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No. 12 of 1950. - 9 JUL 1953

INSTITUTION FOR ADVANCED LEGAL STUDIES

301g18

In the Privy Council.

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ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

BOILER INSPECTION AND INSURANCE COMPANY
OF CANADA (Defendant) - - - - - *Appellant*

AND

10 THE SHERWIN-WILLIAMS COMPANY OF CANADA,
LIMITED (Plaintiff) - - - - - *Respondent.*

Case for the Respondent.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada (Rinfret C.J., Taschereau, Estey and Locke JJ.—Rand J., dissenting), dated 23rd December 1949, reversing a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) (Barclay, Marchand, Bissonette and Casey JJ.—Letourneau C.J., dissenting), dated 12th January 1949, which in turn had reversed a judgment of the Superior Court, District of Montreal (Tyndale A.C.J.), dated 29th March 1946. The judgment of the Superior Court condemned the Appellant to pay to the Respondent, The Sherwin-Williams Company of Canada, Limited, \$45,791.38, with interest from the date of judgment and costs.

RECORD.
Vol. 5 p. 21.
Vol. 5, p. 2.
Vol. 4, p. 704.
Vol. 4, p. 771.

2. The Supreme Court of Canada, when restoring the judgment of the Superior Court, modified it as to the date from which interest should run, i.e., from the date of service of the writ, instead of from the date of the judgment. This modification gave effect to an agreed settlement of a cross appeal to the Court of King's Bench.

Vol. 5, p. 2.

3. The action was originally for \$46,931.28. Two retraxits, totalling \$1,139.90, were filed in the Superior Court, reducing the claim to the figure for which judgment was rendered.

Vol. 1, p. XVIII.

30 The nature of the damage (by explosion) and the amount of the loss, \$45,791.38, are not in dispute.

Vol. 4, p. 787 et seq.

4. The claim is based on an insurance policy issued by the Appellant to the Respondent (Exhibit P.1), under which the Appellant undertook by Section I :—

Exhibit P.1., p. 1.

“ To pay the Assured for loss on the property of the Assured directly damaged by such accident (or, if the Company so elects, to repair or replace such 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.” 10

5. “ Accident ” is defined in the policy as follows :—

Exhibit P.1.,
Schedule, p. 3.

“ 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, 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.” 20

6. “ Object ” is defined in the policy as follows :—

Exhibit P.1.,
Schedule, p. 3.

“ As respects any such unfired vessel, ‘ object ’ shall mean the cylinder, tank, chest, heater plate or other vessel so described ; or, in the case of a described machine having chests, heater plates cylinders or rolls mounted on or forming part of said machine, shall mean the complete group of such vessels including their inter-connecting 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.” 30

7. The Object with which the case is concerned is described as No. 1 Steam Jacketed Bleacher Tank. It is referred to in the evidence as the “ Tank.” It is a cylinder about 12 feet long and $5\frac{1}{2}$ feet in diameter, with rounded ends, resting in a horizontal position on a wooden cradle and bolted to the floor. It is made of steel plate $\frac{1}{2}$ inch thick.

Exhibit P.1.,
Schedule, p. 3.

RECORD.

Vol. 2, p. 247, l. 31.

8. Features of the tank of special interest in the present case are the following.

9. There was an aperture in each end, near the top of the tank. These were so placed in line that by appropriate arrangement of lights the interior of the tank could be seen. They were covered with fixed plate glass $\frac{1}{2}$ inch thick. 40

Vol. 1, p. 30, l. 28 et seq.

Vol. 2, p. 256, l. 10.

10. The glass in one of these apertures was shattered and blown out in the accident hereinafter referred to, by extreme pressure developed inside the tank.

Vol. 1, p. 30, l. 40.
Vol. 2, p. 250, l. 35.
Vol. 1, p. 63, l. 22.

