DOMINION OF CANADA

In the Supreme Court of Canada

OTTAWA

On Appeal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) District of Montreal.

BETWEEN:—

THE SHERWIN WILLIAMS COMPANY OF CANADA LIMITED,

(Plaintiff in the Superior Court and Respondent in the Court of King's Bench (Appeal Side),
APPELLANT,

— and —

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA,

(Defendant in the Superior Court and Appellant in the Court of King's Bench (Appeal Side),
RESPONDENT.

APPELLANT'S FACTUM

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APPELLANT'S FACTUM

This is an appeal from a majority judgment of the Court of King's Bench for the Province of Quebec, sitting in appeal (p. 794) reversing a judgment of the Superior Court, Tyndale A.C.J., which condemned Respondent to pay to Appellant under a Policy insuring against accident as therein defined, the sum of $45,791.38 for concussive or shatteration loss from an explosion resulting from an accident, (p. 792) with interest from the "date hereof" (March 29th, 1946) and costs.

This Appellant cross appealed contending that interest should have been allowed from the date of service of the action instead of from the date of the judgment as allowed. Respondent acquiesced and the Cross Appeal was settled by an agreement to the effect that in respect of any ultimate condemnation,

Int. will run from date of action
Sept 17th 1903 — if at all

P 793

752
765

"filterol" = fullers' earth —

880 gals turpentine
800 lbs. filled
80 " bleaching-filterol } into tank #1

761

Glass peep hole 6" diam. in rear end
Shaft run thru centre — paddles —

½–¾ hour in op.

754 + ruins
768
764
Mch 1900 pd up — & assigned right
to tree —

interest should run from the date of the service of the action, viz., September 17th, 1943, (p. 793); this agreement was referred to by Letourneau C.J.P.Q. in his notes dissenting in favour of Appellant (p. 797).

PART I

THE FACTS

On August 2nd, 1942, in the East room of the new linseed oil mill at Appellant's plant in Montreal there was an accident in the form of the tearing asunder of a Steam Jacketed Bleacher Tank (p. 760) in which, at the time, turpentine was being refined. As a result gases came in contact with the air in the room ignited from a source which could not be identified, causing a violent explosion which did shatteration or concussive damage to the premises and contents in the sum of $45,791.38 (the net amount for which judgment was rendered after deduction of two small items in respect of which Appellant filed retraxits; pp. XVIII & 792). The amount of the claim is not in issue as no evidence was made by Respondent to contradict Appellant's evidence accepted by the Trial Court, as to the amount of shatteration or concussive loss.

Following the explosion the premises took fire and the fire loss was established at $112,793.24, which the Fire Insurance Companies paid Appellant; the total loss from shatteration and the fire which followed was $159,724.62 (p. 740, l. 19).

No part of this action includes loss from fire.

Appellant was insured against accident under Respondent's accident policy, Exhibit P-1; the Supplementary Book contains the policy only and will be referred to hereafter as ("Supp").

The policy covers

> "loss from an accident as herein defined to an object described herein,"

and Respondent undertook:

> "To PAY the Assured for loss on the property of the Assured directly damaged by such accident" . . . "excluding (a) loss from fire" . . . "(b) loss from an accident caused by fire," . . . . "(e) loss from any indirect result of an accident;".

R. v. R.

P748

B1

635-46,

C.C. 25-80, 1,

Roxcauke

Royal C. Dairy v. Russell

(1949) Vol 1 All E.R. C. 749, 751,

"in consequence of")

Can a fire be an intermediate

link in a chain of causation

Must have an indep. fri as a

new source or origin of causation

(1936) S.C.R. 28, } bond -

Endorsement No. 2, March 15th, 1940, provides:

"The amount expressed as Limit per Accident" . . . . "is the Limit per Accident for *loss resulting from an accident* to any object described" etc.
(italics ours)

The object described in Boiler Schedule No. 1F is "No. 1 Steam Jacketted Bleacher Tank" and the "Limite per accident $50,000.00".

The value of this tank at the time remains uncontradicted at $1,821.26 (p. 21 l. 45). This "object" is defined in "Definition of Object B.", and "accident" is defined in "C" of the Policy Schedule of Unfired Vessels, as follows:

(C) " 'Accident' shall mean a sudden and accidental tearing asunder of the object or any part thereof caused by pressure of steam, air, gas, water or other liquid, therein, or the sudden and accidental crushing inward of the object or any part thereof caused by vacuum therein; and shall also mean a sudden and accidental cracking of any cast iron part of the object, if such cracking permits the leakage of said steam, air gas, water or other liquid, but leakage at valves, fittings, joints or connections shall not constitute an accident."

Admitedly there was an accident as defined in the Policy. There was no "leakage at valves, fittings, joints or connections" until the pressure from within became sufficiently high to bend the bar reinforcing the iron door of the tank and blow it out and shatter a 6" plate-glass apperture or peep-hole (Hazen pp. 210, 238-9), during the few seconds that the accident was in progress of development to the stage of explosion.

Respondent pleaded (Vol. I, p. XI, l. 35) that there was

(a) concurrent insurance by a policy of Individual Underwriters and others (p. 680) which should contribute to the loss.

(b) (Vol. I, p. XIII, l. 30) that the loss was a fire loss.

(c) (Vol. I, p. XIII, l. 40) that its liability is limited to a loss "directly damaged by a sudden and accidental tearing asunder of the object or any part thereof, to wit, the lug

Ocean A.S. Assoc. v Prism (1946) 2 All E.R. 355

Accident had port'r room in state of damage.

Scott L.J. 361

Cond. of ship caused by war peril that made her succ. to sea risk.

Here - the flaming gas in state is to be taken as a continuing of the accident

Doesn't exclude explosion damage

Ord. = accident = direct conseq. of what takes place in tank

Wadsworth v C.A.R. 49 S.C.R. 115 } Life & accid. policy.

"external & violent means" excl. of cred. accid. to inj. happ. - "fits"

Suppose a room filled with gas & expl. caused by heat merely of fire created within tank

forming a part of the hinge of the manhole door of an unfired vessel,"

(d) (Vol. I, p. XIV, l. 35) "That the right of action of Plaintiff against Defendant has prescribed"

and by particulars furnished (Vol. I, p. XV, l. 30).

(e) that "All the Insurers on the risk other than Defendant, paid to Plaintiff, prior to the production of Defendant's Plea over one hundred thousand dollars ($100,000.00) of the loss sustained by Plaintiff and since have paid or agreed to pay the balance of the loss in the event of Plaintiff's action failing and Defendant is unable to say whether the undertaking to make a further payment is in writing or was verbal."

The following facts are found to be established in favour of Appellant by the Superior Court; Letourneau C.J. (dissenting) and Bissonnette and Barclay J.J. in the Court of Appeal deal with most of them and the other Judges gave no reasons except to agree with Barclay J.;

(a) the quantum or amount of loss resulting from shatteration or concussion $45,791.38; (Tyndale A.C.J. j. 790 l.)

