

CONCERNING FRIENDLY FIRES

ROBERT M. MORRISON*

In nature, there is no such thing as a "friendly" fire. Fire is a destructive process, changing the substances involved into something different. When caged and controlled, its effects can be limited to those materials which are subjected to it. Under such conditions, the energy, which is a by-product of the process, can be put to useful ends. To gain these desired ends, fire has been introduced into human habitations and structures, but it has never been domesticated. Man cages it but ever fears it.

Apparently, the term "friendly" fire was the brain child of Justice Knowlton of the Massachusetts Supreme Judicial Court at the end of the nineteenth century.¹ It and its companion term, "hostile" fire, were coined in connection with a suit upon a standard fire insurance policy for a loss resulting from the ignition of soot in a chimney. The court held: "A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."² Endowing each fire with a personality and character of its own seemed to appeal to the romantic spirit of the times, and these terms were widely adopted by other courts. They have now become entrenched in the lexicon of insurance law.³ This development has not been without resistance. In the years that have intervened, judges and textwriters alike have squirmed and wriggled within the subjective confines of these terms, seeking to escape from a restrictive interpretation that seemed contrary to the general intention of purchasers of fire insurance policies.⁴

Some limit must be put upon the meaning of the words "loss by fire" as used in a policy of fire insurance. The post-prandial cigar is obviously consumed by fire and, just as obviously, economic loss attends the pleasure derived therefrom. The fuel used to heat our homes is consumed by fire and valuable materials are destroyed in the process. No one would question the fact that such losses lie outside the coverage of a fire insurance policy. It is equally certain that when Dr. Nicolas Barbon, in the year 1667, opened his office in London

* A.B. 1924, LL.B. 1927, Harvard University; C.P.C.U. 1959; Partner in the firm of Morrison, Mahoney & Miller, Boston; President, The School of Insurance, Incorporated.

¹ *Way v. Abington Mutual Fire Ins. Co.*, 166 Mass. 67, 43 N.E. 1032 (1896).

² *Id.* at 74-75, 43 N.E. at 1033-34.

³ 29A Am. Jur. Insurance § 1287 (1960).

⁴ *Vance, Friendly Fires*, 1 Conn. B.J. 284 (1927).

offering "insurance against loss to dwellings and business buildings by fire," he had in mind the damage wrought by the Great Fire of London the preceding year, and contemplated coverage against the destruction of buildings by an uncontrollable conflagration.⁵

The first case which made any attempt to distinguish between these two extremes did not appear in the judicial reports until one hundred and fifty years after Barbon's venture.⁶ This was the case of *Austin v. Drewe* decided in 1817 by Chief Justice Gibbs.⁷ From the various reports of that case, it appears that smoke and heat from a processing fire on the insured's premises, which normally would pass out through the chimney, were, through the negligence of the insured's servants, discharged into the storage rooms where they caused damage to the insured's property. The court had to determine whether this was a loss covered under the insured's fire policy. The decision was in favor of the insurer. It was based upon the conclusion that the fire which created the smoke and heat was not a "fire" within the meaning of that word as it appeared in the insurance policy.

In the years that have intervened, attention has been directed again and again to the decision in *Austin v. Drewe*, and the report has been thoroughly dissected in search of authority to govern new factual situations. That case served in large measure as the anvil upon which, some eighty years later, Justice Knowlton hammered out his concept of "friendly" and "hostile" fires.⁸

Thirty-five years ago, Professor William R. Vance, returning to the language of the Gibbs' decision, found in it a new criterion to be applied in determining whether or not a fire was covered under a policy.⁹ To the criteria theretofore accepted by the great majority of jurisdictions, which excluded coverage if a fire was "friendly," i.e., when it was intentionally set and confined to the place where it was intended to be, Vance added a third requirement, namely, that the fire must not be excessive. Such a requirement would shift many fires which had been held "friendly" to the ranks of "hostile" fires and would, in Vance's opinion, more nearly meet the probable intention of the parties to the contract.¹⁰ This proposed change in criteria was

⁵ Mehr and Cammack, *Principles of Insurance* 782 (rev. ed. 1957).

