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* April 30.
* May 1.
* May 27.

SIN MAC LINES LIMITED AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

HARTFORD FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance, fire—Cause of loss—Burning match—Explosion—Clauses in the policy—Liability of insurer.

A fireman on an oil-burning tug, desirous of ascertaining for the information of the captain whether there was enough fuel oil in the boat to enable her to proceed with her journey without reloading, opened a

* PRESENT:—Duff C.J. and Rinfret, Cannon, Davis and Kerwin JJ.

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manhole on the boat, lit a match, and held the burning match over the man-hole with a view to seeing the quantity of fuel oil in the tank. Instantly the vapour in the tank caught fire, an explosion occurred and the boat was in the midst of flames. Very substantial loss was sustained by the appellants, the owners of the tug, and they sued the respondents upon a policy of fire insurance for the amount of their entire loss. The respondents contended that they were not liable for the loss attributable to explosion, but only for that part of the loss actually caused by fire. The policy contained the following printed clause: "Unless otherwise provided by agreement in "writing added hereto this company shall not be liable for loss or "damage occurring * * * (*g*) by explosion or lightning, unless fire "ensue, and, in that event, for loss or damage by fire only."

Held that by the terms of the policy recovery by the appellants must be limited to the proportion for fire damage as distinguished from explosion damage. *Hobbs* v. *Guardian Fire & Assurance Co.* (12 Can. S.C.R. 631); *Curtis's & Harvey, Ltd.* v. *North British & Mercantile Ins. Co.* ([1921] 1 A.C. 303); *Stanley* v. *Western Ins. Co.* (L.R. 3 Ex. 71) and *Re Hooley Hill Rubber & Chemical Co.* v. *Royal Ins. Co.* ([1920] 1 K.B. 257) disc.

Per Duff C.J. and Davis and Kerwin JJ.—The language of the printed clause in the policy is not limited to cases where the fire was originated by the explosion but includes cases where the explosion occurs in the course of a fire. By the policy, the respondents insured the appellants against "all direct loss or damage by fire." The printed clause in the policy, however, defined or limited the risk and excluded damage caused immediately by explosion.

Per Rinfret and Cannon JJ.—In this case, the insurers agreed to pay fire damage if the fire was caused by an explosion. In order to carry out the intention of the parties as expressed in the policy and in view of the opinion of both courts below on the evidence and its application to the terms of the policy, the recovery by the appellants must be limited to the loss caused by fire which followed or was concurrent with the explosion. *Robbs* case (*supra*) dist.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, McDougall J. and condemning the respondents in the amount of $4,475.94 in an action brought by the appellants in which damages were claimed in the total amount of $38,230.65 under three insurance policies.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

W. F. Chipman K.C. and *Russell McKenzie K.C.* for the appellants.

J. T. Hackett K.C. and *G. B. Osler K.C.* for the respondents.

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The judgment of Duff C.J. and Davis and Kerwin JJ. was delivered by

DAVIS J.—A foolhardy fireman on an oil-burning tug, desirous of ascertaining for the information of the captain whether there was enough fuel oil in the boat to enable her to proceed with her journey without re-loading, opened a manhole on the boat, lit a match and held the burning match over the manhole with a view to seeing the quantity of fuel oil in the tank. Instantly the vapour in the tank caught fire; an explosion occurred and the boat was in the midst of flames. Very substantial loss was sustained by the appellants, the owners of the tug, and they sued the respondent upon a policy of fire insurance for the amount of their entire loss. The policy specifically provided that such explosives as might be necessary in connection with the operations of the appellants might be carried on the vessel without prejudice to the insurance. The respondent contends that under certain exceptions in the policy it is not liable for the loss attributable to explosion but only for that part of the loss actually caused by fire.

In point of strict, literal fact, the burning match was the cause of the explosion. In other words, the explosion was caused by fire, not by concussion or other physical agency as distinguished from fire. On the question whether or not the damage caused by the explosion, that is to say, by the disruptive effect of the explosion, was within the terms of the policy: *Hobbs* v. *Guardian Fire & Life Assurance Co.* (1) would appear to be an authority binding upon us. I am unable, however, to see that it matters in this case whether this view that the explosion was caused by fire or the view that the explosion was not an explosion caused by fire within the meaning of the policy, be accepted. In either case, by the terms of the policy, damage caused by the explosion and not by fire ensuing upon the explosion, or concurrent with the explosion, is excluded from the policy.

