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FRIENDLY v. HOSTILE FIRES

By GEORGE P. SMITH, II*

What is fire? This is the central question in the discussion of the friendly-hostile fire doctrine. Since fire is defined differently by the historian, the scientist, the layman, the economist, the lawyer and the insurance agent, it becomes necessary to consider these viewpoints separately and hopefully seek to clarify the existing differences. After completing this undertaking, it then becomes necessary to discuss the historical evolution of the doctrine with particular emphasis being placed upon a careful dissection of the early English case of *Austin v. Drew*¹ which first introduced the principles embodied in the doctrine and the American case of *Way v. Abington Mutual Fire Ins. Co.*² which later coined the term, "friendly-hostile fire." The various divergent approaches taken by the courts concerning the doctrine will subsequently be viewed. Broadly generalized and inconsistent judicial policies in the area greatly impede the effective and uniform pursuit of logical remedies to the problem.

The five major ways to meet and resolve the difficulties which are manifest as a result of recognition of the friendly-hostile fire doctrine may be listed as: abolition of the very doctrine itself; adoption of a workable definition of fire damage rather than persistence in attempting to define fire; re-examination and subsequent application of the rule enunciated in *Austin v. Drew* as a rule of construction to aid in the determination of the probable intention of the parties when the insurance contract was entered into, instead of a rule of law limiting the insurer's liability; extension of the application of the doctrine by considering the location of the fire and whether in fact it was excessive or unsuitable for its intended purposes; widespread legislative action by the states for the addition of deduction clauses to standard fire insurance policies forcing the insured to pay for all losses under a specified amount and the insurer to pay all losses over a specific amount.

The chief purpose of this article, then, is to assay the general area of fire insurance law which directly concerns the use and application of the friendly-hostile fire doctrine and to consider the validity of the remedies offered to correct the present stature of the doctrine and make them conform to sound legal principles.

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1. 4 Camp. 360, 171 Eng. Rep. 115 (K.B. 1815), *aff'd*, 6 Taunt. 436, 128 Eng. Rep. 1014 (C.P. 1816).

2. 166 Mass. 67, 43 N.E. 1032 (1896).

WHAT IS FIRE?

To the scientist of today, fire is simply defined as a chemical reaction or rapid combustion as such when oxygen unites with an oxidizable substance and thereby forms a chemical compound. So it is, then, that fire implies flame or *ignition* and is accompanied by the liberation of heat and light to a degree which is readily perceptible.³ The layman, however, might glibly reply, where there is smoke, there is fire.⁴

The economist, steeped in the theories and philosophies of notable men in his field, would look upon fire as being an irregular, devastating, and generally unpredictable oxidation; a type of occurrence that a prudent and conscientious businessman would insure against, as distinguished from decay and slower forms of oxidation which are normally charged off to depreciation.⁵ This rather indefinite concept which the economist espouses, has not been embraced by lawyers. On the contrary, the law has generally tended to accept the scientific (chemical) definition as a working rule.⁶ Consequently, a spontaneous combustion unaccompanied by heat and light, is not considered to be a fire within the meaning of a fire policy.⁷

3. See Abbott, *The Meaning of Fire in an Insurance Policy Against Loss by Fire*, 28 HARV. L. REV. 119, 122 (1910); Ackerman, *What Is a "Fire" — An Insurance Definition*, 2 U. NEWARK L. REV. 111 (1937); Note, *What Is a Fire Loss*, 39 MICH. L. REV. 1420 (1941).

4. WEBSTER, NEW COLLEGIATE DICTIONARY 312 (1954).

5. See Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 337 (1929).

6. In *Babcock v. Montgomery Ins. Co.*, 6 Barb. 637 (N.Y. 1849), *aff'd*, 4 N.Y. 326 (1850), the court held that there was no damage by fire when lightning strikes *without igniting* some oxidizable substance.

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, but there must be a fire 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.

Id. at 638. *Accord*, *Case v. Insurance Co.*, 13 Ill. 673 (1852); *Kenniston v. Merrimack Ins. Co.*, 14 N.H. 341 (1843). *But see* PA. STAT. ANN. tit. 40, § 636 (Supp. 1964) (lightning damage covered whether or not fire ensues).

7. *Western Woolen Mill Co. v. Northern Assoc. Co.*, 139 Fed. 637 (8th Cir. 1905). Here bundles of wool became wet and were destroyed by a spontaneous combustion. At no time, however, was there a visible glow or flame. Since glow, flame or ignition was thought to be an essential element of fire, the combustion was *not* a fire within the meaning of the fire insurance policy.