⁶ It is difficult to believe that the meaning of the term "fire" had not been passed upon by a judicial tribunal during this period; nevertheless, no reference to such a case has been found in any of the reported decisions.

⁷ 4 Camp. 360, Holt N.P. 126, 2 Marsh 130, 6 Taunt. 436, 128 Eng. Rep. 1104 (1817).

⁸ *Way v. Abington Mutual Fire Ins. Co.*, supra note 1.

⁹ Vance, supra note 4.

¹⁰ *Id.* at 293. Vance hoped that "the doctrine of the 'friendly' fire may be shrunk to the original form given it by Chief Justice Gibbs. . . ." In none of the reports of

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accepted with enthusiasm last year by the Supreme Court of Minnesota in the case of *L. L. Freeberg Pie Co. v. St. Paul Mutual Insurance Co.*¹¹ That court, citing the Vance article, held "contrary to the great majority of decided cases" that the excessiveness of the fire, even though confined to the place where it was intended to be, changed it from a "friendly" to a "hostile" fire.¹²

Although the first one hundred and fifty years after Barbon produced only one reported case which attempted to categorize the kind of fire covered under a fire insurance policy, the next one hundred and fifty years produced many decisions which wrestled with this problem.¹³ After 1896, most of these cases adopted the nomenclature coined by Justice Knowlton. A reading of these decisions leaves one with the strong suspicion that this romantically oriented terminology has served to blur rather than to clarify. Judges tend to hide behind the words and declare with resignation that "though the present distinction [between "hostile" and "friendly" fires] 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."¹⁴

Today, almost forty years after that statement was penned, it is still doubtful that a frontal attack on the use of the established terminology would meet with any great success, notwithstanding the merit of such an attack. So too, the fact that society has evolved from a romantic into a scientific era would not seem to have seriously undermined so well settled a usage. It is probable that the terms "friendly" and "hostile" will be used for many years to come. Nothing, however, prevents an attempt to re-examine and redefine the scope of these terms. The continued discomfiture experienced by courts in applying these terms, as presently defined, sounds a warning that should not be ignored.

One cannot be oblivious to the trend in judicial circles to apply,

the case is that term used by Gibbs nor is there any implication that he considered the fire in any way "friendly."

¹¹ 257 Minn. 244, 100 N.W.2d 753 (1960).

¹² For one reaction to this decision, see Note, Hostility Toward the "Hostile Fire" Doctrine, 6 S.D.L. Rev. 129 (1961), where the author concluded that "by attempting to alter the 'hostile' and 'friendly' distinction, the court has created an exception even more illogical than the rule itself. It is doubtful that this decision will be widely followed." (The title is refreshing; most hostility is expressed toward the "friendly" fire doctrine.)

¹³ See cases cited in Vance, Insurance 869-871 (3rd ed. 1951), and in 5 Appleman, Insurance Law and Practice § 3082 (1941).

¹⁴ Justice Haines, speaking for the court, in *Lavitt v. Hartford County Mutual Fire Ins. Co.*, 105 Conn. 729, 736, 136 Atl. 572, 575 (1927).

in a very literal sense, the classic definition of insurance as a "social device designed for the spread of loss." Thus, in removing the mantle of charitable immunity from hospitals and other charitable institutions, courts have been influenced by the fact that liability insurance is generally available to spread the resulting loss throughout the social structure.¹⁵ In the light of such developments, it is not entirely unexpected that a rigorous attempt might be made to attack the defense barriers raised by insurers against the imposition of liability under their contracts of fire insurance. Included among these defenses is that of the "friendly" fire. Existing, as it does, as an implied limitation not spelled out in a policy and running, as it does, contrary to the popular desire to have all loss compensated by insurance, Justice Knowlton's terminology can turn into a trap wherein the sound legal principles involved may be lost. An examination into and a restatement of the legal principles inherent in the proposition that loss caused by some fires cannot be recovered under a fire insurance policy is very much in order. That is the task to which the balance of this article is directed.¹⁶ If, out of deference to long established custom, the old labels of "friendly" and "hostile" are reattached to such newly formulated analysis, no serious objection need be raised.

