THE EQUITY FIRE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

J. C. THOMPSON AND THE UNION BANK OF CANADA (PLAINTIFFS) RESPONDENTS.

1909

*Mar. 17, 18.
*April 5.

THE STANDARD MUTUAL FIRE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

J. C. THOMPSON AND THE UNION BANK OF CANADA (PLAINTIFFS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Statutory condition—R.S.O. [1897] *c.* 203, *s.* 168, *s.-s.* 10(*f*)—*Construction of statute—Gasoline "stored or kept."*

One of the conditions of the contract of insurance against fire imposed by the Ontario Insurance Act (R.S.O. [1897] ch. 203, sec. 168, sub-sec. 10(*f*), is that an insurance company is not liable for a loss occurring while gasoline, *inter alia*, is "stored or kept in the building insured * * * unless permission is given in writing by the company."

T. effected insurance on a building used as a drug and furniture shop having in his employ a qualified chemist who occupied rooms in the upper part as tenant. This clerk had a gasoline stove which he used occasionally for domestic purposes and later on he brought it down to the shop and used it in making syrups, and while doing so the building took fire and was totally destroyed.

Held, that this was a "keeping" of gasoline on the insured premises within the meaning of the statutory condition, and the insurance

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

company were not liable for the loss. *Mitchell* v. *City of London Assur. Co.* (15 Ont. App. R. 262) distinguished.

Judgment appealed from (17 Ont. L.R. 214) reversed, Idington and Anglin JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The only question reserved for consideration on this appeal was whether or not gasoline was "stored or kept" on the insured premises in breach of the statutory condition imposed by R.S.O. [1897] ch. 203, sec. 168, sub-sec. 10(*f*). The facts relied on to support the defence of so "keeping" gasoline are sufficiently stated in the above head-note. All the other questions dealt with by the courts below were disposed of at the argument in respondent's favour.

Raney K.C. for the appellants. "Stored" and "kept" are not synonymous terms and effect must be given to each. "Kept" is the more comprehensive word and its meaning cannot be cut down by the more narrow term preceding it. See *Anderson* v. *Anderson* (2) as to the principle of construction in such case.

Mitchell v. *City of London Assur. Co.* (3) can easily be distinguished. It was decided there that lubricating oil was, to the knowledge of the company, a necessity for the operation of the insured property and its use was, therefore, an implied term of the contract. *Boyer* v. *Grand Rapids Fire Ins. Co.* (4), was decided according to our contention in this case.

As to the condition being reasonable see *Bastian* v.

(1) 17 Ont. L.R. 214.
(2) [1895] 1 K.B. 749.
(3) 15 Ont. App. R. 262.
(4) 124 Mich. 455.

British American Assur. Co.(1); *Johnston* v. *Dominion of Canada Guarantee Co.*(2), at pp. 479 and 482.

Gamble K.C. for the respondent Thompson. Words collocated in a manner similar to "stored or kept" in this condition have frequently been held to mean the same thing. For example, "have or keep" in *Biggs* v. *Mitchell*(3); "case or canister," *Foster* v. *Diphwys Casson Slate Co.*(4). In *Krug* v. *German Fire Ins. Co.*(5) a condition against using premises otherwise than for storage was not violated by a temporary use for other purposes. And the Ontario courts held the same in *Mitchell* v. *City of London Assur. Co.*(6).

Hellmuth K.C. for the respondent The Union Bank, referred to Strand's Jud. Dict. word "kept": *Farmer & Mechanics Ins. Co.* v. *Simmons*(7).

THE CHIEF JUSTICE.—As I read the evidence it establishes these facts:

That the plaintiff's manager, Post, some time before the fire, brought upon the insured premises half a gallon of gasoline to be used in a gasoline stove with which he cooked his meals in a room over the store, where he lodged with his wife. While the gasoline was being kept upstairs where it had been used for several days by Post for cooking purposes an emergency arose in connection with the preparation of syrups in the store and the stove with what was left of the gasoline (about a pint) was brought down to a room at the rear of the store to prepare the syrups, and during the

(1) 143 Cal. 287.
(2) 17 Ont. L.R. 462.
(3) 2 B. & S. 523.
(4) 18 Q.B.D. 428.
(5) 147 Pa. St. 272.
(6) 15 Ont. App. R. 262.
(7) 30 Pa. St. 299.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

The Chief Justice.

time that it was thus in use for this purpose the fire occurred. The question to be decided on these facts is: Was gasoline stored or kept on the premises insured in violation of the condition of the policy set out at length by Sir Louis Davies?

