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.

RESPONDENT'S FACTUM

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RESPONDENT'S FACTUM

Tyndale J. rendered a judgment in the Superior Court for the District of Montreal on the 29th of March, 1946, condemning the Defendant-Respondent, Boiler Inspection and Insurance Company of Canada, to pay to Plaintiff-Appellant, The Sherwin Williams Company of Canada Limited, $45,791.38 with interest and costs.

The Defendant appealed to the Court of King's Bench, Appeal Side. A Bench of that Court, comprised of Letourneau,

C.J., Barclay, Marchand, Bissonnette and Casey JJ., Letourneau C.J. dissenting, reversed, on the 12th of January, 1949, the judgment of the Superior Court and dismissed Plaintiff's action with costs.

This is an appeal by Plaintiff from the Judgment of the Court of King's Bench, Appeal Side.

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The case is printed in four volumes; the policy P-1 is printed as a supplementary volume.

PART I — THE FACTS

(a) THE FACTS GIVING RISE TO THE ACTION.

The action is based upon Insurance Policy No. 60350-B, Exhibit P-1, issued by the Respondent, Boiler Inspection and
20 Insurance Company of Canada, in favour of the Appellant, The Sherwin Williams Company of Canada Limited, on the 9th of March, 1940, for a period beginning on the 15th of March 1940, and ending the 15th of March 1943, See Supplementary Book, Exhibit P-1.

The policy was limited to $50,000.00. It was neither a *fire* policy nor an *explosion* policy. On the contrary, the Boiler Company agreed, respecting loss from an accident to an object, to pay the assured for loss on the property of the assured, directly
30 damaged by accident. Loss from fire and loss from the indirect result of an accident, were excluded from the risk.

The words "accident" and "object" are defined. "Accident" is defined as follows (see Policy, reverse side of Schedule No. 2);

> "C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental tearing asunder of the object or any part thereof caused by
> 40 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."

"Object" is defined as follows (see Policy reverse side of Schedule No. 2):

"B. As respects any such unfired vessel, 'Object' shall mean the cylinder, tank, chest, heater plate or other vessel so described; or, in the case of a described machine having chests, heater plates, cylinders or rolls mounted on or forming part of said machine, shall mean the complete group of such vessels including their interconnecting pipes; and shall also include water columns, gauges and safety valves thereon together with their connecting pipes and fittings; but shall not include any inlet or outlet pipes nor any valves or fittings on such pipes."

The particular "object" in this case is described as "#1 Steam Jacketted Bleacher Tank," in Schedule No. 2 under the heading of "Unfired Vessels", — see third page of P-1 and page 1f.

The Tank consisted of a large metal cylinder, resting in a horizontal position on a kind of cradle which was bolted to the floor. The bolts held and at no time was the tank or the cradle displaced, Frazier, p. 83. The lower half of the tank was surrounded by a steam chamber or jacket. This chamber was attached to the tank in such a way that the outside wall of the cylinder constituted the inside wall of the chamber. The cylinder and chamber were entirely encased (excepting certain openings) in an asbestos covering.

The Boiler Inspection and Insurance Company of Canada, in consideration of $1589.50, premium, gave this undertaking; "does hereby agree with the Sherwin-Williams Company of Canada, Limited, ...

SECTION I.—To PAY the Assured for loss on the property of the Assured *directly* damaged by such accident (or, if the Company so elects, to repair or replace such damaged property), excluding (a) loss from fire (or from the use of water or other means to extinguish fire), (b) loss from an accident caused by fire, (c) loss from delay or interruption of business or manufacturing or process, (d) loss from lack of power, light, heat, steam or refrigeration, and (e) loss from any *indirect result* of an accident;" (our italics).

Sections II, III, IV and V are not immediately relevant. The conditions of the Policy are found on the back of the first page and will be dealt with later.

Condition No. 3, appearing on the back of the first page of the Insurance Policy, is headed "Other Property Insurance" and is in these terms:—

"3. In the event of a property loss to which both this insurance and other insurance carried by the Assured apply, herein referred to as 'joint loss', (a) the Company shall be liable only for the proportion of the said joint loss that the amount which would have been payable under this policy on account of the said loss had no other insurance existed, bears to the combined total of the said amount and the whole amount of such other valid and collectible insurance; or, (b) the Company shall be liable only for the proportion of the said joint loss that the amount which would have been payable under this policy on account of said loss had no other insurance existed, bears to the combined total of the said amount and the amount which would have been payable under all other insurance on account of said loss had there been no insurance under this policy; but this clause (b) shall apply only in case the policies affording such other insurance contain a similar clause."

Again, let it be clearly understood that Respondent's policy was not an insurance against loss by either fire or explosion. The Appellant was insured against loss by fire and explosion by twenty-two fire insurance policies produced as Defendant's Exhibit D-6-1 to 22.

Until Sunday, the 2nd of August, 1942, #1 Steam Jacketted Bleacher Tank (hereinafter referred to as "the tank") had been used solely for the bleaching of linseed oil, but on that date, following instructions previously issued by Mr. Moffat, the General Manager of Appellant's Linseed Oil Plant, a quantity of discoloured turpentine was to be bleached by a process almost the same as that used to bleach linseed oil. It is contended that a formula now missing issued by a chemist, also missing, was given to Asselin who was in charge of the tank. To bleach linseed oil, its temperature is raised to 200° F. To bleach turpentine, its temperature is raised to 165° F., p. 45; otherwise, the procedure is the same.

On Sunday, the 2nd of August, 1942, about ten o'clock in the morning, an explosion occurred in the Linseed Oil Plant of the Appellant. It was followed by a fire. One man was killed. The damage was estimated at $159,724.62.

The amount of damages attributed by the Appellant to causes other than fire and water, and claimed from Respondent under the policy, was $46,931.28, — the amount originally claimed

by the action. The details of this sum are set forth in the Proof of Loss, Exhibit P-5.

It may be just a coincidence that Respondent's policy is limited to $50,000.00.

Appellant says that the various Fire Insurance Companies on the fire risk have paid $112,793.34, in full settlement of the loss attributed to fire or water, Exhibit D-3, p. 768.

In brief, therefore, Appellant claimed in the trial Court that, of the damages caused by the disaster of the 2nd of August, 1942, amounting in all to $159,724.62, the Respondent was liable under its policy "after deduction of the amount attributable to loss by fire and water", for $46,931.28. From this sum, however, two items amounting to $1139.90 were deducted at trial by Appellant.

(1) $182.12, mentioned in page 3 of the Proof of Loss, P-5, p. 740, and withdrawn by Retraxit before Enquete, p. XVII, and

(2) $957.78, withdrawn by Retraxit at Enquete, p. XVIII,

leaving a balance of $45,791.38.

The twenty-two fire insurance companies also paid to Appellant the original amount claimed by the present action, i.e., $46,931.28. This fact the Fire Insurance Cos attempted to conceal from the Respondent as well as from the Court, p. XVI, l. 20. These companies contributed in proportion to the amount of their rsepective policies, and each one obtained from the Appellant a document called "Receipt, Transfer and Subrogation", said to be each in terms identical to D-9 except as to the amount mentioned therein.

The only Receipt produced, Exhibit D-9, that given by Appellant to the Aetna Insurance Company, is in these terms:—

> "SHERWIN-WILLIAMS COMPANY OF CANADA LIMITED, the undersigned, hereby acknowledges to have received at the execution hereof from AETNA INSURANCE COMPANY Seven thousand, five hundred ninety-eight 40/100 Dollars being the latter's pro-rata proportion of the sum of forty-six thousand nine hundred and thirty-one dollars and twenty-eight cents ($46,931.28) now claimed by the undersigned from Boiler Inspection and Insurance Company of Canada by action instituted in the Superior Court for the District of Montreal, under the number 221869 of the records of said Court, as being

the amount of loss or damage to the property on the undersigned, alleged to have been suffered on the second of August, nineteen hundred and forty-two, as a result of an accident consisting of a sudden and accidental tearing asunder of a steam jacketted bleacher tank, at the premises of the undersigned in the City of Montreal.

In consideration of the aforesaid payment of Seven thousand, five hundred ninety-eight 40/100 Dollars ($7,598.40) to the undersigned, by the above named Company, the undersigned hereby transfers, assigns and makes over unto the said Company in the proportion that the sum now paid, bears to the sum of forty-six thousand nine hundred and thirty-one dollars and twenty-eight cents ($46,931.28), all the undersigned's rights, title and interest in and to the claim of the undersigned against the said Boiler Inspection and Insurance Company, under the latter's policy No. 60350B dated March 9th, 1940, issued in favor of the undersigned; hereby subrogating and substituting the said AETNA INSURANCE COMPANY in all the undersigned's rights, title and interest in and to said claim as well as in and to the aforesaid action and all proceedings had thereunder, with the right on the part of the said AETNA INSURANCE COMPANY to continue the said action but at its own expense, as of the date thereof, in the name of the undersigned and with the benefit unto said Company of all costs incurred and to be incurred by virtue of said action, in so far and to the extent that the undersigned is able to deal with such costs.

Montreal, Mar. 3, 1944.

The Sherwin-Williams Company of Canada, Limited,

Per P. W. Hollingworth,
Sec.-Treas."

None of the documents was served upon the Respondent nor was the Respondent advised of the matter either by the Appellant or by any of the Fire Insurance Companies.

The trial Judge on the 29th of March, 1946, (p. 771), awarded Appellant the full amount of $45,791.38 with interest from the date of judgment.

By Declaration of Settlement of Cross Appeal K.B. No. 3106 dated the 3rd of May 1947, the parties agreed that interest, if the appeal failed, would accrue from the date of the service of the action, to wit, 17th of September, 1943, instead of from the date of judgment as held by the trial Judge.

(b) EVENTS LEADING UP TO THE EXPLOSION.

Appellant's Linseed Oil Plant is located in Montreal; it is a three-storied construction. Two stories of the western part of the building were old construction. The eastern part was new as was the entire third storey. The plant is bounded to the north, by St. Patrick Street, to the west, by Atwater Avenue, to the south, by Centre Street, to the east, by D'Argenson St. The tank was situated on the top floor, i.e., the third floor. Plans of this floor are produced as P-7, p. 752, and D-10, p. 765. The third floor was divided into two large rooms by a wall in which there were two doors eight feet square. These doors are referred to in the evidence as the "North Door" and the "South Door" and the rooms are designated as the "East Room" and the "West Room". The height of the ceiling is about seventeen feet. The tank was in the East room and the filter presses in the West room. As the plan indicates the stairway from the lower floors opens into the East Room as did the elevator shaft. An outside fire escape consisting of a metal stairway ran down to the yard from a doorway near the south-west corner of the West Room.

In the early Spring of 1942, the Appellant had learned that it had on hand a quantity of discoloured turpentine. After complaint was received from customers to whom quantities had been shipped, it was decided to bleach the turpentine in Tank No. 1 which was ordinarily used to bleach Linseed Oil.

In fact, turpentine had never before been bleached in the plant, p. 189, l. 34. The new operation aroused a good deal of curiosity at the plant, p. 190, l. 45, as was established by the number of men who had congregated just before the accident at filter press No. 6 in the West Room with no duty whatever to perform there.

The bleaching operation was under the general supervision of Frazier, under the immediate supervision of Rymann and was carried out by Asselin and his assistant Gosselin. At p. 173, Asselin describes in detail what happened. He said that in the first place, a vacuum had to be established in the tank by turning valve no. 5 shown on P-8, at p. 753. It was this valve which con-

trolled the air release line. When it was intended to use the vacuum pump, valve no. 5 was shut, the air pumped out of the tank and a vacuum created, which made it possible to draw liquids and powders into the tank by what is called the vacuum pump. Asselin says, p. 173, l. 3, "Premièrement il faut mettre le 'vacuum' dessus."

This having been done, 850 gallons of discoloured turpentine from 16 or 18 drums were introduced into the tank. Then Valve No. 5 which is called "release valve" was opened. The agitator on the shaft which runs through the centre plane of the tank operated before any steam was applied to the jacket. Then the steam was turned into the jacket up to a temperature of 145° to 160°F. when the valve controlling the steam was shut and then valve no. 5 was shut and a vacuum again created within the tank for the purpose of drawing in 200 lbs. of Filterol and 50 lbs. of Filtersel. When the filterol and the filtersel had been put into the tank, (the witness does not mention filtersel here, but he does at p. 178), valve no. 5 was again released and was open at all times afterwards. This valve opened, permitted vapour to escape to the atmosphere through what Mr. Hazen has called "the vent", pp. 272 and 273.

After the vacuum was released, the agitator operated for about half or three-quarters of an hour. — "On laissait brasser peut-être une demi-heure ou trois-quarts d'heure", p. 174.

Then Asselin went to the cellar to start the pump, having opened a valve which permitted the turpentine to run to the cellar, p. 180. Asselin himself, was operating the filter press. When he came back to the filter room, Frazier, Rymann, Gosselin, and a number of others had congregated near filter press no. 6. The colour of the turpentine was unsatisfactory. He was sent to the cellar to stop the pump, p. 180, l. 40. He went down by the stairs and came back the same way. He was astonished to find that the turpentine was still coming through the filter, — p. 181, l. 48. He thought something was wrong with the pump and he was about to turn the valve to cut off the flow of turpentine from the tank to the cellar when he heard a sizzling noise.

The facts leading up to the explosion are best described in the written statements of the Appellant's employees made to their employer a few days after the accident, i.e., on the 10th of August 1942. The statement of Frazier, the Superintendent of the Linseed Oil Mill is fyled as D-1; the statement by Rymann, the man in charge of the operation as D-2; statement by Asselin, the man in

charge of the tank, as D-4; and the statement by Boucher who was taking drums of turpentine up to the third floor by means of the elevator, as D-5.