In an age when science reigns supreme, it may not be amiss to explore briefly some of the technical aspects of the phenomenon we call "fire." By accepted definition, "fire" is "the principle of combustion as manifested in light [and heat], especially flame."¹⁷ Although the term "combustion" may be applied to any chemical process, it is used in the present context to denote the union of two or more substances. In the course of such union, not only are fresh substances produced, but energy is transferred. Some combustion requires the addition of energy to produce the new substance, while in other combustion, energy is given off. The latter type is called "exothermic" combustion.¹⁸ Fire is a combustion of this type, usually resulting from the union of oxygen with another substance. The most obvious and visible signs of the production of energy are the emission

¹⁵ See *President and Dir. of Georgetown College v. Hughes*, 130 F.2d 810, 823-24 (D.C. Cir. 1942); *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash. 2d 162, 172, 260 P.2d 765, 771 (1953); *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 475, 135 N.E.2d 410, 415 (1956); *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W.2d 131, 134 (1961).

¹⁶ The author has never forgotten the suggestion of a Massachusetts Superior Court judge that, once every forty years, precedent should be disregarded and rules of law submitted to the highest state court for reconsideration.

¹⁷ Webster's New International Dictionary (2d ed. 1955).

¹⁸ Details concerning combustion are taken principally from Cameron, *Chemistry in Relation to Fire Risk and Fire Extinction* (3rd ed. 1948).

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of heat and light. If the union of the two substances takes place slowly, as in the oxidation or rusting of iron, the heat is produced very slowly and is dissipated without the molecules of the substances being strongly excited. Where the union or combustion takes place rapidly, the heat has little chance to be dissipated and the temperature of the substance is raised. The effect of heating a substance is to throw its molecules into motion or vibration, or to increase the amount of motion. This motion can be transferred into other substances, thereby transferring heat. The transfer of heat can produce a whole gamut of results, from warming, through blistering and charring, to ignition of the other substances. When molecules are excited beyond a certain point, part of their motion is reflected as a glow or incandescence. Thus, in the process of combustion, the heightened temperature may convert some of the substances involved into a gaseous state. If this gas is energized to a point where it begins to glow, we have a flame. Flame is thus a glowing gas.

It has been established by judicial decision that, in order for a combustion to be considered a "fire" within the meaning of a fire insurance policy, the reaction must be violent enough to produce a visible flame or glow.¹⁹ This ties in with the aforementioned dictionary definition of "fire" as "the principle of combustion as manifested in light [and heat], especially flame."²⁰ Thus, the word "fire" is, by its very definition, a relative and not an absolute term. It refers to a combustion that has reached a certain degree of intensity. Short of that degree, the damage caused by the process of combustion is not damage by fire. It has been held that heat and light are not fire;²¹ they are only visible signs that the process of combustion is proceeding at a degree of intensity which brings it within the context of the insurance policy. Certainly, once the heat is removed from intimate contact with the substances involved in the combustion, it can no longer be considered fire, any more than can the smoke which is given off or the ashes which remain.

¹⁹ *Western Woolen Mill Co. v. Northern Assur. Co.*, 139 Fed. 637 (8th Cir. 1905). Huebner, *Property Insurance* 148 (1938). The introduction of so-called "all risk" policies creates an entirely new situation, depending on policy exclusions. Such a situation is beyond the scope of this article.

²⁰ Webster, *op. cit.* supra note 17. It seems clear that the Minnesota Court was technically on unsound ground in the use it made of the definition of the word "burn" as given in Webster's Dictionary. "Burn" can mean to be on fire; it can also mean to be charred, scorched, scalded, withered, etc., by the action of fire or heat. It is misleading to cite this as authority for the statement that "burn and char are held to be synonymous" and then go on to hold that the capacity to burn has escaped from the place where the flames were confined and hence we have a "hostile" fire where charring only took place.

²¹ *Lavitt v. Hartford County Mutual Fire Ins. Co.*, 105 Conn. 729, 136 Atl. 572 (1927).

