are equitable in nature, or non-legal, then no right to jury trial exists.

The leading case in California concerning the constitutional right to a jury trial is *People v. One 1941 Chevrolet Coupe*.<sup>13</sup> The facts in *One Chevrolet* concerned the seizure and attempted forfeiture of an automobile pursuant to a statute which provided that any vehicle used to

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10. See text accompanying notes 20-26 *infra*.

11. See text accompanying notes 72-187 *infra*.

12. The analogous counterpart in the United States Constitution is the seventh amendment which reads in pertinent part:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . .” Because the United States Supreme Court has not incorporated the seventh amendment into the Due Process Clause of the Fourteenth Amendment, the several states may create or diminish the right to a jury trial in state civil actions free of the seventh amendment’s requirements. *See Palko v. Connecticut*, 302 U.S. 319, 324 (1937). For this reason, federal decisions interpreting the seventh amendment right to a jury trial, although persuasive authority, are not binding on the states. This article will address only the right to a jury trial in a civil action under state jurisdiction pursuant to the California Constitution, Article I, Section 16.

13. 37 Cal. 2d 283, 231 P.2d 832 (1951).

unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or is unlawfully possessed by an occupant thereof, shall be forfeited to the State.<sup>14</sup> Other provisions of the statute authorized any peace officer making a narcotics arrest to seize any vehicle used in contravention of the statute and hold it as evidence until a forfeiture has been declared or a release ordered.<sup>15</sup> Additional provisions provided for notice to owners, hearings, and for a judgment of forfeiture or release.<sup>16</sup> No provision of the statute provided for a jury trial in the forfeiture proceedings.<sup>17</sup> The legal owner and holder of a chattel mortgage filed a demand for a jury trial which was eventually disallowed by the trial court.<sup>18</sup> In reversing the trial court's ruling disallowing the legal owner's demand for a jury trial, the California Supreme Court articulated the test to be applied by the courts in determining if a constitutional right to a jury trial exists.<sup>19</sup>

The court held that the constitutional right to a jury trial is the right as it existed at common law at the time the California Constitution was adopted.<sup>20</sup> Moreover, it was stated that the common law at the time the constitution was adopted included not only decisional law, but also the statutes of the British Parliament in effect on that date.<sup>21</sup> In addition, the court held that any act of the legislature attempting to abridge the constitutional right to a jury trial was null and void.<sup>22</sup> In emphasizing the historical nature of the inquiry, the court explained:

It is the right to trial by jury as it existed at common law which is preserved; and what that is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.<sup>23</sup>

A problem is created, however, when an action is brought pursuant to a statutorily created cause of action unknown in the English common law. Like the forfeiture statute in *One Chevrolet*, the California declaratory relief statute<sup>24</sup> creates a cause of action unknown to the English common law. Furthermore, the legislature did not specifically

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14. *Id.* at 286, 231 P.2d at 834.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 285-86, 231 P.2d at 834.

19. *Id.*

20. *Id.* at 286-87, 231 P.2d at 835 (citing *People v. Richardson*, 138 Cal. App. 404, 408, 32 P.2d 433, 435 (1934)).

21. *Id.* at 287, 231 P.2d at 835 (citing *Moore v. Purse Seine Net*, 18 Cal. 2d 835, 838, 118 P.2d 1, 4 (1941)).

22. *Id.* (citing *People v. Kelly*, 203 Cal. 128, 133, 263 P. 226, 228 (1928)).

23. *Id.* at 287, 231 P.2d at 835.

24. CAL. CIV. PROC. CODE §1060.

provide for the right to a jury trial in either the declaratory relief or forfeiture statutes.<sup>25</sup>

The problem of fitting a cause of action into an historical category, either legal or equitable, was faced by the court in *One Chevrolet* where it developed what is commonly referred to as the “gist of the action” test:

The right to a trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature. If that could be done, the Legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials, and thus entirely defeat the provision of the Constitution. The Legislature cannot convert a legal right into an equitable one so as to infringe upon the right of trial by jury. The provision of the Constitution does not permit the Legislature to confer on the courts the power of trying according to the course of chancery any question which has always been triable according to the course of the common law by jury. If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist of the action*. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.<sup>26</sup>

At one point in time, the California Supreme Court appeared to abandon the historical approach set forth in *One Chevrolet*. In *Raedeker v. Gilbralter Savings and Loan Association*,<sup>27</sup> plaintiffs sued (1) to set aside a trustee’s foreclosure sale of real property owned by them; (2) to recover damages for conversion of personal property; (3) to recover compensatory and punitive damages for fraud; and (4) to recover damages for breach of contract.<sup>28</sup> To insure themselves of a trial by jury, plaintiffs voluntarily abandoned their equitable claim to set aside the trustee sale and eventually dismissed their fraud and breach of contract claims. Plaintiffs used the factual allegations of their abandoned claim to set aside the trustee sale to support a cause of action claim for damages for breach of Gilbralter’s oral promise not to sell the property.<sup>29</sup> In addition, plaintiffs retained their second cause of action for conversion.<sup>30</sup> Eventually, the jury returned a verdict for plaintiffs on both of

25. See 37 Cal. 2d at 286, 231 P.2d at 834; CAL. CIV. PROC. CODE §1060.

26. 37 Cal. 2d at 299, 231 P.2d at 843-44 (emphasis added and footnotes omitted).

27. 10 Cal. 3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

28. *Id.* at 668, 517 P.2d at 1158, 111 Cal. Rptr. at 694.

29. *Id.* at 669-70, 517 P.2d at 1159-60, 111 Cal. Rptr. at 694-95.

30. *Id.*

these remaining causes of action, that is, for breach of oral promise and conversion.<sup>31</sup> The trial court, however, treated the jury verdict as advisory only<sup>32</sup> and entered its own findings of facts and conclusions of law which adopted the jury's findings as to conversion only, but adopted contrary findings as to Gilbralter's breach of oral promise not to sell the property.<sup>33</sup> The court thereafter entered judgment for the plaintiffs in the amount of \$14,000 which was found by the jury to constitute compensatory damages for the conversion of plaintiffs' personal property.<sup>34</sup> Plaintiffs appealed after the trial court denied their motions for a new trial and to set aside the court's judgment.<sup>35</sup> On appeal, the California Supreme Court reversed the trial court's ruling that treated the jury verdict as advisory only.<sup>36</sup> However, instead of applying the historical analysis articulated in *One Chevrolet* and focusing on the "gist of the action," the court focused on the nature of the relief sought to determine if the cause of action was legal or equitable in nature. "As the relief sought in both causes of action was *damages*, and as the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded . . . plaintiffs were entitled to a jury trial as a matter of right."<sup>37</sup> The court did not examine the English common law at the time the California Constitution was adopted nor did they examine the nature of the rights involved to determine if the "gist of the action" was legal or equitable in nature.<sup>38</sup> Instead, by focusing on the mode of relief to be afforded, i.e., damages, the court appeared to be formulating a new test to be applied.