The statements were dictated by the men, taken down in shorthand by the stenographer of Mr. Moffat, the manager of the Appellant, and transcribed by her, see pages 457 and 458.

Defendant's Exhibit D-1 at Enquete, Page 719 of the Case:

"August 10, 1942.

Statement by Mr. Frazier concerning accident at Linseed Oil Mill, which occurred Sunday, August 2nd.

I arrived on the third floor of the mill about five minutes to ten.

Walked around, glanced at machinery, was running O.K. Walked over to press, picked up a bottle, looked at the liquid. This was not O.K. to my knowledge, then decided to discuss color with man in charge, Mr. Rymann. While discussing it I heard a sizzling noise in the bleaching room. Was going to walk over to investigate and just as I walked towards the press I glanced at the North side and saw fumes or vapors, then saw fire and called to the men to get out. Some were going to the staircase but I said, no, the fire escape. I went with them.

As I put my foot on the fire escape I heard a noise like a boom. When we got down to around the second storey I heard the second noise which was louder. We stood paralyzed for about two seconds. Could not move.

Went to bottom of ladder and crawled out under platform to railway tracks.

The whole thing happened in 5 to 7 minutes at the most.

Witness: J. S. Moffat. H. A. Frazier."

Defendant's Exhibit D-2 at Enquete, Page 720 of the Case:

"August 10, 1942.

Statement by Mr. A. Rymann concerning accident at Linseed Oil Mill, which occurred Sunday August 2nd.

Came in 15 minutes before explosion, approximately 9:45.

Was over at tank, looked at it, temperature was up to 165. Sent Henry down to the pump to start it. Stopped close to filter while he went down to pump. Stayed at filter until explosion happened.

I stayed at the filter and watched it come up, looked at it and stayed 5 minutes or so. All at once Mr. Frazier walked in. He was telling me the stuff did not look very good and decided to stop the pump and change cloths. Henry stopped the pump. He waited until everything stopped and then figured would change the cloths in the filter. All of a sudden we heard a sizzling noise like a steam valve breaking. Saw steam coming around the North door and figured would walk to the South door to see what was the matter. The doorway was full of vapors. Saw a big flash like fire. We had to get out by fire escape. While out on the fire escape heard an explosion. Did not wait but went downstairs and saw that walls had fallen.

I left building last. Henry was in front of me.

Explosion took place while I was at filter press, Was just starting down fire escape when second explosion occurred.

Witness: J. S. Moffat. A. Rymann."

Defendant's Exhibit D-4 at Enquete, Page 721 *of the Case.*

"August 10, 1942.

Statement by Mr. H. Asselin concerning accident at Linseed Oil Mill, which occurred Sunday, August 2nd.

Came in at 7 o'clock.

First thing I started to pump Turpentine into the tank. I bleached it, put the bleaching earth in, put the steam on to heat it up to 165, then I rested it for 30 minutes. Agitator was going but no heat.

I went downstairs everything was O.K. to start filtering. Went downstairs and came up again to third

floor to start filtering. Mr. Frazier came in and I had to go down to shut off the pump. I stayed at the filter, then went back to the pump downstairs and stopped it. Came back again and was discussing with Mr. Frazier about changing cloths.

I heard a hissing, not sure if I saw flames or fumes. Was looking towards the South door. I went towards it two or three steps. It must have been flames so I turned around. Frazier caught me and told me to use the fire escape. I went down. I heard a noise but could not tell where. The first noise was not an explosion, like a roar. I came down by the fire escape and went towards the yard. Witness: J. S. Moffat. H. Asselin."

Defendant's Exhibit D-5 at Enquete, page 728 *of the Case*:

"August 17, 1942.

Statement by Mr. Alphonse Boucher concerning accident at the Linseed Oil Mill which occurred Sunday, August 2, 1942.

Commencing 9:30 I was bringing drums up and down by elevator with Durocher. When I was taking up the second load Mr. Frazier came up. When we got to the top floor I heard Mr. Frazier say he was going to No. 6 press and instead of taking the drums off I walked over to No. 6 press. Durocher pulled a drum off and both of us went over to the press. I was standing in the middle between No. 4 and No. 6 press, facing the sewing machine and seed tanks.

I heard a noise and on hearing it I turned around facing the North door. When I turned around I saw blue-white smoke. Before I saw that I heard something like a safety valve popping. From the press I went South.

When I saw the smoke I was frightened. When I heard Mr. Frazier tell the boys to get out I was at the door. When I was on the fire escape I did not hear anything or notice anything until I got near the second floor when I heard what I think was the second shock. It sent me against the railing and I hit my leg. When I got to the bottom I jumped onto the platform, went down about six steps and along the track and through the seed elevator.

Witness: J. S. Moffat. Alphonse Boucher."

(c) COMMON GROUND.

It is common ground that the above statements establish that the events hereinafter enumerated occurred in the following order:—

1. There was a sizzling or hissing sound;

2. There were "fumes or vapors" according to Frazier, p. 719, or "steam" or "vapors" according to Rymann, p. 720, filling the North and South doorways in the fire wall dividing the East room where the tank was from the West Room where the filter presses were. Boucher saw blue white smoke in the direction of North Door, p. 728, l. 48.

3. There was "fire" according to Frazier, p. 719; "big flash like fire" according to Rymann, p. 719; "it must have been flames" according to Asselin, p. 721.

4. Then followed a noise which Frazier described as a "boom"; Rymann as "an explosion". Asselin says the first noise was not an explosion "but like a roar".

5. Then came the major explosion which paralysed Frazier so he "could not move" for about two seconds, raised the roof from the building, blew out the windows and the walls and disturbed the whole structure.

(d) THE PLEADINGS.

1. *Declaration.*

In its declaration (Case pages III - IV), Plaintiff-Appellant asks for an aggregate condemnation of $46,931.28 which it alleges represented the total damage other than fire caused by the accident in question.

Paragraphs 5, 6 and 8 are as follows:—

> "5. THAT the total loss on the property of the Plaintiff directly damaged by the said accident amounted to One hundred and fifty-nine thousand, seven hundred and twenty-four dollars and sixty-two cents ($159,724.62) including damage to property of third parties to the amount

of One hundred and eighty-two dollars and twelve cents ($182.12) as hereinafter stated, with respect to part of which total loss the Defendant is liable towards the Plaintiff as herein stated."

"6. THAT the Defendant is liable towards the Plaintiff to the amount of Forty-six thousand nine hundred and thirty-one dollars and twenty-eight cents ($46,931.28) respecting such loss from such accident to such object, being, to the extent of Forty-six thousand, seven hundred and forty-nine dollars and sixteen cents ($46,749.16), loss on the property of the Plaintiff directly damaged by such accident to the actual cash value thereof as shown in detail in the Proof of Loss hereinafter mentioned and filed herewith as Exhibit P-5, and to the extent of One hundred and eighty-two dollars and twelve cents ($182.12) damage to property of third parties which the Plaintiff became obligated to pay and did pay to such third parties by reason of the liability of the Plaintiff for loss on the property of such third parties directly damaged by such accident, the whole under, pursuant to and in accordance with the provisions of the said Insuring Agreement."

"8. THAT the details of the said loss were prepared and the determination and calculation thereof were made by Messrs. Ross & MacDonald, Architects, and The Foundation Company of Canada Limited, Contractors, and the Defendant has agreed to accept their costs incurred by the Plaintiff as the basis for adjustment of the loss in accordance with the provisions of the said Insuring Agreement, if in the final analysis the Defendant is found liable, the whole as more fully appears by a signed copy of a letter addressed by the Defendant to the Plaintiff dated August 14th, 1942, hereinafter mentioned and filed herewith as Exhibit P-4."

In substance Plaintiff-Appellant alleged that the damages represented by the figure $46,931.28 were a direct result of the accidental tearing asunder of a steam jacketted bleacher tank or parts thereof, exclusive of damage attributable to fire for which the insurer was not liable under the terms of the Policy.

Plaintiff concludes:—

"Wherefore the Plaintiff concludes and asks that by judgment to be rendered herein the Defendant be condemned

to pay to the Plaintiff th sum of Forty-six thousand, nine hundred and thirty-one dollars and twenty-eight cents ($46,931.28) with interest from the date of service of the Writ of Summons issued in this action and costs in favour of the undersigned Attorneys."

2. *The Plea.*

By its Plea, (page IX), Defendant-Respondent invokes its policy P-1 denies the principal allegations of Plaintiff and in particular that the damages represented by the figure $46,931.28 were the direct result of the accident exclusive of that attributable to fire.

Defendant-Respondent contends that the alleged loss is a fire loss within the meaning of said Agreement.

Paragraph 16 reads as follows:—

"That in the premises it appears that the alleged loss and damage sustained by Plaintiff is a fire loss under the terms and provisions of the contracts of other insurance hereinabove enumerated and described and Defendant is in no way liable therefor, and, as a matter of fact, said other Insurers have admitted liability and have paid or agreed to pay the said loss, which fact seriously affects this Honorable Court in giving effect to the conditions of the Policy Exhibit P-1 and is relevant and pertinent to the issues herein;"

Paragraph 17 states:—

"That Defendant's liability, if any, which is not admitted, but on the contrary denied, is limited to loss on the property of Plaintiff directly damaged by a sudden and accidental tearing asunder of the object or any part thereof, to wit, the lug forming a part of the hinge on the manhole door of an unfired vessel, being used at the time as a turpentine bleaching tank, actually occurred subsequently is covered by the terms and conditions of the aforesaid policies hereinabove enumerated and described and/or under their Supplemental contracts forming part of said contracts, which extended the coverage to any direct loss or damage caused by explosion originating within the insured premises when such explosion results either from a hazard inherent to the business as conducted therein or otherwise; and if there be liability, which is denied, on the part of

Defendant under Exhibit P-1, within the terms of the definition of Accident, such liability is limited to the actual cash value at the time of the accident of the part or parts involved of the object, as defined under Exhibit P-1, after proper deduction for depreciation however caused;"

In any event Defendant-Respondent contends that because of a condition of the policy under the caption "Other Property Insurance" that he is only proportionately liable for the loss; the whole as appears from paragraph 18 of the Plea.

Defendant-Respondent concludes:—

"Wherefore Defendant prays that its Plea be maintained and that the action of Plaintiff be dismissed with costs."

3. *Particulars.*

Defendant provided certain particulars with respect to paragraphs 9, 11 and 16 of its Plea, page XV.

4. *Answer.*

In its answer Plaintiff joins issue with Defendant on substantially all the disputed allegations, page XVI.

5. *Retraxit.*

By retraxit Plaintiff subsequently reduced its claim by the following amounts:—

1. Damage to other properties (Details page 3 Proof of Loss Exhibit P-5)	$182.12
2. Merchandise — Turpentine, Page 2, details Proof of Loss	957.78
	$1139.90

thus reducing its claim to $45,791.38 and the condemnating conclusion to such amount, Case p. XVIII.

PART II — JUDGMENT

It is submitted that the Judgment of the Court of King's Bench, Appeal Side, is well founded in that it held:

1. The loss suffered by Appellant was NOT loss on the property of the Assured directly damaged by such accident there being a *nova causa interveniens* which was fire and Respondent is only liable for DIRECT damage; Factum, p. 17,

"CONSIDERING that the damages claimed were not the direct result of the tearing asunder of the tank", Case p. 797, l. 8;

"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." Barclay, J. p. 823, l. 12;

"Il y a eu *causa interveniens,* ce qui devait entraîner le rejet de l'action." Bissonnette, J. p. 832, l. 20;

"CONSIDERING that the policy in question is not an explosion policy but a policy restricted to the direct damages, other than fire, caused by the accidental tearing asunder of the object insured;", Case p. 797, l. 1.

2. The loss suffered by Appellant was a fire loss, it being indisputable that there was a fire as proven by the factual witnesses and Respondent, by the terms of the said policy, is not liable for "loss from wire", Factum p. 24,

"The evidence is uncontradicted that turpentine mixed with filtercel and filtrol is not in itself inflammable. It was only when this mixture was allowed to escape into the air and mix with the air that it became highly inflammable and liable to explode if ignited. Something outside the tank and in no way connected therewith caused this inflammable mixture to ignite." Barclay, J. p. 822, l. 42.

"Car, il faut bien l'affirmer, si l'on prend pour cause initiale de ce tragique accident, les vapeurs qui se sont dégagées du réservoir et que l'on retienne cette cause pour conclure à la responsabilité de l'appelante dans le cas d'une explosion, qui s'est nécessairement produite *en raison du feu, il faut* en toute logique mettre également à sa charge

toutes les conséquences directes de cette explosion. Or, rien ne me paraîtrait, sous un tel raisonnement, être un dommage plus immédiat et plus direct que celui résultant de l'incendie de l'édifice même"; Bissonnette, J. p. 831, l. 42;

"CONSIDERING that the policy in question deals with two risks, an accident as defined, and fire which is specifically excluded;", p. 796, l. 44;

"CONSIDERING that fire of any description, whether a direct or indirect result of the tearing asunder of the tank, is excluded by the terms of the policy:", p. 796, l. 48.

MOREOVER

A. The Court of King's Bench, Appeal Side, might have maintained the appeal and dismissed the judgment of the Trial Court because: Factum p. 42,

The Plaintiff-Appellant had not on interest sufficient in the claim which it had advanced to maintain an action at law.

The Appellant has no interest to support its claim having been indemnified in full by the Fire Insurance Companies, and having subrogated them in all its rights, including the right to use its name, to the said companies, and consequently any claim which it may have had against Respondent has been extinguished.

This defence was rejected by the Courts below, but Respondent submits, with great respect, that Appellant having subrogated the Fire Insurance Companies in all its rights, it no longer has the interest necessary to support the present action.

