Privy Council Appeal No. 12 *of* 1950

Boiler Inspection and Insurance Company of Canada – – *Appellants*

v.

The Sherwin Williams Company of Canada Ltd. – – – *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1951

Present at the Hearing :

LORD PORTER
LORD MERRIMAN
LORD REID
LORD RADCLIFFE
LORD TUCKER

[*Delivered by* LORD PORTER]

This is an appeal by special leave from a judgment of the Supreme Court of Canada which by a majority reversed a judgment of the Court of King's Bench for the Province of Quebec ; that Court having previously by a majority reversed a judgment of the Superior Court of the District of Montreal. By the judgment of the Supreme Court the appellants were ordered to pay 45,791.38 dollars with interest to the respondents.

The claim in the Action is made under the terms of an insurance policy issued by the defendants in favour of the plaintiffs on 9th March, 1940, covering a period from 15th March, 1940, to 15th March, 1943.

The risks insured against are "loss (. . . including loss of the kind described in Section 4) from an accident as here defined to an object described herein", and the policy includes the following provisions:—

> "Section 1. To pay the Assured for loss on the property of the Assured directly damaged by such accident, 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 ; (*e*) loss from any indirect result of an accident."

Section 4 provides that the Insurers are to pay "such amounts as the Assured should become obligated to pay by reason of the liability of the Assured, including liability for loss of services on account of bodily injuries (including death at any time resulting therefrom) sustained by any person and caused by such accident except that the indemnity hereunder shall in no event apply to any liability or obligation under any workmen's compensation law".

The opening paragraph of the policy refers to an accident "as herein defined" and the definition reads as follows:—

"C. As respect any object described in this Schedule, 'Accident' shall mean a sudden and accidental tearing asunder of the object or any part

thereof caused by pressure of steam, air, gas, water or other liquid therein or the sudden or 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."

The objects covered by the insurance are enumerated in the annexes to the policy, and those with which this action is concerned are described as three tanks designated as Nos. 1, 2 and 3. The disaster which gave rise to the action originated in the tank No. 1, which is described as a " steam-jacketted bleacher tank ". This tank consisted of a large metal cylinder, resting in a horizontal position on a kind of cradle which was bolted to the floor. The lower half of the tank was surrounded by a steam chamber or jacket. This chamber was fixed on 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 surrounded (except for certain openings) by an asbestos covering.

The tank was situated on the third floor of the plaintiff Company's Linseed Oil Mill, which is located on St. Patrick Street in the City of Montreal. The third storey was divided into two large rooms by a wall in which there were two doors, eight feet square. These doors are referred to 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 given as about 17 feet. The tank and other equipment were in the east room ; in the west room were four filter presses. The only regular stairway from the latter was reached through the east room where the elevator shaft was also to be found, but an outside fire-escape, consisting of a metal stairway, ran down from a doorway near the south-west corner of the west room itself.

The tank was used normally for bleaching linseed oil for which purpose crude oil was syphoned into the cylindrical chamber of the tank and to it was added a quantity of " filtercel " and a further quantity of bleaching earth known as " filtrol ". Both the liquid and the powders are put into the cylinder of the tank by means of a vacuum system. Inside the cylinder there is a kind of shaft, connected to a motor which is situated outside and close to the rear of the tank. This shaft revolves rapidly, thus keeping the contents of the cylinder in suspension. After the liquid and powders have entered the cylinder, steam is turned on to fill the steam chamber. When the required temperature is obtained the steam is turned off, and the shaft is allowed to continue to operate for about half an hour. The contents of the cylinder are then allowed to run down through a pipe into the basement, where a pump is situated. This pump serves to force the liquid up again to one of the filter presses in the west room where it passes through the press, is there strained through cloths, and comes out bleached.

Until Sunday the 2nd August, 1942, the normal use of the tank and the other apparatus described above had been for bleaching linseed oil. It had never previously been used for bleaching turpentine, but it was determined to bleach a quantity of turpentine by the same process on that date. For bleaching linseed oil, however, the temperature in the tank was customarily raised to about 190° Fahrenheit, whereas the instructions issued for the bleaching of the turpentine specified 165° Fahrenheit as the figure to be reached.