Shortly after the California Supreme Court decided *Raedeke*, it handed down its decision in *C & K Engineering Contractors v. Amber Steel Company*.<sup>39</sup> *C & K Engineering* concerned an action for *damages* arising from a breach of contract.<sup>40</sup> Plaintiff's theory for recovery was based upon the doctrine of promissory estoppel.<sup>41</sup> Instead of focusing on the mode of relief to be afforded in determining the nature of the action as they had in *Raedeke*, the court declined to develop the *Raedeke* test further and returned to the historical approach set forth in

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 672, 517 P.2d at 1160-61, 111 Cal. Rptr. at 696-97.

37. *Id.* (emphasis added).

38. *See People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 299, 231 P.2d 832, 843-44 (1951).

39. 23 Cal. 3d 1, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978).

40. *Id.* at 5, 587 P.2d at 1137, 151 Cal. Rptr. at 324.

41. *Id.*

*One Chevrolet*.<sup>42</sup> The court held that although the legal or equitable nature of a cause of action is ordinarily determined by the mode of relief to be afforded, the prayer for relief in a particular case is not conclusive.<sup>43</sup> Therefore, reasoned the court, the fact that *damages* may be a possible remedy does not guarantee the right to a jury trial.<sup>44</sup>

The decision in *C & K Engineering* failed to remove the confusion created by *Raedeke*, however. Instead of overruling *Raedeke* when given the opportunity to do so, the court merely assimilated its rationale by adopting the "mode of relief" prayed for as a factor to be considered when applying the "gist of the action" test of *One Chevrolet*.<sup>45</sup> In any event, the court did apply the historical test by examining the English common law at the time the constitution was adopted in determining that the gist of an action based upon the doctrine of promissory estoppel is historically equitable in nature and therefore not to be tried to a jury as a matter of right even though the mode of relief to be afforded, damages, was in form legal.<sup>46</sup>

Although at first glance there appears to be some authority that insurance coverage declaratory relief actions are triable to a jury in California, the California Supreme Court has not, in fact, squarely decided the issue. In *State Farm Mutual Automobile Insurance Company v. Superior Court*,<sup>47</sup> the California Supreme Court used strong *obiter dicta* by citing what appears to be the majority rule that issues of fact which would have been triable by jury as a matter of right in an action which might have been substituted for declaratory relief are likewise triable by jury as a matter of right in the action for declaratory relief.<sup>48</sup> The court in *State Farm* indicates, however, that the petitioner was not challenging the propriety of respondent's right to a jury trial in the declaratory relief action.<sup>49</sup> Therefore, the issue was not properly before the court. Nor does the court specifically identify the particular action at law replaced by the declaratory relief action when it applied the majority rule.<sup>50</sup> The identity of the fundamental action at law is essential in determining whether a trial by jury in a declaratory relief action is a

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42. *Id.* at 9, 587 P.2d at 1140, 151 Cal. Rptr. at 327.

43. *Id.*

44. *Id.*

45. After citing the "gist of the action" test set forth in *One Chevrolet*, the *C & K Engineering* decision went on to add:

"On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial." *Id.* at 9, 587 P.2d at 1140, 151 Cal. Rptr. at 327.

46. *Id.* at 10-11, 587 P.2d at 1141, 151 Cal. Rptr. at 328.

47. 47 Cal. 2d 428, 304 P.2d 13 (1956).

48. *Id.* at 431, 304 P.2d at 15.

49. *Id.*

50. *Id.*



matter of right under the majority rule.<sup>51</sup> The *State Farm* decision does state, however, that “courts will not permit the declaratory action to be used as a device to circumvent the right to a jury trial in cases where such right would be guaranteed if the proceeding were coercive rather than declaratory in nature.”<sup>52</sup> Apparently, because the issue of whether a right to a jury trial existed in insurance coverage declaratory relief actions was not squarely before the court, it did not examine the right to a jury in insurance coverage litigation as it existed in the English common law at the time the constitution was adopted in 1850.<sup>53</sup> Therefore, the historical inquiry as to the gist of the action mandated by *One Chevrolet* was not used by the court to determine if a right to a jury exists in declaratory relief actions involving insurance coverage disputes. However, this has not stopped the appellate courts from citing *State Farm* for the proposition that trial by jury is a matter of right in such situations.

The first appellate court to cite *State Farm* as establishing a constitutional right to a jury in insurance coverage declaratory relief actions was *Allstate Insurance Company v. The Normandie Club*.<sup>54</sup> In *Allstate*, the plaintiff insurer sued its insured and other parties in declaratory relief seeking a declaration that the plaintiff's policy of insurance did not afford coverage for the underlying damage suit and that plaintiff, therefore, did not owe its insured a duty to defend the damage suit.<sup>55</sup> Citing *State Farm*, the court held that a jury trial was a matter of constitutional right “since the present case is one in which an action for declaratory relief has been substituted for an action at law for *breach of contract* . . . .”<sup>56</sup> As already explained, *State Farm* did not identify the specific action at law replaced by insurance coverage declaratory relief actions.<sup>57</sup> In addition, *Allstate* cites no other authority for this conclusion.<sup>58</sup> The truth of the matter is that neither *Allstate*, nor the *State Farm* opinion cited by the *Allstate* court, followed the historical approach mandated by the California Supreme Court in determining whether the gist of an action for declaratory relief involving insurance coverage was legal or equitable in accordance with the test set forth with *One Chevrolet*.<sup>59</sup> The court simply concluded, presumably on the

51. *Id.*

52. *Id.* at 432, 304 P.2d at 15.

53. *Id.* at 431, 304 P.2d at 15.

54. 221 Cal. App. 2d 103, 34 Cal. Rptr. 280 (1963).

55. *Id.* at 105, 34 Cal. Rptr. at 281.

56. *Id.* at 105-06, 34 Cal. Rptr. at 281-82 (emphasis added).

57. See *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 431-32, 304 P.2d 13, 15 (1956).

58. 221 Cal. App. 2d at 105-06, 34 Cal. Rptr. at 281-82.

59. See *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286-87, 299, 231 P.2d 832, 835, 843-44 (1951).

basis of the dicta in *State Farm*, that an insurance coverage declaratory relief action was a substitute for an action at law for breach of contract and, therefore, a jury trial was a matter of right under the majority rule articulated by the *State Farm* decision.<sup>60</sup>

The court's conclusion in *Allstate* that an insurance coverage declaratory relief action is a substitute for an action at law for breach of contract is not well founded. Actions at law are generally for damages,<sup>61</sup> while an action in declaratory relief seeks, in this situation at least, only a declaration of non-coverage. It is hard to comprehend the situation where an insured could be liable in damages to his insurer for suffering an occurrence,<sup>62</sup> or non-occurrence as contended by the insurer, as defined by the insurance contract.<sup>63</sup> An occurrence is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."<sup>64</sup> Although we have chosen to use the word "occurrence" in our discussion, a word ordinarily used in comprehensive liability insurance policies, the same principles apply to all other *loss events* in other types of policies.

Insurance coverage disputes usually involve the non-performance of a condition to the insurance contract excusing performance by the insurer from its promise to defend and indemnify the insured.<sup>65</sup> A breach of contract, on the other hand, usually involves the unjustified failure to perform a material promise or covenant.<sup>66</sup> Nowhere in the standard liability policy does the insured promise not to suffer an occurrence giving rise to liability on behalf of the insurer.<sup>67</sup> For a court to interpret an insurance contract as containing such a covenant by the insured would be ludicrous. The express intent of the parties is manifested in the general insuring provisions of the policy which provide that the insurer promises to pay on behalf of the insured all sums which

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60. 221 Cal. App. 2d at 105-06, 34 Cal. Rptr. at 281-82; see 47 Cal. 2d at 431-32, 304 P.2d at 15; 13 A.L.R.2d 777, 778.

