# In the Privy Council.

No. 12 of 1950.



# ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA ... ... ... ... ... ... APPELLANT

AND

THE SHERWIN WILLIAMS COMPANY OF CANADA LIMITED ... ... ... ... ... ... ... RESPONDENT.

## CASE FOR THE APPELLANT

RECORD

1.—The Appellant seeks leave to appeal from a Judgment of the Supreme Court of Canada of the 23rd December, 1949, which by a majority (Rinfret, C.J., Taschereau, Estey and Locke, JJ., Rand, J. dissenting) restored the Judgment of the Superior Court (Tyndale, J.) dated the 29th March, 1946, and maintained the Respondent's appeal from a Judgment of the Court of King's Bench (Appeal Side) dated the 12th January, 1949 (Barclay Marchand, Bissonette and Casey, JJ., Letourneau, C.J. dissenting) which had maintained the Appellant's appeal from the Judgment of the Superior Court condemning the Appellant to pay to the Respondent $45,791.38. p. 2. (Vol. 5). p. 771. p. 794.

2.—The Appellant (who inspects boilers and unfired vessels and insures against loss from "accident" to the objects which it inspects) undertook, for a period of three years beginning the 15th March, 1940, for a premium of $1,589.50, in the event of an accident as defined in the policy to an object therein described— Ex. P. 1

> To pay the Assured for loss on the property of the Assured directly damaged by such accident . . . . excluding (a) loss from fire . . . . and (e) loss from any indirect result of an accident.

The Appellant's liability was limited to $50,000.00.

p. 770 3.—At all relevant times twenty-two fire insurance companies had insured the Respondent against loss from fire, including loss from explosion, in the total amount of $4,697,250.00.

p. 39 4.—The Respondent manufactures paint at a plant which includes a linseed oil mill in a three-storey building. The accident out of which the case arises occurred on the third or top storey which is new construction, divided into the East Room and the West Room by a fire wall. The West Room rests on an old building, the East Room on new construction. The outer or eastern wall of the old building was continued through the third storey and constitutes the fire wall dividing the East from the West Room. 10
pp. 13–14 This wall is 118 feet long. The ceiling is 17 feet above the floor. Two
p. 93 doors, 8 feet square, give access from one room to the other. The south door is 22 feet 6 inches from the south wall. The north door is 19 feet 6 inches from the north wall. The two doors are 60 feet apart. The only way of reaching the top storey from the ground floor is by an elevator and stairway to the East Room. A fire escape, or outside iron stairway, runs from the West Room to the yard. Four filter presses are in the West Room. The filter press in use at the time the events hereinafter related took place is 31 feet from the fire escape and 75 feet from the north door and 54 feet from the south door. It is 106 feet from the fire escape 20 to the north door.

Ex. P. 1 5.—The "object" of the insurance, "1 steam jacketted bleacher
p. 42, l. 30 tank" was, with other machinery, in the East Room. The lower third of the tank was steam jacketted; steam was turned into the jacket and regulated by a valve, thus raising the temperature of the contents of the
p. 55 tank. The tank was 56 feet from the south door and 40 feet from the north door. It was 12 feet 5 inches long and 5 feet 4 inches in diameter,
p. 31; p. 42 covered with asbestos and canvas. It lay in a horizontal position in a metal
p. 82 cradle bolted to the floor. There was a glass peephole 6 inches in diameter
p. 256, l. 12 in the rear; in front, a manhole closed by a door 20 inches in diameter, 30
p. 55; held in place by $\frac{3}{4}$ inch bolts or pins which passed through two lugs on either
p. 746; side of the frame of the door and two lugs on either side of the door and
p. 748 through holes in the end of a cross-bar or cross-arm. The cross-arm was
p. 246 pressed against the door by a steel pin 11 inches long and $1\frac{1}{2}$ inches in
p. 87; diameter, turned by means of an 8 inch wheel. Vacuum was used to fill
p. 135 the tank, gravity to empty it. A vent or air release line ran from the top
p. 87 of the tank to a point near and below the door at the right front of the
p. 59 tank. It was controlled by a valve. The vent or air release pipe was open
p. 753 and remained open at all times relevant to the issue. A shaft ran through
p. 174, l. 40; the centre of the tank; paddles were attached to the shaft. The shaft is 40
p. 198, l. 8 turned by electric power. The shaft in operation keeps the contents of the
p. 257, l. 24 tank in solution. The tank was constructed to resist pressure from without, rather than pressure from within.