SUBSIDIARILY

B. Moreover, Respondent submits, subsidiarily, that even had it been liable, it would only have been liable for a small part of the loss because: Factum p.

There was liability on the part of the Fire Insurance Companies in the event of such loss. The tank in question was not "a pressure container" within the meaning of the exclusion appearing in the combination policy of Associated Reciprocal Exchange which covered "direct loss or damage caused by explosion."

PART III — ARGUMENT

FIRST POINT:—The loss suffered by Appellant was not loss on the property of the assured directly damaged by such accident, there being a nova causa interveniens which was fire, and Respondent is only liable for DIRECT damage.

The insured object in this case is described in Schedule #2 "Unfired Vessels" as "#1 Steam Jacketted Bleacher Tank." (Page 1-f of Policy).

The Respondent undertook by Section I, which is the principal insuring agreement of the policy P-1, p. 1:—

> "TO PAY the assured for loss on the property of the assured directly damaged by such accident (or if the Company so elects, to repair or replace such damage to property) excluding
>
> (a) Loss from fire (or from the use of water or other means to extinguish fire);
>
> (b) Loss from an accident caused by fire;
>
> (c) Loss from delay or interruption of business, or manufacturing or process;
>
> (d) Loss from lack of power, light, heat steam or refrigeration;
>
> (e) Loss from any indirect result of an accident."

Thus, the Respondent undertook to insure the Appellant's property DIRECTLY DAMAGED by an accident. In contradistinction to this liability, however, it expressly excluded:— "(a) Loss from fire, etc (e) Loss from any indirect result of an accident."

The first distinction to be made is between the "property directly damaged" and "property indirectly damaged", the Respondent being liable for the former and not the latter..

In other words, Respondent is responsible for the direct damage arising from the accident, that is, the loss which can be directly attributed, *independently of any other intervening cause,* to an accident, as described. If it has been proved that the walls, steel girders, etc, have been directly damaged by the accident *without any intermediary cause,* then the Respondent is liable.

On this point, Mr. Justice Bissonnette says, p. 827, l. 39:

"Dans son sens littéral, cette stipulation paraît nettement indiquer que la défenderesse n'a jamais assumé le risque provenant d'un incendie ou par un accident résultant d'un incendie. Ces deux contigences sont expressément exclues; excluding (a) loss from fire, (b) loss from an accident caused by fire, et (e) loss from any indirect result of an accident.

Ces trois restrictions à sa responsabilité n'ont, à mon avis, qu'un seul sens et elles viennent circonscrire l'obligation principale d'indemniser pour toute perte directement causée par 'l'accident' prévu et défini dans le contrat même."

Respondent submits that a close examination of the uncontradicted proof in this case clearly establishes the existence of another intervening cause, which was fire.

Frazier, D-1, p. 719, l. 50: "saw fire."

Asselin, D-4, p. 721, l. 33: "It must have been flames. . ."

Rymann, D-2, p. 720, l. 43: "Saw a big flash like fire."

The existence of the fire, as witnessed by Frazier, Asselin and Rymann, before the explosion, can in no way be attributed to an accident as described in the policy, i.e., the "tearing asunder" of the bolts and pins of the manhole door of the tank. Fire existed and was seen before the accident to the tank occurred. The vapors which escaped from the open vent and from the periphery of the door, pp. 272, 273, were aflame before the door was blown off, Exhibits D-1, D-4 and D-2, above quoted.

Mr. Hazen, Appellant's expert in chemistry under cross-examination, says p. 272, l. 1:—

"Mr. Hackett, K.C.:—

Q.—Now, Mr. Hazen, what would be the effect of the vent which was open, on a pressure which rose as rapidly as the pressure rose in tank No. 1? A.—At first, the vent would relieve the pressure entirely. As the reaction proceeded more violently, it would only partially relieve it. When the reaction got up to a temperature around 400, it wouldn't begin to relieve it; it would only let out a very small proportion of the rapidly forming vapor.

Q.—I put it to you, Mr. Hazen, that what has been called the sizzling noise, the noise which was likened to

the breaking of a steam main. . . . A.—I didn't think that was referred to as a sizzling noise, a sizzling noise. What I think you mean is that a steam valve, broken, would permit the vapors to escape through it with a sizzling noise; isn't that it?

Q.—I am asking if the sizzling noise would be accounted for by the escape of the vapor or whatever was thrown off by the combination in the cylinder, through the vent? A.—It would account for some of it, surely, not necessarily all of it.

Q.—Where else could it come from? A.—From around the sides of the door. As the pressure built up, those doors would lift, or, that door, would lift, and allow vapors to escape all around the edge of it, between the door and the gasket, and that certainly would produce some sizzle.

Q.—Some sizzle?

The Court:—And the word 'some' is obviously underlined by the witness and used in the colloquial sense, meaning a high degree of sizzling.

Q.—Am I right in that statement? A.—Yes.

The Court:—The learned Judges of the Court of Appeal, if they have the advantage of reading this, might overlook that. That is why I put it in the deposition.

By Mr. Hackett, K.C.:—

Q.—What I am going to ask you now, Mr. Hazen, it this:—whether the sizzling noise that was heard by the witnesses Frazier, Rymann and Asselin, came from the door or from the vent? A.—I cannot say. I can only infer from their testimony, and I do infer that the sizzling noise was the result of escaping vapors which immediately afterwards were seen coming through the doorway, and that those sizzling vapors escaped from that pressure tank, and that in all probability they came from both.

By the Court:—

Q.—That is, from both the vent and the door? A.—Yes.

By Mr. Hackett, K.C.:—

Q.—You have already said that, — but what I was trying to determine is whether the noise that was heard was produced by the vapors that escaped, as I understood you to say to the Court, around the complete periphery of the door, or from the vent? A.—From both, I think.

Q.—Well, do you think that the sizzling would be the same from the apertures around the door as from the vent? A.—I don't think anybody could distinguish at any distance. The vapors coming from the vent had to pass through the openings in a twisting direction inside a brass valve. That would produce a hissing sound. If you should ever open a valve a little way on any steamline you will hear it sizzle. Now, in the same way, when that cover lifted, — and that cover lifted, — it later lifted up so suddenly that it went up against the ceiling, — I say that, before that occurred, the side or all sides of the door would spring up and allow vapors to escape, and I have no doubt, — and it is an inference again, because I did not see it, — that that sizzling noise was produced by both."

There was already fire in both the east and possibly the west room between the "sizzling noise" and the "boom" described by Frazier, pp. 719-720, between the "sizzling noise" and the "first explosion", described by Rymann, p. 720, and the "hissing" and the "roar", described by Asselin, p. 721.

Dr. Lipsett gives his version at page 531 l. 46 as follows:—

"The bolt on the right-hand side of the tank, looking at it from the outside, would bend rather easily under this pressure, because the two lugs holding the bolt on this side were 4 and 1/8th inches apart, and the retaining arm would press outwards in the centre of this 4-and-1/8th inch length. This may be seen clearly in photograph P-6-c.

Any appreciable pressure within the tank would tend, thus, to bend the bolt and push the door of the tank ajar and allow turpentine vapors to escape under pressure".

This was the sizzling noise or hissing heard by the men."

The men, upon hearing the "sizzling or hissing" sound, turned around to investigate, whereupon they saw vapors fire

and flames. The vapors which filled the east room and the two doors and had already invaded the West room, Frazier, p. 103, l. 33, had ignited and there was fire. Ultimately the pressure within the tank grew to such proportions that the release provided by the vent and around the periphery of the door was not sufficient and the accident described above occurred, thereby permitting a greater quantity of vapor to mix with the already ignited vapors in the East Room. The climax was the inevitable explosion but there was fire existing, before the accident i.e. before the door was blown off the tank.

The facts, their existence and sequence are very significant. The elements of an explosion were not within the tank. The elements of an "accident", as defined, were. It follows that an explosion could not be an "accident" as defined by the policy. Within the tank there was but turpentine gas which is not inflammable. It could only become ignited when it had escaped from the tank to the atmosphere, and become diluted in or mixed with the air. It was then, and then only, that it became an inflammable mixture. It had then lost its original characteristic of uninflammability. It became inflammable when it ceased to be what it was inside the tank. The new substance composed of turpentine gas and air had peculiar characteristics of its own which distinguished it sharply from both of its elements, gas and air, neither of which, separately, is inflammable or explosive. It wasn't the accident that transformed them. It was their ad-mixture which made of the uninflammable turpentine gas and the uninflammable air, an inflammable and explosive mixture.

All this happened outside the tank. The turpentine gas might have been released to the atmosphere and become mixed with it and still nothing happen. It was because the new mixture came into contact with fire, that it burned and subsequently exploded. There were two new intervening causes between the turpentine gas and the explosion. The first: its mixture with the atmosphere; the second: the fire which ignited the new mixture. Each of these was a "nova causa interveniens", — "atmosphere," which made of the uninflammable gas an inflammable mixture and "fire", which caused the new mixture to explode.

How then, can it be said that the Respondent's obligation to "pay the assured for loss on the property of the assured directly damaged by such accident" includes the loss resulting from explosion which occurred outside the tank, as the result of the ignition of a substance of which the contents of the tank was

but one element and which could not have exploded had it not been for the presence of two elements which were not within the tank, — air and fire?

There is no proof of any loss on the Property of the

Assured, directly damaged by such accident.

The burden of proof is on the Appellant.

Had the manhole door in its flight knocked down an outer wall or destroyed machinery or equipment or stock, the Insurer might have been liable. That would have been damage coming within the terms of the policy, — "Loss on the property of the assured directly damaged by such accident."

In considering the meaning of the words "directly damaged", the learned Trial Judge turned to Article 1075 of the Civil Code, and stated at p. 783, l. 19:—

> "It seems to the undersigned that the interpretation to be given to the phrase 'directly damaged' (Section I of the policy) should be the same as that given to the phrase 'an immediate and direct consequence' as found in Article 1075 C.C. In other words, it means nothing more than what is implied in the generally accepted Latin maxim: Causa proxima non remota spectatur."

Without admitting that the fire in this case can be held to be "an immediate and direct consequence", Respondent contends that the Article does not apply, nor should any analogy be attempted in the use of the word "directly".

The language of the Code is helpful in many perplexities, but it is submitted that in this instance, it cannot safely be relied upon. The parties entered into a contract by the terms of which the Insurer undertook.

> "to pay the Assured for loss on the property of the Assured directly damaged by such accident",

and at the same time, excluded:

"(a) Loss from fire, etc.

(b) Loss from an accident caused by fire;

(c) Loss from delay or interruption of business. . . ;

(d) Loss from lack of power, light, etc.

(e) Loss from any indirect result of an accident," see foot of p. 25.

It is submitted that the Court, has misdirected itself. It has invoked a principle of punitive justice applicable to the perpetrator of fraud and given it effect in a matter of contract in which both parties stand on a footing of moral equality. "Direct" is used in contradistinction to "indirect". This is borne out by the use of the word "indirect" in clause (e) of Section 1 of the Policy whch reads:—"loss from any indirect result of an accident".

The word "direct" as distinguished from "indirect" has a much narrower and more precise meaning in the contract of insurance than in the statement of principle found in Article 1075 of the Code where, due to special circumstances, the perpertator of the fraud is naturally held to be responsible for the damages which resulted from his fraud, although these damages were restricted to damages which are "an immediate and direct consequence" of the fraudulent inexecution of the obligation.

The property of the assured was not directly damaged by the accident. To hold that it was is to make no distinction between the property directly damaged by the accident, i.e., the property of the assured damaged by the released pressure itself or by the missiles which it hurled, and the property indirectly damaged by fire and explosion resulting, not from the contents of the tank, but from the contents of the tank mixed with a new element, air, and by the intervention of a second new cause "fire". If the force of the released pressure had pushed out a wall, if the door had broken or destroyed machinery, if the contents of the tank had spoiled stock, that might be "property directly damaged by" the accident. No nova causa interveniens would there be brought into play. But that isn't what happened.

SECOND POINT:—The loss suffered by Appellant was a fire loss, it being indisputable that there was a fire as proven by the factual witnesses and Respondent, by the terms of the said policy, is not liable for "loss from fire".

Respondent submits that Appellant's loss does not fall within the insuring clause of P-1, Section I, but does fall within any or all of the exclusions (a), (b) and (c) of the same clause.

The trial Judge held at p. 783:—

"The next question to be considered is closely related to the one just discussed, but is distinguishable therefrom. *It is Defendant's contention that the entire loss is attributable to fire and is, therefore, excluded by the specific terms of the policy.*"

Continuing at p. 784 His Lordship said:—

"This contention rests upon the exclusion indicated by the letter (b) in Section I of the Policy, which exclusion reads: 'loss from an accident caused by fire'.

Defendant's argument on this point (as the Court understands it) may be expressed as follows:—

As already stated, all the experts agree that the explosion could not have occurred unless there had been *ignition* of the explosive mixture. Ignition means *fire* of some kind; therefore fire caused the explosion and all the resulting damages. Consequently, the entire loss, whether caused by shattering or by fire, must be attributed to the original 'fire' which ignited the explosive mixture.

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."

This is a finding of fact. The Court holds that there was a fire in the East room before the explosion.

Mr. Justice Bissonnette comments on the exclusion of loss from fire in Respondent's policy, p. 831, l. 32:—

"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 agent 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.

"Donner un autre sens à la police d'assurance conduirait à des conséquences qui rendraient fort onéreux et à un degré disproportionné les risques découlant de la police d'assurance."