The courts have consistently held that before "fire" exists there must be a visible aura or flame or light, which have resulted from ignition. *H. Schumacher Oil Works, Inc. v. Hartford Fire Ins. Co.*, 239 F.2d 836 (5th Cir. 1957); *Security Ins. Co. v. Choctaw Oil Co.*, 149 Okla. 140, 299 Pac. 882 (1931); *City of N.Y. Ins. Co. v. Gugenheim*, 7 S.W.2d 588 (Tex. Civ. App. 1928). *Cf.* *Sun Ins. Office v. Western Co.*, 72 Kan. 41 (1905).

There are cases holding that excessive heat is sufficient for the existence of a "fire." See, e.g., *Fiorito v. California Ins. Co.*, 262 Minn. 340, 114 N.W.2d

New York, through its insurance commissioners, attempted to set up a standard form for all contracts of fire insurance made within its boundaries. With periodic revisions, the form later became known as the New York Standard Fire Policy.⁸ After a subsequent revision of the form, many of the sister-states began to adopt it.⁹ Although the standard form provides protection "against all *direct* loss by fire," it does not attempt to define the word "fire."

The general rule of construction for interpreting any clause in an insurance policy states that such a clause is to be construed against the insurer and in favor of the insured.¹⁰ The majority of the courts, however, still persist in holding that a fire must be "hostile" before the insured may collect.¹¹ Thus, the majority of cases dealing with the standard policy have very simply defined "direct" as meaning that loss which is caused by a fire of a hostile nature.¹² It follows, then, that insurance will cover the damage to property if such damage is precipitated by a hostile fire. Yet, if the fire is held to be of a "friendly" origin, there is generally no policy coverage.

THE HISTORICAL EVOLUTION

*Austin v. Drew*¹³ is the first English case credited with creating the "friendly-hostile fire doctrine." The plaintiff owned an eight-

661 (1962); *L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co.*, 257 Minn. 244, 100 N.W.2d 753 (1960); *Consoli v. Commonwealth Ins. Co.*, 97 N.H. 224, 84 A.2d 926 (1952); *Holmes v. Employer's Liability Assur. Corp.*, 70 Ohio App. 239, 43 N.E.2d 746, 754 (1941). *But see* *Wasserman v. Caledonian-American Ins. Co.*, 326 Mass. 518, 95 N.E.2d 547 (1950); *American Towing Co. v. German Fire Inc. Co.*, 74 Md. 25, 21 Atl. 553 (1891).

8. See N. Y. INS. LAW. § 168.

9. *E.g.*, PA. STAT. ANN. tit. 40, § 636 (Supp. 1964). Massachusetts, Minnesota, New Hampshire and Texas, however, have their own standard form. Compare PA. STAT. ANN. tit. 40, § 636 (Supp. 1964) and S.D. CODE ANN. ch. 31, § 31.24 (Supp. 1965), with MINN. STAT. ANN. § 65.011 (1957).

10. *E.g.*, *Hannon Motor Lines, Inc. v. Liberty Mut. Ins. Co.*, 214 F.Supp. 250 (E.D. Pa. 1963); *Gulf Ins. Co. v. Mach. Warehouse Corp.*, 212 F. Supp. 39 (W.D. Pa. 1962); *Mode, Ltd. v. Fireman's Fund Ins. Co.*, 62 Idaho 270, 110 P.2d 840 (1941); *Maryland Cas. Co. v. Boise St. Car Co.*, 52 Idaho 133, 11 P.2d 1090 (1932); *Great Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 412 Pa. 538, 194 A.2d 903 (1963); *Lovering v. Erie Indem. Co.*, 412 Pa. 551, 195 A.2d 365 (1963); *Dzurko v. Pilot Life Ins. Co.*, 195 Pa. Super. 267, 171 A.2d 885 (1961).

11. *E.g.*, *Mode, Ltd. v. Fireman's Fund Ins. Co.*, 62 Idaho 270, 110 P.2d 840 (1941); *Mitchell v. Globe & Republic Ins. Co.*, 150 Pa. Super. 531, 28 A.2d 803 (1942); *Tannenbaum v. Connecticut Fire Ins. Co.*, 127 Pa. Super. 278, 193 Atl. 305 (1937). See generally Note, 67 U. S. L. REV. 41 (1933); Note, 37 YALE L. J. 264 (1927).

12. *E.g.*, *Tannenbaum v. Connecticut Fire Ins. Co.*, 127 Pa. Super. 278, 193 Atl. 305 (1937); *Merrimack Mut. Fire Ins. Co. v. Lanasa*, 202 Va. 562, 118 S.E.2d 450 (1961). See Adams, *Hostility Toward the "Hostile Fire" Doctrine*, 6 S.D.L.REV. 129, 134 (1961).

