A SHORT HISTORY OF FIRE INSURANCE LAW.

Of the origin of contracts of insurance, little of a precise nature is known. There is some authority for the statement that insurances of property were of Italian origin. It seems fairly certain that many of the customs of merchants in insurance matters were brought from Italy to England by the Lombards, who made London the centre of their activities in the latter country. These merchants sought to protect themselves by insuring the risks to which they were subjected in the course of trade. The perils against which they most frequently insured in early times were the perils of the sea.

It is certain that the Lombards used policies of marine insurance very similar in form to the one subsequently adopted by the underwriters at Lloyds. The term “policy” seems to have been derived from the Italian word “polizza.” The word in Italian appears to have had a very general sense, being applicable to a writing setting forth or serving as evidence of any kind of transaction.

With the exception of Quebec the Provinces of Canada have adopted the English common law as the basis of their legal systems. We are only concerned here with the law of fire insurance in the common law provinces, and it is necessary, therefore, for us to go back to English sources in order to obtain a clear understanding of our subject.

It is fairly well established that not more than sixty insurance cases, of which there is any record, were decided before the days of Lord Mansfield, who came to the English Bench in the year 1756. Lord Mansfield’s carefully written judgments and wise decisions settled many contentious points in insurance law and charted the course for succeeding generations which this branch of law was to follow.
The English courts early recognised the fact that a policy of fire insurance is a contract of indemnity and not a wager. Some early marine insurance contracts were in the form of wagers. These early marine policies had inserted in them the words “interest or no interest.” That is to say, the insured did not have to prove an interest in the property insured, but merely had to produce the policy itself in order to recover from the insurers the amount of money mentioned in the policy.

In so far as fire insurance was concerned, it was decided by Lord Hardwicke in 1743 in the case of The Sadlers Company v. Badcock\(^1\) that the insured must prove a property in the subject-matter of the insurance. He must, in other words, have an insurable interest. The contract was one of indemnity. If the insured had no interest in the property insured he had suffered no loss and therefore could recover no indemnity.

In the case of Godin v. London Assurance Company,\(^2\) Lord Mansfield observed:

> Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.

Parliament in 1745\(^3\) passed legislation prohibiting the inclusion in marine insurance policies of clauses which dispensed with proof of interest in the property insured. “The Marine Insurance Act” of 1745 raised the question in every contract of marine insurance as to whether or not the insured had an insurable interest. It then became necessary to decide what constituted an insurable interest. Lawrence, J., in Lucena v. Craufurd\(^4\) said in part as follows:

> A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it... And whom it importeth, that its condition as to safety or other quality should continue: 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 the 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 is 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

\(^1\) (1743) 2 Atk. (Fire) 554; 26 Eng. Rep. 733.
\(^3\) 19 Geo. II, c. 37.
interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction.

The definition of insurable interest was continuously expanded by the courts in order to take a policy of insurance out of the wagering class. In the case of *Stock v. Inglis*, Brett, M.R., said in part:

In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law allow it, to find in favour of an insurable interest.

It must be borne in mind that “The Marine Insurance Act” of 1745 did not make wagers illegal. What it did was to declare that every policy was void which contained words dispensing with proof of interest and thus directed the attention of the courts to the subject of what constituted an insurable interest.

Another important matter which came before the courts in the early days of fire insurance, was that of the right to assign a fire policy. Marine policies, unless a condition to the contrary was inserted in the policy, could be assigned without the consent of the underwriters, but fire policies were never assignable without the consent of the fire office.

It was early decided that a fire insurance contract was a personal contract. As such it could not be assigned without the consent of the underwriter. In other words, the underwriter was insuring the person named in the fire contract against the possibility of a loss by fire, and he had a right to accept or reject the personal risk. In the case of *Castellain v. Preston*, Lord Bowen said:

What is it that is insured in a fire policy? Not the bricks and materials used in building the house, but the interest of the assured in the subject-matter of the insurance, not the legal interest only, but the beneficial interest.

The early fire insurance companies made certain proposals which set forth the conditions under which they would insure the houses and goods of persons acceptable to the insurers against possibilities of loss by fire. Copies of these proposals were delivered with the policies.

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5 (1884) 12 Q.B.D. (Marine) 564 at p. 571.
6 *The Sadlers Company Case* (supra).
7 (1883) 11 Q.B.D. 380 A.C., at p. 397.
An unincorporated fire insurance company was established in London in the year 1680 by one by the name of Dr. Nicholas Barbon, known as The Fire Office. This man's baptismal name was "If Christ had not died thou hadst been damned - Nicholas Barebones". He was the son of the famous Praise God Barebones of Cromwell's time and although he was not financially sound or successful he deserves to be remembered as one who laid down many of the principles of fire insurance underwriting.

