THE TWELVE COMMANDMENTS IN INSURING AN AUTOMOBILE,

These commandments are to be found in Section 165 of The Ontario Insurance Act, being Chapter 50 of the Statutes of Ontario, 1924, and amendments thereto.

Under that Act, the word "automobile" includes all self-propelled vehicles, their trailers, accessories and equipment, but not the rolling stock of a railway corporation, as defined by The Ontario Railway Act. When, therefore, I use the word "automobile" this evening, I intend it to have the definition as given in The Ontario Insurance Act.

In dealing with automobile insurance, the legislature of this province has seen fit to lay down twelve commandments for the guidance and direction of those who may apply for automobile insurance, and recent decisions of our Courts make it abundantly clear that it is important for one to observe those commandments, if he would have insurance upon which he can rely, for protection, in the event of a claim by or against him arising out of an automobile accident.

I propose now to refer to these twelve commandments and to decisions of the Courts dealing with same.

Section 165 of The Ontario Insurance Act provides for an application in writing preceding the issue of an automobile insurance policy, and that section, as I have already indicated, sets forth what that application shall disclose.

1. The first commandment is that it shall set forth the name, address and occupation or business of the applicant.

The *name* may be important, because it may indicate to the company the nationality of the applicant, which nationality the company may have decided as a matter of policy not to insure. Then, again, the name may be that of a person who has, according to the company's records, been refused insurance on previous occasions.

The *address* may be important because, if correctly given, it may be in a territory from which the company has for the time being withdrawn, or in which it is not operating.

The *occupation* may be important, because it may, if correctly given, put the company upon inquiry. For instance, if a man is a

taxicab driver, the company, as a matter of policy, may have decided not to insure taxicab drivers, or in any event, it may want the opportunity of making inquiries about the applicant.

2. The second, third, fourth, fifth and sixth commandments deal with particulars of the automobile. The law requires that the applicant shall state the description of the automobile, its purchase price, to the applicant, whether fully paid for or not, whether purchased new or otherwise, and particulars of any mortgage, lien or other encumbrance thereon. Violation of these commandments has been the cause of many lawsuits, within the past few years, and I shall now refer to some of them: In *Boudreau* v. *Imperial Guarantee and Accident Ins. Co.*[1] the plaintiff described his car as a 1917 year model. The car was stolen and subsequently destroyed by fire. At the trial it was established that it was manufactured in 1915. The Court dismissed the action. In *Holdaway* v. *British Crown Assurance Corporation Ltd.*,[2] the plaintiff in his application stated that the motor truck was a 1921 year model, whereas in fact it was manufactured in 1917; also that it cost him $7,000, whereas the purchase price was $5,900; also that he was the owner of the truck, whereas in fact there was a lien against the truck. The truck was destroyed by fire, and the company refused to pay. The plaintiff sued, but his action was dismissed. In *Panovics* v. *British America Assurance Co.*,[3] the plaintiff in his application stated that the automobile was fully paid for, and that there was no mortgage or lien against same, whereas in fact there was a lien against the car, which he was paying off by monthly instalments. The car was said to have been stolen and next day was found some miles away, destroyed by fire. The assured sued the company, which refused to pay, and the plaintiff's action was dismissed.

"The purchase price to the applicant" was recently interpreted in an unreported case of *Fienberg* v. *Continental and Casualty Company and the St. Paul Fire and Marine Insurance Corporation,* in which His Honour Judge Tytler held that that phrase meant the actual cost to the applicant at the time he bought, and that a larger amount mentioned by him in his application could not be justified by proof that he had spent the difference in repairs and improvements. This same view was held in the case of *Standard Auto Ins. Assn.* v. *West*[4] in Kentucky, and also in *Abass* v. *Globe and Rutgers.*[5]

[1] [1923] 2 D.L.R. 57.
[2] [1925] 1 D.L.R. 386; (1925) 57 O.L.R. p. 70.
[3] (1925-26) 29 O.W.N. 443.
[4] 203 Kentucky 335.
[5] [1927] 1 D.L.R. 435.