p. 45 6.—The tank was habitually used to clarify linseed oil. Henri Asselin
pp. 173–174 (for the Respondent) describes the process. He speaks of filling the tank

5/1951





with vacuum. Oil was drawn from the basement by the effect of vacuum in the tank; then the air was admitted and the agitator put in motion; steam was admitted to the jacket and the contents of the tank raised to 190° when the steam was turned off. Then, by the closing of an air release valve, a vacuum was again re-established in the tank and used to draw in 200 lbs. of Filterol and 50 lbs. of FilterCel. The agitator continued to operate for half or three-quarters of an hour. The oil was then allowed to flow to the basement and was then pumped from there to the West Room where it was clarified by filter presses.

7.—In the spring of 1942 a certain amount of discoloured turpentine was discovered. It was determined to clarify it by subjecting it to a process similar to that used to clarify linseed oil, with the sole modification that the tank was to be charged from drums carried to the third storey on the elevator, and the temperature raised to 145° to 150° instead of to a temperature of 190° used for linseed oil. A written formula is said to have been provided by the chemist, Mr. Hodgins, but neither the chemist nor the formula was available at the trial. p. 134, l. 28 p. 187, l. 20 p. 177, l. 34

8.—On Sunday 2nd August, 1942, the Respondent, apparently ignorant of the fact that turpentine in association with Filterol (Fuller's Earth) sets up a violent chemical reaction, embarked upon the process of clarifying 850 gallons of discoloured turpentine. The experiment aroused great interest and curiosity among the Respondent's employees. The process was carried out under the supervision of the superintendent, Halsey Frazier, the oil mill foreman, Arnold Rymann, and by Henri Asselin, oil refiner, who was in charge of the tank, and his helpers.

9.—Asselin, Boucher and Gosselin had proceeded with the process of clarification in the ordinary way; 150 gallons of the contents of the tank had been released to the basement by Asselin and were being pumped from the basement to the filter press in the West Room, about which the superintendent, Frazier, the foreman, Rymann, Asselin, Boucher, Gosselin and others had assembled. The steam in the jacket heater had been turned off when the contents of the tank had reached a temperature of 145° to 150°, and the vent or air release line, controlled by valve No. 5, was open at all times after the Filterol had been drawn into the tank. p. 174, p. 187 p. 133, l.40 p. 174,l.42; p. 198. l. 4

10.—As the turpentine was being forced through the filter press in the West Room, the men were witness to events in the following sequence:

1. They heard a hissing or sizzling noise in the East Room which attracted their attention to the north and south doors.

2. Frazier saw, to use his own words, "fire" in the north doorway. Rymann saw "a big flash like fire" in the south doorway. Asselin saw "flames or fumes. Was looking towards the south "door . . . . it must have been flames."

RECORD

3. The alarm was given by Frazier, the superintendent, who "called to the men to get out by the fire escape."

4. As the men were on the fire escape they heard a noise which is admitted to have been caused by the blowing off of the manhole door of the tank.

5. As they were further down the fire escape they heard a louder noise which is admitted to have been the explosion which caused the loss now claimed by the Respondent from the Appellant.

pp. 456–458 11.—The men made written statements of what they saw and heard within a few days of the accident. These statements were taken down by a shorthand writer, typed, read over to the men and signed and witnessed.

12.—The essential parts of the statements of the men may be summarised as follows:

p. 719 (a) The superintendent, Frazier, said he heard a sizzling noise which he was about to investigate when glancing at the north side he saw fumes—then fire. He called to the men to get out by the fire escape. He went with them, and as he put his foot on the fire escape he heard a noise like a boom, followed (when the party had got to the second storey) by a second noise which was louder, and momentarily paralysed them.

p. 720 (b) Rymann, waiting to change the cloths in the filter, all of a sudden heard a sizzling noise like a steam valve breaking and saw steam coming round the north door. The south doorway was full of vapours. He saw a big flash like fire. They had to get out by the fire escape, and while Rymann was just starting down the second explosion occurred. He went down and saw that walls had fallen.