This is a mixed question of law and fact which, in my opinion, must, in the circumstances of this case, be answered in the affirmative. I hold that there was a breach of this positive condition and that the plaintiff cannot recover.

The object of this statutory condition, which is part of the consideration of the policy, is to decrease the risk of destruction by fire of the thing insured, and, by limiting the peril insured against, to proportionately lessen the obligation of the insurer to indemnify the insured; and to that end it prohibits the storing or keeping on the premises of the very inflammable substances enumerated, *i.e.*, gasoline, etc. Can it be said that the insured did not violate this condition of the contract which he entered into with the company when he brought upon the premises gasoline, one of the prohibited articles, and which he kept there for several days and used in a gasoline stove for cooking purposes? I cannot find anything in the record to shew that there was any limitation of the time during which it was intended to use the stove for which the gasoline was required. It is said to have been discarded; but as a fact it was available for use at any time, as evidenced by the fact that the fire was caused by the use of the gasoline stove and its contents.

I do not think it is necessary to either extend or restrict the meaning to be given to the words "stored or kept." They are to be read along with the context and the whole section *must have a reasonable interpre-*

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

The Chief Justice.

tation, such as was probably contemplated by the parties at the time the contract was entered into. For a dealer to store or keep for commercial traffic during a protracted period the excluded substances on the insured premises under proper conditions of safety would, it is admitted, be a breach of the condition; but it is argued that to keep them for occasional daily domestic use during months under such conditions as common sense suggests are most likely to bring about the destruction of the premises is not a violation of such a condition. With proper deference and fully sensible of the weight to be attached to the opinions of the distinguished judges below, I am obliged to say that I cannot accept such a conclusion which necessarily involves the inference drawn by Mr. Hellmuth that the destruction of the property as a result of the use of gasoline in a gasoline stove kept on the premises is one of the perils *insured* against whereas the destruction of the property while gasoline is stored or kept under proper conditions as regards safety would not be a risk insured against.

Let me repeat again to avoid possible misunderstanding: This is not a case of bringing upon the insured property an excluded article for a temporary purpose or for a purpose which might reasonably be contemplated or be assumed to be in the minds of both the insurer and the insured in view of the subject matter of the insurance, such as arose in the *Mitchell Case*(1), but was the keeping on the premises of an excluded article in a manner and for a purpose in direct violation of the condition of the policy. The distinction between the case where the excluded article is brought upon the premises for a temporary pur-

(1) 15 Ont. App. R. 262.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

The Chief Justice.

pose, and one in which it was kept there in direct violation of the condition, is well exemplified in the cases of *McCurdy* v. *Orient Insurance Co.*(1), in 1906, and *Boyer* v. *Grand Rapids Fire Ins. Co.* (2), in 1900. In the latter case the court said, in referring to a previous decision of *Smith* v. *German Ins. Co.*(3) :

> In the last named case the gasoline was in the building for the purpose of being used by the painters, when they were making ordinary and usual repairs to the building by painting it where it needed painting. The court discussed the questions involved at length, citing many authorities, and held, in substance, that the making of ordinary repairs, in a reasonable way, even though it increased the risk while the work was going on, and even though an article was used in the work the use of which in the business carried on in the building was prohibited by the policy, would not avoid the policy; that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger from fire, as well as to other considerations, it would not render the policy void, but the question was a proper one for the jury.
>
> The case proceeded upon the theory that it was in the contemplation of the parties that the insured building should be kept in repair, and that what it was reasonably necessary to do to accomplish that purpose would not avoid the policy. But there can be no such claim here. It is a well-known fact that gasoline is a dangerous article to have in and about a building. The parties had a right to contract that it should not be allowed upon the premises without the written consent of the company. They made such a contract. Gasoline was brought upon the premises, not for the purpose of being used in a reasonable way for necessary repairs, but, according to the version of the plaintiff, for the purpose of using it in a gasoline stove in an upstairs room, having no direct connection with the store, but reached from an outside stairway. Would it be claimed that a gasoline stove could be used without the consent of the company, and that its use would not invalidate the policy? If not, could the keeping of gasoline be allowed on the premises for the purpose of using it in a stove without the consent of the company, and the policy remain good? If so, how much might be kept? And for how long? It seems to me to ask these questions is to answer them against the claim of the plaintiff.

