

# UNIVERSITY OF NEWARK LAW REVIEW

VOL. II

SUMMER, 1937

No. 2

## WHAT IS A "FIRE"—AN INSURANCE DEFINITION\*

"When I use a word," Humpty Dumpty said, . . .  
"it means just what I choose it to mean—  
neither more or less."

"The question is," said Alice, "whether you *can*  
make words mean so many different things."

"The question is," said Humpty Dumpty, "which  
is to be master—that's all."

*Through the Looking Glass*, Lewis Carroll.  
Harper & Bros., 1902 Ed., Page 117.

The standard fire insurance policy<sup>1</sup> covers "all direct loss or damage by fire". But, nowhere in this fulsome contract is a definition of the word "fire". What is it?<sup>2</sup> What are its distinguishing features—its ingredients? Does the chemistry definition<sup>3</sup> help: rapid combustion<sup>4</sup>—a combined union of an oxidiz-

---

\* The author wishes to express his appreciation to Mr. Ernest Gatta for his invaluable assistance.

1. 2 N. J. COMP. STAT. (1910), p. 2862, §77; CONSOLIDATED LAWS N. Y.—Chap. 33, Sec. 121; VANCE, INSURANCE (2nd Ed. 1930), p. 953.

2. Since the writer commenced the teaching of insurance, he has each year posed the question: what is a "fire?" to his students in fire insurance. The reactions may be classified into four groups. There are those who laugh because the professor is joking again. Some will gaze with a superior air of sympathy—these naive, dull teachers! A few will relight the dimming fires of memory and give some formal definition—usually chemical in nature. Those who are actively engaged in the insurance business will have some notion of the insurance meaning.

3. The view as given in the text represents the present analysis of fire as taught in the schools. It stems from the experiments of Lavosier. He rang the requiem bell for the old Aristotlean theory. Aristotleans believed there were

able substance with oxygen of the air? Does the dictionary meaning solve the problem? Webster's *International Dictionary*<sup>5</sup> gives this generalized form: "the principle of combustion as manifested in light especially flame and in heating, destroying and altering effects—combustion, ignition". An examination of the cases<sup>6</sup> will disclose the pertinancy of these definitions.

The first requirement, to satisfy the composite legal form-

four elements—earth, air, fire and water. There were also four principles—heat, cold, dryness and wetness. Each element contained two principles. Fire contained the principles of heat and dryness. The growth of the experimental technique proved the scientific untenability of this theory.

4. The chemical reaction that takes place with the evolution of light and heat. Cf. CHEMISTRY IN RELATION TO FIRE RISK AND FIRE EXTINCTION, by A. Cameron (Pittman-London, 1933).

5. 2nd Ed. Unabridged.

6. Some of the legal dicta fall into the same pitfall as the first classification of students mentioned in note 2, *supra*. They confuse familiarity with understanding. We see fires often. Therefore we know what a fire is. A glaring *non sequitur*. Cf. BLACK, LAW DICTIONARY (2nd Ed. 1910), p. 500.

"The juridical meaning of the word does not differ from the vernacular." Cf. Insurance Office v. Western Woolen Mill Co., 72 Kan. 46, 82 Pac. 513 (1905):

"The defendant," (insurance company) "offered to prove by the deposition of an expert witness . . . who qualified as an expert chemist, what is 'fire,' 'ignition,' and its physical characteristics: . . . While much of this evidence might have been interesting, it would throw little, if any, light upon the one question at issue—whether in fact there was a fire in the wool as claimed, and there was no error in refusing to admit the testimony. (Most of it related to the characteristics of fire, a subject within the common knowledge and experience of the jury. . ."

"Fire and human culture date together. It was a factor in the religious observances of the ancient Egyptians, Greeks, Latins and Persians and on the American Continent among the Natchez, Mexicans and Peruvians. All of this evidences man's familiarity with fire and the fact that its phenomena are nothing new to the human race."

Cf. COUCH, INSURANCE CYCLOPEDIA, Vol. 5, No. 1201, p. 4391. In discussing the meaning of a "fire," Couch adds to this line of reasoning. ". . . it (fire) should not be confined to any technical and restricted meaning dependent upon a scientific analysis of the nature and properties of fire and while the word should be construed in its ordinary signification, still it should not receive the general and extended meaning which is sometimes given to it. It should be given

ula developed in the cases, is that there must be ignition, producing a visible glow and flame or light.<sup>7</sup> The point seems to be taken for granted. The cases dealing with it are few and, in the majority, outworn relics of a fast receding past. The text book authorities assume it without dissent.<sup>8</sup>

The problem arose originally in connection with lightning destruction.<sup>9</sup> The early continental authorities were convinced that lightning was fire.<sup>10</sup> They apparently were relying on biblical descriptions.<sup>11</sup> The American courts, however, refused to follow the conclusions of the continental jurists. The head case, although not the first case, is *Babcock v. Insurance Co.*<sup>12</sup> The court devoted itself to an extensive excursion into the then current physical theories of lightning. The case is replete with citations to books and lectures dealing with the phenomena of electricity and lightning. From this maze of erudition, the court is led to a denial that lightning fits into the insurance concept

that construction which conforms to the popular ordinary sense in which it is used."

Cf. also *Ins. Co. v. Naiman*, 6 S.W. (2d) 743 (Tex. 1928); *Babcock v. Ins. Co.*, 6 Barb. (N.Y.) 637 (1849); *aff'd* 4 N.Y. 326

7. *Ins. Co. v. Choctaw Cotton Oil Co.*, 149 Okla. 140 (1931); *Gibbons v. Insurance Institution*, 30 Ill. App. 263 (1889); *Kenniston v. Insurance Co.*, 14 N.H. 341 (1843); *Ins. Co. v. Corlies*, 21 Wendel 367 (1839); *Grim v. Ins. Co.*, 13 Johns Rep. 451 (Marine Ins.); *New Orleans Rwy. Co. v. Ins. Co.*, 145 La. 82, 81 So. 764 (1919); *St. John v. Ins. Co.*, 11 N.Y. 518 (1854). 2 GREENLEAF, EVIDENCE, § 405; ELLIS ON FIRE INSURANCE, p. 273; 1 PHILLIPS ON INS., 631 (2nd Ed.); HUGHES ON INS., p. 390; 6 COOLEY, BRIEFS ON LAW OF INS. (2nd Ed., 1928) 4932; 3 JOYCE, INS. (1897) 2779; COUCH Vol. 5, § 1201 ff.

8. Cf. note 7, *supra*.

9. Under the Standard form of fire insurance policy, the problem is obviated by excluding lightning damage from the coverage.

10. 1 EMERIGON, c. 12, § 17, n. 1.

11. KINGS, 1st book, Chap. 18, verse 38: "The fire of the Lord," is mentioned as an agent of destruction; Job c. 1, verse 16: "The fire of God is fallen from heaven and hath burned up the sheep and the servants and consumed them."

12. 6 Barb. (N.Y.) 637 (1849) *aff'd* 4 N.Y. 326, *supra*, note 6. This case was completely overlooked, however, in *St. John v. Ins. Co.*, 11 N.Y. 518 (1854). The court, in the latter case, reached the same result but stretched to Louisiana for precedent.

of a "fire". The court then states the general rule as to ignition: "Unless therefore there be actual ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed or even ignited,<sup>13</sup> but there must be a fire<sup>14</sup> or burning which is the proximate cause. It is immaterial how intense the heat may be; unless it be the effect of ignition, it is not within the terms of the policy. The heat of the sun often contracts timber, from which losses occur but they would not be considered losses by fire".

The very courts who were denying that lightning constituted ignition, were affirming at the same time, that gunpowder explosions did possess the element of ignition.<sup>15</sup> The distinction seems highly refined. It is curious to note that continental jurists were in harmony with the American courts on this point.<sup>16</sup> However, again, explosion problems were eliminated by an express exclusion in the Standard Fire policy.<sup>17</sup>

The more recent cases involving ignition revolve about heat and steam damage and the courts consistently have refused recovery.<sup>18</sup> This view is succinctly expressed in the *Gibbons* case.<sup>19</sup> "The common understanding<sup>20</sup> of the word fire would never include heat, short of the degree of ignition, however produced." Ignition<sup>21</sup> is the foundation stone of our definition. Let

13. To the same effect *cf.* *Case v. Ins. Co.*, 13 Ill. 676 (1852).

14. Does the court imply ignition is the sole ingredient? Note the glaring error in logic—defining a term, in terms of itself.