(b) that there was an accident within the definition of the policy; (Barclay J., p. 852, l. 35).

(c) that there was an explosion of released gases immediately following the "tearing asunder" of the tank ("object") (p. 581 l. 40)

(d) that the explosion was within the train of events which produced the loss claimed for;

(e) that the action was not prescribed when instituted;

(f) that Appellant had complied with all the conditions of Respondent's policy; (p. 774, l. 21).

(g) that the tank was a "pressure container" and consequently was not insured under the Individual Underwriters' Policy (pp. 683-4), and Tyndale A.C.J. (p. 790 ll. 40-5).

(h) that Appellant had an interest in the action and the right to sue Respondent. (p. 834 l. 45; p. 835 l. 18; p. 835 l. 29) and all the judges of the Court a quo who wrote notes.

(c) gas filled room ~~[illegible]~~ ignited by spark of glass-alas etc

(d) the flame from burning gas causes exp. from the volume of gas following so ~~that its~~ effective link remained the gas from the tank + in normal cond. — say ignited thru friction in escape from tank —

So long as the fire remains the cond. of the gas = the continuing accident — suppose mess mixed up with flames = not a "fire" is a new & intervening cause

P 718 +

723 +

Point raised by resp. in this case

1/ Causation - direct etc.

2/ assignment of cause of action

3/ does reciprocal under. - sh'd be co-insurance

Jan. 0 ' 11?

Hawley v West. Ins.
(1868) LR 3 Ex. 303

Martin B.

The following facts were found in Appellant's favour by the Superior Court and were not argued by Respondent in either Court, nor are they referred to by any of the Judges in the Court of Appeal except Letourneau C.J. (dissenting) and Barclay J.;

(a) that there was no fire of any kind preceding the "accident";

(b) that there was *no fire or burning of any part of the building or stock therein until after the shatteration or concussive loss had taken place as a result of the explosion;*

(c) that no "loss from fire" is claimed by the action.

(Italics ours)

The reasons for the judgment a quo are exclusively based on the interpretation of *two exclusions from liability in the Policy,* viz.: "(a) *loss from fire"* and "(e) *loss from any indirect result of an accident".*

(Italics ours)

Admittedly there were in the building dynamos, switches and electrical apparatus which could and apparently did ignite the gas released as a result of the accident to the tank.

The heated metal of the tank itself could have ignited the gas, (Lipsett, p. 573, l. 25) and Tyndale A.C.J. found, although strictly speaking an electric spark is fire, that this was not fire within the meaning of the policy.

No part of the property at risk was on fire during the time that the three stages of the explosion of the gas emanating from the ruptured tank, were in progress. The only element of fire before the shatteration of the building was the burning of the gas set free as a result of internal pressure and the tearing asunder and cracking of parts of the tank; this element of fire is conclusively proved to have been the first phase of explosion — the propagation of flame through the explosive mixture.

The following facts are not contradicted:—

(a) THAT one of the common causes for igniting explosive vapors is sparks from electric motors or from switches or machinery (p. 581, l. 1);

(e) Suppose dam. of the gas as covering valuable machinery — Cannot limit to the mere effect of the tank being (ind) open or a nuisance by the part of the tank

Can you have a "fire" which does not do any damage to any prop. but serves only as a link in a causation —

A fire constituting a partial state of escaping gas from tank — Comes within exception?

"Loss from fire" — not "Loss by fire" —

Does a fire have to do some dam. or partial itself to some prop. assured before it becomes a "fire" for all purposes?

— It is a consequence of "accident" until a fire does dam. — & that fire & all its consequences are excluded —

fire directly resulted of accident doing dam.

(b) THAT if you have a large volume of inflammable vapor mixed with air set loose in a room it will usually find a source of ignition some place and rarely gets away without being ignited (p. 581, l. 15);

(c) THAT it "would be a miracle if they (the vapors) "did not explode" (p. 581, l. 34).

(d) THAT the hot iron of the tank itself could have ignited the gas (p. 573, ll. 17-30).

(e) THAT the transfer of claim (p. 764) was never signified upon Respondent nor did it accept it. (Barclay J. p. 819 l. 36 and p. 821 l. 31). (Tyndale A.C.J. p. 778 l. 6).

When in the month of May 1943 the fire insurance companies paid Appellant $112,793.24, the amount of the loss from fire following the explosion (p. 620, l. 10), a letter was written by each Insurer accompanying its cheque for the proportionate amount of the fire loss (p. 768). The date of this letter is erroneously printed as November 15th, 1946, it should be May 1943 (p. 620, l. 10).

The action was instituted by Appellant against Respondent for the recovery of the shatteration or concessive loss on September 17th, 1943, in its own name and through its own Attorneys, Messrs. Kearney, Duquet and MacKay (pp. III - VII).

It was elicited in cross-examination at the enquette that on March 3rd, 1944, in excess of four months after Respondent's plea had been filed (p. IX) and about the time that Respondent had furnished particulars of its defence, (p. XV), that the late Fred Jennings of Johnson and Jennings Inc., who had brokeraged the fire insurance to the twenty-two interested companies had felt that it would be "a feather in my cap" (p. 619 l. 16) if he could procure the fire insurance companies to pay to his client (Appellant), the balance of its loss (p. 619), with the result that during March 1944, (six months after action brought), Appellant was paid that balance, $46,931.28, by the Fire Insurares in exchange for a transfer to them of Appellant's claim under Respondent's policy (p. 764). The action was continued under the provisions of the transfer receipt and inconformity therewith, in the name of Appellant for the benefit of the Fire Insurers and through their own Attorneys .

The transfer was never signified on nor did Respondent accept it (p. 778, l. 8) (C.C. 1570 & 1571).

"loss" from fire, a direct result of an "accident"

683

Pres. continuing — conc. predic. of fact
Ins. [illegible] prior [illegible]

"[illegible], 60, 1,
the tank [illegible]
pressure from within or without
Steam [illegible]

684. [illegible] [illegible] pressure [illegible]
— Includes of any other policy,
Non-conc., covers same risk.
— live grounds
No acid claimed

Interest
1522, 1, 2 CC, "creance conditionnel"
"transport [illegible]"
[illegible] assign'd but no [illegible] — neither
cause?

All evidence with respect to this additional payment was objected to and taken under reserve of Appellant's objection (p. 621, l. 20).

PART II

THE JUDGMENTS A QUO

Appellant submits that the judgment a quo and the reasons therefor were erroneous in finding that:—

1° By Barclay J.

(a) *"The fumes which escaped thruogh the valve and possibly through the bulging of the door were, according to the evidence and its interpretation by the experts, already ignited before the door of the tank burst open.* It was the great volume of fumes which thus escaped through the open door into an atmosphere already ignited that caused the final and destructive explosion"; (p. 822, l. 48). (Italic ours)

(b) "A new substance, with peculiar characteristics of its own, was formed outside the tank, and this new substance came into contact with fire. Thus there were two intervening causes between the turpentine gas within the boiler and the explosion, and therefore the damage was not the direct result of the accident but was the direct result of a fire, which is excluded as a risk"; (p. 823 l. 7).

