

COMMITTEE ON NOTEWORTHY CHANGES
IN STATUTE LAW

REPORT TO THE COUNCIL OF THE CANADIAN BAR ASSOCIATION,
JANUARY 31ST, 1940

Though certain Acts were the inspiration for this report, the report itself only attempts to deal with legislation in a general way. It is more concerned with a frame of mind and the setting up of certain definite standards. The difficulty of the task has been enhanced because the background is economic and economics unfortunately are encumbered with prejudices.

If what I have to say should appear to be very elementary, the reason is that it deals with certain fundamental truths which appear to have been lost sight of in some quarters and the disregard of which may have a very important bearing on our future. These truths are not simply matters of theory. They are basic facts of geography and human behaviour which cannot be altered by wishful thinking.

We must always bear in mind that Canada is a northern country, a big country, an isolated country and in so far as we are concerned a new country.

As a northern country Canada has all of the increased costs due to extreme variations in temperature. As a big country it is a country of long internal hauls. As an isolated country it takes at least a week to get its goods to market and as a new country it is for the most part only in its primary and secondary stages of development.

Even in a normal season its climate ranges from sweltering heat to arctic cold. Its waterways are frozen over for at least a third of the year and there are still vast areas of both actual and potential wealth which are only accessible by plane.

These things all mean that not only is a substantially larger capital investment required in order to obtain a given result, but depreciation and maintenance are important items of expense which add heavy burdens to the cost of production.

When it comes to the facts of human behaviour, I suppose that everyone at one time or another has heard of the law of supply and demand and I suppose that if he stopped to think about it he recognized that it has its origin in the struggle for subsistence. It is on the operation of this law that earnings or losses depend. As long as there are earnings, production is a means of subsistence. The greater the earnings, the greater the

attraction. The greater the attraction the greater the supply. The greater the supply the smaller the margin of profit. The smaller the margin of profit the more unprofitable the undertaking. The law of supply and demand therefore has a corollary. All business through the working of the law has an inherent tendency to become unprofitable. Accordingly all business would probably reach bare subsistence levels if it were not for certain other human attributes which also stem from the same struggle. In addition to the mere instinct for self-preservation, human beings have ingenuity, enterprise, courage and thrift. There is always someone who believes that he can produce the same article or one which is just as good at a lower price or a better article at the same price.

From the dawn of history down to the present time this has been the source of all progress, not only on its material side, but to a very substantial extent on its spiritual side.

It has to be remembered, however, that the personal attributes which make for progress are not shared equally. If they were or if a situation were created in which all members of a society were put in the same position as though they were, then progress would have to stop either because every want would have been satisfied or because no want could be.

As a northern country our costs will always be high. As a big country our hauls will always be long. As a new country our demands for imported capital will always be heavy. But we can make our costs relatively low. We can make our hauls relatively shorter and we can make our country relatively rich if we pursue legislative policies which attract people with money to come to Canada, not merely to lend us money, but to stay and develop the country. This can only be brought to pass if they feel that Canada offers opportunities as a permanent home.

It took us a number of years to wake up to the potentialities of the tourist business. We finally found that it brought in very substantial amounts of money. Finally a number of our Legislatures took active steps to encourage it, but I am afraid that we are not fully alive to this new problem of refugees and refugee money and to the advantages we can gain by offering security and opportunity to people who have either been uprooted or who are dissatisfied with the insecurity of conditions in their own country. We have already received a certain amount of refugee money from Europe and a fairly small trickle of refugees.

It is altogether probable that under favourable conditions we could see more of both and the exodus might not be confined to Europe.

There are unquestionably a number of people on this continent who would be strongly tempted to come here and bring their money with them or who would be very much tempted to make permanent investments here, if they felt that our Governments were friendly to business and to the private ownership of capital.

Of course if these standards are no longer valid, that ends the matter. In that case criticism is useless and the legislation appearing in the statutes has to be judged by an entirely new and different set of standards. As apart from vague generalities, no one has ever disclosed precisely what those standards are and the new human attributes on which they rest, there is no point from which a rational inquiry can start to see if these attributes are sufficiently prevalent to serve as the foundations for a new and stable social system. The time has come when all shades of opinion cannot be successfully united by avoiding a clear definition of our objectives. Either Canada is to continue as a capitalistic state where the private ownership of property is respected, where private enterprise is encouraged and where personal liberty is unquestionable or we have set our course toward something else. It is the task of statesmanship to define our objectives in clear and unmistakable terms. It is not the task of a non-political body of this kind to do so. But until they are defined, there is nothing to do, in so far as criticising legislation is concerned, except to test it by the existing standards.