61. *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 2d 1, 9, 587 P.2d 1136, 1140, 151 Cal. Rptr. 323, 327 (1978).

62. A standard insuring clause for a liability insurance policy usually provides the following:  
The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or  
B. property damage to which this insurance applies, caused by an occurrence . . . . R. KEETON, *BASIC TEXT ON INSURANCE LAW* 658 (1971) [hereinafter cited as KEETON].

63. For specimen policy language setting forth the insured's obligations under an insurance contract, see KEETON, *supra* note 62, at 655 (general liability-automobile policy), 663 (family combination-automobile policy) (1971). These examples are illustrative of insurance policies in general.

64. See KEETON, *supra* note 62, at 654.

65. See B. WITKIN, *SUMMARY OF CALIFORNIA LAW Contracts*, §560, at 478 (8th ed. 1973).

66. See *id.* §616, at 525.

67. See KEETON, *supra* note 61, at 663.

the insured shall become legally obligated to pay to third persons by reason of an occurrence and as long as coverage is not expressly excluded.<sup>68</sup> Instead of the declaratory relief action being a substitute for a breach of contract action, insurance coverage actions seek a declaration from the court construing the insurance contract to determine the rights and liabilities of the parties before a breach occurs.<sup>69</sup> Therefore, the court's holding in *Allstate* that insurance coverage declaratory relief actions are substitutes for breach of contract actions at law is not based upon sound legal principles.

The confusion caused by the holding in *Allstate* is compounded by the fact that subsequent appellate court decisions readily followed its conclusionary holding.<sup>70</sup> If the court, however, would have answered the historical question required to be answered by the *One Chevrolet* decision in determining whether the gist of the action is legal or equitable in nature, it is quite likely that a different result would have been reached by the *Allstate* court and in those subsequent decisions based on *Allstate*. Because the *One Chevrolet* decision requires an in depth historical inquiry, we must examine closely the origins and development of insurance law to determine if the common law had proper jurisdiction over insurance disputes.

#### THE HISTORY OF THE CONTRACT OF INSURANCE: WHO HAS JURISDICTION?

The earliest traces of insurance date back to the ancient world.<sup>71</sup> Some sources seem to indicate that primitive forms of insurance existed as early as the third century before Christ.<sup>72</sup> These early forms of insurance provided primarily funeral rites for the dead and in some instances aid to the elderly and ill.<sup>73</sup> This type of insurance was usually sponsored by fraternal and benevolent societies such as the Roman Collegia<sup>74</sup> and flourished among other cultures like the Egyptians, Chi-

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68. See KEETON, *supra* note 61, at 658.

69. See *California Union Ins. Co. v. Trinity River Land Co.*, 105 Cal. App. 3d 104, 110, 163 Cal. Rptr. 802, 806 (1980); CAL. CIV. PROC. CODE §1060.

70. See *Interinsurance Exch. v. Savior*, 51 Cal. App. 3d 691, 694, 124 Cal. Rptr. 239, 240 (1975); *Patterson v. Insurance Co. of N. Am.*, 6 Cal. App. 3d 310, 315-16, 85 Cal. Rptr. 665, 667-68 (1970); *General Ins. Co. of Am. v. Whitmore*, 235 Cal. App. 2d 670, 676, 45 Cal. Rptr. 556, 560 (1965).

71. See 1 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW*, 27-28 (2d ed. 1959) [hereinafter cited as 1 COUCH]; J. PARK, *A SYSTEM OF THE LAW OF MARINE INSURANCE* i-xliii (2d ed. 1799) [hereinafter cited as PARK]; E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 48 (2d ed. 1957) [hereinafter cited as PATTERSON]; W. VANCE, *HANDBOOK ON THE LAW OF INSURANCE* 8 (3d ed. 1951) [hereinafter cited as VANCE].

72. VANCE, *supra* note 71, at 8.

73. VANCE, *supra* note 71, at 8.

74. VANCE, *supra* note 71, at 9.

nese and Hindus.<sup>75</sup> The principles embodied in the Roman *Collegia* eventually passed to the guilds flourishing in the merchantile centers of medieval Europe and formed the foundations for what became known, at a much later date, as life, accident and health insurance contracts.<sup>76</sup> Perhaps, more important to the development of insurance law was the custom by which merchants, transporting goods by sea, allocated the risks which permeated this form of transportation.<sup>77</sup> Therefore, as explained below, all insurance law has its origins in the development of marine insurance and it is upon this type of early insurance that our inquiry must focus.

The early beginning to what we know today as marine insurance appears to have been the ancient practice of "general average" contribution and later the bottomry and respondentia bonds.<sup>78</sup> When the goods of one merchant were destroyed or sacrificed to save the remaining merchandise in the ship, as when goods were jettisoned during a perilous storm, the loss was made up by the proportionate or "general average" contributions from the owners of the other interests which were benefited by the sacrifice.<sup>79</sup> The custom of "general average" served as a device for the equitable allocation and distribution of the loss among all the adventurers in the merchantile enterprise.<sup>80</sup>

In addition to "general average" contribution, early merchants used bottomry and respondentia bonds. The bottomry bond was ordinarily evidence of a loan made to a merchant repayable only if the vessel upon whose bottom the bond was secured completed the contemplated voyage safely.<sup>81</sup> Thus, if the goods financed by the loan failed to arrive at the destined port, the merchant was sheltered from the loss by the bottomry bond. Instead of assessing a premium, the lender in a bottomry bond transaction was allowed to charge a higher rate of interest to compensate him for the risk of losing his loan.<sup>82</sup> When and if the vessel was lost, the owner of the vessel was not indemnified for the loss, but instead received a discharge from payment on the loan.<sup>83</sup> The respondentia bond was similar to the bottomry bond except it was secured upon the cargo instead of the vessel bottom thereby protecting individual merchants from loss sustained to their particular goods while enroute even though the vessel itself may arrive safely at its

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75. PATTERSON, *supra* note 71, at 48; VANCE, *supra* note 71, at 9.