(c) "As this is not a fire insurance policy, the question is not, with due deference, whether there has been such a fire as would entitle the assured to claim on a fire insurance policy, but whether the exclusion of loss by fire is in any way qualified or limited"; (p. 824, l. 5)

(d) "There was in fact no explosion of the tank. The explosion which did take place was an explosion of a totally different character — an explosion of gases or fumes outside the tank" . . . "This seems to me to carry the terms of the policy far beyond its natural meaning and bevond what was in the contemplation of the parties"; (p. 829 l. 38).

(e) "If fire of any kind or from whatever source, or whenever occurring, is totally excluded from the policy, that question is solved. The policy, it is true, insures against the risk of direct damage due to an accident, but the subsequent exclusion of fire would seem to me to exclude fire even if a direct cause of loss"; (p. 825, l. 7).

v Cutts' Case
(1944) KB 8,

Whitfield
Lindsey,

(f) "As this policy, which is not, I repeat, an explosion policy, limits liability to direct damages due to an accident, and in the same sentence excludes loss from fire without any qualification whatsoever, I can see no justification for reading into that sentence some limitation or qualification." (p. 825, l. 26).

2°. By Bissonnette J.

In discussing the judgment of Tyndale C.J.:—

(a) (p. 827, l. 2)—"a statué que la rupture du réservoir résultait de l'inflammation du liquide qui s'y trouvait et que c'est la pression développée par le feu dans ce réservoir qui a provoqué l'explosion".

and:—

(b) (p. 829, l. 12)—"Je crois que la BOILER INSPECTION & INSURANCE COMPANY s'est obligée, à l'endroit de la SHERWIN-WILLIAMS COMPANY, d'indemniser celle-ci pour toute perte subie par suite de la rupture d'un réservoir quelconque et que la mesure de cette indemnité sera restreinte à la perte ou au dommage directement causé par l'accident, c'est-à-dire par la rupture ou déchirure causée par la pression du liquide sur le réservoir ou sur ces accessoires."

(c) (p. 829, l. 24)—"L'origine de la perte susceptible d'être recouverte, par l'assuré, réside uniquement dans la rupture du réservoir mis sous pression."

(d) "En un mot, l'échappement de vapeurs de térébenthine peut avoir causeé l'explosion, mais ce n'est pas la *présence* de térébenthine dans le réservoir qui a causé l'explosion. Or, la police d'assurance couvrait cette dernière éventualité pourvu que celle-ci ne dépassât pas une simple rupture ou déchirure du réservoir."

(e) (p. 831, l. 33)—Or, dès que la Cour supérieure en venait à la conclusion que l'explosion ne se serait jamais produite sans l'intervention d'un élément, qui est le feu, elle devait affranchir l'appelante de toute responsabilité et de tout dommage qui prenaient leur cause dans cet argent externe, 'le feu', risque que l'appelante non seulement n'a pas voulu couvrir, mais dont elle s'est expressément déchargée par l'une des exceptions contenues dans la police."

(f) (P. 832, l. 15)—"Je suis donc d'opinion que l'appelante ne pouvait être tenue responsable que de la rupture du réservoir si celle-ci avait pour cause la pression qu'il était appelé à subir, suivant sa nature et sa destination. Il y a eu *causa interveniens,* ce qui devait entraîner le rejet de l'action."

With regard to 2 (a) to the effect that Tyndale C.J. found that the rupture of the tank resulted from the burning of the liquid in it and that the pressure developed from the fire within the tank provoked the explosion, with the greatest respect it would appear that Bissonnette J. did not appreciate that there is nothing in the judgment to the effect that the liquid took fire or that the explosion was caused from, fire within the tank nor is such suggested by any witness, factual or expert.

With regard to 2 (b), (c) and (d) to the effect that the total measure of indemnity is restricted to the loss caused by the rupture or tearing asunder of the tank, we submit that had the policy intended that to be the limit of Respondent's liability, it would have said so. The total value of the tank was $1,821.26 but the limit of loss "*on the property of the Assured resulting from an accident*" was $50,000.00 excluding loss of contents of the tank (Supp. Endorsement No. 2; Schedule 1F).

With regard to 2 (e) to the effect that when the Superior Court came to the conclusion that the explosion would never have taken place without the intervention of fire, the Respondent was discharged from all liability. Again with respect, Tyndale C.J. came to the conclusion (p. 783 l. 30 and p. 785 l. 48) that;

> "There is no evidence of any 'hostile fire' (see infra) before the explosion nor of any other abnormal phenomenon, apart from those already described".

The evidence is uncontradicted that there was no fire until the inflammable material had been set alight by the explosion itself. (Lipsett, p. 540, l. 3); also Barclay J. (p. 815. l. 48).

With regard to 2 (f) that there were causae interveniens between the rupture of the tank and the explosion which caused the damage claimed for; there was no burning of anything at risk between the begining of the accident and the concussion of the ensuing explosion; Tyndale A.C.J. so found and none of the judges in Appeal say that there was and Letourneau C.J. confirms Tyndale A.C.J.

PART III

ARGUMENT

As stated by Barclay J., (p. 816)

> *"There were a number of defences to the action, but some of them were not persisted in. Those which were persisted in are the followings—*
>
> 1. *"The damages claimed are attributable to fire, which is specifically excluded from the policy, and not to an 'accident' within the meaning of that word contained in the policy.*
>
> 2. *"The plaintiff has no claim against the defendant because it has already received from other insurers the total amount to which it is entitled."*
>
> 3. *"If the defendant is liable for any amount, its liability is restricted to loss on the property of the plaintiff directly damaged by the accident, as defined."*
>
> 4. *"There was concurrent insurance and a proportion of the loss should be borne by another company, thus relieving the defendant to that extent."*
>
> (Italic ours)

While all Respondent's defenses which were not persisted in, will necessarily have to be dealt with, the principal defenses which were found available by the majority in the Court of Appeal, will be dealt with first.

1° DEFENCES PERSISTED IN

(a) The loss was attributable to fire and was not a direct result of the accident as defined in the policy.

The policy insures:

(a) *"loss" . . . "from an accident".*

(b) *"loss on the property of the Assured directly damaged by such accident"*

(c) Endorsement No. 2 "*loss resulting from an accident*" and

(d) Boiler Schedule 1F "*Limit per accident* $50,000.00" (Supp.)

From the policy is excluded:

(a) "loss from fire or from the use of water or other means to extinguish fire" and

(e) "loss from any indirect result of an accident;".

There is no exclusion, however, for loss from explosion during or following an "*accident*".

The demand is for loss "*resulting from an accident*" and "*from an accident*" and is limited to shatteration or concussive damage from an explosion "resulting from" and during the course of an accident as defined in the policy.