Misrepresentation as to the year model of the automobile sought to be insured has been held in the United States Courts also to be fatal to the assured. A case in point is *Smith* v. *American Automobile Co.*[6] Representing that the applicant bought the car new when he really bought it *second hand* is fatal to applicant.[7]

3. The seventh and eighth commandments make provision for information in four respects, namely :—

(a) The place where the automobile is.

(b) The place where it usually will be kept.

(c) The purpose for which the automobile is and chiefly will be used.

(d) The locality where the automobile is and chiefly will be used.

Several cases have held that where the applicant states the automobile will be used for pleasure only, proof that the automobile at the time of the accident was being used for hire or livery purposes vitiates the claim of the insured. According to some decisions of the courts, however, he is not deprived of the benefits of the policy, because the automobile has been used for livery purposes or for hire provided it is being used for pleasure only at the time of the accident. Then again if the applicant represents that his automobile is and will be chiefly kept in a private garage, he is not protecting himself if later on he keeps it in a public garage without notice to and consent of the company. Under this eighth commandment the company is also entitled to know the locality where the automobile is and chiefly will be used. In this connection a case is pending now in which the applicant stated that the automobile was at a certain village in Ontario, and would usually be kept there. As a matter of fact, the automobile, although there at the time of the application, had just been brought from Michigan, where it was purchased. It had a Michigan license. The owner was on a visit in this Ontario village, where she used to live. She intended to go to the State of Minnesota, where she was to take up a permanent place of abode. She did go there, and shortly after the policy was issued a serious accident happened there. The insurance company denied liability, on the ground that the facts were not correctly stated in the policy, and they never contemplated insuring an automobile which, to the knowledge of the applicant, would usually be kept and used in Minnesota, beyond the jurisdiction of our Courts.

[6] 188 Missouri 297.
[7] *Abass* v. *Globe and Rutgers* (*supra*).

A decision of the Appellate Division of the New Brunswick Supreme Court, dealing with this requirement, is *Journeay* v. *Railway Passengers Assce. Co.*[8]

5. The ninth commandment is one which requires the applicant to disclose the fact of any accident in which any automobile owned or operated by the applicant has, within the last three years preceding the application, been involved. Violation of this commandment has been the cause of considerable litigation. It is important to note what accident must be disclosed :—

(1) The accident to be disclosed is not confined to the automobile being insured;

(2) It is not confined to any automobile *owned* by the applicant;

(3) The applicant must disclose any accident in which any automobile *owned* or *operated* by the applicant has been involved, provided it occurred within the last three years.

I mention three cases that are pertinent:—(1) What is perhaps the most quoted case on this point is *Holdaway* v. *British Crown*, (*supra*). In that case, the plaintiff stated in his application that no claim had been made against or by him for any accidental damage or other loss in respect of the ownership or operation of any automobile. It was proved, however, at the trial, that he had collected $700 from an insurance company for damage to an automobile by fire, and that a claim had been made against him for damages done by an automobile belonging to him. Chief Justice Latchford, in delivering judgment, stated that the misrepresentations as to the model, year of the truck, as to the cost thereof, and as to the previous fire, were material, and that the action must be dismissed; (2) another case is *Condogianis* v. *Guardian Assce. Co.*;[9] (3) another case is *Furey* v. *Eagle Star and British Dominions Ins. Co.*[10]

6. The tenth commandment goes still further, and requires particulars of any claim made against or by the applicant in respect of the ownership or operation of any automobile within the last three years to be disclosed. Disclosing one accident only, if there have been others, is not sufficient. Furthermore, failure to disclose is not justified by the fact that the claim for damages was made or collected by the applicant. He must disclose particulars of all claims within that period, whether they were made by or against him. The reasons of Mr. Justice Hodgins, in *Dworkin* v. *Globe Indemnity Co. of*

[8] [1924] 1 D.L.R. 308.
[9] [1921] 2 A.C. 125.
[10] (1922) 56 I.L.T. C.A. 109.