76. VANCE, *supra* note 71, at 9.

77. VANCE, *supra* note 71, at 9. See generally PARK, *supra* note 71, at i-xliii.

78. VANCE, *supra* note 71, at 9.

79. VANCE, *supra* note 71, at 9.

80. VANCE, *supra* note 71, at 9.

81. VANCE, *supra* note 71, at 9.

82. VANCE, *supra* note 71, at 9.

83. VANCE, *supra* note 71, at 9.

destination.<sup>84</sup>

The practice of respondentia and bottomry bonding was perfected by the Rhodian merchants in the Mediterranean World and is commonly identified as the direct origin of the law of marine insurance, the earliest form of insurance law.<sup>85</sup> All insurance law developed from this common origin. From the twelfth to sixteenth centuries, the republics of northern Italy flourished on their maritime commerce.<sup>86</sup> Therefore, it is not surprising that most of the early documentation concerning commercial insurance comes from Italian sources. The earliest insurance policy known to have been in standard form originated in Genoa in 1347.<sup>87</sup> This was soon followed by a statutorily prescribed form policy enacted in Florence in 1523.<sup>88</sup> From Italy the custom of making mutual contracts of insurance rapidly spread throughout the commercial centers of Europe, eventually to be centered in the merchant organizations forming the Hansaetic League.<sup>89</sup> The insurance contract became known as a "policy" of insurance, being derived from the Italian word "poliza," which, according to etymological sources, traces back to a Greek word meaning a folded writing.<sup>90</sup>

During the fourteenth and fifteenth centuries, the making of insurance contracts became a firmly rooted commercial custom among merchants throughout all the maritime states of Europe.<sup>91</sup> Because the practice of making insurance contracts was limited primarily, if not exclusively, to insuring the transportation of goods in international commerce, a need for uniformity of rules governing insurance contracts, as well as other international commercial contracts, existed in the commercial community.<sup>92</sup> Therefore, in response to the need for uniformity in commercial contracts, insurance law, as well as other commercial rules, took on an international character eventually giving rise to a whole body of rules which became known as the "law merchant."<sup>93</sup>

This body of commercial rules is said to have borne a peculiar relation to the respective systems of law existing within the several countries where international commerce was prevalent.<sup>94</sup> All controversies involving commercial transactions, including insurance matters, were

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84. VANCE, *supra* note 71, at 9.

85. VANCE, *supra* note 71, at 10.

86. VANCE, *supra* note 71, at 10.

87. VANCE, *supra* note 71, at 11.

88. VANCE, *supra* note 71, at 11.

89. VANCE, *supra* note 71, at 11.

90. VANCE, *supra* note 71, at 11.

91. VANCE, *supra* note 71, at 11.

92. VANCE, *supra* note 71, at 11.

93. VANCE, *supra* note 71, at 11.

94. VANCE, *supra* note 71, at 11.

decided in accordance with the "law merchant" apparently to the exclusion of local law.<sup>95</sup> Professor Vance in his work on insurance explains this phenomenon in the following manner:

During the Middle Ages these merchants engaged in international commerce, being much more enlightened than most of their countrymen, and better capable of governing their own trade, were naturally unwilling to leave the determining of their rights with respect to such trade to the crude forms of law and the rude courts that administered the local laws of Continental Europe. From this fact arose the custom among these merchants of leaving all questions arising under the law merchant to be settled by conventional courts established by themselves, and having only such powers as were derived from the consent of the parties appearing before them. Nevertheless, these informal tribunals of merchants which were, in effect, but committees of arbitration, and which had no means of enforcing directly any order that might be entered, were by the mere force of custom enabled to settle satisfactorily all causes arising out of the law merchant during those centuries.<sup>96</sup>

From the above paragraphs tracing the origins of insurance, it can be said with certainty that insurance law originated with and was developed by the merchants of Europe and was finally embodied in the customs and rules commonly known as the "law merchant."<sup>97</sup> As discussed below, in fact, it was through the medium of the "law merchant" that insurance was introduced into England.<sup>98</sup>

As early as the twelfth century, Italian merchants from Northern Italy, commonly known as Lombards, established trading houses in London and introduced into English trade the merchantile customs known as the "law merchant."<sup>99</sup> The Lombards brought with them not only the Italian custom of insuring against the hazards of trade, but also their custom of submitting all controversies arising under merchantile transactions to courts of merchants, established by themselves, having no relation to or sanction from the common law courts of England.<sup>100</sup> Apparently, these merchant courts were adequate tribunals for several centuries until, in 1601, Parliament enacted the Statute of Assurances<sup>101</sup> establishing a court of special jurisdiction modeled after the customary conventional courts of the merchants.<sup>102</sup>

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95. VANCE, *supra* note 71, at 11.

96. VANCE, *supra* note 71, at 11-12.

97. 1 COUCH, *supra* note 71, at 28; VANCE, *supra* note 71, at 11; *see* PARK, *supra* note 71, i-xliii.

98. VANCE, *supra* note 71, at 14.

99. VANCE, *supra* note 71, at 14.

100. VANCE, *supra* note 71, at 14.

101. An Acte concerninge matters of Assurances, amongste Merchantes, 1601, 43 Eliz., c. 12.

102. VANCE, *supra* note 71, at 14.

The first statute enacted by the English Parliament which recognized the practice of insurance was the Statute of Assurances, 43 Eliz. c. 12, formally entitled "*An Acte concerninge matters of Assurances, amongste Merchantes.*"<sup>103</sup> This statute was enacted to provide a more efficient

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103. The following is the text to the Statute of Assurances, officially titled "An Acte concerninge matters of Assurances, amongste Merchantes." The reader is reminded that the inconsistencies in spelling are in the original text of the statute.

Whereas it ever hath bene the Policie of this Realme by all good meanes to comforte and encourage the Merchante, therbie to advance and increase the generall wealthe of the Realme, her Majesties Customes and the strengthe of Shippinge, which Consideracon is nowe the more requisite, because Trade and Traffique is not at this psente soe open as at other tymes it hath bene: And whereas it hath bene tyme out of mynde an usage amongste Merchantes, both of this Realme and of forraine Nacyons, when they made any greate adventure (speciallie into remote partes) to give some consideration of Money to other psons (which comonlie are in noe small number) to have from them assurance made of their Goodes Merchandizes Ships and Things adventured, or some parte thereof, at such rates and is such sorte as the Parties assurers and the Parties assured can agree, which course of dealinge is comonly termed a Policie of Assurance; by meanes of whiche Policies of Assurance it cometh to passe, upon the losse or perishinge of any Shippe there followeth not the undoinge of any Man, but the losse lightethe rather easilie upon many, then heavilie upon fewe, and rather upon them that adventure not then those that doe adventure, whereby all Merchantes, spiallie the yonger sorte, are allured to venture more willinglie and more freelie: And whereas heretofore suche Assurers have used to stande so justlie and pciselie upon their credites, as fewe or no Controvysies have risen thereupon, and if any have grown the same have from tyme to tyme bene ended and ordered by certaine grave and discrete Merchantes, appoynted by the Lorde Mayor of the Citie of London, as Men by reason of their experience fitteste to understande, and speedilie to decide those Causes; untill of late yeeres that divers psons have withdrawn themselves from that arbitrarie course, and have soughte to drawe the parties assured to seek their moneys of everie seerall Assurer, by Suites comenced in her Majesties Courtes, to their greate charges and delays: For Remedie whereof be it enacted by the authoritie of this psente Parliamente, That it shall and may be lawfull for the Lorde Chauncellor, or Lorde Keeper of the Great Seale of Englande for the tyme beinge, to awarde foorthe under the Greate Seale of England, one generall or standinge Comysson, to be renewed yeerelie at the leaste and otherwise soe ofte as unto the saide Lorde Chancellor or Lorde Keeper shall seeme good, for the Hearinge and determynynge of Causes arisinge, and Pollicies of Assurances, suche as now are or hereafter shall be entred within the office of Assurances within the Citie of London, and whereof no Suite shalbe dependinge the laste day of this Session of Parliamente in any of her Majesties Courtes; whiche Comysson shallbe directed unto the Judge of the Admiraltie for the tyme beinge, the Recorder of London for the time beinge, two Doctors of the Civil Lawe, and two comon Lawyers, and eighte grave and discrete Merchantes, or any five of them; whiche Comyssoners, or the greater parte of them, whiche shall sit and meete, shall have by vertue of this psent Acte full power and auctoritie to heare examyne order and decree all and everie suche cause and causes concernynge Policies of Assurances, in a briefe and sumarie course, as to their discrecon shall seeme meete, withoute formalities of Pleading or Pceeding.