15. *Cf.* *Ins. Co. v. Corlies*, 21 Wend. 367 (1839); *Grim v. Ins. Co.*, 13 Johns Rep. 451 (Marine Ins.); *Scripture v. Ins. Co.*, 64 Mass. 356 (1852).

16. *Cf.* STRACCHA DE ASSEC., gl. 18, No. 2.

17. Line 59 in the Standard fire policy excludes coverage "by explosion or lightning, unless fire ensues, and in that event, for loss or damage by fire only."

18. *Cf.* *Gibbons v. Ins. Institution*, 30 Ill. App. 263 (1889); *Ins. Co. v. Choctaw Cotton Oil Co.*, 149 Okla. 140 (1931).

19. *Cf.* note 18 *supra*.

20. I can see eye to eye with the court as to the common understanding in such a situation. But can such a theory explain the friendly fire doctrine to be discussed later? Some courts think so: *cf.* cases cited note 6, *supra*.

21. Thus, one can discount merely as a romantic metaphor, the expression:

us explore further.

The fire must be accidental.<sup>23</sup> It cannot be the consequence of an intentional effort. This rule is well nigh universal. In *Thompson v. Hopper*,<sup>23</sup> the English court expresses the omniscience of this principal: "a maxim of our insurance law and of the insurance laws of all commercial nations, that the assured cannot seek indemnity for a loss produced by his own wrongful act". The reasons for such a view, however, vary to some degree. Thus, it has been argued<sup>24</sup> that to permit a recovery would offend the sensibilities of that nebulous, pervasive ruler—public policy.<sup>25</sup> Why? Because it would tend to induce crime. This

"Where there's smoke there is fire."

One of the most interesting cases involving the ignition requirement is *Western Woolen Mill Co. v. Assurance Co.*, 139 Fed. 637, *certiorari denied*, 199 U. S. 608, 26 Sup. Ct. 750 (1905). Plaintiff's wool was insured against fire. Rising waters in the neighborhood covered the wool. After subsidence of the flood, the wool was found to be very hot. It had to be handled with pitchforks. The room which contained the wool was full of smoke and the odor of burned wool. No flame or visible glow was apparent. The defendant insurance company was victorious.

The court said: "No definition of fire can be found that does not include the idea of visible heat or light and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat of the body. It causes wheat to heat in the bins and in the stack. It causes hay in the stack and in the . . . barn to heat and decompose. It causes the sound trees of the forest, when thrown to the ground, in the course of years to decay and molden away until it becomes again a part of mother earth. Still we never speak of these processes as 'fire.' And why? Because the process of oxidation is so slow that it does not . . . produce a flame or glow."

22. *Smith v. Ins. Co.*, 102 Ore. 569, 202 Pac. 1088 (1922); *Thompson v. Hopper*, 6 E. & B. 171; *Wagner v. Peters*, 142 Va. 412, 128 S.E. 445 (1925); *Kane v. Ins. Co.*, 39 N.J.L. 697 (E.&A. 1877); *First Nat. Bank of Charleroi v. Ins. Co.*, 180 Atl. 165 (Pa. 1935); 14 R.C.L. 1223; 52 A.L.R. 805; 26 *Corpus Juris* 347.

23. Note 22, *supra*.

24. *Smith v. Ins. Co.*; *Wagner v. Peters*, *supra*, note 22.

25. Some courts express the same theory in different language. They say: "There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy." *Burt v. Ins. Co.*, 187 U.S. 362. Of course, the

argument is a well known one in the field of insurance and insurance law. It has been one of the twin corner stones for that moribund doctrine, insurable interest. It serves to bar incendiaries from collecting on their fire policies. Apparently, the criminal penalty of arson<sup>26</sup> is no deterrent. Without the former remedy, intentional destructions would increase materially. This seems fantastic reasoning.<sup>27</sup>

Another argument to support the rule and one more sober in its structure, is the reasoning that: "the direct burning of the building by the willful act of the insured is not one of the

court does not mean the word "obligation" but rather "condition." To imply a condition is merely to make subsisting mores, silent police in every contract.

26. CUM. SUPP. N. J. COMP. STAT. (1911-1924), p. 859, § 123. Fine and 15 years at hard labor.

27. It might be argued that the criminal penalty by itself is insufficient. A man may escape conviction only because the quantum of proof was not large enough or of sufficiently persuasive quality. The person may have skillfully destroyed much of the evidence. Having done this, he can recover the money and profit by his wrong. But how many incendiaries speculate on this possibility?

In the case of *Ins. Co. v. Bowen*, 219 Ky. 41, 292 S.W. 504 (1907), the plaintiff, who had been acquitted of arson, argued that the verdict in the criminal prosecution was *res judicata* to the issue of intentional destruction of the property. The court denied the plea and based its conclusion on the following reason: "In a criminal case, the jury is required to believe from the evidence beyond a reasonable doubt every fact essential to the guilt of the accused, while in a civil suit a jury may find against him if it believes from the evidence that he has brought about the destruction of his property by fire." To the same effect, see *Catalanotto v. Ins. Co.*, 15 La. App. 320, 131 So. 700, 705 (1931).

*Kane v. Ins. Co.*, 39 N.J.L. 698 (1877). 5 WIGMORE, EVIDENCE, § 2498.

This was not always the rule. Formerly the same quantum of proof was necessary in civil cases as in criminal cases where the defense was fraud. See *Thurtell v. Beaumont*, 8 J. B. Moore 612, 1 Burg 339 supported by 2 GREENLEAF, EVID., § 418, and TAYLOR, EVID. (5th Ed.) § 97a.

However, today the old view has become a dusty historical memento and nothing more.

Although the quantum of proof is different in criminal and civil actions, yet juries pay little attention to such distinctions. Cf. 5 WIGMORE, § 2498, for a violent attack on the distinction. However, the feeling of the ordinary jurymen must be different in each case, i.e., let him lose his suit for money—but send him to jail?—well, that deserves more consideration.

risks within the contemplation of the parties to the contract".<sup>28</sup> In computing its pure premium,<sup>29</sup> the carrier did not make a charge for possible arson and it might reasonably be expected that a mythically reasonable insurance company and a mythically reasonable insured never contemplated arson as an included risk.

Is negligence then a bar to recovery? Again, the rule is universal. Negligence is not a bar to recovery by the assured.<sup>30</sup> Mr. Justice Story<sup>31</sup> states the doctrine with some attempt to dig at the foundations of the rule: "As applied to policies against fire on land, the doctrine has for a great length of time prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies; and as such recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies containing special exceptions and not excepting this; or it may have been and more probably was founded upon a more general ground that as the terms of the policy covered risks by fire generally no exceptions ought to be introduced by construction<sup>32</sup> except that of the fraud of the assured which, upon the principles of public policy and morals, was always implied. It is probable, too, that the consideration had great weight that

28. *First Nat. Bank of Charleroi v. Ins. Co.*, 180 Atl. 163, 165 (Pa. 1935).

29. *I.e.*, loss expense plus loss adjustment costs.

30. *Waters v. Ins. Co.*, 36 U.S. \*220, 9 L. Ed. 691 (1837); *Ins. Co. v. Laurence*, 35 U.S. \*518 (1836); *Jamison v. Ins. Co. Irish Reports*, 7 C.L. 126 (1837); *Ins. Co. v. Strain*, 24 Ky. 958, 70 S.W. 274; *Champlin v. Assurance Co.*, 6 Lans. 71 (1872); *Todd v. Ins. Co.*, 230 Mass. 595, 120 N.E. 142 (1918); *Wheeler v. Ins. Co.*, 118 S.E. 609 (S.C. 1923); *Kane v. Ins. Co.*, 39 N.J.L. 697 (E.&A. 1877); *Chandler v. Ins. Co.*, 3 Cush. 328; *Johnson v. Ins. Co.*, 88 Mass. 388 (1862); *Rose v. Ins. Co.*, 160 N.E. 306 (Mass. 1928); *Huckins v. Ins. Co.*, 11 Fost. (N.H.) 238; *Shaw v. Robberds*, 6 Ad. and El. 75; 6 Couch, § 1488 and cases cited therein; ANGELL ON INS., § 125.

31. *Waters v. Ins. Co.*, *supra*, note 30.

32. *Cf. Friendly fire doctrine, infra.*

otherwise, such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect or inattention of the members of the family". This is the rule. It requires little comment. Few can quarrel with it.

