JAMES STAPLES (PLAINTIFF) ..... APPELLANT; 1940 * Nov. 25.

AND

1941 * Feb. 4.

GREAT AMERICAN INSURANCE COMPANY, NEW YORK (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Insured motor yacht lost by fire—Suit to recover under policy—Warranty by insured as to use of the yacht—Alleged breach of warranty—Construction of warranty—"Private pleasure purposes"—Nature of policy—Whether a policy of "fire insurance" and whether subject to Part IV (and statutory conditions therein) of The Insurance Act, R.S.O., 1937, c. 256—Policy of marine insurance.

Respondent insured appellant's motor yacht in respect of perils "of the seas and waters, * * * fires, collisions, jettisons, salvage * * * and all other similar marine perils, losses and misfortunes * * *." Appellant warranted that the yacht would be confined to a named Ontario inland lake and tributary waters; and by a marginal endorsement warranted that it "shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon." The yacht was destroyed by fire on said lake during the currency of the insurance policy. At the time of the fire it was being used by appellant's friend, R. (who, as found by the trial judge, had taken it without appellant's knowledge but in pursuance of a vague general consent to use it), to take (without remuneration) R.'s uncle to a part of the lake where the uncle was to inspect a mine for his own benefit (the yacht was not hired or chartered either by R. or his uncle). About a month before the fire, one C. on two occasions had used the yacht to convey C.'s workman across the lake for the purpose of filling C.'s boom with logs, had tied up the yacht there, worked for about four hours logging, and then brought the workman back in the yacht. (As found by the trial judge, this was done without appellant's knowledge, but C. had appellant's general permission to use the yacht; its said use by C. had nothing to do with its loss). Appellant sued to recover under the policy. His action was dismissed by the trial judge, who found breach of appellant's warranty in R.'s use of the yacht at the time of its destruction, and in C.'s use of it as above stated. An appeal to the Court of Appeal for Ontario was dismissed, and appellant appealed to this Court.

Held: There was no breach of warranty, and appellant was entitled to recover.

Per the Chief Justice and Crocket and Davis JJ.: A "strict though reasonable construction" (*Provincial Ins. Co.* v. *Morgan*, [1933] A.C. 240, at 253-4) of the marginal endorsement is to treat the words "not to be hired or chartered" as set in apposition to, and declaring the meaning of, the words "solely for private pleasure purposes." The evidence showed that appellant's intention was that the yacht would be used solely for private pleasure purposes and

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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that that became in fact its normal use; there was no intention to hire or charter it, and it was never hired or chartered during the currency of the policy.

Per Rinfret, Crocket and Kerwin JJ.: In construing the policy, the marginal statement should not be read as a condition that the policy would be avoided upon the yacht being used for other than private pleasure purposes even though at the time a loss was suffered it was not being so used (*Provincial Ins. Co.* v. *Morgan*, [1933] A.C. 240, affirming [1932] 2 K.B. 70. Judgment of Scrutton L.J. in [1932] 2 K.B., at 79, 80, particularly referred to). As to the use of the yacht at the time of the fire: The word "private" in the marginal statement must be read in conjunction with the words "and not to be hired or chartered unless approved and permission endorsed hereon"; and so read, the "pleasure purposes" may be private even when the yacht was used by R. with appellant's implied permission; and the use by R. in question was such as was within the words "private pleasure purposes."

Per Rinfret, Crocket and Kerwin JJ.: The contract was not a policy of fire insurance within the meaning of the Ontario *Insurance Act*, R.S.O., 1937, c. 256, and it was not subject to Part IV (and the statutory conditions therein) of that Act; the contract was one of insurance against losses incident to marine adventure, and the policy was one of marine insurance. Secs. 23 (1), 1 (39), 1 (30), 102 (1), of said Act considered.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Urquhart J. dismissing his action for recovery of $1,500 and interest under an insurance policy issued by the defendant upon appellant's motor yacht which, within the period covered by the policy, was destroyed by fire. The material facts of the case and the questions before this Court are sufficiently stated in the reasons for judgment now reported and are indicated in the above head-note. Special leave to appeal to this Court was granted by the Court of Appeal for Ontario.