13. 4 Camp. 360, 171 Eng. Rep. 115 (K.B. 1815).

story sugar warehouse which was heated by means of a central furnace. From the furnace a connecting chimney or flue ran into the various storage rooms where the sugar was kept. Plaintiffs would close the register at the top of the chimney each evening when the fire was low and open the register in the morning when the daily fire was made. On the morning of the accident plaintiff's servant forgot to open the register. Consequently, the chimney became overheated; smoke and sparks filled the warehouse damaging the sugar. The three English reports in which the *Austin* case is covered disagree on the exact facts of the case. Taunton's report notes that:

. . . sparks and smoke had got into the rooms. The heat had slightly blistered the walls, and considerably discolored and damaged the sugar. There was much smoke, but *the only injury done to the sugars proceeded from heat; the smoke would not have hurt them.* Gibbs C.J. directed the jury . . . it was not a loss by fire within the meaning of the policy, but was occasioned by the improper management of the register.¹⁴

The report by Holt reads:

No sensible damage resulted from the smoke and sparks. . . . The fire is where it ought to be. . . . No substance, therefore was taken possession of by the fire which was not intended to be fuel for it; as the sparks and *smoke caused no mischief*, but as the *damage arose from an excess of heat in the rooms*, occasioned by the register being shut, I am of opinion that the plaintiffs are not entitled to recover.¹⁵

Campbell's report, however, varies:

The sugars were very much damaged by the smoke, and still more by the heat. . . . There was no more fire than always exists. . . . Nothing was consumed by fire . . . the fire was never excessive, and was always confined within its proper limits. This was not a fire within the meaning of the policy, nor a loss for which the company undertakes.¹⁶

If the facts as reported by Taunton and Holt are taken to be correct, the judgment rendered specifically excluded what the result might have been if the case was one based entirely on smoke damages. If so read, *Austin* would seem to be of little authority for any subsequent case of smoke damage.

Seizing upon single phrases from one of the three reports, reading them out of context and thereby seeking to mold them to a particular situation has given rise to the general legal assump-

14. 6 Taunt. 436, 128 Eng. Rep. 1104 (C.P. 1816). (Emphasis added.)

15. Holt N.P. 126, 127, 171 Eng. Rep. 187 (K. B. 1815). (Emphasis added.)

16. 4 Camp. 360, 361, 171 Eng. Rep. 115 (K. B. 1815). (Emphasis added.)

tion by the courts that the *Austin* case decided there was to be no insurance damages for a fire which was confined in its ordinary and rightful location, as in a stove or grate, regardless of the size, nature or intensity of the fire itself.¹⁷ Although location is mentioned in *Austin*, it was by no means the sole criteria in the ruling. There seems to be no logical reason for singling out location rather than excess heat or ignition, the other two factors of importance mentioned in *Austin*. In the final analysis, *Austin v. Drew* was merely a case involving the overheating of sugar. On its facts, it is but a simple refusal to apply the words "fire damage" to *overheating* of sensitive goods by an ordinary fire and nothing more.

It remained for an American court in *Way v. Abbington Mutual Fire Ins. Co.*¹⁸ to expressly coin the terms, "friendly" and "hostile" fires. This case involved an action for insurance damages caused by the ignition of soot in a chimney. In allowing recovery the court said:

We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such 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, and as such, if it causes damages, it is within the provisions of ordinary contracts of fire insurance.¹⁹

Even though this case was decided correctly in favor of the insured, the court proceeded to endow each fire with a distinct personality and a character of its own producing irreparable harm and utter confusion to the insurance law.²⁰

17. See *Spare v. Glen Falls Ins. Co.*, 137 Conn. 105, 74 A.2d 204 (1950); see generally 5 APPLEMAN, INSURANCE § 3082 (1941); Morrison, *Concerning Friendly Fires*, 3 B. C. IND. & COM. L. REV. 15 (1961).

18. 116 Mass. 67, 43 N.E. 1032 (1896).

19. *Id.* at 69, 43 N.E. at 1033. *Accord*, *Washington Mut. Fire & Lightening Ins. Ass'n. v. Sherer*, 32 Ohio App. 465, 168 N.E. 234 (1927).