p. 721 (c) Henri Asselin (the oil refiner in charge of the tank) stopped the pump, then discussed changing cloths with Frazier. He heard a hissing and saw at the south door, toward which he had moved, flames which turned him back. Frazier told him to use the fire escape. He went down, and heard a noise, but could not tell where. The first noise was not an explosion, but like a roar.

p. 728 (d) Boucher was standing in the middle between two presses. He heard a noise like a safety valve popping and turned facing the north door where he saw blue-white smoke which frightened him. He heard Frazier tell the boys to get out. On the fire escape Boucher heard and saw nothing until he got near the second floor. Then he heard the second shock which sent him against the railing.

13.—The twenty-two fire policies contained Statutory Condition No. 11, being section 240 of the Quebec Insurance Act, R.S.Q. 1941, Ch. 299, which is in the following 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. RECORD

which rendered the fire companies liable for loss caused by explosion: *Hobbs* v. *Guardian Insurance Company* (1886) 12 S.C.R. 631, approved by the Judicial Committee in *Curtis's & Harvey Limited* v. *North British Company* (1921) 1 A.C. 303.

14.—The Respondent was insured against "accident" by the Appellant, whose policy is, in part, in the following terms: Ex. P. 1

Boiler Inspection and Insurance Company of Canada . . . . In consideration of $1589.50 premium does hereby agree with The Sherwin-Williams Company of Canada Limited, . . . . respecting loss (excluding loss of the kind described in Section II, and including loss of the kind described in Section IV) from an accident as herein defined to an object described herein, occurring during the policy period which is from 15th March, 1940 to 15th March, 1943, at 12 o'clock noon standard time, as to each of said dates at the place where such accident occurs, subject to a Limit per Accident . . . . as follows:

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;

Definition of Object—Schedule No. 2. Unfired Vessels:

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 a 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.,

Definition of Accident—Schedule No. 2, Unfired Vessels:

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 pressure of steam,

RECORD

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.

15.—The Respondent's total loss of $159,724.62 has been paid by the fire insurance companies—$112,793.34 which it admitted having received and $46,931.28 the receipt of which it did not reveal to the Appellant but which it was proved at trial to have received before the close of pleadings.

p. 731

16.—The respondent claimed from the Appellant $46,931.28 the Appellant denied liability because :

1. The Respondent had no interest in the present action having subrogated the fire insurance companies in all its rights and the fire insurance companies could not use the name of another to enforce their own rights ;
2. the loss was a fire loss and excluded by the Appellant from its liability under its policy ;
3. the Appellant's liability was limited to payment to the assured " for loss on the property of the Assured directly damaged by such accident " and excluded—" (e) loss from any indirect result of an accident " ;
4. in any event, there was concurrent insurance.

FIRST POINT OF DEFENCE.

17.—The Appellant alleged in its plea that the Respondent had been paid by the fire companies the full amount of its loss including the amount claimed from the Appellant and that the Respondent had not sufficient interest in the claim to bring an action against the Appellant, or any right to do so having subrogated the fire insurance companies in all its rights, and that the fire insurance companies could not use the name of another to enforce any rights they might have against the Appellant by reason of Articles 77 and 81 of the Code of Civil Procedure, which provide :

> 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 merely eventual.
>
> * * * *
>
> 81. A person cannot use the name of another to plead, except the Crown through its recognised officers.

18.—The Respondent in its answer to plea denied that it had been paid by the fire insurance companies the amount it was claiming by this

action from the Appellant, although at the time of the said denial, the 21st April, 1944, more than a month had elapsed since the said payment by the insurance companies to the Respondent had actually been made; and at trial it was suggested that the Respondent had merely secured an extension of the time within which action might be brought by the Respondent against the fire insurance companies.

RECORD

pp. 16-18; p. 768, l. 27

19.—The Supreme Court held—wrongly, the Appellant submits—that the fire companies " are assignees of a debt which they have bought " from the Appellant, and therefore, different principles have to be applied. " The two relevant sections of the Civil Code are 1570 and 1571. They " read as follows:

> 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.

