1934 *Present :* **Macdonell C.J. and Garvin S.P.J.**

SHERIFF *v.* BRITISH PARK INSURANCE CO., LTD.

344—D. C. Kandy, 38,581.

Insurance—Car insured against loss by fire—Hire-purchase agreement—Joint insurance by owner and hirer—Action by hirer for loss of car destroyed by fire—Measure of loss.

Plaintiff was the hirer of a motor car on a hire-purchase agreement, one of the conditions of which was that the car should be insured and kept insured during the continuance of the agreement and that such insurance should be effected in the joint names of the owner and the hirer.

In accordance with the agreement, the car was insured with the defendant company by the owner and the plaintiff for their respective rights and interests.

The car was destroyed by fire five months after the agreement when a sum of Rs. 1,978.50 was due by way of instalments to the owner.

Plaintiff was relieved from the necessity of paying the instalments by reason of the destruction of the car by fire, which was held to be purely accidental. It was agreed that the value of the car at the time of destruction was Rs. 2,750.

Held (in an action brought by the plaintiff to recover his loss under the policy of insurance), that the measure of his loss was determined by his interest in the car which was ascertained by the value of the car less the amount of the instalments due by him.

APPEAL from a judgment of the District Judge of Kandy.

N. E. Weerasooria (with him *Choksy* and *D. W. Fernando*), for defendants, appellant.

H. V. Perera, for plaintiff, respondent.

Cur. adv. vult.

February 26, 1934. MACDONELL C.J.—

In this case the plaintiff-respondent had obtained on a hire-purchase agreement from the United Motor Finance Company a Pontiac car to be used by him for hiring, at a price of Rs. 4,320, on the terms that he was to pay for it by twelve instalments of Rs. 247.50 per month. It was in fact the ordinary hire-purchase contract and the car itself was to remain by the terms of the agreement the property of the company until the last instalment was paid. At the time of the execution of the hire-purchase agreement the car was insured with the defendants-appellant by the plaintiff-respondent and by the United Motor Finance Company from whom he was purchasing the car for Rs. 4,050, "for their respective rights and interests". One of the risks insured against was loss of the insured vehicle by fire up to the value of the vehicle at the time of the fire or the value stated in the schedule, viz., Rs. 4,050, whichever was less. The plaintiff-respondent took possession of the car and drove it as a hiring car for five months, paying monthly instalments for those five months. At the end of that time the car was destroyed by fire and after litigation on the matter the Supreme Court held that the fire was accidental. It is clear therefore that the defendants-appellant, the insurers, must pay, as they themselves admit, and the only question is, how much.

It is admitted by all parties that the value of the car at the time it was destroyed was Rs. 2,750. This is a lesser sum than that for which it was insured, and this lesser sum Rs. 2,750 is therefore the total amount that can be recovered from the defendants under the policy of insurance. At the time the car was destroyed by fire the plaintiff-respondent had paid a premium on the fire insurance, also a deposit and instalments towards the purchase of the car, in all a sum of Rs. 2,581.50, and at the time of its destruction he owed for instalments a sum of Rs. 1,978.50. (The debris of the car after the fire realized Rs. 200 to the United Motor Finance Company.) The judgment of this Court, which held that the fire which destroyed this car was accidental, also exonerated the plaintiff-respondent from any further payment of instalments to the United Motor Finance Company on his contract to purchase this car. The article, the subject of the contract, had perished and the rule *res domino perit* applies. There was a total sum recoverable under the contract, as has been said, of Rs. 2,750, the admitted value of the car at the time it was destroyed, and the insurers, the defendants-appellant in this case, claim that as the plaintiff-respondent is exonerated from payment of further instalments, namely, Rs. 1,978.50, that sum must be deducted from the Rs. 2,750 payable under the policy of insurance, and that only the balance Rs. 771.50 is payable to the plaintiff-respondent.