IMPERIAL

By the British North America Act, 1940, passed by the British Parliament on July 10th, section 91 of the British North America Act was amended by adding "Unemployment Insurance" as one of the subject matters assigned exclusively to the Dominion. The Dominion Parliament, exercising powers thus conferred upon it, passed The Unemployment Insurance Act, 1940, on August 7th.

This Act which sets up an unemployment insurance commission and provides for a scheme of contributory unemployment insurance is much too long to be discussed in a report such as this. Of course, there is no foretelling at this stage to what extent the Act may become of interest to the ordinary practising

member of the profession. On the surface at least it is a fair assumption that the Act will operate after the manner of the Workmen's Compensation Acts without its causing the profession any special concern.

DOMINION

The National Resources Mobilization Act, 1940; The Excess Profits Tax Act; The Income War Tax Act.—These three Acts reflect three policies of the Dominion Government. *Firstly*:—That there shall be conscription of property as well as conscription of man power. *Secondly*:—That the war shall be paid for out of current income to the greatest possible extent. The alternative might be to prohibit the accumulation of excessive reserves, for which provision is already made in the Income War Tax Act, and tax dividends only. The policy and its alternative are not as broad as they are long. The alternative removes all threats to corporate solvency and does not kill corporate enterprise. It also leaves management with an incentive to keep down costs.

Any criticism hinges entirely on the question of where we are going. That is a political question on which the Association should express no opinion.

ONTARIO

The Succession Duty Act.—The provisions of this Act were fully debated in the Provincial Legislature before it was passed and the debates were given wide-spread publicity. If public opinion has not revolted against the barbarous provisions of the Act in connection with the valuation of businesses and unlisted securities, which leave the matter entirely in the hands of the treasurer without recourse to any court, and the strange provisions respecting appeals, there is nothing which this Committee can say except to observe that there will be but little incentive for people with money to choose Ontario either as a home or as a profitable field for investment as long as the attitude of mind which prompted this legislation continues.

The Corporations Tax Act; The Provincial Land Tax Act.—Under amendments to these Acts, not only are taxes made a prior charge to the claims of encumbrancers, but in the case of a railway any penalty imposed by the Corporations Tax Act is also made a prior charge, and any penalty levied under the Provincial Land Tax Act is made a prior charge.

It certainly does not seem fair to charge B with penalties for the acts or omissions of A. Legislation of this type would appear to be of doubtful wisdom.

The Bed of Navigable Waters Act.—Under the common law an owner of land bordering on a stream owns the land to the middle of the stream. Subject to certain rights in connection with water power, which of themselves are rather drastic, the Act in the absence of express grant abrogates existing titles and gives the riparian owner title only to the bank of the lake or stream. In the case both of streams and lakes, the high water mark is defined as the level at which water has been held for a sufficient period to leave a water mark. Nothing is said as to the means by which the water is held back. Of course in the case of a great many of our streams and lakes, it is and has been held back for many years by artificial means. In order to solve all difficulties the Minister of Lands and Forests may on the recommendation of the Surveyor-General fix the high water mark, and his decision shall be final and conclusive.

The general policy in so far as private rights are concerned would appear to be similar to the policy which actuated the amendments to the Succession Duty Act, The Corporations Tax Act and The Provincial Land Tax Act referred to above.

Legislation of this kind may be temporarily expedient, but one would expect it to create serious difficulties in the long run.

The Securities Act.—Under this Act provision is made for the creation of prospecting syndicates with limited liability. The legislation was undoubtedly long overdue, but it is extremely doubtful if legislation which only touches a fringe of the problems which beset the mining industry can do much good as long as other legislation has the effect of wasting ore, taxing mines on more than their true income, and making it impossible for promoters to set off the losses on their unsuccessful ventures against the income on the successful ones.

It is extremely difficult to see how legislation of this type can do anything substantial to help the prospecting industry. The matter deserves much more serious consideration than this report can give it.

The industry as a whole is using up ore reserves more rapidly than they have been discovered. The future does not appear to be bright.

The Execution of Trusts Act.—Generally speaking a trustee cannot delegate his powers. This Act creates an exception in the case of trustees engaged in war service.

The Local Government Extension Act, 1940.—This is an Act extending the term of office of members of municipal councils and local boards, such as school boards, public utilities commissioners, etc., etc.