The tank in question was primarily constructed in order to resist pressure from without following upon the evacuation of air from it in order that the material to be mixed might be sucked into the boiler.

Consequently the door which it contained (which was intended to be used for cleaning purposes only) opened outwards and became more firmly held in position the greater pressure from without, but it was strongly constructed, was held in position by an iron bar and would also resist considerable pressure from within.

In the door, which was at the front of the tank, there was an aperture, referred to as a peep hole, covered with glass and even more strongly resistant to pressure than the door itself. At the back opposite this peep hole was another glass aperture of similar construction.

There was also a vent, which was open at all material times, leading from the tank to the air in the east room.

On the morning in question the process described above was followed until the first batch of the mixture had been pumped up to the filters in the west room. There a number of employees including the foreman were gathered round a filter press in order to see how effective the bleaching had been. They found it unsatisfactory and sent one of their number down to stop the pumps to the filter press.

Unknown to any of those engaged in the process the mixing of filtrol with turpentine produces an exceedingly heavy pressure of vapour within the tank and creates a gas which when united in a certain concentration with air becomes a highly explosive mixture.

The result was that this vapour forced itself out through the open vent, then as the pressure mounted first distorted the door and a second or two later blew it off and permitted a large body of gas to escape. The vapours so escaping penetrated the east room and mixing with the air there eventually became ignited in some way, exploded and shattered a large portion of the building.

The men who were at work and gathered round the filter press in the west room first knew of anything unusual because they heard what they described as a sizzling noise which, it is common ground, was the escape of the gas from the distorted door. Two of them turned and took a step or two towards the two doors between the east and west rooms where they saw a cloud of vapour, followed, as some at any rate observed, by a flash or flame which may have been at both doors or only at one. In their Lordships' view it is immaterial which account is accurate. Thereupon the foreman called to them to escape by the fire escape and a rush was made towards it. By the time those in front had reached that staircase, but before those behind had got so far a boom was heard which both sides accept as the blowing off of the door of the tank. Almost immediately afterwards and when the last men had just reached the top of the fire escape the heavy explosion took place which wrecked the building. The only man in the east room was killed. All those in the west room managed to escape.

The damage caused by the disaster amounted to $159,724.62. Of this amount, however, the greater part was attributable to a fire which followed the explosion or to damage from water made use of to put out the fire and is accepted by the respondents as excluded from the claim against the defendants because of the wording of Section 1 of the policy. The amount attributed to causes other than fire damage and said to be covered by the policy is, after adjustment, $45,791.38, and this sum is claimed in the present action. The amount of the claim is not, as their Lordships understand, in dispute, but liability is denied on a number of grounds.

It is said that the loss was not caused by an accident as defined in the policy but by the subsequent explosion: that in any case it was due to fire which so far from being covered is expressly exempted by the terms of the policy. Moreover it is contended that the accident was not the direct cause of the loss; its only direct effect was to tear the tank asunder.

Two additional defences are raised. (1) It is said that the respondents have already received from the Companies insuring against fire the total amount to which they are entitled and therefore have no claim against the appellants, and (2) that there was concurrent insurance and the loss should therefore be divided in a prescribed proportion between those companies which were on the risk.

The question whether the respondents' claim is no longer maintainable on the ground that they have already been paid in full goes to the root of the matter since it challenges their right to recover at all. It is therefore best dealt with first as it was dealt with by the Courts in Canada. In all three Courts there it has been uniformly unsuccessful even with those Judges who for other reasons would have dismissed the claim. Their Lordships agree that the contention is not sustainable. They need not repeat what has already been pointed out in those Courts that there is here no question of subrogation but merely of the transfer of a debt. The facts are not in dispute but stand thus. Before the initiation of the action, the 22 fire companies, parties to the risk paid each the proportion of £100,000 being part of the loss. Later on one Jenkins, a fire insurance broker and agent of the assured, persuaded the fire companies to pay the residue of the loss, leaving it, as he said, to the two groups of insurers to fight it out amongst themselves without the respondent having to wait for their money. This payment was made in March 1944 after action brought. On making payment each fire insurance company obtained a document headed " Receipt, transfer and subrogation " in the following terms: —