Further, it is quite unnecessary to determine whether or not the policy is governed by the provisions of the Quebec *Insurance Act*. That statute was invoked only for the purpose of showing that statutory condition no. 11 was, by

(1) (1886) 12 Can. S.C.R. 631.

force of the statute, imposed upon the policy as a matter of law though not actually printed or written upon the policy, if the policy was one that had been delivered to the insured in Quebec. In this connection, it was contended that certain clauses in the policy could not be treated as variations of the statutory condition because they were not printed or written upon the policy in red ink as required by the Quebec statute. It was held in the *Hobbs* case (1) and affirmed in the *Curtis's & Harvey (Canada) Ltd.* v. *North British and Mercantile Insurance Co. Ltd.* (2) that statutory condition no. 11 relates to an explosion which originates a fire and not to an explosion caused by a fire; and, by that condition, the insurer is responsible for the fire resulting from the explosion. There has been no substantial change in the wording of statutory condition no. 11 in the Quebec statute since the *Curtis's* case (2) but it makes no difference in this case whether or not that condition was part of the policy or was effectively varied by the policy.

The policy in this case contains the following printed clause:

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

It will be necessary to return to this printed clause later but for the moment I turn to certain typewritten clauses which were added to the printed form of policy in this particular case. Only one of the specific typewritten clauses was relied upon but before referring to it the following general clause in typewriting appears in the policy:

> These clauses shall be considered to supersede and annul any other clauses to the same or similar effect, printed in or attached to this policy, and that for the purposes of construction these clauses shall be deemed of the nature of written additions thereto.

Now the specific typewritten clause relied upon reads as follows:

> In the event of loss or damage to the subject of insurance by any peril or cause not covered by this policy, followed by fire or with which fire is concurrent, this company shall only be liable for that part of the damage actually caused by fire, whether the loss be partial or total.
> * * *

(1) (1886) 12 Can. S.C.R. 631. (2) [1921] 1 A.C. 303.

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Dealing with this last clause, this stipulation is entitled to be given its full effect but it is to be observed that the event specifically covered by it is "loss or damage to the subject of insurance by any peril or cause not covered by this policy." This stipulation, however, can have no application to the facts of the case before us if we have here a fire followed by an explosion rather than an explosion followed by a fire, because the peril of a fire followed by an explosion is covered by the policy. The specific stipulation points to a peril or cause not covered by the policy and therefore does not come into play upon the facts of this case.

Reverting now to the printed clause, above set out, in the policy before us, which expressly excepts liability for loss or damage "occurring by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." The object of that clause was clearly to restrict and limit the risk. It was in fact a contractual condition that the risk should be so limited. The first question that arises in considering this clause is whether or not the specific typewritten clause, above set out, by virtue of the general typewritten clause, superseded and annulled this printed clause as being one "to the same or similar effect." The typewritten clauses are expressly agreed to be "deemed of the nature of written additions" to the policy, whereas the printed clause was clearly intended to limit and restrict the risk. The point is one of some difficulty but I incline to the view that the two clauses may stand independently of one another. That being so, the question then arises as to whether or not the printed clause is so general and unlimited in its scope that it may fairly be read as applying "to the whole risks in which the explosion takes part" and not confined to the case where an explosion originates a fire. If so confined, the clause does not apply to the case before us if the case is to be properly treated as a fire followed by an explosion. If, on the other hand, the printed clause is to be given such a general construction as to apply to every case whether an explosion originates or merely takes part in the fire, the clause would apply to

the facts of this case. Now in the *Curtis's* case (1) the Judicial Committee had to consider the scope and extent of the following clause:

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

The Judicial Committee said that those words were "absolutely general and in no way limited" and "that the more natural construction is to apply the words of exception to the whole risks in which the explosion takes a part."

Stanley v. *Western Insurance Co.* (2) was considered in the *Curtis's* decision (1) as a case which explained an exception. In that policy, which was against fire, the insurer, in terms of the policy, was not to be liable for loss or damage by explosion and the expression was there 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. Lord Dunedin pointed out, in the *Curtis's* case (1), that the *Stanley* case (2) was followed by the English Court of Appeal in *In Re Hooley Hill* and *Royal Insurance Co.* (3), and then said:

> These cases are not actually binding on their Lordships but they agree with them. *Stanley's* case (2) was decided by a very strong Court and has stood as the law of England for many years.

We should therefore turn to the specific clauses that were before the courts in the *Stanley* (2) and the *Hooley Hill* (3) cases for they were interpreted as sufficiently wide and general to cover an explosion whether it succeeded to or was caused by a fire or was prior to and caused a fire. Now the clause in the *Stanley* case (2) was this:

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

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

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

(1) [1921] 1 A.C. 303. (2) (1868 L.R. 3 Ex. 71.
(3) [1920] 1 K.B. 257, at 272.