Some courts, however, worshiping at the tarnished shrine of medieval metaphysics, have attempted to create a twilight zone between the daylight strand of negligence and the midnight ocean of intentional destruction. They label this judicial haze—gross negligence. The doctrine was delivered into the world by the famous Chief Justice Shaw. Its mother was the case of *Chandler v. Insurance Company*.<sup>33</sup> "The question then is, whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn the building, we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, *but not including a mere nonfeasance*. Suppose the insured, in his own house, sees the burning coals in the fireplace roll down on to the wooden floor and does not brush them up; this would be mere nonfeasance. It would not prove an intent<sup>34</sup> to burn the building, but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire and the flame begin to kindle in a small spot, which a cup of water would put out; and the assured has the water at hand but neglects to put it on. This is mere nonfeasance; yet no one would doubt that it is culpable negligence." A legal Kalikak family had come into being.

It is well to note the narrow ground upon which the Justice rested his decision—Gross negligence applies apparently only

---

33. 3 Cushing 328 (1848).

34. Apparently the Chief Justice thinks of "intent" as some entity which can be identified and seen. This might be the philosophical key to the decision.

to the limited domain of non-feasance. Misfeasance and the clear rule of intentional destruction are outside the pale of this authority. It is well to note further that the two examples cited are not too helpful in bolstering this ugly brain child. The coal example smacks very strongly of fraud and few would believe otherwise. The second example of the small, easily extinguishable fire is totally irrelevant. Even in those days, the assured was subject to a condition in his policy which required that all reasonable precautions be taken to prevent further damage.<sup>35</sup> The decision in such case could be satisfied by the breach of this condition of minimization of loss.

The tenuousness of Shaw's position was soon apparent. In *Hackins v. Insurance Co.*, the court in discussing Shaw's illustrations said: "The cases put by the distinguished chief justice would, according to the civil law, be of themselves proof of fraud or equivalent to fraudulent purposes or design". . . . although such negligence consists in doing nothing and may therefore be a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose to commit such injury".<sup>36</sup> Differing little in character? Absolutely, not at all!

But, the doctrine had taken hold. The timid, cautious step of the child became the sturdy, bold stride of the man. Non-feasance took on its old partner misfeasance.<sup>37</sup> Soon the courts

35. Cf. line 68 in Standard fire insurance contract for the rule today.

36. 31 N.H. 238 (1855). Other cases sensing the fetid air of confusion and joining this case in a half-hearted way were *Mickey v. Ins. Co.*, 35 Iowa 174 (1872). The Iowa court although subscribing to the gross negligence doctrine finds itself forced into this apparently contradictory position: "The gross degree of negligence, and its inexcusable character, coupled with the knowledge of its certain effects, ought, it would seem to us, to raise a presumption that the party intended the obvious and necessary consequences of his act, which at the time was apparent to him." But isn't the picture clear—negligence on one side—fraud on the other? Cf. also, *Nash v. Ins. Co.*, 188 Iowa at 132, 174 N.W. 378 (1919); 1 PHILLIPS ON INS., § 1096, and cases cited therein.

37. *Johnson v. Ins. Co.*, 4 Allen 388 (1862), where, on a hot, sultry August

were busy at work constructing definitions of this strange phenomenon. The *Mickey* case<sup>38</sup> began this game. Gross negligence is that course of conduct "as one with ordinary prudence under no circumstances, would fall into". This is more rationalization than definition. If a man is guilty of gross negligence, then he is not an ordinary prudent man. If he is an ordinary prudent man, he can't be grossly negligent. Now, what is gross negligence?

The definition took clearer shape. Gross negligence is "the want of that diligence which even careless men are accustomed to exercise".<sup>39</sup> Who knows the degree of care careless men take? It is far easier to stack up conduct with some ideal conception of conduct which the juror might have in terms of the much maligned and sinned against reasonable man. And even that is no child's play. The poor juror is led to the torture chamber.

Soon the doctrine leads to statements of this calibre. "It is not a defense to an action on an insurance policy to show that the property was destroyed through the plaintiff's negligence, unless such negligence was willful or was of such a degree as to amount to fraud".<sup>40</sup> Or statements like this: "A fire policy is a

---

day, plaintiff was unloading hay and placing it in a shed next to the barn. Bees, sensing an enemy, began to annoy him. He thereupon thrust a lighted wisp of straw into the bee hole. It was toward evening and the fresh breezes of late afternoon began to blow. They caught up the fire in their cradle and soon the barn was a merry blazing furnace. The court held that there was no gross negligence. But apparently, from the discussion of the applicability of gross negligence, misfeasance has been annexed to its sphere or influence. But some courts remained faithful to their early teacher, *Bouchard v. Ins. Co.*, 114 Me. 361, 96 Atl. 244 (1916): "Gross negligence . . . the intentional failure to perform a manifest duty."

38. *Supra*, note 36.

39. *Ins. Co. v. Barringer*, 733 Ill. 230 (1874). To the same effect, see *Moss v. Ins. Co.*, 30 Ky. 630, 99 S.W. 308 (1907): "Gross negligence is the failure to use that degree of care that careless and inattentive persons would usually exercise under the circumstances as then and there existed." Also, *Bouchard v. Ins. Co.*, note 37 *supra*.

40. *Ins. Co. v. Owens*, 69 Kan. 602, 77 Pac. 544 (1904).

protection against fire caused by the assured's own negligence, unless the negligence amounts to fraud".<sup>41</sup> If its fraud, it isn't negligence. If its negligence, it isn't fraud. Why have any in between stops?

Here and there cases cried out in the wilderness against the sheer nebulousness of the chief justice's creation. New York carried the torch of light. In *Gates v. Insurance Company*<sup>42</sup> the court said: "There can be no doubt that one of the objects of insurance against fire is to protect the insured from loss as well against his own negligence as that of his servants and others and therefore, the simple fact of negligence, *however great in degree*, has never been held to be a defense in such policy".<sup>43</sup> The following year, New York appears to contradict its former position—although the inconsistency is not too clear.<sup>44</sup> But soon the rule of the *Gates* case reasserted itself.<sup>45</sup> The followers of the *Gates* case are few but vociferous.<sup>46</sup> The majority of cases do homage to this mystic of the law.<sup>47</sup>

41. *Ins. Co. v. Douglas*, 58 Pa. 328 (1868).

42. 5 N.Y. 469 (1851).

43. The court apparently was unacquainted with the Chandler case, note 31 *supra*, otherwise, why the sweep and omniscience of the last line?

44. *Hynds v. Ins. Co.*, 16 Barb. 119, *aff'd*, 11 N.Y. 554 (1852).

45. *O'Brien v. Ins. Co.*, 38 N.Y. Sup. Ct. 526 (1875).

46. *Cf. Ins. Co. v. Carpenter*, 4 Wis. 20 (1855). In this case the plaintiff employed a stove in the ballroom of his tavern to dry the plastering. "It is insisted that there was great carelessness in the use of this stove and that the fire resulted from this carelessness."

To this the court answered: "The simple fact of negligence . . . however great in degree, has never been held to be a defense in such a policy."

*Cf. also Pool v. Ins. Co.*, 91 Wis. 530, 65 N.W. 54 (1895); *Ins. Co. v. Fallis*, 203 Ky. 112 (1924); *Wertheimer-Swarts Shoe Co. v. U. S. Cas. Co.*, 72 Mo. 135, 72 S.W. 635 (1903); *Henderson v. Ins. Co.*, 10 Rob. (La.) 164 (1845); *Ins. Co. v. Appleton Paper & Pulp Co.*, 59 Ill. app. 511 (1895).

47. *Cf. COUCH, INSURANCE*, § 1488, Vol. 6, and cases cited therein. What the gross negligence rule may do to an otherwise careful collator of cases, *Cf. 19 Cyc.*, p. 831: "In the absence of fraud or design on the part of the insured or some stipulation in the policy, the insurer is not relieved from liability by mere negligence or carelessness of the insured or his servants, although directly

What more fitting epitaph can we promise this doctrine than the two lines from Hamlet:

Polonius: "What do you read, my Lord?"

Hamlet: "Words, words, words."<sup>48</sup>

Is destruction accidental if an assured, while insane, destroys his property by fire? The courts are unanimous in their answer. Such destruction is within the coverage of a fire insurance policy. The rule and its reason are thoroughly and clearly stated in *Blindell v. Insurance Co.*:<sup>49</sup>

"To relieve the insurer from liability, the destruction of the property must have been caused or brought about by the fraudulent design, voluntary act, or intentional misconduct of the insured. Accepting this doctrine as sound, it necessarily follows that if the insured did not at the time have mind enough to know the nature or quality of his act, and was laboring under such a defect of reason as not to be responsible for his conduct, or as a result of mental unsoundness, he did not have sufficient will power to know

contributing to or causing the loss; but on the other hand, even in the absence of stipulation in the policy, the failure of the insured to take reasonable care to avoid loss . . . may be such as to defeat recovery under the policy."