Continuing at p. 784, l. 23, the learned trial Judge said:—

"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 else- "where in the establishment. In this connection, one may "note Dr. Lipsett's remark that when an explosive mixture "is formed in a place such as Defendant's plant, it is almost "bound to encounter some source of ignition. Accordng to "Dr. Lipsett (who is confirmed on the point by Dr. Lortie), "an explosion of this nature passes through three stages. "He describes these stages as follows (deposition page "775):—

> " 'When an inflammable or explosive mixture "is ignited, the detonation does not take place im- "mediately. The explosion occurs in three stages. In "the first stage a flame moves through the explosive "mixture at a slow, more or less uniform rate of "speed. In the second stage the speed of the flame "increases, and the flame may oscillate backwards "and forwards in the explosive mixture, and there "may be turbulence or a mixing up of the gases in "the mixture, and finally there is the third stage "in which the flame is accelerated in velocity to a "great speed and there is usually a loud report "and this is the stage termed detonation.'

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

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

"Appellant contends that this question must be an- "swered in the negative urging that the word 'fire' is to be "interpreted as meaning a 'hostile' fire — i.e. one which

"broke out accidentally and would, of itself, have consumed "property which it was not intended to consume; and there "is no evidence of any such fire having preceded the ex- "plosion.

"The distinction between a 'hostile' and a 'friendly' "fire is frequently referred to in American authorities "and Appellant cites several relevant passages from Couch: "Cyclopedia of Insurance Law (Rochester, N.Y. 1929). "Defendant, on the other hand, states that this distinction "is not recognized in Canada. The terms 'hostile' and " 'friendly' do not, indeed, occur in any of the local juris- "prudence or in any English authorities cited to the Court; "but mere terminology is not of great importance. One "finds, for instance, in *Welford & Otter-Barry*: 'The Law "relating to Fire Insurance' 3rd edition (London, 1932) "at page 59, the following elements as necessary to consti- "tute 'fire' within the meaning of a fire insurance policy:—

" '(1) There must be an actual fire or igni- "tion; hence a mere heating or fermentation will not "be sufficient to render the insurers liable for loss "occasioned thereby.

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

" (3) There must be something in the na- "ture of a casualty or accident; but a fire occa- "sioned by the wilful act of a third person, without "the privity or consent of the assured, is to be re- "garded as accidental for the purposes of this rule.'

"The undersigned has no doubt but that these ele- "ments 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."

It is to be recalled that Respondent's Policy was not a fire insurance policy.

Respondent, without admitting that the three elements above mentioned must apply in the present case, submits, however, that these elements were all present. As to the first element,

there is the uncontradicted evidence of Frazier, Rymann and Asselin. They all saw, before the door was blown off, before the explosion

> "fire", — Frazier Exhibit D-1, p. 719;
> "a big flash like fire", — Rymann Exhibit D-2, p. 720;
> "flames or fumes. . . . it must have been flames", — Asselin, Exhibit D-4, p. 721".

The testimony of the experts moreover indicates that fire is an essential ingredient to the type of explosion which took place.

As to the second element, the fumes were on fire before the explosion. There was no reason for them to be on fire. They ought not to have been on fire.

As to the third element, there can be no doubt that the fire was accidental in that it was not planned or foreseen.

The learned trial judge continues, at p. 786, l. 1:—

> "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."

At p. 786, l. 49, of the Case, the learned Trial Judge held as follows:—

> "On the whole, therefore, the Court, rejecting this third contention of Defendant, finds that the explosion cannot properly be attributed to 'fire' within the meaning of the Policy but was the direct result of the accident to the tank."

With great deference, Respondent regrets that it failed to make its point clear to his Lordship of the trial court. Respondent based its argument upon the exclusion indicated by the letter (a) in Section I of the Policy P-1, p. 2:—

"(a) Loss from fire (or from the use of water or other means to extinguish fire),"

and not, as stated by his Lordship at p. 784, l. 1:—

". . . upon the exclusion indicated by the letter (b) in Section I of the Policy, which exclusion reads: 'loss from an accident caused by fire'."

The accident had to be within the tank, see the definition of accident. "Caused by pressure of steam etc., therein".

His Lordship agreed that the explosion could not have occurred "unless there had been *ignition* of the explosive mixture", p. 784, l. 11, and that "Ignition means *fire* of some kind; therefore fire caused the explosion and all the resulting damages", p. 784, l. 13.

The learned Trial Judge, after quoting Drs. Lortie and Lipsett with respect to the three stages of an explosion, assumed that the flame or fire which Frazier, Rymann and Asselin saw "was the flame which was being propagated through the explosive mixture following the latter's ignition from an unidentified source", p. 784, l. 48, and held that it was not a fire within the meaning of P-1.

In summary therefore the learned Trial Judge held that the fire which ignited the fumes that escaped from the vent and the periphery of the door before the accident and also the fire which, according to the experts, constituted the first stages of an explosion, was not a fire.

There is no doubt that fire existed in the East room before the accident, i.e., before the "sudden and accidental tearing asunder of the object or any part thereof", that is the blowing off of the door of the tank.

Frazier, Rymann and Asselin are uncontradicted on this point.

Frazier said:—

"I heard a sizzling noise in the bleaching room. Was going to walk over to investigate and just as I walked towards the press I glanced at the North side and saw

fumes or vapors, THEN SAW FIRE (our underlining) and called to the men to get out." Exhibit D-1, p. 719.

Rymann stated:—

"All of a sudden we heard a sizzling noise like a steam valve breaking. Saw steam coming around the North door and figured would walk to the South door to see what was the matter. The doorway was full of vapors. SAW A BIG FLASH LIKE FIRE (our underlining). We had to get out by fire escape. While out on the fire escape heard an explosion." Exhibit D-2, p. 720.

Asselin explained:—

"I heard a hissing, not sure if I saw flames or fumes. Was looking towards the South door. I went towards it two or three steps. IT MUST HAVE BEEN FLAMES SO I TURNED AROUND (our underlining). Frazier caught me and told me to use the fire escape." Exhibit D-4, p. 721.

Parker, the Engineer, at page 637, l. 9, says:—

"The sizzling sound would attract their attention to "the doors leading to the east room, and did.

"The vapors escaping at high velocity, a velocity ap- "proaching or possibly exceeding to some extent 30,000 feet "per minute, as testified by Dr. Lipsett, would mix with "the air in the room and form a cloud of vapor which would "spread and was seen by the men, Frazier and Rymann and "others, in the north and south doors, Mr. Frazier stating "that he saw the cloud of vapor at the north door and Mr. "Rymann mentioning the south door. Next, Mr. Frazier "saw what he has described as fire at the north door; and "Mr. Rymann has described a flash of flame at the south "door.

"On seeing this phenomenon, the fire and flame, Mr. "Rymann, Mr. Frazier and the other men left the building "with little loss of time.

"This fire or flame, as seen in the two doorways, "probably originated from the same source. The material "leaving the manhole which is a combustible mixture when "mixed with air, would find and did find a source of igni- "tion and on being ignited would burn as witnessed by the

"men and, as there was a combustible mixture scattered "probably the full length of the east room between the two "doors, it would travel for the distance, which would ac- "count for the men seeing it at both doors.

"This fire or flame would carry back to the source "of the combustible mixture, which is the tank. This ma- "terial leaving the tank was being mixed with air and, in "an ever increasing amount, due to the increasing pressure "in the tank, was providing further combustible gases, ad- "ditional combustible gases, which would continue burn- "ing once ignited. This would give you a fire in existence "in the east room in the vicinity of the tank.

"The pressure in the vessel was continuing to build "up. It had got beyond the capacity of the vent connection "to relieve and it had sprung, or had caused leakage at, "the manhole opening, and eventually that opening was "unable to relieve the pressure and the manhole door was "blown off. The blowing-off of the manhole door released "a large amount of turpentine vapor in the room which, "mixed with the air in the room, formed a combustible "mixture, was ignited, and caused the serious explosion "which was noted by the men and stopped them, using "their own expressions, in their tracks, on the fire escape."

Mr. Parker's testimony was corroborated by Mr. Schierholtz. Neither one was cross-examined.

There was uncontradicted proof that there was fire in the East room before the accident and the subsequent explosion which damaged the plant.

Respondent had excluded "loss and fire" from the risk it assumed. Respondent submits that it is irrelevant to the issue whether this fire constituted "the unidentified source of ignition", p. 785, l .3, or whether it was the first stage of an explosion as described by the experts.

There was ignition. Something was burning, there was fire, which had it not existed, the turpentine gas mixed with air would have remained quite harmless. There would have been no explosion regardless of the accident to the tank, had it not been for this fire.

It is immaterial whether the fire as seen by the factual witnesses constituted the first stage of an explosion or not, or if

it occured five hours or five seconds before the explosion. Where, when and how the fire occurred in the chain of events does not affect the issue. The plain fact is that this Policy of Respondent does not cover "loss from fire". Fire was excluded from Respondent's risk. Had there been no fire there would have been no loss, but there was a fire, therefore Respondent is not liable for the loss.

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The argument of Drs. Lipsett and Lortie that the fire was part of the explosion cannot avail to Appellant unless loss from explosion were included in the risk.

Mr. Justice Barclay, in commenting on "accident" and "fire", says, p. 824, l. 25:—

> "As a matter of fact, this particular tank did not explode. Only the door, and possibly the rear window, two
> 20 weak spots, were dislodged. The body of the tank remained intact. 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. And what the plaintiff seeks to do is to make this limited policy apply to any kind of explosion which might be traced in part to any elements escaping from a ruptured tank which may have contributed to the explosion. This seems to me to carry the terms of the policy far beyond its natural meaning and beyond
> 30 what was in the contemplation of the parties. But, the plaintiff argues, the fire or ignition which caused the explosion was the direct result of the tearing asunder of the tank, because there was no break in the chain of causation between the accidental release of the vapour from the tank and the explosion. Even if that were so, it is not conclusive and the question remains, as put by the trial judge: 'Now, the unidentified source of ignition did, strictly speaking constitute fire; but did it constitute fire within the meaning of the policy?'
> 40
>
> "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. I find great force in the argument of the defendant that the words of Martin, B., in *Stanley vs. Western Insurance Company* (1868)

3 L.R. Ex. 71, are applicable to the case at bar, if we substitute for the word 'explosion' the word 'fire.' In that case, Martin, B. said, at p. 75:—

> "There is nothing to qualify the word "explosion", and I apprehend, therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion. The clause is exceedingly simple and we should not be justified in adding words to give it the most artificial meaning which Mr. Quain contended for".

"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."

See:—

1. *Stanley vs. Western Insurance,* 1868 L.R. 3 Exch. p. 71.

2. *Curtis's and Harvey vs. North British,* 1921 1AC p. 303.

3. *Hooley Hill vs. Royal Insurance,* 1 K.B. Div. 1920, p. 257.

4. *Descoteaux vs. Nationale de Paris,* 3 ILR 605.

Sir Wm. Ritchie, C.J., in *Hobbs vs Guardian Insurance,* 12 S.C.R. at page 634 said:—

> "I adopt the conclusions arrived at in *Scripture v. Lowell M. F. Ins. Co.* 10 Cush. Mass. 356, that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion or of both combined. In either case the damage occurring is by the action of fire and covered by the ordinary terms of the policy against loss by fire."

Henry J. at page 638 states as follows:—

"Without the fire there would have been no explosion, and the damage was occasioned by the explosion as the immediate result of the fire. The damage was, therefore, through the agency of the explosion caused by the fire. The time the fire was burning is of but little consequence, and if it caused the explosion, it is unimportant how long it lasted before the explosion took place. Suppose that instead of the almost instantaneous explosion, which I presumed took place in the appellant's store, a fire had accidentally caught in some ignitable substances and after progressing for hours had reached and exploded gun powder or some other explosive substances, and damage thereby was done to the insured property, could it be gravely argued that the subsequent explosion was not caused by the fire? The proposition to my mind, admits but of one solution. As well might it be said, in the case of three men standing on the verge of a precipice, one violently shoves a second against the third, who, by the violence, is thrown over the precipice and killed, that his death was occasioned by the second man who was pushed against him. The fire in this case took effect on the gunpowder, and the latter, influenced and promoted by the former, did the damage as the immediate and not remote result of the primary cause."

See also: *Riedle Brewery Limited vs. Merchants Fire Assurance Corporation of New York et al,* 1927 Manitoba Law Reports Vol. 36, p. 181.

The finding of Sir W. J. Ritchie in the *Hobbs Case,* at p. 634, quoted supra, was discussed and followed by the Court of Appeal of Manitoba in confirming the judgment of Stubbs C.C.J. who said at p. 186:—

"I am unable to distinguish the *Hobbs Case* in principle from the case at bar. The facts are somewhat different, in that the explosive material was gunpowder and not grain dust, and the inciting cause of the ignition of the gunpowder was known to be a burning match, whereas the exact cause of the ignition of the grain dust in this case is not known with absolute certainty. The policies were apparently the same with a similar statutory condition as to explosions. However, in view of my finding above that the explosion was caused by some sort of fire, that is, by something burning, the differences between the two cases are

of little consequence, and the *Hobbs Case* can be considered on all fours with this case."

HELD: A policy of insurance against fire which includes the statutory condition that the company shall make good loss or damage caused by the explosion of coal or natural gas in the building not forming part of the gas works, and loss or damage by fire caused by any other explosion, covers loss caused by a grain-dust explosion, where, although the origin of the explosion cannot be positively proved, its most probable cause is found to have been the ignition of the particles of grain dust suspended in the air."

Again, let it be clearly understood, that Respondent's Policy was not an insurance against loss by either fire or explosion. The Appellant was insured against loss by fire and explosion by twenty-two fire insurance policies, Exhibits D-6-1 to 22.

It is submitted that the learned Trial Judge misdirected himself when he refused to recognize that the fire raging in the East Room before the explosion was a fire within the meaning of the Exclusion of the Policy. Even if, without admitting it to be the case, the fire in the East Room was but the first stage of an explosion, it was still a fire and a fire coming within the Exclusions of the Policy. His conclusions were, p. 786, l. 3:—

" . . . but such a contention (that the fire which existed as the first stage of an explosion was a fire within the meaning of the exclusion) appears to the undersigned to be oversubtle 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."

