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SOME ASPECTS OF INSURANCE LEGISLATION.[1]

There are few subjects occupying the attention of legislative bodies in our day comparable in interest and importance with insurance, which in its various forms has become a main factor in the social and commercial life of the community. Not only may a man, by this means, make provision for his wife and family in case of his own death, but he may secure protection from loss by sickness or accident, fire, wind, hail, burglary or the dishonesty of employees. Moreover, an insurance policy affords a simple and satisfactory form of collateral security, whether the applicant is a householder seeking a mortgage on his property or a merchant who requires an advance on goods. Indeed, the variety of uses to which insurance may be put have made it an indispensable element in our daily life, and it is difficult to understand how the industrial and commercial affairs of the world could be carried on without its assistance.

At one time insurance was regarded as a form of gambling, and no doubt there was a preponderating element of chance in the enterprise as originally carried on. The insurance of a ship and her cargo, by a single underwriter, against the danger of loss during a voyage, must of necessity have been a very hazardous undertaking. Insurances on life were, in fact, prohibited in France two centuries ago as mere wagers and against good morals.

I remember listening some years ago to an address in which it was pointed out that in a strictly legal aspect a contract of insurance is a wagering contract. "It is a bet at certain odds that a certain event will or will not happen." If you bet that Eclipse will win the Derby, the law will not aid you in enforcing the con-

[1] Read before the Association of Superintendents of Insurance at Winnipeg, September 1st, 1925.

tract, but if you bet with me that my house will not burn down within the next three years, and lose, the law will compel you to pay. The purpose behind the respective transactions is, however, vastly different. The gambler voluntarily assumes needless risk in the hope of exceptional gain; the prudent man seeks by insurance to minimise the hazards which arise from the nature of things.

As the usefulness of the insurance contract became recognised, and it grew in favour in England, legislation was placed upon the statute book for the purpose of aiding its development. Thus, in 1601, an Act was passed entitled "An Act concerning matters of Assurances used among Merchants," 43 Elizabeth c. 12, which established a commission to hear and determine "causes concerning policies of assurances in a brief and summary course . . . without formalities of proceedings," and the preamble to that Act states, in terms which may still be read with interest, the reasons why insurance should be encouraged. After setting forth that "it hath been time out of mind an usage among merchants, both of this realm and of foreign nations when they make any great adventure (especially to remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandises, ships and things adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly called a policy of assurance," it proceeds in these words: "By means of which policies of assurance it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure."

Since the above enactment there has been, especially in the last century and a half, a long line of imperial statutes dealing with insurance in its various branches from The Assurance Act, 1774, to The Industrial Assurance Act of 1923 and The National Health Insurance Act of 1924.

In Canada the business has grown to great proportions. By the last report of the Superintendent of Insurance of the Dominion it appears that the amount of Canadian fire insurance written in 1924 was over $52,000,000, that the losses incurred exceeded $30,000,000, that the gross amount of life insurance paid for in cash was over $628,000,000, and that the amount of life insurance business in force in Canada at the end of the year was more than

$3,700,000,000, figures which testify eloquently to the value of the system in modern life, and to the appreciation of the people of Canada for the benefits to be derived from it. These figures, it must be remembered, do not include the very substantial amount of business done by provincial companies. In view of the great place which insurance holds in our normal activities, of the different classes into which it is divided and the complex questions to which it gives rise, it is natural that legislation should have been enacted from time to time which has aimed at protecting the public by requiring solvency on the part of the companies and supervising the contracts which they are allowed to make, but at the same time abstaining from needless interference between them and their customers and allowing free scope for healthy and legitimate development.

Canada, being a federation of provinces, that is, a union in which legislative as well as executive powers are distributed between a central and several local governments, wide fields of legislative authority have been assigned to the provinces, and questions as to the limits of the federal and provincial jurisdictions respectively are constantly arising. The British North America Act, which contains our written constitution, assigns to the Dominion, by section 91, exclusive legislative authority over twenty-nine classes of subjects, and to the provinces, by section 92, exclusive legislative authority over sixteen. It also grants to the Dominion a residuary power to make laws for the peace, order and good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provinces. And further, if any matter is comprised in the enumerated, that is, exclusive, powers of the Dominion, such as bills of exchange, it is not to be deemed to be included in the classes of subjects assigned exclusively to the provinces, such for instance as civil rights. The interpretation of a written document of this character offers difficulties which tax the most acute minds, and up to this day we have had a succession of cases in which questions of constitutional law have come before the courts, requiring them to decide which legislature has control of the subject. Some of these cases affect insurance, and I shall refer to them presently.