And be it further enacted by the authoritie aforesaide, That it shall be lawfull for the saide Comyssoners, as well to warne any of the parties to come before them as alsoe to examyne upon Oathe any Witnes that shalbe pduced, and to comytt to prison without Baile or Mainepriise, any pson that shall wilfullie contemne or disobey their synall Orders or Decrees; And that the saide Comyssoners shall once everie weeke at the leaste meete and sit upon the execucon of the saide Comission in the Office of the Assurances, or in some other convenient publike place by them to be assigned; and that no pson by vertue of this Acte may clayme or exact any Fee for any matter or cuase concernynge the execucon of the saide Comysson.

And be it further enacted by the authoritie aforesaide, That if any pson shall be grieved by Sentence or Decree of the saide Comissioners, that suche pson so grieved may, at any tyme within two monethes of the saide Decree soe made, exhibite his Bill into the Highe Courte of Chauncerie for the re-exaiacon of such Decree; soe as everie pson Complaynante, before hee shall exhibite any suche Bill, doe either execute and

process for adjudicating insurance matters. The preamble to the Statute of Assurances provides some enlightening information concerning the history of insurance in England. From the preamble, one can deduce that the practice of making insurance contracts among merchants was firmly established by 1601:

And whereas it hathe bene tyme out of mynde an usage amonge Merchantes, both of this Realme and of forraine Nacyons, when they make any greate adventure (speciallie into remote partes) to give some consideracion of Money to other persons (which comonlie are in noe small number) to have from them assurance made of their Goodes Merchandizes Ships and Things adventured, or some parte thereof, at suche rates and in such sorte as the Parties assureres and the Parties assured can agree, whiche course of dealinge is commonly termed a Policie of Assurance; by means of whiche Policies of Assurance it comethe to passe, upon the losse or perishinge of any Shippe there followethee not the undoinge of any Man, but the losse lightethe rather easilie upon many, than heavilie upon fewe . . . .<sup>104</sup>

Apparently, at the time this statute was written, the custom of writing insurance contracts among English merchants had existed for centuries.<sup>105</sup> In addition, the customs and rules which made up the “law merchant” were familiar to the members of Parliament who enacted the Statute of Assurances.<sup>106</sup> In fact, by creating a special court for “policies of assurance,” it appears that the intent of Parliament was to legitimize and sanctify the conventional courts established by the merchants.

The preamble goes on to recite that in the past, the merchants were successful in arbitrating any controversy arising under a policy of insurance in the merchantile courts. These merchant’s courts were com-

satisfie the saide Sentence soe awarded, or at leaste lay downe, in deposito withe the said Commissioners, such sumes of money as he shall be awarded to pay, and that upon soe doyng the saide Complaynante shalbe enlarged of his Imprisonmente; and that the Lorde Chauncellor or Lorde Keeper for the tyme beinge shall have full power and authoritie, by vertue of this Acte, upon everie Complaynte made (in order as aforesaide) to reverse or affirme everie suche Sentence or Decree accordinge to Equitie and Conscience; And that saide Lorde Chauncellor or Lorde Keeper, in everie suche Suite broughte before hym as aforesaide by such Assurers, and decreede against the saide Assurers, shall be awarde double Costes to the partie assured.

Provided nevtheles, That noe Comyssoner shall intermeddle in the execucon of any suche Comission, in any cause or matter of Assurance shere hymselfe shalbe either a partie assurer, or assured, in the ame Assurance whiche is broughte in question; nor that any Comyssoner, (other then the saide Judge of the Admiraltie and the Recorder of London,) shall deale or pcede in the execucon of any suche Comission before he have taken his Corporall Oathe, before the Lorde Mayor and Courte of Aldermen of the Cite of London, to pcede uprightlie and indifferentlie betwene partie and partie.

104. 43 Eliz., c. 12 (1601). See note 103 *supra*.

105. 43 Eliz., c. 12 (1601) “it hathe bene tyme out of mynde an usage amonge Merchantes

106. *Id.*



prised of "certaine grave and discreete Merchantes," whose "experience fitteste to understande, and speedilie to decide those Causes . . . ."107 Eventually, however, it became increasingly the practice of some to avoid the merchant courts by bringing actions in the royal courts.<sup>108</sup> This practice resulted in great expense to the parties and burdensome delays in deciding the rights of the litigants.<sup>109</sup> To remedy this situation, Parliament enacted the Statute of Assurances which created a court of special jurisdiction to decide matters relating to insurance contracts.<sup>110</sup> This court of special jurisdiction was comprised of "the Judge of the Admiraltie for the tyme beinge, the Recorder of London for the tyme beinge, two Doctors of the Civil Lawe, and two common lawyers, and eighte grave and discrete Merchantes . . . ."111

The court of special jurisdiction was in essence a commission and the members of the court were commissioners who served for a term of one year, any five of which could convene the court and decide controversies brought before it.<sup>112</sup> The court was empowered to decide cases without formalities of pleading and procedure.<sup>113</sup> This served to eliminate the unnecessary delay and expense which existed in the royal courts. In addition, the court had authority to subpoena witnesses, examine them under oath, and imprison persons for contempt.<sup>114</sup> The most enlightening historical fact of this statutory scheme that created this court of special jurisdiction is that jurisdiction on appeal did not exist in the common law courts, but was vested in equity with an appeal to the "Highe Courte of Chauncerie" to be decided "according to Equitie and Conscience . . . ."115

The insurance court established by the Statute of Assurances was empowered only to act *in personam* and was without power to act *in rem*.<sup>116</sup> This proved to be a severe hinderance to the effectiveness of the insurance court.<sup>117</sup> Moreover, because the commissioners were required to take an oath before both the Lord Mayor of London and the "Courte of Aldermen of the Citie of London," and because the Court of Aldermen did not meet every year, many of the commissioners were unable to participate in deciding insurance cases because they could

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; see PARK, *supra* note 71, at xlv.

117. 43 Eliz., c. 12 (1601).

not be sworn in.<sup>118</sup> An additional hinderance to the insurance court was that a burdensome total of five commissioners was required to convene the court and decide cases.<sup>119</sup> These problems were addressed by Parliament in an amendment to the Statute of Assurances enacted in 1662 entitled "An Additional Act concerning matters of Assurances used amongst Merchants."<sup>120</sup>

The amendment empowered the court to act *in rem* against the ship and/or goods of the parties,<sup>121</sup> required the oath of office to be administered only by the Lord Mayor of London who was readily available,<sup>122</sup> and reduced the number of commissioners required to convene the court from five to three, one of which must be either a Doctor of the Civil Law or a Barrister at Law of five years experience.<sup>123</sup> Finally, Parliament was careful to make explicitly clear that the "appeal to the High Court of Chancery" was to be preserved.<sup>124</sup> In summary, from the Statute of Assurances and its subsequent amendment, one may conclude that Parliament sanctified the conventional courts of the Merchants, which had originated in the "law merchant," and determined that the ultimate rules of law to govern insurance contracts were those of Chancery and not those of the common law.