In one breath negligence is not a bar, then it is. Now you see it!—now you don't! legerdemain worthy of the greatest of magicians.

Is this a simple out for this doctrine? Lines 14 and 15 of the Standard policy exclude coverage "if the hazard be increased by any means within the control or knowledge of the insured." When this gross negligence mood comes on to a man and he does or fails to do something which even careless persons could not be guilty of, is he not violating the "increase in hazard" clause? Could not the decision be rested on that foundation stone—far more secure and substantial than the gross negligence doctrine? For the application of this idea, *Cf. Ins. Co. v. Goodfriend*, 30 Ky. Law Rep. 218, 97 S.W. 1098 (1906); *Des Moines Ice Co. v. Ins. Co.*, 99 Iowa 193, 68 N.W. 600 (1896)—compare this last with Iowa cases cited in note 36 *supra*.

48. SHAKESPEARE, HAMLET, Act II, Scene 2.

49. 128 Ky. 389, 108 S.W. 325 (1908).

right from wrong, to to govern his actions, that (*sic*) the destruction of the property by him would not relieve the company. Under the conditions stated, the act of the insured could not have been fraudulent because there can be no actual fraud in the absence of an intent to commit it. It could not be voluntary or intentional because he did not have sufficient mind and memory to do a voluntary or intentional act." . . . "So, an insane person can form no wrongful or fraudulent design in destroying his own property so far as the insurers are concerned, and the insurers are liable although the insured himself burns the property when insane."<sup>50</sup>

There is but a single problem in completing this phase of our journey. It has been contended that once the insane person or his representatives have recovered, the insurance company may then, under its subrogation rights, sue the insane person's representatives for the amount of the loss.

In the *Showalter* case,<sup>51</sup> the insane person jointly owned a barn with a relative. He intentionally fired it. In a suit against the company, the insane person's committee recovered the amount of \$606.23. Thereupon, the company took subrogation and sued the assured's committee. The amount of recovery—\$605.74. The action of the company sounded in trespass which implies intent. However, the court avoided the glaring contradiction in its attitude by pulling another principle from the grab bag of legal aphorisms. They relied on the principle that where a loss must fall upon one of two persons equally innocent, it must be borne by the one who caused it. But, what of the result? The insane person recovered nothing. Therefore, the Pennsylvania court gives only lip service to the rule of the

---

50. In support of this rule see, *Archemont v. Ins. Co.*, 65 Hun. 475, 20 N.Y.S. 344; *Karrow v. Ins. Co.*, 57 Wis. 56, 15 N.W. 27 (1883); *Showalter v. Ins. Co.*, 3 Pa. Super. Ct. 448 (1897).

51 *Supra*, note 50.

*Blindell* case.

The *Blindell* case effectively criticizes this procedure: "It has been suggested that although an insane person is not criminally liable for his acts and although a policy of fire insurance will not be avoided if the property is destroyed by the insured while insane, yet the insane persons are responsible to the extent of compensatory damages for any injury done by them, and hence, if *Blindell* damaged the insurance company by his own act, his estate should be required to compensate it for any loss sustained thereby". To this the court says, "No!" "In short, the doctrine seems to be that the company ought not to be allowed by this indirect means to defeat a recovery on the policy when it could not have succeeded solely upon the ground that the insured burned it, if, in fact, he was at the time insane. To permit the company to recover from the insured would be going through the idle ceremony or form of paying him the amount of the policy with one hand and at the same time, taking it away from him with the other". The *Blindell* case expresses the prevailing view as to subrogation under these facts.<sup>52</sup> The *Showalter* case stands alone.

The wayfarer wends further along this interesting road, seeking new sights to appease the mind's eye. If someone other than the assured destroys the property, can a recovery be had? The immediate reaction generally is—No question about it. Let us see.

In the case of *Meily v. Insurance Co.*,<sup>53</sup> the assured was a corporation. All the stock but one share was owned by the Meily family. One of the family, G. W. Meily, was accused of firing the building. The following charge was upheld: "If from the whole evidence you find that G. W. Meily had *control, management and power of disposition* of the property, the same as if he had title or that there was an understanding among them" (the

---

52. Cf. cases note 50.

53. 142 Fed. 873 (C.C.E.D. Pa. 1906), *aff'd*, 148 Fed. 683 (C.C.A. 3rd 1906).

stockholders) "that he should burn the property in order that they might collect the insurance and that G. W. Meily did . . . wilfully set fire to his store . . . then . . . find a verdict for defendant". Apparently, then, the question is who benefits by the destruction. If the destroyer is benefited financially, then no recovery.

Prior to this case, a federal district court of Rhode Island in *Perry v. Insurance Co.*,<sup>54</sup> has held that despite the destruction of a wife's property by her husband, the wife may recover on her fire insurance policy. The court arrived at its conclusion with a modicum of reasoning. However, it is well to indicate that under the laws of Rhode Island,<sup>55</sup> a husband had, at the time of this case, a revocable agency to collect the rents and profits of the wife's estate.<sup>56</sup> Yet the *Meily* case finds no possible

54. 11 Fed. 485 (1882).

55. Chap. 152 of GENERAL STATUTES.

56. The spouse cases seem to follow this theory despite agency or community of interest which might result in benefit. *Cf. Ins. Co. v. Smith*, L.R. 6 Q.B.D. 561 (1881): Wife destroyed husband's home. The wife was in charge of it. Yet the husband recovered. As *dictum* the court pointed out that the company under its subrogation rights could not proceed against the other party. The apparent reason is a suit for damages by one spouse against the other. But isn't the company the real party in interest? To like effect on destruction by spouse, *Cf. Walker v. Ins. Co.*, 62 Mo. App. 209 (1895); RIDDLE ON INS. 442; Feibelman v. Ins. Co., 108 Ala. 180, 19 So. 540 (1896). *Cf. Ins. Co. v. Lilgemont, Inc.*, 84 Fed. (2d) 685 (1936) (C.C.A. 5th).

To same effect, *Cf. Ins. Co. v. McCullough*, 2 Neb. 198, 96 N.W. 79 (1901) ". . . law, reason and justice all combine in declaring that her rights should not be affected by his wrongful acts of which she had no knowledge."

What is interesting in this excerpt is the connotation that law is neither reason nor justice. The court was describing an endemic conflict in the law as to what it is. The endemic condition is epidemic today. Lord Coke said: "Law is reason." *Cf. Prohibitions del Roy.*, 12 Co. 63 (K.B. 1612). Holmes believed it to be only rules of conduct determined by the courts. *Cf. Holmes, Path of the Law*, 10 HARV. L. R. 457. When the writer went to law school, law was described as merely a set of predictions as to what the courts will decide.

As final support for the rule, *Cf. O'Toole v. Ins. Co.*, 159 Mich. 187, decided by Justice Ostrander—"There can be no question of the legal proposition that the wife is not charged with the fraudulent conduct of her husband, *notwith-*

conflict between itself and the *Perry* case.

The *Meily* case cites *Kirkpatrick v. Insurance Co.*,<sup>57</sup> as an apt source of support. Yet the *Kirkpatrick* case merely involved the question of whether the evidence supported the verdict. Nowhere is there any indication that the plaintiff was excepting to the charge. The Appellate Division, therefore, only took cognizance of the questions raised on appeal.<sup>58</sup> How then is such a case a precedent?

The *Meily* case was followed in 1925 by *Insurance Co. v. Queens City Bus and Transfer Co.*<sup>59</sup> In this case the incendiary had a chattel mortgage on the property of the corporation. He was president of the corporation. He held one-fourth of the capital stock. At the time of the fire, a condition of the mortgage had been breached and by virtue of the mortgage provisions, the mortgagee had become the legal owner. Yet under these facts, the court held that the "incendiarism of the mortgage cannot be imputed to the mortgagor".

The question was raised on appeal by a refusal of the trial court to instruct the jury "that if the mortgagee intentionally burned the property, the mortgagor could not recover". This was a partially correct ruling. The guide posts of control, management and power of disposition, erected in the *Meily* case, must be added to the charge, however, if it is to be completely proper. The Appellate Court disregarded this apparent basis for decision. It assumed that the requested charge contained these three important conditions. Then it proceeded to say that the evidence in no way gave a reason for such a charge. One of the main cases cited in support of its ruling is *Assurance Co. v.*

---

*standing that he may have been her agent in the management of the property and the conduct of her business."*

57. 102 Am. Dec. 327, 92 N.Y.S. 466 (1905).