In an insurance policy as in any other contract, the intention of the parties is to be gathered from all the terms of the instrument read together. Respondent prepared the policy and Appellant must be presumed to have read and understood its purport.

Firstly the policy covers "*loss on the property of the Assured*" but excludes "*loss from fire*", so that Appellant insured fire loss in other policies to meet the case where fire should occur preceding or following an accident or in any manner.

Respondent not having contracted itself out of "*loss from explosion*", Appellant did not procure protection by a policy specifically mentioning "*explosion*", contenting itself with Respondent's accident policy; the latter having excluded "fire" as an acknowledged probable sequence to an accident but not having excluded "explosion" as a reasonably probable immediate result of an accident. Respondent using the words "*from an accident*" and "*resulting from an accident*", rather than to name the many possible types of events which could "result from an accident".

It will be observed that the exceptions of the policy are:—

(a) "loss from fire," (or from extinguishing media) not loss *caused* by fire;

(b) "loss from an accident *caused* by fire". This imports fire must have brought about the "tearing asunder" etc. of the tank, which did not happen here.

The first mentioned exclusion (loss from fire), *must mean loss from actual physical burning* of something the subject of a fire risk or why include "that use of water or other means to extinguish fire"? There was no such loss until the explosion had set fire to the premises, and all the fire loss was paid for by the Fire Insurance Companies long before this action was brought.

Admittedly from the moment the burning of the building started following the explosion, Respondent was free from liability and is not charged with any part of the loss from fire (which the fire insurance companies paid to the extent of $112,793.34); there was no other loss from fire or burning whatever.

Bissonnette J. seems to justify Appellant's position. The tank was broken by pressure caused by the accumulation of gas and liquid within it and Appellant claims for "*le préjudice qu'il aurait subi comme effet direct et immédiat de cette rupture*". (p. 830, l. 1).

The policy does not use the expression "attributable to fire", and "fire" must be given its "real and natural interpretation", "*natural construction*" *and its* "plain, ordinary, accepted *significance*". These are the exact expressions used by Respondent in its factum in the Court a quo and it is submitted are supported by all authority and are applicable when a word such as "fire" is used without qualification.

Lord Dunedin in Curtis's & Harvey, Limited versus North British and Mercantile Insurance Company Limited (1920) 55 D.L.R. p. 95, (1921 A.C. p. 303) at p. 99, discussing the word "explosion" said:

> "As to what is the true meaning of the word 'explosion', the parties have been content to leave the Court without any means of judging this from the scientific point of view. Their Lordships do not think they are entitled to read in any knowledge which they may as individuals possess on the subject, but are bound to take it that the parties are agreed to take the word in the popular sense," etc.

It is our submission that the word "fire" should be taken in the popular sense and not in the narrow and restricted sense given to the word by Bissonnette & Barclay J.J.

The Civil Code of Lower Canada dealing with fire insurance, accepts that meaning of the word "fire".

C.C. 2580—"The insurer is liable for all losses which are the immediate consequence of fire or burning" etc.

C.C. 2581—"The insurer is not liable for losses caused merely by excessive heat in a furnace, stove or other usual means of communicating warmth when there is no actual burning or ignition of the thing insured".

Here there was no actual "burning or ignition" of anything insured until after the explosion.

Apart from this statutory law, the interpretation by the the Courts of the meaning of the ward "fire" excludes electric sparks from dynamos or electrical apparatus.

Welford & Otter-Barry's Fire Insurance, Fourth Edition, p. 59, (Third Edition also, p. 59), Section 1, says:—

"in order to determine whether in a particular case the loss was caused by fire, the following rules apply:—

(1) There must be an actual fire or ignition; . . .

(2) There must be something on fire which ought not to have been on fire.

(3) There must be something in the nature of a casualty or accident;" etc.

"The only case which calls for consideration is the case where the cause of the loss is a fire lighted for the ordinary purposes for which a fire is used," etc. "So long as the fire is burning in the grate or furnace, it is fulfilling the purpose for which it was lighted."

and P. 60, citing Gibbs C.J. in *Austin v. Drew,* S.C. (1815), 4 Camp. 360, at p. 361:—

"There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire."

This quotation is most apt and is exactly what happened here.

"Loss from fire" it is submitted means loss from burning, not of the uninsurable gas which escaped during the course of

the accident, but some of the property or stock in trade which should not have been on fire, and the burden of proof being upon Respondent, it was not sufficient for it or the Court of Appeal to interpret the unqualified word "fire" as being from "some unidentifiable source" without proof that something which ought not to have been on fire was in fact on fire and ignited the gas. There is not a suggestion of proof in that regard.

Tyndale, C.J., says (p. 784, l. 18 & seq.), after citing a letter Exhibit P-19, from Respondent to Appellant (p. 731):—

> "There is, of course, no doubt but that some flame or fire was present before the main explosion occurred. This is clear not only from the testimony of the experts but from that of the factual witnesses who saw a flame, a flash or fire in the vapour emanating from the east room. There is no specific evidence to identify the source of the ignition; but it was proved that there were motors and dynamos in the east room and there were doubtless several other possible sources of ignition there or elsewhere in the establishment."

After citing Dr. Lipsett, confirmed by Dr. Lortie (p. 784, l. 48):—

> "It may be assumed that the flash, flame or fire described by the factual witnesses was the flame which was being propagated through the explosive mixture following the latter's ignition from an unidentified source."

and at p. 785, l. 3 & seq.:—

> "Now, the unidentified source of ignition did, strictly speaking, constitute fire; but did it constitute fire within the meaning of the Policy?"

Then after citing the foregoing, and other authorities as to the meaning of the word "fire":

(p. 785, l. 45):—

> "The undersigned has no doubt but that these elements would be required in this Province to constitute such a fire as would entitle an assured to recover under a fire insurance policy; *and, again, there is no evidence of any*

such fire as the source of the ignition of the explosive mixture in this case.''

(Italic ours)

(p. 786, l. 1) :—

10 *''One might further contend, as Defendant appears to do, that once the ignition took place, the fire in the explosive mixture itself was accidental or hostile;* but such a contention appears to the undersigned to be over-subtle and inadmissible. It would mean that a fire insurance policy as such would cover loss by explosion even if there were no accidental fire other than the flame in the explosive mixture; and it might even imply that an 'explosion' policy which specifically excluded fire would not cover an explosion of this nature at all.''

20

(Italic ours)

Barclay J. in the Court of Appeal refers to the ''unidentified source of ignition'' and calls it fire and says; (p. l.)

''We are here dealing with two risks — an accident, as defined, and fire, not defined.''

and at (p. 825, l. 9)

30

''If fire of any kind or from whatever source or whenever occurring, is totally excluded from the policy, that question is solved. The policy, it is true, insures against the risk of direct damage due to an accident, but the subsequent exclusion of fire would seem to me to exclude fire even if a direct cause of loss.''

(p. 825, l. 31)

40 ''I can see no justification for reading into that sentence some limitation or qualification.''