(1) 30 Penn. S.C. 77. (2) 124 Mich. 455.
(3) 107 Mich. 270.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

I agree with Sir Louis Davies. The appeal should be allowed with costs.

DAVIES J.—These were actions brought to recover moneys claimed to be due under policies of insurance taken out by respondent Thompson in the appellant companies. More than one defence was set up to the actions by the companies and argued upon this appeal besides that with which I will deal presently. These defences related to prior and subsequent insurances upon the property in question as to which it was alleged no notice as required by the policies had been given to the companies. They were all, however, disposed of at the argument adversely to the appellants, the only question reserved for consideration being that of the proper construction of the statutory condition R.S.O. ch. 203, sec. 168, sub-sec. 10(*f*), which reads as follows:

> This company *is not liable for the losses* following, that is to say:
> (*f*) For loss or damage occurring while petroleum, or rock-earth or coal oil, camphene, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

There was no dispute as to the facts relating to the fire which destroyed the insured premises or to the presence upon the premises at the time the fire occurred of a small quantity of gasoline, or to the circumstances under which it had been bought and remained upon the premises.

The respondent Thompson being the proprietor of

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

a drug store, not being himself a licensed druggist, employed one Post who was so licensed as manager of his store. This manager was in charge at and prior to the effecting of the insurance and also at the time the fire occurred. He was also tenant of the respondent of the rooms above the drug store which he occupied with his family, all of which formed part of the insured premises.

Some weeks before the fire Post purchased and brought to his rooms above the drug store half a gallon of gasoline which he used in a gasoline stove for cooking purposes for three or four days and then ceased to use it further for cooking purposes and left the stove with the unused portion of the gasoline in it in one of his upstair rooms.

On the day of the fire he carried the stove and its gasoline contents down to a room in the rear of the drug store and there lighted the gasoline in the stove and began to boil some syrups. The stove had been burning some ten minutes or more when the syrup boiled over and the fire took place.

The fact that the fire took place as a consequence of the use at the time of the gasoline stove does not in itself affect the question of the plaintiff's right to recover. The sole question is: Did the loss occur while gasoline was "stored or kept" on the premises within the meaning of those words in the statutory condition?

The learned trial judge in a considered judgment after reviewing the cases upon the point came to the conclusion that to bring a case within the condition

> there must be something in the nature of dealing in such articles or having a storehouse therefor;

and that

> no court could give to the words a meaning wide enough to cover the present case.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

In the Court of Appeal the learned Chief Justice who delivered the judgment of the court after dealing with the facts went on to say that

what is to be ascertained is the meaning to be attached to the condition as a whole.

To that I fully subscribe and inasmuch as the language of the condition is that of the legislature and not that of the company the court is not justified in construing the words for any reason against either insurer or insured. Effect must be given to the plain simple meaning of the words if that can be ascertained. The Chief Justice goes on to say:

Is there any reason for separating the words "stored or kept" even though they were expressed in the disjunctive? If the intention was to exclude gasoline and the other substances mentioned in condition 10 (*f*) and the word "kept" has a wider and more extensive meaning than "stored" why use the latter at all. It must be taken to have been used in the ordinary sense and for some reason and as not unnecessarily inserted. And "kept" should also be read as not intended to nullify the meaning of the word with which it is associated. In other words they should be read together. Read together they indicate the *continuous habitual storage or keeping of an article.*

I have italicized what I understand to be his conclusion which in another sense he puts as follows: "It would do no violence to either words to read them in this condition as they were by Hagarty C.J.O. in *Mitchell* v. *City of London Ass. Co.* (1) as

pointing to a dealing in such articles or having a storehouse therefor.

But Chief Justice Hagarty in the paragraph from which the above words are taken seems rather to rest his judgment upon the ground that the words "stored or kept" were not applicable

to a lubricating oil necessarily used for machinery where machinery or a boat propelled thereby was the subject matter of the insurance

as was the case then before him.

(1) 15 Ont. App. R. 262, at p. 268.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

As I understand the ratio of the judgment of the Court of Appeal in that case it was that the presence of the oil there in question on board of the tug was not within the condition of the policy, but was within what was held by them to be *an implied exception,* out of that condition. The Chief Justice so reasoned from the fact that the oil was as he said on board the tug "for the necessary purposes of lubricating the engine" and with the knowledge of the insurance company as he says

> the court must assume a universal knowledge that lubricating oil must be so used.