> " Sherwin-Williams Company of Canada, Limited, the undersigned, hereby acknowledges to have received at the execution hereof from .....Company .....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 the said Court, as being the amount of loss or damage to the property of 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 .....Dollars 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 9th March, 1940, issued in favour of the undersigned ; hereby subrogating and substituting the said .....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.....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."

These documents were not served on the appellants and indeed they were only disclosed during the trial of the Action.

Some technical objections were taken to the right of the appellants to raise or rely upon the plea but were overruled by the learned Judge who tried the case and their Lordships are content to deal with the matter on that basis. They agree with Barclay J. that though the document is headed " subrogation " what has to be considered is not the title but the substance of the agreement. So regarded it is plainly a purchase of a debt by the fire insurance Companies from and an assignment to them by the respondents. That assignment if duly served upon the debtor would no doubt defeat the claim of the respondents and transfer it to the fire Companies. The relevant

sections of the Civil Code are 1570 and 1571. They are in the following terms:—

> " 1570. The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature.
>
> 1571. The buyer has no possession available against third persons, until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127."

In the present case as the Supreme Court pointed out the sale has no doubt been perfected between buyer and seller, but there has been no signification of the Act of Sale or delivery of a copy to the debtor, nor has there been any acceptance by the appellants of the transfer of their liability to the fire Companies, if any liability existed. On the contrary they denied liability throughout. Their Lordships cannot accept the view that proof of payment by the fire Companies and of the transfer of the debt from seller to buyer is a sufficient signification of the act of sale within the meaning of Section 1571.

Signification implies an act on the part of the buyer or seller as opposed to acceptance of the transfer by the debtor whereby the buyer is enabled to sue him. Here there was no act by buyer or seller and therefore no signification by either. The case accordingly differs on the facts from *Bank of Toronto* v. *St. Lawrence Fire Insurance Company* [1903] A.C. 59 where the assignee took action in his own name against the debtor and was thereby held to have given signification of the act of sale. Nor are their Lordships able to accept the contention that a denial of the transfer followed by proof of its existence at the trial alters the position. It rather showed that the respondents so far from signifying the change expressly avoided doing so.

The appellants however rely upon Articles 77 and 81 of the Code of Civil Procedure which are in the following terms:—

> " 77. No person can bring an action at law unless he has an interest therein. Such interests, except where it is otherwise provided, may be merely eventual.
>
> 81. A person cannot use the name of another to plead, except the Crown through its recognised officers."

They maintain that the respondents having been paid in full have no longer any interest in the Action. Their Lordships do not agree.

It is true that payment in full has been made, not however because the fire Companies admitted any liability but because it was doubtful upon whom the liability fell. As between the appellants and the respondents, the debt was still due to the latter and by the very terms of the transfer they were under an obligation to continue the Action or allow it to be continued in their name. They would have been in breach of their contract had they not done so: it was still *their* action and the fire Companies were not using the respondents' name to plead.

Their Lordships therefore agree with all the Judges in Canada that this plea cannot prevail.

Once it is decided that the respondents are not precluded from suing owing to the fact that they have received payment from the fire Companies, the question of the cause of the loss and the exclusion of fire from the risks covered has to be faced.

On these points the appellants succeded in the Court of Kings Bench (Letourneau C.J. dissenting) and received the support of Rand J. in the Supreme Court.

On their behalf it was said, in the first place, that Explosion was not the risk covered. It was the tearing asunder of the boiler against which insurance was given and in this case it was the explosion and not the accident to the boiler which did the damage.

This argument, it is maintained, receives support from the provision that direct damage alone is covered and loss from any indirect result of an accident is expressly excluded.