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

"But to give the instrument this construction," said Kelly, C.B. (1),

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

Martin, B., added (2):

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

In the *Hooley Hill* case (3), the words of exception in the policy were:

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

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

Having regard to the statement of Lord Dunedin in the *Curtis's* case (4) that the Judicial Committee agreed with these two cases, the *Stanley* case (5) and the *Hooley Hill* case (3), although they were not actually binding on their Lordships, and to the decision in the *Curtis's* case (4) itself that the warranty clause there in question applied to the whole risks in which explosion takes a part, we must conclude that the language of the printed clause in the policy before us is not limited to cases where the fire was originated by the explosion but includes cases where the explosion occurs in the course of a fire. By the policy, the respondent insured the appellants against "all direct loss

(1) (1868) L.R. 3 Ex. 71, at 74.
(2) (1868) L.R. 3 Ex. 71, at 75.
(3) [1920] 1 K.B. 257, at 258.
(4) [1921] 1 A.C. 303.
(5) (1868) L.R. 3 Ex. 71.

or damage by fire." The printed clause in the policy, however, defined or limited the risk and excluded damage caused immediately by explosion.

The appeal should be dismissed.

The judgment of Rinfret and Cannon JJ. was delivered by

CANNON J.—On June 16th, 1931, Osborn and Lange, the appellants' insurance brokers and their agents, applied, in New York, to each of the defendants, for insurance on fifty-two vessels owned by the Sin Mac Lines, Limited, including the tug *Rival*. All the applications were for insurance for "fire only," as per form attached thereto. The form thus referred to in the applications was the typewritten form subsequently attached to the policies which are identical.

The tug *Rival* was insured by these three policies for a total amount of $75,000, of which the proportion of the respondent was $37,500 and that of each of the other defendants $18,750.

A printed condition in each policy provides:

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

The typewritten form attached to each policy, as it was to the application for insurance, reads as follows:

> Fire on vessels clause:
>
> In the event of loss or damage to the subject of insurance by any peril or cause not covered by this policy, followed by fire or with which fire is concurrent, this company shall only be liable for the part of the damage actually caused by fire, whether the loss be partial or total and, in the event of said vessel being necessarily moved for repairs this company shall in no way be liable for any part of the expense incurred unless the necessity for removal arises wholly or partly from fire, and then only in the proportion that the cost of the fire damage repair bears to the total cost of all repairs necessitating the removal, and then only when the cost of such removal has been approved by the representative of this company.

This typewritten form also provided:

> It is agreed that these clauses shall be considered to supersede and annul any other clauses to the same or similar effect, printed in or attached to this policy, and that for the purpose of construction these clauses shall be deemed of the nature of written additions thereto.

A rate of 1·35% was charged as premium. Through the same brokers, the appellants had secured marine insurance from five different companies against explosions, with a typewritten form making the policies

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free from claim for loss caused by fire or in consequence of fire, whether or not fire ensues as a result of a marine peril.

The charge for these policies which covered the tug *Rival* from August 7th, 1931, to August 7th, 1932, was $8 per $100 of insurance.

The *Rival* was registered at the port of Montreal. On the 10th November, 1931, she was proceeding on a voyage from Port Colborne to Montreal and was tied up for the night in the Welland canal. The captain having made inquiry with regard to the fuel in the tug tanks, one of the firemen, Gendron, to secure the information, removed the manhole cover over the tank on the starboard deck and held a lighted match over this opening for the purpose of illuminating the inside of the tank. Immediately thereafter there was an explosion which caused the conflagration which lasted for about forty minutes, when the tug sank. The appellant sued to recover the sum of $38,230.65, including explosion damages which, the appellant contends, was a direct loss and damage by fire. The respondent denied all liability. The courts below did not allow any explosion damage as recoverable under the policy, but limited the recovery to loss from fire following the explosion: $4,475.94 with interest and costs.

The appellants claim that the unanimous judgment of the six learned judges who have considered this case erred in the following respects:

(*a*) Effective consideration was not given to the fact that fire did actually precede the explosion and that the explosion was an incident thereof and caused thereby;

(*b*) The conditions relied upon by the respondent were illegal and in conflict with the Quebec *Insurance Act;*

(*c*) In the proper interpretation of the policy;

(*d*) In the quantum of damages.