I think that this contention is correct. The contract of fire insurance is a contract of indemnity. The party or parties insured in such a contract are entitled to be indemnified up to the amount of his or their loss in respect of his or their respective interest in the article insured and then lost by fire. He or they bargain for "the payment of a sum of money . . . . representing his" or their "interest in such object in the event of its loss" (*Welford & Otter-Barry on Fire Insurance, 3rd ed., p.* 13). "The assured is, as a general rule, precluded from recovering more than the value of his interest in the subject-matter, since the

measure of his loss is the interest in respect of which he has been prejudiced, and if he was permitted to recover a greater sum he would be receiving more than was requisite for a full indemnity." *Ibid. p. 292.* If we apply this principle to the present case, then the value of the interest of the plaintiff-respondent, the insured, in the subject-matter, the car, is its value at the time it was destroyed, less any " sum of money or other benefit from a third person which has the effect of diminishing or extinguishing the loss." *Ibid. p. 351.* In the present case the insured receives a " benefit " in the shape of exoneration from the payment of the further instalments towards purchase of the car. To permit him to retain this " benefit ", and also the full value of the car at the time it was destroyed, would be to permit him to recover " a greater sum " than the " value of his interest in the subject-matter ", since he would then be recovering " more than was requisite for a full indemnity ". It can be put in this way. If he were permitted to receive the whole Rs. 2,750, he would be a trustee for the insurance company, the defendants-appellant, to the extent of the Rs. 1,978.50, the instalments on the car from payment of which he is exonerated; see *London and North-Western Railway v. Glyn*[1]. He could not retain that sum as against the insurance company because to allow him to do so would be, in effect, to pay him twice over in respect of the sum of Rs. 1,978.50, which would be a clear departure from the principle that the contract of fire insurance is one of indemnity. Then the contention of the defendant-appellants is correct, and the amount recoverable in this case by the plaintiff-respondent is the value of the car less the unpaid instalments.

The learned trial Judge in his judgment has stated correctly that the contract of insurance against fire is a contract of indemnity, but, with all respect, has proceeded on figures and payments not applicable to the question. In his judgment he has taken account not of what was recoverable under the policy, namely, the admitted value of the car at the time of the fire, but of the amount which the insured, plaintiff-respondent, had paid by way of instalment and otherwise towards becoming the owner of this car. He has then taken a proportion between the amount still due by way of instalment to the United Motor Finance Company and the amount Rs. 4,050, the sum named in the policy as that for which the car was insured, and has awarded that proportion, which he makes out at Rs. 1,620, to the plaintiff-respondent. This does not seem to be the correct way of applying the doctrine of indemnity.

In argument for the plaintiff-respondent it was urged that to allow the insurers, the defendants-appellant, the full amount of Rs. 1,978.50 would be to give them an immediate payment of money some of which would only be due in the future, and that there must be a deduction accordingly; it was even suggested that a reduction from the Rs. 1,978.50 and a corresponding addition to the Rs. 771.50 bringing the amount recoverable by plaintiff to some Rs. 850 would be a fair compromise. This line of argument however disregards the terms of the agreement between plaintiff and the United Motor Finance Company. These were that he should pay instalments amounting at the time the car was destroyed by fire to Rs. 1,978.50, and there is nothing in the agreement suggesting that

[1] *1 El. & El. 652; 120 E. R. 1054.*

he could have claimed a reduction on this amount by paying it in one sum in advance—the contract was that he should pay that amount and not any less sum. If so it is difficult to see how any deduction from this Rs. 1,978.50 in the plaintiff's favour can, on the facts of this case and on the agreement between the parties, be made. If so, the United Motor Finance Company is entitled to have the whole of that sum taken into account, and consequently the plaintiff is entitled to the Rs. 771.50 and no more. The defendant-appellants having succeeded must have the costs of this appeal.

With regard to the cost of the trial, it will perhaps be best to order that each side pay its own costs, except those of July 13, 1932 which, having been specifically awarded to the defendant, he should be allowed to retain.

