1932

*May 10.
*June 15.

BENJAMIN JOHNSON (PLAINTIFF).....APPELLANT;

AND

THE BRITISH CANADIAN INSURANCE COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Insurance—Motor vehicles—Insurance of automobile against loss by fire—Terms of application and policy—Automobile to be "chiefly used for private purposes only"—Insurer's liability excluded if automobile "rented or leased"—Fire Insurance Policies' Act, R.S.N.S., 1923, c. 211—Variation in or addition to statutory conditions—Application of Act where policy covers hazards besides loss by fire—"Change material to the risk" (statutory condition 3)—Onus of proof—Effect of alleged misrepresentation in application as to previous claim for loss by fire.

Appellant was insured by respondent company against loss or damage to his automobile by fire, the policy covering other hazards also. His application, made a part of the policy, stated, item 4, that the automobile "will be chiefly used for private purposes only"; and, item 8, that he had made no claim for loss by fire within the last three years preceding the application in respect of the ownership or operation of any automobile; and that if the applicant knowingly misrepresented or omitted to communicate any circumstance required by the application to be made known to the insurer, the contract should be void as to the risk undertaken in respect of which the misrepresentation or omission was made. The policy provided, under the heading "Exclusions from Perils," that respondent should not be liable for loss or damage arising while the automobile was being used otherwise than for the purposes specified in said item 4, or "if rented or leased." During the term of the policy, appellant, who had taken the car to B.'s garage for repair, agreed, on request of B. who stated he was overhauling his own car and promised, for his use of appellant's car, to make certain adjustments and repairs, to allow B. to use his car

*PRESENT: Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

and to leave it in B.'s garage until said work was done, but stipulated that appellant or his wife could use the car whenever they wished, and they did use it while it remained at B.'s garage. While B. was driving the car it took fire (supposedly from self-ignition caused by the wires having become wet). B. had as yet made no adjustments or repairs. Appellant sued respondent to recover the loss by fire.

Held: Appellant was entitled to recover. Judgment of the Supreme Court of Nova Scotia *in banco,* 4 M.P.R. 280, reversed, and judgment of Carroll J., *ibid,* restored.

Per Lamont, Smith and Cannon JJ.: (1) The arrangement made with B. did not amount to a renting or leasing within the meaning of the policy. (The limitation intended by the words "if rented or leased," and the nature of the arrangement with B., discussed). Even if it did, the provisions of the *Fire Insurance Policies' Act,* R.S.N.S., 1923, c. 211, applied, and the clause excluding liability if the car was rented or leased was a variation in or addition to the statutory conditions and, not being evidenced in the form required by the Act, was not binding on appellant.

(2): The arrangement with B. could not be held to constitute a "change material to the risk," so as to avoid the policy, under statutory condition 3 of said Act. The onus was on respondent to shew that it was a "change material to the risk"; there was no evidence on the point, nor was the case so clear that the court could itself say that it was; in fact, the use of the car from time to time by other qualified drivers, with appellant's consent, was a thing likely, and should be held, to have been within the contemplation of the parties. *Semble,* moreover, giving a reasonable effect to the word "chiefly" in said item 4 of the application, the latitude contemplated would cover such an arrangement as that made with B.

(3): The fact that, prior to his application, a car of appellant's was damaged by fire and the damage ($95) paid by an insurer, which occurrence, appellant explained, had entirely escaped his memory when making his application now in question, did not, upon the facts and circumstances, void the policy as being a misrepresentation in said item 8 of the application. The policy provided that all statements made by the insured upon the application should, in the absence of fraud, be deemed representations and not warranties. This distinguished the present case from *Dawsons Ltd.* v. *Bonnin,* [1922] 2 A.C. 413. Being simply representations, they affected respondent's liability only if material to the risk; and the non-disclosure in question was not material to the risk, as, upon the evidence, the proper inference was that full disclosure would not have influenced respondent, or any other reasonable insurers, to decline the risk or stipulate for a higher premium (*Western Assur. Co.* v. *Harrison,* 33 Can. S.C.R. 473, distinguished on the facts).