58. Cf. CARMODY, N. Y. PRACTICE, Vol. 6, p. 254. "They (appellate courts) frequently decline to pass upon questions clearly involved in cases before them, but a determination of which is not essential to a proper disposition of the case."

59. 3 Fed. (2d) 784 (C.C.A. 4th 1925).

*Rachlin Clothes Shop*.<sup>60</sup> This latter case seems directly contrary. Qualitatively, the facts in the *Rachlin* case were of equal strength with the facts in this case. Quantitatively, there was little difference in the respective fact set ups. Yet, in the *Rachlin* case, the question was submitted to the jury of whether *Rachlin's* acts were those of the corporation's. But in the present case, this question does not have to be submitted to the jury.

Further, the *Rachlin* case cites what appears to be an unreported District Court case in West Virginia, decided in the December, 1913,<sup>61</sup> term, which might be contrary to the *Queen City Bus* case. There again the question was one to be submitted to the jury on the three rules of the *Meily* case.

The Federal doctrine marches on. In 1927 the same circuit offered a new approach to the third party incendiary cases. The case was *Kimball Ice Co. v. Insurance Co.*<sup>62</sup> The circuit court of appeals sanctioned this instruction: "if you believe from all the evidence . . . that this property was willfully burned at the instance of Kaufman, a stockholder and general manager of the plaintiff, then you should find for the defendant". The three stalwarts of the *Meily* case—"control, management and power of disposition of the property"—totter and shake.<sup>63</sup> The court pursues its iconoclastic trend further. It introduces a new element—witnesses the language: "The right of recovery upon an insurance policy in behalf of stockholders and owners of a company, is not necessarily defeated or prejudicially affected by the action of an officer of the company acting in an improper manner; but where, in a case like the present, especially if there was fraud or wrongdoing on the part of the company's representa-

60. 125 Atl. 184 (Del. 1924).

61. *Downey v. Ins. Co.*

62. 18 Fed. (2d) 563 (C.C.A. 4th 1927).

63. The *Meily* doctrine may well have been followed without affecting the verdict. Kaufman held 25% of the stock; was a large creditor of the corporation which was wholly insolvent and was in exclusive control and management of the property.

*tive in procuring the policy*, it presents a very different question. This is undoubtedly true where the specific charge of fraud in the procurement of the policies and the actual burning of the property is made against the chief officer of the company in effecting the insurance . . . " The court stresses the element of the source of application. It mentions the fact three times in its opinion. Is there a new guide post to be added to the three of the *Meily* case?

The court states the rationale for a denial of recovery in cases of this type: "If recovery could be had in the present instance, all that would be necessary would be to turn over the property of a corporation to the exclusive management and control of a single person who could procure insurance fraudulently and effect the willful burning of the insured premises, and assert a mere claim of innocence on the part of those interested in the company who would thereby receive the benefit of the direct fraud".<sup>64</sup>

The discordant Federal views continue. The next case<sup>65</sup> involves an agency in which the father was the principal, the son, the agent. The son originally owned a hotel in Wisconsin. Father held the mortgage on it. Subsequently the son was divorced from his wife. Concurrently with the divorce proceedings, the father foreclosed. The son then became the manager and caretaker of the hotel. However, the facts indicated that the foreclosure was merely an attempt to insulate the son from the alimony claims of his wife.<sup>66</sup> The son intentionally set fire to the building. The father sued to recover on the policy.

As one of its defenses, the insurance carrier posed that of the son's incendiarism. The case was decided for the defendant

---

64. Is not the real deterrent, the criminal penalty of arson? Cf. note 26 *supra*.

65. *Sternberg v. Assur. Co.*, 6 Fed. Supp. 541 (Dist. Ct. E.D. Wis.) (1934).

66. "Coincident with the commencement of the divorce proceedings, the plaintiff (the father) at the request of the son, instituted foreclosure proceedings. . ."

on the ground that the occupancy condition of the policy had been breached. Then the court unloaded this unique dicta on the effect on the principal of the agent's incendiarism. The father owned the implied negative duty not to burn the premises. Therefore, "it is difficult to find a justification for limiting the consequences of violation of such duty by himself personally and refuse to impute or ascribe to what ought to be implicit warranty that his delegate, his substitute, alter ego will likewise not violate it. It cannot be that, if the insured owes the duty, his agent or substitute has the privilege of not respecting it, and thus give the insured the benefit of the contract".

The reason base for such conclusion is stated in this language: "In ascribing to an insured, the responsibility of the tortious act of his servant, as a basis of defense by the insurer, the principle which is involved strikes me as identical with that of a railroad company upon imputation for deliberate tort of its servant . . . This, again, is upon the assumption that the insured owes the negative duty indicated, and that observance of such duty may be exacted not only from him personally but also from those who are deputed to stand for him in respect of the subject of insurance".

How reconcile this case with the *Perry* case?<sup>67</sup> How reconcile it with the philosophy of the *Meily* case which seems to think in terms of "benefit". Does the wrongdoer benefit? If so, no recovery. If not, then recovery may be had. What about the source of application tenet of the *Queens Bus* case? Should a Court build a support for a contract case out of tort materials? Are not the fabrics of each woven out of different and in many cases, incongruous social threads? This is the legal tapestry created by the hand of the Court. The repercussions of this case were immediate and acute.

In *Hawkins v. Insurance Co.*,<sup>68</sup> a son was accused of burn-

67. Note 54, *supra*.

68. 177 S.E. 442, 115 W.Va. 618 (1934).

ing property of his parents. The defendant insurance company requested the charge that if the son fired the building, then the parents may not recover. The trial judge refused so to charge. Instead, he instructed the jury that "even though they may believe from the evidence that Tipton Hawkins (the son) set fire to the building in which the property involved was located, yet that fact will not prevent the plaintiff's from recovering unless the jury should furthermore believe from the evidence that he did so at the instance of or with knowledge, consent or connivance of the plaintiffs or one of them".<sup>69</sup> The defendant excepted to this portion of the charge and on the appeal argued the *Sternberg* case as authority.

The charge was upheld. The court dealt a vital thrust to the *Sternberg* case. "In our opinion, the learned trial judge there (*Sternberg* case) has stated a conclusion that is a non-sequitor of his major and minor premises. Because a railroad is responsible in a tort action for the conduct of its agent within

---

69. The father and mother were partners in the business occupying the destroyed property. They owned the property jointly. Apparently under the direction given, mere connivance of one of the parties is enough to deprive the partnership of the insurance proceeds. Yet isn't the whole question of agency and principal responsibility originally raised in the *Sternberg* case and repudiated in this case, under facts similar to those of the *Sternberg* case, raised in this situation? The upper court repudiates the *Sternberg* doctrine. Yet it impliedly accepts it in a limited case—i.e., where a partnership is involved. The reason for such a distinction is not apparent. Certainly under the benefit theory of the *Meily* case, the innocent partner should receive his share of the proceeds. But this is not the law.

The only other case involving incendiarism in which partners were involved is *Ins. Co. v. Brown*, 75 Ark. 251, 87 S.W. 135 (1905). A lower court charge to the effect that "if Brown or McKiblon or either of them set fire to and burned the property insured, or intentionally caused the same to be done, plaintiff cannot recover," was sustained upon appeal. The appellate decision, however, gives no clue as to whether objections, to the phrase of charge holding one responsible for the others criminal act, were raised. Cf. further the following language in *Insurance Co. v. Lilgemont*, 84 Fed. (2d) 684 (C.C.A. 5th 1936).

"But if he be interested in some way in the corporation and in the insurance, but is not the only one interested, his fraud would not defeat the insurance, because of the interest of innocent persons."

the scope of his employment and because in an action, a building may be burned by the agent of the insured, it does not follow that the insured must be held responsible for the criminal act of his agent that he neither authorized, ratified or knew about, and which, in the nature of things could not, without previous authorization or subsequent ratification, be within the scope of the agent's authority. Although the statement is undoubtedly based upon slender authority, because of the extremely limited number of cases in which the question has been directly presented as a matter of law, we believe that the general statement of law contained in Ruling Case Law<sup>70</sup> is sound. We quote it—"the fact that the property was intentionally burned by the insured's husband, wife or agent does not defeat a recovery where the insured was not a party thereto". A mere family relationship does not raise the presumption of participation in incendiarism . . ."