Canada,[11] and of Chief Justice Latchford and of Mr. Justice Hodgins in *Holdaway* v. *British Crown Assurance Corporation* (*supra*) fully set forth the necessity on the part of the applicant to make full disclosure. In the last mentioned case, Mr. Justice Hodgins said:—

> Where untrue material statements are shewn to have been made in order to induce the issue of a policy of insurance, or fraudulent suppression upon material matters is proved, resulting in the insurance contract being entered into and the policy delivered, then, quite apart from any defence based on its terms, the party responsible for such statements and omissions cannot recover upon the contract.

Now let me point out to you, that although the decisions are not all uniform, I venture to express the view that all of the information required by Section 165 of The Ontario Insurance Act to be furnished by an applicant for automobile insurance must be regarded as material to the contract. I think that view is justified by such cases as: *Thomson* v. *Weems*;[12] and *Journeay* v. *Railway Passengers Assce. Co.* (*supra*), and by a comparison of statutory condition number one on an automobile policy with statutory condition number one on a fire insurance policy.

7. As an eleventh commandment the legislature enacts that the applicant must state whether any insurer has cancelled any automobile policy of the applicant or refused automobile insurance to him. You will note that this is *not* confined to the three-year period. It covers the entire experience of the applicant in automobile insurance. Many assured have found, to their sorrow, that they have had personally to bear heavy monetary losses arising out of automobile accidents, because they did not strictly observe this commandment. In some cases they have entirely concealed the information required. In others they have told part of the truth, by disclosing perhaps one cancellation or one refusal, and concealing others. As you know, a contract of insurance is a contract *uberrimae fidei*. It requires the utmost good faith on the part of the applicant, and failure on his part fully to disclose the information to which, under the Act, the company is entitled, may entirely vitiate any claim which he may make at a later date. Two cases illustrate the point, namely: *Clicksman* v. *Lancashire and General Assce. Co.*,[13] where the company, in its form of application, asked this question: "Has any company declined to accept, or refused to renew, your burglary insurance?" The applicant in his answer made a partial disclosure, but not a

[11] [1922] 67 D.L.R. 404; (1921-22) 51 O.L.R. 159.
[12] (1884) 9 A.C. 671 at p. 683.
[13] [1927] A.C. 139.

full disclosure. He omitted to disclose the fact that he had over three years before applied to the Sun Insurance Office for burglary insurance, which the company had declined. The Privy Council held that the non-disclosure of this material fact deprived the plaintiff of his claim under the policy. And also that of *Holdaway* v. *British Crown* (*supra*) in which case the St. Paul Fire and Marine Insurance Company had insured the plaintiff's truck, and a few weeks later cancelled the policy. The plaintiff then applied to the defendant, did not disclose his experience with the St. Paul Company, and his action against the British Crown Assurance Corporation was dismissed.

8. Finally, as a twelfth commandment, the Act requires the applicant to state any further information which the company in its form of application may require. For instance, in the usual form of application, the company requires the applicant to disclose his nationality. In *Horne* v. *Poland*[14] the plaintiff, an alien, born in Roumania, was brought to England when twelve years of age. He assumed an English name, and years later effected a policy against burglary. In an action on the policy, the company shewed that they would not knowingly accept the risk of an alien for insurance. The Court held that in the circumstances of this particular case, the non-disclosure by the plaintiff that he was an alien was fatal to his claim under the policy. Then, again, the company may ask the question: have you ever been convicted of or charged with the offence of driving a motor vehicle while intoxicated? or, have you ever been convicted of or charged with any criminal offence arising out of the operation of a motor vehicle by you? If these questions are asked failure to answer them truly may vitiate any subsequent claim of the applicant under the policy issued to him.

Now, Gentlemen, the legislature, realizing the importance, both to the insurer and the insured, of a full disclosure of the information required, has provided in the Ontario Insurance Act that the insured shall have three warnings that he should give this information, and give it fully and correctly:—

First, in every application over the signature of the applicant appears the following:—

> If the applicant falsely describes the property to the prejudice of the insurer or knowingly misrepresents or conceals or omits to communicate any circumstances required by this application to be made known to the insurer, the contract shall be void as to the property insured or risk undertaken in respect of which the misrepresentation or omission is made.