20. See Morrison, *supra* note 17. Generally a "hostile" fire is one which has escaped its normal confines. It is an unexpected, unintentional fire not anticipated as such in a place where fire is not ordinarily maintained. *Mitchell v. Globe & Republic Ins. Co. of America*, 150 Pa. Super. 531, 28 A.2d 803 (1942). A "friendly" fire, however, is usually defined as being a fire lighted and contained in a usual place for fire, such as a furnace, stove or incinerator, and used for the purpose of heating, cooking, manufacturing or other common and usual everyday purpose. *Tannenbaum v. Connecticut Fire Ins. Co.*, 127 Pa. Super. 278, 193 Atl. 305 (1937). If a fire which is originally friendly escapes, and becomes hostile, generally speaking, recovery will be allowed for loss or damage resulting thereby. *Mitchell*

The 1941 English case of *Harris v. Poland*²¹ did much to clarify the modern English viewpoint in this area of fire insurance law. Here the plaintiff, who was an elderly lady, had had her apartment burglarized several times. In order to prevent the theft of further personal items, she decided to hide her jewelry in a fire grate among sticks and paper used for lighting the fire. She later forgot where she had placed the jewelry and proceeded to light a fire in the grate, which in turn burned the jewelry. Plaintiff tried to collect under the fire insurance policy which specifically insured the contents of her apartment against fire. The insurer resisted, not on the grounds of negligence by the plaintiff, but rather on the contention that the policy was only *intended* to cover loss by fire occurring in places where no fire was intended. The court refused to read such a limiting provision into the policy and further noted that since the direct cause of the loss was the fire, it was immaterial that the fire was enabled to operate owing to the very negligence of the insured.²²

[W]hen the ordinary man insures against loss by fire, he believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory fire. . . . Am I not covered, he would ask, if the wind blows something—say a valuable manuscript or sheet of foreign stamps—into the fire in the grate, or if a careless servant drops something into the fire, or if my wife stumbles and causes her lace scarf or silver fox tie to get caught in the fire grate?²³

The *Harris* case, then, would not go so far as to say that all damage is recoverable under a fire insurance policy. Instead, it would only allow recovery where there has been *actual ignition* by a friendly fire.

v. Globe & Republic Ins. Co., supra. See generally 29A AM. JUR. *Insurance* § 1287 (1960).

In Vance, *Friendly Fires*, 1 CONN. BAR J. 289 (1927), Professor Vance lists three elements necessary for a friendly fire to occur; (1) the fire must have been intentionally kindled; (2) it must be confined to the place where it was intended to be; and (3) it must not be excessive. In PATTERSON, ESSENTIALS OF INSURANCE LAW 246-47 (1957), however, it is observed that:

Since most 'friendly' fires are confined to containers, we may define a 'hostile' fire as one that escapes from the container in which it was started and to which it is ordinarily confined. . . . While one court [*O'Connor v. Queen Ins. Co.*, 140 Wis. 388, 122 N.W. 1038 (1909)] has held that any excessively hot fire that causes damage outside the container (stove or furnace) is covered by the policy, the argument that the container rule, because of its certainty, will in the long run avoid wasteful litigation (e.g. to determine what is 'excessive' fire) and thus be most beneficial to the insuring public has almost universally prevailed.

21. [1941] 1 All. E. R. 204.

22. *Id.* at 206.

23. *Id.* at 208. *Accord*, *Bentley v. Lumberman's Ins. Co.*, 191 Pa. 276, 43 Atl. 209 (1899).

Justice Cardozo, in *Bird v. St. Paul Fire & Marine Ins. Co.*,²⁴ explained that the extent to which property was covered under the ordinary fire insurance policy is determined by the intentions of ordinary businessmen when the initial contract was made. The rule of proximate cause should only be applied when it tended to indicate what losses the businessman would ordinarily think he should be protected against.²⁵ It is submitted that this type of reasoning is, in essence, what the modern *Harris v. Poland* case hopes to achieve. Unfortunately, however, the American courts still persist in paying unwavering loyalty and homage to a misguided interpretation of *Austin v. Drew* and to the conceptualism of *Way v. Abington Mutual Fire Ins. Co.*

THE MODERN APPROACH

It would appear that the general American rule regarding the application of the friendly-hostile fire doctrine is that where fire is either employed as an agent for ordinary heating purposes, for manufacturing purposes or as a mere instrument of art, the insurer will not be held liable for the consequences arising therefrom.²⁶ This is so, of course, so long as the actual fire is confined within the limits of the agencies employed. It is only where a fire assumes a "hostile" nature by accidentally escaping its intended bounds that the insurer will be held liable to cover the resulting damage. The accidental quality must attach to the fire

24. 224 N.Y. 47, 120 N.E. 86 (1918).