"We cannot, however, refrain from commenting that . . . where a close family relationship exists between the person who, it is alleged, did the actual burning and the insured, an instruction is fully warranted which would tell the jury in no unmistakable terms that in reaching their conclusion as to the participation of the insured in the incendiarism, that such proof need not be based upon direct evidence, but might be shown by the circumstances, and stating further that in judging of the circumstances, the jury might consider the family relationship involved and the likelihood of direct proof being available where such relationship exists."

This is a reasonable approach to the problem of the *Sternberg* case. the judge there was probably groping for an answer such as set forth in this case. The facts of the *Sternberg* case smacked strongly of collusion and the jury might well have found such to be the case.

The final federal pronouncement on the question, of

---

70. 14 R.C.L. p. 1223.

whether an agent's incendiarism vitiates the principal right to insurance proceeds, is found in the case of *Insurance Company v. Lilgemont*.<sup>71</sup>

A husband and wife purchased property jointly. Subsequently the property was transferred to a corporation, the plaintiff in the action. The wife held all the shares of the corporation. The husband, further, was not an officer of the corporation. He often transacted business for it. Under the Georgia law, a husband does not represent his wife touching her property. Fire destroyed the property. The carriers claimed participation by the husband in the intentional firing of the building. Therefore, they denied liability. In the ensuing action, the court held for the plaintiff reverting to the original benefit<sup>72</sup> theory of the *Meily* case.

The journey nears its end. The final element in the insurance definition of "fire" is the hostile nature of the fire. This condition precedent<sup>73</sup> is court made. The word "hostile" is not found in the fire insurance contract. Rooted in another age; nurtured by the force of precedent; it has come into the present with a vigorous, authoritative swing.

The seed of the doctrine was sown in the case of *Austin v. Drew*.<sup>74</sup> The facts and the opinion are important. The case has set the framework within which this doctrine has taken form. The insured premises were used as a manufactory for sugar baking. Pans for boiling sugar were kept on the ground floor and a stove was there to heat these pans. From the stove, a chimney or flue went to the top of the building. As it passed

---

71. 84 Fed. (2d) 684 (C.C.A. 5th 1936).

72. *Cf. Sandersville Oil Mill Co. v. Ins. Co.*, 124 S.E. 728 (Ga. 1924), for benefit theory. *Cf. also the interesting case of Felsenthal v. Assurance Co.*, 205 Ill. App. 610 (1917).

73. Existence of a "fire" is part of plaintiff's case and is a condition precedent. *Cf. New Orleans Ry. & Light Co. v. Insurance Co.*, 145 La. 82, 81 So. 764.

74. 4 Campbell 360, 171 Eng. Repr. 115 (1815). Rule to show cause denied in 6 Taunt. 436 (1816).

each floor, there was a register in it with an aperture into the rooms. The purpose of this construction was to introduce heat into the upper floors which were used for drying the baked sugars.

One morning the employee whose duty it was to open the register on the top floor forgot to do so. The result was that when the fire in the stove was kindled, smoke, sparks and heat were intercepted in their progress through the flues and were forced through the apertures into the rooms where the sugar was drying. In the charge of the court, to the jury, the following language was employed: ". . . there never was more fire than was necessary to carry on the manufacture and the flame never got beyond the flue".

"In this case, there was no fire except in the stove and the flue as there ought to have been . . . Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable."

"The jury with great reluctance, found a verdict for the defendant."

A rule to show cause was sought. It was denied the following year.<sup>75</sup> This case, on the rule, is reported as having Gibbs, the chief justice say: "I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement of their register by the plaintiffs". Dallas, J. says: "The only cause of the damage appears to me to have been the unskillful management of the machinery by the plaintiff's own servants and it, therefore, is not a loss within the meaning

<sup>75</sup> 6 Taunt. 436 (1816).

<sup>76</sup> Marshall reports the case in somewhat different language. He has Gibbs say: "The damage was occasioned by the unskillful management of the machinery and not by any of those accidents from which the defendants intended to indemnify the plaintiffs.

Dallas, J.—"There was nothing on fire which ought not to have been on fire and the loss was occasioned by the carelessness of the plaintiffs themselves." 2 Marsh. 130.

of the policy".<sup>76</sup> Apparently the court on the reargument is shifting its position. Originally the position was that the flame was confined to its regular place of being. Therefore, it was not the type of fire covered under the policy. The reargument, however, seems to leave the court sustaining its conclusion on the ground of negligence or gross negligence. What did the court decide?

In the *Scripture* case, this apparent confusion is commented upon, "The conflicting and imperfect reports of this case (*Austin v. Drew*) have led to various and contradictory misapprehensions of its import. On the one hand, it has been supposed that the decision in *Austin v. Drew* is put on the ground of carelessness of servants<sup>77</sup> and is thus in apparent contradiction with the decision of *Hobson v. Southerly*<sup>78</sup> in which Lord Tenterden says that "one of the great objects of insuring is security against the negligence of servants and

---

77. Cf. HUGHES ON INSURANCE, 507-511.

That modern authorities sin as much, cf. *McGraw v. Ins. Co.*, 93 Kan. 432, 144 Pac. 821 (1914). In this case a boiler with insufficient water in it had an excessive fire lit under it. The net effect was the ruination of the boiler by excessive heat. The reasoning of the court resembles a stock market chart with its usual dips and rises. The opinion commences with these remarks: "Plaintiff practically concedes that no liability attaches to the insurance company if the person employed to operate the boiler intentionally applied fire to it." How does this line up with the rule as to intentional destruction by an agent without the connivance or direction of his principal? Cf. *Supra* text and notes 71, et. seq., "and the loss was occasioned by his mismanagement for instance, in allowing the supply of water to be exhausted"—Isn't this governed by the negligence rule? "The present controversy is as to the origin of the fire that caused the injury." But should it be? "If the loss was due to the want of skill or care on the part of the person in charge of the boiler or of interference with its management by some other employees, there was no liability on the policy." If someone who desired to injure the plaintiff's property gained unlawful entrance to the building, drained the water from the boiler, lit the gas under it, waited until his full purpose was accomplished, carefully turned off the gas and then withdrew without leaving any other trace of his presence" (suppose he left fingerprints—what then?) "doubtless the fire he kindled would be regarded as a hostile one."

78. Mood and Malk 90.

workmen".

"Another authority supposes the point described to have been that, 'in order to recover upon a policy against loss or damage by fire it is not sufficient to show that the property has been damaged by the heat of fire usually employed in manufacture and incurred by the negligence of the insured or his servants beyond its usual intensity'."<sup>79</sup>

"On the other hand Marshall says:<sup>80</sup> 'To bring a loss within the risk insured against, it must appear to have been occasioned by actual ignition and no damage occasioned by mere heat, however intense, will be within the policy'."

Shrouded in the grey cloak of doubt, *Austin v. Drew* came to rule in America. The first cases to rally to its support were the explosion actions. In *Briggs v. Insurance Co.*,<sup>81</sup> the plaintiffs were engaged in rectifying liquor. Vapor filled a room in which a lamp was burning. Contact was established and an explosion resulted. The policy excluded explosion damage unless following fire damage. The court refused recovery. "There was no fire prior to this explosion. The burning lamp was not a fire within the policy."

The lines of the doctrine were becoming defined. The logical and economic rationale was next needed. It soon found its

79. ELLIS ON INSURANCE 25. Some very modern writers who have perpetuated the guess match of what *Austin v. Drew* decided and quarrel on this point are Vance in 1 CONN. B. J. 284, who says one of the grounds of the *Drew* decision is that the fire must not be excessive, and Abbot in 24 HARV. LAW REV. p. 134, who says that "The locus and origin of the fire, not its size, is the logical and proper test of its accidental character."

80. 2 MARSHALL ON INSURANCE (3rd Ed.) 790—To the same effect cf. *Marsden v. County Ass'n.*, 35 L.J. (C.P.) 60 (1865).

Willes J.—"*Austin v. Drew* shows that a damage occasioned by heat without actual contact of flame is not a damage by fire."

Also 2 GREENLEAF, EVIDENCE, § 405. "The proof of loss must show an actual ignition by fire, damage by heat alone, without actual ignition, not being covered by the policy."