T. J. Agar K.C. for the appellant.

J. D. Watt and *J. C. Osborne* for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—The respondent company insured the appellant against loss of a motor boat owned by him. The policy was for $1,500 and the annual premium was $71.25. The boat became a total loss by fire during the currency of the policy. The appellant made claim under the policy; the respondent refused to pay the claim; hence this action.

One defence was that the appellant had fraudulently over-valued the boat in his application for the policy; another defence was fraudulent over-valuation in the proof of loss. These defences were not pressed before us in view of the evidence and the findings of the trial judge. A third ground of defence, and it prevailed at the trial, was that the policy contained a warranty and that a breach of that warranty had occurred and avoided the policy. Urquhart J., who tried the case, found a breach of warranty but said that the appellant was entirely innocent in the matter and that the respondent had taken too narrow a view of its liability under the policy but he said he felt compelled on the law to decide in favour of the respondent and he therefore dismissed the action without costs.

The appellant appealed to the Court of Appeal for Ontario. That Court dismissed the appeal without any written reasons and then, by a subsequent order, granted the appellant special leave to appeal to this Court, the amount involved being less than $2,000. There were no written reasons for the latter order either, and this Court is now in the unfortunate position of not having the advantage of the reasons which led the Court of Appeal to dismiss the appeal from the judgment at the trial or of the reasons which led that Court to grant further leave to appeal.

The words endorsed in the margin of the policy and relied upon by the respondent read as follows:

> Warranted by the insured that the within named yacht shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon.

The motor boat at the time of the fire was being used by a friend of the appellant, one Racicot, to take his uncle up to another part of the lake (the lake on which the boat was usually used) to a dam where the uncle was to inspect a mine for his own benefit. The trial judge found that Racicot had taken the boat without the knowledge of the appellant but in pursuance of a vague general consent to use the boat. It is not suggested by the respondent that the boat was hired or chartered by Racicot. This incident was one of two grounds upon which the trial judge found that there had been a breach of the warranty. The other ground was the use of the boat on occasions by one

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Cryderman. Cryderman had built the boat for the appellant and the appellant admitted that Cryderman might use it whenever he wanted to, without asking permission. Cryderman testified that on two occasions about a month before the burning of the boat, having a boom at the other side of the lake, he took an employee of his across the lake in the boat for the purpose of filling the boom with logs belonging to him which were at or near the shore; that he tied the boat up there; worked for about four hours logging; and then brought his workman back home in the boat. The trial judge found that this had nothing to do with the loss of the boat by fire—that it was in fact a month or more previous thereto—and that it was done without the knowledge of the appellant. The appellant testified that he had heard rumours that Cryderman had used the boat to tow logs and that he went up to where the logs were and made inquiries and found, as he thought, that Cryderman was not using the boat for that purpose; his fears were allayed and he did nothing further about it. The trial judge referred to the appellant as a man "who appears to be a simple sort of man" and said:

> He did not think, I presume, that the slight use of the boat by Cryderman in conveying a workman across the water to go to work would be a breach of the warranty. I do not suppose, as a matter of fact, that he ever gave that point a thought.

But the trial judge concluded that although Cryderman's use of the boat was antecedent in time and in no way connected with the loss of the boat—"merely taking it across the lake, and tying it up"—nevertheless it was, in his opinion, a breach of the warranty. The trial judge put his judgment upon two distinct grounds, (1) Racicot's use of the boat at the time of its destruction, and (2) Cryderman's use of the boat on the occasions mentioned when he conveyed his workman and himself to the boom of logs.

There was evidence that the appellant had used the boat commercially on a few occasions, receiving in all about $15, once from a tourist and at other times taking parties to the blueberries, but the trial judge accepted the appellant's statement that these occasions were before he had taken out the insurance on the boat and did not occur afterwards. There was also some evidence that Cryder-

man had used the boat for hauling logs across the lake and had been paid for this work but the trial judge disbelieved this evidence. There was also evidence that Cryderman on two occasions had taken a Dr. McCullough from Sudbury when Dr. McCullough's boat had broken down and that the doctor had paid for the gasolene, but the trial judge said he was not inclined to find that on those occasions the boat was not being used solely for private pleasure purposes.