Letourneau C.J. (dissenting says:

(p. 800, l. 28)

''A ce moment, les vapeurs devenues de plus en plus denses, et combustibles et inflammables au contact de l'air, auraient sans aucuns doute rencontré un point d'ignition,

puisqu'en moins de temps qu'il n'en faut pour le dire, des éclairs (flashes) ont été aperçues par les employés qui attendaient dans la 'West Room', et ceci aux deux portes nord et sud par où entraient les vapeurs venant de la 'East Room'."

(p. 801, l. 48)

"Notons que tout autant pour ce qui a été vu et entendu, que pour les conclusions scientifiques qui en peuvent découler, la preuve est bien positive et nullement contredite, selon que l'a cru le premier juge."

(p. 802, l. 27)

"A ce moment on aperçut au-dessus de ces nuages de vapeur, un ou deux "flashes" que la défenderesse voudrait tenir pour "feu", alors qu'à ce sujet les témoins présents témoignent comme suit:"

Here follows citations from the evidence.

Letourneau C.J. after referring to the evidence of District Fire Chief Hollett (p. 213) to the effect that one minute after the alarm had been received the firemen were on the spot and found twenty-five feet from the ruptured tank, an employee buried in debris or tin cans; that the fire (following the explosion) was around and over upset cans; that the upset condition was confirmed by the witness Rymann "the blown — all-over effect"; that the fire was out in ten minutes, and after dealing with the evidence of the factual witnesses Frazier, (pp. 54 & 112), Rymann, (pp. 113 & 147), Asselin, (pp. 170 & 182), Boucher, (p. 199), Gosselin, (p. 221), Duquette, (p. 228) and Moffat, (pp. 17 - 53, 159, 161 & 456 1 616 says:—

(p. 807, l. 22)

"Faut-il conclure de là que les témoignages donnés en Cour aient pour cela perdu de leur valeur, de leur véritable portée quant aux précisions qu'on y trouve concernant les *signes lumineux?* . . . Le premier juge ne l'a pas cru et je suis d'avis qu'il a eu raison."

and (at p. 807, l. 48)

"Mais de tout ceci, il y a quelque chose de plutôt décisif, c'est que plusieurs des témoins qualifient cette 'flamme'

ou 'flash', en en précisant la couleur: 'same like a *bluish;* same as 'whitish color' nous dit *Frazier* lui-même (p. 99); 'd'un blanc bleu' nous dit *Boucher* (p. 208). Et à supposer que les juges ne puissent d'eux-mêmes conclure d'une telle particularité, ils sont sûrement admis à s'en remettre pour cela à des autoristés que cite l'Intimée au bas de la page 22 de son mémoire et où il est dit:" (authorities on meaning of fire)

Letourneau C.J. then cites the evidence of the Appellant's expert witnesses, Drs. Hazen, Lipsett and Lortie and Respondent's expert Dr. Rioux and says:—
(p. 812, l. 5)

"*chaine ininterrompue* de causes, mais dont la première s'est produite au sein du 'vessel' qu'était le 'Jacketted Bleacher Tank'."
(p. 812, l. 25)

"L'Origine du désastre aurait donc été ce qu'en a pensé le premier juge et ce qu'à notre tour nous tenons pour bien établi, à savoir qu'il s'agissait véritablement de cette explosion particulière que couvre la police P-1 de la défenderesse, puisqu'il y a eu 'tearing asunder of an object' . . . et que des dommages directs en sont résultés: *ceux des diverses 'sautes' ou démolitions qui ont précédé l'incendie."*
(p. 813, l. 17)

"De sorte que sur le tout, et particulièrement *sur les deux questions principales du litige et qui ont vraiment fait l'objet de l'Appel,* j'en viens à la conclusion qu'il n'y a pas *mal jugé*: que l'action devait être accueillie comme elle l'a été, sauf que l'intérêt sur le montant de la condamnation ($45,791.38) devait courir de la date de l'action, soit du 17 septembre 1943, selon que les parties en ont convenu à l'occasion d'un contre-appel de la demanderesse."

In the Court of Appeal Barclay J., refers to the judgment of this Court in Boiler Inspection and Insurance Company of Canada and Abasand Oils Limited 1948 Canada Law Rep. (Sup. Crt.) p. 315, and particularly to the language of Rand J. at p. 319.

The Court will remember while the Defendant was the same as in the instant case, the policy was entirely different being one of Use and Occupancy and insuring against explosion as defined, and that there was a fire following an explosion. In Abasand's case the policy provided indemnity for the loss of of business.
(p. 318)

"caused solely by an accident to an object" etc.
but excluding loss

> "resulting from an accident caused by fire or by the use of water or other means to extinguish fire (nor for any prevention of business resulting from fire outside of the object, following an accident)".

10

The vital words are "*caused solely by an accident*" as contained in clause "A" but as qualified by the words of clause "G" above quoted, and Rand J. said (p. 319) :—

> "It thus declares the meaning of "A" that the word 'solely' restricts the cause for which there is liability to purely explosive effects as against a resulting fire: that 'solely by accident' means 'solely by explosion': if the language had been 'caused by explosion' a resulting fire
> 20 would be included as a cause; 'caused solely by explosion' excludes such a fire."

In Respondent's policy there is no similar qualification such as "*caused solely by an accident*" and "*resulting from explosion outside of the object, following an accident*". The words are "*from an accident*" and "*resulting from an accident*", consequently we submit, paraphrasing the reference by Rand J. to the argument of Mr. Steer, K.C. (p. 318) :—

30 *Without more, "accident" would include an explosion resulting directly from such accident; and the loss to Appellant caused by such explosion or by the accident and such an explosion acting concurrently, would be within the obligation of Respondent.*

As Respondent's policy does not exclude "*loss from explosion outside the object;*" it must be taken to include such loss provided it results from an "accident" as defined. The Policy says "*resulting from an accident;*" and it is common ground
40 that there was an "accident" as so defined.

We submit therefore that all the Court has to do here is to determine whether or not the loss claimed resulted directly from the accident or the accident and explosion combined, without the intervention of some definite independent and external operation. Of the latter there was none.

With respect, it is putting it rather high as do Barclay & Bissonnette J.J.,to say that the "air" was a nova causa inter-

veniens and to call an electric spark or some other unidentified source of ignition, a fire; specially is this so when the definition of "Accident" forsees the leakage of "gas".

Neither the air in the room nor the usual sparks from dynamos or machinery in a manufacturing establishment or both together could have done any harm without the explosive gas which escaped from the ruptured tank during the course of an accident as defined in the Policy.

ELEMENTS WHICH DO NOT CONSTITUTE FIRE

In *Sin Mac Lines Limited vs. Hartford Fire Insurance Company et al,* Vol. 1, Ins. Law Rep. (1934), Superior Court, p. 308—A lighted match in the fingers of an employee was used at the top of a fuel oil container to determine as to whether there was enough fuel to carry the tug "Rival" a given distance. Fumes from the container ignited from the flame of the match and exploded.