As the policy of this Act was fully debated at the time it was passed, there is no reason for comment.

The Assessment Amendment Act, 1940.—For the purposes of equalizing assessments a County may appoint a County Assessor who is given a right to appeal to the Court of Revision and the County Judge in the same manner as the person assessed. He can appeal either with respect to any particular assessment or generally with respect to all assessments included in the roll or in any area of the municipality defined in the notice of appeal.

Unless a power of this kind is used with the utmost circumspection, it cannot help but increase the hazards involved in the ownership of real estate, which have already brought the real estate market practically to a standstill. Another amendment to the same Act exempts rooming houses from business tax.

MANITOBA

The Limitation of Actions Act.—You will remember that in *Coleman v. Yarmolinsky*, [1935] O.R. 266, the Ontario Court of Appeal held that payments by a third party, the owner of an equity, had the effect of keeping the mortgagee's rights against the mortgagor alive. The effect of the amendment is to get rid of the doctrine in *Coleman v. Yarmolinsky* in so far as Manitoba is concerned.

The Law of Property Act.—Under one amendment to this Act no chattel erected or placed on farm lands shall by reason only of a declaration, agreement or covenant in an agreement for sale or mortgage be deemed to be part of the realty.

Under another amendment, a purchaser or mortgagor may apply to the Court of King's Bench within sixty days for an order respecting the application of the proceeds payable under any fire insurance policy, notwithstanding anything contained in any other Act or agreement of sale or mortgage.

The Insurance Act.—The suicide clause in an insurance policy is now lawful in Manitoba.

SASKATCHEWAN

The King's Bench Act.—"Where an action is brought to enforce any right, legal or equitable, the Court may permit the amendment of any pleading or other proceeding therein upon such terms as to costs or otherwise as it deems just notwithstanding that between the time of the issue of the writ and the application for amendment, the right of action would, but by reason of action brought, have been barred by the provisions of any Statute; provided that such amendment does not involve a change of parties other than a change caused by the death of one of the parties."

Under another amendment to the same Act provision is made in personal injury cases for the medical examination of the plaintiff by a doctor appointed by the court. The doctor may then be called as a witness by an *ex parte* order, in which case he shall not be deemed to be a witness called by either party. The examination is to be full and complete, by x-ray or otherwise as the practitioner may deem necessary and the person examined shall answer all proper questions.

Similar provisions are contained in The District Courts Act.

The Land Titles Act.—In *Re Green and Flatt*, 29 O.L.R. 103, Mr. Justice Middleton held some years ago that executors derived their title not from the letters probate but from the will. He therefore held that Scotch executors could assign an Ontario mortgage without taking out ancillary letters probate or resealing the original letters. In the case of an administrator, of course, the case is different. His powers are wholly territorial and limited to the jurisdiction in which he is appointed.

Saskatchewan has now provided that no transfer of land and no transfer of mortgage affecting land to an executor or administrator shall be registered until there has been probate or resealing in the Province.

The Garage Keepers Act.—This Act gives mechanics' liens to garage keepers even though he has parted with possession of the motor car which he has repaired or serviced.

The legislation is similar in principle to legislation in Alberta and British Columbia.

ALBERTA

Judicature Act Amendment Act, 1940.—A new subsection has been added to section 37 of the Judicature Act. The subsection provides that :

“The rights of the mortgagee or vendor respectively under any order or judgment heretofore or hereafter obtained in any action heretofore brought upon any mortgage of land, whether legal or equitable, or any agreement for the sale of land, shall, notwithstanding the terms of such order or judgment be restricted to the land to which the mortgage or agreement relates, or foreclosure of the mortgage or cancellation of the agreement for sale as the case may be; and notwithstanding the terms of the said order or judgment the same shall confer no right of any kind upon the mortgagee or vendor respectively for the enforcement of the same by any means whatsoever except by the foreclosure of the mortgage or the cancellation of the agreement for sale, as the case may be.

“Provided however, that this paragraph shall not apply to any action in which final order or judgment has been heretofore obtained for sale or foreclosure of the mortgage, or vesting the lands in the mortgagee, or cancelling or determining the agreement of sale as the case may be.”

BRITISH COLUMBIA

Administration Act Amendment Act, 1939.—This Act gives priority for services rendered and medicine and goods supplied to the deceased during the last three months of his life by doctors, nurses and hospitals, in addition to the priority already given in respect of funeral expenses.

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