11. The tank was placed at right angles to the wall dividing the top floor of the factory into two rooms, the end of the tank near the wall being about 10 feet from the wall. In the end away from the wall (referred to in the evidence as the "Front"), there was an opening about 20 inches in diameter; this is referred to in the evidence as the "Manhole." When the tank was in use, the manhole was closed by a gasket and a circular iron cover, sometimes referred to as the "Door," which was fastened in place by a bar or cross-arm placed horizontally and secured at the ends by steel bolts $\frac{3}{4}$ inch thick running through steel lugs on the tank. In the centre of the cross-bar was a wheel attached to a screw, which when turned pressed against the cover to hold it tightly in place.

Vol. 2, p. 240, l. 40.
p. 240, l. 42 *et seq.*

12. In the course of the accident the door was forced outward and torn from its seating; the bolt holding one end of the cross-arm was bent and the other was sheared off and finally the door was completely blown off its hinges.

Vol. 1, p. 29, l. 44
et seq.
Vol. 2, p. 272, l. 1
et seq.

13. The lower part of the tank was so constructed as to permit the introduction of steam into an outer compartment or jacket extending half way up the tank. The inner wall of the steam jacket formed the outer wall of the main cylinder, the whole being enclosed in an asbestos cover. Steam under pressure was introduced into this jacket, for the purpose of raising the temperature of the contents of the main cylinder.

Vol. 2, p. 248, l. 27.

14. The tank was situated in a large room of irregular shape, measuring approximately 120 feet by 100 feet and about 17 feet high. This room is referred to in the evidence as the "East Room." It is separated from an adjoining room by a wall approximately 100 feet long. In this wall are two openings or doorways, each 8 feet square and placed in the wall at a distance of about 60 feet apart. These openings are referred to in the evidence as the "North Door" and the "South Door." The adjoining room is referred to in the evidence as the "West Room." The two rooms together comprise all of the third or top floor of the Respondent's factory in Montreal. An inside stairway leads downward from the east room and an outside fire escape leads downward from the west room.

Exhibit P.7.
Vol. 4, p. 752

15. It is common ground that there was an accident within the meaning of the policy. On 2nd August 1942 the tank was being used in an experiment with turpentine. An unexpected, violent, chemical reaction was produced which suddenly raised the temperature inside the tank and generated turpentine vapour under extreme pressure. This vapour burst forth, tearing asunder parts of the tank. It poured out into the room in great volume and at high velocity (30,000 feet per minute) and exploded, doing the damage for which recovery is sought.

Vol. 3, p. 531, l. 40.
Vol. 1, p. 63, l. 43.
p. 113 *et seq.*
Vol. 3, p. 523.
p. 553.
Vol. 4, p. 663.

Vol. 2, p. 210.
p. 238.

16. There was no fire before the vapours escaped.

Vol. 1, p. 69, l. 14.

17. A disastrous fire followed the explosion.

18. The present claim is for damage caused by the explosion only. No part of it is for damage caused by the ensuing fire.

19. The Respondent claims that there was an unbroken chain of events from the first rupture of the tank which constituted the beginning of the accident to its culmination in the shattering of the building caused by the explosion.

20. The Appellant claims that (1) mixing of the turpentine vapours with the air and (2) their ignition from some unknown source (possibly an electric spark or the overheated cover of the tank) each constituted a *nova causa interveniens* and consequently the accident to the tank was not the proximate cause of the explosion. 10

21. The question of what was the proximate or dominant cause of the disaster is a question of fact (*Leyland Shipping Co. vs. Norwich Union* [1918] A.C. 350, by Lord Dunedin, at p. 363):—

“ The solution will always lie in settling as a question of fact
“ which of the two causes was what I will venture to call . . . the
“ dominant cause of the two.”

22. There have been concurrent findings of fact in two Courts below, namely, the Superior Court and the Supreme Court, that the accident was the proximate cause of the loss for which recovery is now sought. 20

23. The Respondent submits that your Lordships should not depart from their established rule and should now decline to examine the evidence for a third time (*Srimati Bibhabati Devi and Kumar Ramendra Narayan Roy et al* [1946] A.C. 508).