There was legislation upon insurance before Confederation but, as might be expected, it was very limited in scope. As long ago as 1836 an Act was passed to authorise the establishment of mutual insurance companies in the several districts of Upper Canada. Even before this date provision had been made for the formation of such companies in the counties of Lower Canada. In 1860 an Act was

passed requiring companies not incorporated by any statute of Upper or Lower Canada to obtain a license from the Finance Minister; and in 1865 there was legislation to secure to wives and children the benefit of assurances on the lives of their husbands and parents.

After Confederation, at the first session of Parliament, held in 1868, an Insurance Act was passed, 31 Vict., c. 48. This Act made it unlawful for any company, not engaged exclusively in ocean marine insurance, to transact insurance business in Canada without a license from the Finance Minister. Such license was only to be issued when the applicant company had deposited with the Minister a sum of money to be held in trust for the persons having claims against the company in case of insolvency, and a company was to be deemed to be insolvent "upon failure to pay any undisputed claim arising or loss insured against in Canada for the space of thirty days after being due, or, if disputed, after final judgment and tender of a legal valid discharge, and (in either case) after notice thereof to the Minister of Finance."

In 1875 and 1877 there was more legislation, and in 1886 the insurance law revised and consolidated was included in the Revised Statutes of Canada as chapter 124. The provisions of this measure were declared not to apply to ocean marine insurance or to any company incorporated by an Act of the former province of Canada or by an Act of any of the provinces and carrying on business wholly within the limits of that province. It was declared that no company or person, with certain exceptions, should carry on in Canada the business of fire, life or inland marine insurance without a license from the Minister. Section 4, containing this prohibition, appeared in the Revised Statutes of 1906 and was carried into the Insurance Act of 1910 by which the revised statute was repealed. Moreover, the statute dealt with the conditions of policies. Thus, sections 27 and 28 required conditions or stipulations modifying or qualifying a policy to be set out in full on its face or back, and provided that a condition avoiding a policy for an untruthful statement in the application must be limited to statements material to the contract.

The Insurance Act was again revised in 1910, and section 4, with some slight changes of phraseology, was retained, its new form being as follows:—

"4. In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any

risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it is done by or on behalf of a company or underwriters holding a license from the Minister";

and section 70 imposed penalties upon persons infringing this provision.

Doubts having been entertained as to the validity of these sections, the Canadian government referred them to the Supreme Court of Canada which decided in the case of *In re "Insurance Act, 1910,"*[1] by three judges to two that they were *ultra vires*. An appeal was taken to the Judicial Committee of the Privy Council which in 1916 confirmed the opinion of the Supreme Court, condemning the impeached provisions on the ground that they dealt with civil rights, a subject assigned to the exclusive jurisdiction of the provinces. At the same time it was stated that Parliament could, by properly framed legislation, prohibit a foreign company from carrying on business in Canada without a Dominion license, even though the business was confined to a single province.

Next year the Act of 1910 was repealed and replaced by The Insurance Act, 1917, containing licensing provisions but not making it compulsory for any private individual or unincorporated association to become licensed as a condition of lawfully transacting the business of insurance. An amendment was, however, made to the Criminal Code by which it was made an indictable offence to carry on the business of insurance in Canada without a license, subject to certain exceptions in favour of provincial incorporations, societies or associations specially authorised and persons doing marine and inland marine insurance. This legislation in turn came before the Privy Council on an appeal from the appellate division of the Supreme Court of Ontario in the case of *Attorney-General for Ontario* v. *Reciprocal Insurers*.[2] The Board found that the amendment to the Code, though in form criminal law, was really ancillary to the Insurance Act, whose regulative provisions it was meant to enforce, that in substance it was a measure for controlling the exercise of civil rights, and therefore invaded the area of exclusive provincial jurisdiction and was invalid.

[1] 1913, 48 S.C.R. 260.
[2] [1924] A.C. 328.

The Act of 1917 forbids "any Canadian company, or any alien, whether a natural person or a foreign company" to engage in insurance business in Canada without first obtaining a license from the Minister, and forbids any British company or any British subject, not resident in Canada, to immigrate into Canada for the purpose of so engaging, without such license. In 1924, Parliament, notwithstanding the united protests of six provinces, inserted two new sections in the Act, making infringement of these provisions an offence, punishable with severe penalties. These sections are not to apply to individuals when acting as agents for provincial companies which have not obtained licenses under the Act. The object of this legislation is to give Parliament an extended control over insurance under cover of its authority over aliens and immigration.