It is this chemical reaction that man has introduced into his environment for his comfort and use, conscious of the fact that it is in the nature of the energy produced to involve any substance which it can reach by conduction or radiation. To prevent the involvement of additional materials, the reaction is contained by appropriate measures. Sometimes the measures are inadequate and other materials become involved in the process of combustion and are destroyed. This is a peril inherent in the very nature of fire.²² Insurance offers protection against the risk of loss from this peril.

Insurance is a social device designed to offset the risk or uncertainty that a particular peril will result in loss to the individual, loss being the unintentional decline in or disappearance of values arising from a contingency.²³ A basic concept of insurance is that, for a risk to be insurable, the occurrence of the loss in any individual case must be accidental or fortuitous. Thus, insurance against the peril of fire rests on the principle that, as to any individual insured, the involvement of his property in the process of combustion must be accidental or fortuitous.²⁴

Supporting this concept of accident or chance in the occurrence of loss is the principle that a policy of insurance is a contract involving the utmost good faith.²⁵ Any act of the insured which affects the operation of chance, any act which intentionally brings about the happening of the peril, removes the uncertainty which is the essence of risk, and destroys the foundation upon which the contract was based. Professor Vance, in his book on insurance, states: "The [insurance] contract does not contemplate granting indemnity for a loss which is due to the intentional act of the insured, for one of the requisites of insurance is that the risk shall not be subject in any wise to the control of the parties."²⁶ Similarly, Ackerman explains: "If the loss results from an intentional act of the insured, there is usually

²² The containment may be total, as in an incinerator; partial, as in a fireplace; or achieved merely by separation, as in an outdoor rubbish fire. Society is now attempting to cope with the danger of energy given off by nuclear fission and fusion. Since this is not a process of combustion involving molecules, the process which produces this energy is not a fire.

²³ Mehr and Cammack, *op. cit.* supra note 5, at 24a.

²⁴ Mehr and Cammack, *op. cit.* supra note 5, at 36-38. In enlarging the concept of accident, in connection with accident insurance, it has been held that where acts are done as intended and yet produce injury because of the unknown existence of some condition which materially changes the consequences of the act, the result is undoubtedly unexpected and accidental, that is, the injury resulting from the intended act is accidental. The resultant fire is to be equated with such resultant injury.

²⁵ Mehr and Cammack, *op. cit.* supra note 5, at 124.

²⁶ Vance, *op. cit.* supra note 13, at 90.

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no liability under the contract—the loss must be contingent upon some scientifically measurable element of chance.”²⁷

When an insured starts a fire, be it in his furnace, stove, incinerator or at the end of his cigarette, he has intentionally set in motion the process or reaction that will destroy the materials involved; he has violated the insurance principle; and he has removed any loss that may result from this destruction from the realm of his policy coverage.²⁸

Under most circumstances, knowledge on the part of the insurer that the insured is intentionally causing losses by the peril insured against, even though no claim is being made therefor, would result in an immediate cancellation of the policy. If fire insurance were treated in this manner, an impossible situation would result. As noted earlier, it is common knowledge that any insured will be continuously destroying materials through combustion—in his furnace, stove, incinerator, etc. Such fires are the very peril insured against under his fire insurance policy, and the insurer's knowledge of their existence would make it impossible to procure insurance coverage. Fortunately, fire insurance rests upon a slightly different basis. This daily destruction by fire is accepted, and the concept of hazard is utilized in order to determine whether the restraints upon the destructive process are sufficient, in form and intent. If the hazard is properly measured by the rate, the insurance company will “accept the risk.”²⁹

Thus, a policy against loss or damage by fire is issued even though the insurer knows that the insured will frequently destroy materials by fire. Such destruction will not be a “loss” under the policy because it is not an “unintentional destruction of value arising from a contingency.” Moreover, any losses which flow directly from such an intentional fire will not be covered under the policy, whether they result from heat or smoke produced by the fire, or from water used to extinguish it.³⁰

As stated, in order to constitute a “fire” within the coverage of a policy of fire insurance, two requirements must be satisfied. First, there must be an actual burning, evidenced by a visible flame

²⁷ Ackerman, *Insurance* 543 (1938).