24. If, notwithstanding the foregoing concurrent findings of fact, your Lordships should feel impelled to disregard their rule and should decide to review the evidence for a third time, it is anticipated they will do so in conformity with the principle laid down in such cases as *Allen vs. Quebec Warehouse Company* [1886] 12 A.C. 101, where (at p. 104) Lord Herschell says:— 30

“ Their Lordships entirely adhered to the views thus expressed
“ and therefore they do not consider that the question they have to
“ determine is, what conclusion they would have arrived at if the
“ matter had for the first time come before them, but whether it
“ has been established that the judgments of the Courts below were
“ clearly wrong.”

25. The Respondent submits that on examination of the whole evidence, far from it being “ established that the judgments of the Courts below were clearly wrong,” it will be found that the concurrent findings of the Superior Court and of the Supreme Court were clearly right. 40

26. The findings of fact in the Superior Court are as follows:—

“ Notwithstanding the learned and skilful exposition contained
“ in the testimony of Defendant’s expert Professor Paul Rioux, the

“ Court has been unable to find any break in the chain of causation
 “ or any *nova causa interveniens* between the accidental release of
 “ the vapour from the tank and the explosion. There is no evidence
 “ of any ‘ hostile fire ’ (see *infra*) before the explosion nor of any
 “ other abnormal phenomenon, apart from those already described.

“ To accept Defendant’s contention would, in the opinion of
 “ this Court, be to give to the relevant provisions of the Policy an
 “ unreasonable and unjustifiably restrictive interpretation.

10 “ The Court accordingly rejects Defendant’s contention on this
 “ point and concludes that the disaster and the resulting damages
 “ were caused directly by the accident to the tank.

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

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

26A. The concurrent findings of fact in the Supreme Court are
 stated as follows—(Taschereau J.—concurred in by the Chief Justice) :—

30 “ In the present case I have come to the conclusion that there
 “ was an unbroken sequence between the explosion in tank No. 1,
 “ which is the casualty, and the ultimate loss. There was not an
 “ intervening cause in which was merged the original casualty.”

Estey J. :—

“ The issue between the parties is, in the circumstances, what
 “ was the direct or proximate cause of this explosion—the accident
 “ or the fire.”

He concludes as a matter of fact that the proximate cause was the
accident.

Locke J. :—

40 “ I agree with the learned Trial Judge that there was no break
 “ in the chain of causation which led through a succession of causes
 “ direct 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, i.e., the
 “ mingling of the turpentine vapour with the atmosphere, producing
 “ the highly explosive mixture, and the ignition from the unknown
 “ source brought into existence by the peril insured against and not
 “ therefore the *cause proxima*.”

27. In the Court of King's Bench, Barclay and Bissonette JJ., who gave reasons, took divergent views and neither agreed with the Superior Court.

Vol. 4, p. 822, l. 24
et seq.

28. Barclay J. was of the opinion that the word "fire" should be taken literally and in an unrestricted sense and without considering its context in an insurance policy. He appears to be of the opinion that as there was an electric spark which ignited the fumes (it is not proved what ignited them), thus setting off the explosion of which the first stage was flashes of flame, this constituted fire within the meaning of the policy, and as fire is excluded from the coverage provided by the policy, the Respondent could not succeed. 10

29. It is submitted, with great respect, that the learned Judge was wrong in his interpretation of the evidence and has mistaken a subsidiary or incidental cause for the dominant or proximate cause. He appears to have thought erroneously that the cause nearest in point of time was the proximate cause and failed to apply the clearly established rule of insurance law that it is the dominant cause that is proximate. See statement by Lord Wright in *Canada Rice Mills Limited vs. Union Marine & General Insurance Co.* [1941] A.C. 55 at p. 71, quoting *Leyland Shipping Co. vs. Norwich Union*. This case is cited by Estey J., 20 Record Vol. 5, p. 15.

Vol. 4, p. 830, l. 9.

30. With great respect it must be said that Bissonette J. appears to have misread the evidence. He seems to be under the impression that the rupture of the tank was caused, not by pressure generated by the experiment, but by an explosion of turpentine vapours ignited inside the tank after vapours had escaped into the room and become ignited. He pictures the flame reaching back from an external explosion into the tank and there setting off another explosion which ruptured the tank. It is respectfully submitted that the evidence is not to that effect.