The moving force behind the enactment of the Statute of Assurances was the fact that the common law courts with their formal rules of pleading and procedure were entirely inadequate tribunals for deciding insurance cases.<sup>125</sup> As recited in the preamble to the Statute of Assurances, actions on policies of insurance brought in the common law courts resulted in unnecessary delay and expense.<sup>126</sup> In addition, common law principles were inadequate to decide insurance cases because insurance contracts were not made according to the requisites of the common law, but instead were negotiated pursuant to merchantile customs embodied in the "law merchant."<sup>127</sup> It was not until the appointment of Lord Mansfield as Chief Justice of the Court of King's Bench in 1756 that any recognition of merchant customs is seen in the courts of common law.<sup>128</sup>

Lord Mansfield, who is often referred to as the "Father of English

118. *Id.*

119. *Id.* See note 103 *supra*.

120. An Additional Act concerning matters of Assurance used amongst Merchants, 1662, 14 Car. 2, c. 23.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. VANCE, *supra* note 71, at 15.

126. 43 Eliz., c. 12 (1601); 14 Car. 2, c. 23 (1662).

127. VANCE, *supra* note 71, at 15-16.

128. VANCE, *supra* note 71, at 16.

Commercial Law,"<sup>129</sup> recognized the peculiar circumstances which attended the making of commercial contracts and the importance of recognizing and considering merchantile customs when determining the rights of the parties to a commercial contract.<sup>130</sup> In an effort to make the common law courts suitable for determining rights under merchantile contracts, Lord Mansfield attempted to fuse English common law and the "law merchant" into one body of law.<sup>131</sup> More significantly, perhaps, is the fact that Lord Mansfield impaneled special juries of merchants to determine the rules and customs of English merchants.<sup>132</sup> Therefore, even Lord Mansfield recognized that the common law jury was an inappropriate trier of fact in certain commercial contexts which may have included insurance cases.

Blackstone describes the usual insurance case as being "determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final . . . ."<sup>133</sup> Although Blackstone recognized the validity of the Statute of Assurances, he pointed out that "no such commission has of late years issued."<sup>134</sup> Apparently, several common law court decisions interpreting the Statute of Assurances limited its effectiveness in deciding insurance cases.<sup>135</sup>

Mr. Justice Park, a contemporary legal scholar, in his work on insurance gives the following reasons for the decline of the courts of special jurisdiction created by the Statute of Assurances. First, Park posits that the statutory jurisdiction, being limited to policies of insurance recorded in London, was not extensive enough to serve the needs of the merchants involved in commerce.<sup>136</sup> This reason, however, is not persuasive. Although the exact ratio of insurance policies written in London to those written in other cities is not known, what is known is that the insurance business in London, with the legendary Lombard Street and Lloyds Coffee House, certainly dominated the industry and would have accounted for a considerable amount of litigation regarding insurance claims.<sup>137</sup> Second, Park indicates that some court decisions strictly construed the Statute of Assurances by holding that the insurance courts only had jurisdiction over insurance contracts relating

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129. VANCE, *supra* note 71, at 16.

130. VANCE, *supra* note 71, at 16.

131. VANCE, *supra* note 71, at 16.

132. 4 W. BLACKSTONE, COMMENTARIES 75 (1st ed. 1769) [hereinafter cited as BLACKSTONE]; VANCE, *supra* note 71, at 16.

133. BLACKSTONE, *supra* note 132, at 75.

134. BLACKSTONE, *supra* note 132, at 75.

135. See PARK, *supra* note 71, at xlv-xlvi.

136. PARK, *supra* note 71, at xlv-xlvi.

137. See VANCE, *supra* note 71, at 17-18.

to merchandise.<sup>138</sup> Third, other court decisions restricted the powers of the insurance courts further by holding that they could only entertain actions brought by insureds, and not actions brought by insurers.<sup>139</sup> These decisions appear to be in direct conflict with the language of the statute and should be viewed with caution.<sup>140</sup> As Park points out, however, the most convincing reason the insurance courts lost their utility was because subsequent court decisions held that bringing an action in the insurance court pursuant to the Statute of Assurances was not a bar to litigating the same cause of action in the royal courts.<sup>141</sup> These decisions deprived insurance court judgments of finality and thus created the delay and expense Parliament sought to eliminate by enacting the Statute of Assurances.<sup>142</sup>

It is extremely important, however, to note that the Statute of Assurances as subsequently amended was not repealed by Parliament until 1863, long after these decisions restricted the efficacy of the courts it created.<sup>143</sup> Furthermore, despite the insurance court's perfunctory status, scarcely 60 cases are reported in the official reporters involving insurance disputes in the intervening century between the enactment of the Statute of Assurances in 1601 and the appointment of Lord Mansfield as Chief Justice of King's Bench in 1756.<sup>144</sup> Moreover, the majority of these decisions are general verdicts or short opinions of a single judge which do not clearly indicate what was happening in the development of insurance law, if anything.<sup>145</sup> Whether the common law had jurisdiction in all insurance cases is, at best, unclear during the period immediately preceding the appointment of Lord Mansfield as Chief Justice. It is more likely that once the insurance courts created by Parliament failed, merchants continued to settle insurance cases in their own conventional courts.<sup>146</sup>

The history and development of insurance helps us to understand its nature. As already discussed, the focal point in history which determines if a right to jury trial exists in California is the year 1850, that being the year the California Constitution was adopted.<sup>147</sup> If the gist of the action is essentially legal in nature, then there is a constitutional right to a jury trial.<sup>148</sup> If the gist of the action is not legal, for example,

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138. PARK, *supra* note 71, at xlv-xlvi.

139. PARK, *supra* note 71, at xlv-xlvi.

140. 43 Eliz., c. 12 (1601). See note 103 *supra*.