81. 53 N.Y. 446 (1873). Cf. to like effect, *Ins. Co. v. Foote*, 22 Ohio St. 340 (1872).

spokesman. A tug boat was insured against fire. The boat was damaged by fire. The company offered to pay for all damage except that which occurred to the interior of a boiler. This injury resulted from an absence of water in the boiler coupled with the overheating of the furnace which was in contact with the boiler. The plaintiff also claimed coverage for this damage. A suit ensued.<sup>82</sup> The court held for the carrier on this latter

---

82. A minor offshoot of this doctrine is the excessive heat and flame cases. The first of these cases to directly decide on the particular question was *Samuels v. Ins. Co.*, 2 Pa. Dist. R. 397 (1892). The flame of a lighted lamp flared up to a height of two or three feet above the lamp chimney. Smoke and soot damage resulted. The court decided in the carrier's favor. No opinion was rendered. Some of the adherents of the *Samuel's* case are: (1) *Hansen v. Ins. Co.*, 193 Iowa 1, 186 N.W. 468 (1922). Here an excessive fire in an oil burner caused smoke and soot damage. Despite the excessive flame, it was not held to be a "fire" within the policy meaning. Admitted the court, "close questions may arise over the dividing line between a hostile and a friendly fire." All that was necessary in this case was to turn the burner down.

(2) *Sigourney Produce Co. v. Ins. Co.*, 211 Iowa 1203, 235 N.W. 284 (1931). The flame of an oil stove became excessive, giving off smoke and soot. It was necessary to put out the flame in the stove by smothering it with sacks. But nevertheless, said the court, "there is no evidence in the record to the effect that the fire could not have been turned out by turning down the wick in the usual manner."

"The basic point is that in this case nothing burned which the plaintiff did not intend should turn. All that happened was that there was more burning than was intended." In view of this language, I wonder how the Iowa court would decide this hypothetical problem: Jones lights a fire to burn brush in his backyard. A wind arises and fans the fire which becomes excessive and as a result the side of Jones' house becomes discolored by smoke. May Jones recover?

(3) *Fire Ass'n v. Nelson*, 90 Colo. 524, 10 Pac. (2d) 943 (1932). An electric range was turned on to a high degree of intensity to cook a chicken in an aluminum vessel. It was left unattended and smoke and soot damage resulted: Held: for the carrier. "There was no actual fire outside of the place where it was intended to be although it increased in intensity."

The leading opponent of the *Samuels* case is *O'Connor v. Ins. Co.*, 140 Wis. 388, 122 N.W. 1038 (1909). The plaintiff's servant built a fire in the furnace with paper and cannel coal which was not used or intended to be used for such purposes. As a result the fire developed to such a degree of fury as to fill the house with a great volume of smoke, soot, and intense heat. These elements damaged personal belongings of the plaintiffs. Held: for the plaintiff. The court's reasoning is open to criticism. It distinguishes *Austin v. Drew* on

point. "The fire, while in the furnace was in its proper place and where it was intended to be; and it was placed there to act upon the boiler, which in course of time, would be burnt out or warped, as the grate in the furnace would be by the continued action of the fire therein; and if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions, the liability under the policy would

---

the ground that there the fire was not excessive. But *Cf.* note 80, *supra*. It is most curious to watch *Austin v. Drew* become a judicial football kicked in whatever direction suits the predilections of a court.

The court then argues that the contract is to be construed against the company in interpreting the meaning of "fire." But since most fire insurance policies are subject to scrutiny and in some instances to actual construction by state insurance departments who represent the public, why should such a rule prevail? The public shares in the bargaining process and the parties meet on equal terms. If anything, the public has the advantage. *Cf.* *Solomon v. Ins. Co.*, 53 R.I. 154, 165 Atl. 214 (1933). "The language of the standard policy is not the language of the insurer, it is prescribed by statute and hence should not be extended by construction." To same effect *cf.* article by Vanderbilt, 5 N. Y. U. L. Q. 121, and authorities cited therein. But *cf.* VANCE, 2nd Ed., p. 689 to the contrary.

The court proceeds to cite voluminous authorities. Most of these deal with the problem of proximate cause and smoke damage following fire losses and explosion losses following fires. Hardly to the point.

As a final touch, it advances this argument: "In the case before us, the fire was extraordinary and unusual, unsuitable for the purpose intended and in a manner uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was, we think, a hostile fire within the contemplation of the parties." Is the test of "hostile" fire uselessness of the fire? No other case takes this viewpoint. Therefore, excessiveness of the fire remains. But isn't that the very question to decide: does an excessive fire come within the policy?

The court, however, seems to be introducing a new test—namely, did the parties contemplate covering this situation. Unfortunately, the court's brevity gives no indication of the weight it gave to this theory. Does it mean "that it is by the intention of the parties that the applicability of the insurance is to be tested?" *Ins. Co. v. Thomas*, 138 Atl. 33 (Md. 1927). This is meaningless. Certainly it is the rare assured who sits down and thinks through with the carrier all the situations they intend to cover. Does it mean that "our guide is the reasonable expectation and purpose of the ordinary business man when mak-

attach for injury caused by the action of the fire while confined to the furnace and providing no external ignition". Then the court goes into an analogy which forms a bulkwark to the decisions supporting this view. "If a person has his house insured against all loss or damage by fire and he should make a fire in his grate or fire place of such intense heat<sup>83</sup> as to crack his chimney or to warp or crack his mantel piece, it would hardly be contended that he could hold the insurance company liable for such damage though the damage was unintentionally allowed to be produced by the action of the fire. In such case, the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured." The expression "hostile fire" was yet to be coined from the verbal mint of the judicial treasury. The honors in this respect go to the Massachusetts court.

In *Way v. Insurance Co.*<sup>84</sup> the plaintiff's foreman emptied the contents of a waste paper basket into a stove. He thereupon applied a match to it. The burning waste paper ignited soot in the chimney which in turn expelled smoke into the plaintiff's rooms damaging goods stored there. The doctrine begins to crack its rigid legal mold. The court wanted to grant a recovery. Yet, it wished to remain within the bounds of legal precedent. It therefore, conceived of the secondary fire doctrine, i.e., a fire which is ignited by a confined one and then operates out of the intended place. But let the court spin its own web of logic. "We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained

---

ing an ordinary business contract?" Justice Cardozo, in *Bird v. Ins. Co.*, 224 N.Y. 47, 120 N.E. 86 (1918). "At any rate, it is a jury question." The court said: "Ordinarily the question in such cases is for the jury."

Other cases supporting the O'Connor view: *Ins. Ass'n. v. Sherrer*, 32 Ohio App. 465, 168 N.E. 234 (1927); *Ins. Co. v. Armstrong*, 219 Ala. 208, 122 So. 23 (1929); *McDonald v. Ins. Co.*, 98 Mont. 572, 40 Pac. (2d) 1005 (1935).

84. 43 N.E. 1032 (1896).

for useful purpose in connecting with the occupation of a building, and a fire which starts from such a fire, without human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire . . ." The doctrine has found a name. The secondary "fire" has been created to loosen the rigidity of the old legal mold.<sup>85</sup>

---

85. Supporting this view, *Cannon v. Ins. Co.*, 110 Ga. 563, 35 S.E. 775 (1899). The doctrine has led to all sorts of logical and factual refinements. Thus in *Collins v. Ins. Co.*, 9 Pa. Super. Ct. 576 (1899) coal oil supplied to a wick from a tank, for the purpose of heating a coal oil stove came afire in the tank. Heavy smoke and soot came forth and damaged the property. The defendant carrier's counsel argued that ". . . even if the oil were burning, yet, as it was inside the stove, it cannot be said that there was actual ignition outside of the agency employed to heat the room." The court refused to accept this argument and said: "It (the fuel) was no more intended to be burned in the tank than in the barrel or the can in which it was brought to the house and kept."

*Fitzgerald v. Ins. Co.*, 30 Misc. 72, 62 N.Y.S. 824 (1899). The court made the question one of law. Cf. *O'Connor* case *supra* note 84.

*Cabbell v. Ins. Co.*, 218 Mo. App. 31, 260 S.W. 490 (1924). A heater in a basement exploded and live coals were ejected over the cellar floor. Smoke and soot seeped through the house, damaging the walls. The court adheres to the general distinction. It restates the secondary fire appendage. In referring to this doctrine it says: "while this" (doctrine) "might seem to imply that there must be a communication of the fire to something outside the stove, yet we think it means merely that fire must exist outside of the receptacle intended for it so that such fire becomes a hostile agent either through ignition of other property or from the smoke or soot arising from the escaped fire." Unfortunately, nothing in the facts gives any evidence that the soot and smoke damage arose from the escaped coals.