[14] [1922] 2 K.B. 364.

Second,—The Act requires that a copy of the application or such part thereof as is material to the contract shall be endorsed upon or attached to the policy, when issued by the insurer.

Third,—The Act further stipulates that the statutory conditions mentioned in Section 168 of the Act shall be printed on every policy and shall be deemed a part thereof. One of these conditions reads:—

> If any person applying for insurance falsely describes the property to the prejudice of the insurer, or knowingly misrepresents or conceals or omits to communicate any circumstance which is required by the terms of the written application to be made known to the insurer, the contract shall be void as to the property or risk undertaken in respect to which the misrepresentation or omission is made.

Now, assuming that the applicant has fully and faithfully furnished all the information required by the company in its form of application, and the company has issued a policy to him, is he entitled to protection under that policy, when his act, which gives rise to a claim against him, is a criminal act? That is a question which in recent years has engaged the attention of the Courts, and, with deference, I venture to deal with it. The first case of importance is that of *Tinline* v. *White Cross Ins. Assn. Ltd.*[15] In that case by a policy of insurance the assured was entitled to be indemnified against, *inter alia,* sums which he should become legally liable to pay to third parties as compensation for "accidental personal injury" caused through the driving of his motor-car. While driving his car at an excessive speed the assured knocked down three persons, injuring two and killing one, and in respect of this occurrence he was convicted of manslaughter on his own confession. Actions having been commenced against him by the injured persons and by the representative of the person who was killed, for damages, the assured sued the insurance company for a declaration that he was entitled to be indemnified in respect of those claims. It was held that the policy protected the assured against the civil consequences of accidents due to negligence, whether slight or great, that the injuries to the two persons and the death of the third were due to an "accident" within the meaning of the policy, that a policy covering risks of this nature was not void as against public policy, and, therefore, that the assured was entitled to the declaration claimed.

About the same month that this decision was rendered in England, namely, in May, 1921, the same point came up for consideration in Ontario, in the case of *O'Hearn* v. *Yorkshire Insurance Co.*,[16]

[15] [1921] 3 K.B. 327.
[16] [1922] 64 D.L.R. 437; (1921) 50 O.L.R. 377.

where the insured was driving his automobile, which struck and killed a man. The insured was drunk at the time, was driving his car at a high rate of speed, and subsequently was convicted of criminal negligence. Mr. Justice Middleton held that it was against public policy for a company to agree to indemnify anyone against the consequences of a criminal act, that the insured was guilty of criminal negligence, which fact constituted a good defence to an action on the policy of insurance issued to him.

In his decision the learned Judge said:—

> Accidents which do not result from criminal misconduct are bound to take place. There is no law that prevents indemnity with respect to such occurrences, but when the misconduct is criminal, the situation is different.

There was an appeal from this judgment, and the decision of the First Appellate Division, which is reported in 51 O.L.R. at page 131, affirmed the judgment of the learned trial Judge. Between the date of the trial and the date of the appeal, we learned over here of the decision in *Tinline* v. *White Cross* (*supra*), which I have mentioned above, and the Appellate Division distinguished it, evidently, on the ground that in that case the criminal act was not intentional, while in the *O'Hearn* case the criminal act might be regarded as intentional.

Then comes the decision in *London Guarantee & Accident Co. and Sowards*,[17] which case clearly established that an insured was entitled to indemnity under his policy, where the accident was due to a breach of a provincial statute. In March of this year the subject has been further dealt with by Mr. Justice Roche in the Kings Bench Division in England, in the case of *James* v. *British and General Ins. Co.*[18] In this case the insured was driving his automobile which killed a passenger being carried in a motorcycle. The insured was drunk, and was subsequently charged with and convicted of manslaughter. The driver of the motorcycle who was injured sued and recovered a judgment against the insured, which the company refused to pay. In delivering his judgment in this case, Mr. Justice Roche said that the main defence relied upon was that as the collision resulted from the criminal conduct of the plaintiff, it was against public policy that he should be indemnified by the defendants. His Lordship said that defence raised a question of very general importance, because if it was sound it cut at the very root of a very large number of these motor insurances. His Lordship said he saw no half-way house, that the principle, if applicable at all,