" Between the Appellant and the fire insurance companies the sale was " perfected at the date the relevant document was signed, but it is not " contested that a copy of it has never been delivered to the respondent. " Of course, this was essential to give the insurance companies possession " available against the respondent, but it is argued that although the " assignees could not exercise their rights until the fulfilment of this " requirement of the law, the assignor was nevertheless divested of all his " rights of ownership, and could not properly bring the present action. " If he did so, it would be in violation of section 81 of the Code of Civil " Procedure, which says:

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

" It has been said that this theory has received the support of Mr. Justice " Cimon in *Montreal Loan & Investment Co.* v. *Plourde* (Vol. 9 R. de J. 292). " But I do not think that such is the case. A perusal of that judgment " shows that the plaintiff, the assignor, had sold to the assignee a claim " against the defendant, but the latter, in lieu of notification, had accepted " the assignment. The learned Judge rightly decided that the assignee " was the only proper party who could claim, having on account of the " acceptation by the debtor, a ' possession available ' against him. In " view of 1571, the assignor was divested of all his rights, and any action " taken by him was in the name of ' another ' and contrary to 81 Code C.P.

RECORD

" But here there was no notification, no acceptance, and if, between " the seller and the buyer the deed of sale was complete, it was not as to " third parties. Until the signification is made, as to third parties, the " title remains in the assignor. This is so true that a garnishee may be " served in execution of a judgment against the assignor upon moneys in " the hands of the debtor. The former or the assignee will not be allowed " to oppose the transfer, if no signification has been made. Vide " Aubry & Rau (Traite Pratique de Droit Civil, Vol. 7 p. 450)."

20.—The Appellant contended and submits that having alleged and proved as an issue in the case the transfer of the Respondent's rights to the insurance companies and the payment by the fire insurance companies to the Respondent, both of which the Respondent has denied, that a sufficient signification of the act of sale within the meaning of Article 1571 of the Civil Code, has been made : *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (1903) A.C. 59.

21.—Moreover, the Appellant contended and submits that signification is required for the benefit of the debtor who may elect to waive it.

p. 784, l. 1 22.—The learned trial Judge erred in stating that the Appellant's contention rests upon the exclusion indicated by the letter " (b) " in Section 1 of the policy which excludes " loss from an accident caued by fire." The Appellant's contention rests upon exclusion " (a) loss from fire."

SECOND POINT OF DEFENCE.

p. 784, l. 18 23.—The learned trial Judge found :

> 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.

But he also held :

p. 784, l. 48 > . . . . that the flash, flame or fire described by the factual witnesses was the flame which was being propagated through the explosive mixture following the latter's ignition from an unidentified source ;

and did not constitute a fire within the meaning of the policy.

24.—In coming to this conclusion Tyndale, J. relied upon *Sin Mac Lines Limited* v. *Hartford Fire Insurance Company* (1936) S.C.R. 589, known as the Barge Rival case, but in holding that " the flame or fire which " was present before the main explosion " did not " constitute fire within p. 786, l. 30 " the meaning of the policy " was under the misapprehension that the Supreme Court of Canada had held that the lighted match in the Barge Rival case was not a fire within the meaning of the policy.

25.—The statements of the factual witnesses mentioned in paragraph 12 hereof make it clear that these witnesses saw " fire," " a big flash like fire," " flames or fumes " before the accident, i.e. the blowing off of the tank door. RECORD

26.—The " hissing or sizzling noise " which attracted the attention of these witnesses came from the escape of vapours first through the vent and secondly at the periphery of the door.

27.—The learned trial Judge found : p. 782, l. 1

> It is common ground that the summary of the facts contained in this letter is substantially exact. It is also admitted or established that the " hissing or sizzling noise " mentioned in Exhibit P–19 must have been caused by the vapours escaping from the tank through the periphery of its door or manhole cover, which was being forced open by the pressure created within the tank. When the door of the tank was blown off, a much larger quantity of vapour was, of course, released, and it was presumably the explosion of this vapour which was heard by the employees as they were going down the fire escape.

The learned trial Judge, however, failed to appreciate the importance of the facts that the " hissing or sizzling noise " came in the first place from the vent and secondly from the periphery of the door as explained by the Respondent's experts, Hagen and Lipsett. That there definitely was a fire in the East Room before the accident is confirmed by the witness Parker.