The only direct damage, it was contended, was the injury to the boiler itself and the cost of repairing it was infinitesimal. So narrow an interpretation of the wording of the policy is not, as their Lordships think, justified, the more so having regard to the terms of section iv. of the policy which expressly grants an indemnity against payments to injured servants. Clearly something more than the mere bursting of the tank was contemplated, but this conclusion still leaves open the question whether the explosion which followed was the direct result of the accident to the tank.

Whatever meaning the word "direct" may have in qualifying the word "result" it does not imply that there can be no step between the cause and the consequence. It is unnecessary to multiply examples. *The Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* [1918] A.C. 350 sets forth the principle; though Lord Dunedin's words at p. 363 will require consideration later. At page 362 however he says "I think the case turns on a pure question of fact to be determined by common sense principles. What was the cause of the loss of the ship?" To the like effect are Lord Wright's words in *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* [1941] A.C. 55 at p. 71:—"It is now established by such authorities as *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society,* and many others, that causa proxima in insurance law does not necessarily mean the cause last in time, but what is 'in substance' the cause, or the cause 'to be determined by common sense principles'."

If this be, as their Lordships believe, the true view, then the matter is concluded by the evidence of Dr. Lipsett which was accepted by the learned Judge who tried the case. It would be a miracle, he said, if the vapour did not explode when it was released in the circumstances then existing. When one is considering only whether the explosion was the direct result of the tearing asunder of the tank, and disregarding the question whether the exception of fire from the risk frees the appellants from liability, it matters not that the escaping fumes required to be mixed with air before they became explosive or that some source of ignition was required. Both these steps were the natural, indeed almost the inevitable, consequence of the original rupture, and therefore its direct result.

There remains the more difficult question whether the exclusion of loss from fire prevents the respondents from recovering. Undoubtedly no explosion would have taken place without some source of ignition. One suggested source was the heated door of the tank. Mr. Lipsett thought this a possible method of ignition in as much as if heated to 484 degrees it would have reached a temperature high enough to ignite the gas. But he regarded this result as unlikely, and though the learned Judge speaks of an unascertained source of ignition, he does, their Lordships think, consider that the most probable cause was a spark or gas jet or open fire in a grate. He does not in terms reject the heated door, but regards it as an unlikely cause of the ignition of the vapour.

Some cause of the ignition there must have been and the appellants maintain in the first place that the loss was due to fire, if the combustible material was ignited by any spark or flame and broadly that a combustion explosion as a rule is caused by fire. In the particular case under consideration however they maintain that they are on even firmer ground in that some of the respondent's witnesses did say that they saw fumes of vapour followed by fire or a flash like fire at the two doors. In their submission there was a fire raging in the room for some appreciable time before the final explosion took place.

In either case there is, as the learned Judge recognizes, in some sense fire unless the unlikely cause of ignition was the heated door. An electric spark, a naked gas jet, an open fire are still fire, though they may not be fire within the exceptions contained in the policy. Still more plainly fire

was at least an element in the disaster which occurred if the true view be that there was for an appreciable period of time a burning of the gases before the ultimate explosion took place.

Whether an independent fire burning for an appreciable time had been generated and existed before the final explosion is, it is clear, a question of fact. The Judge of first instance and four Judges in the Supreme Court thought there was not. Rand J. on the other hand thought there was and in their Lordships' view it was this difference in outlook which led him to dissent from the opinion of the rest of the Court. He says:—