Mc Dougall J. said, p. 309:—

> "it is practically impossible to disassociate the fire from the explosion" . . ., "but from that moment the 'explosion' entered the first of the three stages described by Professor Stacey in his testimony, ignition passed at once to the second or turbulent phase and then almost immediately into the third or detonation stage." He describes or defines the word "explosion" as including three phases — "uniform flame propagation, turbulence and detonation, without all of which there can be no gas explosion" . . . ,
>
> "It cannot be said that there was a fire within the meaning of the policies, which burned for an appreciable period during the course whereof the explosion occurred, as an incident of the fire."

This Court is familar with this case (reported at Can. Sup. Crt. Rep. (1936), p. 598), and it confirmed the view expressed by McDougall J., holding that the loss was from explosion and not from fire (Canan J. pp. 606 and 607); the lighted match not being fire.

It is submited that the use of the expressions "hostile fire" and "friendly fire" which have not frequently been used in the Province of Quebec but are continually used in the English provinces and in the United States, are completely apt to dis-

tinguish on the one hand fire which consumes and burns and on the other hand, fire which does neither but reslults from friction of machinery or sparks from electric contact in manufacturing establishments and elsewhere and remains within fixed or destined bounds.

Couch on Insurance distinguishing such fires, Vol. 5, Section 1201, pp. 4392 - 4396 illustrates the distinction:—

P. 4392:

> "in fact, that to constitute a hostile fire, it must be one which becomes uncontrollable, or breaks out from where it was intended to be so as to become a hostile element as distinguished from a friendly one such as is employed for ordinary purposes, and is confined within its usual limits."

P. 4393:

> "Likewise, fire, when used for certain manufacturing and other special purposes, and while confined within the limits where it is usually kept for such purpose, is not 'fire' within the terms of the policy."

P. 4394:

> "So, the fire causing an explosion, and which may constitute a ground of recovery under a clause excluding liability for loss by explosion, must be something more than a mere blaze produced by lighting a match, gas jet, or lamp; an actual fire in accordance with the commonly accepted meaning of that word, is what is intended."

P. 4395:

> "Likewise, if fire is used for culinary and heating purposes, or for the purpose of generating power, the fire being confined within the limits of certain agencies for producing heat, or if it is used by chemists, artisans, and manufacturers as a chemical agent, or is an instrument of art or fabrication, or for any of the other numerous purposes of like character, and if in such case it is used or applied by design, and a loss occurs in consequence of overheating or by unskilfulness or negligence of the operator, and his mis-management of heat as an agent or instrument of manufacture or other useful purpose, this is not a loss within a fire policy. To this extent the rule is law."

P. 4396:

"where the fire did no damage except causing the explosion, as a loss of that kind is a loss by explosion, and not by fire, upon the principle that it is the proximate and not the remote, cause that controls."

Vol. 6, Section 1282, p. 4721:

"Again, an exception in a steam boiler Insurance Policy, of loss or damage 'due to fire' means from 'hostile' and not from 'friendly' fire", etc.

Briggs vs. North American & M. Ins. Co., 54 N.Y. 336, 449:

"Where a lighted lamp was placed near the machinery used in rectifying spirits and vapor given off by the process same in contact with the flame of the lamp and exploded, it was held 'there was no fire prior to this explosion. The burning lamp was not a fire within the policy.

The machinery was not on fire, as such a term is ordinarily used, until after the explosion':"

Cough, Vol. 5, Section 1197, p. 4315:

"accordingly, where inflamable vapors evolved in the process of rectifying came in contact with flame, resulting on 'a sudden and violent combustion of the vapor, accompanied by a noise described by one witness as being like the crack of a gun, by another as if a bundle of iron had been thrown on the pavement', it was found that there was an explosion."

Mitchell vs. Potomac Ins. Co., 183 U.S. p. 42 at p. 52:

"The flash accompanying an explosion is not a fire within the meaning of the policy. The question is, was the 'accident' an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion".

Tannenbaum vs. Com. Fire Ins. Co., 127 Pa. Super., p. 278:

"The flash of the explosion in the instant case was not itself a preceding hostile fire. The burning of the gas, which was the flash, was in the ordinary sense an integral part of the explosion, though actually but not perceptibly ignition and combustion must have preceded the explosive result."

....*Weldorf & Otter-Barry's,* 3rd Edition, pp. 61, 67, 247 and 248, 250, 252 and 253, 258 and 259.

McGillvray on Insurance, 2nd Ed. pp. 812, 813, 815, 816 & 827; and as to Accident Insurance pp. 1119 & 1134.

Barclay J., says (p. 823, l. 2)

10

"It was the great volume of fumes which had escaped through the open door into an atmosphere already ignited that caused the final and destructive explosion."

It is submited with respect that this statement even if in conformity with the evidence (which with respect it is not), is mere theory. The evidence is that the pressure began immediately to bend the door bolt, (Exhibit P-20), and the gas was escaping through the periphery of the door from the beginning. (Dr.
20 Hazen, p. 273). Dr. Lipsett (confirmed by Dr. Lortie) says that the quantity of gas escapig from the door was seventeen times that escaping from the relief vent (p. 532, l. 40).

No human being can say or remotely guess what part of the gas escaped and ignited first. See Dr. Lipsett, p. 531, l. 28; p. 534, l.l. 10 - 35; p. 535; p. 539, l.l. 29 - 35; p. 665, l. 10 & l. 41; p. 674, l. 40; p. 675, l. 28 "there was one accident", & l.l. 35 - 40; p. 572, l. 22.

30

By the Court:—

Q.—I understood you to say, Dr. Lipsett, a little while ago, tha tthe element of ignition in an explosion need not be what the layman calls 'fire' — it might be an electric spark or even, you said, if I understood you correctly, a hot piece of iron?" A.—"Yes."

By the Court:—

40 P. 573, l. 15:

Q.—"According to your testimony, it is an accepted scientific fact that turpentine vapor will be ignited by any object which is hot to the degree of 484 degrees Fahrenheit, — or am I making it too general?"

A.—"It maw be ignited at that temperature provided it has not cooled off by radiation, if the hot body is sufficiently large or if it encloses the turpentine vapor."

By Mr. Hackett, K.C.:—

P. 573, l. 25:

Q.—"Ahe you aware of any such body in the east room on the morning of the 2nd of August?"

A.—"As a matter of fact, the tank itself during this reaction which occurred could heat up beyond that temperature. It would be a body large enough to be a source of ignition of this type."

By The Court:— . . .

P. 582, l. 45:

Witness:—

"I consider it a possibility that the tank could have ignited the mixture of turpentine vapors and air. I would not even want to classify it as a probability. And I don't think that possibility depends on where the flash of fire was seen."

P. 583, l. 9:

A.—"I don't think you can eliminate it."

L. 19:

"It is a fair possibility, and that is about all I would like to say. But there are other possible causes, such as electric sparks."