141. PARK, *supra* note 71, at xlv-xlvi.

142. PARK, *supra* note 71, at xlv-xlvi.

143. See generally CHRONOLOGICAL TABLE AND INDEX TO STATUTES (9th ed. 1884).

144. PARK, *supra* note 71, at xlviii.

145. PARK, *supra* note 71, at xlviii.

146. VANCE, *supra* note 71, at 16.

147. See notes 20-26 and accompanying text *supra*.

148. *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 299, 231 P.2d. 832, 843-44 (1951).

an action in equity or possibly one in admiralty, then there is no right to a jury trial.<sup>149</sup>

At this point, it is necessary to emphasize one important fact to avoid confusion to the reader. Modern liability insurance did not in fact exist in 1850. In understanding this statement, certain definitions may be helpful. Generally, insurance is a contract by which one party, for compensation, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency.<sup>150</sup> Liability insurance is a contract of indemnity for the benefit of the insured and those in privity with him obligating the insurer to indemnify the insured for damages which the insured becomes legally obligated to pay to another and within the coverage of the policy provided by the insurer.<sup>151</sup> Liability insurance is essentially an outgrowth of the increase in personal injury litigation that occurred in the late nineteenth and early twentieth centuries.<sup>152</sup>

The first liability insurance case reported in the United States was not until 1892, some forty-two years after the California Constitution was adopted.<sup>153</sup> Although the exact year liability insurance premiered in the United States is unknown, it is very unlikely that it was much earlier than the date of its first reported case. Liability insurance, as with all other insurance except possibly life insurance, evolved from the same body of law, that is the "law merchant," as did marine insurance discussed above.<sup>154</sup> As Couch so aptly explains, "undoubtedly the first forms of legal expression in insurance concerned marine law and marine insurance, and it is to this branch of the law that one must look for the early formulations and development of the principles governing the contract of insurance."<sup>155</sup>

Although fire insurance, a type of property insurance, existed in England prior to 1850, it was not until 1869 that it was accepted as consistent with public policy and encouraged.<sup>156</sup> Therefore, as with liability

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149. *Id.*

150. See 43 AM. JUR. 2d *Insurance* §1, at 62 (1969).

151. See *id.*, §2, at 65.

152. *Employers Liab. Ins. Corp. v. Merrill*, 155 Mass. 404, 406, 29 N.E. 529, 531 (1892).

The invention of accident insurance preceded the recent flood of actions of tort for personal injuries, and the only risk from accidents to the person then commonly thought of as a factor in ordinary life was the risk of injury to one's own person. Such insurance grew popular, was afterwards seen to be too costly for general use, and was abandoned by most of the companies which engaged in the business. But when it came to be understood that every man engaged in business, and every owner or lessee of business property, was exposed to heavy losses from accidents to the persons of others, the chance of which no prudent man could afford to ignore, a new demand for accident insurance against personal injuries arose, which was the legitimate function of accident insurance companies to meet.

153. See *id.*

154. 1 COUCH, *supra* note 71, at 28.

155. 1 COUCH, *supra* note 71, at 28.

156. VANCE, *supra* note 71, at 19-20.

insurance, fire insurance had not yet fully developed by 1850. Prior to 1869, fire insurance in England was held to be contrary to public policy in that it encouraged arson.<sup>157</sup> Parliament attempted to hinder the development of fire insurance with burdensome taxes and the courts viewed a policy of fire insurance with ardent disfavor.<sup>158</sup> It was not until the last half of the nineteenth century, when England recognized that fire insurance was highly beneficial to property interest, that fire insurance spread with rapidity.<sup>159</sup> Because liability and fire insurance had not yet developed beyond their infancy at the time the California Constitution was adopted, it is through historical necessity that the determination of whether a right to a jury in insurance coverage declaratory relief actions depends on whether the gist of action on a marine insurance policy is legal in nature, or, in other words, whether it was cognizable at common law.<sup>160</sup>

The issue of whether an action on a marine insurance policy was cognizable at common law has been addressed by the United States Supreme Court. Although decisions of the United States Supreme Court concerning the right to a civil jury trial are not binding on California courts, they are persuasive. In 1870, the United States Supreme Court was called upon to decide whether the common law courts of England had jurisdiction over insurance contracts in *New England Mutual Marine Insurance Company v. Dunham*.<sup>161</sup> In *Dunham*, the admiralty jurisdiction of the federal court sitting in the District of Massachusetts was challenged in a action on an insurance contract on the theory that jurisdiction was properly in the courts of law.<sup>162</sup> The appellant argued that if jurisdiction for an action on an insurance contract was not found to be in the courts of law, then appellant's right to a jury trial protected by the seventh amendment to the United States Constitution would be violated.<sup>163</sup> The *Dunham* court was not persuaded by the appellant's contention that his right to a jury trial would be violated if insurance cases were decided in admiralty. The key issue for our present discussion decided by the Court was that the common law courts of England did not have jurisdiction over insurance contracts; and, that therefore, by implication, no right to a jury trial in an insurance contract dispute was preserved by the seventh amendment.<sup>164</sup>

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157. VANCE, *supra* note 71, at 19-20.

158. VANCE, *supra* note 71, at 19-20.

159. VANCE, *supra* note 71, at 19-20.

160. *See People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 299, 231 P.2d 832, 843-44 (1951).

161. 78 U.S. 1 (1870).

162. *Id.* at 22.

163. *Id.* at 17.

164. *Id.* at 31.

[I]t is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A.D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance.<sup>165</sup>

In addition, the Court in *Dunham* pointed out that even after the common law courts in England attempted to wrestle jurisdiction over insurance contracts away from admiralty and the insurance courts, the contemporary scholar Sir W.D. Evans remarked "the inadequacy of the existing law to settle, *proprie vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination."<sup>166</sup> In other words, these disputes were presumably submitted to the arbitration of the conventional merchant courts. Finally, the Court in *Dunham* concluded that the contract of insurance is an "exotic in the common law" because the historical development of insurance was totally separate and distinct from the common law of England.<sup>167</sup>

Applying the *One Chevrolet* test to the historical facts just presented,<sup>168</sup> it is reasonable to state that at the time the California Constitution was adopted in 1850, the English common law courts did not have jurisdiction over insurance cases. Despite the fact history suggests otherwise, considering the fact that a breach by an insurance company of its policy of insurance has long been thought to give rise to a cause of action for breach of contract, a traditional common law cause of action to which there has always been a right to a jury trial, it is very unlikely that any court entertaining an action on a policy against an insurance company will hold that the insured is not entitled to trial by jury. On the other hand, the strong policy in favor of jury trial in actions initiated by an insured against the insurer is not dispositive of the issue when an action is brought by the insurer against the insured in declaratory relief for a declaration of non-coverage. By recognizing that an insurance contract is a unilateral and executory contract subject to the condition precedent of either an occurrence or other stated conditions, one can easily see that the insured owes no duty to perform on

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165. *Id.*

166. *Id.* at 32.

167. *Id.*

168. See notes 20-26 and accompanying text *supra*.

the contract the failure of which can ever rise to an action at law for breach of contract. As already discussed, an action for declaratory relief is *sui generis*, a creature of statute totally unknown to the common law of England in 1850.<sup>169</sup>

In positing that actions on insurance policies were not properly the subject of common law jurisdiction in England, the United States Supreme Court in *Dunham* traced the historical development of insurance and concluded that its history presented a separate and distinct tradition from that of the English common law.<sup>170</sup> Blackstone mentions that insurance contracts are based upon *equitable* principles which are decided on a case by case basis.<sup>171</sup> Thus, jurisdiction in equity for a cause of action on an insurance contract is not without historical foundation.<sup>172</sup> However, it may be more accurate to state that the evidence which suggests that the courts of common law had proper jurisdiction over insurance causes is outweighed by evidence which suggests that it did not, as in the case where jurisdiction should have been in either equity, admiralty, or a court of special jurisdiction.