GARVIN S.P.J.—

This was an action on a policy of insurance in which one of the risks contemplated is fire. The subject of the insurance is a motor car which is valued in the policy as Rs. 4,050. The car was destroyed by fire and became a total loss save that upon salvage a sum of Rs. 200 was realized. The plaintiff was at the time a person who was the possessor and had the use and control of the car—rights which accrued to him under a hire-purchase agreement entered into with the owner of the car, the United Motor Finance Co. The agreement is dated February 2, 1929, and was made in consideration of the payment at the time of the agreement of a sum of Rs. 1,350 and the undertaking to pay the balance sum of Rs. 2,970 by 12 instalments, the first of which payments to be made on March 4, 1929. It was a condition of the agreement that the vehicle should be insured and kept insured during the continuance of the agreement and that such insurance should be effected in the joint names of the owner and the hirer with such company as the owners may determine. In accordance with this term of the agreement the policy earlier referred to was entered into by which the defendant-company agreed to indemnify the United Motor Finance Company and the plaintiff "for their respective rights and interests" in respect of this car.

Plaintiff brought this action praying for judgment for the sum of Rs. 4,050 the full sum for which the car was insured. The defendant-company filed an answer denying liability and praying for a dismissal of the plaintiff's action for the following among other grounds: (*a*) The vehicle was being driven in an unsafe or in a damaged condition; (*b*) Reasonable care in the protection and use of the said vehicle was not exercised; (*c*) The plaintiff's agent or servant wrongfully refrained from taking any steps to extinguish the said fire or to lessen the damage consequent thereof.

The record of these proceedings shows that there was pending at the time another action instituted by the Motor Finance Company against the present plaintiff for the recovery of the balance sum payable on a hire-purchase agreement. It would seem that in that action the principal issue between the parties related to the circumstances under which the fire occurred. That action resulted in a judgment in favour of the present plaintiff which was based upon the finding that the fire was

purely accidental and that he as the hirer was relieved from the liability to pay any further hire. In consequence of this decision, which was accepted by both parties to this action, the answer was amended and the defendant, after taking certain other pleas, alleged that, in any event, the plaintiff in respect of his interests in the car was not entitled to claim anything in excess of Rs. 771.50. At a later stage the plaintiff himself restricted his claim to the sum of Rs. 2,581.50.

At the trial all other defences were abandoned, and the sole question submitted for the determination of the Court was the assessment of the amount recoverable by the plaintiff under the policy in respect of the destruction of this car by fire.

In so far as this is a policy of fire insurance, the ordinary liability of an insurer is to indemnify the insured for the loss of the subject-matter. Consequential loss is not recoverable unless specially insured against. There is no such special insurance in this case. The sole liability therefore of the defendant-company under this policy is to indemnify the insured for the loss of the property insured, and the amount so recoverable is the value of the subject-matter at the time of the fire. There are exceptional cases in which it has been held that the liability cannot be determined purely upon the basis of the value of the subject of insurance at the date of the fire and extends to the cost of reinstatement. This however is not such a case. The actual value, therefore, of the motor car at the time of destruction is the measure of the liability of the defendant-company. Moreover, it is specially provided in this policy that the limit of the liability of the defendant shall be the actual value of the car at the time of the fire or the declared value, whichever shall be less. The parties are agreed that the value of the car at the time of its destruction by fire was Rs. 2,750. If the plaintiff were the owner of the car he would clearly be entitled to judgment for that amount. But the plaintiff is not the owner and in terms of the very policy upon which this action is based he and the Motor Finance Company are both insured each for their respective interests in this car. It becomes necessary, therefore, to determine the value of the plaintiff's interest. His interest is clearly not as extensive as the interest of an owner. The combined interests of the plaintiff and the Motor Finance Company would amount to the interests of an owner, and together they are entitled to the sum of Rs. 2,750. The proportion of that sum payable to the plaintiff must therefore depend upon the value of his interest in the car. In terms of the hire-purchase agreement the plaintiff could only clothe himself with full rights of ownership upon payment of all the instalments. At the date of the fire there were still instalments to the aggregate amount of Rs. 1,978.50 payable by him. His rights therefore in the car, whatever they may be, could only have been converted into full ownership by the expenditure of a sum of Rs. 1,978.50. Since this car at the date of the fire was of the value of Rs. 2,750 it is impossible to value his interest therein at any higher figure than the sum of Rs. 2,750 less the amount of Rs. 1,978.50 which he would have had to expend before he could claim that his inerests were that of an owner. Those interests which he needed to complete the ownership of the car were vested in the Motor Finance Company. That company remains the owner in terms of the hire-purchase agreement until all