Even if this statement were beyond respectful challenge, it would not, it is submitted, warrant the holding.

The 11th Statutory Condition forming part of all fire insurance policies, is in these terms:—

"11. The company shall make good: loss caused by the explosion of natural or coal gas, in a building not forming part of gas works, and all other loss caused by fire resulting from an explosion, and all loss caused by lightning, even if it does not set fire."

It was held in *Hobbs v. Guardian Fire and Life Assur. Co.* 1886, 12 S.C.R. 631, and in *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co. Ltd.,* 1921, 1 A.C. 303, that Statutory Condition #11 refers to an explosion which originates a fire and not to on explosion caused by a fire.

But, that is not the question. *The question is: when Respondent excluded from its risk "loss from fire",* what did it exclude?

The principle which the learned Trial Judge applies is not, it is submitted, applicable to Respondent's Policy which is not a fire policy. However reasonable and consistent it may be to apply his Lordship's conclusions to a fire policy where an explosion had been excluded, it does not follow that it should be applied to Respondent's Policy. In this case, the Insurer and the Insured agreed that the former would not be held liable for any loss resulting from fire. Fire is not defined. It is not necessary that it should be. Nor is it qualified or limited in any way. Fire is fire. To restrict the meaning of the word in the policy under consideration, is to limit. if not to pervert, the ordinary use of words. It is to read into the exclusion a limitation which is not expressed. It is to deny to words their plain, ordinary, everyday and universally accepted meaning.

In effect, and with great respect, the learned Trial Judge restated the exclusion. In the policy it was stipulated that ",a) Loss from fire" should be excluded. As interpreted by the Court, the exclusion must read: "Loss from fire except fire (be it the primary stage of an explosion or not) which really results in explosion", in which event, the liability of the Insurer shall continue."

The contracting parties had no intent of ascribing to the word "fire" any meaning other than that consistent with its plain, ordinary and accepted significance. No limitation or re striction whatever was placed upon it. yet the learned judge has read such a limitation and restriction into it.

The learned Trial Judge discussed

Sin Mac Lines Limited v. Hartford Fire Insurance Co., 1936 S.C.R. p. 598.

commonly called the *Barge Rival Case.* It will be necessary to

consider other aspects of this case later on. For the moment, we refer only to the passage found at p. 786, l. 30 of the Case:— His Lordship said:—

> "Plaintiff relying on the scientific description of an explosion given by the expert Dr. Stacey (which is the same as that given here by Dr. Lipsett, who, it may be said, was familar with the *Rival* case) claimed that the explosion itself as well as the ensuing fire, was caused by the lighted match, which itself constituted fire; and that, consequently, the entire loss was payable by the 'fire' insurer. This contention was rejected by all three courts."

It is submitted with respect, that this holding of the learned Trial Judge seems to be at variance with the facts. The question at issue in the Rival Case was whether or not the Defendant, an insurer against loss from fire, was liable under the terms of its policy. The insurer had excluded from its risk, loss from explosion. The exclusion was expressed in these terms: p. 601, l. 21 (1936 S.C.R.).

> "Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring
>
> (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only."

The Plaintiff sought to recover from Defendant, a fire Insurance Co., loss from explosion contending that the explosion had been caused by fire. The Defendant, the Respondent in the Supreme Court, contended that any loss from explosion, whether the explosion preceded a fire or was caused by a fire, was excluded from the risk. The Court held: p. 604, l. 38, (1936 S.C.R.):

> " . . . the language of the printed clause in the policy before us is not limited to cases where the fire was originated by the explosion but includes cases where the explosion occurs in the course of a fire."

Consequently, Plaintiff's appeal was dismissed and it failed to recover because loss from explosion was excluded, no matter what caused the explosion or when it occurred.

But, the Court did not reject the proposition that the lighted match which was held over the manhole and which was

the fire that caused the explosion, was a fire and that is the particular point to which the attenion of this Court is directed. Davis J., speaking for Duff, C.J., and Kerwin, J., said at p. 600, l. 21, (1936 S.C.R.):—

> "In point of strict, literal fact, the burning match was the cause of the explosion. In other words, the explosion was caused by fire, not by concussions or other physical agency as distinguished from fire."

It is submitted moreover, that the *Barge Rival* case is in point, because the Supreme Court held, as above pointed out, that an exclusion of explosion in a fire insurance policy must be interpreted, regardless of where it (the explosion) occurred in the chain of events, as excluding all loss resulting from an explosion regardless of its origin, whether fire caused it or whether it caused the fire.

Davis J. cites the following cases as authority for this proposition:—

Stanley v. Western Insurance Company, 1868 L.R. 3 Ex. 71;

Curtis's & Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co. Ltd., 1921 (1) A.C. 303;

Hooley Hill v. Royal Insurance Co., 1920 1 K.B. 257.

At pp. 603-605, l. 10, of the *Barge Rival* case, S.C.R. 1936, Davis J. speaking for Duff and Kerwin J. said:—

> "*Stanley vs. Western Ins. Co.* was considered in the "Curtis's decision as a case which explained an exception. "In that policy, which was against fire, the insurer, in "terms of the policy, was not to be liable for loss or dam- "age by explosion and the expression was there held to "cover all loss by explosion, whether the explosion suc- "ceeded to or was caused by a fire, or was prior to and "caused a fire. Lord Dunedin pointed out, in the Curtis's "case, that the Stanley case was followed by the English "Court of Appeal in In Re Hooley Hill and Royal Insur- "ance Co. and then said:—
>
> > "These cases are not actually binding on their Lord- "ships but they agree with them. Stanley's case was

"decided by a very strong Court and has stood as "the law of England for many years.

"We should therefore turn to the specific clauses that were before the courts in the Stanley and the Hooley Hill cases for they were interpreted as sufficiently wide and general to cover an explosion whether it succeeded to or was caused by a fire or was prior to and caused a fire. Now the clause in the Stanley case was this:—

"Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas.

"The word "gas" in the policy was held to mean ordinary illuminating coal gas but that is immaterial for our purpose. The point is that the clause was held to be an exemption of liability for loss by explosion, not limited to cases where the fire was originated by an explosion but included cases where the explosion occurred in the course of a fire. Reference to the language of the whole clause in that case shows that

"Losses by lightning will be made good by this company, as far as where either the building or the effects insured have been actually set on fire thereby, and burnt in consequence thereof.

"The plaintiff in that case contended that the company was not to be responsible for any loss arising from explosion provided the explosion was not occasioned by a fire already in existence upon the premises, but, on the other hand, if there was already a fire upon the premises so that the explosion was incidental to and occasioned by that fire, and then lent itself to further the fire and so to increase the loss, the whole of the damage caused was within the insurance of the policy.

"But to give the instrument this construction, said Kelly, C.B.:—

"would be, in fact, to introduce into it words not found there; while the natural construction of the words gives a probable and easily intelligible sense.

Martin B., added:—

> " 'There is nothing to qualify the word "Explosion", and I apprehend therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion. The clause is exceedingly simple, and we should not be justified in adding words to give it the most artificial meaning which (the plaintiff) contended for.' "

"In the Hooley Hill case, the words of exception in the policy were:—

> "This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby or was not the result thereof.

"It was held in that case that the insurers were ex- "empted from liability as to the damage caused by the "explosion although the explosion occurred in the course "of a fire.

"Having regard to the statement of Lord Dunedin "in the Curtis's case that the Judicial Committee agreed "with these two cases, the Stanley case and the Hooley Hill "case although they were not actually binding on their "Lordships, and to the decision in the Curtis's case itself "that the warranty clause there in question applied to the "whole risks in which explosion takes a part, we must con- "clude that the language of the printed clause in the policy "before us is not limited to cases where the fire was origin- "ated by the explosion but includes cases where the explo- "sion occurs in the course of a fire."

In other words, the Courts in all the above cases held where an explosion is excluded from the risk that that word means just what it says — explosion, no matter when or where it occurs in the causative chain. Attempts were made to hold the insurer liable for explosion when preceded by fire, but the Courts held this not to be the "natural construction" (p. 604, l. 12-13) of the exclusion.

In this case, the Respondent and the Appellant agreed to exclude "loss from fire". There was no mention as to when, or where, or how such a fire was to occur in the chain of events be-

fore the exclusion came into operation. In the absence of any intention to the contrary it is submitted that the words "loss from fire" should receive their real and natural interpretation.

The remarks of Martin B. quoted above, apply to the word explosion. But the underlying principle of interpretation is equally applicable to the phrase "loss from fire". The learned judge's statement might be paraphrased to read:—

> "There is nothing to qualify the word "fire" and I "apprehend, therefore, that the company bargain and the "insured agrees with them, that they are not to be respon- "sible for any loss or damage by fire. The clause is exced- "ingly simple and we should not be justified in addding "words to give it the most artificial meaning which Appel- "lant contended for."

For the same reason, it is submitted, Appellant's contention that the fire which existed prior to the explosion was a "friendly fire" should be rejected. Its origin is unknown and whether it were friendly or otherwise is immaterial. The fire that Frazier, Rymann and Asselin saw, was not friendly. It was so fearful that they ran for their lives. There was a fire; whether it was "friendly" or "hostile" is of absolutely no moment. In the second place, this distinction, upon which Appellant places so much importance, has never been accepted in Canada.

In a case recently decided in England, an attempt was made to limit "fire", in a fire insurance policy, to fire elsewhere than in a place where fire was intended to be. The attempt failed. The case is of interest in that it frowns upon attempts to vary the plain meaning of ordinary words.

Harris v. Poland. The All England Law Reports Annotated 1941 Vol. I p. 204.

In this case the plaintiff,

> "who lived in a flat, had taken out a Lloyds comprehensive insuring her against 'loss or damage caused by fire, burglary', etc. On one occasion, having to absent herself from the flat for a whole day, she hid her jewellery, worth about £500, and a sum of money in bank notes amongst the paper and sticks in the sitting grate. Later, forgetting that she had done this, she lit a fire, and all except two

pieces of jewellery were destroyed. She claimed their value from the insurance company. On behalf of the plaintiff, it was submitted that any accidental burning of something not intended to be consumed by fire was 'damage by fire' within the meaning of the policy. The defendants contended that, where the damage done to the insured property was by fire in a place where fire was intended to be, there was no fire within the meaning of the policy:—

> *Held*: no such limitation as that which the defendants sought to impose could be read into the policy. The true test to be applied is whether or not there has been ignition of insured property not intended to be ignited. In the circumstances, there had been such ignition, and the plaintiff was entitled to recover under the policy."

In summary, Respondent submits:—

1. That there was a fire, — this fact is indisputable and undisputed;

2. That Policy No. 60350-B specifically excludes "loss from fire";

3. That the word "fire" is to be given its "natural construction" in accordance with ordinary usage, jurisprudence and canons of interpretation.

Therefore, Respondent submits that it should not be held liable for this loss, which is a fire loss and one which the fire insurance companies should assume, Exhibit D-6-1 to 22.

— A —

The Court of King's Bench, Appeal Side, might have maintained the appeal and dismissed the judgment of the Trial Court because:

> The Plaintiff-Appellant had not an interest sufficient in the claim which it had advanced to maintain an action at law, C.P. 77 and 81.
>
> The Appellant has no interest to support its claim having been indemnified in full by the Fire Insurance Companies, and having subrogated them in all its rights, including the right to use its name, to the said companies,

and consequently any claim which it may have had against Respondent has been extinguished.

At p. 779 of the Case, the learned Trial Judge said:—

"The Court accordingly rejects Defendant's contention that the action should be dismissed for lack of interest."

As outlined in Part I of this Factum, proof was adduced through Mr. Jennings that Appellant had received payment from the twenty-two Fire Insurance Companies, acting through Mr. Jennings, their representative, of the sum of $46,931.28, the amount of the original action against Respondent before it was reduced by the Rertaxits to $45,821.70.

Respondent pleaded specifically by the 16th paragraph of its Plea that Appellant-Plaintiff had no interest in the amount for which it had brought action, as it was a fire loss for which the twenty-two Fire Insurance Companies had admitted liability and had either paid or undertaken to pay, if the present action fail, the amount for which the present action is brought, i.e., $46,931.28; see paragraph 16 of Plea on p. XIII and Particulars on p. XV. This was denied by Plaintiff.

Many obstacles were encountered in making the proof. It was finally made through Mr. Jennings.

Mr. Jennings, insurance agent and insurance broker, is the President of Johnson-Jennings Inc. who acted on the fire insurance companies who carried at least 50% of the risk and who instructed Messrs. Cheese and Debbage, Adjusters, who acted no behalf of the fire insurance companies, on the very day of the fire, to start an investigation. Mr. Jennings was summoned as a witness b yDefendant, — sse p. 605. He admitted that the 22 fire insurance companies had paid to The Sherwin-Williams Company of Canada Limited, $46,931.28 for which Sherwin-Williams has brought action against Appellant. His testimony is in these terms: Case, p. 608:—

"By Mr. Hackett, K.C.:—

Q.—What was the total carried by these three companies? A.—Roughly 50 per cent.

Q.—Roughly fifty per cent of how many millions? A.—$6,125,000.00; or shall we put it this way: the insurance on this particular item was, I think, $2,625,000.00.

Q.—In any event, under the arrangement between the companies, the group that you represented were in the lead and the others followed? A.—Yes; that is usual.

Q.—Will you say whether the negotiations leading up to the writing of the letter Exhibit D-3 which you now hold in your hand were started by the insurance companies or the insured? A.—I rather fancy, the insurance companies.