An early fire insurance advertisement emanating from The Fire Office gives us some idea of the early proposals of this class of insurance. It reads as follows:

There is a new office to be kept at the backside of the Royal Exchange, London, and will be opened on Thursday next. They do undertake for a very reasonable rate to secure the houses in London and suburbs thereof from fire, and if burnt down to build them again at the cost of the office, for which end is provided bank of money and a fund of free land, to such value as will secure those who agree with the office. There now being in print a particular thereof, we need not give you any further account.

This advertisement indicates that these early fire insurance proposals contained a clause giving the insurer the right to re-build which has become a fundamental condition of every fire insurance contract. The right of re-building began therefore with the establishment of The Fire Office in London.

The proposals afterwards became conditions inserted in the policies themselves. The case of Lynch v. Dalzell throws some light on the nature of the proposals under which fire insurance was written in 1729. Copies of the proposals were delivered with the policies. Under them it was essential that persons insuring should have an interest in the property insured. In the event of a loss the insured was required to make an affidavit setting forth the nature and extent of his loss. This was to be verified by the minister, churchwardens and householders in the district where the loss occurred who were to state that they knew and verily believed that the insured had sustained a loss. It was also provided that the insurance should enure to the benefit of the executors and administrators of the insured.

With the development of conditions inserted in the policy itself in place of the proposals we have fire contracts in their modern form.

Prior to the enactment of the various companies Acts in England insurance was underwritten in one of the following ways:

(1) By an association of insurers with individual liability only such as Lloyds.

(2) By a common law partnership under a partnership deed.

(3) By a corporation founded either
   (a) By royal charter.
   (b) By a private act.

In 1719 the British Parliament passed an Act\(^9\) giving the King the power to grant two charters to corporations having as their objects the writing of insurance. In 1720 these charters were granted to The London Assurance Company and The Royal Exchange Assurance Corporation. These companies, which were later amalgamated, held a monopoly of corporate insurance underwriting until the year 1824, when Parliament passed a repealing Act.

Beginning with the year 1824 many British insurance companies were founded, some by private Act and later under the provisions of the companies Acts.

British companies began accepting risks in the colonies and foreign countries. Fire insurance soon developed in Canada and the United States. We shall pass over all the intervening period and come to the year 1872. At this time the companies which operated in Ontario attached such onerous and technical conditions to their policies that it became increasingly difficult for anyone to recover under a policy of fire insurance if a company wished to resist payment of the loss. Law-suits on fire contracts became the order of the day until finally in the year 1872 Wilson, J., in the case of Smith v. Commercial Union Insurance Company,\(^{10}\) in describing the practices of fire insurance companies of that day, used the following words:

It would scarcely be right to pass over some notice of the wonderful structure and scope of the fourteenth condition (this condition was the one covering proof of loss). It has been set out in full, and it numbers (although the numbers are not in the condition itself) thirty-six prerequisites, which must be complied with before the insured can demand his money.

Beside furnishing an account of the loss, in the most precise manner, and verifying the same by books and vouchers, and oath, and giving the names and residences of all persons interested in it, and of all incumbrances which affected the property, and getting special certificates of two Magistrates, the assured is to submit to an oral examination, and to answer on oath and to subscribe the same if required.

And, where practicable—and it would be hard to convince the Company, if tempted to abuse the power they have under the conditions, that in every case it was not practicable—to verify the statement of loss by the testimony of his domestics, servants, or other persons in his employ;


\(^{10}\) 33 U.C.R.Q.B. 69, pp. 89, 90, 91.
And in case of real property or fixtures, he is to produce his title deeds, and an abstract from the registry office. And he is to supply such other vouchers, etc., etc., as may reasonably be required, to prove his loss and his right to be paid. And until all that is done, and done in three months, time being of the essence of the contract, no money is to be paid. . . . At present it is a mere system of attack and defence. The more fraudulent or felonious the attack, the more numerous, complicated, and guarded the defences are. But that is a war calculated only for two very special classes of persons. The honest people are lost sight of, and suffer in the conflict.

The object should be, to restore this invaluable protection when honestly administered to its legitimate and mercantile character and purpose, and that will have to be done by legislation unless the Companies will modify their conditions.

The remarks of the learned judge and the general agitation in connection with the settlement of fire loss claims finally resulted in action being taken by the Ontario legislature in the year 1875. The Act, known as 38 Victoria, Chapter 65, provided for a commission to be issued by the Lieutenant-Governor addressed to three or more persons holding judicial office in the Province, for the purpose of determining what conditions of all fire insurance policies are just and reasonable conditions.

This was followed in 1876 by the passing of an Act to secure uniform conditions in policies of fire insurance. Thus Ontario led the way towards securing what were at that time considered just and reasonable conditions in a fire insurance contract.