The statement endorsed in the margin of the policy was of a promissory nature and was in apt language to create a warranty or a condition. It is clear law, said Lord Wright in the House of Lords in *Provincial Insurance Co.* v. *Morgan* (1), that a warranty or condition, "though it must be strictly complied with, must be strictly though reasonably construed." That leaves the essential problem to be what is the exact scope of the language used. As Lord Haldane said in *Dawsons'* case (2), the question which really lies at the root of the matter in dispute is one of construction simply, or, as Lord Buckmaster said in the *Morgan* case (3), the question on this appeal depends upon the true construction of the policy of insurance. In my opinion, a strict though reasonable construction of the marginal endorsation is to treat the words "not to be hired or chartered" as set in apposition to the words "solely for private pleasure purposes," the latter words in the document declaring the meaning of the former words. The evidence shows that the appellant's intention was that the boat would be used solely for private pleasure purposes and that that became in fact the normal use of the boat. There was no intention to hire or charter it, and on the evidence the boat was never hired or chartered during the currency of the policy.

I would allow the appeal, set aside the judgments below and direct judgment to be entered for the appellant (plaintiff) as of the 2nd day of November, 1939, for the full amount of his claim with interest from the 25th day of June, 1938, with costs throughout.

(1) [1933] A.C. 240, at 253-4. (2) *Dawsons Ltd.* v. *Bonnin*, [1922] 2 A.C. 413.
(3) [1933] A.C. 240.

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The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The respondent insurance company issued to the appellant a policy of insurance covering his motor yacht *Silver Foam* and its tackle, apparel, etc. By the policy, it was warranted by the insured that the yacht would be confined to Lake Wanapitei (an Ontario inland lake) and tributary waters. The adventures and perils which the company took upon itself

> are of the seas and waters, as hereinabove described, thieves (but against theft of the entire yacht only), fires, collisions, jettisons, salvage and general average charges, and all other similar marine perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of said yacht or any part thereof, during the life of this Policy.

On November 2nd, 1937, during the period covered by the policy, the boat and its equipment were destroyed by fire on Lake Wanapitei. Suit was brought by the appellant to recover the sum of $1,500, at which amount the yacht, etc., was valued by the policy. For reasons to be mentioned later, the trial judge dismissed the action and an appeal to the Court of Appeal for Ontario was dismissed without reasons being given. By leave of that Court, the present appeal is now before us.

The appellant contends that the contract was a policy of fire insurance within the meaning of the Ontario *Insurance Act*, R.S.O., 1937, c. 256, or, at any rate, as it included fire risks, was subject to Part IV of the Act. I cannot accede to either argument.

This contract is not a policy of fire insurance. By subsection 23 of section 1 of the Act:—

> "Fire insurance" means insurance (not being insurance incidental to some other class of insurance defined by or under this Act) against loss of or damage to property through fire, lightning or explosion due to ignition.

Loss by fire was a risk insured against but the mere reading of the policy demonstrates that this was insurance incidental to some other class of insurance; and subsection 39 of section 1 shows that it was incidental to a class of insurance defined by the Act, i.e., marine insurance:—

> "Marine insurance" means insurance against marine losses; that is to say, the losses incident to marine adventure, and may by the express terms of a contract or by usage of trade extend so as to protect the insured against losses on inland waters or by land or air which are incidental to any sea voyage.

The contract was one of insurance against losses incident to marine adventure. By its express terms, it not only extends so as to protect the insured against losses on inland waters but is confined to protection against losses on an inland lake and tributary waters. It is clear from a consideration of the history of the relevant sections of *The Insurance Act* that subsection 39 of section 1 must be read so that the words "which are incidental to any sea voyage" do not apply to "losses on inland waters" but only to the words "against losses" "by land or air." By subsection 28 of section 1 of chapter 222 of *The Insurance Act*, R.S.O., 1927:—

> "Inland marine insurance" means marine insurance in respect of subjects of insurance at risk above the harbour of Montreal;

and this subsection remained in the Act until 1934 when it was repealed and "inland transportation insurance" was defined by subsection 30 of section 1 as meaning,—

> insurance against loss of or damage to property while in transit by land, or by water and by land, or by air and by land or by water, or during delay wholly incidental to or accidentally arising out of the transit.