Vol. 4, p. 832, l. 17.

31. The learned Judge appears to conclude erroneously that the explosion of the vapours following the rupture of the tank was a *nova causa interveniens*. 30

Vol. 4, p. 826, l. 1.

32. Marchand J. concurred with Barclay J., without assigning reasons.

Vol. 4, p. 835, l. 30.

33. Casey J. did not deal with the facts. He affirmed Respondent's right to institute and continue the action and concurred with Barclay J.

Vol. 4, p. 797, l. 20.

34. Letourneau C.J., dissenting, came to the same conclusion as the Trial Judge.

Vol. 5, p. 10, l. 7.

35. In the Supreme Court, Rand J., dissenting, describes an intermediate stage in the explosion during which the vapours were burning before the detonation. He says that "Tongues of flame licked up the thin streams of grayish gas before that point (explosion) was reached; both gas and flames were seen through both doors by the men working 40

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."

36. With great respect, it is submitted that the evidence of the factual witnesses and of the experts comes far short of justifying such a view.

37. The only witness of the explosion who used the word fire was Frazier. In a cryptic statement taken by stenography shortly after the accident and subsequently signed by him, he uses the word fire in describing
10 what he saw in the vapours. At the time of making the statement he was not under oath, nor does any special attention appear to have been directed to the use of the word fire. In his evidence he explains that what he saw was not fire but a flash.

Vol. 1, p. 99, l. 30.

38. The expert witnesses, Dr. Lipsett, Dr. Hazen and Dr. Lortie, men of the highest professional standing and qualifications, whose evidence was accepted by the trial Court and has not been challenged in any other Court, state that the flashes seen by Frazier and the other men present at the time of the accident was the first stage of the explosion.

Vol. 4, p. 676, l. 3.
p. 637, l. 25.

Vol. 3, p. 539, l. 20.

39. That the vapours pouring out of the ruptured tank and becoming
20 mixed with the atmosphere would explode was the natural and inevitable consequence of the accident. Dr. Lipsett says it would have been a miracle if they had not exploded.

Vol. 4, p. 637, l. 25.

Vol. 3, p. 581.

40. He describes the three stages of such an explosion :—

Vol. 3, p. 534, l. 30.

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

" The scientific conception of an explosion is thus the move-
" ment of a flame through the explosive mixture of gases, and the
" different stages of the explosion are concerned primarily with
" the speed at which the flame moves.

40 " When you have a mixture of explosive gases and air, the
" first stage of the explosion always occurs, namely, the slow
" movement of the flame. The second or third stages may or may
" not be present.

" This conception of an explosion is based upon the work of
" a great many investigators and is well founded by work carried
" out since 1881.

“ 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.”

41. It is respectfully submitted that Rand J. took an exaggerated view of the flashes seen in the explosive mixture and was wrong in his view that the burning of the gas in the process of explosion constituted a new and independent cause of loss and could be called fire, thereby making the exclusion provision of the policy applicable. 10

42. The eye witnesses of the explosion were in the west room at the time and described what happened. The sequence of their observations should be noted :—

Vol. 1, p. 71, l. 46.

(1) First they heard a noise like the breaking of a steam valve etc. (presumably the bursting out of the glass over the aperture in the rear of the tank).

Vol. 3, p. 533, l. 33.

(2) Next they heard a sizzling or roaring sound (said by the expert witnesses to have been probably caused by the escaping vapours under great pressure around the periphery of the manhole door which had been forced up from its seating, the $\frac{3}{4}$ inch bolts holding it having been bent and sheared off, and possibly through the vent). 20

Vol. 1, p. 119, l. 15.

(3) Following this they saw a great cloud of vapour extending almost up to the ceiling, which was 17 feet high and filling the north and south doors, which were 60 feet apart.

Vol. 2, p. 215, l. 20.

(4) After the foregoing, they then saw flashes in the vapour and fled for their lives down the fire escape.

Vol. 1, p. 71, l. 40.