Dr. Lipsett then indicates the other possibilities of ignition such as "naked lights" "possible short circuits" "possible open jets".

L. 49:

"Or a person striking a match to light a cigarette. All these things at times cause explosions."

P. 585, l. 30:

"There was a machine on that floor, I understand, being used for cleaning seed. I f a nail happened to get in there and friction sparks were created, that also might ignite the vapor."

L. 49:

"In the absence of air no ignition would occur."

By The Court:—

P. 586, l. 12:

"I wouldn't call a piece of iron, heated to a degree less than glowing, 'fire', I may not be correct scientifically, but I would not call it fire."

L. 33:

By Dr. Lipsett:—

A.—"Technically speaking, I don't think the term 'fire' is used unless chemical reaction is going on, and an electrical coil when it is heated by electricity does not change its composition, — it is not consumed."

Dr. Hazen, p. 249, l. 23; p. 252, l.l. 18 - 40; p. 264; p. 271, l. 20; p. 272, l.l. 25 - 30 & l. 49.

The evidence of Dr. Lipsett is entirely confirmed by Dr. Lortie, and by Dr. Hazen to the extent that the latter dealt with the subject. Their evidence, with that of the men who saw a "flash like fire", "fumes", "vapor", "bluish fumes" etc. in the large fire doors between the East and the West rooms, within a few seconds prior to the explosion, is the only evidence of any kind which justifies Barclay and Bissonnette J.J. in applying the term "fire" to the source of ignition of the escaping gas. In fact, they do not suggest or rely upon any other evidence.

Dr. Paul Rioux, an eminent chemist called by Respondent, (p. 642) seems to suggest that some gas from the same source (the Tank), escaped first and caught fire and the burning gas then ignited a larger volume of gas.

P. 661, l. 19:

"Oui c'est bien cela, deux sources différentes de matières combustibles, c'est la même source mais qui sont sorties à des moments différents et d'une façon différente. Ces vapeurs sont venus en contact avec une source de feu. La première a pris feu, le feu a continué ou non, je ne le sais pas, mais si le feu n'a pas continué, la source du feu a restée. Si le feu n'est resté les deux évènements, les deux

incendies sont complètement séparés et si le feu a continué, le premier n'est pas le commencement de l'explosion, de la grande explosion, c'est une combustion à part."

This theory was not accepted by Tyndale A.C.J. nor by Letourneau C.J. in the face of the evidence of Drs. Lipsett, Lortie and Hazen but appears to a great extent the bases of the reasons of Barclay and Bissonnette J.J., although they do not specifically refer to Dr. Rioux's evidence.

It is also submitted that the findings of fact by a trial Judge should not be disturbed by an Appellate Court.

Tremblay vs. Beaumont (Supreme Court) (1946, 3 D.L.R., p. 514.

Rinfret C. J. Can. in *Latour & Grenier* (1945), Can. Law Rep. 749 at p. 761.

PROXIMATE CAUSE

It is submitted that the effective, dominant and consequently the proximate cause of the loss was the accident and not the unidentified source of the ignition of the gas.

Halsbury's Laws of England, 2nd Edition, Vol. 18, p. 306, puts the matter clearly:

> *"It seems that there may be more than one proximate .... cause of a loss .... If, however, one of these causes is excluded from the policy by a "warranty", it becomes necessary to discriminate between the relative efficiency of the several causes, and if the most effective or dominant of the causes contributing to the loss is excluded by the warwranty, the Assured will not be entitled to recover. In other words, the first question in such cases is: Was a peril insured against a proximate cause of the loss? If it was, the next question is: Was a peril excluded by the warranty also a proximate.... cause of the loss? If this question be answered in the affirmative, the final question arises: Which of these causes was the more effective, or in other words, the dominant cause of the loss?"*
>
> *"The question whether the excluded peril was a proximate cause of the loss must be determined as if it arose under a policy insuring against the excluded peril."*
>
> (Italic ours)

If the above view is accepted, that is the end of the matter and Appellant must succeed.

It is clear beyond peradventure that the Civil Code 2580-1, would not recognize a claim under a policy for "loss from fire", unless there was actual ignition or burning of the thing insured. Here to repeat, nothing was on fire except the uninsurable gas escaping from the rupturing tank, until after the shatteration loss claimed for, had occurred. This view was accepted by Tyndale A.C.J. and Letourneau C.J.

Dr. Lipsett says (p. 540, l. 3):

> "The inflammable material on the third floor was set alight by the explosion". (The explosion is admitted, p. 582, l. 10).

Barclay J. agrees that the explosion preceded the fire (p. 815, l. 48); that is also the effect of the notes of Bissonnette J.

Try as they both have done, neither can put his finger, on fire or burning of anything between the beginning of the "accident" as defined and the explosion which caused the loss claimed, nor can they find any intervening cause except "*air*" and some "*unindentified source of ignition*" — which is in every manufacturing establishment, both of which Respondent must be presumed to have foreseen whn its policy was issued.

In *Century Indemnity Company versus Northwestern Utilities Limited,* 1935 S.C. Rep. p. 291, Dysart, J. said:—
(p. 294)

> "Gas is a substance which unless properly confined is liable to escape and which, if it does escape, is liable to do damage to person or property."

Then at (p. 295) citing Lord Dunedin in *Dominion Natural Gas Company Limited versus Collins and Perkins* (1909) A.C. 640:—

(p. 295)

> "A loaded gun will not go off unless someone pulls the trigger, a poison is inocuous unless some takes it, gas will not explode unless it is mixed with air and then a light set to it."

and again at (p. 295)

"Even disregarding the element of negligence, it would still appear that the conflagration on the customers premises was 'the result of accidents'. The explosion was certainly an accident in the sense that it was unexpected and undesired. It arose out of the distributing of gas through the Respondent's distributing system in the ordinary course of the 'operations' of the gas plant."

10

In the Century Indemnity case the trial judge had found that the gas which exploded had escaped from the break in the service pipe, etc. (p. 293).

In the instant case the gas which exploded escaped from the cracking and tearing asunder of the tank and there was no "definite external event, unexpected and unavoidable," (Lord Porter in *York Dale S. S. Co. versus War Transport Minister* (1942) 2 All E. Rep. at p. 21).

20

Neither the air in the room nor the machinery, motors and electric apparatus were "unexpected or unavoidable" in Appellant's plant and there was no "external event" whatever.

(Italic ours)

The burden of proof that "fire" was the proximate cause was on Respondent:—

30 MacGillivray, 2nd Edition, p. 831:—

"The English rule that the burden of proving that a loss was caused by an excepted peril rests on the insurers is now too well established to be doubted and is more equitable and practical than the American rule which places on the insured the burden of proving the negative."

p. 833:

40

"The onus is on the insured to prove that the loss was accidental in the sense that it was occasioned by the intervention of something fortuituous which could be called a casualty within the meaning of an insurance contract, but he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss, and if the insurer's case is that it was caused by an excepted peril the onus is on him to prove it."