> "I take the circumstances of the loss of the appellant's property to be these. The course of escape of gas generated in the tank by the mixture of turpentine and the other substances, as the pressure mounted, was first by way of the small aperture in the manhole door or the vent at the rear, then between the manhole door, forced outward, and the frame, and finally through the manhole when the door was blown off. The sizzling noise was produced in the second stage; and the first explosive sound was the blasting of the door. The gas mixing with the air in the room became combustible and was ignited by a spark probably from an electric mechanism. This burning tended to reach back toward the source of the gas and while its quantity was limited the combustion was relatively slow and presented flames flashing in different directions as it followed the air currents. When the manhole opened the quantity was so great that the rapidity and extent of combustion issued in an explosion. Tongues of flame licked up the thin streams of grayish gas before that point was reached; both gas and flames were seen through both doors by the men working in the adjoining room. There was this fire in the eastern room for a sensible period of time before the explosion apart from the spark or other source of the original ignition.
>
> The passage of that fire into explosion resulted from the sudden access of the gas; if the slow feed or emission had been maintained or if the peak pressure had been reached before the door gave way, there would have been only the fire. In that case it would ordinarily follow that any damage done by it, either through the burning of property insured or by producing other direct effects, would be fire loss.
>
> Whether the ignition of the gas can be said to have been due to a fire within the meaning of the fire polices, ceases, then, to be of importance. There was clearly a secondary stage of fire which superseded the initial cause."

and again:—

> "This view differs from that of the Chief Justice at trial in the significance attributed to the flashes of flame previous to the explosion. He considers it too fine a distinction, in relation to the language of the policy, to resolve the developing explosion into stages and to treat the first and second—the ignition and the gas combustion periods—as constituting a "fire" existing as such, to be taken as a cause of new consequences. But that depends on the facts and I am unable to interpret them here as not creating an intermediate state of fire, either of the original gases or in the initial stages of the explosion. Time is significant and explosion was not necessarily involved in the burning gases. The minutes or even seconds which elapsed marked a period not of explosion but of a state of things that, in combination with new elements, led to explosion: the impact of the mass of gas upon the floating fire was the same as the contact of the burning match with the powder in *Hobbs*, supra, and likewise the development of the burning mass into explosion."

Whether he would have come to the same conclusion if the explosion had followed directly upon the original ignition is at least doubtful.

In these circumstances in their Lordships' opinion the view of the learned Judge who saw and heard the witnesses and could evaluate the importance to be attached to their evidence should be followed unless there is some valid ground for rejecting it, and for differing from the supporting views of the majority of the members of the Supreme Court. In particular the Board must be guided by the expert evidence accepted by him. The clearest expression of this evidence is to be found in the testimony of Dr. Lipsett, one of the experts called on behalf of the respondents, who stated:—

> "If you have a tank, such as in this case, which is generating vapours quite rapidly and filling alleyways that are 25 or 50 feet long and many feet wide and many feet high full of an inflammable mixture of turpentine vapours and air, it would be a miracle if they did not explode."

He goes on to explain that these explosions occur in three stages and says:—

> 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."

And further:

> "When an explosive mixture is ignited, a flame forms and moves slowly through the explosive mixture. This slow movement may last for from a fraction of a second to several seconds or minutes, and the rate of velocity usually is from one foot to ten feet per second."

In view of this evidence it is perhaps desirable to repeat the evidence as to what those working in the West room observed. According to their testimony vapour and then a flash or flame was seen in one or both of the doors between the East and West room; the foreman then shouted to the men to get out by the fire escape; the boom was heard about the time when the first man was near the top of the escape and the second explosion occurred when the last had no more than reached the top of the ladder.

As Locke J. says the whole sequence of events according to the respondents' foreman lasted only a few seconds.

The learned Chief Justice found, and their Lordships agree with him, that the incidents from the moment when the first flash was observed until the ultimate explosion took place was all part of one momentary event. The flame was the first stage of an explosion which in the then condition of the tank and outrush of vapour, necessarily went forward through the next stage, when the speed of the flame increased, until the final stage was reached and the explosion took place.

If this be the true view, it follows that there was no appreciable moment of time between the beginning of the ignition and the explosion. Each was a part of the same event, the ignition being the first and the explosion the final stage of the disaster. There was no separate fire which burnt in the room before the explosion took place. The flame or flash which the witnesses observed was the first stage of an explosion which immediately and inevitably followed. The fact that ignition and in that sense fire was an element in the ultimate result is not in their Lordships' view destructive of the respondents' claim.