The only man in the east room was apparently killed instantly : he was found in a crouched position, indicating that he had not had time to rise from his chair. As the other men were fleeing down the fire escape, they heard a dull thud (thought by the expert witnesses to have been caused by the complete blowing out of the manhole door). The explosion, of which they saw the first stage in the flashes, reached its third and final stage of detonation and blew out the front of the building, etc., causing the loss now claimed. 30

Vol. 1, p. 69, l. 14.
p. 70, l. 10.

43. It is proved and is not contested that there was no fire in the premises before the vapours escaped.

44. The contention that the initial stage of the explosion, i.e., the flashes seen in the exploding vapours, was fire is untenable. It might as well be claimed that the flash of a bursting shell is fire. It has never been held, so far as the undersigned is aware, that in insurance law the words “ explosion ” and “ fire ” are synonymous, but that in substance is what the Appellant asks your Lordships to hold. 40

45. It is submitted that there is no justification for dividing the incident just described into separate and distinct compartments as to time and consequence. It was all one moving event from start to finish.

46. The claim that there was an event in the middle of the principal occurrence which had the effect of separating the bursting forth of the vapours from their final explosion is not supported by the evidence.

47. Dr. Lipsett's evidence on the point is as follows :—

10 "The Court: The separation of the two phenomena was not mentioned by any of Plaintiff's witnesses that I recall. If I have seized correctly the general trend of the Plaintiff's evidence, it was that the whole sequence of phenomena were closely connected and formed part of one general phenomenon. Dr. Rioux has advanced the theory which I have already mentioned, a theory which differs from the trend of Plaintiff's evidence, in that he suggests that there was a distinct separation between two minor phenomena, so to speak, which together formed one, and a second phenomenon following that, which consisted of what occurred after the door was blown off, and Dr. Rioux makes it quite clear in his evidence that there is a distinct separation to be noted between them. That is a new aspect, and I think it is fair in rebuttal to have your expert comment on it, Mr. Mann.

20

Vol. 4, p. 075, l. 12.

By Mr. Mann :—

Q. Do you understand the question ?—A. Yes.

Q. With the Court's statement and my question, will you answer ?—A. I cannot agree with Dr. Rioux's interpretation of the events at all. As far as I see the reaction, there was one accident.

Mr. Hackett : That is just a reiteration of what was said in chief.

30 By the Court : He does not agree with Dr. Rioux's interpretation, particularly the aspect of separating those phenomena.

Q. That is so ?—A. That is so.

Q. Why don't you agree with his interpretation ? What is wrong with it ? Don't tell us what you have already told us but, if you can, put the finger of criticism on the proposition or theory that Dr. Rioux advanced ?—A. I see no actual physical line of demarcation. I see no point at which the first explosion ceased and the second explosion started. The detonation that finally occurred was part of the explosion which originally started. The flash of flame seen by Mr. Rymann—Mr. Rymann saw a flash of fire, I think he termed it . . .

40

Q. We have heard all that, but the point you make, if I understand it correctly, is that the chain of events was composed of links which were not separate one from the other ?—A. Which were not broken.

Q. Not broken ?—A. That is right.

Q. That is your point ?—A. Yes."

48. The evidence of Frazier is as follows :—

“ By Mr. Hackett :

Q. What was the next thing you noticed after you saw—if you want me to use your word—the flash ?—A. It happened so fast—it was like a series of things. We heard the flash and we heard that dull “ zoom ” as I said before, and after we got on the fire escape—I don’t know how far it was—then we heard a blast.

Q. A blast ?—A. Yes. I don’t know whether it was a blast or not—a big noise.

By the Court :—

Q. Sharper than the first noise ?—A. Yes.

Q. That is what you clearly indicated to me previously ?—
A. Yes.

By Mr. Hackett :—

Q. Now, Mr. Frazier, after the flash you heard one noise. Where were you then ?—A. I was on my way to the fire escape.

Q. On your way to the fire escape ?—A. Yes.

Q. Are you sure you were not on the fire escape ?—A. That I could not say for that.

Q. Then, when you were part way down the fire escape, you heard a much bigger noise ?—A. Yes ; but they happened in such a short notice . . .