Whether or not, however, the English view is accepted and the American view applied does not seem to matter as both Courts below find no fire in the sense of burning except of the escaped gas, until after the explosion.

Barclay and Bissonnette J.J. wih respect, give the word "fire" a meaning which is not accepted in any system of law.

Again the intention of the parties by the words they have chosen must govern:—

Beals Cardinal Rules of Legal Interpretation, 3rd Edition, 1924, p. 61, also at p. 174:

> "The construction that renders the deed valid should be adopted and that which renders it void repected."

(b) The Appellant, having been paid by the Fire Insurance Companies for the amount claimed by the action, has no further interest therein. (Plea, p. XIII, l. 28).

The transfer from Respondent to the Fire Insurance Companies, (p. 764), is conditional in that the latter are given the right to carry on the action in the name of the Transferor but at the expense of the Transferees.

It is common ground that there was no signification of the transfer and the judgment in both Courts so states, (p. 778, l. 8 and p. 796 l. 40). Consequently, the Transferee (buyer) had no possession available against Respondent until signification or until the transfer had been accepted by the Debtor Respondent, (CC 1571).

The Agreement does not suggest that the Fire Insurance Companies acknowledged the debt as theirs but on the contrary the payment was without prejudice, and Appellant is the only one who could or can give a discharge to the Respondent (CC 1572).

This defence was rejected by the judgment of the Superior Court under the authority of *McFee vs. Montreal Transportation Co.,* 27 K.B. p. 421; *Coderre vs. Douville,* 1943 ,KB.. p. 687 and *Hébert vs. Rose,* 1935, 58 K.B., p. 459, and upon the basis of Articles 1570. 1571 and 1572 of the Civil Code of Lower Canada; and by the formal judgment of the Court a quo (p. 796, l. 40).

Respondent invoked the provisions of the Quebec Code of Civil Procedure, Section 77,

> "No person can bring an action at law unless he has an interest therein."

This Section was Article 19 of the old Code of Procedure and was disposed of by the Privy Council in *Porteous vs. Reynar,* 1888, 13 A.C. p. 120.

Lord Fitzgerald at (p. 131):—

> "Their Lordships entertained the view that Article 19 is applicable to mere agents or mandatories who are authorized to act for another or others, and who have no Estate or interest in the subject of the trusts, but is not applicable to Trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the Trust Estate."

Moffat vs. Burland, 28 L.C.J., (p. 24);

See also *Dalloz,* Supp. Verbo Assurance terrestres No. 25; *Dalloz,* 1869, 2, 19 No. 546;

De Lalande — Assurances Contre l'incendie;

Sumien — Traité des Assurances terrestres N 175, (p. 79);

Planiol 10th Ed., Vol. 2, No. 474, pp. 169, 170 & 179, No. 1621, p. 564, No. 1623, p. 564, No. 1624, p. 564, No. 1625, p. 566;

Langelier, Vol. 4, p. 105;

Fuzier Herman, Code Civil Ann. under C.N. 1162, p. 1113, C.N. 1250, p. 132, Nos. 32, 33, 36, 37, C.N. 1733, Nos. 99, 100, 102;

Mignault, Vol. 5, pp. 557 - 561, 570 - 572.

(c) That the policy of individual underwriters, gp. 680), should contribute to the loss.

The pertinent provisions are in Paragraph "C" of the "Limited Form Supplemental Contract" of the individual underwriters.

Paragraph "C", p. 684:

> *"but this Company shall not be liable under the terms of this clause for any loss or damage occasioned by or incident to the explosion, collapse, rupture or bursting of* (1) steam boilers and other *pressure containers,* and pipes and apparatus connected therewith" etc. and "if such loss or damage be more specifically insured against in whole or in part by any other insurance non concurrent herewith which includes any of the hazards insured against by the terms of this clause;".
>
> (Italic ours)

The evidence is that the steam in the lower half of the tank was under a pressure of 20-25 lbs. to the square inch (p. 117, l.l. 1 - 20).

The contention of Respondent is that the tank in question was not a "pressure container". Tyndale C.J. dealt with this defence against the pretentions of Respondent at (p. 790, l. 20). None of the other Judges dealt with this question at all. Tyndale C.J., (p. 790, l. 40):—

> "Defence counsel, in his factum, submits an interesting argument to establish that the tank was not a 'pressure' container or vessel. But three experts (Hazen, Lipsett and Lortie) classify it as such; and they are not contradicted. . . the Court must conclude that the tank was a 'pressure container' . . . and that, in consequence, that policy does not constitute other insurance concurrent with the policy of the Defendant."

2° DEFENCES NOT PERSISTED IN

(a) *That the claim is prescribed.*

Section 10 of the Policy Conditions excludes the right of action unless brought within fourteen months from the date of an accident or within such shorter limitation of time under the laws of the province.

The action was brought within the fourteen months and there is not in Quebec any shorter limitation of time in respect of an accident policy of this nature.

Under C.C. 2260, Section 4

"any claim of a commercial nature reckoning from maturity", is prescribed by five years only.

Under C.C. 2470:—

"Marine insurance is always a commercial contract; other insurances are not by their nature commercial but they are so when made for a premium by persons carrying on the business of insurers;" etc.

Tyndale C.J. disposed of this defence as being without foundation and none of the Judges in Appeal have dealt with it at all, presumably because it was not referred to in either Court. of Appeal.

(b) *The quantum of the loss.*

This question has been fully dealt with. The Superior Court found the amount to be established and uncontradicted at $45,791.38. (p. 790). There was no evidence to contradict or modify the finding and Respondent did not argue in either of the Courts below that the amount was incorrect, nor did any of the Judges in appeal deal with it.

(c) *That all the conditions of the Policy were complied with.*

The proof is that the conditions were all complied with by Appellant and the Superior Court so found. That they were not was not argued by Respondent in either of the Courts below nor referred to by the Judges in the Court of Appeal.

Tyndale A.C.J. found that all conditions had been complied with (p. 774, l. 36).

PART IV

CONCLUSIONS

Appellant submits that this appeal should be allowed with costs throughout and that the judgment of Tyndale C.J. in the Superior Court should be restored with the addition, however, that the judgment should carry interest from the date of the service of the action, September 17th, 1943, in accordance with the agreement of the parties on the cross appeal (p. 793, l. 42).

Montreal, March 31st 1949.

MANN, LAFLEUR & BROWN,
Attorneys for Appellant.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA
OTTAWA

On Appeal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) district of Montreal.

BETWEEN:—

THE SHERWIN WILLIAMS COMPANY OF CANADA LIMITED,

(Plaintiff in the Superior Court, and Respondent in the Court of King's Bench (Appeal Side),

APPELLANT,

— and —

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA,

(Defendant in the Superior Court and Appellant in the Court of King's Bench (Appeal Side),

RESPONDENT.

APPELLANT'S FACTUM

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