

*Privy Council Appeal No. 160 of 1924.*

The Palatine Insurance Company, Limited	-	-	-	<i>Appellants</i>
			<i>v.</i>	
John A. Gregory	-	-	-	<i>Respondent</i>
The Canada Accident and Fire Assurance Company	-	-	-	<i>Appellants</i>
			<i>v.</i>	
Same	-	-	-	<i>Respondent</i>
The Yorkshire Insurance Company, Limited	-	-	-	<i>Appellants</i>
			<i>v.</i>	
Same	-	-	-	<i>Respondent</i>
The British Crown Assurance Corporation, Limited	-	-	-	<i>Appellants</i>
			<i>v.</i>	
Same	-	-	-	<i>Respondent</i>
The Merchants' Marine Insurance Company, Limited	-	-	-	<i>Appellants</i>
			<i>v.</i>	
Same	-	-	-	<i>Respondent</i>
				<i>(Consolidated Appeals)</i>

FROM

THE SUPREME COURT OF NEW BRUNSWICK.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 22ND OCTOBER, 1925.

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*Present at the Hearing :*

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD CARSON.

MR. JUSTICE DUFF.

[*Delivered by the LORD CHANCELLOR.*]

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The question to be determined on these appeals is, what effect is to be given in the circumstances of this case to certain sections of the New Brunswick Fire Insurance Policies Act. By that Act fire

policies are to be deemed to be subject to certain statutory conditions and by sections 4 and 5 of the Act it is provided as follows :

4. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed Statutory Conditions words to the effect set out in the second Schedule, printed in conspicuous type, and in ink of a different colour, and with the heading, 'Variations in Conditions.'

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured ; and no questions shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable ; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid . . . . .

By each of the policies with which these proceedings are concerned certain timber and wood goods of the present respondent were insured by the appellants against fire in a specified sum, but only while located in a certain timber yard at Ferry's Cove, St. John County, New Brunswick. Each policy was expressed to be "subject to the 50-foot clear space clause and 100 per cent. co-insurance clause attached." The clear space clause so referred to and attached to each policy was in the following form :—

"NEW BRUNSWICK BOARD OF FIRE UNDERWRITERS.

CLEAR SPACE CLAUSE NO. 2.

For Lumber in the Vicinity of Mills.

"Warranted by the assured that a continuous clear space of 50 feet shall hereafter be maintained between the property hereby insured and any sawmill or woodworking establishment, and the said space shall not be used for the piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled alone being excepted, and 300 feet between any open refuse-burner [or any standing wood brush or forest]. The space clause does not admit of any erection whatever (except tramways) within the space limits, but this shall not be construed to prohibit loading or unloading within, or transportation of lumber or timber products across such clear space."

The words "or any standing wood brush or forest" were struck out in some of the policies, but this is for present purposes immaterial. It is admitted that the clear space clause was not indicated and set forth in manner required by section 4 of the Act—that is to say, it was not introduced by the heading prescribed by that section, nor was it printed in conspicuous type or in ink of a different colour.

There was at the date of the policies an open refuse-burner distant not 300 feet, but 80 feet only, from the goods insured, and this burner remained within that distance throughout the currency of the policies ; and while the policies were still current sparks from this burner reached and set fire to the insured property, which was wholly destroyed. A claim having been made under each policy, the insurers pleaded (among other defences) that the clear space clause had not been complied with, and that the policies

were void on that ground. To this it was replied that the clear space clause was a new condition within the meaning of the Act, and, not having been indicated and set forth as the Act requires, was not binding on the insured. The question so raised was decided in favour of the insured (the present respondent) by the King's Bench Division of the Supreme Court of New Brunswick and by the Appeal Division of that Court; and it is against this decision that the present appeals are brought. It should be added that other defences were also raised and decided in favour of the respondent; but these are not now insisted upon by the appellants, and they need not be further referred to.

The argument urged on behalf of the appellants was that the clear space clause was not a condition of the policy, but was only a description and limitation of the risk covered. The effect of the clause, it was said, was that the timber if and while distant 300 feet from an open refuse-burner was insured, but if within that distance was not covered by the policy at all; and in support of this view reference was made to the decision of this Board in *Curtis's & Harvey (Canada) v. North British and Mercantile Insurance Company* (L.R. 1921, 1 A.C. 303). In their Lordships' opinion the clear space clause was not a description of the goods or of the risk insured, but was in the true sense a condition of the insurance. Each policy is expressed to be "subject to" the clause, and the clause is introduced by the word "warranted," which is commonly used in relation to a condition in a policy. Further, the clause requires that the clear space prescribed shall be "maintained"—that is to say, maintained throughout the currency of the policy; and the effect of this stipulation is to impose on the insured an obligation which continues and is to be observed throughout the currency of the policy. As to the authorities, *Curtis's & Harvey's* case, where it was held that having regard to the terms of the insurance it did not extend to damage by explosion caused by fire, has no application; and the same may be said of *London Assurance Corporation v. Great Northern Transit Co.* (1899, 29 S.C.R., 577). The present case is not distinguishable from *Mackay v. British America Assurance Company* (S.C.R. 1923, page 335) and *Fidelity-Phoenix Insurance Co. of New York v. McPherson* (S.C.R. 1924, page 666), with which their Lordships agree.

For these reasons their Lordships are of opinion that the clear space clause was void, and they will humbly advise His Majesty that these appeals fail and should be dismissed with costs.

In the Privy Council.

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THE PALATINE INSURANCE COMPANY, LIMITED

<sup>2.</sup>  
JOHN A. GREGORY.

THE CANADA ACCIDENT AND FIRE ASSURANCE  
COMPANY.

<sup>2.</sup>  
SAME.

THE YORKSHIRE INSURANCE COMPANY, LIMITED

<sup>2.</sup>  
SAME.

THE BRITISH CROWN ASSURANCE CORPORATION,  
LIMITED

<sup>2.</sup>  
SAME.

THE MERCHANTS' MARINE INSURANCE  
COMPANY, LIMITED

<sup>2.</sup>  
SAME.

*(Consolidated Appeals.)*

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DELIVERED BY THE LORD CHANCELLOR.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1925.