25. *Id.* at 51, 120 N.E. at 89-90; *Marks v. Lumbermen's Ins. Co.*, 160 Pa. Super. 66, 49 A.2d 855 (1947). Words used in insurance contracts are to be interpreted according to their plain and ordinary sense so as to give effect to the intention of the parties. *Yerise v. Employees Fire Ins. Co.*, 172 Kan. 111, 238 P.2d 472 (1951); *Automobile Ins. Co. v. Thomas*, 153 Md. 253, 138 Atl. 33 (1927). When the insurer takes into consideration the customs and usages of the particular trade, the courts should endeavor to interpret the policy itself with adequate evaluation of the customs. *Sterling Fire Ins. Co. v. Comision Reguladora Del Mercado De Hanequen*, 195 Ind. 29, 143 N.E. 2d (1924); *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. 594 (1909). Yet, in *Home Ins. Co. of N.Y. v. Porter*, 225 Ky. 280, 8 S.W.2d 408 (1928) and *Runyan v. Runyan*, 101 Ark. 353, 142 S.W. 519 (1912), it was held that customs and usages were inadmissible as evidence to vary the terms of an insurance policy where the terms of the policy were clear and unambiguous. *Accord*, *Consoli v. Commonwealth Ins. Co.*, 97 N.H. 224, 226, 84 A.2d 926, 927 (1952).

26. See *Pacific Fire Ins. Co. v. C. C. Anderson*, 47 F. Supp. 90 (S. D. Idaho 1942); *Springfield Fire & Marine Ins. Co. v. Armstrong*, 23 Ala. App. 126, 121 So. 906 (1929); *Lavitt v. Hartford Co. Mut. Fire Ins. Co.*, 105 Conn. 729, 136 Atl. 572 (1927); *Mutual Fire Ins. Agency of Louisville v. Slatter & Gilroy Inc.*, 265 S.W.2d 788 (Ky. 1954); *McDonald v. Royal Ins. Co.*, 98 Mont. 572, 40 P.2d 1005 (1934); *Corywell v. Old Colony Ins. Co.*, 118 Neb. 303, 229 N.W. 326 (1930); *Mitchell v. Globe & Republic Ins. Co.*, 150 Pa. Super. 531, 28 A.2d 803 (1943); *Progress Laundry & Cleaning Co. v. Reciprocal Exch.*, 109 S.W.2d 226 (Tex. Civ. App. 1937). See generally Note, 57 L. Q. REV. 461 (1941).

itself, and not to the damage or loss.²⁷

It has been held that when a fire formerly contained in a stove or furnace spreads or escapes from its intended place of confinement, it becomes "hostile" in nature.²⁸ Recovery is accordingly granted to the insured for *subsequent damage* caused by smoke, soot or heat from the fire in such cases.²⁹ In the leading case of *Collins v. Delaware Ins. Co.*,³⁰ the insured suffered damage caused by heavy smoke and soot emitting from an uncontrolled fire in a stove. The fire spread to an oil tank. The court allowed recovery from the insurer under a standard fire insurance policy noting:

The fuel was oil and was intended to be consumed in a particular place, namely by a wick fed from a tank in which the oil was kept. It 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. If some malicious or careless person had dropped a match in the tank, or if the tank had leaked and the oil reached some part of the stove where it was not intended to be, and in either case there had been an ignition, and furniture in the room had been damaged by smoke and soot, could there be any question that the efficient cause of the injury was a fire 'out of place'? We think not.³¹

Similarly, in *Cabbell v. Milwaukee Mechanics' Ins. Co.*,³² the insured's furnace exploded causing hot coals to be ejected onto the basement floor with the subsequent smoke and soot damages. In allowing recovery, the court observed:

If live burning coals were ejected upon the floor of the basement, then such fire was a *hostile element* that had escaped from its place of confinement, and from which damage could arise either by consuming plaintiff's property or by damaging it by smoke or soot. In either case, there would be a loss or damage by fire.³³

27. See Adams, *Hostility Toward the "Hostile Fire" Doctrine*, 6 S.D.L. REV. 129, 135 (1961). See generally 5 APPLEMAN, INSURANCE § 3082 (1941); 19 COUCH, INSURANCE § 42.2 (2d ed. 1959).

28. *Mitchell v. Globe & Republic Ins. Co.*, 150 Pa. Supp. 531, 28 A.2d 803 (1942).

29. See *City of N.Y. Ins. Co. v. Gugenheim*, 7 S.W.2d 588 (Tex. Civ. App. 1928). Here fire from the oil furnace escaped into the blower system. The smoke and soot from this "hostile fire" proceeded through the air vents into insured's house. The walls, fixtures and furniture were damaged. The court allowed recovery. See also *Hartford Fire Ins. Co. v. Armstrong*, 219 Ala. 208, 122 So. 23 (1929); *Pappadakis v. Netherlands Fire & Liability Ins. Co.*, 137 Wash. 430, 242 Pac. 641 (1926). *But see* *Levert-St. John Ins. Co. v. Birmingham Fire & Cas. Co.*, 137 So. 2d 494 (La. App. 1961).

30. 9 Pa. Super. 576 (1899).

31. *Id.* at 580.

32. 218 Mo. App. 31, 260 S.W. 490 (1924).