Q.—So do I. And I will put the blunt question, Mr. Jennings:—Is it to your knowledge that there are any undertakings or obligations or agreements between the insurance companies or you as representing the insurance companies, — and when I say "you" I mean you as representing your company or you personally, — and the plaintiff company, which go beyond the terms of the letter D-3 which you hold in your hands?

Mr. Mann:—I really don't know where my friend is going. My friend hasn't pleaded anything to do with this.

The Court:—Consider the question carefully, Mr. Mann, and if you wish to make an objection, make it and tell me what motivates it.

Page 609:—

Mr. Mann:—I make an objection to the question by reason of a lacuna in my friend's question, and the lacuna is with respect to the date of the service of the action. Now, that is all there is to it. Whether there is an agreement or not, it matters not. However, I am limiting it to what I have said: there is no mention of the date of the action.

The Court:—What is the date of the action?

Mr. Mann:—The 17th of September, 1943, was the date of service of the action. Payment is proved to have been made during the months of March and April or April and May, 1943, — that is, before the beginning of the action, — but there is no objection with regard to that. I say that the words "before the action was brought" should go into my friend's question. I will sit down and say no more if he adds that.

The Court:—Will you amend your question by putting that in, Mr. Hackett?

Mr. Hackett:—Yes, I will, for the time being.

By The Court:—

Q.—You understand the question? Was there any agreement, undertaking or understanding between you, Mr. Jennings, of the firm, of which you are an officer or the companies some of which you represent or any of the group of companies concerned in this disaster other than the Boiler Inspection & Insurance Co., and the owner of the building, the Sherwin-Williams Co., which is not comprised in the terms of that letter. Exhibit D-3, up to the 17th of September, 1943? A.—There was definitely no agreement.

Q.—And, of course, when I say agreement or understanding I do not limit myself to writing, — any verbal understanding ? A.—Verbal or written.

Q.—There was nothing? A.—Nothing.

By Mr. Hackett, K.C.:—

Q.—I will ask you if there has been anything, since the action was taken, whereby the insurance companies have substituted their attorneys for the company's attorneys and have taken on the burden of this litigation?

Page 610:—

Mr. Mann:—I don't think I need to re-argue the objection. There is no plea of arrière-continuance. I don't know where my friend is going unless he is driving at the proof of loss.

Mr. Hackett:—No.

Mr. Mann:—There is an additional objection to the question. It is entirely irrelevant and inadmissible. My authority for that is the well-known case in the Court of Appeal, Hebert & Rose. Whether there is an agreement or a payment or anything else is irrelevant. Your lordship is familiar with the case. Every lawyer ought to be and every Judge is, I venture to suggest, and if your lordship would care for me to read any passages from it I will.

The Court:—First, is the question covered by the pleadings as they now stand?

Mr. Hackett:—I read in the Particulars furnished of Paragraph 16 of the Plea:—"All the insurers on the "risk, other than Defendant, paid to Plaintiff prior to "the production of Defendant's Plea over $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 Plain- "tif's action failing and Defendant is unable to say whe- "ther the undertaking to make a further payment is in "writing or was verbal."

The Court:—That is very definitely pleaded.

Mr. Mann:—It relates to the date of the Defence, because, it is merely particulars of the Defence. It doesn't relate to the date the Particulars were filed. It relates to the Defence, and the Defence is dated, — I don't know really when it was served, but it doesn't matter, because it is so far back, — the 23rd of October, 1943. That was a motion to particularize what is said in the Defence.

The Court:—I was looking at your Answer to Paragraph 16 of the Plea.

Mr. Mann:—I have it here.

The Court:—There was no motion to reject or anything of that sort?

Mr. Mann:—No. I think the Defendant's Plea, my lord, may be a little bit mixed, inasmuch as the agreement to pay if we fail in this case is contained in Exhibit D-3. I think maybe that is the confusion. The agreement to pay is contained in D-3, — rather, not the agreement to pay, but a reserve. It reserves the right to recover if your lordship should decide that the loss is not all explosive loss but part of it fire loss. The exhibit makes the thing clear.

The Court:—The situation, as I see it now, seems to be this:—The question arises out of the pleadings, inasmuch as there is a specific allegation in Paragraph 3 of the Particulars furnished by the Defendant, which paragraph relates to Paragraph 16 of the Plea. In those Particulars there is a specific allegation that, prior to the production of Defendant's Plea, there was a payment or an agreement to pay. That alleges something which took place after the institution of the action. Now, gener-

ally speaking, the Court has to deal with a situation that exists as at the moment when an action is instituted. Nevertheless, the Code does provide for the raising of issues which have taken place, so to speak, after the issue is joined, — specially under Article 199, by a Supplementary Plea. Now, instead of putting in a Supplementary Plea, the Defence has raised this point in a Particular to the Defence. That method of puting the issue forward was not objected to by Plaintiff either by a motion to reject or an exception to the form, and, as it is purely a matter of procedure and no one of fundamental law, I am inclined to think that from the procedural point of view the question is admissible.

Now I have to consider whether it is relevant or not, and it is upon that point you cite to me the case of Hebert & Rose. There has been jurisprudence since that case and there has even ben legislation on that point since that case. I am not prepared to pronounce myself extempore on the weight of the jurisprudence, at the moment, read in the light of the comparatively recent amendment to one of the articles under the chapter of Insurance, and if the point is considered of importance by Counsel for Defendant I will either have to ask him to suspend the question until tomorrow, when I will give a ruling, or I can allow the question and answer in under reserve, to be dealt with by me later and possibly later still by the Court of Appeal. I would be inclined to let the evidence in under reserve if there was any doubt at all or any thought that any reasonable person could differ from my opinion. I will either let the question be put under reserve of your objection. Mr. Mann or I will ask Mr. Hackett to suspend it until I can give the mater some further thought and I will give my ruling in the morning.

Mr. Mann:—Your lordship was kind enough to ask me. I would prefer that your lordship decide it in the morning. I would prefer if your lordship gave mature reflection to it. Your lordship is familiar with the amendment to the Code which says no question of insurance has any relation to an action. There has been no signification or anything.

The Court:—Mr. Hackett, to facilitate my task, — does your question refer to an agreement to pay or a payment of the loss?

Mr. Hackett:—Yes.

Mr. Mann:—I'm not sure that the question is that at all.

The Court:—That is the purpose of it. Mr. Hackett wants to find out whether there is either a payment or a promise to pay if this litigation ends unfavorably to the Plaintiff.

Mr. Mann:—My answer is that it doesn't matter whether there is a payment or an agreement or promise to pay.

The Court:—I am inclined to think that the nature of the undertaking or the method of the payment, the agreement, might have some bearing on the subject, and I am wondering, inasmuch as there is no Jury, whether it would not be advisable for me to admit it under reserve so that I can decide its admissibility "en connaissance de cause", of all the details. I think that I can safely say that I can eliminate the matter from my mind if I find that in my opinion it is admissible, and I think in the circumstances I will allow the question under reserve, so that I may have the details before me when I study the admissibility.

(The question, Page 609, is read:—"Q.—I will ask "you if there has been anything, since the action was "taken, whereby the insurance companies have substituted "their attorneys for he company's attorneys and have "taken on the burden of this litigation?):

Mr. Mann:—That cannot be the question you want, Mr. Hackett. The substitution of attorneys is on the record.

The Court:—That is a rather different matter, isn't it?

Mr. Hackett:—Maybe.

The Court:—Would you not find it convenient, Mr. Hackett, to make it more specifically applicable to your allegation?

By Mr. Hackett, K.C.:—

Q.—Mr. Jennings, have you, your company, Johnson-Jennings Inc., or any of the fire companies paid to the Plaintiff any sum of money since the institution of the action arising out of the loss?

Mr. Mann:—I take it your lordship rules that that matter be taken under reserve?

The Court:—Yes. Counsel for Plaintiff has objected to the question. The Court takes the objection under reserve. That is my Provisional ruling for the moment.

Mr. Mann:—With respect, Counsel for Plaintiff excepts to the ruling of the Court permitting an answer to the present inquiry by Counsel for Defendant under reserve.

I would ask that the witnesses be excluded from the room when this question is answered, all of them without any exception.

Mr. Hackett:—I just wonder now where we are going to. This is a Court of Justice, and if there is going to be anything improper for the ears of the populace I am a little bit amazed.

The Court:—I am sure there is nothing in the nature of obscenity in the matter. It seems to me it is simply a question of disclosure of the company's business to the public.

Mr. Hackett:—That is an incident of every trial. I do not want to be put into a strait jacket in a case of this kind.

Mr. Mann:—It would be very easy to get out of it if you were.

Mr. Hackett:—I think the question is one that arises out of the litigation and should be dealt with in the ordinary course.

Mr. Mann:—I quite appreciate that. I am asking your lordship to exclude the witnesses, as you have a perfect right to do, with respect to this statement of fact.

The Court:—Any Counsel may ask for the exclusion of witnesses for the purpose of avoiding collusion, of course, on questions of fact.

Mr. Hackett:—We discussed that earlier in the trial.

The Court:—The article does not say it is for that purpose, but it is, isn't it?

Mr. Hackett:—We deal with the matter of exclusion earlier in the trial, my lord, and we have a complete list of those that might remain. I think both Mr. Mann and I tried to be reasonable in the matter. I don't really mind, if your lordship thinks it is the proper thing to do.

The Court:—I don't know that it is the proper thing ao do. Under Article 313 if I have an application for exclusion must I not grant it?

Mr. Hackett:—Not "must", — "may". Your lordship is master of the situation.

The Court:—Well, unless Mr. Mann can show me some reason for it. I am not inclined to grant his request. I can't foresee the possibility of anything obscene that would offend the ears of the public, and I can't on the face of it see that any valuable business secrets of the firm of Johnson-Jennings Inc. can be given away by the evidence. Is there any valuable secret?

Mr. Mann:—I prefer not to say. I made my application. If your lordship sees fit not to grant it, I am in your lordship's hands.

The Court:—On the situation as it now stands I see no reason for granting the request.

(The question, Page 613, is read to the witness):

Witness:—They have.

By Mr. Hackett, K.C.:—

Q.—How much? A.—$46,931.28.

The Court:—One has heard that figure before, I think.

Mr. Mann:—Yes, I think we have heard it before.

By Mr. Hackett, K.C.:—

Q.—So, as the matter now stands, the full amount owing to the plaintiff company has been paid to it? A.—Yes.

Mr. Mann:—By the fire companies.

Mr. Hackett:—By the fire companies.

By the Court:—

Q.—When was that payment made? A.—Around February, 1944.

Q.—And were there receipts given or was there a document of some kind executed at the time the payment was made? A.—There would be subrogation receipts that each company would receive.

The Court:—I think it would be well to have those before the Court.

By Mr. Hackett, K.C.:—

Q.—It is suggested by the Court, Mr. Jennings, that you produce the subrogation receipts given by the plaintiff company to the various fire companies concerned?

The Court:—Or, if there were many companies that received receipts, one receipt if they were all in the same terms, would probably suffice.

Mr. Mann:—I'm not sure there are any subrogation receipts.

The Court:—The witness will say.

Mr. Mann:—Perhaps, Mr. Jennings, you had better tel us, because I am ignorant on the subject.

Witness:—These receipts normally would go to each insurance company. I wouldn't have them.

By The Court:—

Q.—Would you not have a copy of one or a form of one? I suppose the payment was made through you, Mr. Jennings, was it not? A.—Yes, it was.

Q.—Surely you would have a copy of the receipt or subrogation or a combination of both??

I am asking that because according to my present recollection of the jurisprudence there may be some importance in the wording of the document executed at the time of the payment. I haven't had occasion to look into those cases just recently, but I recall that that may be of some importance.

Witness:—I have one here.

Mr. Mann:—Well, I'm not familiar with it. I don't remember, at least. Is that a typical one?

Mr. Hackett:—I think in the circumstances it might be well to have them all.

Mr. Mann:—You had better get them from the companies.

Mr. Hackett:—I think Mr. Jennings has got copies of them.

Witness:—No; I have brought the Aetna Insurnace Company's file here, and that forms part of it.

By The Court:—

Q.—Do you not think that all the receipt-subrogations, the combinations, would be in the same form? A.—Exactly in the same form, differing in amount only.

Q.—But the wording would be the same? A.—Yes, exactly the same."

At p. 618, l. 46, Mr. Jennings is asked:—

"Q.—I want to come back now to this D-9. Did you negotiate the settlement with the Sherwin-Williams Co. which is evidenced by this document? A.—I didn't negotiate with the Sherwin-Williams Co. I can put it another way and say that I persuaded the fire companies to pay this. There was no negotiation. A definite amount had been arrived at. My clients were out 46-odd thousand dollars,

and I persuaded the fire companies to assume and pay this amount.

Q.—Now, Mr. Jennings, didn't you get the fire companies into that mood before the action was taken against the defendant company? A.—No.

Q.—Who came to you from the Sherwin-Williams Co. and complained that they were out 46-odd thousand dollars and you should pay it? A.—Nobody. The suggestion didn't come from the Sherwin1Williams Co. They had taken an action against the Boiler Company. I as an insurance broker felt that my clients were out this money and it would be a feather in my cap if I could persuade the fire companies to pay this and satisfy my clients."

Mr. Jennings' testimony is somewhat difficult to accept. The fire insurance companies could not pay the loss unless it was fairly owing by them and it is reasonable to conclude that they would not pay the loss unless it was owing by them.

The Insurance Law of the Province of Quebec, R.S.Q. 1941, ch. 229, sec. 240, contains the statutory conditions which form part of every fire insurance contract. Conditions 12 and 13 are in these terms:—

"12. Proof of loss must be made by the assured, although the loss be payable to a third person.