It was this combined necessity and knowledge which induced his conclusion that the condition did not cover this oil, but that on the contrary it was within the implied exception which permitted it. Chief Justice Hagarty goes on to say:

> No person insuring a steam vessel against fire would think of obtaining express permission to keep enough oil to lubricate the machinery nor would, except after taking legal counsel, construe this clause in the statutory condition as prohibiting its use.

Osler J.A. in the same case at page 278 while stating he was not prepared to differ from the Chief Justice rested his judgment upon the ground

> that the statutory condition is qualified by the application which is a part of and is incorporated with the policy and which prohibits only the storing of *camphene, coal oil or burning fluid* without the special permission of the company saying nothing of petroleum or rock-earth oil.

Patterson J.A. concurred with both Hagarty C.J.O. and Osler J.A., while Burton J.A. dissented from the judgment, but upon a ground having no relation to the one we are discussing.

This case cannot be said to be an authority one

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

way or the other applicable to the appeal now before us. I am not able to accept the construction of Chief Justice Moss that the words of the condition "stored or kept" must be read as indicating a "continuous habitual storage of an article." There may be authority for such a conclusion in some of the cases cited from the state courts of the United States on the language of the policies before those courts, but I cannot accept it with regard to this statutory class nor can I accept the alternative construction he suggests and which was adopted by the trial judge based evidently upon a casual observation made by Chief Justice Hagarty in the case of *Mitchell* v. *London Assurance Co.*(1) that they may "relate only to something in the nature of dealing in such articles or having a storehouse therefor." I venture to think that both readings involve the importing into the section of a limitation never intended by the legislature and which the words used will not justify. I think there is reason to be found in the use of the disjunctive separating the words stored or kept, the latter being a word of broader and larger meaning than the former. If the word "stored" was alone used it might be held to import some commercial or business meaning only, and such as would be applicable to and understood in the world of trade and commerce. But I cannot see how such a limited meaning can be put upon the word "kept." It has no special reference to dealing in an article as one of trade and commerce, and to so limit it must be to fritter away the language of the legislature. It must be taken as being used in its ordinary sense and as it would be understood by ordinary

(1) 15 Ont. App. R. 262, at p. 268.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

people and as inserted for some good reason and not unnecessarily or without meaning. It might be a reasonable limitation to say that the prohibition is not applicable to such very small quantities of the forbidden article, say a few ounces for medicinal or cleansing purposes as are not unusually found in ordinary households. A court might well determine without doing violence to the language of the clause that it did not prohibit and never was intended to prohibit such very small quantities, and obviously it must be a question in each case whether the quantities kept are within that limitation. But could such a limitation be extended to the pint, the remains of the half gallon, which was the unfortunate cause of the fire here? I feel compelled to say no. It is said that at the time of the fire there was only about a pint. But that was quite sufficient for the purpose of boiling his syrups by the chemist. Though the fact that this quantity of gasoline actually caused the fire may have nothing to do with the defendant's liability for the damage it would be almost ludicrous for the court to hold that it existed in a quantity so insignificant as to be innocuous or ignored.

There remains the ingenious suggestion of Mr. Hellmuth, which at the time impressed me somewhat, that under the condition the fire must have occurred while the gasoline was being "kept" on the premises and that this fire occurred not while it was being kept, but while it was being actually used for fuel. But if the conclusion is once reached that it was so being kept while it was being used for three or four days as fuel upstairs and for the period when it was abandoned as a fuel and simply remained in the gasoline stove, it is difficult to see when it ceased to be kept

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

simply because it was brought down stairs in the stove where it had been for some weeks and then ignited for the purpose of boiling syrups for the chemist's business. It seems to me to come back to the primary question: Was it not being "kept" when and while it remained in quantity a pint or more in the rooms upstairs after it ceased to be used for the three or four days as a fuel and did it not continue to be kept while it was being carried down and used in the room downstairs behind the drug store for the purpose connected with the business of boiling syrups?

The criminal cases called to our attention assist very little if any in the construction of this clause, and I am bound to say that after reading the different American cases cited I did not find them, owing to the different language used in the clauses of the policies discussed, and to the fact that they were conditions of policies prepared by the companies and so for special reasons construed must strongly against the party preparing them, of any great assistance in this case where we are construing the language of the legislature.