28.—In the Supreme Court Locke, J. in his reasons for Judgment said : p. 16, l. 16 (Vol. 5)

> While it is admitted that there was an accident to the steam jacketted bleacher tank above referred to which was followed by an explosion and by fire, there is disagreement as to just what constituted the accident.

and then found—wrongly, the Appellant submits, that " accident " as defined by the policy as " a sudden and accidental tearing asunder of the " object or any part thereof," was not merely " tearing asunder " but included events leading up to the tearing asunder ; so that in his opinion

> The forcing out of the manhole door and the bending of the bolt or bolts which permitted this and the subsequent blowing off of the door should be treated as the accident and not the latter occurrence alone.

29.—The Appellant submits that such an interpretation of " tearing asunder " does violence to the ordinary meaning of plain language. " Tearing asunder " cannot mean stretching, bending or twisting ; it means

RECORD

cleaving, severing, complete separation. Anything less is not tearing asunder. If the pressure within the tank has subsided after twisting the bolt which held the manhole cover in place, without blowing it off, there would not, in the Appellant's submission, have been an "accident," and the vapour which would have escaped would have been but "leakage "at valves, fittings, joints or connections," which, in the terms of the definition, "shall not constitute an accident," and in consequence no loss could have been claimed from the Appellant.

p. 785, l. 4

30.—The learned trial Judge held that although the unidentified source of ignition did, strictly speaking, constitute fire, fire within the meaning, there was no evidence of any fire which would entitle an assured to recover under a fire insurance policy as the source of the ignition of the explosive mixture in this case.

p. 824, l. 45

31.—In dealing with this point Barclay, J. said in the Court of Appeals :

> 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 ?" 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 defendant that the words of Martin, B., in *Stanley* v. *Western Insurance Company* (1863) 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 page 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 cause is exceedingly simple, and we should not be justified in adding words to give it the most artificial meaning which Mr. Quain contended for.

p. 11, l. 9 (Vol. 5)

In dealing with this point Rand, J. in the Supreme Court of Canada, held :

> In an ordinary policy against fire, we do not go back for originating causes; what has brought fire about is irrelevant; we take it as if it were a first cause. The same conception is to be given to fire as an exception ; when it appears we mark it as a

> new factor and we are not concerned with what has preceded it. Was it then an actuating agent here ? I am bound to say that the answer seems to me to admit of no doubt. It was the flame that set the mixed gases into combustion so great and rapid as to produce the explosion. Both the gases and the fire were necessary to that reaction, but the fire was the factor in producing it. The problem is not one of abstract or philosophical causal determination ; we are endeavouring to ascertain the scope of an exception from a risk assumed, the language of which carries the ordinary and popular sense of these phenomena.

On this point the Appellant relies on the reasoning of Barclay, J. and of Rand, J.

32.—Locke, J. in the Supreme Court of Canada says : p. 18, l. 32 (Vol. 5)

> The damage in respect of which the claim is made was not caused by burning. Against this risk the appellant was insured, and the insurance companies have paid the loss.

the inference being that loss other than loss from burning is not included in the terms of a fire contract, and Locke, J. comments upon the fact that explosion had not been excluded from the risk :

> In the *Stanley* case liability for damage by explosion was excluded, and it was accordingly held that there should be no recovery.

Estey, J. held :

> The particular loss we are here concerned with arises out of an explosion the loss or damage from which was not by the terms of the policy specially excluded.

33.—The inference to be drawn from these observations of Locke and Estey, JJ. is, in the Appellant's submission, that had explosion been excluded, the action against the Appellant would have been dismissed.

34.—Taschereau, Estey and Locke, JJ. comment on the fact that the Appellant did not exclude " loss from explosion " from its policy and seemingly hold the Appellant responsible for " loss from explosion," although " ignition which is fire " is essential to explosion.

35.—Although " loss from explosion " was not excluded from the Appellant's policy, " loss from fire " was excluded, and inasmuch as fire is an essential to explosion, the exclusion of fire excluded explosion.

