Privy Council Appeal No. 22 *of* 1920.

Curtis's and Harvey (Canada), Limited, in liquidation, and another - *Appellants*

v.

The North British and Mercantile Insurance Company, Limited - *Respondents*
and Cross-Appeal (Consolidated Appeals)

AND

Privy Council Appeal No. 23 *of* 1920.

Curtis's and Harvey (Canada), Limited, in liquidation, and another - *Appellants*

v.

The Guardian Assurance Company, Limited - - - *Respondents*
and Cross-Appeal (Consolidated Appeals)

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.
MR. JUSTICE DUFF.

[*Delivered by* LORD DUNEDIN.]

Though this is an important case, both in respect of the amount which is at stake and from the fact that it has given rise to a difference of judicial opinion, yet the facts out of which the question arises are capable of being set forth with great succinctness.

The appellants in the first of these appeals are manufacturers of explosives and are the owners of works in which such explosives are made, and in particular, they were engaged in the manufacture of Tri-Nitro-Toluol. They wished to insure their works against fire, and through their brokers they sent to the respondents, the North British and Mercantile Insurance Company, a slip on which was typewritten their requirements for insurance. These consisted of a specification of the various buildings wished to be insured, with the addition of terms on which they wished the insurance to be granted. Upon this the respondents issued a policy. The policy consisted of a printed form giving the general words of insurance against fire, leaving a blank for a specification of the premium, and leaving a large blank for the specification of the subject insured. This latter blank was filled up by pasting in a slip, or, as it is locally termed, an "allonge," which was a

typewritten paper exactly echoing the proposal made by the broker. On the back of the form are the printed statutory conditions which, according to the law of Quebec, must be printed on every policy, and to which fuller reference will be presently made.

A fire took place in one of the buildings insured in which there was a nitrator, which is a machine employed in one of the stages of the manufacture of T.N.T. From this building the fire extended to the adjoining building, in which there was some T.N.T. Ten minutes after the inception of the fire, an explosion occurred of the T.N.T. That building was wrecked and burning material blown about. Further fires ensued, and then from time to time further explosions. In the end practically the whole of the insured buildings were, whether by explosions or by fire, totally destroyed.

The appellants sue upon the policy for the whole amount, subject to the adjustment which is necessary in respect of there being other insurances in other policies on the same subject. The respondents admit their liability for damage by fire, but contend that they are not liable for damage attributable to explosion, and aver that the greater part of the damage was in fact so caused. Proof was led in which the facts, which have been summarised, were elicited.

It is now necessary to set forth the clauses of the policy on which the question of law depends. The insurance is expressed to be against fire. In the slip or allonge there is the following clause :—

> " Warranted free of claim for loss or damage caused by explosion of any of the material used on the premises."

No. 11 of the statutory conditions is as follows :—

> " 11. The Company shall make good loss caused by the explosion of gas in a building not forming part of gasworks, and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire."

The Revised Statutes of Quebec, 1909, enact Sec. 7034 :—

> The conditions set forth in this article shall, as against the insurer, be deemed to be part of every contract of fire insurance entered into or renewed on or after the tenth day of February, 1909, in the Province, with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every such policy with the heading, " Conditions of the Policy," and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the Assured unless evidenced in the manner prescribed by Articles 7035 and 7036.
>
> 7035. If the Insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added to the contract containing the printed statutory conditions, words to the following effect, printed in conspicuous type and in ink of a different colour : " VARIATIONS IN CONDITIONS." This policy is issued on the above conditions, with the following variations and additions. [Set forth the conditions.]
>
> " These variations are made by virtue of the Quebec Insurance Act, and shall have effect in so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable requirements on the part of the Company."
>
> 7036. No such variation, addition or omission shall, unless the same is distinctly indicated as set forth in Article 7035, be legal and binding on the insured.

The above quoted warranty contained in the allonge is not printed in red ink. There is, however, inserted in red ink the following variation of condition 11 :—

> ". . . Add the following clause as explanatory of the Company's actual liability under Clause 11 : " This Company is not liable for loss caused by explosions of any kind, unless fire ensues, and then for loss or damage by fire only " ; nor for loss or damage to any electrical machinery, appliances or equipment, unless fire ensues, and then to include the loss or damage caused by fire only."

The respondents contended that in respect of the clause of warranty above quoted they are not bound to pay for any damage caused by explosion. The learned Trial Judge found for the appellants, and held that the warranty clause was bad, first because it was a variation of the statutory conditions not properly authenticated, and second, because in itself it was unreasonable. The Appeal Court reversed that judgment, and ordered enquiry as to how much damage was caused by explosion and how much by fire, the evidence as led not having been directed so as to clear up this point. Appeal has now been taken to this Board.

There are two questions accordingly which fall to be decided. The first is what is the proper construction of the clause of warranty, the second is if on a proper construction of the clause the respondents are not bound to pay any loss caused by explosion, then is the clause binding on the appellants in respect either (*a*) that it is not properly authenticated or (*b*) that it is in itself unreasonable ?