13. Every person entitled to make a claim under this policy shall observe the following directions:—

(a) He shall forthwith after loss give notice in writing to the company;

(b) He shall deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits;

(c) He shall also furnish therewith a sworn declaration establishing:

1. That the said account is just and true; (our underlining).

2. When and how the fire originated so far as declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurances; . . . ''

Somebody on behalf of Sherwin-Williams took an oath that the claim was just and true.

The subrogation receipt produced as Exhibit D-9 has been quoted at length at p. 10.

The learned Trial Judge, citing with approval, Rivard J. in

Coderre v. Douville, 1943, K.B. 687,

and

Hébert v. Rose, 1935, 58 K.B., 459,

came to the conclusion that Respondent's contention that Appellant's action should be dismissed for lack of interest, failed.

It is submitted that his Lordship erred in applying the principles set forth in *Coderre v. Douville* to the present case and in so doing misdirected himself.

Article 77 of the Code of Civil Procedure reads as follows:

''77. No person can bring an action at law, unless he has an interest therein. Such interest, except where it is otherwise provided, may be eventual.''

Article 81 of the Code of Civil Procedure provides:—

''81. A person cannot use the name of another to plead, except the Crown through its recognized officers.''

These articles seem to bar Appellant's action. Appellant contends however that the 1942 amendment to Art. 2468 C.C. comes to its rescue.

Article 2468 C.C. in the Title of Insurance states:—

''2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valu-

able consideration to indemnity the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

Civil responsibility shall in no way be lessened or altered by the effect of insurance contracts. — 6 Geo. VI, c. 68 (1)."

Respondent contends that Appellant is without interest.

First: The last paragraph of this Article was added in 1942, in order to clear away the mass of confusion which had developed on the subject of Insurance Law with respect to the liability of a tort-feasor when the insured had been indemnified by the Insurer. The intent and purpose behind this change is clearly illustrated in the preamble to the Act (6 Geo. VI, Chapter 68 (1)) which effected the amendment:—

"Whereas it is expedient to prevent the author of an offence or quasi offence from invoking, in mitigation of his liability, the insurance compensation which may have become exgible through the act giving rise to responsibility."

In other words, if "A" had an action against "B" arising out of "B's" fault, "B" may not say: You have suffered no damage because an Insurance Company with which you have a contract has compensated you.

The purpose of this new legislation was to prevent the tort-feasor, or the person at fault, from escaping from his responsibility merely because the person wronged had insured against the hazard of that fault. It obviously has no reference to the present case where the Respondent can in no wise be considered the wrong-doer. The validity of Appellant's denial of Respondent's contention of lack of interest cannot, therefore, rest upon this recent amendment to Article 2468 C.C., enacted by 6 Geo. VI ch. 68.

Recent decisions seem to show that the only way in which the Insurer can proceed against the person liable for the loss or damage, is by obtaining a transfer of the rights of the Insured and bringing an action in its own name.

Article 2584 C.C. provides a method for this transfer of rights:—

"2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by who fault the fire or loss was caused."

Article 2584 C.C. says, first, that the Insurer, to whom the rights of the Insured have been transferred, may enforce these rights against the person by whose fault the fire or loss was incurred. Therefore, only the Insurer, as distinct from other persons, is entitled to a transfer and the action can be brought only against the persons by whose fault the fire or loss was caused. Even if a transfer had taken place, it would only avail to the Transferee as against the person by whose fault the fire or loss was caused. Under this Article, it couldn't avail against an Insurance Company unless it were a person "by whose fault the fire or loss was caused" Moreover, the fire insurance companies contend that they are not the Insurers, hence on their own statement they are not entitled to a transfer.

Second, nowhere is it said that anyone other than the Insurer may enforce these rights. A mere transfer of the rights in the case of the fire insurance policy, is all that is required, but the Transferee, the Plaintiff, must be the Insurer who has paid the loss, and it must bring the action in its own name, to meet the requirements of the Code of Civil Procedure above quoted.

Third, as between the parties, in the circumstances of the case, a subrogation was necessary and in fact a subrogation was made. The Appellant subrogated the twenty-two insurance companies in all its rights.

The relevant part of the Deed of Subrogation, Exhibit D-9, (and they are all in identical form excepting the amount), called "Receipt, Transfer and Subrogation", is in these terms:—

"In consideration of the aforesaid payment of Seven thousand, five hundred ninety-eight 40/100 Dollars ($7,598.40) to the undersigned, by the above named Company, the undersigned hereby transfers, assigns and makes over unto the said Company in the proportion that the sum now paid, bears to the sum of forty-six thousand nine hundred and thirty-one dollars and twenty-eight cents ($46,931.28), all the undersigned's rights, title and interest in and to the claim of the undersigned against the said Boiler Inspection and Insurance Company, under latter's policy No. 60350B dated March 9th, 1940, issued in favor

of the undersigned; hereby subrogating and substituting the said AETNA INSURANCE COMPANY in all the undersigned's rights, title and interest in and to the said claim as well as in and to the aforesaid action and all proceedings had thereunder, with the right on the part of the said AETNA INSURANCE COMPANY to continue the said action, but as its own expense, as of the date thereof, in the name of the undersigned and with the benefit unto said Company of all costs incurred and to be incurred by virtue of said action, in so far and to the extent that the undersigned is able to deal with such costs."

For these reasons, it is contended, with great respect, that the learned Trial Judge erred in applying to this case, the principle of *Coderre v. Douville* and *Hébert v. Rose.* In both these cases, the litigation was between the Insurer and the person "by whose fault the fire or loss was caused". This is clear from the judgment of Rivard J., at p. 689 of

Coderre v. Douville, 1943 K.B. 687.

"Les termes de l'acte intervenu entre le demandeur et son assureur sont clairs; c'est bien une cession de ses droits que Douville a consenti. Dans ce cas, le recours au nom du créancier contre l'auteur du dommage reste ouvert (*Hébert vs. Rose*)."

If this instrument does not represent a valid transfer of rights which enable the Fire Insurance Companies to bring action against the persons "by whose fault the fire or loss was caused", what is the basis of the action? Is it a sale of litigious rights? No signification was given to the debtor in accordance with 1571 C.C.

By their very terms and purport, it is submitted that these documents, whereof D-9 is a sample, are subrogations, whereby the Appellant subrogated the twenty-two fire insurance companies in all its rights.

It is enacted by Article 1154 C.C.:—

"Subrogation in the rights of a creditor in favor of a third person who pays him is either conventional or legal."

Article 1155 C.C. reads:—

"1. When the creditor, on receiving payment from a third person, subrogates him in all his rights against the debtor. This subrogation must be express and made at the same time as the payment.

2. When the debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender in the rights of the Creditor. It is necessary to the validity of the subrogation in this case, that, the act of loan and the acquittance be notarial or be executed before two subscribing witnesses; that in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose. This subrogation takes effect without the consent of the creditor.

If the act of loan and the acquittance be executed before witnesses, the subrogation takes effect against third persons from the date only of their registration, which is to be made in the manner and according to the rules provided by law for the registration of hypothecs."

It is limited in no way. The creditor, the Sherwin Williams Company, on receiving payment from a third person, — the Fire Insurance Companies, — has elected to subrogate the Fire Insurance Companies in all its rights against the Boiler Inspection and Insurance Company. This subrogation is in express terms and was made at the time of payment.

In Exhibit D-9 on the second page, it is stated that the Sherwin-Williams Company of Canada Limited, p. 764 of the Case:—

"hereby subrogating and substituting the said AETNA INSURANCE COMPANY in all the undersigned's rights, title and interest in and to said claim as well as in and to the aforesaid action and all proceedings had thereunder, with the right on the part of the said AETNA INSURANCE COMPANY to continue the said action but at its own expense, as of the date thereof, *in the name of the undersigned* (our underlining) and with the benefit unto said Company of all costs incurred and to be incurred by virtue of said action, in so far and to the extent that the undersigned is able to deal with such costs."

It will be seen that each of the Companies has paid to Appellant the complete amount owing by it, the total of the said amounts paid, constituting the sum of $46,931.28. being the original amount for which the Defendant was sued.

Mignault, "Droit Civil" Vol. 5 at p. 558 states that, where there is subrogation and the creditor has been paid in full and subrogates another in its, the creditor's rights, the claim of the creditor is thereby fully and finally extinguished:—

> "Nous avons vu que la subrogation est une fiction par laquelle le créancier est censé céder au subrogé ses droits, actions, hypothéques et privilèges. Il ne faudrait pourtant pas la confondre avec la cession véritable. La subrogation suppose qu'un tiers a désintéressé le créancier pour rendre service au débiteur et nullement dans un but de spéculation, et sa seule fin est d'empêcher que ce tiers ne soit victime de son dévouement. Quant au créancier, lorsque le paiement est total, la créance est absolument éteinte avec ses accessoires, et elle ne subsiste à l'égard du subrogé, que pour assurer son recours contre le débiteur."

The French authors share the same view.

Colin et Capitant, in Cours Elémentaire de Droit Civil, Vol. II, 5th ed. 1928, at p. 90, state as follows:—

> "Le paiement avec subrogation est une institution qui joue un rôle considérable dans la pratique. Il diffère du paiement ordinaire en ce que, au lieu d'éteindre la dette, il ne fait que changer la personne du créancier. Le débiteur est bien libéré envers son créancier, mais il devient débiteur de celui qui a payé la dette pour lui."

As there is no subrogation, Respondent "est bien libéré envers son créancier." What interest, therefore has the latter in an action against a debtor when that debtor vis-à-vis that creditor has been "bien libéré"?

At p. 99:—

> "La créance acquittée par le solvens subsiste à son profit avec tous ses accessoires, *avec toutes les actions qui y sont jointes.* Le subrogé est mis à la place de l'accipiens.
>
> Ainsi, c'est bien la créance, elle-même, et non seulement ses garanties qui passe au tiers. . . "
> (our underlining).

As "la créance elle-même. . . avec toutes les actions qui y sont jointes . . . " has passed to "le subrogé", what interest has "l'accipiens"? He has now become a total stranger to the debt.

Planiol et Ripert (*Traité Elémentaire de Droit Civil,* Vol. II, 9th Ed. 1947) at p. 565 et seq.:—

> "La subrogation se produit au cas de paiement. Le paiement avec subrogation est un paiement non libératoire pour le débiteur, parce qu'il n'est pas fait par lui, et la subrogation qui l'accompagne est une opération juridique en vertu de laquelle la créance payée par le tiers subsiste à son profit et lui est *transmisé avec tous ses accessoires, bien qu'elle soit considérée comme éteinte par rapport au créancier".* (our underlining).

Savatier — Cours de Droit Civil, Vol. II, 1944, p. 231:—

> " . . . . le débiteur ne gagne rien à avoir vu payer sa detter, sinon de changer de créancier. Sa dette, éteinte par le paiement, est aussitôt ressucitée sur la tête de celui qui a payé. Ce dernier est subrogé au créancier désintéressé. La subrogation est donc la resurrection d'une créance au profit de celui qui l'a payée, contre celui qui devait la payer."

And at p. 235:—

> "La subrogation ne peut non plus se faire après le paiement, car, celui-ci ayant éteint les droits du créancier, il est trop tard pour les ressusciter."

Beaudry Lacantinerie, 4 ed. Vol. 2, p. 743, no. 1042:—

> " . . . . Ainsi, par rapport au créancier qui reçoit son paiement, la créance est éteinte; elle subsiste au contraire, ou plutôt *est réputée subsister*, avec tous ses accessoires, au profit du subrogé."

P. 744, l. 6:—

> " . . . . D'après le premier, la créance payée étant reputée subsister au profit du subrogé, celui-ci est mis complètement au lieu et place du créancier, et peut exercer tous ses droits."

Respondent submits that on this phase of the case, the question is: What is the effect of this subrogation? Did Appellant, when it executed the subrogation, actually transfer, divest itself completely and entirely of any right, title and interest it might have had to and in the claim against Respondent? Was the debt extinguished in so far as Appellant is concerned? If such be the case Appellant had not an interest sufficient to support the litigation.

Mr. Justice Cross in *McFee vs. Montreal Transportation Company,* 27 K.B. at p. 424, while stating that the Insurer has the right to obtain a transfer of the rights of the insured against the wrong-doer, states at p. 425:—

> "The result might be different if the Plaintiff had subrogated the Insurer in all his recourse against the wrongdoer (or if the law had operated such subrogation. . . .) Instead of a subrogation, what the insurer in the present case is entitled to is a transfer of rights. . . ."

It is submitted, therefore, in view of the foregoing that the Appellant, who has been fully and completely indemnified with respect to the loss suffered by explosion, has no interest whatsoever in the present case and consequently its action should be dismissed.

Fourth: There is a further aspect of the action. Despite the allegations of paragraph 16 of the Plea, and the Particulars thereof, and the complete denial of the fact of payment and subrogation after payment had been made and subrogation taken, (payment was made and subrogation taken at the end of January or the beginning of February, 1944, — see p. 620 of the Case), in the Answer to Plea, dated the 21st of April, 1944, p. XVI, the payment by the twenty-two fire insurance companies is denied, and this further statement made:—

> "and in addition Plaintiff admits that it received from the fire insuring companies, other than the Defendant, the sum of $112,793.34, being the total loss caused by fire following the explosion the loss or damage in respect of which Plaintiff now claims from the Defendant."

At that time, Appellant had not only received $112,793.34, but a total of $159,724.62. At p. 16, at the trial, it was stated on behalf of the Respondent:—

"ADMISSION BY PLAINTIFF.

Mr. Mann:—The admission of the plaintiff company is as follows:—The total loss, including loss by explosion, concussion or detonation and fire is alleged to be, and to have been adjusted at, insofar as the company's claim is concerned, the sum of $159,724.62, of which the plaintiff company acknowledges to have received from the fire insuring companies $112,793.34, as being the alleged or claimed loss by fire only, leaving a balance of $46,931.28 alleged to be a concussion, detonation or explosion loss exclusive of fire damages, and which is the amount claimed in the present action."