It is true that a flash or flame or fire almost inevitably plays a part in many combustion explosions. But it does not follow that injury from the subsequent explosion is to be attributed to fire.

The old flint lock musket required a flash in the pan in order to ignite the powder and drive out the bullet, but death due to the penetration by the bullet would not naturally be described as death by fire.

The learned Judge who tried the case came to the conclusion that the ignition was due to some type of fire normally to be found in the building, e.g. a naked gas light or an electric spark and decided that such a fire was not included within the exception. He found support for this view in the distinction drawn in the American cases, of which *Tannenbaum* v. *Connecticut Fire Insurance Coy* (1937) Atlantic Reporter 193 is an example, between a friendly and hostile fire; the former being that type which is ordinarily used in a building; the latter something on fire which ought not to be on fire. The fire in the explosive mixture he thought, and as their Lordships have indicated they agree with him, was merely an incident in the explosion. In this they differ from Barclay J. who interpreted fire in the widest possible sense and thought that any accident in which fire formed an element was excluded.

> "If fire", he says, "of any kind or from whatever source or whenever occurring, is totally excluded from the policy, the question is solved. The subsequent exclusion of fire would seem to me to exclude fire even if a direct cause of loss."

For this opinion he finds support in *Stanley* v. *Western Insurance Company* (1868) L.R. 3, Ex. 71, where an exception of explosion in a fire policy was held to exclude all explosion even if caused by fire. The observations of Martin B. are as follows:—

> "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."

In their Lordships' view there are always elements of danger in applying to one word the attributes which can rightly be applied to another, nor are they persuaded that "fire" in a fire policy is a simple conception. Indeed the American differentiation between one type and another shows that it is not. Nor in their Lordships' opinion do the appellants establish the principles for which they contend by reliance upon such a case as *Hobbs* v. *Guardian Assurance Coy.*, 1886, 12 S.C.R. 631 where fire was caused by the dropping of a match into a keg of gunpowder resulting in an explosion followed by fire. The main question was whether an explosion which was caused by and was an incident in a fire was covered by an insurance against fire. It was held that it was so covered. Some difference of opinion between the Courts in Canada seems to have arisen as to the effect of Condition No. 11 of the statutory conditions which are made applicable by the Laws of Quebec to fire insurance policies. The present wording of Condition No. 11 is set out in the Quebec Insurance Act, section 240, paragraph 11. (Revised Statutes of Quebec, 1941, chapter 299.) But that condition deals with fire following an explosion and would impose liability upon the fire companies in such a case, but is in no way concerned with fire preceding an explosion.

The judgment has been referred to and approved in *Curtis's and Harvey (Canada) Ltd.* v. *North British and Mercantile Insurance Coy., Ltd.* [1921] 1 A.C. 303. In that case however the fire burned for ten minutes before the first explosion and it is plain from the judgment of this Board delivered by Lord Dunedin that what was covered was an explosion which was an incident in a fire. His words at page 309 are:—

> "In *Hobbs* v. *Guardian Assurance Coy.* the Supreme Court of Canada decided that a policy which insured against fire covered all loss caused by explosion which was an incident of the fire—i.e., when a fire began without an explosion and an explosion took place during its course and was caused by it. Scrutton L.J. in *Hooley Hill Coy.* v. *Royal Insurance Coy.* [1920] 1 K.B. 257, expressed an opinion

to the same effect. Their Lordships agree with the reasoning of the learned Judges in *Hobbs'* case. That is an authority on what an insurance against fire covers. *Stanley* v. *Western Insurance Co.* was 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 damage by explosion. This expression was held to cover all loss by explosion, whether the explosion succeeded to or was caused by a fire, or was prior to and caused a fire."

Both cases deal with the legal consequences which follow an explosion which is an incident in a fire, not those which follow fire which is the consequence of an explosion, and therefore have no direct bearing on the point at issue.