This statute provided that the conditions set forth in the schedule to the Act were to be deemed as against the insurers part of every policy of fire insurance issued thereafter. The statutory conditions were to be printed on every policy and were to be headed "Statutory Conditions." Variations could be made to the statutory conditions, provided they were printed on the policy in a different colour of ink with the heading "Variation in Conditions." These variations were only to be enforced where they were held by a court or a judge to be just and reasonable.

The Ontario "Fire Insurance Policy Act" contained twenty-one statutory conditions. These covered, among others, such matters as misrepresentation and omissions, form of the policy sent to the insured, change of risk, change of property, partial damage and salvage, property not insured, prior or subsequent insurance, risks not covered, proof of loss and to whom payable, directions to be observed in making a claim, fraud in making a claim, arbitration, when loss was payable, repairing or rebuilding property, termina-

\footnote{39 Vict., Cap. 24.}
tion of insurance by notice from the insurer, waiver, actions of agents of the insurer and limitation of actions on the policy.

The constitutional validity of the Ontario "Fire Policy Act" was soon tested in the Courts. The well known case of Citizens Insurance Company v. Parsons put beyond all doubt the right of the legislature of a province to legislate as to fire insurance contracts. In this judgment the Privy Council said:

It is enough for the decision of the present case to say that, in their view, its (the Dominion Parliament's) authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore, that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of Section 92, (Property and Civil Rights within the Province).

As is well known, many attempts have been made by the Dominion Parliament to regulate and control insurance companies. These attempts have met with the disapproval of the courts and the Privy Council. In the recent case of the Attorney-General for Quebec v. Attorney-General for Canada and Belding-Corticelli Limited et al., the Privy Council declared that many important sections of the present Dominion Insurance Act were ultra vires of the Dominion Parliament as infringing upon the jurisdiction of the Provinces over property and civil rights. While this phase of insurance law in Canada is very interesting, it does not come within the scope of the present discussion as it involves a consideration of "The Dominion Insurance Act."

Discussion now arose as to the primary object of statutory conditions in fire insurance contracts. Were they for the purpose of assisting the assured or the insurer? In effect, they really assist both parties to the contract by making it clearer and easier to interpret. However, in the case of Curtis's and Harvey (Can.) Ltd. v. North British and Mercantile Insurance Company, the Privy Council made this matter very clear. In that case it was stated that the primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree with the arguments of the appellant's counsel that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability.

12 (1881) 7 A.C. 96, at p. 113.
14 [1921] 1 A.C. 303, at p. 310.
The present "Ontario Insurance Act" is a consolidation covering all classes of insurance. The provisions of this Act relating to fire insurance contracts differ from those of the Act of 1875 in that the statutory conditions are rigid. No variation from the present statutory conditions is allowed and thus no discussion can arise as to what conditions are in the opinion of the court just and reasonable. The only exceptions to this general statement are Sections 99 and 102, which read:

99. (1) A policy may contain a co-insurance clause, in which case it shall have printed or stamped upon its face in conspicuous type and in red ink, the words "This policy contains a co-insurance clause," and unless those words are so printed or stamped such clause shall not be binding upon the insured. Such clause shall not be deemed a variation or addition to the statutory conditions.

(2) A policy may contain a partial payment of loss clause to the effect that the insurer in the event of loss shall pay only an agreed proportion of any loss which may be sustained or the amount of the loss after deduction of a sum specified in the policy, in either case not exceeding the amount of the insurance, in which case there shall be printed or stamped on the face of the policy in conspicuous type in red ink, the words "This policy contains a partial payment of loss clause." Such partial payment of loss clause shall not be deemed a variation or addition to the statutory conditions.

102. Where the rate of premium is affected or modified by the user, condition, location or maintenance of the insured property, the policy may contain a clause not inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition. Such clause shall be binding on the insured only in so far as it is held by the Court before which a question relating thereto is tried to be just and reasonable.

The provisions of "The Ontario Insurance Act" relating to fire insurance have been adopted and thus made uniform in the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Nova Scotia. Quebec has a "Fire Policy Act," similar to the former Ontario Act. It has not as yet adopted the uniform Act.

The Legislature of Manitoba in its last session passed an Act consolidating the insurance laws of the Province. This Act does not alter the uniform conditions relating to fire insurance contracts and comes into force by proclamation on the first of September, 1932.

Fire insurance has now become such an important matter in the conduct of modern business that we can congratulate ourselves
to date in Canada upon the efforts to make our provincial laws uniform. These efforts were brought to a successful issue by the combined support of the Canadian Bar Association, the Commissioners on Uniformity of Legislation in Canada and the Association of Superintendents of Insurance of the Provinces of Canada, with the co-operation of the fire underwriters. It is to be hoped that the provinces which have not as yet adopted the uniform Acts will do so very soon.

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