36.—Loss from explosion is a risk assumed by the insurer in any fire policy in which the Quebec Statutory Conditions, or similar conditions, are effective : *Hobbs* v. *Guardian Assurance Co.* (1886) 12 S.C.R. 631,

RECORD

approved by the Privy Council in *Curtis's and Harvey Limited* v. *North British Company* (1921) 1 A.C. 303. In the *Hobbs* case Ritchie, C.J. said at p. 634 :

> 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.

37.—Taschereau, Estey and Locke, JJ. have merged the second point of defence with the third and have held that even if there were a fire within the meaning of the policy, the Appellant is liable because the accident was the dominant, direct or proximate cause of the explosion, and not the fire.

THIRD POINT OF DEFENCE.

p. 782, l. 40

38.—The learned trial Judge found :

> 1. The explosion required three elements : (a) the turpentine vapours which escaped from the tank ; (b) the mingling of these vapours with the air outside the tank, which constituted an " explosive mixture " ; and (c) the ignition of this explosive
>
> p. 783, l. 1
>
> mixture by some spark or other source of " fire " which was also outside the tank . . . . Only one of these three elements, namely, the turpentine vapour, was inside the tank. This vapour was harmless until it had mixed with the outside air and the mixture thus formed had been ignited.

p. 822, l. 36

39.—Barclay, J. of the Court of Appeals said:

> There is no doubt that in this case an accident, as so defined, did occur. A pressure of liquid within the tank caused the bursting out of the door. This pressure was due to the effects which filtrol has when mixed with turpentine and subjected to a heat of 160°. There is equally no doubt that the contents of the tank per se were not inflammable. The evidence is uncontradicted that turpentine was mixed with filtered oil and filtrol (should be filterol and filtercel) 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. The fumes which escaped through the valve and possibly through the bulging of the door were, according to the evidence

and its interpretation by the experts, already ignited before the door of the tank burst open. It was the great volume of fumes which thus escaped through the open door into an atmosphere already ignited that caused the final and destructive explosion.

40.—In the Supreme Court Taschereau (with whom the Chief Justice concurred), Estey and Locke, JJ. have held in terms that the accident was the dominant, direct and effective cause of the explosion. Taschereau, J. said : p. 8, l. 30 (Vol. 5)

It is the contention of the respondent that the loss suffered by the appellant was not a loss directly caused by accident, there being a nova causa that intervened, which was fire, and as the respondent is only liable for direct damage caused by an explosion, it therefore denies all liability. The theory is that, although there has been a minor explosion in tank No. 1, the vapour that escaped from the tank, coming into contact with the air, was ignited by a fire, which was probably an electric spark, and it was only after the intervention of this new cause that the explosion occurred.

(Then follows a reference to the *Leyland* case mentioned in the next paragraph.)

Estey, J. said : .

The " tearing asunder " of the door released at first a quantity and almost immediately a large volume of turpentine vapour into the room. Without the release of the vapour there would have been no explosion. The " tearing asunder " of the door which released such a volume of vapour would appear to have been the direct and proximate cause of the explosion. The presence of the air and ignition were necessary and in that sense causes of the explosion. Seldom, if ever, does an explosion, fire or accident result from one cause. The law, from all the causes leading up to a result, selects that which is direct or proximate and regards all the others as remote. p. 14, l. 21 (Vol. 5)

(He, too, relies upon the *Leyland* case.)

Locke, J. said : p. 20, l. 17 (Vol. 5)

. . . . it was this accident which was the effective cause of the explosion and the resulting damage. I agree with the learned trial judge that there was no break in the chain of causation which led through a succession of causes directly from the peril insured against to the loss. The flash or flame produced by the ignition of the inflammable vapours was undoubtedly a causa sine qua non, as was the grounding of the vessel in the *Leyland* case caused by the action of the tide, but this was, in my opinion, one of the two intermediate causes . . . . fire was not the proximate cause of the loss.

RECORD

41.—In the *Leyland* case—*Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918) A.C. 350—the ship " Ikaria " was " warranted " free of capture, seizure and detention and the consequences thereof or " of any attempt thereat piracy excepted, and also from all consequences " of hostilities or warlike operations whether before or after declaration " of war." The ship was torpedoed and sank, despite many attempts to save her. She was lost, not, said Lord Finlay at p. 355, l. 21, " by any " new peril, but by the natural consequences of the explosion of the " torpedo."