33. *Id.* at 36, 260 S.W. at 491. See *Hartford Fire Ins. Co. v. Armstrong*, 219 Ala. 209, 122 So. 23 (1929); *Fire Ass'n. of Philadelphia v. Nelson*, 90 Colo. 524, 10 P.2d 943 (1932); *New Hampshire Fire Ins. Co. v. Rupard*, 187 Ky. 671, 220 S.W. 538 (1920); *Washington Twp. Mut. Fire & Lightning Ins. Ass'n. v. Sherrer*, 32 Ohio App. 465, 168 N.E. 234 (1927). Cf. *Mitchell*

On the other hand, when a friendly fire in a stove or furnace, which does not escape from its intended place of confinement, becomes excessive and unsuitable for its intended purpose and location, the courts have generally refused recovery.³⁴ Although a fire was found to have forced the door of the plaintiff's furnace open, causing smoke and soot to fill his store and thereby in turn causing damage to his merchandise, the court in *Pacific Fire Ins. Co. v. C. C. Anderson Co.*,³⁵ nonetheless refused to allow the plaintiff a recovery. There was no combustion of any type *outside* of the furnace and the flames outside of the furnace failed to ignite or burn any merchandise. The court concluded that since the damage was caused by smoke, soot and fly-ash which originated from a friendly fire, the loss was not within the terms contemplated by the insurance contract.³⁶

Moreover, in *Canon v. Phoenix Ins. Co.*,³⁷ plaintiff's stove pipe, which extended through the second story of a building that he owned, became disengaged from the central heating unit on the ground floor and, consequently, forced smoke and soot into the second story of the building causing much damage to the merchandise stored there. Refusing to allow recovery, the court noted that there was no fire in or about the building, except in the stove where it was intended to be built, and that the fire in question had not spread from the place where it was intended to remain. Hence, the fire was to be considered a friendly, and not a hostile, fire.³⁸ The court, however, observed that when a fire

v. *Globe & Republic Ins. Co.*, 150 Pa. Super. 531, 28 A.2d 803 (1942); *Progress Laundry & Cleaning Co. v. Reciprocal Exch.*, 109 S.W.2d 226 (Tex. Civ. App. 1937).

It is most interesting to note that at common law the liability of an occupier of land for damage done to the property of another by the escape of fire appears to have been strict. The only defenses were that the escape was caused by the act of the plaintiff, the act of a stranger or the act of God. See 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 385 (1923); POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 528 n.1 (1911); PROSSER, *TORTS* (3d ed. 1964). A possible fourth defense was that the fire was of an unknown origin. The general presumption, however, was that the fire originating on the premises was kindled by the occupier and was *his own* fire. *Becquet v. MacCarty*, 2 B & Ad 951, 109 Eng. Rep. 1396 (1831). See Surton, *Liability for Escape of Fire*, 34 N.Z.L.J. 87 (1958).

34. *Spare v. Glen Falls Ins. Co.*, 137 Conn. 105, 75 A.2d 64 (1950); *First Nat'l Bank v. Royal Indem. Co.*, 193 Iowa 221, 186 N.W. 934 (1922); *McGraw v. Home Ins. Co.*, 93 Kan. 482, 144 Pac. 821 (1914); *Consoli v. Commonwealth Ins. Co.*, 97 N.H. 224, 84 A.2d 926 (1957). See 5 APPLEMAN *INSURANCE* § 3082 (1941).

35. 47 F. Supp. 90 (S. D. Idaho 1942).

36. *Id.* at 92-93. This case smacks of a misinterpretation of *Austin v. Drew*. See *Lavitt v. Hartford Co. Mut. Fire Ins. Co.*, 105 Conn. 729, 136 Atl. 572 (1927); *Sigourney Produce Co. v. Milwaukee Mechanics' Ins. Co.*, 211 Iowa 1203, 235 N.W. 284 (1931); *Salmon v. United States Fire Ins. Co.*, 53 R.I. 154, 165 Atl. 214 (1933).

37. 110 Ga. 563, 35 S.E. 775 (1900).

38. *Id.* at 564, 35 S.E. at 776.

breaks out from its intended place and becomes a hostile element by *ignition*, even though not in fact actually burning insured property but damaging it by smoke or heat, money damages are recoverable from the insurer.³⁹

No court-made rule, regardless of how strongly rooted in age by fundamental principles of *stare decisis* and momentary logic, will be able to withstand all the rigors of forever changing modern legal concepts. Exceptions to the rule must, on occasion, be made and *Corywell v. Old Colony Ins. Co.*⁴⁰ was just such an exception. Here flames up to five feet flared from the door of an oil furnace. The plaintiff's entire house was filled with smoke, soot and vaporized oil. In a 4-3 decision the court allowed recovery for the plaintiff-insured stating that when it is clearly proved that loss was caused by a fire which had escaped from the place of its intended confinement, the fire becomes hostile and the insurance company is liable.⁴¹ It is interesting to note, however, that the central fire never escaped totally from its place of confinement; rather its flames were directed outside the intended area due to an internal combustion in an oil furnace. It, therefore, should have been considered as friendly in origin. The excessive nature of the fire was not even argued conclusively and there was no actual burning of anything in plaintiff's house. Thus, the final decision rests not on clear legal reasoning but apparently on a weak policy decision by the courts to make the party with the "deepest pocket" suffer the liability.