Mr. J. S. Moffat, the manager of the Appellant's Linseed Oil Mill, testifies at p. 17 and explains how the fire loss was segregated from the loss claimed from Defendant. After testifying to each item which he contended was recoverable from the Respondent, he mentions the total of $46,258.01, at p. 35. This testimony was given on the 23rd of October, 1945, one year and six months after a claim had been made upon the fire insurance companies and paid by them as a fire loss.

On the 5th day of February, 1946, p. 622, l. 10, Mr. Moffat admits that the fire insurance companies had paid 2 years previously the amounts he had sworn were due by Respondent to his Company.

"By Mr. Hackett, K.C.:—

Q.—And it is to your knowledge that a sum of $46,931.28 has been paid by the different fire insurance companies to your Company? A.—I understand that. They told me that it had been paid.

By the Court:—

Q.—That is not denied, I think, — in addition, of course, to the amount previously paid for the admittedly fire loss? A.—Yes."

It is to preclude a situation of this kind that the law has enacted that all actions must be brought in the name of the party interested, C.C. P. 77 and 81.

It is submitted therefore, in view of the foregoing, that the Appellant who has been fully and completely indemnified with respect to the loss sustained on the 2nd of August, 1942, has no interest to maintain or continue the action now before the Court. The Respondent subrogated the Fire Companies in all its rights, title and interest to the debt claimed by the action and the subrogation included all the privileges, all the hypothecs, all the incidentals, even the action itself.

SUBSIDIARILY

— B —

Moreover, Respondent submits, subsidiarily, that even had it been liable, it would only have been for a small part of the loss because:—

There was liability on the part of the Fire Insurance Companies in the event of such loss. The tank in question was not a "pressure container" within the meaning of the exclusion appearing in the combination policy of Associated Reciprocal Exchange which covered "direct loss or damage caused by explosion."

At p. 790, l. 43 of the Case, the learned Trial Judge held as follows:—

> "In view of this testimony (by the three experts Hazen, Lipsett and Lortie), the Court must conclude that the tank was a 'pressure container' within the meaning of the policy Exhibit D-6-22, and that in consequence that policy does not constitute other insurance concurrent with the policy of Defendant."

His Lordship found as a fact that Messrs. Hazen, Lipsett and Lortie testified that the tank was a pressure container. His Lordship said, 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. In view of this testimony, the Court must conclude that the tank was a 'pressure container' within the meaning of the policy Exhibit D-6-22. . . "

This was not discussed by the Court of King's Bench.

In the first place, there is no allegation in the Declaration or in the Answer to Plea that the Tank was a "pressure container". Mr. Hazen refers to it casually at p. 210 as an "unfired pressure vessel" but he seems to retract his statement at p. 252. Mr. Mann said to him, Case p. 249, l. 19:—

"Q.—With regard to the steam jacket, I keep calling it 'compartment'. Is that a proper mechanical term or am I wrong? A.—It is a common phrase used to designate such an arrangement of applying steam heat to an unfired pressure vessel."

In cross-examination, at p. 252, Mr. Hazen is askel:—

"Q.—In referring to the cylinder, was there anything in its structure which indicated what its use might be? A.—No, except that it is of cylindrical form, which suggests being designed to withstand pressure.

Q.—Well. pressure from within or pressure from without? A.—Either.

Q.—You spoke of a gasket. Did that indicate anything to you as to the use or the source of the pressure to which the vessel might be subjected? A.—The gasket is merely a seal, and there was nothing in the use of the gasket that would suggest anything other than a seal where the door was clamped against it.

Q.—There was nothing in the way the gasket was applied and nothing in the way the door was constructed which indicated whether or not the cylinder was to be used as regards pressure from within or pressure from without? A.—The arrangement and construction of the door and its frame indicated that it was designed to be used with vacuum on the tank.

Q.—That means with pressure from without, does it not, — or from within? A.—That means the absence of pressure within.

Q.—The absence of pressure within? A.—Yes.

Q.—So the structure of the door was such that it indicated that the pressure was a sucking-in pressure rather than a pushing-out pressure? A.—That is quite correct.

Q.—Now, just tell the Court, will you, Mr. Hazen, what there was in the structure that made that apparent? A.—The fact that the door was applied on the outside definitely indicated that it was to resist pressure from without, air pressure. Had it been designed to resist pressure from within, then the structure would have been different.

Q.—In what way? A.——The door would have been applied from inside.

Q.—And the gasket in a different place? A.—Yes."

Dr. Lipsett was shown a book in which it was asserted that the tank was defined as a "pressure container". His tesitmony on this point was objected to at pp. 525 and following.

The court said at p. 529:—

"Q.—I gather that there isn't such a thing as a definition in the volume you have in your hand: is that so? A.—I haven't located one yet, my lord."

At p. 530, the question was suspended and does not appear to have been resumed, so, unless others are more successful than Respondent in discovering the testimony of Dr. Lipsett on which the finding of the learned trial judge can be based, it doesn't exist. If Dr. Lortie testified on this point, it has escaped the attention of Respondent.

If Tank No. 1 was a pressure container, there would appaper to be no liability under Exhibit D-6-22. If it were not a pressure container, the Appellant has a claim against "Associated Reciprocal Exchanges" "for direct loss or damage caused by explosion" which would relieve Respondent in large measure for any liability therefor.

WAS TANK No. 1 A PRESSURE CONTAINER?

It is Respondent's submission that it was not.

First, there is no allegation in the Answer to Plea to that effect, nor is there any proof that Tank No. 1 was a pressure container. The words themselves, "pressure container", would indicate a container designed and used for the purpose of developing pressure, i.e., power. This was not the purpose or the use of Tank No. 1.

It is stated that the very construction of Tank No. 1 made it clear that it was not for that purpose.

Pressure is developed only when the liquid in the container is brought to a boiling point. At no time in the use of Tank No. 1 was it contemplated that the liquid therein should be brought to the boiling point. All the witnesses testified that the linseed oil was raised to a temperature far below its boiling

point. The purpose of this heating was to facilitate its admixture with the filtrol and the filter-cel with a view to clarifying the oil and removing therefrom certain colouring matter.

This was the purpose for which the vessel had been designed. It was the purpose for which it was used.

The normal way of raising the temperature of the contents of the Tank was to subject its outer shell to steam generated in a steam boiler. It was not the steam from the steam boiler which circulated within the jacket that half-surrounded Tank No. 1 that caused the mischief. It was the chemical reaction of the filtrol upon the turpentine that brought about the rise in temperature.

To fill it, the air was sometimes pumped from the Tank and a vacuum created within it. In this way the Tank was sometimes filled by suction; at other times it was filled by the use of a pump.

The tank did not collapse from pressure from the outside. The door was blown off the Tank by an accident, something unforeseen and unforseeable, if we are to believe the testimony of Appellant's witnesses, as the result of a chemical action brought by heating turpentine when mixed with filtrol. The filtrol and the turpentine were put into the tank that the turpentine might be clarified, not to generate pressure or power.

Second, by the doctrine of "ejusdem generis", Tank No. 1 was not a "pressure container".

The clause in the Supplemental Contract is in these terms:

> "No liability is assumed under this Supplemental Contract for any loss or damage occasioned by or incident to the explosion of steam boilers and other pressure containers."

The clause in the Limited Form Supplemental Contract is in these terms:

> "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 or other pressure containers, and pipes and apparatus connected therewith. . . . "

Steam boilers, to the knowledge of everybody, are used to generate prssure which is frequently used to drive machinery. At no time was Tank No. 1 or Tank No. 2 used to generate pressure or power. They were used as mixing pots. The use of the Tanks could in no way be associated with the normal use of steam boilers. Tank No. 1 lacked all the characterihtics of a steam boiler. Moreover, it had a characteristic which no steam boiler has — it had a vent to the atmosphere.

Dr. Lipsett and Dr. Lortie were unable to find any statement in the books which they examined in Court which would characterize Tank No. 1 as a "pressure container."

In

Lever Bros. Co. vs. Atlas Assurance Co. Ltd. et al, 131 Federal Reporter, 2d Series, at pp. 770 and following,

by a decision of the Circuit Court of Appeals, 7th Circuit, it was admitted that a Tank of larger proportions than Tank No. 1 used to store cotton seed oil whose temperature was controlled by coils inside the tank, through which steam circulated, was not a pressure container. The fact was so obvious that the parties agreed to it.

At p. 776 it is stated:—

> "This exception, contained in Special Condition No. 3, which is the applicable provision of the policies, refers to steam boilers or other pressure containers. It is admitted by both sides that the tank in question was not a pressure container."

The clause being interpreted is also found at p. 776:—

> " 'Except for any loss or damage (whether or not caused by fire) occasioned by or incident to the explosion, collapse, rupture, or bursting of — (1) steam boilers or other pressure containers, and pipes and apparatus connected therewith, caused by internal pressure.' "

The explosion was caused by steam generated from water, accidentally in the bottom of the tank, the heat causing the water to boil, was apparently provided by the steam coils inside the tank.

Respondent, under reserve of the position it has already taken, submits that the Appellant was specifically insured against loss by explosion by combination policy of Associated Reciprocal Exchanges, Exhibit D-6-22 and in particular by:—

(A) Supplemental Contract — inherent to explosion, and

(B) Limited Form Supplemental Contract.

RE:—(A)

Supplemental Contract - - Inherent Explosion is in these terms, Case, p. 692:—

"The fire insurance policy to which this Supplemental Contract is attached is hereby extended to insure the Insured named in said policy on the same property and in the same amount or amounts as specified in said policy and under the same terms, conditions and limitations, when not in conflict with this Supplemental Contract, against any direct loss or damage caused by:—

(a) . . . . . .

(b) . . . . . .

(c) explosion originating within the insured premises or when caused by the malicious use of dynamite or other explosives, but no liability is assumed under this Supplemental Contract for any loss or damage occasioned by or incident to the explosion of steam boilers and other pressure containers, and pipes and apparatus connected therewith or moving or rotating parts of machinery;"

There is no doubt that

(1) there is no conflict between the terms of the policy itself and the Supplemental Contract and that

(2) the loss was a direct loss caused by "(c) explosion originating within the insured premises."

RE:—(B)

Limited Form Supplemental Contract is in these terms, Case, p. 683:—

"The fire insurance policy to which this Supplemental Contract is attached is hereby extended, subject to the terms, conditions and limitations contained herein and in said policy, to cover direct loss or damage to the therein insured property caused by:—

(a) . . . . . .

(b) . . . . . .

(c) explosion originating within the insured premises when such explosion results either from a hazard inherent in the business as conducted therein or from riot or civil commotion, 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, or (2) moving or rotating parts of machinery, nor shall this Company be liable under the terms of this clause for loss or damage for which under its terms it would otherwise be liable, 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;"

There is no doubt that

(1) the loss or damage to the insured property was "direct loss or damage caused by explosion" and that

(2) the explosion which caused the direct damage is properly described as "(c) explosion originating within the insured premises when such explosion results either from a hazard inherent in the business as conducted therein."

See Limited Form Supplemental Contract attached to and forming part of Exhibit D-6-22.

RE: (A) and (B)

In both (A) and (B) there are exceptions.

In (A) it is stipulated:—

"But no liability is assumed under this Supplemental Contract for any loss or damage occasioned by or incident to the explosion of steam boilers and other pressure containers, and pipes and apparatus connected therewith."

In (B) it is stipulated:—

"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."

Re (A) — it is not denied by Appellant that the loss suffered by Appellant is "direct loss or damage" caused by "explosion originating within the insured premises." It is contended, however, by Appellant that Tank No. 1 is a "pressure container" and that the Supplemental Contract does not extend to the combustion explosion of August 2nd, 1942, and that, in consequence, the fire companies are not liable.

Re (B) — it is not denied by Appellant that the loss was "direct loss or damage to the therein insured property caused by "explosion originating within the insured premises when such explosion results either from a hazard inherent in the business as conducted therein. . . "

It was not suggested that the hazard from which the loss occurred was not "inherent in the business of the Plaintiff as conducted." It was argued, however, that the Limited Form Supplemental Contract did not apply because it was stipulated:—

"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. . .",

and that Tank No. 1 was a pressure container.

In the result, it seems to be common ground that any loss from explosion suffered by Appellant would be, under the Supplemental Contract and under the Limited Form Supplemental Contract, "direct loss or damage caused by explosion", as stated in the Supplemental Contract, and

"direct loss or damage to the therein insured property caused by explosion originating within the insured premises" and resulting "from a hazard inherent in the business",

as stated in the Limited Form Supplemental Contract, and insured by policy D-6-22, had Tank No. 1 not been, as Appellant contends, a "pressure container."

It is submitted therefore without abandoning Respondent's original proposition that the loss was a fire loss, that *if* the loss resulted from combustion explosion, the Associated Reciprocal Exchanges' policy, Exhibit D-6-22, would be liable for at least a portion of the "direct loss or damage to the therein insured property caused by explosion", under the terms of the Limited Form Supplemental Contract, or, under the terms of the Supplemental Contract, for "direct loss or damage caused by explosion."

WHEREFORE Respondent prays that the judgment of the Court of King's Bench, Appeal Side, be maintained and Plaintiff's action dismissed with costs, and subsidiarily should Respondent be condemned, that it be condemned only for that portion of the liability for which other insurers are not liable.

The whole respectfully submitted.

Ottawa, Ontario, April 1st 1949.

Hackett, Mulvena, Hackett & Mitchell,
Attorneys for Respondent.

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.

RESPONDENT'S FACTUM

Messrs. HACKETT, MULVENA, HACKETT & MITCHELL,
Attorneys for Respondent.

CUTHBERT SCOTT, K.C.,
Ottawa Agent.