²⁸ Bament, *What is a Fire Loss?—The Fire Insurance Contract* 250-274 (The Insurance Society of New York 1922). The destruction of huts by fire to produce roast pig, as described so delightfully by Charles Lamb, is an excellent case in point, albeit an imaginary one.

²⁹ Mehr and Cammack, *op. cit. supra* note 5, at 22.

³⁰ Huebner, *op. cit. supra* note 19, at 139.

³¹ *Supra* note 19.

or glow.³¹ Secondly, the fire must be, as far as the insured is concerned, accidental in its origin.³²

The second requisite, if taken literally, would appear to rule out all damage, however caused, which results, through an unbroken chain, from a fire intentionally set by the insured. Such a fire could never be considered accidental in its origin, and if the combustion should spread to include additional materials, the nature of the fire's origin would remain unchanged. This requirement would also appear to exclude many losses which the parties to the insurance contract certainly intended to cover.³³

Once again, the unusual nature of the situation must be taken into consideration. Just as both insured and insurer impliedly accept the fact that intentional destruction by fire is a necessary and expected part of the insured's daily activities, and that any losses caused thereby are not within the meaning of the words "loss by fire," so it is impliedly accepted by both parties that, at some point in the chain of causation, damage resulting from a fire intentionally set will come within the meaning of those words as used in the fire insurance policy. In other words, some limit must be placed upon the extent to which the original intention to start the combustion will bar recovery. The problem is where to draw the line so that, for purposes of the fire insurance contract, the intent to destroy property will be deemed to have ceased, and any destruction thereafter caused will be considered within the scope of the policy's coverage. This is the problem that Justice Knowlton was dealing with when he invented the terms "hostile" and "friendly"; this is the problem that is being reconsidered in this article.

What should be deemed the intention of an insured when he starts the process of combustion? The measures taken to confine the reaction may sometimes be considered in determining what results the insured expected to flow from the process of combustion which he has started. There are also certain consequences which, it can be said, he must have expected, or must be charged with having expected. Thus, he must have anticipated that the process of combustion would

³² Supra notes 24-28.

³³ Vance, *op. cit.* supra note 13, at 867, writes "The rule that the law looks at the proximate and not the remote cause of an injury applies as well to the law of insurance as to the law of torts . . . [except that] the insurer is responsible for loss directly caused by fire, even though the fire may have been due to the negligence of the insured or of some third party; that is, even though negligence on the part of the plaintiff or his agent may have been the original cause of the loss." See also 5 Appleman, *op. cit.* supra note 13, at § 3083. This article deals with the loss resulting from a fire intentionally set by the insured. It would seem that the exception referred to above should also include many of the losses so caused.

follow from his acts; that the process would destroy the substances involved in the reaction; that energy would be given off in the form of heat; and that this energy would tend to involve in the reaction all additional materials to which it might be transferred by conduction or radiation. These results are so closely related to the intentional acts of the insured that recovery for losses caused thereby would clearly violate the fundamental principle of insurance that a loss must be fortuitous to be compensable.³⁴ There is a point, however, where the results flowing from an intentional combustion are sufficiently different from what was expected or intended so that allowance of recovery under a fire insurance policy would in no way be contrary to any of the basic principles of insurance.

Although any consideration of intention or expectation involves delving into the realm of the subjective,³⁵ certain standards are available to assist the trier of fact in reaching a satisfactory decision. These standards are formulated by considering the results of a particular case in relation to the environment in which the insured is operating.

The first of these standards may be described as the spatial relationship. Within what space does the insured expect or intend that the fire should burn? This is a familiar standard, long recognized by the courts. It has formed the basis of the vast majority of cases that have dealt with "friendly" and "hostile" fires.³⁶ The insured expects that the process of combustion will take place within certain limits. As long as the fire remains within these limits, the resulting loss cannot be recovered under an insurance policy. When the fire breaks its bonds and extends beyond the place where the insured intended it should burn, the resultant loss is recoverable.