Owens v. Milwaukee Ins. Co.,⁴² is truly representative of the narrow judicial attitude taken toward the friendly-hostile fire doctrine. In this rather humorous case, the plaintiff inadvertently threw her lower partial denture into a trash fire which she had started in her own yard. She contended that the insurer was bound to reimburse her for this loss because her insurance policy provided that "all direct loss or damage by fire" was fully covered. She contended that the policy itself made no distinction whatsoever between "friendly" and "hostile" fires and that losses caused by "friendly" fires were specifically excluded in the policy. In essence, then, it made no difference what name was given to the destructive fire; for in either case, the loss would still be the direct result of a fire and thereby included within the policy coverage.⁴³ Furthermore, since the law of the forum held contracts of insurance were to be liberally construed in the insured's favor, the phrase "all direct loss or damage by fire" should be taken to in-

39. *Ibid.*

40. 118 Neb. 312, 229 N.W. 326 (1930).

41. *Id.* at 314, 229 N.W. at 327-28. Compare *O'Connor v. Queen Ins. Co.*, 104 Wis. 338, 122 N.E. 1038 (1909) with *Cobbel v. Milwaukee Mechanics' Ins. Co.*, 218 Mo. App. 31, 260 S.W. 490 (1924).

42. 125 Ind. App. 208, 123 N.E.2d 645 (1955).

43. *Id.* at 210, 123 N.E.2d at 647.

clude both "friendly" and "hostile" fires.⁴⁴ The *Owens* court, nonetheless, felt itself bound by the overwhelming weight of authority and denied recovery, holding that a fire was not a fire within the meaning of an insurance policy if it occurred where it was intended to be. Thus, the Indiana court followed the seemingly ridiculous self-imposed rule of determining liability for fire damage on the ground only of location.⁴⁵

The attitude of insurance companies towards fire claims was greatly sharpened by the depression. Where once there had been an air of benevolent liberalism, now all was changed practically overnight into an attitude of extremely cautious scrutinization.⁴⁶ In order to stop the deluge of cigarette burn claims, the National Board of Fire Underwriters in 1933 instructed its members to refuse payment of such claims.⁴⁷ After several test cases refused to grant recovery,⁴⁸ a novel approach to the problem was taken in *Swerling v. Connecticut Fire Ins. Co.*⁴⁹ Here a cigarette, falling from an ash tray, burned through a carpet destroying an area one and one-half inches in length and one-half inch in width. The court granted recovery:

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 a hostile one, because it is then in an improper place and therefore is doing harm.⁵⁰

Some positive action must be taken to remedy the current problems arising over the insistence of most courts to classify a fire either as "friendly" or "hostile." An award for damages under a standard fire insurance policy claim should not depend on such a distinction.⁵¹

44. *Id.* at 211, 123 N.E.2d at 647-48.

45. *Ibid.* But see *Salmon v. Concordia Fire Ins. Co.*, 161 So. 340 (La. App. 1935); *O'Connor v. Queen Ins. Co.*, 140 Wis. 388, 122 N.W. 1038 (1909).

46. See Ackerman, *What Is a Fire? - An Insurance Definition*, 2 U. NEWARK L. REV. 111, 142 (1937).

47. *Id.* at 143.

48. *Ibid.*

49. 55 R. I. 252, 180 Atl. 343 (1935).

50. *Id.* at 253, 180 Atl. at 344.

