IMPORTANT INSURANCE DECISION.

CO-INSURANCE: ECKARDT VS. LANCASHIRE.

The judgment of Chief Justice Meredith, which was delivered in the above case, on 17th October, will be regarded with interest by the Insurance World.

The Co.-Insurance Clause was made compulsory by the Board of Underwriters, in January, 1895, shortly after the great conflagrations in Toronto, and since that time the legal validity of the Clause has only once been under discussion by the courts.

In the case of Wanless *vs.* Lancashire, reported in 23 Ont. App. Rep., p. 224, it was held by the Court of Appeal that a Co-insurance clause contained in a policy of the British America Assurance Company was a *condition*, and not a mere direction as to the mode of ascertaining the amount of the loss, and that it was a variation of statutory condition No. 9. As therefore, in this case, the clause was not inserted in the policy in the manner specially directed in the Insurance Act, for varied or added condifions, it was held that the clause was not legal or binding on the assured.

It was not necessary, therefore, in the Wanless case for the Court to pass upon the reasonableness of this condition.

In the Eckardt case the question of reasonableness came squarely up for decision, uncomplicated by other issues, either of fact or law.

The policy sued on was issued on 2nd January, 1896, for $15,000 on the stock of the plaintiffs, who are wholesale grocers in Toronto, for one year, being renewed for a similar period on 2nd January, 1897. The fire occurred on 29th April, 1897. An appraisement was made, and the value of the goods was found at $115,000, and the loss at $42,120.71. The amount of insurance carried was $70,000, but the amount necessary to satisfy the co-insurance-clause would have been $86,250. The pro rata proportion due from the Lancashire was $9,025.87, but under the co-insurance clause their liability was only $7,325.34. On 16th June, 1897, the Lancashire paid the latter amount, which the plaintiffs accepted, but in the following October issued a writ claiming $1,700.53, the difference between the above two amounts. The action was tried in Toronto, on 14th September last, before Meredith, C. J., without a jury. No witnesses were called, but it was admitted that the presence of the co-insurance clause made a substantial difference in the amount of the premium, and it was also admitted that the plaintiffs were unaware of it, except in so far as the policy spoke for itself. On the face of the policy were stamped in conspicuous letters the words "Subject to 75 per cent. Co-insurance," while the clause itself was stamped in red ink, among the variations to the statutory conditions, and ran as follows:—

"14. The premium having been reduced in consideration of this condition, the insured shall, during "the currency of this policy, maintain insurance concurrent with this policy on each and every item of "the property insured to the extent of at least *seventy-five per cent.* of the actual cash value thereof, and if "the insured shall not do so, the company shall only "be liable for the payment of that proportion of the "loss for which the company would be liable if such "amount of concurrent insurance had been maintained."

The Chief Justice held that the condition was indorsed on the policy in the manner prescribed by the Insurance Act, and that it only remained to decide whether it was "just and reasonable to be exacted by "the Company."

This inquiry opened up the whole question of the manner in which the Courts will look at an addition or variation to the Statutory Conditions.

It was strongly urged by counsel for the plaintiffs that it had been decided that, where an added condition deals with the same subject matter as the Statutory Conditions, there is a *prima facie* presumption that such added condition is unreasonable. On the ground apparently that it imposes mere onerous terms on the insured, and it was further argued that there were no special circumstances in the case to overcome or displace that presumption.

The Chief Justice did not agree with this argument, nor did he consider that there was any previous decision binding on him to this effect, though he carefully analyzed several of the leading cases on the subject. He says: "Apart from authority, it would appear "to me that to read the Act as I am asked to read it "would be practically to eliminate from it that part "of it by which the right is expressly given to vary "the statutory conditions, provided that the variations "be printed as section 169 requires, and that the con"ditions as varied be not such that they must be held "to be not just and reasonable."

And later on: "The decided cases, as I understand "them, are not opposed to, but accord with the opin"ion I have formed, although there are doubtless to "be found in some cases expressions of opinion more "or less strong in favour of the first proposition in "the plaintiff's argument."

Chief Justice Meredith further said that he considers that the intention of the Legislature with regard to the matters dealt with, by the statutory conditions, was, *that what is found there should be taken to be that which prima facie should be the most that the insurer ought to exact from the insured, and that anything beyond this must stand the test of its not being found to be not just and reasonable in the circumstances of the particular contract in which it might be incorporated.* In other words in such cases there is a shifting of the onus of proof; it will be for the *insurer* to show that the addition or variation is *just and reasonable*, while in matters not dealt with by the statutory conditions the *insured* must prove that the addition or variation is *not just and reasonable.*

The Chief Justice then says: "Applying this test, "the co-insurance clause in this case cannot, I think, "be said to be not just and reasonable. The plain-