It may be well here to set out what is the state of the decisions on questions which nearly touch the point. In the case of *Hobbs, Osborn and Hobbs* v. *The Northern Assurance Company* (1886), 12 S.C.C. Reports, 631, 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. Lord Justice Scrutton in the case of *Hooley Hill Rubber and Chemical Company* v. *Royal Insurance Company* [1920], 1 K.B., at page 272, expressed an opinion to the same effect. Their Lordships agree with the reasoning of the learned Judges in *Hobbs's Case*. That is an authority on what an insurance against fire covers. The case of *Stanley* v. *The Western Insurance Company* (1868), 3 Ex. 71, 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. *Stanley's Case* was followed by the English Court of Appeal in the *Hooley Hill Rubber Company's Case* already cited. These cases are not actually binding on their Lordships, 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.

Now were the policy here simply a policy against fire, with the warranty added, the case would be ruled in terms of the decision

in *Stanley's Case*. The only distinction that can be drawn is that here the policy is not simply against fire, but that there is adjected the statutory condition No. 11. The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree with the arguments of the appellants' counsel that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability. Statutory condition No. 11 may, therefore, be taken to fill up the lacuna left by *Hobbs's Case*; that is, to make it clear that when the original cause of fire is explosion the damage must be made good by the insurer. The question, therefore, resolves itself into this. When the assured said he would be content that the insurer should not be liable for all loss caused by explosion of the material used on the premises, was he contracting to that effect in view of the sum total of the liabilities under the policy, or was he merely contracting as to the additional liability imposed by Clause 11 ?

It must be remembered that these were T.N.T. works. It is true that T.N.T. may be consumed without being exploded; it may simply burn without its occasioning an explosion in either the popular or scientific sense. As to what is the true meaning of the word "explosion," the parties have been content to leave the Court without any means of judging this from the scientific point of view. Their Lordships do not think they are entitled to read in any knowledge which they may as individuals possess on the subject, but are bound to take it that the parties are agreed to take the word in the popular sense, in which sense it has been used in the résumé of the facts given above. But while T.N.T. might burn it might also explode, and it seems to their Lordships impossible to come to any conclusion but that the parties must have contemplated the possibility of an explosion either as an incident or as an originator of fire. It is obvious that if the assurer was content to have this possible risk barred, he would secure an insurance on better terms. When, therefore, he used in his proposal and the insurer accepted in the policy, words which are absolutely general, and in no way limited, their Lordships think that the more natural construction is to apply the words of exception to the whole risks in which explosion takes a part rather than to confine them to the one special case provided for by statutory condition 11, to which no reference is made.

The next question to be decided is whether the construction of the warranty, being as above, it is itself struck at by the provisions of Art. 7036. The learned judges in the Court below have held that in respect that Art. 7035 specified the insurer as the person who may be desirous to vary the condition, the clause does not apply in cases where, as here, the insured proposed the variation, which was accepted by the insurer. Their Lordships are unable to agree with this view of the Statute. Art. 7036 is quite peremptory in its terms. Their Lordships think that it is the policy of the Statute to make a hard and fast rule that

every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort, except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect. This leads, though by a different line of reasoning, to the same result as reached by the learned Judges of the Court of Appeal. Their Lordships need only add that they agree with the Court of Appeal, differing from the Trial Judge that the condition is not in itself unreasonable.

Two minor matters forming the material of interlocutory judgments must be mentioned, as they enter into the judgment of the Court of Appeal, though they were not made a matter of argument before their Lordships. Their Lordships consider that the Trial Judge was right in striking out a paragraph which proposed to adduce evidence as to the intentions of parties antecedent to the issue of the policy. The matter of the other interlocutory judgment is somewhat obscure. If, as Maclennan J. thought, it was only a renewal in another form of the motion already dealt with, no more need be said. If, on the other hand, it was a plea which would destroy the contract on the ground of its being *ultra vires* of the Company, there is, in the view of their Lordships' decision on the merits, no necessity to discuss it. Their Lordships, therefore, think that the judgment of the King's Bench should be varied by striking out from the operative final paragraph such part as deals with the interlocutory judgments, but so far as it directs enquiry into the question of damages due respectively to fire and explosion, should be affirmed, and that the respondents should have the costs of this appeal.

In the second appeal the facts are the same, except that there is no variation whatever of statutory condition 11. The same arguments accordingly apply, and the result must be the same as in the former case.

The respondents on the 11th June, 1920, obtained special leave to cross-appeal in each action, on the ground that the judgments of the Court of King's Bench should have directed judgment to be entered for them. It follows from this judgment that these cross-appeals ought to be dismissed and the appellants are entitled to their costs in respect of them. These costs should be set off against the costs which the appellants are directed to pay to the respondents in the main appeals.

Their Lordships will humbly advise His Majesty to the fore going effect.

In the Privy Council.

CURTIS'S AND HARVEY (CANADA), LIMITED, IN LIQUIDATION, AND ANOTHER

v.

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, LIMITED,

and

CURTIS'S AND HARVEY (CANADA), LIMITED, IN LIQUIDATION, AND ANOTHER

v.

THE GUARDIAN ASSURANCE COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1920.