Anglin C.J.C. and Duff J. agreed in the result. Duff J. held that there was no renting or leasing; there was a bailment of a very exceptional character, not within the contemplation of the condition relied upon under the head of "Exclusions from Perils"; that, as to statutory condition 3, there was no material change proved; it did not appear that appellant did anything not within the contemplation of the policy; that, in so far as the contract was one of insurance against fire, the statutory conditions in said Act took effect, where not inapplicable by reason of the special nature of the subject matter of the contract.

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APPEAL by the plaintiff (on leave granted by the Supreme Court of Nova Scotia *in banco*) from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, reversing the judgment of Carroll J. (1) (Paton and Ross JJ. dissenting), dismissed the plaintiff's action, which was brought to recover, under an insurance policy issued by the defendant company, the amount of his loss by destruction by fire of his automobile.

The material facts of the case are sufficiently stated in the judgment of Lamont J. now reported. The appeal to this Court was allowed, with costs here and in the provincial appellate court, and the judgment of the trial judge restored.

J. A. Walker for the appellant.

F. D. Smith K.C. for the respondent.

ANGLIN C.J.C.—I agree in the result of the judgment in this case, but, for want of opportunity to consider and analyze it in detail, cannot commit myself on the various propositions of law which it incidentally enounces.

DUFF J.—I concur with the conclusion of my brother Lamont.

Section 3 of the Nova Scotia statute (cap. 211, R.S.N.S., 1923) settles the question of the applicability of the statutory conditions. In so far as the contract is a contract of insurance against fire, the conditions take effect, where not inapplicable by reason of the special nature of the subject-matter of the contract; otherwise they do not.

As to the special arrangement with which we are concerned, there was, plainly, no rent, and I do not think there was a lease; there was a bailment of a very exceptional character not within, I am satisfied, the contemplation of the condition relied upon, under the head of "Exclusions from Perils."

As to condition 3, there was no material change proved, because, here again, I am not satisfied that the insured did anything not within the contemplation of the policy.

The appeal must be allowed, with the usual consequences.

(1) 4 M.P.R. 280; [1932] 1 D.L.R. 709.

The judgment of Lamont, Smith and Cannon JJ. was delivered by

LAMONT J.—The appellant insured his automobile with the respondent (hereinafter called the Company) by a policy which made the application a part thereof and in which the appellant stated that the automobile "will be chiefly used for private purposes only" (item 4), and that he had made no claim for loss by fire within the last three years preceding the application in respect of the ownership or operation of any automobile (item 8). By the policy the Company agreed to indemnify the appellant against loss or damage suffered by him in various specified ways, including loss by fire. Under the heading of "Exclusions from Perils" the policy provided that the Company should not be liable for loss or damage arising while the automobile was being used (*a*) otherwise than for the purposes specified in item 4 of the application, or (*c*) if rented or leased. The policy was to be in existence for one year, from noon on October 7, 1929.

In the latter part of February, 1930, the appellant's wife, who also drove the automobile, complained of the manner in which the clutch was working. The appellant took the car to the garage of one George Bryden, a friend of his, who had previously made repairs on other cars owned by the appellant, and had the clutch fixed. When he came for the car two days later Bryden asked him if he was using his car for any particular purpose, and, on being informed that he was not, he stated that he was overhauling his own car and asked if he might use the appellant's car when the appellant did not require it. For such use he said he would remove the carbon from the valves and tighten up any part of the machinery which might require it. To this the appellant agreed, and also agreed to leave the car in Bryden's garage, which was heated, until Bryden had made the necessary adjustments and repairs; but stipulated that whenever his wife or himself wanted the car they were to have it, and in fact they both used it while it remained at Bryden's garage. Bryden had the car some two or three weeks when he drove it to a neighbouring village. A severe storm having set in, he remained at the village all night. Next morning he started for home. The

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roads were heavy and the car wet with the rain and, going up a hill, it took fire. As Bryden had nothing with which to extinguish the fire, the woodwork of the car was completely destroyed. The adjuster fixing the damage done by the fire at $1,200. The Company declined to indemnify the appellant for the loss he had suffered, and the appellant brought this action.