Two things in the condition in question are of importance with respect to its construction, one that with regard to certain of the prohibited articles several have a specified minimum quantity excepted or allowed; five gallons in the case of certain oils, and in that of gunpowder twenty-five pounds; and the other is that apart from such specific exceptions or permissions general words are used at the end of the clause qualifying the absolute prohibition, namely, "unless permission is given in writing by the company." These latter words seem intended to meet the suggested cases where the arbitrary and absolute lan-

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Davies J.

guage of the prohibition might work intolerable hardship while the adoption of the suggested construction excluding such trivial quantities as a few ounces for cleansing clothes from stains or spots or for medicinal purposes in households from the operation of the prohibition relieves the clause from a construction contended to be obviously absurd and not within the intention of the legislature.

The appeals should be allowed with costs and the actions dismissed.

IDINGTON J. (dissenting).—The only question raised herein and now left for decision turns upon the construction of the statutory condition No. 10, subsection (*f*), which as set forth in section 168 of "The Ontario Insurance Act" was indorsed as required by that section on the policy sued on.

The purport of it is that the company is not responsible for loss or damage that occurs "while petroleum" or other things specified

> is or are stored or kept in the building insured or containing the property insured

without written permission. The question to be resolved is the meaning of the words "stored or kept" as used in said condition.

The statutory conditions framed by a commission of judges were first imposed in 1876. The one now in question stood as first enacted until 1887, when possibly anticipating the decennial revision of the Ontario statutes, due to be done that year, the "Ontario Insurance Act, 1887," was passed and this condition was modified in the way I will presently refer to.

Meantime the case of *Mitchell* v. *City of London*

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Idington J.

Fire Ins. Co.(1), which required for its decision that the condition, as it stood then must be interpreted in order to decide the rights of the parties arose out of an insurance on a tug. The tug insured had carried about two gallons of a lubricating oil which was a product of one of the forms of articles thus prohibited.

In deciding in 1886 that issue in that case the late Mr. Justice Armour of this court then sitting in the Queen's Bench Division of the High Court of Justice for Ontario after giving his reasons at p. 744 for doing so held as follows:

> In my opinion the words "stored or kept," as used in this condition, are too indicative of duration and permanence to cover a user such as was had of this black oil on this tug.

The late Mr. Justice O'Connor, though doubting if a tug was a building expressly agreed in this holding and thus the majority of that court maintained the plaintiff's case.

An appeal was taken to the Court of Appeal for Ontario(1) where the late Chief Justice Hagarty, who had been of the commission which framed the conditions held, for reasons that appear on pp. 267 and 268, that the oil in question was not "stored or kept." He says:

> It is not "stored or kept," in the apparent meaning of the words which seem to point to a different matter such as the dealing in such articles, or having a storehouse therefor.

This was concurred in by Mr. Justice Patterson, afterwards a judge of this court, and accepted by Mr. Justice Osler who, however, preferred to rest his judgment of that case on the express terms of the contract as evidenced in the application as he read it.

(1) 12 O.R. 706. (2) 15 Ont. App. R. 262.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Idington J.

He was also one of the judges who concurred in the judgment of the Court of Appeal now in question.

At first blush I was led by what is or appears, on closer reading, only mere illustration in Chief Justice Hagarty's opinion judgment to suppose he had proceeded on an implication to be found in the contract from the nature of the subject matter of the insurance. Clearly that is not his meaning, but a means of arriving at the same meaning of the phrase as Mr. Justice Armour had.

And just as he finds everybody knew of the use of lubricating oil being in necessary use, so everybody knows of each of the other things.

He never intended to say this kind of lubricating oil was a necessity. He had lived too long in this world with an acute sense of what was going on not to know that lubricating oils of other kinds had universally been in use up to about twenty years before the making of the contract he was dealing with to imply any such thing.

I have no doubt he did imply that under such a condition of things as existed the legislature could never have intended to put the meaning on "stored and kept" he was then asked to put and we are now asked to put.

I cannot distinguish that case in principle from this one. It was put clear beyond doubt that the judicial interpretation of the words "stored and kept" as used in this condition did not cover the case of a casual having of any of the prohibited articles in a building whilst burnt down.