When an insured starts a fire in his incinerator, it is held to be his intention that everything in the incinerator will be involved in the fire. Although he may not know specifically what is inside the incinerator, his spatial intention is clear. If, unknown to him, an item such as valuable jewelry has been deposited in the incinerator, his

³⁴ Supra notes 24-28.

³⁵ In *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 54, 120 N.E. 86, 88 (1918), Cardozo, J. stated: "In last analysis, therefore, it is something in the minds of men, in the will of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation." One question not dealt with in this article is the standard to be used in determining the exact nature of the intention with which the insured is to be charged. A purely subjective test could be applied, seeking to determine what each individual insured had in mind. On the other hand, an objective test could be applied, such as that used in actions based on negligence.

³⁶ See cases cited in Vance, *op. cit.* supra note 13, and in 5 Appleman, *op. cit.* supra note 13.

intention extends to this item, and no recovery for its loss can be had under his fire insurance policy.³⁷ Conversely, under the spatial relationship the insured does not intend to have a fire outside of his incinerator. If material outside does catch fire from the combustion within, the result is unexpected, and hence any loss flowing from such an outside fire is recoverable.³⁸

Just what constitutes the space within which the insured intended the fire to burn is a question of fact. In *Way v. Abington Mutual Fire Insurance Co.*,³⁹ a chimney was considered a different space from the stove to which it was attached. Loss from a fire in the chimney, due to the ignition of soot therein, was held to be within the scope of the policy and therefore compensable. Where, because of lack of water, the container itself becomes involved in the process of combustion, the problem is also one of a spatial relationship. It must be expected that the intimate contact of the container with the materials being consumed within it will involve the container in the process of combustion.⁴⁰

In *Johnson v. Berkshire Mutual Fire Insurance Co.*,⁴¹ the Massachusetts Supreme Court stretched the spatial relationship there involved to its conceivable limits. In that case, the insured tried to get bees from under the door of his barn by smoking them out with a wisp of straw. The barn caught on fire and burned. The court held that the insured's conduct was simply negligent, and not so reckless and willful as to constitute bad faith. The court evidently limited the spatial intention of the insured to the wisp of straw, and felt that the structure of the barn was not expected to be involved in the burning.

Because of the general acceptance of the spatial standard, even though it may not be dealt with specifically as such, it should not be necessary to elaborate further on this relationship. It should be pointed out, however, that, with rare exception, the courts have failed to recognize any relationship other than spatial. This failure on the

³⁷ *Weiner v. St. Paul Fire & Marine Ins. Co.*, 124 Misc. 153, 207 N.Y. Supp. 279 (1924), aff'd, 214 App. Div. 784, 210 N.Y. Supp. 935 (1925); *Harter v. Phoenix Ins. Co.*, 257 Mich. 163, 241 N.W. 196 (1932). Contra: *Salmon v. Concordia Fire Ins. Co.*, 161 So. 340 (La. App. 1935). It is immaterial whether the loss resulted from burning or damage by heat.

³⁸ *Way v. Abington Mut. Fire Ins. Co.*, supra note 1; *Pappadakis v. Netherlands Fire & Life Ins. Co.*, 137 Wash. 430, 242 Pac. 641 (1926).

³⁹ Supra note 1.

⁴⁰ *Wasserman v. Caledonian-American Ins. Co.*, 326 Mass. 518, 95 N.E.2d 547 (1950). But see *Progress Laundry and Cleaning Co. v. Reciprocal Exchange*, 109 S.W.2d 226 (Tex. Civ. App. 1937), where the court divided the boiler into two separate containers, from one of which the fire was intended to be excluded, and damage to which was therefore held to be within the coverage of the fire policy.