The learned trial judge says:

> After a careful examination of the evidence as to the fact of the accident, as also of the elaborate expert and scientific evidence having to do with the nature, manifestation and characteristics of an explosion, the Court has reached the conclusion that it is practically impossible to dissociate the fire from the explosion. In point of time they were practically simultaneous or concurrent. It is true that the hand, which brought the lighted match to the aperture created by the removal of the manhole cover, introduced a flame (fire) to the gaseous substances contained in the tank, but from that moment the "explosion" entered the first of the three stages described by Professor Stacey in his testimony, ignition, passed at once into the second, or turbulent phase, and then almost imme-

diately into the third or detonation stage. He describes or defines the word "explosion" as including three phases: uniform flame propagation, turbulence, and detonation, without all of which there can be no gas explosion. The eye witnesses of the accident speak of the sequence of events as passing with almost instantaneous rapidity, which is quite consistent with the theory expounded by Professor Stacey. Had the lighted match not been applied to the gaseous explosive mixture in the tank no explosion would have occurred and in this restricted sense only can it be said that fire preceded the explosion. It cannot be said that there was a fire, within the meaning of the policies, which burned for an appreciable period, during the course whereof the explosion occurred as an incident of the fire. The element of simultaneity defeats any such theory. So difficult was it found to dissociate fire from explosion, or to state which preceded the other, that the plaintiff itself, in the first notices of the casualty given to the defendants, through their agents, referred to the incident as "explosion followed by fire." Similarly, plaintiffs' agents notified the explosion underwriters of the nature of the casualty as "explosion followed by fire and sinking in Welland canal."

The learned trial judge then proceeds to determine the exact nature and scope of the risk incurred by the insurers and, in view of the special clauses of the contract above quoted, reached the conclusion that the intention of the parties was to exclude such loss by explosion which would be within the policy under the ruling of this Court in *Hobbs* v. *The Guardian Fire & Life Assurance Co.* (1), but for

(1) (1886) 12 Can. S.C.R. 631.

the exception. The first judge also noted that the premium paid on the policies in question in this case was on the rate for fire insurance only and that the appellants carried separate policies covering explosion damages excluding fire losses. Moreover, the trial judge found that, even if the policies were subject to the statutory conditions contained in the Quebec *Insurance Act,* condition 11 does not conflict with the provisions in the defendant's policies exempting them from liability for explosion damages.

This statutory condition, if applicable to this case, would make them liable "for all loss caused by fire resulting from an explosion," which is practically to the same effect as the printed and typewritten clauses above quoted. If the Act applies to exclude the typewritten fire on vessel clause, then the statutory condition would justify the judgments *a quo.* We have, therefore, in this case a contract against loss by fire containing an exception, as in *Stanley* v. *Western Insurance Company* (1), referred to in the case of *Curtis's and Harvey* v. *North British and Mercantile Insurance Co.* (2) by Lord Dunedin. There, the

(1) (1868) L.R. 3 Ex. 71. (2) [1921] 1 A.C. 303, at 310.

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insurer, in terms of the policy based on the insured's application, 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 or caused the fire. In our case, the insurer agreed to pay fire damage if the fire was caused by an explosion—but not more. The clause is exceedingly simple and is to be construed according to its natural meaning, and as ordinarily understood by mankind. The Privy Council also agreed with the judgment of the English courts in *In re Hooley Hill Co.* v. *Royal Insurance Co.* (1), where full effect was given to an exception memorandum.

In the same case, the Privy Council uses words which may well apply to the facts of the present case:

> As to 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 assurance 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 special case provided for by statutory condition 11, to which no reference is made.

As pointed out in *Hobbs* v. *Guardian Fire & Life Assurance Co.* (2):

> It is not so much a question of law as of fact that we are called on to decide.

In the latter case, the parties had agreed that the loss was occasioned by some employee accidentally setting fire to some gun powder stored in the premises insured. In this case, in the opinion of the trial judge, the preponderance of evidence shows that the fire damage was subsequent to the explosion and that 85% of the loss must be ascribed not to the burning of the vessel but to the disruptive force of the explosion. In spite of the very able argument of Mr. Chipman, I cannot see my way clear to reach a firm conclusion that all the judges below were wrong in their

(1) [1920] 1 K.B. 257.

(2) (1886) 12 Can. S.C.R. 631, at 637.

appreciation of the evidence and their application of it to the terms of the policies. The circumstances of the case make it clearly distinguishable from *Hobbs* v. *Guardian Fire & Life Assurance Co.* (1). The appellant's request for separate policies distinguished the fire risk from the explosion risk and makes it clear to my mind that, in order to carry out the intention of the parties, as expressed in the policies, we must adopt the views of the courts below and limit the recovery to the loss caused by fire which followed or was concurrent with the explosion.

We also agree with the trial judge that the amount of the first survey, $19,839.68, to which must be added the salvage account of $10,000, would represent the total loss and that a proportion of 15% should be paid by the respondents as constituting fire damage distinguished from explosion damage.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett & Hannen.*