What happened the condition, about a year later than the decision in the Queen's Bench, was that it was as already referred to amended by the "Ontario Insur-

ance Act, 1887," inserting gasoline which had not previously been so amongst the things forbidden "to be stored or kept."

It was further amended by inserting the following words in the excepting parenthesis of the condition:

or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity.

The judicial interpretation had evidently thus got legislative sanction in 1887 which has never been questioned since.

The general use of petroleum began about 1861 and increasing general use of its many products had also by 1887 become such as to enable those concerned to frame a more appropriate condition than had been done twelve years before. Gasoline is then for the first time expressly enumerated amongst the articles dealt with. And the term lubricating oil is used for the first time and then in the parenthesis, and distinguished from crude petroleum, and required to be of a certain specific gravity.

In no way does this indicate anything in the amending Act to shew that the legislature did not mean to use the words "stored or kept" in the sense attributed to them by the court.

In this amended Act I think the presumption is that the legislature did use them in the sense attributed to them by the court. See the cases cited, Hardcastle (3 ed.), p. 183 *et seq.*

The amendment of the "Interpretation Act," by 60 Vict. ch. 2, sec. 11, now section 9, sub-section 59, of the "Interpretation Act of 1907," R.S.O., whatever it may mean is not retroactive or of such nature as to touch herein this case now cited.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Idington J.

The use of gasoline has gone on increasing and become so general that probably half the existing fire insurance in Ontario is for the moment practically worthless if we find as asked to do here that a pint of gasoline being in a building when fire takes place destroys the right to recover.

Whatever may be said of the true meaning of the phrase in question especially in light of the curiously framed excepting parenthesis in the middle of the condition, I think that the meaning indicated expressly by judicial authority, sanctioned by legislative use immediately after such indication, and then upheld by such a mass of judicial opinion in the Court of Appeal immediately after that must be taken (when unquestioned ever since amid so vast a number of cases as undoubtedly have given opportunity to demand such interpretation as now sought by appellant), to have come to be regarded by all concerned as the meaning by which they were bound in their dealings in regard to insurance for the past twenty years.

The meaning adopted so long ago and followed by the Court of Appeal in the judgment now under consideration is in harmony with the meaning given amongst many others to the word "keep" by the Century Dictionary "to have habitually in stock or for sale."

I respectfully submit we should always hesitate to adopt in the interpretation of either statute or contract a meaning that is likely to run athwart the common understanding of men in the ordinary conduct of their affairs, lest thereby the ends of justice be frustrated.

The adoption of the plain ordinary sense of the language used is daily and properly pressed upon us.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Idington J.

The basis of the rule is to give to words and phrases that meaning, whether etymologically accurate or not, which passes current amongst men in relation to the business in hand.

These words in question here have come to have and be accepted as having in the relation now in question the meaning the Court of Appeal has applied.

I think the appeal ought, therefore, to be dismissed with costs.

DUFF J.—I agree in the opinion stated by the Chief Justice and Mr. Justice Davies.

ANGLIN J. (dissenting).—In the course of the argument the court intimated that, except upon one point common to both cases, the appeal of the insurance companies is hopeless. That point, reserved for consideration, is, whether, at the time the plaintiff's premises were destroyed by fire, gasoline was "stored or kept" upon them, within the meaning of statutory condition 10(*f*), prescribed by the "Ontario Insurance Act," R.S.O. (1897) ch. 203.

The facts are fully set forth in the judgments of the learned trial judge and the Chief Justice of Ontario(1), and in that of Mr. Justice Davies in this court.

Statutory condition 10 (*f*) exempts the insurers from liability

> for loss or damage occurring while * * * gasoline * * * is stored or kept in the building insured * * * unless permission is given in writing by the company.

This condition, when originally introduced in Ontario, as No. 10 (*g*), by the statute 39 Vict. ch. 24, did

(1) 17 Ont. L.R. 214.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Anglin J.

not apply to gasoline; but, by the Act 50 Vict. ch. 36, gasoline was included in the list of prohibited articles.

In *Mitchell* v. *City of London Assurance Co.*(1), in 1886, and(2) in 1888, the Ontario courts were called upon to interpret this statutory condition. A fire had occurred on a tug while there was upon it a small quantity (about a gallon in two small cans) of oil—assumed to be "rock, earth or coal oil"—used for lubricating the machinery. Lubricating oil was not then, as it is now, excepted from the condition to the extent of five gallons. (See 39 Vict. ch. 24.) In the Divisional Court it was held by Armour and O'Connor JJ. (Wilson C.J. dissenting), that crude or earth oils, kept for lubricating purposes in such a quantity as was on the tug, could not be said to be "stored or kept" within the meaning of the statutory condition.