⁴¹ 86 Mass. (4 Allen) 388 (1862).

part of the courts has resulted in an undesirably narrow view on the question of what losses are recoverable under a fire insurance policy. The almost apologetic analyses which periodically emanate from judges and textwriters alike may, in turn, be traced to this restricted outlook.⁴²

Yet, if one is dealing with subjective intent and expectation, it is submitted that there are at least two other relationships equally appropriate as standards to aid the trier of fact in its quest for a more satisfactory solution to this problem. Adoption of these "additional" standards would be but a recognition of the fact that there are other situations in which the results of combustion also exceed the expectation or intention of the insured when he initiated the process. Their adoption would also serve to clarify the issues involved in this problem, by enabling courts to place their decisions upon a more substantial basis than is presently afforded by recourse to exceptions. The process of change would be more a transition than a revolution since these "additional" relationships can be easily fitted within the framework of the established terminology, and are in no way contrary to accepted insurance principles.

The first of these newly formulated standards may be described as the temporal relationship. The insured expects or intends a fire to burn for a certain length of time and then cease, for example, where it is expected that a fuel pump will shut off at a certain hour, or that a thermostatic control will stop the process of combustion when the heat has reached a specified temperature. It would seem that the intention of the insured in such cases (that the process of combustion should be contained within these temporal relationships) is just as clear, definite and determinable as in the case of the spatial relationship. If, for reasons beyond the control of the insured, the process of combustion extends beyond the time controls set for it, and damage by fire results, the insured should be permitted to recover for his loss under his fire insurance policy.

Such recovery would not be based upon a change of fire insurance principles, for example, by permitting recovery for an accidental loss

⁴² Patterson, for example, has called the spatial relationship the "container" theory. He writes: "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 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." Patterson, *Essentials of Insurance Law* 246-47 (2d ed. 1957), citing *O'Connor v. Queen Ins. Co.*, 140 Wis. 388, 122 N.W. 1038 (1909).

from an intended fire.⁴³ The loss would simply be one resulting from an unexpected, unintended and unanticipated fire, burning when (rather than where) a fire was not expected to be burning. The decision of the Minnesota Court in *L. L. Freeberg Pie Co. v. St. Paul Mutual Insurance Co.*⁴⁴ would also be acceptable under such a temporal relationship standard. It would be unnecessary to carve out an exception of dubious value. The thermostat in that case was expected to turn off the fuel when the oven temperature reached 200° F. The thermostat was defective, and did not shut off the fuel, so that the temperature rose above 650° F. Substantial damage was done to the oven and the surrounding structures, but there was no ignition outside the oven. Applying the temporal relationship standard to such facts, however, the fire inside the oven could no longer be considered intentional when it exceeded the temporal intention of the insured.

The second newly formulated standard may be described as the potential relationship, referring thereby to the intensity of the energy given off by the process of combustion. If the energy producing potential of the materials ignited by the insured differs substantially from that which he intended, recovery should be allowed under a fire insurance policy for any resulting loss. Allowance of recovery under such circumstances would still be in accord with generally accepted insurance principles.

A simple example of the type of situation in which the potential standard could be utilized would be a case where damage results from the insured's inadvertent use of gasoline instead of fuel oil as the material to be used in the process of combustion. The energy producing potential of the resulting fire would be entirely different from anything that the insured can be said to have expected or intended. It should be noted that it is not the heat or other products of the fire, but the fire itself, that is different and unexpected. The nature and characteristics of the fire which actually takes place cannot be held to have been within the intention of the insured when he initiated the process of combustion.

A decision which may be considered as falling within this potential relationship is that of *O'Connor v. Queen Insurance Co.*⁴⁵ In that case, the insured's servant built a fire in a furnace using cannel coal, a material not intended for such use. A fire of such fury developed that the house was filled with great volumes of smoke, soot and excessive and intense heat. Although there was no ignition out-

⁴³ Supra note 12, at 136.

⁴⁴ Supra note 11.

⁴⁵ Supra note 42.

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side the furnace, the court allowed recovery. In its decision, the court referred to the fact that the materials were unsuited for the purpose intended, but seemed to place primary reliance upon the excessiveness of the fire. It held that the rule set forth in *Austin v. Drewe*⁴⁶ did not encompass such excessive fires, and that they were to be considered "hostile" fires.