51. But see *Pew, Insurance-Friendly & Hostile Fires*, 33 TEX. L. REV. 954, 956 (1955).

THE SOLUTIONS

The solutions to the problem generally suggested are: (1) abolition of the rule;⁵² (2) gradual break from the traditionally rigid approach of attempting to define "fire" and instead endeavor to find a workable definition of "fire damage" - or that element which the insured himself is most interested in learning about;⁵³ (3) use the rule in *Austin v. Drew*, as clarified by *Harris v. Poland*, as a *rule of construction* to aid in determining the probable intention of the parties when the insurance contract is entered into, rather than a *rule of law* limiting the insurer's liability.⁵⁴ If this were to be followed, recovery, then, would be permitted where there was an actual burning of the insured article. In such a case there would indeed, from a realistic viewpoint, be a hostile fire; (4) do not abolish the "friendly-hostile" fire doctrine, but broaden it to include a consideration of the kind of fire in addition to the location of the fire. Thus, in determining whether a certain loss by smoke, soot or heat is caused by a hostile fire, the court would consider the location of the fire—whether in fact it was not confined to the place where it was so intended. It would then investigate the kind or type of fire, determining whether the fire was excessive or unsuitable for its intended purpose;⁵⁵ (5) develop a receptive atmosphere in the states for the inclusion, by legislative action, of deduction clauses to standard fire insurance policies. The accomplishment of this purpose would be greatly advanced if the guiding principles enunciated in *O'Connor v. Queen Ins. Co.*,⁵⁷ were used by the court as a framework in reaching its determinations. Here a servant lighted a fire in his master's furnace with paper and oil. A violent fire within the furnace caused smoke, soot and excessive heat to fill the house. The court held that the damage to the house from excessive heat was recoverable, even though the fire was contained in its proper place.⁵⁸ The *O'Connor* case appears to have established two criteria for determining whether loss by smoke, soot and heat was caused by a "hostile fire." Location and kind of fire, *i.e.*, where was the fire and was it excessive or unsuitable for the intended purpose.⁵⁹

52. Adams, *Hostility Toward the "Hostile Fire" Doctrine*, 6 S. D. L. REV. 129 (1961). "Kill the offending varmint rather than . . . catch him and pull his fanges." *Id.* at 135-36.

53. MacIntyre, *Hostile & Friendly Fires in Canadian Insurance Law* 2 U. BRITISH COLUMBIA L. NOTES 373, 380 (1950).

54. Faggart, *Application of the Hostile Fire - Friendly Fire Rule*, 30 N. C. L. REV. 431, 436 (1952); Morrison, *Concerning Friendly Fires*, 3 B. C. IND. & COM. L. REV. 15, 28 (1961); Vance, *Friendly Fires*, 1 CONN. B. J. 284, 293 (1927).

55. Kerr, *Hostile & Friendly Fires*, 32 ORE. L. REV. 69, 75-77 (1952).

56. Adam, *supra* note 52, at 135-36.

57. 140 Wis. 388, 122 N.E. 1038 (1909).

58. *Id.* at 390, 122 N.E. at 1039.

59. *Ibid.*

Furthermore, the extent to which any piece of property is covered under an ordinary fire insurance policy should be determined by the intentions of the parties when the contract is made.⁶⁰ When an insured purchases a fire insurance policy, he wants insurance against any accidental loss by fire. Insurance is sold to laymen, not to experts in the field; where there is smoke, there is fire.⁶¹

Effective state legislation setting up standard deductible limitation clauses on fire losses would also be ideal. The courts could completely free themselves from the tedious and very strained application of the "friendly-hostile" fire doctrine. Few state legislatures could effectively solve the problem in view of the heavy insurance lobby. Hence, legislation of this type would never get reported out of committee. It appears that the best solution would be to re-evaluate the misconstrued case of *Austin v. Drew* in terms of *Harris v. Poland* and *O'Connor v. Queen Ins. Co.*

Perhaps *Lavitt v. Hartford Co. Mut. Fire Ins. Co.*,⁶² presents one of the strongest arguments in support of retaining the "friendly-hostile" fire doctrine. Here the court noted:

While the use of the term 'hostile fire' does suggest superficially, any fire which by getting beyond control or operating in a manner different from that expected or designed causes damage . . . yet when fully considered, it becomes obvious that the wide range of circumstances upon which liability would thus depend [under such a definition] would tend to render each case mostly a law unto itself and introduce elements of great uncertainty in determining the rights of the parties. . . . Though the present distinction may seem arbitrary, yet it is of long standing, makes for certainty in the ascertainment of rights, and has been acted upon in the writing of so vast a number of insurance contracts throughout this country that its soundness may not, at this time, be questioned.⁶³

It is most commendable for the *Lavitt* court to be searching for a common thread of legal development and stability in these fire insurance cases. Nonetheless, it would appear that the courts have sacrificed established principles of individual justice for a principle of judicial group conformity.

It is suggested that the courts re-examine *Austin* and adopt a policy similar to *Harris v. Poland* and *O'Connor v. Queen Ins. Co.* so that the intention of parties can be given effect according to the layman's definition of fire: where there is smoke, there is fire.

60. *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 89 (1918).

61. See Adams, *supra* note 52, at 135-36.

62. 105 Conn. 729, 136 Atl. 572 (1927).

63. *Id.* at 733, 136 Atl. at 575. See Pew, *Insurance - Friendly & Hostile Fires*, 33 TEX. L. REV. 954, 956 (1955) (distinction between friendly and hostile fires has a reasonable basis).



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