> Storing or keeping an article seems to me to convey the notion of conservation, a keeping inconsistent with the destruction of continual or occasional use,

per O'Connor J., at p. 748.

In the course of his judgment in the Ontario Court of Appeal, Hagarty C.J.O., at p. 268, said that the oil was

> not "stored or kept" in the apparent meaning of the words, which seem to point to a different matter such as the dealing in such articles, or having a storehouse therefor.

Patterson J.A. concurred with Hagarty C.J.O. Osler J.A. preferred to rest his concurring judgment upon another ground. Burton, J.A., who dissented on another point, expressed no opinion upon the construction of the words "stored or kept."

So construed in the Ontario courts twenty years

(1) 12 O.R. 706. (2) 15 Ont. App. R. 262.

ago, this statutory condition has since been used in many thousands of insurance contracts, and we find it unqualified in the policies now sued upon. Before its adoption in Ontario in 1876 it had received a like construction in the NewYork Courts, *Williams* v. *Fireman's Fund Insurance Co.*(1), in 1874, and I respectfully agree in the statement of the Chief Justice of Ontario in the present case that

> the trend of decision in the courts of the United States is in the same direction.
>
> It is a wholesome rule that has often been laid down that when a well-known document has been in constant use for a number of years, the court, in construing it, should not break away from previous decisions, even if, in the first instance, they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down.

Dunlop & Sons v. *Balfour, Williamson & Co.*(2), in 1892.

In *Bourne & Tant* v. *Salmon & Gluckstein, Limited* (3), the Court of Appeal when asked to overrule the Divisional Court decision in *Direct Spanish Telegraph Co.* v. *Shepherd*(4), in 1884, refused to do so. Cozens-Hardy M.R. said:

> Mr. Macorran has frankly and fairly asked us to overrule that decision and to say that it is no longer law. I am not prepared to do so. I think it is a very serious matter in dealing with rates and questions of this kind lightly to depart from an interpretation which must have governed and guided the rights of parties in innumerable cases of a similar kind ever since.

And Sir Gorrel Barnes said:

> I think it is extremely important where a decision has been in existence for some 20 or 25 years, which is practically on all fours with the case before the court, that the court should be very reluctant to entertain a fresh view of that old decision which might disorganize

(1) 54 N.Y. 569.
(2) [1892] 1 Q.B. 507, at p. 518.
(3) [1907] 1 Ch. 616.
(4) 13 Q.B.D. 202.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Anglin J.

the state of things which had existed as a result of that old decision for that length of time.

A similar view was expressed by Vaughan-Williams L.J., in *Southwark Union* v. *City of London Union* (1). For other instances of the application of the rule reference may be made to *Re Wallis; Ex parte Lickorish* (2); *Pandorf* v. *Hamilton* (3); *Philipps* v. *Rees* (4); *Palmer* v. *Johnson* (5); *Smith* v. *Keal* (6); *Pugh* v. *Golden Valley Railway Co.* (7).

The same rule is applicable to old and accepted dicta of eminent judges which are likely to have affected divers and numerous contracts. *In re Rosher* (8); *Quilter* v. *Heatly* (9); *Ex parte Willey* (10).

The views expressed in *Mitchell* v. *City of London Assurance Company* (11), are certainly not "manifestly erroneous and mischievous" (*Pugh* v. *Golden Valley Railway Company*) (7); on the contrary unless the meaning of "kept" is restricted in some degree by collocation with "stored"—*noscitur a sociis*—the latter word is practically expunged; neither are these views "contrary to principles of the general law" (*Smith* v. *Keal*) (6); nor have they been questioned in later cases (*Labouchere* v. *Dawson*) (12). We are dealing with a "contract in daily use" (*Philipps* v. *Rees*) (4), and with a decision which

> is not binding upon us, but in view of its character and practical results is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the court from which they proceed" (*Pugh* v. *Golden Valley Railway Co.*) (7).