As in the *Freeberg*⁴⁷ case, the *O'Connor* court seemed satisfied with an expansion of the term "hostile" sufficient to allow recovery for so-called "excessive" fires. The use of the word "excessive" offers no real guide for the solution of the problem which confronts a court in these cases. In determining whether or not a particular loss is recoverable under a fire insurance policy, use of the word "excessive" serves to blur, rather than clarify, the issue. Neither court tells us exactly when a fire is to be deemed excessive, and yet such a determination must be made unless we are to struggle anew with the same problem in each succeeding case.

It is submitted that a fire may properly be considered excessive only where such a fire exceeds the spatial, temporal or potential relationships expected or intended by the insured. Use of these standards will not only allow a court to establish a solid foundation upon which to place its future decisions, but will also avoid the many pitfalls inherent in the use of an undefined, and seemingly all-inclusive term.⁴⁸

It is important that a distinction be drawn between a situation such as that which occurred in the *O'Connor* case and a situation where the materials consumed were those intended by the insured, but where, in the process of combustion, more heat was given off, or was given off at a faster rate than he had anticipated. The latter situation could occur when, for example, the dampers in a stove were left open, thereby allowing a faster inflow of air, carrying the oxygen which the insured expected to enter into the process of combustion. In such a case, the entire process of combustion takes place within the potential relationship which the insured can be held to have intended. Thus, any loss resulting from the accelerated rate of combustion (of the materials intended to be used by the insured) can

⁴⁶ Supra note 7.

⁴⁷ Supra note 11.

⁴⁸ The term "excessive" would seem to be sufficiently vague so as to allow recovery for damage resulting from any unexpected amount of heat or smoke, on the ground that the fire was excessive. Such a result would extend the insurer's liability beyond a proper limit. In the case of *Austin v. Drewe*, supra note 7, Gibbs, C. J. does state that the "fire . . . continued all the time to burn without any excess," but he at no time specifies to what the excessiveness pertains.

properly be excluded from recovery.⁴⁹ The same result would follow where the excess heat was produced by the combustible material which the insured intended to burn, but where a greater amount of such material was present than the insured realized.⁵⁰

It would appear, then, that the relationship of today's society to the peril of fire, always present as a necessary part of the environment, requires an adjustment in the usual rules of proximate causation, when deciding whether or not to permit recovery for a loss under a policy of fire insurance. Although a loss must be fortuitous to be recoverable, the term "fire" in the fire insurance policy cannot be limited to fires that are fortuitous in their origin. When a loss, otherwise not recoverable because the fire is intentional in its origin, results from a fire that has departed from any one of the environmental relationships, which the insured intended should exist, such a loss should be compensable.⁵¹ If the fire has remained within all the intended relationships, the loss should not be recoverable. These relationships are spatial, temporal and potential, where, when and how the fire was expected to burn.

The courts have universally allowed recovery in the case of a spatial variant. The "conflict" and confusion created by the so-called minority position would in large part be eliminated by the recognition and acceptance of the temporal and potential variants as additional standards upon which recovery could be based. Such recognition would require a reconsideration of the rule of law⁵² established in some jurisdictions, but, in view of the basic principles involved, no violent reversal of position need be anticipated.

It is unfortunate that the terms "friendly" and "hostile," as presently defined, have come into such wide use, because the former scarcely conforms to the popular attitude toward a fire which has done damage to the insured's property. Their continued use in judicial decisions, however, need not necessarily lead to an improper application of insurance principles, if they are applied in the manner suggested, with due regard for the insured's intentions.

⁴⁹ *Hansen v. Lemars Mutual Ins. Ass'n*, 193 Iowa 1, 186 N.W. 468 (1922); *Fitzgerald v. German-American Ins. Co.*, 30 Misc. 72, 62 N.Y. Supp. 824 (1899).

⁵⁰ *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553 (1891).

⁵¹ It would seem that only that part of any loss which resulted from a fire beyond what the insured expected or intended should be recoverable.

⁵² Professor Vance took the contrary position, that what is involved in these cases is a rule of construction to determine the probable intention of the parties (in their use of the words "loss by fire"), rather than a rule of law limiting the insurer's liability. Vance, *supra* note 4.