Ex. P. 1

42.—The Appellant undertook " To pay the assured for loss on the " property of the assured directly damaged by such accident " excluding " (a) loss from fire " and " (e) loss from any indirect result of an accident." Applying the terms applied in the *Leyland* case, the Appellant submits that the loss was from a new peril, " fire." There could have been no loss by explosion without fire or ignition.

p. 575 l. 7

43.—The force which blew down the walls and lifted the ceiling of the Respondent's plant was distinct from the force which blew off the door o the tank, as appears from the evidence of the expert, Dr. Lipsett, who entirely ruled out the possibility of their being a fire within the tank.

p. 797, l. 8

44.—The Court of King's Bench, Appeal Side, held that the damage claimed was not directly caused by the accident—

> Considering that the damages claimed were not the direct result of the tearing asunder of the tank.

p. 832, l. 16 and Bissonnette, J. said :

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

45.—If the accident, as held by the Supreme Court of Canada, is the cause of the explosion and the Appellant is to be held liable therefor, it would seem to follow that, by the same reasoning, the Appellant would be liable for the fire and for the loss resulting therefrom.

46.—Bissonnette, J. in the Court of King's Bench in his reasons for Judgment said :

p. 831, l. 27

> Sous un autre aspect également, mais qui est le complément de la proposition que je viens de soutenir, il me paraît que le jugement de la Cour Supérieure a outrepassé les obligations assumées par l'appelante dans son contrat d'assurance. Celle-ci, je l'ai déjà souligné, n'a pas assuré les dommages resultant d'un

incendie. Or, dès que la Cour Supérieure en venait à la conclusion que l'explosion ne se serait jamais produite sans l'intervention d'un element, 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 seulment n'a pas voulu couvrir, mais dont elle s'est expressément déchargee 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. 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 les cas d'une explosion, qui s'est nécessairement produite en raison du feu, il faut en toute logique mettre églement 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 ; ce que reviendrait à dire que l'appelante devrait être tenue responsable, non seulement des dommages causés au réservoir, mais aussi de tous ceux qui en ont été la suite immédiate, ce qui comprendrait la destruction de l'immeuble et en definitive, l'exonération des compagnies d'assurance qui couvraint le risque d'incendie.

On voit par là que si l'on va au-delà de la stipulation limitative contenue dans la police, on transgresserait la règle que la ou les parties se sont clairement exprimée, leur volonté forme la loi.

FOURTH POINT OF DEFENCE.

47.—The Appellant humbly submits that, in any event, the Supreme Court of Canada erred in holding that there was no concurrent insurance.

48.—The Appellant therefore submits that the reasons for the Judgment in the Court of King's Bench, Appeal Side, are to be preferred to those given in the Supreme Court of Canada, and that this appeal should be allowed for the following amongst other

## REASONS.

1. BECAUSE, having been paid the full amount of its loss, the Respondent had no interest or right entitling the Respondent to maintain an action against the Appellant.
2. BECAUSE the Fire Insurance Companies could not lawfully use the Respondent's name to litigate the claims raised in this action.

RECORD

3. BECAUSE the policy covers only loss on the property of the Respondent directly damaged by an accident as defined in the policy; and the loss upon which the claim is based is not such a loss.

4. BECAUSE the loss was a loss from fire and the policy excludes the Appellant's liability for loss from fire.

5. BECAUSE the claim is for loss from an indirect result of an accident, and the policy excludes the Appellant's liability for such loss.

6. BECAUSE if the Appellant insured the Respondent against the loss which is the subject of the claim, there were concurrent insurances in respect of such loss and the Appellant is liable only for its proportion.

7. BECAUSE of the other reasons given by Barclay, Marchand, Bissonnette, Casey and Rand, JJ.

JOHN T. HACKETT.

FRANK GAHAN.

# In the Privy Council.

No. 12 of 1950.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

---

BETWEEN

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA ... ... ... APPELLANT

AND

THE SHERWIN WILLIAMS COMPANY OF CANADA LIMITED ... ... ... RESPONDENT.

---

## CASE FOR THE APPELLANT

---

BLAKE & REDDEN,
17 Victoria Street, S.W.1,
*Solicitors for the Appellant.*

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A5384)