[17] [1923] 2 D.L.R. 495; [1923] S.C.R. 365.
[18] [1927] 2 K.B. 311; 5 C.B. Rev. 439; (1927) W.N. 106.

would apply to all who drove to the public danger, and that it would apply also to other kinds of insurance, as, for example, to workmen's compensation insurance in cases in which the accident resulted from a breach of the Factory Acts. His Lordship further said that the conduct which brought about the criminal responsibility in this case and in the *Tinline* case was negligent, whatever the degree of the negligence, and was not intentional. In his view there was not on the part of a person who did an act negligently such a degree of criminality as made it improper that he should be indemnified in such a case. He further stated that the driver in this case and in the *Tinline* case were equally guilty of criminal conduct. Neither of them however intended the consequences of his acts, and he held that the plaintiff was entitled to recover under the policy.

In 1924, following the decision in *O'Hearn* v. *Yorkshire* (*supra*) a new section was added to the Ontario Insurance Act, namely, Section 79, which reads as follows:—

> It shall be lawful for an insurer to contract to indemnify an insured against financial loss occasioned by reason of liability to a third person whether or not the loss has been caused by the insured through negligence or while violating the provisions of any municipal by-law or any Act of this legislature.

Some day, perhaps, the Court will have before it a case in which it will be necessary to decide whether the word "negligence" in section 79 includes or excludes a negligent act bringing about criminal responsibility on the part of the insured. In the meantime the best consideration which I have been able to give to the matter leads me to the following conclusions:—

1. Policies insuring owners of automobiles against the consequences of negligence in their operation, whether personal or vicarious, are not against public policy, where there is no legislation to the contrary.

2. A policy of automobile insurance is not necessarily restricted to cases in which there has been no violation of the criminal law by the assured. As has been said in *Messersmith* v. *American Fidelity Co.*,[19] a decision of one of the Courts in the State of New York, so to restrict it would reduce indemnity to a shadow.

3. Where the act of the insured however brings about criminal responsibility, and is intentional or a wilfully criminal act, he thereby deprives himself of the benefits of his automobile insurance policy.

[19] 19 A.L.R. 876.

4. Where the negligent act is not that of the insured personally, but the negligent act of a person driving the insured's automobile, the insured is entitled to the benefits of his policy.

5. In all other cases, whether the negligence is slight or great, personal or vicarious, criminal or otherwise, the assured is still entitled to the benefits of the policy.

In considering the rights of the insurer and of the insured, one must of course always keep in mind statutory condition number five which forms part of every policy of automobile insurance, which condition reads as follows:—

> The insurer shall not be liable for loss or damage occurring while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.

We all are, or ought to be, familiar with the Ten Commandments, which were laid down for our guidance and observance in life, and in conclusion I venture to suggest the wisdom of fully observing and complying with the twelve commandments of Automobile Insurance which I have referred to, if one wishes to have an automobile insurance policy upon which he can safely rely for protection, in the event of a fire or theft of the automobile, or of a property damage, collision or public liability claim arising out of the ownership or operation of the automobile.

T. J. AGAR.

Toronto.

DISRAELI'S VALENTINE TO QUEEN VICTORIA.—The publication of the third volume of the Second Series of the Letters of Queen Victoria on January 19th by Longmans, Green & Co., discloses the following valentine addressed by the Earl of Beaconsfield to Her Majesty:—"10 Downing Street, 14th February, 1880.—He wishes he could repose on a sunny bank, like young Valentine in the pretty picture that fell from a rosy cloud this morn—but the reverie of the happy youth would be rather different from his. Valentine would dream of the future, and youthful loves, and all under the inspiration of a beautiful clime! Lord Beaconsfield, no longer in the Sunset, but the twilight of existence, must encounter a life of anxiety and toil; but this, too, has its romance, when he remembers that he labors for the most gracious of beings!"