Under the British North America Act aliens fall under one of the heads of the exclusive jurisdiction of the Dominion, namely, "Naturalization and Aliens," and immigration is a subject upon which Parliament may pass laws which will override conflicting provincial enactments. The judgment of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Alberta*[3], delivered by Lord Haldane, lends some countenance to at least one branch of the legislation under review as may be seen by the following extract:

"The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in section 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

We are not, however, told how such legislation could be properly framed, and should the validity of the provisions above referred to be brought before the courts, there are obvious tests by which their value will have to be tried. Parliament has exclusive authority to legislate in respect of crime, but when the amendments made to the Code in 1917 came before the Judicial Committee, they were found to be *ultra vires* and void on the ground that, although in form criminal law, they were in substance insurance law. The question then arises, are the sections of the Insurance Act, requiring

[3] [1916] 1 A.C. 588 at p. 597.

aliens to obtain Dominion licenses, directed to aliens as such, or is their real purpose to deal with insurance? Again, can it be believed that a British company extending its business to Canada is an immigrant within the meaning of section 95 of the B. N. A. Act?

The Act of 1917 contains conditions of accident and sickness insurance, and in 1923 conditions of automobile insurance were added. Meanwhile at least five provinces have enacted uniform legislation covering the same subject-matter for the same purpose. This conflict of legislation raises a constitutional issue which has already been referred to the Appellate Division of the Supreme Court of Ontario for decision. It was decided by the Privy Council in *The Citizens Insurance Co.* v. *Parsons*,[4] that the province had the right to prescribe conditions of fire insurance binding upon all companies, British and foreign, as well as those incorporated by the Dominion, the contract of insurance being a matter of civil rights which are placed under control of the provinces. It had been argued that such legislation belonged to the Dominion as a regulation of trade and commerce, a class of subject assigned to its exclusive jurisdiction by section 91 of the constitutional Act. Upon this point Sir Montague Smith, delivering the opinion of the Board, said:

"Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulations of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular trade or business, such as the business of fire insurance in a single province."

The principle here laid down has never been departed from. On the contrary, it was reiterated and affirmed in the *Attorney-General for Canada* v. *Attorney-General for Alberta*,[5] and in the recent case of *The Toronto Electric Commissioners* v. *Snider*.[6] It was intimated, however, in the last-mentioned case, that the power to regulate civil rights in the provinces might be validly exercised by Parliament

[4] [1881] 7 A.C. 96 at p. 113.
[5] [1916] 1 A.C. 588.
[6] [1925]A.C. 396 at p. 409.

"when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada." This was shown in *John Deere Plow Co.* v. *Wharton.*[7] From this dictum it may, and undoubtedly will, be argued, on the part of the Dominion, that having power to create companies, as above mentioned, and having jurisdiction over aliens and British immigrants, it has the right to legislate with regard to the contracts of Canadian and foreign companies and British companies which extend their business to Canada. Here is a clear-cut issue, the judicial determination of which would be to the general advantage.

Turning now to provincial legislation, it will be found that the provinces have long exercised the right of regulating the terms of insurance contracts. Before they did so, the companies, to protect themselves against fraud, were accustomed to draw their policies in such a form that recovery was difficult however honest the claim of the insured might be. A policy of this sort came before the Court of Queen's Bench in 1873, in the case of *Smith* v. *Commercial Union Insurance Co.*,[8] and Chief Justice Wilson, in delivering judgment, used the folowing language:—

"This is a degree of inquisitorial power, under the penalty of a forfeiture of the insurance money, which it is vexatious and difficult to comply with, and which is about equal to a forfeiture of itself, and almost a perfect immunity to the insurers against their ever paying the money.

"They could, if so disposed, probably cut out work enough for the assured for at least a twelvemonth, before he could be done with his further explanations, or servants' testimony or the other multifarious devices provided for him; and if it did take more than three months, time being of the essence of the contract, so much the worse for the assured.

"The conduct of Companies, when enforcing rigidly such conditions, has often been complained of by the Courts—by reason of the number and nature, and difficulty of the conditions they introduce into their policies; and the time perhaps has come when the legislature should interfere, and stand between them and those they insure, or pretend to insure, or, in other words, the public, by limiting them to such conditions as the Courts shall determine to be reasonable."

[7] [1915] A.C. 330, at p. 340.
[8] 33 U.C.R. 69 at P. 90.