By the Court :—

Q. You mean, there wasn’t much time between them ?—

A. They were very fast, your honour.”

49. Even if in retrospect an intermediate event could be imagined, it would not have the legal effect claimed by the Appellant ; it would not cut off and obliterate the other parts of the whole occurrence and would not alter the fact that the accident was the proximate cause of the loss. *Clan Line Steamers, Ltd. vs. Board of Trade* [1929] A.C., p. 524— 30

Lord Hailsham :—

“ My Lords, it is a well settled principle of marine insurance law that *causa proxima non remota spectatur* ; and it was expressly determined in the well-known case of *Ionides vs. Universal Marine Insurance Co.* that this maxim is applicable in cases in which the question to be decided is whether the loss is due to a marine risk or to a war risk . . . This necessarily imposes upon the tribunal the duty of determining in the case of loss by collision whether or not that collision is the consequence of a warlike operation ; and I have no doubt that in determining this question the proximate cause of the collision is the one which has to be looked at. But this does not mean that you must exclude from consideration everything which happened before the actual impact took place ; the illustrations given by Erle C.J. in his judgment in *Ionides* case are sufficient to establish that proposition.” 40

50. Turning now to a second defence offered by the Appellant, to the effect that there was other concurrent insurance which should contribute to the loss, it may be pointed out that the success or failure of this defence turns upon a question of fact.

51. It is common ground that if the tank is a pressure container, such other insurance does not apply. The Trial Judge found as a fact that the tank is a pressure container. No Judge in any of the other Courts appears to have disagreed with this finding.

Vol. 4, p. 799, l. 20.

52. The finding of the Superior Court was concurred in in the Supreme
10 Court by Estey J., Record Vol. 5, p. 21 :—

“As to this, I concur with the learned Trial Judge.”

53. Note the Board's rule above referred to. This question of fact should not be again reviewed by this Board. If it is reviewed, it will be found that there is unquestionably evidence justifying the finding and no evidence against it.

54. A third defence, challenging the Respondent's right to maintain the action because of certain arrangements made with twenty-two fire insurance companies, was rejected by all the Courts and there is no dissent by any Judge in any of the Courts below. The law on the point is clear
20 and settled. Its interpretation appears to have been uniform and consistent from the time of the French regime, through Colonial days, down to the present. It runs parallel with the French civil law. It is embedded in the legal system of Quebec and should not be disturbed. The reasons and authorities given by Taschereau J. are conclusive. Respondent has the necessary interest to maintain its action.

55. The Respondent therefore submits that this Appeal should be dismissed with costs and the judgment of the Supreme Court confirmed for the following amongst other

REASONS.

- 30
- (1) BECAUSE the Appellant's contentions are unfounded in fact and in law.
 - (2) BECAUSE the principal issue is a question of fact on which there are concurrent findings in two Courts below. The evidence should not be reviewed a third time and these findings should not be disturbed.
 - (3) BECAUSE these findings are supported by the evidence and are right.
 - (4) BECAUSE the Court of King's Bench was wrong in holding that “fire of any description, whether a direct or indirect result of the tearing asunder of the tank, is excluded by the terms of the policy.” Fire is not
40 excluded. Loss from fire is excluded, but only when fire is the proximate cause of the loss. The mere

presence of fire when it is not the proximate cause of the loss is immaterial and does not enable the Appellant to escape liability under the insurance agreement. Flashes in the exploding gases do not constitute fire. No part of the present claim is for loss from fire.

- (5) BECAUSE the loss claimed for was "loss on the property of the assured directly damaged by the accident" and must be paid for by the Appellant in accordance with the policy issued to the Respondent.
- (6) BECAUSE there is no other concurrent insurance which 10 should contribute.
- (7) BECAUSE the Respondent had an interest in instituting and in continuing the action and has not lost its right to come before the Courts.

J. ARTHUR MATHEWSON.

In the Privy Council.

ON APPEAL

from the Supreme Court of Canada.

BETWEEN

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OF CANADA (Defendant) *Appellant***

AND

**SHERWIN-WILLIAMS
COMPANY OF CANADA,
LIMITED (Plaintiff) - *Respondent***

Case for the Respondent

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