In determining if the English common law had jurisdiction of an action in 1850, the California Supreme Court has held that the Acts of Parliament are to be given great weight because "it is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament."<sup>173</sup> As pointed out above, Parliament in 1601<sup>174</sup> recognized that the common law courts were entirely inadequate in determining cases on insurance contracts due to the unsophisticated state of the common law, great expense and delay.<sup>175</sup> Parliament enacted the Statute of Assurances creating a court of special jurisdiction for insurance cases to remedy this inadequacy.<sup>176</sup> This statute was amended in 1662<sup>177</sup> and was not repealed by Parliament until 1863,<sup>178</sup> long after the California Constitution was adopted. Although the insurance courts created by the Statute of Assurances were relegated to a perfunctory status by subsequent

169. *Patterson v. Insurance Co. of N. Am.*, 6 Cal. App. 3d 310, 315-16, 85 Cal. Rptr. 665, 667-68 (1970); *Veale v. Piercy*, 206 Cal. App. 2d 557, 560-61, 24 Cal. Rptr. 91, 93 (1962).

170. *New England Marine Ins. Co. v. Dunham*, 78 U.S. 1, 32 (1870).

171. 2 W. BLACKSTONE, COMMENTARIES 461 (1st ed. 1766).

172. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 636 (1924) [hereinafter cited as HOLDSWORTH].

173. *Moore v. Purse Seine Net*, 18 Cal. 2d 835, 838, 118 P.2d 1, 4 (1941).

174. An Acte concerning matters of Assurances, amongst Merchantes, 43 Eliz., c. 12 (1601). See note 103 *supra*.

175. *Id.*; VANCE, *supra* note 71, at 15.

176. 43 Eliz., c. 12 (1601). See note 103 *supra*.

177. An Additional Act concerning matters of Assurance used amongst Merchants, 14 Car. 2, c. 23 (1662).

178. See generally CHRONOLOGICAL TABLE AND INDEX TO STATUTES (9th ed. 1884).



court decisions,<sup>179</sup> Blackstone was of the opinion that a trial in accordance with the statute could still be had pursuant to the statute's authority.<sup>180</sup>

At the very least, the Statute of Assurances is indicative of a Parliamentary intent not to vest jurisdiction over insurance contracts in the common law courts.<sup>181</sup> In debating the issue in Parliament, it was suggested that original jurisdiction be given to Chancery.<sup>182</sup> However, Bacon tells us that Parliament declined to do so because a suit in Chancery was "too long a course" and that the chancery courts "have not the knowledge of their terms, neither can they tell what to say upon their cases, which be secrets in their science, proceeding out of their experience."<sup>183</sup> Therefore, Parliament eventually decided to create a court of special jurisdiction modeled after the conventional merchant courts of continental Europe.<sup>184</sup> Although Parliament did not vest Chancery with original jurisdiction, it did vest it with appellate jurisdiction to decide cases "according to Equitie and Conscience."<sup>185</sup> The Court in *Dunham* was of the opinion that this manifested an intent not to vest jurisdiction in the common law courts.<sup>186</sup> Any argument that the common law courts under Lord Coke effectively obtained jurisdiction over insurance contracts was aptly rebutted by Justice Story's opinion in *De Lovio v. Boit*<sup>187</sup> which was approved by the *Dunham* court.<sup>188</sup> The historical inquiry required by *One Chevrolet*, therefore, suggests that jurisdiction over insurance cases was not vested in the common law courts in 1850. Whether jurisdiction was vested in equity or in admiralty is uncertain. However, for the purposes of this article, the same conclusion follows.

### CONCLUSION

The same problem exists today that existed in England in 1601. In recent years, insurance companies have been forced to provide a conditional defense to its insured to prevent the potential of bad faith liability. This defense is ordinarily conditioned upon a full reservation of rights by the insurer to seek a judicial declaration of non-coverage. The litigation expenses of the underlying damage suit and the declara-

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179. See PARK, *supra* note 71, at xlv.

180. 3 W. BLACKSTONE, COMMENTARIES 75 (1st ed. 1768).

181. *New England Mar. Ins. Co. v. Dunham*, 78 U.S. 1, 31 (1870).

182. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 150 (1924).

183. *Id.*

184. 43 Eliz., c. 12 (1601). See note 103 *supra*.

185. 43 Eliz., c. 12 (1601); 14 Car. 2, c. 23 (1662).

186. 78 U.S. at 31.

187. 7 F. Cas. 418 (D. Mass. 1815) (No. 3,776).

188. 78 U.S. at 35.

tory relief action are ultimately passed on to the consumer in the nature of higher premiums. In addition, the extra litigation adds to the existing problem of congested court calendars. In this respect, the expense to both the insured and the insurer for unnecessary litigation and the burdensome delays experienced in England in 1601 exist in our own modern society.

Unlike the British Parliament, however, the California Legislature may not enact laws to remedy this problem if the legislation abridges the constitutionally protected right to a jury trial. Any law enacted by the legislature which infringes upon the constitutional right to trial by jury is a nullity.<sup>189</sup> Therefore, before the legislature is free to provide a remedy, it is of paramount importance to determine if the California Constitution protects the right to jury trial in insurance coverage disputes.

This article has attempted to show that the historical evidence which suggests that the common law in 1850 did not have jurisdiction over causes of action arising under a policy of marine insurance outweighs the historical evidence which suggests that it did. It is not the intent of this article, however, to advocate the abrogation of all jury trials in cases involving insurance contracts. The trend in the law seems to be toward expanding the right to a jury trial, not towards constricting that right. However, the policy reasons which support the right to a jury trial when the insured sues an insurer for damages under a policy of insurance are not as compelling when the insurer is suing its insured for a declaration of its rights. In the latter case, no breach by the insurer has yet occurred and the insurer is usually seeking an interpretation of the insurance contract and a judicial declaration of its rights and obligations pursuant to that interpretation. In the former case, a breach, if any, has already occurred and the jury is called upon to determine the facts constituting that breach and award damages commensurate with it. While the historical evidence outlined in this article suggests that the right to a jury trial in all insurance cases should not be protected by the California Constitution, it is more realistic from a public policy point of view, to say that, historically, insurance coverage declaratory relief actions were not cognizable at common law in 1850 and, therefore, no right to a jury trial exists in insurance coverage declaratory relief actions. In this way, the California Legislature would be free to enact remedial legislation, possibly in the same spirit and tradition as the British Parliament in 1601, to solve the problems of high insurance

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189. *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951); *People v. Kelly*, 203 Cal. 128, 133, 263 P. 226, 228 (1928).

premiums and congested court calendars now presented by increasing insurance coverage disputes.

One possible remedy the legislature could enact is to remove insurance coverage disputes from the jurisdiction of the judiciary and vest jurisdiction in an administrative agency, possibly modeled after the Workers Compensation Appeals Board.<sup>190</sup> Such an "insurance coverage appeals board" with subordinate administrative tribunals would benefit both the insurer and insured. An administrative hearing to determine coverage issues by interpreting the insurance contract would provide a more expedient determination of the rights and obligations of the parties resulting in less litigation expense and delay which in turn could be passed on to the consumer in the nature of lower insurance premiums. Finally, by removing jurisdiction of insurance coverage issues from the judiciary, court calendars would be less congested which would speed up the final determination of other types of litigation. In this respect, society as a whole would be better off.

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190. *See generally* CAL. LAB. CODE §§3201-6002 (setting forth the statutory scheme implementing the Workers Compensation insurance program).