payments have been made. But its ownership is undoubtedly subject to the limitation that the agreement gave to the plaintiff the right to become the owner by the payment of the balance of the instalments on the car. They remain the owners of the car subject however to the right of the plaintiff to acquire their rights by the payment of the balance hire, *i.e.*, Rs. 1,978.50.

The Motor Finance Company were entitled to be paid these instalments under the agreement, but the plaintiff as hirer of the car is by reason of the destruction of the car by fire which was purely accidental relieved from the necessity to make those payments. The amount of the hire payable immediately before its destruction would therefore seem to be the measure of the loss sustained by the Motor Finance Company who were the owners of the car. The respective interests therefore of the plaintiff and the Motor Finance Company in the car which was the subject of this insurance are capable of exact assessment. The plaintiff's interest with which alone we are concerned clearly does not extend beyond the value of the car Rs. 2,750 less the amount of Rs. 1,978.50 which he would have had to pay before he could claim that his interests were those of an owner. The difference which amounts to Rs. 771.50 is all that is recoverable by him under this policy.

It was urged, however, that from the sum of Rs. 1,978.50 which was the aggregate of the instalments still payable under the hire-purchase agreement, some deduction should be made when assessing the value of the Motor Finance Company's interest in the car. It was said that inasmuch as that sum was payable over a period of 8 months and was not due and payable at the date on which this fire occurred the interest of the Motor Finance Company should not be valued upon the basis that the whole of the sum was payable at the date of the fire. There is no evidence before us as to what deduction, if any, the plaintiff would be entitled in the event of his having elected to pay the full amount of these instalments at once. Nor is it clear that he was entitled to any deduction at all in the event of his deciding to make immediate payment instead of availing himself of the right to pay the sum by instalments. Nor indeed is there any evidence before us as to the sum, if any, which should be deducted from the aggregate of these instalments in consideration of the immediate payment of all sums payable under the agreement. It was admitted in the course of the argument that assuming a case had been made out for such a deduction the amount could hardly exceed Rs. 60 or Rs. 70. But as already stated the plaintiff has shown no right to claim any such deduction nor has he adduced evidence to show what the deduction should be even if it be assumed that he had such a right.

The order under appeal must therefore be set aside and judgment will be entered for the plaintiff for the lesser sum of Rs. 771.50. The defendant is entitled to the costs of this appeal.

It remains to consider what order should be made in respect of the costs in the Court below. The plaintiff was compelled to come into Court as the defendant-company disclaimed all liability and refused any payment whatsoever. Eventually the parties confined the trial to the single issue whether the plaintiff's interests should be valued at Rs. 771.50 as the defendant contended or at the larger sum claimed by the plaintiff.

The conclusion arrived at in appeal is that the defendant should have succeeded at the trial which ultimately took place on September 21, 1932, in his contention that the plaintiff was not entitled to anything in excess of the sum of Rs. 771.50. In these circumstances I think that each party should be left to bear his own costs of the proceedings had in the Court below, save only that the defendant will retain the order for costs of July 13, 1932 made in his favour by the District Judge.

Judgment varied.