The Government adopted the Judge's suggestion, and next session the Lieutenant-Governor was authorised to appoint a commission of three or more Judges to prepare such conditions as they considered just and reasonable to be contained in fire insurance policies. A commission was accordingly appointed, consisting of Honourable W. B. Richards, Honourable J. G. Spragge, Honourable J. H. Hagarty, Honourable S. H. Strong and Honourable C. S. Patterson, and this commission reported a set of statutory conditions which were enacted in 1875-76 and have remained in force, with no very great changes, until the present day.

These conditions have been the subject of much discussion during the past decade. When, in 1914, the Canadian Bar Association was organised, the first article of the constitution declared one of its objects to be "to promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the basic systems of law in the respective provinces." At the first annual meeting of the Association, Mr. Eugene Lafleur, of Montreal, delivered an address upon "Uniformity of Laws in Canada," in the course of which he emphasized the desirability of harmonising, so far as possible, provincial enactments on commercial and industrial subjects, such as the sale of goods, incorporation of companies, succession duties, workmen's compensation, the authority and effect in one province of judgments rendered in another, and insurance.

Referring in particular to the last-mentioned topic, Mr. Lafleur said:—

"Every province has an insurance law of its own, for the most part in the form of a statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities calculated to produce conflicts and uncertainty. For instance, the statutory conditions prescribed for insurance policies vary in the several provinces, so that a great transcontinental railway is unable to get a uniform cover for its rolling stock throughout Canada, but must submit to the modification of its contract every time it passes a provincial boundary line. The matter is further complicated by the fact that a Dominion Insurance Law is superadded to the various provincial enactments, and the companies must satisfy the requirements of nine or ten insurance departments before they can do business throughout Canada."

Mr. Lafleur's address was given in March, 1915, but representatives of the western provinces had already, in May, 1914, met in Calgary for the purpose of discussing uniform conditions of fire insurance. Taking the Ontario conditions as a basis, they revised

them, making some minor amendments and rearranged them in what they considered a more logical order. In 1915, the revised conditions were enacted in the four western provinces, so that from Ottawa to the Pacific there was agreement in substance, and west of Ontario there was identity in the form of these important provisions.

In 1918, the committee on insurance of the Canadian Bar Association brought in a model fire policy Act, based upon existing Ontario legislation, but following the American standard policy in not allowing variations and in substituting appraisement for arbitration in case of differences arising as to the value of the property insured, the property saved, or the amount of the loss. This document was ordered to be distributed to fire underwriters, insurance departments, commissioners on uniform laws, and members of the council of the Association, for the purpose of obtaining further information from persons having a special knowledge of the subject-matter; and the committee was asked to report at the next annual meeting.

On the same occasion, a body, now known as the Conference of Commissioners on Uniformity of Legislation in Canada, was established, and the commissioners from Saskatchewan were instructed to prepare a uniform Act upon the same subject. In 1919, at the meeting of the Bar Association in Winnipeg, the model Act, drawn by the committee of the Association, was severely criticised, and both it and a bill prepared by the Saskatchewan commissioners were referred to those commissioners with instructions to reconsider the whole matter and report further to the Conference the next year. Early in 1920, a revised draft was sent out to the commissioners of all the provinces, the superintendents of insurance, trade journals, representative bodies and underwriters, and individuals known to have given special attention to fire insurance, with a request for criticism and suggestions. A large amount of correspondence was received in reply and presented to the conference which met at Ottawa at the end of August.

On August 30 and 31 and September 1, 2, and 3, 1920, the conference met at Ottawa. The draft bill was examined and discussed at length, the underwriters being represented by Mr. Jenkins, of Montreal. A number of alterations were made in the bill, the most important being the addition to Condition 17, providing for appraisement, of a clause under which, if the property were insured in more than one company, the question at issue was to be dealt with as between the insured and all the companies; requiring the companies to unite in the choice of an appraiser, and providing that the award

should determine the proportions to be paid by the companies respectively. The Manitoba commissioners and myself were asked to attend the Conference of Superintendents of Insurance to be held in Winnipeg in October and, if it were considered that no substantial alteration was desirable, to complete the Act and recommend it to the commissioners of the various provinces. We appeared accordingly at the Winnipeg meeting and the bill was discussed clause by clause, objection being taken to Condition No. 17 by a number of those present.

At the meeting of the commissioners held in Ottawa from September 2 to 8, inclusive, of 1921, the Act, in its amended form, was brought before the conference and the underwriters were allowed again to appear, this time by counsel, namely, Mr. Robert McKay, K.C., of Toronto, who criticised various provisions of the bill, and especially Condition No. 17. After hearing the objections, the conference amended the bill in some respects and approved it.