In the same year, "marine insurance" was defined as we now find it in subsection 39 of section 1. The 1934 definition of "inland transportation insurance" was repealed in 1935 and re-enacted as it now appears in subsection 30 of section 1:—

> "Inland transportation insurance" means insurance (other than marine insurance) against loss of or damage to property,—
>
> (*a*) while in transit or during delay incidental to transit; or
>
> (*b*) where, in the opinion of the Superintendent, the risk is substantially a transit risk.

The policy is not subject to Part IV of the present Act. By subsection 1 of section 102, that part applies "to fire insurance and to any insurer carrying on the business of fire insurance in Ontario." For the reasons already given, the insurance against loss by fire was incidental to marine insurance and, therefore, not within the definition of "fire insurance" in subsection 23 of section 1. The statutory conditions do not apply and need not be considered.

The policy being one of marine insurance, the respondent relies upon the following statement in the margin of the policy:—

> WARRANTED by the Insured that the within named yacht shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon.

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The trial judge, adopting the language of Lord Finlay in *Dawsons, Limited* v. *Bonnin and others* (1), was of the view that

> the expression "warranty" imports that a particular state of facts in the present or in the future is a term of the contract, and, further, that if the warranty is not made good the contract of insurance is void.

Dawsons' case (2) was considered in *Provincial Insurance Company, Limited* v. *Morgan* (3). In the Court of Appeal, Lord Justice Scrutton, at pages 79-80, states:—

> No doubt a great deal turns upon the language of the particular policy; but it must be remembered that in contracts of insurance the word "warranty" does not necessarily mean a condition or promise the breach of which will avoid the policy. A warranty that a marine policy is free from particular average certainly does not mean that if there is a partial loss to the insured ship the whole policy is avoided. It merely describes the risk, and means that the only risk being insured against is the risk of a total loss and that a partial loss is not the subject of the insurance. Again, if a time policy contains the clause "warranted no St. Lawrence between October 1 and April 1," and the vessel was in the St. Lawrence on October 2, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between October 1 and April 1 the vessel was in the St. Lawrence: *Birrell* v. *Dryer* (4). That is an example of a so-called warranty which merely defines the risk insured against.

In that case the proposal for insurance signed by the applicant contained questions to be answered, one of which, as to the purposes for which the lorry proposed to be insured was to be used and the nature of the goods to be carried, was answered that the purpose was the delivery of coal and that the substance to be carried was coal; and the applicant thereby warranted and declared that the questions were fully and truthfully answered, and that the declaration and the answers should be the basis of the contract. The policy recited the proposal and stated that it was a condition precedent to any liability on the part of the insurer, (1) that the terms, conditions and endorsements thereof should be duly and faithfully observed; and (2) that the statements made and the answers given in the proposal form should be true, correct

(1) [1922] 2 A.C. 413, at 428. (2) [1922] 2 A.C. 413.
(3) [1932] 2 K.B. 70 (*sub nom. In re Morgan and Provincial Insurance Co. Ltd.*); [1933] A.C. 240.
(4) (1884) 9 App. Cas. 345.

and complete. Under the heading "Endorsements and Use Clauses" in the policy were the words: "Transportation of own goods in connection with the insured business." The premium paid by the assured was less than that which would have been payable if they had stated that the lorry was to be used for the purposes of general haulage. On a day during the period covered by the policy, the assured were using the lorry for carrying a load of timber under a contract, together with 5 cwt. of coal. After they had delivered all the timber and 3 cwt. of the coal and while they were on their way to deliver the remaining 2 cwt. of coal to a customer, a collision occurred.

In the House of Lords, the affirmance of the order of the Court of Appeal was put by Lord Buckmaster on this ground:—

> To state in full the purposes for which the vehicle is to be used is not the same thing as to state in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle it is not suggested that the answer was inaccurate.
>
> I am therefore of opinion that there was no bargain here so to confine the use of the vehicle to the cartage of coals as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the policy was based.