The Company contends that it is under no liability in respect of the policy, for the following reasons:—

1. That by the terms of the policy the Company was not to be liable while the automobile was rented or leased, and that, at the time the fire occurred, it was being operated by George Bryden under an arrangement which amounted to a renting or leasing.

2. That statutory condition 3 of the Nova Scotia *Fire Insurance Policies' Act* provides that "any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent"; that the arrangement with Bryden, even if it did not amount to a renting or leasing, was a change material to the risk and that no notice thereof in writing or otherwise was given to the Company.

3. The policy is void for misrepresentation.

The learned trial judge gave judgment in favour of the appellant. He held that the arrangement between the appellant and Bryden amounted to a renting or leasing within the meaning of the clause in the policy headed "Exclusions from Perils," but that the Company could not take advantage of that clause because it imported a variation in or addition to the statutory conditions which formed part of the policy, and was not evidenced in the manner prescribed by the Act and, therefore, not binding upon the appellant (s. 5). On appeal to the Supreme Court *en banc,* the judgment of the trial judge was reversed (Paton and Ross JJ. dissenting), on the ground that the arrangement made with Bryden constituted a change material to the risk and notice of it should have been given to the Company, as required by statutory condition 3.

1. In my opinion, the arrangement made between the appellant and Bryden did not amount to a renting or leasing within the meaning of the policy. It is undoubtedly

true that goods and chattels may be rented or leased, though the terms "landlord" and "tenant" are inapplicable to the relationship created by such a letting. "Rent" in legal language may be defined as the compensation which a tenant of the land or other corporeal hereditament makes to the owner for the use thereof. It is frequently treated as a profit arising out of the demised land. In this sense the word "rent" as applied to an automobile would not be appropriate. The word "lease" is used in various senses: it is sometimes applied to term or estate created, and sometimes to the conveyance creating the estate. To constitute a lease, however, the possession of the lessee must be exclusive. *Glenwood Lumber Company* v. *Phillips* (1).

The distinction between a lease and a licence to use, as I conceive it, is that under a lease the lessee's right to possession is exclusive until the expiration of the term agreed upon; while under a licence the licensee has no exclusive possession, and his right both to the possession and the use may be revoked at any time by the licensor, unless the licence is coupled with an interest or the circumstances raise equitable considerations to which the court will give effect. *Plimmer* v. *Mayor, etc., of Wellington* (2); *Hurst* v. *Picture Theatres, Limited* (3).

The limitation which, in my opinion, the parties intended to place upon the Company's liability under the policy by the employment of the words "if rented or leased" was that there should be no liability if the appellant for a consideration turned over to another the exclusive possession and control of the car for a fixed period or even at will. What they were endeavouring to exclude was the farming out of the car. The arrangement between the appellant and Bryden cannot, in my opinion, be construed as a farming out. It did not give Bryden the exclusive possession and the appellant could at any time have taken his car away and retained possession of it. The arrangement was simply a licence to Bryden to use the car which was revocable by the appellant, for, at the time of the fire, Bryden had not made any repairs or adjustments to it. His licence was, therefore, neither coupled with an interest nor

(1) [1904] A.C. 405. (2) (1884) 9 App. Cas. 699.
(3) [1915] 1 K.B. 1.

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were there any equitable considerations to prevent revocation. But even if the arrangement had amounted to a renting or leasing it would not assist the Company, for I agree with the courts below in holding that the provisions of the Nova Scotia *Fire Insurance Policies' Act* apply, and that the clause excluding liability if the car was rented or leased was a variation in or addition to the statutory conditions and, not being evidenced in the form required by the Act, was not binding upon the appellant.

2. Then did the arrangement constitute a change material to the risk? Of this there is not, as pointed out by Mr. Justice Paton, any evidence whatever. No one familiar with the business of fire insurance was called to testify that such an arrangement would be considered by any reasonable insurer as in any way affecting the risk. Where an insurer resists payment of a policy on the ground that the policy is voided by reason of a change in the risk prejudicial to him, the onus is upon him to prove it. In Porter's Laws of Insurance, 6th ed., at page 116, the author says:—

> Where it appears that the loss is due to fire, under a fire policy, the burden is upon the insurers to prove all the facts necessary to exclude the loss from the risk.