(1) [1906] 2 K.B. 112.
(2) 25 Q.B.D. 176, at p. 180.
(3) 17 Q.B.D. 670, at p. 674.
(4) 24 Q.B.D. 17, at p. 21.
(5) 13 Q.B.D. 351, at pp. 354-7-8.
(6) 9 Q.B.D. 340, at pp. 351-2.
(7) 15 Ch.D. 330, at p. 334.
(8) 26 Ch.D. 801, at p. 821.
(9) 23 Ch. D. 42, at p. 49.
(10) 23 Ch.D. 118, at pp. 127-8.
(11) 12 O.R. 706.
(12) L.R. 13 Eq. 322.

"One of those decisions which * * * it would be mischievous to overrule" (*Andrews* v. *Gas Meter Company*) (1):

To put upon the language of paragraph (*f*) of the 10th condition a construction different from that placed upon it 20 years ago by such eminent judges as Hagarty C.J.O. and Armour J., which, so far as I can find, has not since then been questioned in Ontario, and which, it is entirely proper to assume has been acted upon by insurers and insured during the intervening period, and now to hold that it is a breach of this condition to have upon the insured premises a small quantity of gasoline for domestic purposes, would, I think, be unfair and unjust, and could produce nothing but mischief and uncertainty in the mercantile world. On this ground alone I would affirm the judgment in appeal.

I fully recognize that in the *Mitchell Case*(2) the article in question was something which both insurer and insured must have contemplated should be used, having regard to the subject of the insurance; and therefore a case of implied exception was made out. But the decisions in *Williams* v. *Fireman's Fund Ins. Co.*(3); *Putnam* v. *Commonwealth Ins. Co.*(4); *Mayor of New York* v. *Hamilton Fire Ins. Co.*(5); *Hynds* v. *Schenectady County Mut. Ins. Co.*(6); *Springfield Fire and Marine Ins. Co.* v. *Wade*(7), and other American cases are not susceptible of this explanation. Moreover, I rely not upon the actual decision in the *Mitchell Case*(2), but rather upon the

(1) [1897] 1 Ch. 361, 371.
(2) 15 Ont. App. R. 262.
(3) 54 N.Y. 569.
(4) 4 Fed. Rep. 753.
(5) 10 Bosw. 537.
(6) 11 N.Y. 554.
(7) 95 Tex. 598.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Anglin J.

views as to the meaning of the phrase "stored or kept," which the distinguished Ontario judges, whom I have named, expressed as a ground of their judgment.

I was also impressed by the contention of counsel for the respondents that, whether or not the gasoline should be regarded as having been "stored or kept" while it lay in the disused stove upstairs, it certainly was not being "stored or kept" when it had been brought down stairs in the stove for actual and immediate use and consumption. At the time of the fire the conditions were the same as if the gasoline had been brought upon the premises only when the stove was carried downstairs. Gasoline thus in actual use and in course of consumption cannot be said to be "stored or kept." *Dobson* v. *Sotheby*(1); *Maryland Fire Ins. Co.* v. *Whiteford*(2); *Phœnix Ins. Co.* v. *Lawrence*(3); *Mears* v. *Humboldt Ins. Co.*(4); *Krug* v. *German Fire Ins. Co.*(5); *Fraim* v. *National Fire Ins. Co.* (6). The fact that it had been previously "stored or kept" would be quite immaterial; *Putnam* v. *Commonwealth Ins. Co.*(7); as is also the fact that the use of the gasoline actually caused the fire; *Turnbull* v. *Home Fire Ins. Co.*(8); the excepted risk being confined to fire occurring while the prohibited article is actually "stored or kept" in the insured building.

I find myself with great respect unable to agree in the judgment of the majority in this court. The appeal in my opinion fails and should be dismissed.

(1) Moo. & Mal. 90.
(2) 31 Md. 219.
(3) 4 Met. (Ken.) 9.
(4) 92 Pa. St. 15.
(5) 147 Pa. St. 272.
(6) 170 Pa. St. 151.
(7) 18 Blatch. 368.
(8) 34 Atl. Rep. 875.

1909

EQUITY FIRE INS. CO. v. THOMPSON.

STANDARD MUTUAL FIRE INS. CO. v. THOMPSON.

Appeal allowed with costs.

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Solicitors for the appellants Standard Mutual Fire Ins. Co.: *Curry, Eyre, O'Connor, Wallace & Macdonald.*

Solicitors for the respondents: *Hartman & Smiley.*