Lord Blanesburgh and Lord Warrington of Clyffe agreed; the latter also concurred with Lord Wright. Lord Wright treated the matter, as did Lord Buckmaster, as a question of the scope of the condition and held that it had not been broken.

In other words, both in the Court of Appeal and in the House of Lords, the promises of the assured were treated as merely descriptive of the risk and not that a certain state of things should continue, or a certain course of conduct be pursued during the whole period covered by the policy so that, if the particular promise be not kept, the policy was invalidated; that is,

> provided the loss occurs while the state of things is in being the policy is not avoided by the fact that at some other time the state of things has been discontiued or iterrupted (1).

I refer particularly to the judgment of Lord Justice Scrutton because, as I read the speeches in the House of Lords, a majority, if not all, of the peers did not disagree with his views. Lord Buckmaster, with the con-

(1) *Per* Scrutton L.J., [1932] 2 K.B. at 79.

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currence of Lord Blanesburgh and Lord Warrington of Clyffe, thought the judgment of the Court of Appeal was right "and the full explanation given by Scrutton L.J. renders further elaboration unnecessary." In any event, Lord Buckmaster also pointed out that in *Dawsons'* case (1), Lord Haldane had stated that the question which lies at the root of the matter is simply one of construction.

In the case at bar, I cannot read the statement in the margin of the policy as a condition that upon the yacht being used for other than private pleasure purposes the policy would be avoided even though at the time a loss was suffered the yacht was not being so used. One ground, therefore, upon which the trial judge concluded that the company was not liable,—"that Cryderman's use of the boat on the occasions mentioned when he conveyed his workman and himself to the boom of logs," cannot be sustained.

As to the other ground, the trial judge thus expresses his views:—

> Then the fourth and most serious objection is that Mr. Racicot used the boat on the very occasion when it burned, to convey his uncle to his mine for purposes of the uncle's. While I believe that he was not paid for it, and it was an entirely voluntary service that he was rendering his uncle, it can hardly be said in this instance that the boat was being used "for pleasure purposes." My finding of fact on that is that Racicot was using the boat without the knowledge of Staples, and therefore Staples had not knowledge of the purpose for which the boat was used; that Racicot was using it to convey his uncle to the mine, not for pleasure but to oblige his uncle in some business of the latter's; that he was not remunerated for the service; that he merely drove the boat to the mine; that the uncle got out of the boat to go about his business and while Racicot was backing up and turning around in the ordinary and usual manner, the boat caught fire and burned as has been described.

In the first place, there is nothing in the statement attached to the policy to prohibit the use of the yacht by someone other than the insured. The word "private" must be read in conjunction with the words "and not to be hired or chartered unless approved and permission endorsed hereon." So read, the "pleasure purposes" may be private even when the yacht was used by Racicot with the appellant's implied permission. On the day of the fire,

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

it was certainly not hired or chartered, and the question is whether Racicot, who "took his uncle up to another part of the lake, without remuneration, to a dam where the uncle was to inspect a mine for his own benefit," was using the yacht solely for private pleasure purposes. That question, in my view, must be answered in the affirmative. The yacht was not hired or chartered either by Racicot or by his uncle. The word "pleasure" has various meanings, depending upon the context in which it is used, and I think that on the occasion in question, it must be held that Racicot experienced "enjoyment, delight, gratification" (Oxford Dictionary), in transporting his uncle from one part of the lake to another, equally as well as if he had taken his uncle as a matter of friendship to a part of the lake in order to board a train or bus.

The trial judge disposed of the other defences raised by the company and I can see no reason to disagree with his conclusions. The appeal should be allowed and judgment directed to be entered for the appellant as of the date of the trial judgment (November 2nd, 1939) for $1,500 and interest from June 25th, 1938, and costs. The appellant is entitled to his costs of the appeals to the Court of Appeal and to this Court.

CROCKET J.—I agree that this appeal should be allowed for the reasons stated by my brothers Davis and Kerwin.

Appeal allowed with costs.

Solicitor for the appellant: *A. Gordon Wallingford.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*