In their Lordships' opinion the problem may be solved in another way as it was solved in the Supreme Court by the majority of its members. The cause of an event is, as has been pointed out in the *Leyland* case, to be decided on common sense principles and to be ascertained by determining what is in substance the cause. In their Lordships' view in the present case the cause, whether it be described as dominant or proximate or by any other of the numerous epithets which have been used, was the bursting open of the door of the tank. In other respects the factory was being carried on in its normal way and it would be an unjustified view to hold that one of the sources of ignition always present in a factory was in substance the cause of the explosion. Of course it played its part but as Lord Dunedin said in the *Leyland* case (*supra*) at p. 363:—

"The moment that the two clauses have to be construed together, it becomes vital to determine under which expression it"—

i.e., the cause of the loss—

"falls. The solution will always lie in settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words you seek for the *causa proxima*, if it is well understood that the question of which is *proxima* is not solved by the mere point of order of time."

If fire were the risk insured against it might well be that an explosion in which fire played a part was covered, but, when it has to be determined whether the tearing asunder of the tank or the ignition of the gases thereby released is the cause of the explosion and of the loss which it occasions, their Lordships have no hesitation in choosing the former.

But, it is said, if the accident to the tank was the cause of the explosion it was also the cause of the subsequent fire and logically therefore the appellant would be liable for all the damage including that done by the fire.

This result would no doubt follow if there were no exception of fire, but fire is excepted. Such an exception is unnecessary if fire alone caused damage since fire is not insured against. As Scrutton L.J. pointed out in the *Hooley Hill* case (*supra*) an exception of explosion in a fire policy covers an explosion caused by fire but such an exception would be unnecessary if the explosion was not caused by fire since fire alone was covered. It is fire caused by the tearing asunder of the tank against which the insurers required protection. If the words "fire" and "explosion" be substituted one for the other the principle is the same as that applied in *Sin Mac Lines Ltd.* v. *Hartford Fire Insurance Coy.* (1936) S.C.R. 598. In other words the insurers stipulated that they should not be liable for fire even though its dominant cause was an accident, as defined, to the tank itself.

In their Lordships' view the appellants are not absolved from liability for the damage due to the explosion by reason of the exception of fire.

One final point awaits the determination of the Board, viz., the proportion of the loss which the appellants have to bear.

The clause dealing with the matter is condition 3 on the back of the policy and is in the following terms:—

"OTHER PROPERTY INSURANCE

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 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."

The argument on behalf of the appellants on this point is not and could not be fully developed before their Lordships having regard to the state of the record and the finding of Tyndale J.

That finding is incorporated in his judgment in the words now quoted:—

"Plaintiff had, at the time of the disaster, twenty-two policies of fire insurance. They were all produced, at Defendant's request, as Exhibit D-6, with separate identifying numbers from 1 to 22; but Defendant, now invokes, on this point, only one—i.e., Exhibit D-6-22, which is the policy of 'Associated Reciprocal Exchanges'. To this policy are annexed two supplemental contracts, on which Defendant relies. Each of these two supplemental contracts covers direct loss or damage by explosion, subject to certain conditions and exclusions. The exclusion relevant to the present problem relates to 'pressure containers'; and it is common ground between the parties that Defendant's contention depends upon whether or not the tank was a 'pressure container'."

The learned Judge adds:—

"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 and that, in consequence, *that policy does not constitute other insurance concurrent with the policy of Defendant.*"

In the view of the trial Judge therefore the contention failed. In the King's Bench having regard to the opinion of the majority the question was immaterial and is not referred to. In the Supreme Court the only member who adverted to it was Locke J. and he merely says that he agrees with the learned trial Judge.

In these circumstances no material is provided upon which the Board could differ from the Courts in Canada even if they had any reason for doing so.

They like Tyndale J. reject the contention and upon the matter as a whole will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

(1088) Wt. 8348—56 100 3/51 D.L./P1/3

In the Privy Council

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA

v.

THE SHERWIN WILLIAMS COMPANY OF CANADA LTD.

DELIVERED BY LORD PORTER

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1951