At Vancouver, in 1922, the conference was asked to reopen the matter, and did so, allowing the underwriters again to state their case; and at Montreal, in 1923, the commissioners heard representations made by the Toronto Board of Trade with regard to the desirability of an appeal from the award of the appraisers. The request was acceded to, and it was referred to a committee to draft an appropriate clause. Subsequently superintendents of insurance met in Winnipeg and decided to alter Condition No. 17 in accordance with a memorandum printed in blue and presented to the Uniformity of Legislation Commissioners in Winnipeg in 1922.

They also assigned to the insurance department of Ontario the task of giving final form to the conditions, in accordance with the views expressed during the discussion. In 1924, the conditions as redrawn were placed upon the statute book of Ontario, one feature of the redraft being that no variations or omissions were to be allowed, while the old form of No. 17, providing for arbitration, was retained. In the same year the superintendents of insurance, meeting in Toronto, approved the Ontario form, and it has since been adopted by legislation in British Columbia, Manitoba, and Saskatchewan.

From this narrative it will be seen that the matter was under discussion, and that the drafts prepared from time to time were subjected to scrutiny and criticism, for several years. The Commissioners on Uniformity of Legislation spared no pains to obtain the opinions of all those whose occupation or interest was likely to throw light upon the subject. In the end the Association of Superintendents of Insurance did not approve the bill which was the fruit of their

labours, and the various provincial governments have been guided by the decision of the heads of their departments.

It would serve no useful purpose to revive past controversies, but perhaps you will permit me to make one or two observations with regard to Condition No. 17. The Commissioners on Uniformity of Legislation proposed to do away with arbitration, which was considered to be a cumbersome mode of settling disputes, and to substitute appraisement. Appraisement had already been adopted in the American standard policy; it was introduced into the hail insurance conditions of Saskatchewan in 1917, and it has a place in the automobile conditions of Ontario.

The change to appraisement met with general approval, and in all the discussions over Condition No. 17, I do not remember to have heard a voice raised at any time in favour of returning to arbitration, nor do I now know on what grounds this was done. The whole contest was over the proposal of the Commissioners to require that in case property destroyed or damaged was insured in more than one company, the companies concerned should agree upon a single appraiser and that the questions in issue should be decided as between all the companies and the insured.

The labours of the Commissioners were more successful in the sphere of life insurance. In 1921, Mr. V. Evan Gray, Superintendent of Insurance for Ontario, laid before the Conference at Ottawa, a draft bill, which was the result of the collaboration of various counsel and experts representing the Government of Ontario, the life insurance companies and fraternal societies and other persons interested. This bill was taken up and discussed clause by clause. There were present, taking part in the discussion, a number of gentlemen, including Mr. A. M. Dymond, K.C., Legislative Counsel for Ontario; Mr. F. L. Monk, Superintendent of Insurance for Quebec; Mr. H. J. Sims, K.C., for the Canadian Life Officers Association; Mr. F. G. Dunham, Attorney for the Life Insurance Presidents of the United States; Mr. Lyman Lee, Mr. W. F. Montague, and Mr. V. A. Sinclair, K.C., representing the Canadian Fraternal Association, the Canadian Order of Chosen Friends, and the Canadian Order of Foresters; and Mr. G. D. Finlayson, Dominion Superintendent of Insurance.

After giving the whole day to this measure the committee rose and reported the draft, with various suggestions that had been made, and the draft was then referred to a committee which was instructed to report in 1922. That year, in Vancouver, the greater part of five days was given to the consideration of the bill, and in 1923, four

days more were devoted to it, after which it was finally approved. The bill, as approved, has now been placed upon the statute books of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan.

Here, again, it will be seen that the procedure of the Commissioners was deliberate and thorough-going. Pains were taken to obtain all possible light upon every phase of the subject, and to ensure that no detail should be allowed to pass without exhaustive discussion. The result is a measure which ought to give satisfaction and should not require amendment or serious alteration for some years.

Provincial legislation now covers the whole field of insurance other than marine insurance. It is not only comprehensive in scope but it has been worked out with thoroughness and drawn with care. Further, a high degree of uniformity has been achieved and the wide divergencies in form and substance, which were a cause of complaint by the mercantile world ten years ago, have, to a large extent, disappeared. As the world moves on and the business of insurance develops new features, existing legislation will need revision, but a continuation of the spirit of co-operation between the provinces, which has hitherto been so fruitful of good results, will enable their Legislatures to adopt measures which will be advantageous to the public, as well as creditable to the statute books. And I am sure I may say that should the assistance of the Commissioners on Uniformity of Legislation be at any time required, it will be cheerfully afforded.

R. W. SHANNON.

Regina.