*Pappadakis v. Ins. Co.*, 137 Wash. 430, 242 P. 641 (1926). Plaintiff operated a bakery in a market. A sprinkler system had been installed for the purpose of extinguishing fires, should any occur. One of the sprinkler heads was directly above a bake oven. There was a crack in the top of this oven. One day, "flame from the fire in the oven escaped upwards through this crack, heated the automatic sprinkler head to such a temperature that the sprinkler was released and threw a huge quantity of water over the bakery and the stock therein."

Note there was no secondary fire here. The court refuses to recognize

However, it leaves the doctrine shrouded in a mystery of metaphysical distinctions. Professor Patterson in his classic article, "The Apportionment of Business Risks,"<sup>86</sup> attempts to rationalize the cases on the following basis: "It is submitted that the courts are trying to distinguish here between mere irregularity in the process of manufacture or other use of fire as an instrument which might be charged off to the cost of doing business and those extraordinary accidental fires against which a prudent man insures". The chameleon-like character of the doctrine was soon to belie this prophecy.

A cautious wife seeking to protect her jewelry from burglars, during her absence from the home, conceived of an unique hiding place. She placed the jewelry in a velvet handbag and deposited it in the stove. While in the stove, an inadvertent fire was started. The jewelry was destroyed. The court<sup>87</sup> invoked the friendly vs. hostile fire doctrine and refused recovery. "Com-

---

the excessive fire theory of the O'Connor case. Yet recovery was had by the plaintiff. It is the judicial mind straining for a result forbidden by the rule of precedent.

*Cf. also, Ins. Co. v. Gugenheim*, 7 S.W. (2d) 588 (Tex. Civ. App. 1928). A long opinion and a vitriolic dissent in *Corryell v. Ins. Co.*, 118 Neb. 303, 229 N.W. 326 (1930).

Contrary to these last four cases, *Cf. Solomon v. Ins. Co.*, 53 R.I. 154, 165 Atl. 214 (1933), *reargument denied* 166 Atl. 254 (1933). In this case, smoke and soot damage occurred in plaintiff's store due to a broken pipe. Flames shot out through the opening occasionally. But, said the court: "The damage in the case at bar was caused by one fire which was intentional and within the place that this fire was intended to be. The fact that this fire was excessive and that the flame for a short time was seen to be outside the furnace did not change the nature of the fire. The flame outside the furnace was merely an extension of the flame within the furnace . . . No secondary fire resulted from the intentional 'fire.'" Ah! the metaphysics of primary and secondary fires!

The court then advances a real argument evidentiary of the intentions of the parties: "If a protection from smoke and soot from a furnace fire is desired by the insured, it can be readily obtained by paying the premiums for the additional risk" *i.e.*, purchase a smoke damage endorsement.

86. 24 HARV. L. REV. at 338.

87. *Weiner v. Ins. Co.*, 124 Misc. 153, 207 N.Y.S. 279, *aff'd*, 214 Am. Dec. 784, 210 N.Y.S. 975.

mon sense and human experience" never contemplated recovery in such a situation. What "common sense" is, I do not know. I wonder if anyone does. "Human experience" in the United States, had never met this problem before. Certainly there are no reported cases or discussions of this problem. Mere personal experience is apparently not "the human experience" referred to here. At least, the question should be one for a jury and not merely a question of law for a court alone.

The court appreciated a possible dilemma its decision might create. "We are not required to pass upon what may, possibly, be the difficult question whether recovery could be had for the loss of something that fell or was blown into a stove or fireplace".

Again a cautious wife placed jewelry in a safe place. This time in a hat box in a clothes closet. The box was taken into the cellar on the assumption it contained waste matter. It was then put into the furnace and consumed. The Texas<sup>88</sup> court in a well reasoned opinion, pointed out that the hostile fire doctrine concerns itself with but one question—"locus of the fire". If the fire was in the place intended for it, then no recovery can be had.

The first break in this tributary of interpretation came in the case of *Harter v. Insurance Co.*<sup>89</sup> Jewelry was destroyed by the inadvertent placing of it in a furnace. The majority of the court followed the previous cases. Two judges dissented. Their argument is worthy of attention: "Courts cannot remake the contract between the parties".

"The policy of defendant Insurance Co. issued to plaintiffs is general in its terms. It contains no limitations and exceptions applicable to the facts herein. It insures plaintiff's jewelry without exception against all direct loss or damage by fire. There being no limitations or exceptions in the language of

---

88. *Ins. Co. v. Naiman*, 6 S.W. (2d) 743 (1928).

89. 257 Mich. 163, 241 N.W. 196 (1932).

the policy, we can make none. The loss falls directly within the language of the policy. If the defendant would escape liability, it should by appropriate language, exclude such liability by the terms of its contract."

Is not the minority opinion begging the question? Are we not trying to define the meaning of the very word they assume to be so clear in meaning—"fire". What is a fire within the meaning of the policy? The majority opinion says: one which is hostile in nature. The minority opinion fail to define it except by their conclusion.

The *Harter* case broke the sanctity of undefiled precedent. In *Solomon v. Insurance Co.*<sup>90</sup> jewelry found its way accidentally into a trash burner in plaintiff's backyard. The court repudiated the previous cases and gave recovery to the plaintiff. The Court, however, hid behind no sham curtain of distinction. It frankly refused to apply the friendly fire doctrine to this case.

The depression accentuated the moral hazard in fire. It sharpened the attitude of the companies towards claims. Benevolent liberalism changed into conservative scrutiny. One of the manifestations of the increase in the moral hazard was the deluge of cigarette burn claims.<sup>91</sup> This led to a statement such as this from one authority:<sup>92</sup> "The recognition by insurance companies of these scorch claims is getting to be, if it is not now, a matter of common knowledge on the part of the insuring public, and has thereby caused many claims to be presented which are fraudulent, either because the loss in question was willfully caused or had occurred long prior to the date set out in the proof of loss". The writer then suggested the elimination of losses caused by lighted cigars, cigarettes or pipes from the policy. Another possible way to exclude this problem is to write

---

90. 161 So. 340 (La. 1935).

91. It has been estimated that 60% of the claims are based on cigarette burns. Cf. BEST'S INSURANCE NEWS (Fire and Marine Ed.) May 20, 1933.

92. BEST'S INSURANCE NEWS (F. & M. Ed.) Mar. 20, 1934.

a \$50.00 or \$100.00 deductible provision which would eliminate most of these scorch claims. The large claims are not fraught with as much danger of fraud.

On March 31, 1933, the National Board of Fire Underwriters instructed its member companies to refuse payment of cigarette burn claims.<sup>93</sup> As might be expected, litigation resulted. The friendly fire doctrine found itself caught up in a new whirlpool of reasoning and application.

The first two cases<sup>94</sup> discussing the point assumed that the cigarette was the container of the fire; that the flame was intended to be in the cigarette. Therefore, to give recovery, there had to be a secondary fire. Again metaphysics rears its baffling banner.

The only other case, that of *Swerling v. Insurance Co.*,<sup>95</sup> adopted a more realistic approach. This was a Rhode Island case and had the precedent of the *Solomon* case<sup>96</sup> hovering menacingly over it. A cigarette fell from an ash tray on to a rug. It destroyed an area 1½ inches long and ½ inch wide. The court gave recovery to the plaintiff. It supported its conclusion with this convincing discussion: "The cigarette was not the container of fire. It was composed of tobacco and container and both were burning. It was the fire itself . . ." "If while the cigarette is lighted, the person desires to put it aside temporarily or to discard it, he may put it in an ash tray or some other suitable receptacle. The burning cigarette is then confined in a place where it is intended to be. As long as the cigarette remains there, the fire in the cigarette is a friendly fire and for any damage it might cause while in its proper place, there can be no recovery. But, if through accident, the cigarette gets on the floor and causes damage to a rug by charring or scorching it, the fire in the cigarette is no longer a friendly fire, but is

---

93. JOURNAL OF COMMERCE, Nov. 4, 1933.

94. BEST'S INS. NEWS (F. & M. Ed.) March 20, 1934.

95. 180 Atl. 343 (R.I. 1935).

96. Cited *supra*, note 85.

a hostile one, because it is then in an improper place and therefore is doing harm".

"Thus grew the tale of wonderland  
Thus slowly, one by one,  
Its quaint events were hammered out—  
And now the tale is done,  
And home we steer, a merry crew  
Beneath the setting sun."<sup>97</sup>

LAWRENCE J. ACKERMAN.

New York, N. Y.

---

97. Introductory poem—Alice in Wonderland.