No evidence having been put in on the point, is the case so clear that we can ourselves say that the arrangement was a change material to the risk? In my opinion we cannot. The fire is supposed to have resulted from self-ignition caused by the wires having become wet. I can see no greater danger of that happening when the car was being driven by Bryden than by the appellant. It seems to me most improbable that any reasonable insurer would refuse insurance if he knew that the insured might allow his friend or neighbour, a licensed driver, to have the use of his car on occasion. Indeed it seems to me that the likelihood of the insured allowing another licensed driver to sometimes have his car would be one of the things to be expected and which the parties at the time the contract of insurance was entered into would contemplate as likely to happen. That would be part of the risk insured against, whether the appellant got any compensating favour for the use of his car or not. Moreover, on the language of the policy itself such an arrangement as was here made was not, in my opinion, excluded. The car was to be " chiefly "

used for private purposes only. Some effect must be given to the word "chiefly"; the use is not limited solely to private purposes; some latitude is contemplated, and, in my opinion, that latitude may well cover the arrangement here made. I, however, wish to rest my judgment on the broad ground above stated, that the use of the car from time to time by other qualified drivers, with the appellant's consent, must be held to have been within the contemplation of the parties.

3. The misrepresentation which it is contended voided the policy is the statement of the appellant in the application that he had made no claim for loss by fire, in respect of the ownership of an automobile, within three years immediately preceding the application, whereas in fact in the year 1928 a car of his which was then standing in front of his office in some way took fire and, before it was put out, the fire had caused damage to the extent of $95, which the company with which it was insured immediately paid without cancelling or altering the policy of insurance. The appellant's explanation of his statement is that it was such a trifling matter it entirely escaped his memory. The application contained a clause to the effect that if the applicant knowingly misrepresents or omits to communicate any circumstance required by the application to be made known to the insurer, the contract shall be void as to the risk undertaken in respect of which the misrepresentation or the omission is made.

The first statutory condition of the policy provides that all statements made by the insured upon the application for his policy shall, in the absence of fraud, be deemed representations and not warranties. This distinguishes the present case from *Dawsons Limited* v. *Bonnin* (1). Being simply representations, they affect the Company's liability only if material to the risk. Every fact is material which would, if known, reasonably affect the minds of prudent and experienced insurers in deciding whether they will accept the contract, or in fixing the amount of premium to be charged in case they accept it.

Mr. Freeman, the general agent of the Company in Nova Scotia, was called as a witness. Although pressed he would

(1) [1922] 2 A.C. 413.

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not say that the policy would have been refused if the appellant had disclosed his previous fire and the fact that he had claimed and received the $95. The furthest he would go was to say that the Company would have obtained a mercantile report on the appellant.

In view of the unwillingness of the Company's agent to negative the acceptance of the risk with full knowledge, and in view of the fact that the then insurers of the car paid the loss and continued the insurance, the proper inference, in my opinion, is that full disclosure would not have influenced the Company, or any other reasonable insurers, to decline the risk or stipulate for a higher premium.

The non-disclosure, not being material to the risk, affords the Company no defence to the appellant's action.

We were referred to the case of *Western Assurance Co.* v. *Harrison* (1), where the application which formed the basis of the contract of insurance contains the following:—

Q. 12. Have you, or if a firm, has any member of it, ever had any property destroyed by fire?—A. Yes.

Q. 13. Give date of fire, and if insured name of company interested; —A. 1892. National, and London & Lancashire.

The evidence disclosed that the insured had, prior to the application for insurance, three fires while living on the same property in which the insured property had been destroyed, and the insurance by the policy granted on the application in question was on property which replaced that destroyed by the latter fires. The distinction between this case and the one before us is obvious, as it certainly would be material to the risk to know that an insurer was having numerous fires.

In my opinion, therefore, the appeal should be allowed with costs; the judgment below set aside, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. Walker.*

Solicitor for the respondent: *C. J. Burchell.*

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(1) (1903) 33 Can. S.C.R. 473.